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Survey - Developments in Maryland Law, 1991-92

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SURVEY

Developments in Maryland Law, 1991-92

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I. CONSTITUTIONAL LAW

A. The Defendant’s Right to a Public Trial

In Watters v. State, the Court of Appeals held that the exclusion of the public during the voir dire of prospective jurors was a denial of a defendant’s Sixth Amendment right to a public trial. In a unanimous decision, the court found that the public may be excluded from a trial—including the voir dire phase—only when the closure is narrowly tailored and necessary to protect an overriding state interest. Recognizing that not every technical violation of the Sixth Amendment right to a public trial will mandate a new proceeding, the court nevertheless held that when the violation of the right to a public trial is substantial, specific prejudice is to be presumed and an appropriate remedy must be afforded.

1. The Case.—In December 1988, Ronald Watters was charged with felonious homicide, first and second degree rape, assault with intent to murder, assault with intent to rape, and assault and battery in the death of Lisa Taylor. The murder was highly publicized both at the time of the victim’s disappearance and when the victim’s body was found three months later near Salisbury State University.

On the first day of trial in the Circuit Court for Wicomico County, a deputy sheriff barred members of the public, including the defendant’s family and the news media, from the courtroom.

2. Id. at 45, 612 A.2d at 1291. The applicable portion of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (finding the Sixth Amendment applicable to the States through the Fourteenth Amendment). Long before the Sixth Amendment was applied to the states, however, the Supreme Court suggested in dicta that exclusion of the public would violate due process. See, e.g., Gaines v. Washington, 277 U.S. 81, 86 (1928).
3. Watters, 328 Md. at 45, 612 A.2d at 1291.
4. Id. at 49, 612 A.2d at 1293.
5. Id.
6. Brief for Petitioner at App. 17, Watters (No. 134). Taylor never returned to her apartment after a visit with her parents on June 7, 1988. There were no immediate suspects in her disappearance. On December 1, 1988, however, Watters asked to speak to the police while he was being held on unrelated charges at the Wicomico County Detention Center. Subsequently, Watters made statements implicating himself in the murder of Taylor. Watters v. State, 84 Md. App. 230, 233, 578 A.2d 810, 811 (1990), rev’d, 328 Md. 38, 612 A.2d 1288 (1992).
7. Watters, 328 Md. at 41-42, 612 A.2d at 1289.
CONSTITUTIONAL LAW during voir dire. The deputy sheriff closed the courtroom "[w]ithout the knowledge or consent of the trial judge or the parties." While the courtroom was closed, a jury was selected and sworn in. Upon returning from a lunch recess, Watters informed the court that he had learned that members of the public had been excluded from the courtroom during voir dire. Watters then moved for a mistrial, arguing that he was deprived of his right to a public trial.

At the hearing on this motion, the defense presented the testimony of Watters's mother and the deputy sheriff. Watters's mother testified that she arrived at the courthouse with her aunt and two sisters at approximately 9:30 a.m. Although she identified herself as the defendant's mother, she was denied admission into the courtroom by the deputy sheriff. Spectators were eventually admitted into the courtroom at 1:30 p.m., following the lunch recess. When questioned, the deputy sheriff testified that he closed the courtroom because he was concerned about the "nature of the number of people involved in the case and [that] the courtroom would not handle all the persons who wanted to get into the courtroom." The sheriff further testified that he only allowed witnesses and prospective jurors into the courtroom, despite the availability of extra seats. Nevertheless, the trial court denied Watters's motion for a mistrial, finding that the closure "was done as a matter of court security because of the crowded conditions of the courtroom, and it [did] not deny[] him his right to a public trial."

Watters was subsequently convicted of first degree murder and was sentenced to life without parole. The Court of Special Appeals affirmed the conviction, holding that the unilateral actions of the deputy sheriff did not constitute a deprivation of Watters's Sixth

8. Id. at 42, 612 A.2d at 1289.
9. Id.
10. Id.
11. Id., 612 A.2d at 1290.
12. Id.
13. Id. at 42-43, 612 A.2d at 1290.
14. Id. at 43, 612 A.2d at 1290.
15. Id.
16. Id.
17. Id. at 42, 612 A.2d at 1290.
18. Id., 612 A.2d at 1289-90.
19. Id. at 43, 612 A.2d at 1290.
20. Id. at 41, 612 A.2d at 1289.
Amendment right to a public trial.\textsuperscript{21} The Court of Appeals granted a writ of certiorari to consider whether the denial of public access to the voir dire proceedings would constitute a violation of a defendant's right to a public trial.\textsuperscript{22}

2. Legal Background.—Open criminal trials have long been a prominent part of the American judicial system.\textsuperscript{23} The Sixth Amendment expressly guarantees that "the accused shall enjoy the right to a . . . public trial."\textsuperscript{24} Because this language is so explicit, there is little explanatory case law. The Supreme Court has recognized that a defendant has an absolute right to a public trial.\textsuperscript{25} Courts have disagreed, however, as to what constitutes a public trial and to what extent a court may constitutionally exclude members of the public from attending parts of a trial. The constitutional right of access to attend criminal trials, held by the public and the press, has developed through several recent Supreme Court decisions.

a. Constitutional Jurisprudence.—The Supreme Court first considered the issue of a Sixth Amendment right to a public trial in Gannett Co. v. DePasquale.\textsuperscript{26} The Gannett Court noted that the Sixth Amendment right to a public trial is a right created solely for the benefit of the accused.\textsuperscript{27} The Court stated:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . .\textsuperscript{28}

Gannett declined to recognize an independent and enforceable Sixth Amendment right held by the public and the press to access to a

\textsuperscript{22} Id.
\textsuperscript{23} See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 567-68 (1980) (noting that court records in the 1600s from Virginia, New Jersey, and Pennsylvania indicate that trials were open to the public).
\textsuperscript{24} U.S. CONST. amend. VI.
\textsuperscript{25} See Gannett Co. v. DePasquale, 443 U.S. 368, 385 (1979) ("There is no question that the Sixth Amendment . . . presumes open trials as a norm." (emphasis added)); Houchins v. KQED, Inc., 438 U.S. 1, 36 (1978) (Stevens, J., dissenting) ("By express command of the Sixth Amendment the proceeding must be a 'public trial.'" (emphasis added)).
\textsuperscript{26} 443 U.S. 368 (1979).
\textsuperscript{27} Id. at 379-80.
\textsuperscript{28} Id. at 380 (quoting In re Oliver, 333 U.S. 257, 270 n.25 (1948)).
pretrial suppression hearing. Additionally, the Court found it unnecessary to consider whether such a right existed under the First Amendment, reserving that issue for future consideration.

One year later, in *Richmond Newspapers, Inc. v. Virginia,* the Supreme Court addressed the First Amendment issue reserved in *Gannett.* The *Richmond Newspapers* Court held that although there is no explicit constitutional right given to the public to attend criminal trials, such a right is implicit in the guarantees of the First Amendment. The Court drew this recognition of a public right of access from the First Amendment freedoms of speech, press, and assembly, which guarantee open communication regarding affairs that relate to the functioning of government. In addition, the Court specifically recognized that these rights were adopted against the backdrop of the historical openness of criminal trials. The openness of the trial is considered important in assuring fair trials: open proceedings encourage witnesses to come forward, discourage per-

29. *Id.* at 391. In his concurring opinion, Chief Justice Burger emphasized that the holding of *Gannett* applied only to pretrial proceedings and not to trials. *Id.* at 394-97 (Burger, C.J., concurring). But see Justice Blackmun's dissent, joined by Justices Brennan, White, and Marshall, in which the dissenters favored recognition of a public right of access to criminal trials under the Sixth Amendment. *Id.* at 406-07 (Blackmun, J., concurring in part and dissenting in part).

30. *Id.* at 392. The *Gannett* Court declined to address the First Amendment issue but suggested that the balancing test conducted by the trial judge, between the defendants' constitutional right to a fair trial and the press's constitutional right of access, was proper. *Id.* at 392-93. Further, the Court noted that the denial of access was not absolute because the closure was a temporary measure and the transcript of the proceedings would be made available to the public and press at a later time. *Id.* at 393.


32. *Id.* at 575, 580. Although *Richmond Newspapers* was a plurality opinion, seven justices recognized that the First Amendment embodies a right of access. 448 U.S. at 558-81 (plurality opinion of Burger, C.J., with White, J., and Stevens, J.; *id.* at 584-98 (Brennan, J., with Marshall, J., concurring in the judgment); *id.* at 598-601 (Stewart, J., concurring in the judgment); *id.* at 601-04 (Blackmun, J., concurring in the judgment). In a more recent decision addressing the First Amendment right of public access, six justices joined in the opinion of the Court recognizing that the First Amendment was "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604 (1982).

33. See *Richmond Newspapers,* 448 U.S. at 575-78.

34. See *id.* at 575; see also *id.* at 569 (noting that "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open").
jury, and ensure unbiased decisions. Additionally, public trials afford communities with an opportunity to see that justice is being served, thereby reinforcing public understanding of, and confidence in, the legal system. Public trials thus provide a critical therapeutic and educational value.

In Press-Enterprise Co. v. Superior Court, the Supreme Court extended the presumptive right of access established in Richmond Newspapers to include voir dire proceedings. The Press-Enterprise Court found that the jury-selection process was conducted in public as early as the 16th century, noting that "the entire trial proceeded 'openly, [and] that not only the [12 jurors], but the Judges, the parties and as many [others] as be present may heare.'" Historically, bystanders served as jurors if peremptory challenges reduced the jury to an insufficient number. The United States subsequently adopted England's open and public jury-selection process and it was the traditional practice at the time the Constitution was ratified.

Nevertheless, the Court recognized that there are circumstances, albeit limited ones, when the public can be barred from a criminal proceeding. The Press-Enterprise Court adopted a balanc-
ing test that must be satisfied before a courtroom can be closed to the public, ruling that “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”42 The Court additionally noted that the overriding interest should be articulated with specific findings to enable a reviewing court to determine whether the closure was proper in light of reasonable alternatives.43

When faced with the issue of how far the Sixth Amendment right to a public trial extends, the Supreme Court applied much of the analysis from its earlier decisions regarding the public’s First Amendment rights.44 In Waller v. Georgia,45 the Court addressed the question of whether the closure of an entire suppression hearing over the objection of the defendant violated his Sixth Amendment public-trial guarantee.46 The Court unanimously pronounced that “there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”47 Accordingly, the Waller Court held that the four-part balancing test adopted in Press-Enterprise should be applied whenever there is a Sixth Amendment objection by the accused to the closure of a hearing. Therefore, the party seeking to close the hearing must establish “an overriding interest that is likely to be prejudiced.”48 The trial court must then consider reasonable alternatives to closure, make findings on the record adequate to support the closure, and assure that “the closure trial.’” Id. at 511 n.10 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581-82 n.18 (1980)). The Court emphasized, however, that the defendant’s right to a fair trial is superior. Id. at 508. Thus, when public attendance at a trial presents a substantial danger to the defendant’s right to a fair trial, the public’s access can be limited. See id. at 509.

The Court has additionally recognized as an example of interests that compete with the defendant’s right to a public trial, situations where sexual conduct and children are involved. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-08 (1982) (holding, however, that even though the well-being of a child is a compelling interest, such an interest will not “justify a mandatory closure rule” in all instances involving children and that closure of a courtroom must be evaluated on a case-by-case basis).

42. Press-Enterprise, 464 U.S. at 510.
43. Id.
44. See Waller v. Georgia, 467 U.S. 39, 44-45 (1984) (applying precedent to decide whether the accused’s Sixth Amendment right to a public trial extends to suppression hearings).
46. See id. at 43.
47. Id. at 46.
48. Id. at 48.
... [is] no broader than necessary to protect that interest."

The Waller Court also affirmed a position adopted by the Third Circuit—that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." The Court clearly expressed, however, that although specific prejudice is presumed, every violation will not require a new trial.

b. Maryland Jurisprudence.—Similar to the approach taken by the Supreme Court, Maryland courts have established public-access rights through a free speech analysis. Maryland case law unquestionably recognizes a First Amendment right of public access to criminal trials. While the Supreme Court has not ruled directly on the issue, the Court of Appeals has specifically recognized a presumptive right of access to pretrial proceedings in criminal cases. Accordingly, before pretrial proceedings can be closed, Maryland requires advance public notice by the filing of a motion to close the

50. Waller, 467 U.S. at 49-50. The Court noted:
The general view appears to be that of the Court of Appeals for the Third Circuit. It noted in an en banc opinion that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury."

Id. at 49 n.9 (quoting United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969)).
51. Id. at 50 ("The remedy should be appropriate to the violation."). The Waller Court concluded that the appropriate remedy in the case would be to require a new suppression hearing. If at that time the hearing produced a different result, a new trial would be warranted. Id.
53. See Buzbee, 297 Md. at 76, 465 A.2d at 431 (holding that there is a right of public access to pretrial judicial hearings). In Buzbee, the Court of Appeals recognized that the societal interests announced by the Supreme Court in Richmond Newspapers were as applicable to pretrial hearings as to criminal cases. Id. See supra note 36 and accompanying text.
Like the Supreme Court, Maryland courts have also acknowledged that the public right of access is not absolute. In order to determine whether an order to close a courtroom is proper, the Court of Appeals has adopted a balancing test similar to the standard announced in the *Press-Enterprise* decision. For example, in *Baltimore Sun Co. v. Colbert*, the court reiterated that the presumption of openness "can be overcome only by an 'overriding interest,' such as an accused's right to a fair trial." Further, "[t]he party moving for closure has the burden of proving that 'higher values' will be infringed by publicity; that closure of the courtroom will prevent such prejudice; and that reasonable alternatives to closure cannot protect the asserted values." The *Colbert* court proclaimed that closure is to be considered an extreme remedy and as such will be improper when reasonable alternatives exist. In addition, in *Buzbee v. Journal Newspapers, Inc.*, the Court of Appeals held that "[i]f the conclusion is that some form of restriction on public access is required, the trial court must adopt the least restrictive means necessary to protect the interest which, on the facts of the case, has outweighed public access."

While Maryland courts clearly recognize a First Amendment right of access to criminal trials, prior to *Watters* the Court of Appeals had not considered the specific issue of whether a temporary exclusion of the public would violate the Sixth Amendment. It should be noted, however, that in *Patuxent Publishing Corp. v. State*, the Court of Special Appeals had previously recognized that "[t]he Sixth Amendment right to a public trial is one that runs to the criminal defendant alone and not to the people." That decision noted that the language of the Sixth Amendment expressly establishes a

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54. Baltimore Sun Co. v. Colbert, 323 Md. 290, 300, 593 A.2d 224, 229 (1991) (holding that a motion to exclude the public from pretrial hearings in a criminal case requires prior public notice in order that the public may assert its right of access).

55. See *Patuxent Publishing*, 48 Md. App. at 692, 429 A.2d at 556; *Buzbee*, 297 Md. at 80, 427 A.2d at 433.

56. See supra notes 48-49 and accompanying text.


58. Id. at 302, 593 A.2d at 229.

59. Id., 593 A.2d at 229-30.

60. Id. at 303, 593 A.2d at 230. Reasonable alternatives suggested by the court include "continuance, change of venue, voir dire, voluntary cooperation of the media, and jury instructions." Id.


62. Id. at 82, 429 A.2d at 434.


64. Id. at 691, 429 A.2d at 556.
right to a public trial in the criminal defendant.\textsuperscript{65}

3. The Court's Reasoning; Analysis.—

\textit{a. Constitutional Standard.}—In \textit{Watters}, the State argued on appeal that the constitutional standard announced in \textit{Press-Enterprise} and \textit{Waller} applies only to situations where a determination is to be made on a motion to close a trial.\textsuperscript{66} The State further contended that because the courtroom was closed without the authority of the court, the proper issue was whether the trial court's refusal to grant a mistrial was an abuse of its discretion.\textsuperscript{67} The Court of Appeals, however, rejected the State's argument by holding the \textit{Press-Enterprise} and \textit{Waller} standards appropriate in all cases where the public is excluded from a trial, whether the objection to the closure is made by the defendant under the Sixth Amendment or by the press under the First Amendment.\textsuperscript{68} Recognizing this standard, the court concluded that "the public may only be constitutionally excluded from a trial, including voir dire, pursuant to a narrowly tailored order necessary to protect an overriding state interest."\textsuperscript{69}

Applying this standard, the \textit{Watters} court found no compelling reason to exclude members of the public from the voir dire, especially the defendant's family and members of the press.\textsuperscript{70} Although it is generally recognized that people may be excluded from the courtroom to prevent overcrowding,\textsuperscript{71} the \textit{Watters} court concluded that the facts did not suggest that such a situation existed.\textsuperscript{72} In fact, testimony presented by the deputy sheriff confirmed that seats in the courtroom were available.\textsuperscript{73} The court further warned that even if the potential for overcrowding existed, the exclusion of everyone from the courtroom was not a "narrowly tailored means of protecting that interest."\textsuperscript{74} Based on the facts presented, the court con-

\textsuperscript{65} See \textit{id.}; see also supra note 2 and accompanying text.
\textsuperscript{66} Watters, 328 Md. at 44, 612 A.2d at 1290.
\textsuperscript{67} Id., 612 A.2d at 1290-91.
\textsuperscript{68} See \textit{id.} at 45, 612 A.2d at 1291.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} See United States v. Kobli, 172 F.2d 919, 922 (3d Cir. 1949) (recognizing that spectators not connected with the case may be excluded from the courtroom to prevent overcrowding); People v. Jelke, 123 N.E.2d 769, 722 (N.Y. 1954) (recognizing that a court may limit spectators to prevent overcrowding); E.W. Scripps Co. v. Fulton, 125 N.E.2d 896, 903 (Ohio 1955) (recognizing that a judge may exclude spectators to protect public health and safety).
\textsuperscript{72} See \textit{Watters}, 328 Md. at 45, 612 A.2d at 1291.
\textsuperscript{73} Id. at 42, 612 A.2d at 1290.
\textsuperscript{74} Id. at 45, 612 A.2d at 1291.
cluded that the courtroom closure violated Watters's Sixth Amendment right to a public trial.\textsuperscript{75}

In reaching its decision, the Court of Appeals focused its analysis exclusively on whether the resulting closure violated Watters's public-trial right rather than on the circumstances leading to the closure. By so doing, the court signalled that all future courtroom closures—whether by a motion to close or because of an accident or mistake—will be subject to the strictest scrutiny. The Court of Appeals's interpretation is clearly supported by both Supreme Court and Maryland case law.\textsuperscript{76}

Although the Watters court failed to discuss the implications of the accidental closure, it is clear that a defendant's Sixth Amendment public-trial right should not be any less protected because of the accidental nature of a violation. In fact, when a courtroom closure takes place without the safeguard of a prior hearing for the defendant to object, there is an even greater cause to believe that the public-trial guarantee has been violated. By expressly including the right to a public trial in the Sixth Amendment—with other highly regarded rights such as the right to an impartial jury, a speedy trial, and the assistance of counsel—the Framers plainly thought the right to be paramount to a criminal defendant.\textsuperscript{77} Furthermore, as the Supreme Court noted, "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it."\textsuperscript{78} Recognizing the dual focus of the provision, the Court of Appeals gave considerable weight to the resulting harms of a violation of the public-trial guarantee.

b. \textit{Specific Prejudice}.—In the second part of its opinion, the Court of Appeals considered whether specific prejudice is to be presumed when a violation of the public-trial guarantee has occurred and whether the appropriate relief would be a new trial.\textsuperscript{79} The State had argued that even if a constitutional violation did exist, such an error was \textit{de minimus}, and Watters was not entitled to a new trial.\textsuperscript{80}

In its decision, the Court of Special Appeals rejected the argument that the trial judge must apply the balancing test announced in

\textsuperscript{75} Id.
\textsuperscript{76} See supra notes 23-65 and accompanying text.
\textsuperscript{77} See U.S. Const. amend. VI.
\textsuperscript{79} Watters, 328 Md. at 46, 612 A.2d at 1291.
\textsuperscript{80} Id., 612 A.2d at 1291-92.
Press-Enterprise and Waller because there was no motion made to exclude the public. Consequently, the intermediate appellate court focused its decision entirely on whether the unilateral actions of the deputy sheriff constituted a constitutional deprivation.

Although there is persuasive case law in other jurisdictions suggesting that minor errors of exclusion do not amount to a constitutional deprivation, the Court of Special Appeals failed to recognize the gravity of the exclusion in Watters. In so doing, the court overlooked the Supreme Court's ardent protection of the constitutional mandate of open and public trials.

The Court of Appeals clearly recognized that not every accidental or technical violation of a defendant's Sixth Amendment right to a public trial will warrant a new proceeding. Although the court did not establish a bright-line test to be applied in all circumstances, it offered several factors for trial courts to consider: the scope of the closure, the period of time over which the closure extended, and the other harms that resulted to the defendant. The Watters court also noted that other harms were created because the defendant's family was unable to aid him in the jury selection process and because potential jurors could not view the interested individuals. Because the scope of the closure was substantial in that it encompassed the entire voir dire proceeding and excluded all members of the public,

82. Id.
83. See, e.g., Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (holding that a bailiff's unilateral action of barring entry and exit from the courtroom during the attorneys' arguments to the jury was "entirely too trivial to amount to a constitutional deprivation"); Butler v. Smith, 416 F. Supp. 1151, 1154-55 (S.D.N.Y. 1976) (holding that the clearing of the public from the courtroom during the testimony of a witness who had otherwise refused to testify due to threats on his life was not a denial of the defendant's right to a public trial where the duration of the exclusion was relatively minimal); State v. Clark, 616 P.2d 888, 894 (Ariz.) (holding that the unilateral action of a deputy sheriff who closed the courtroom to the public for approximately 30 minutes did not violate the defendant's right to a public trial because the situation lasted for an extremely short period and was immediately corrected), cert. denied, 449 U.S. 1067 (1980); Commonwealth v. Burton, 330 A.2d 833, 837 (Pa. 1974) (holding that the district attorney's unilateral request to court personnel to exclude the defendant's wife and members of the Black Panthers from the courtroom during the testimony of a witness who did not constitute a constitutional deprivation of the right to a public trial, even though other members of the defendant's family were also accidentally excluded); but see People v. Kan, 574 N.E.2d 1042, 1044-45 (N.Y. 1991) (holding that the exclusion of all members of the public, including the defendant's family, during the testimony of a witness, violated the defendant's constitutional right to a public trial, thus warranting a new trial).
84. Watters, 328 Md. at 49, 612 A.2d at 1293.
85. See id.
86. Id. at 48, 612 A.2d at 1293.
the court considered the violation to be significant. The Court of Appeals concluded that "we would be hard pressed to declare a violation of this magnitude de minimus, or otherwise not of constitutional significance."88

Because the Court of Appeals considered the exclusion to be substantial, it determined that the "violation of the defendant's Sixth Amendment right carries with it the presumption of specific prejudice mandated by Waller, and thus requires the granting of appropriate relief."89 As discussed in Waller, the Court of Appeals acknowledged that requiring the plaintiff to prove specific prejudice would likely deprive the accused of the constitutional protection of a public trial for it would be nearly impossible to pinpoint evidence of specific injury.90 As stated in Waller, the "benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, [however] the Framers plainly thought them nonetheless real."91

Although the Supreme Court has adopted the general rule that "a constitutional error does not automatically require reversal of a conviction,"92 the Court recently reaffirmed that a violation of the right to a public trial is not subject to harmless error analysis.93 The Court considered a public trial error to be a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."94

Because a violation of the public-trial guarantee is not subject to harmless error analysis, the Maryland court properly concluded that the appropriate remedy in the present case would be to grant Watters a new trial.95 There can be no other satisfactory remedy when the violation of the public-trial guarantee occurs during the critical phase of jury selection and the trial has been concluded.96

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87. Id. at 49, 612 A.2d at 1293.
88. Id.
89. Id.
90. Id. at 47-48, 612 A.2d at 1292.
93. See id. at 1265.
94. Id. (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)).
95. See Watters, 328 Md. at 48-49, 612 A.2d at 1293.
96. Id. at 47 n.4, 612 A.2d at 1292 n.4.
c. Mistrial.—The final issue addressed in Watters was the State's assertion that even if there was a violation of constitutional magnitude that would normally compel a new trial, that principle is not applicable to the present case.\(^{97}\) The State argued that because the constitutional violation was committed without the court's knowledge and was not raised as an issue until after it occurred, by a motion for a mistrial, the appropriate test on review should be simply whether the trial court abused its discretion in refusing to grant a mistrial.\(^{98}\)

The court found little merit in the State's argument. The court recognized that the granting of a mistrial lies within the discretion of a trial judge,\(^{99}\) and that a decision by the trial court will not be disturbed on appeal unless it is determined that the defendant was clearly prejudiced.\(^{100}\) As the Watters court found, however, the language of Waller conclusively establishes that specific prejudice is presumed when there is a violation of the defendant's public-trial right. Because specific prejudice is presumed, the court necessarily found that the trial court inappropriately denied Watters's motion for a mistrial.

4. Conclusion.—The Court of Appeals's decision in Watters does not represent a drastic departure from established precedent. The court's decision leaves open for argument the possibility that the First Amendment standard does not go far enough in protecting a defendant's explicit Sixth Amendment right to a public trial. Nevertheless, the court's decision clearly establishes that an accused's public-trial right will at least be furnished the same protections as the rights of the general public. Thus, the Watters decision merely reiterates that when trial judges are faced with a public-trial issue, they must carefully weigh the rights of the accused to a fair trial against the interests of the public and the defendant to an open and public trial. In the absence of a compelling interest factually estab-
lished on the record, Maryland courtrooms will be strictly held open to the public throughout all parts of all criminal proceedings.

RENATA J. BAKER

B. The Constitutionality of Maryland's Non-economic Damage Cap

In Murphy v. Edmonds, the Court of Appeals held that Maryland's $350,000 statutory cap on the recovery of non-economic damages in personal injury actions does not violate the Maryland Constitution. In particular, the court held that the cap neither violates the equal protection guarantee of article 24 of the Declaration of Rights nor infringes upon the right to a jury trial under articles 5 and 23 of the Declaration of Rights.


(a) Noneconomic damages.—In this section:
   (1) 'Noneconomic damages' means pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; and
   (2) 'Noneconomic damages' does not include punitive damages.

(b) Limitation of $350,000 established.—In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

(c) Award under § 3-2A-06 included.—An award by the health claims arbitration panel in accordance with § 3-2A-06 of this article shall be considered an award for purposes of this section.

(d) Jury Trials.—(1) In a jury trial, the jury may not be informed of the limitation established under subsection (b) of this section.
   (2) If the jury awards an amount for noneconomic damages that exceeds the limitation established under subsection (b) of this section, the court shall reduce the amount to conform to the limitation.

Id. § 11-1108.

103. Murphy, 325 Md. at 370, 375, 601 A.2d at 116, 118.

104. Article 24 of the Declaration of Rights provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of Rts. art. 24.

105. Article 5 of the Declaration of Rights provides:

That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled
The court also used this case to set forth the standard it will employ in reviewing the constitutionality of statutes of this nature. Specifically, Maryland courts will not subject economic regulations to "any level of scrutiny higher than the traditional, deferential rational basis test."106

1. The Case.—On December 14, 1987, Sarah Murphy was driving her car southbound on Interstate 83 in Baltimore County.107 Richard Edmonds was traveling northbound when the left front tire of his tractor-trailer blew out.108 The truck swerved to the left, crossed the median and the three southbound lanes, and collided with an embankment.109 Murphy's car collided with the truck and she sustained serious physical injuries.110

Murphy and her husband filed suit in the Circuit Court for Baltimore County against Edmonds and Port East Transfer, Inc., Edmonds's employer and the owner of the tractor-trailer.111 The complaint alleged gross negligence and sought compensatory and punitive damages.112

Murphy presented evidence to the jury that on the day of the accident Edmonds was late making a delivery to Pennsylvania and therefore was in a hurry, that the blown tire had been improperly repaired prior to the accident and had two visible holes in it, and that Edmonds dove to the floor of the cab after the blow out instead of trying to control the truck.113 Edmonds testified that he had inspected the tires before leaving for Pennsylvania and had found nothing wrong.114 He further stated that he was told by the mainte-
nance department at Port East that the tire was new.115

Additional evidence revealed that after the accident, Port East sent the tire to the manufacturer, Michelin, who inspected it to determine the cause of the blow out.116 According to Michelin's product-analysis engineer, the blow out was caused by an improper repair.117 The engineer also testified that a visible hole in the tire would have been detected if a proper inspection had been performed.118

The jury returned a verdict against both Edmonds and Port East for compensatory damages totaling $797,165.31, including $510,000 in non-economic damages.119 Punitive damages were also assessed against Edmonds in the amount of $3000 and against Port East in the amount of $1,000,000.120

The defendants filed a post-trial motion121 to reduce the non-economic damages to $350,000 pursuant to section 11-108(b) of the Courts and Judicial Proceedings Article.122 The trial judge determined that section 11-108 created two seemingly illogical classifications of tort plaintiffs: those who are less-severely injured and therefore entitled to their entire awards, and those who are more-seriously injured but cannot keep any award for non-economic damages greater than $350,000.123 Finding that section 11-108 infringed upon an "important right," the trial judge applied a "heightened scrutiny" test and found that the section 11-108 cap violated the equal protection guarantee embodied in article 24 of the Declaration of Rights.124

Edmonds appealed, asserting that the statutory cap on non-economic damages was constitutional and should be enforced.125 The

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115. Id.
116. Id.
117. Id. at 349, 601 A.2d at 105.
118. Id.
119. Id.
120. Id.
121. The defendants actually filed three post-trial motions. In the first one, the defendants wanted the compensatory award for non-economic damages aggregated with the loss of consortium awards, including the loss of household services awards, and that total reduced to the $350,000 cap. The judge, by concluding that loss of household services constituted economic damages, denied the motion for consolidation. The second motion, for judgment notwithstanding the verdict, and the third motion, for remittitur, were both denied by the trial judge. See id.
123. Murphy, 325 Md. at 350, 601 A.2d at 105.
124. Id., 601 A.2d at 106.
125. Id. The defendants also raised additional issues with respect to liability, and compensatory and punitive damages.
Murphys re-asserted that section 11-108 violated the equal protection guarantee of article 24 and the right to a jury trial under articles 5 and 23 of the Declaration of Rights.126

The Court of Special Appeals upheld the statute's constitutionality on all grounds, reversing the trial court's ruling.127 The court ruled that the statute was subject only to the traditional rational basis test and that under such a test it did not violate the equal protection guarantee.128 Pursuant to its ruling, the court reduced the award of non-economic damages to $350,000.129

The Court of Appeals granted both the Murphys' petition for a writ of certiorari and Edmonds's cross-petition.130 In an opinion authored by Judge Eldridge, a six-to-one majority affirmed the decision of the Court of Special Appeals.131 By concluding that the section 11-108 classification of tort plaintiffs was neither arbitrary nor irrational, the Murphy court held that the statute did not violate Maryland's equal protection guarantee.132 The court also held that the statute did not infringe upon the right to a jury trial.133

126. Id. See supra note 105. In the intermediate appellate court, the plaintiffs also contended that § 11-108 violated article 19 of the Declaration of Rights and was inconsistent with the separation of powers requirement under article 8. These issues were not brought before the Court of Appeals. See Murphy, 325 Md. at 351, 353, 601 A.2d at 106, 107.
128. Id. at 162, 573 A.2d at 867. The court stated that even if it were to apply a “heightened scrutiny” test to the statute, it would still “hold § 11-108(b) constitutional because we believe the classifications the statute creates are ‘reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation.’ ” Id. (quoting Potomac Elec. Power Co. v. Smith, 79 Md. App. 591, 631, 558 A.2d 768, 788, cert. denied, 317 Md. 393, 564 A.2d 407 (1989)).
129. Id. at 179, 573 A.2d at 876. In addition, the court reversed the award for punitive damages on the basis that the evidence was not sufficient to constitute gross negligence. Id. at 175, 573 A.2d at 874.
131. Murphy, 325 Md. at 370, 601 A.2d at 119.
132. Id. at 370, 601 A.2d at 116.
133. Id. at 375, 601 A.2d at 118. In addition to attacking the constitutionality of § 11-108 on the grounds that it violated equal protection rights embodied in article 24 of the Declaration of Rights, the Murphys also argued that the statute infringed upon their right to a jury trial as set out in the Declaration of Rights. Id. at 370, 601 A.2d at 116. See also supra note 105. Specifically, they contended “that the procedure required by § 11-108, which prohibits the jury from being informed of the $350,000 limitation on noneconomic damages, interferes with the jury’s ability properly to determine damages.” Murphy, 325 Md. at 370-71, 601 A.2d at 116.

As the court explained, the General Assembly merely modified the cause of action for non-economic damages in tort actions by eliminating a remedy of more than $350,000. “As the wording of Article 23 itself indicates, the jury trial right in civil cases relates to ‘issues of fact’ in legal actions. It does not extend to issues of law.” Id. at 371,
The dissenting opinion favored a standard different than the rational basis test. Judge Chasanow wrote that "the right to recover full and fair compensation from a tortfeasor is an important personal right, and any limitation on that right should be subject to 'heightened' or 'intermediate' scrutiny," noting that section 11-108 would not survive a constitutional challenge under that standard.

2. Legal Background.—Courts have developed several standards to review the constitutionality of governmental classifications under an equal protection analysis. Which standard to apply is determined by deciding whether the legislative classification infringes upon a suspect class or a fundamental right.

Courts apply the commonly used rational basis test when the statute does not implicate a suspect class or infringe upon a fundamental right. Under this low level of scrutiny, a classification will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational." Due to strong presumptions of constitutionality and legislative competence, statutes reviewed under the rational basis test are generally upheld.

If, however, the classification burdens a "suspect class" or infringes upon a "fundamental right," courts subject the legislation to strict scrutiny. A class is "suspect" primarily when legislation discriminates against a group that is politically powerless or in the minority. A statute that focuses on a suspect class or fundamental right will withstand an equal protection challenge only if it is "suit-

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601 A.2d at 116. "A remedy is a matter of law, not a matter of fact. . . . A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function." Id. at 374, 601 A.2d at 117 (quoting Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989)). Accordingly, Murphy concluded that § 11-108 does not infringe upon the right to a jury trial as protected by articles 5 and 23 of the Declaration of Rights. Id. at 375, 601 A.2d at 118.

The court also upheld the Court of Special Appeals's ruling that the evidence was insufficient for the jury to have concluded that gross negligence occurred. Id. at 378, 601 A.2d at 119.

134. Murphy, 325 Md. at 378, 601 A.2d at 120 (Chasanow, J., dissenting).
135. Id. at 379, 601 A.2d at 120 (Chasanow, J., dissenting).
138. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").
ably tailored to serve a compelling state interest."\textsuperscript{139}

In some instances, courts have imposed an intermediate level of scrutiny, called heightened scrutiny.\textsuperscript{140} This less-deferential standard is applied if the classification infringes upon an important personal—but not necessarily fundamental—right or interest.\textsuperscript{141} The legislation must have a legitimate purpose and the means employed to effectuate that purpose must bear a "fair and substantial" relationship to it.\textsuperscript{142}

The Supreme Court has applied an intermediate level of scrutiny to cases involving classifications based on gender,\textsuperscript{143} age,\textsuperscript{144} and illegitimacy.\textsuperscript{145} The Court of Appeals has employed an intermediate scrutiny standard to invalidate a law that denied retired judges the right to practice law, the profession for which they were trained and licensed.\textsuperscript{146}

3. The Court's Reasoning.—In Murphy, the Court of Appeals began its analysis by stating that although the Maryland Constitution does not contain an express equal protection clause, "it is settled that the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Declaration of Rights, embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{147} Maryland courts have "consistently taken the position that the Maryland equal protection principle applies "in like manner and to the same extent as" the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{148} Hence, Supreme Court decisions regarding the Equal

\textsuperscript{139} Id.
\textsuperscript{141} See Craig, 429 U.S. at 197.
\textsuperscript{142} See Waldron, 289 Md. at 713-14, 426 A.2d at 946.
\textsuperscript{143} See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).
\textsuperscript{144} By law, gender is a suspect class in Maryland. See Md. Const. Decl. of RTS. art. 46.
\textsuperscript{146} Waldron, 289 Md. at 716-28, 426 A.2d at 947-54.
\textsuperscript{148} Id. at 354, 601 A.2d at 108 (quoting Waldron, 289 Md. at 704-05, 426 A.2d at 941).
Protection Clause of the Fourteenth Amendment "are practically direct authorities" with respect to article 24 of the Declaration of Rights.\textsuperscript{149}

Although the Court of Appeals recognized Supreme Court decisions that employed a "less deferential standard of review than had previously been applied under the traditional rational basis test" to strike down legislative classifications,\textsuperscript{150} it concluded that where the legislation is an economic regulation, the traditional "rational basis" test should be used unless the classification clearly burdens a suspect class or infringes on a fundamental right.\textsuperscript{151}

Following Supreme Court precedent, the Court of Appeals rejected the argument that section 11-108 infringed upon important personal rights and was therefore subject to a heightened level of scrutiny.\textsuperscript{152} The Murphy court stated that

[w]hatever may be the appropriate mode of equal protection analysis for some other statutory classifications, in our view a legislative cap of $350,000 upon the amount of noneconomic damages which can be awarded to a tort plaintiff does not implicate such an important 'right' as to trigger any enhanced scrutiny. Instead, the statute represents the type of economic regulation which has regularly been reviewed under the traditional rational basis test by this Court and the Supreme Court.\textsuperscript{153}

The court relied on \textit{Duke Power Co. v. Carolina Environmental Study Group}\textsuperscript{154} to support its conclusion that the great majority of jurisdictions use the rational basis test when reviewing legislative caps on non-economic damages.\textsuperscript{155} In \textit{Duke Power}, the Supreme Court up-

\textsuperscript{149} Id. (quoting \textit{Waldron}, 289 Md. at 705, 426 A.2d at 941, quoting Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 156, 321 A.2d 748, 755 (1974)).


\textsuperscript{151} \textit{See} Murphy, 325 Md. at 362, 601 A.2d at 111. The court disagreed with the holdings in the cases cited by the Murphys in which a "heightened" scrutiny test was applied to legislation capping recoverable tort damages. \textit{Id.} at 361, 601 A.2d at 111.

\textsuperscript{152} \textit{Id.} at 361-62, 601 A.2d at 111.

\textsuperscript{153} \textit{Id.} at 362, 601 A.2d at 111-12.

\textsuperscript{154} 438 U.S. 59 (1978).

\textsuperscript{155} \textit{See} Murphy, 325 Md. at 368, 601 A.2d at 112.
held the constitutionality of a statute limiting the recovery of damages in the event of a major nuclear accident.\textsuperscript{156} The Court described the cap "as a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"\textsuperscript{157} In addition to\textit{ Duke Power}, the\textit{ Murphy} majority referred to cases in other jurisdictions that applied the traditional rational basis test and held that the statutes in question did not deny equal protection.\textsuperscript{158}

Applying the rational basis test to the facts in\textit{ Murphy}, the Court of Appeals found a legitimate legislative purpose behind the statutory cap.\textsuperscript{159} The cap "was enacted in response to a legislatively perceived crisis concerning the availability and cost of liability insurance in this State."\textsuperscript{160} The court stated that the cap was neither irrational nor arbitrary because it was reasonably related to a legitimate legislative objective.\textsuperscript{161} The\textit{ Murphy} court concluded, therefore, that the legislative classification did not violate article 24 of the Declaration of Rights.\textsuperscript{162}

At oral argument, the Murphys contended that section 11-108 restricted access to the courts and thus implicated article 19 rights, creating the need for a higher degree of scrutiny.\textsuperscript{163} The court rejected this argument, pointing out that "Article 19 does guarantee access to the courts, but that access is subject to reasonable restrictions. A statutory restriction upon access to the courts violates article 19 only if the restriction is unreasonable."\textsuperscript{164} The court found that the limitation imposed on recoverable damages under section

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\item \textsuperscript{156} \textit{Duke Power}, 438 U.S. at 93.
\item \textsuperscript{157} \textit{Id.} at 83 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).
\item \textsuperscript{158} \textit{Murphy}, 325 Md. at 364, 601 A.2d at 113. The court cited a number of cases, including Davis v. Omitowoju, 883 F.2d 1155, 1158 (3d Cir. 1989); Boyd v. Bulala, 877 F.2d 1191, 1196-97 (4th Cir. 1989); Fein v. Permanente Medical Group, 695 P.2d 665, 682-84 (Cal.), appeal dismissed, 474 U.S. 892 (1985); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 533-34 (Va. 1989).
\item \textsuperscript{159} \textit{Murphy}, 325 Md. at 369, 601 A.2d at 115.
\item \textsuperscript{160} \textit{Id.} at 368, 601 A.2d at 115.
\item \textsuperscript{161} \textit{Id.} at 370, 601 A.2d at 115-16.
\item \textsuperscript{162} \textit{Id.}, 601 A.2d at 116.
\item \textsuperscript{163} \textit{Id.} at 365, 601 A.2d at 113. Article 19 of the Declaration of Rights states in pertinent part that every person "for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, . . . fully without any denial, . . . according to the Law of the land." Md. Const. Decl. of Rts. art. 19.
\end{itemize}
11-108 did not "amount to a restriction upon access to the courts" but merely modified the substantive law of damages in tort cases.\textsuperscript{165} Even if section 11-108 could be viewed as somehow restricting access to the courts, the court would view it as an entirely reasonable restriction that would not require heightened scrutiny.\textsuperscript{166}

Judge Chasanow argued in dissent that a middle level of scrutiny had indeed been developed.\textsuperscript{167} Quoting Professor Tribe, Judge Chasanow explained the emergence of this intermediate level of review as

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a judicial response to the growing awareness that the "all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death-blow of truly strict scrutiny, but through methods more sensitive to risks of injustice than the former and yet less blind to the needs of governmental flexibility than the latter.”\textsuperscript{168}
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The dissent further contended "that the right to recover full and fair compensation from a tortfeasor is an important personal right, and any limitation on that right should be subject to 'heightened' or 'intermediate' scrutiny.”\textsuperscript{169} Applying this standard, the dissent posited that legislation to limit non-economic damages in motor vehicle tort actions would not survive a constitutional challenge because of the lack of a clearly established need for such legislation. Judge Chasanow found that "[t]here was clear evidence that there was a crisis in the availability and affordability of \textit{medical malpractice liability insurance}. . . . No one has demonstrated there was a crisis, or that the cap would solve any crisis, in the availability and affordability of \textit{automobile liability insurance}.”\textsuperscript{170}

4. Analysis.—At issue in \textit{Murphy} was whether equal protection analysis of legislative caps on non-economic damages required heightened scrutiny. Because the legislation clearly did not involve a fundamental right, there was no question that strict scrutiny was

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\item \textsuperscript{165} \textit{Murphy}, 325 Md. at 366, 601 A.2d at 114.
\item \textsuperscript{166} Id. at 367, 601 A.2d at 114.
\item \textsuperscript{167} Id. at 379, 601 A.2d at 120 (Chasanow, J., dissenting).
\item \textsuperscript{168} Id. at 381, 601 A.2d at 121 (Chasanow, J., dissenting) (quoting \textit{Laurence H. Tribe, American Constitutional Law} \textsection{} 16-32, at 1609-10 (2d ed. 1988)).
\item \textsuperscript{169} Id. at 379, 601 A.2d at 119 (Chasanow, J., dissenting).
\item \textsuperscript{170} Id. at 384, 601 A.2d at 122 (Chasanow, J., dissenting) (emphasis added & citation omitted).
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not applicable. The question then became whether the legislation implicated a personal right important enough to warrant application of a heightened scrutiny test. The Court of Appeals correctly decided that the right to receive full non-economic damages in a personal injury action was not such a pivotal personal right and appropriately applied the traditional rational basis test to the legislation.

The Court of Appeals had applied heightened scrutiny to only one case involving a legislative classification. In Attorney General v. Waldron,171 a retired judge who accepted a pension was prohibited by statute from practicing law for compensation.172 The court justified applying an intermediate level of scrutiny in Waldron by stating that "the right to pursue one's calling in life is a significant liberty interest entitled to some measure of constitutional preservation."173 The Supreme Court, Waldron noted, "has long recognized that the right 'to engage in any of the common occupations of life' is encompassed within the concept of liberty guaranteed by the due process clause of the fourteenth amendment."174

In Murphy, however, there was no similar constitutionally protected right to receive compensation for non-economic damages in a tort action. The Murphys looked solely to the common law as the source of that right.175 The court correctly noted, however, that Maryland's constitution clearly indicates that common law may be statutorily changed.176 In addition, "unlike many of the 'rights' at common law, the right to recover for pain and suffering is not of ancient origin and does not enjoy a long history."177

The legislation at issue in Murphy was typical economic regulation, "which has regularly been reviewed under the traditional rational basis test."178 The court has recognized that "[w]hen a court analyzes what it considers to represent a 'local economic' regulation impacting on business interests, it should defer 'to legislative determinations as to the desirability of particular statutory discrimina-

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172. Id. at 686, 426 A.2d at 931.
173. Id. at 722, 426 A.2d at 950.
174. Id. at 721, 426 A.2d at 950 (quoting Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).
175. Murphy, 325 Md. at 362, 601 A.2d at 112.
176. Id.
178. Murphy, 325 Md. at 362, 601 A.2d at 111-12.
By applying the traditional rational basis test to the legislation in Murphy, the Court of Appeals was consistent with its prior approaches to evaluating legislative classifications.

The Murphy decision also comports with the Supreme Court's treatment of a legislative damages cap in Duke Power. In Duke Power, the Supreme Court upheld the constitutionality of a statute capping the amount of damages recoverable as a result of a major nuclear accident. Although the Court applied a due process analysis, its review was akin to an application of the traditional rational basis test under equal protection analysis. The Court afforded the legislation the "traditional presumption of constitutionality generally accorded economic regulations" and found the legislative purpose to be rational and legitimate.

Murphy can be distinguished from Duke Power, however, by considering the different governmental interests at issue. As one commentator has noted, "[T]he protections, purposes, and governmental interests involved in Duke Power are strikingly different from those present where a state P[ersonal] I[njury] R[ecovery] C[ap] is involved." Under the statute in Duke Power, unlike a typical statute limiting recovery for personal injury, a plaintiff had better protection—a greater likelihood of recovering anything—than he would have had without the act. The issue in question in Murphy, however, was not the state's interest, but the relative importance of an individual's right to damages. A plaintiff injured under either scenario would arguably have the same right of recovery. Under the Duke Power facts, however, the Supreme Court did not consider this right of recovery important enough to warrant heightened scrutiny.

Recognizing the absence of a bright-line test to determine the importance of an individual's interest, the Court of Appeals did not

180. See supra text accompanying note 154.
182. Id. at 82-93. The Court's conclusion that there was no equal protection violation was premised on the idea that "the equal protection arguments largely track and duplicate those made in support of the due process claim." Id. at 93.
183. Id. at 83.
184. Id. at 85-86.
186. Id. at 337-38 (noting that "a private nuclear power plant operator would almost assuredly be driven to insolvency well before liability payments reached the cap set forth in the . . . [a]ct").
base its conclusion solely on the Supreme Court's decision in *Duke Power*. It also looked to other jurisdictions for guidance. In *Etheridge v. Medical Center Hospitals*,\(^ {187}\) the Supreme Court of Virginia recently applied the traditional rational basis test to a statute capping recoverable damages in medical malpractice actions.\(^ {188}\) The court did not even discuss whether the legislation infringed upon an important personal right because the plaintiff agreed that the rational basis test was the proper one to use.\(^ {189}\)

Similarly, in *Fein v. Permanente Medical Group*,\(^ {190}\) the Supreme Court of California applied the rational basis test to a legislative cap on non-economic recovery in medical malpractice cases.\(^ {191}\) Fein contended that the limit on damages "violates equal protection because of its differential effect within the class of malpractice plaintiffs,"\(^ {192}\) an argument similar to that advanced by the Murphys. The California court dismissed the claim, stating that "[j]ust as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the $250,000 limit—which applies to all malpractice victims—does not amount to an unconstitutional discrimination."\(^ {193}\)

Thus, the reasoning that section 11-108 did not create a discriminatory classification is consistent with the California Supreme Court's analysis.

Of those state courts that have struck down legislation limiting recovery in medical malpractice actions, "[w]ith only one exception, all of the invalidated statutes contained a ceiling which applied to both pecuniary and nonpecuniary damages."\(^ {194}\) These courts apparently felt that a higher degree of scrutiny of the legislation was warranted when total damages were limited. This position is not inconsistent with the *Murphy* decision because section 11-108 limits only non-economic recovery, not total damages.

In *Carson v. Maurer*,\(^ {195}\) the Supreme Court of New Hampshire struck down legislation limiting recovery in medical malpractice ac-

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188. Id. at 534.
189. Id.
190. 695 P.2d 665 (Cal. 1985).
191. See id. at 679-84.
192. Id. at 683.
193. Id.
194. Id. at 682 (citing Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Baptist Hosp. of Southeast Tex. v. Barber, 672 S.W.2d 296 (Tex. Ct. App. 1984)).
tions as violative of equal protection. The *Carson* court considered the right to recover for personal injuries to be an important right. The court applied an intermediate level test to the statute, stating that the legislative classification "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' in order to satisfy State equal protection guarantees." The New Hampshire court noted that the Supreme Court has only applied this heightened scrutiny in "cases involving classifications based upon gender and illegitimacy" but warned that "[i]n interpreting our State constitution . . . we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires."

The Court of Appeals, on the other hand, has invariably held that the equal protection guarantees embodied in article 24 of the Declaration of Rights are consistent with those in the Equal Protection Clause of the Fourteenth Amendment. While a state is always free to be more protective of individual rights than the federal government, it is also free to choose not to expand federal constitutional protections. The *Murphy* court was extremely reluctant to expand individual protections under an unclear standard. Because no real guidelines have emerged as to when to use heightened scrutiny, and no clear definition of "important right" is available, the court concluded that the logical standard to be applied in the instant case was the rational basis test. With its holding, the court has mandated that any economic legislation will be reviewed under the rational basis test.

5. Conclusion.—In *Murphy*, the Court of Appeals applied the rational basis test to the legislative cap on non-economic damages in a personal injury tort action. This practice is consistent with the Supreme Court's treatment of similar statutes and the treatment adopted by a majority of other courts. It is likely that future challenges to the constitutionality of economic-based legislation will be met with equal treatment. Maryland's lower courts now have a clear

196. *Id.* at 836.
197. *Id.* at 831 (quoting State v. Scoville, 304 A.2d 366, 369 (N.H. 1973)).
198. *Id.*
199. See *supra* text accompanying notes 147 & 148.
ruling from the State's highest court to guide their analysis in equal protection challenges to similar statutes.

LYNN A. DYMOND

C. The Due Process Requirements of Tax Sale Notice

In St. George Church v. Aggarwal,200 the Court of Appeals held that a purchaser's failure to comply with statutory notice provisions prescribed by the Tax-Property Article denied the previous property owner due process in an action to foreclose its right of redemption following a tax sale.201 The decision reversed the Court of Special Appeals, which had sustained an order of the Circuit Court for Prince George's County foreclosing the property owner's right of redemption.202 Because the applicable section of the Tax-Property Article—section 14-839—was completely rewritten in 1986,203 this case provided the court with its first opportunity to determine the constitutionality of the newly crafted statute, as well as to interpret its meaning. The court interpreted the statute to require more extensive efforts by tax-sale purchasers to locate and give notice to property owners than were seemingly dictated by the statute.204 Based on its expansive interpretation, the Aggarwal court found that the statute—on its face and in practice—comported with federal due process standards.205

1. The Case.—The controversy began on July 31, 1992, when St. George Antiochian Orthodox Christian Church received a donation of "an unimproved parcel of land in Prince George's County."206 The transfer deed did not, however, list an address for the property or the new owner.207 It did contain an address for the Commonwealth Title Company, a Washington, D.C.-based firm that

201. Id. at 104, 603 A.2d at 491.
203. In 1986, amendments to the statute regulating tax sales were promulgated in House Bill 1828. As part of this process, § 14-839, which governs notice in actions to foreclose the right of redemption, was completely rewritten. Senate Judicial Proceedings Committee, Summary of Committee Report on House Bill 1828 at 2 (1986) [hereinafter Committee Report]. See Aggarwal, 326 Md. at 96, 603 A.2d at 487.
204. Aggarwal, 326 Md. at 103, 603 A.2d at 490.
205. Id. at 102, 603 A.2d at 490.
206. Id. at 92, 603 A.2d at 485.
207. Id.
handled the transfer. In addition, an address in Bladensburg, Maryland, supposedly belonging to the transferred property, was supplied to the Supervisor of Assessments for Prince George’s County. No other addresses were given to county officials by the parties involved in the conveyance.

Tax bills for the property were subsequently mailed to the vacant lot located at the Bladensburg address and were never received by the Church. When the taxes for the property went into arrears in May 1984, the Director of Finance for Prince George’s County sold the property at a tax sale. On April 2, 1986, Rakshpal Aggarwal—the purchaser of the property—filed a complaint to foreclose the Church’s right of redemption.

An attempt was made to serve the property owner in accordance with Tax-Property Article, section 14-839. Aggarwal’s efforts to locate an address for the Church included a title search, contacting the Maryland Department of Assessments and Taxation, consulting the white pages of local telephone directories and writing to the postmaster for the town in which the vacant lot was located. As a result of this search, Aggarwal directed all attempts at notice to the address of the vacant lot listed in the tax records. No effort was made to contact the Commonwealth Title Company to inquire as to the whereabouts of the Church. A summons, sent

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208. Id. at 100, 603 A.2d at 489. The deed consisted of two pages, both of which were recorded. Id. The second page contained the name and address of the Commonwealth Title Company. Id.

209. Id. at 92, 603 A.2d at 485. The address provided to the tax office was described as one “that someone believed corresponded to the lot which was transferred to the church.” Id.


211. Aggarwal, 326 Md. at 93, 603 A.2d at 485.

212. Id. The tax sale was held pursuant to Md. Ann. Code art. 81, §§ 70-123C (1980) (revised as Md. Code Ann., Tax-Prop. §§ 14-808 to -854 (1986)). See Aggarwal, 326 Md. at 93, 603 A.2d at 485.


215. Aggarwal, 326 Md. at 93, 603 A.2d at 488. “All subsequent notices, publication, and an attempt to serve process were directed to that [vacant lot].” Id. at 93, 603 A.2d at 485.

216. “All subsequent notices, publication, and an attempt to serve process were directed to that [vacant lot].” Id. at 93, 603 A.2d at 485.

217. Id. at 100, 603 A.2d at 489. Commonwealth’s address was on the deed to the property, which the purchaser is required to search as part of the title search described
by certified mail, was returned marked "non est" and a summons that the county sheriff attempted to serve was returned marked "per fire board bad address." Determining that Aggarwal's attempts to effect actual notice were valid, although unsuccessful, the Circuit Court for Prince George's County issued an order on July 28, 1987, to foreclose the property owner's right of redemption.

Never having received notice of any of these proceedings, the Church did not realize it had lost its property until it sought to list the lot for sale. In March 1989, the Church filed a motion to set aside the tax sale, claiming that it was deprived of its property without due process of law. In an affidavit accompanying the motion, the Church claimed that it had received neither tax bills nor notice of the tax sale and the subsequent proceeding to foreclose the right of redemption. Furthermore, the Church stated that it believed it was not required to pay taxes as it held tax-exempt status.

The Circuit Court for Prince George's County denied the Church's motion, finding that Aggarwal's efforts were "reasonably diligent" and complied with section 14-839 of The Tax-Property Article. The Court of Special Appeals affirmed the denial of the motion and held that the statute itself was constitutional. The Court of Appeals granted certiorari to address the constitutional issues.

2. Legal Background.—

a. The Federal Due Process Standard.—In any proceeding that might potentially deprive an interestholder of a protected prop-

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218. Aggarwal, 326 Md. at 100, 603 A.2d at 488.

219. Id. at 93, 603 A.2d at 485.

220. Id.

221. Id.

222. Id. at 94, 603 A.2d at 486. The motion asserted that "Aggarwal had failed to comply with the requirements of the statute governing tax sales and had failed to make a reasonable investigation to obtain the church's address. . . ." Id.

223. See id. at 93-94, 603 A.2d at 485-86.

224. Id. at 94, 603 A.2d at 486. The Church conceded, however, that its assumption that it did not owe taxes on the unimproved parcel of land was incorrect. See id. at 94 n.6, 603 A.2d at 486 n.6.

225. Id. at 94, 603 A.2d at 486.


Constitutional Law

Property right, the standards of notice that must be given to that interestholder are governed by the Due Process Clause of the Fourteenth Amendment. In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court articulated the rule that due process requires "notice 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." Although the *Mullane* Court recognized that states have a vital interest in the final disposition of property within their borders, it held that this state interest must be balanced against "the individual interest sought to be protected by the Fourteenth Amendment."

This standard requires that the notice-giver make a reasonably diligent effort to ascertain the identity and address of interested parties. In *Mennonite Board of Missions v. Adams*, the Supreme Court held that if a party's name and address can be obtained by exerting a reasonable effort, notice by mail—or a method equally as certain to reach the party—is constitutionally mandated. The Court recognized that the notice-giver has much to gain by not accomplishing

228. U.S. Const. amend. XIV, § 1.
229. 339 U.S. 306 (1950). *Mullane* addressed the constitutional sufficiency of notice provided to the beneficiaries of a common trust fund. As dictated by the governing New York statute, the beneficiaries—even those whose names and addresses were readily ascertainable—were given only notice by publication. *Id.* at 309. The Court found that this notice was insufficient as to those beneficiaries whose names and addresses could be obtained with a reasonable effort because notice by publication was not reasonably calculated to reach the interestholders. *Id.* at 318.
230. *Id.* at 314.
231. *Id.*
232. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The *Mennonite* Court stated, "We assume that the mortgagee's address could have been ascertained by reasonably diligent efforts." *Id.* at 798 n.4. See also *id.* at 796 n.3 (discussing the efforts required to identify and notify interested parties).
233. 462 U.S. 791 (1983). *Mennonite* dealt with the issue of which interestholders deserved notice of a tax sale. An Indiana statute provided for notice by mail to the property owner, but said nothing about notice to a mortgagee. The Court decided that notice under the standard developed in *Mullane* must be given to any party with a constitutionally recognized interest in the property. *Id.* at 798, 800 (citing *Mullane*, 339 U.S. at 314-17).
234. *Id.* at 800. In its decision, the Court concluded, first, that the "mortgagee possess[ed] a substantial property interest that [would be] . . . significantly affected by a tax sale." *Id.* at 798. As the mortgagee's interest was legally protected, the purchaser was required to provide "notice reasonably calculated to apprise him of a pending tax sale." *Id.* See, e.g., *Mullane*, 339 U.S. at 315 ("[P]rocess which is a mere gesture is not due process."); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 491 (1988) ("If appellant's identity was know or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process.").
actual notice\textsuperscript{235} and it addressed this inherent bias by mandating a reasonably diligent effort.\textsuperscript{236}

Thus, the due process standard articulated by the Supreme Court is a fact-specific rule. Although the standard establishes that constructive notice alone is not constitutionally adequate to provide due process in actions that may deprive a person of a property right,\textsuperscript{237} the ultimate determination of whether an individual was deprived of due process depends upon the particularities of the specific situation.\textsuperscript{238} The key questions are whether a reasonable effort was initially put forth to obtain the name and address of the property owner for notification purposes and whether, under the specific set of facts, the method of notice—mail or otherwise—was reasonably calculated to reach the property owner.\textsuperscript{239}

b. Notice Under Maryland Law.—The section of the Maryland Code governing tax sales provides that local tax collectors may sell property on which tax is in arrears at the time established by local law.\textsuperscript{240} The purchaser of the property receives a certificate of sale that acknowledges that the property has been conveyed to her.\textsuperscript{241} The original owner of the property, however, possesses a right to redeem the property by paying specified taxes and fees at any time until the right of redemption is foreclosed.\textsuperscript{242} Generally, the holder of a certificate of sale may bring an action to foreclose the right of redemption six months after the tax sale.\textsuperscript{243} Once a judgment foreclosing the right of redemption has been entered, it may be reopened only on the grounds of lack of jurisdiction or fraud in the conduct of the foreclosure proceedings.\textsuperscript{244}

\textsuperscript{235} See Aggarwal, 326 Md. at 96, 603 A.2d at 487 ("[T]he plaintiff often stands to benefit from failed attempts to notify the defendant(s).") (citing Mullane and Mennonite).
\textsuperscript{236} See Mullane, 339 U.S. at 315.
\textsuperscript{237} In the case of a tax sale or similar proceeding, for example, the Court has determined that a statute must first provide for actual notice. See Mennonite, 462 U.S. at 800. If a statute meets this first test, questions as to whether it safeguards due process are addressed on a case-by-case basis. See id. at 802 (O'Connor, J., dissenting).
\textsuperscript{238} The Mullane court stated, "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." 339 U.S. at 314-15. See also Mennonite, 462 U.S. at 799 (finding that the required effort may be more extensive depending upon the circumstances).
\textsuperscript{239} Mullane, 339 U.S. at 314.
\textsuperscript{241} See id. § 14-820.
\textsuperscript{242} See id. § 14-828.
\textsuperscript{243} See id. § 14-833.
\textsuperscript{244} See id. § 14-845 (outlining the procedure for reopening a judgement foreclosing the right of redemption).
In *Aggarwal*, the Court of Appeals was forced to decide whether the recently rewritten notice requirements of the tax-sales statute, section 14-839, passed constitutional muster. This section, which

245. *See id.* § 14-839. The notice section provides as follows:

(a) *Notice to defendants.*—(1) The plaintiff shall show in the title of the complaint the last address known to the plaintiff or to the attorney filing the complaint of each defendant, as obtained from:
   (i) any records examined as part of the title examination;
   (ii) the tax rolls of the collector who made the sale, as to the property described in the complaint; and
   (iii) any other address that is known to the plaintiff or the attorney filing the complaint.

(2) Paragraph (1) of this subsection does not require the plaintiff or the attorney for the plaintiff to make any investigations or to search any other records or sources of information other than those stated.

(3) On the filing of the complaint, the court shall issue a summons to procure the answer and appearance of all the defendants as in other civil actions.

(4) This paragraph does not apply if a last known address for a defendant is not obtained as provided under paragraphs (1) and (2) of this subsection. The plaintiff shall cause a copy of the order of publication to be mailed by first class mail or certified mail, postage prepaid, to each defendant at the defendant's address as determined by the provisions of paragraphs (1) and (2) of this subsection. As to any defendant not served by summons or as provided by paragraph (5) of this subsection, the plaintiff shall file an affidavit in the proceedings, which affidavit:
   (i) shall certify that this provision has been complied with; and
   (ii) shall be accompanied by:
      1. the receipt obtained from the post office for the mailing; or
      2. the certified mail receipt.

(5) Notice to a defendant may be made in any other manner that results in actual notice of the pendency of the action to the defendant. When notice is made under this paragraph it shall be certified to by an affidavit that fairly describes the method and time of service.

(6) A final judgement may not be entered before the last of:
   (i) where actual service is made on the defendant, the passage of the time specified in the summons issued by the court;
   (ii) the actual time specified in the order of publication; or
   (iii) 33 days after the date of mailing the copy of the order of publication under paragraph (4) of this subsection.

(b) *Same—Declared reasonable and sufficient.*—The provisions of this section as to notice to persons who may have an interest in property sold for nonpayment of taxes, coupled with the order of publication and the other publicity and notices as ordinarily accompanies the sale of such property, as well as the knowledge of the taxes and the consequences for nonpayment of the taxes is declared:
   (1) to be reasonable and sufficient under all of the circumstances involved, and necessary in light of the compelling need for the prompt collection of taxes; and
   (2) to supersede any other requirement in other cases or civil causes generally.

(c) *Notice to collector.*—Notice of the institution of proceeding to foreclose the right of redemption also shall be given to the collector where the property is located.

*Id.*
was entirely rewritten in 1986, applies to notification of interested parties in actions to foreclose the right of redemption after tax sales of property. 246

The language of section 14-839 provides three directives that a tax-sale purchaser must follow in furnishing notice to a property owner. First, the purchaser must look to the documents consulted as part of a title search. 247 Second, the purchaser must inspect the tax records. 248 Finally, the purchaser must consult any other address known to her or her attorney. 249 The provision further states that the purchaser need not "make any investigations or search any other records or sources of information other than those stated." 250 The intent of the legislature in setting out this specific course of conduct was to "provide greater protection for due process by facilitating notice of tax sales of property in the State." 251 In addition, the statute expressly recognizes the interest of the State in the prompt collection of taxes. 252

3. The Court's Reasoning; Analysis.—In formulating its holding, the Aggarwal court addressed two major issues: first, whether the statute was constitutional on its face; and, second, whether the steps taken by the purchaser to notify the property owner in this case complied with the statute. 253 The court’s ultimate decision confirmed the constitutionality of section 14-839, 254 but found that Aggarwal failed to fulfill the statute’s requirements. 255

a. The Statute’s Constitutionality.—The bulk of the court’s opinion was devoted to developing a constitutionally valid construction of the statute. The court’s approach was governed by the prin-
principle that "a court will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality." Consequently, Aggarwal read the statute to not permit a purchaser to ignore reasonable sources of information concerning a property owner's whereabouts by narrowly reading the language of section 14-839.\textsuperscript{257} Rather, the court held that the statute mandates a reasonable effort to provide actual notice to the property owner.\textsuperscript{258}

Although acknowledging the seemingly narrow requirements of the statute,\textsuperscript{259} the court indicated that "the fact that the statute does not require the purchaser to employ all reasonable sources in an effort to notify the owner does not contradict the conclusion that using the sources required by the statute will result in notice reasonably calculated to reach the owner."\textsuperscript{260} This approach enabled the court to uphold section 14-839 by construing it in such a way to ensure that, in practice, it would meet the mandated constitutional guarantees.

Establishing a broad scope for the efforts required by the statute, the court focused on section 14-839(a)(1)(iii), which requires a purchaser to consult "any other address that is known to the plaintiff or the attorney filing the complaint."\textsuperscript{261} By expansively defining the term "known" in that subsection, the court created a catch-all provision which essentially dictates that the purchaser must comply with federal due process standards.\textsuperscript{262} The court's definition was extracted from its recent decision in Owens-Illinois, Inc. v. Zenobia,\textsuperscript{263}

\textsuperscript{256} Aggarwal, 326 Md. at 102, 603 A.2d at 490 (citing Schochet v. State, 320 Md. 714, 725, 580 A.2d 176, 181 (1990); Board of Trustees v. Mayor of Baltimore, 317 Md. 97, 562 A.2d 720, 732 (1989); Craig v. State, 316 Md. 551, 566, 560 A.2d 1120, 1127 (1989)).

\textsuperscript{257} See id. at 103, 603 A.2d at 490. Through his title search, Aggarwal found the name and address of the title company, which in all likelihood would have been able to provide him with the Church's correct address. Id. at 100, 603 A.2d at 489.

\textsuperscript{258} See id. at 98, 603 A.2d at 488.

\textsuperscript{259} See Md. Code Ann., Tax-Prop. § 14-839 (1986 & Supp. 1992). Reading sections (a)(1)(i), (ii), (iii) and (a)(2) together, it is logical to conclude that a very limited search is all that is required, as § 14-839(a)(2) states that the purchaser must make no search beyond the documents listed. Id.

\textsuperscript{260} Aggarwal, 326 Md. at 98, 603 A.2d at 488. To support this position, the court noted that the statute, in accordance with federal due process standards, does not prefer notice by publication. Id.


\textsuperscript{262} See supra notes 228-239 and accompanying text (discussing the federal due process standard).

\textsuperscript{263} 325 Md. 420, 601 A.2d 633 (1992).
in which it held that “actual knowledge” includes the “wilful refusal to know.”\textsuperscript{264} In Aggarwal, the court applied the same definition to “known” in section 14-839, concluding that the section requires efforts beyond a mere perusal of the documents listed in the statute.\textsuperscript{265} Specifically, a purchaser may not ignore plausible leads—aiding proper notice—discovered through a search of title and tax documents.\textsuperscript{266} The court reasoned:

If Aggarwal’s argument is correct, subsection (a)(2) of § 14-839 obviates the need for any additional investigation, even consulting one’s own files where correct information is known to be. On the other hand, if the word “known” is given its usual meaning as defined in Owens-Illinois, then subsection (a)(2) means only that no investigation or search beyond that necessary to avoid willful ignorance is required.\textsuperscript{267}

The Court of Appeals further stated that the most logical reading of section 14-839 leads to the conclusion that the legislature did not intend to condone disregard for information that may lead to the discovery of a taxpayer’s identity or address.\textsuperscript{268} The sanctioning of such behavior by the statute would ignore the constitutional requirement of a reasonably diligent search.\textsuperscript{269} In addition, the court recognized that the strong financial disincentive for purchasers to provide actual notice makes it necessary to use a high standard in judging a purchaser’s attempts to locate and notify property owners.\textsuperscript{270}

The court went to great lengths to read section 14-839 (a)(1)(iii) to require investigative steps that section 14-839(a)(2)

\textsuperscript{264} Id. at 462 n.23, 601 A.2d at 654 n.23. The court stated that “a defendant cannot shut his eyes or plug his ears when he is presented with evidence of a defect and thereby avoid liability for punitive damages.” \textit{Id.}

\textsuperscript{265} Aggarwal, 326 Md. at 102, 603 A.2d at 490.

\textsuperscript{266} \textit{Id.} at 103, 603 A.2d at 490.

\textsuperscript{267} \textit{Id.} at 102, 603 A.2d at 490.

\textsuperscript{268} See id. at 101-02, 603 A.2d at 489-90.

\textsuperscript{269} The Aggarwal court stated:

\begin{quote}
Given the importance of the property right that is involved in the foreclosure of a right of redemption, and the principles of due process so recently enunciated by the Supreme Court, we adopt the latter interpretation of the statute which embraces the conventional meaning of the word ‘known.’ Indeed, we believe an interpretation that would permit a purchaser to engage in deliberate ignorance to the detriment of the owner’s interest in the land would be at least constitutionally suspect.
\end{quote}

\textit{Id.} at 102, 603 A.2d at 490.

\textsuperscript{270} See id. at 96, 603 A.2d at 487.
seemed to exclude. The court’s interpretation mandates that if a purchaser uncovers a plausible lead during a search of the sources listed in subsections (a)(1)(i), (ii) and (iii) of the statute, she must take the next logical step to investigate those leads. In a sense, the court interpreted the section 14-839(a)(2) limitations out of the statute entirely.

In applying the federal due process standard, the court’s main concern was ensuring that the effort demanded by the statute to obtain the identity and address of interested parties was one of reasonable diligence. Thus, the court established a flexible construction of the statute that requires the purchaser to take all reasonable steps, as dictated by the specific facts, to identify the property owner.

b. Compliance under the Statute.—After upholding the validity of section 14-839, the court addressed whether Aggarwal’s actions did, in fact, comply with its interpretation of the statute’s requirements. In concluding that he did not comply with section 14-839, the court focused on the fact that Aggarwal and his attorney were aware that the address to which they were continually mailing notices was a “bad” address. The court indicated that when the validity of an address is questionable, a purchaser may be required to undertake a more extensive search of public records, and to follow-up on any leads the initial search provides. The court stated that in instances where purchasers or attorneys are aware that an address is questionable, they may be required to undertake additional research.

271. Section 14-839(a)(2) states: “Paragraph (1) of this subsection does not require the plaintiff or the attorney for the plaintiff to make any investigations or to search any other records or sources of information other than those stated.” Md. Code Ann., Tax-Prop. § 14-839(a)(2) (1986 & Supp. 1992). Aggarwal argued that the language in this section was intended to eliminate any duty to go beyond a search of the title, the tax records, and any address the purchaser actually had in his possession. Aggarwal, 326 Md. at 100-01, 603 A.2d at 489.

272. The court determined that because the address of the title company was in the deed to the property, and the deed was consulted as part of the title search, a purchaser acting in good faith would have made a phone call or written a letter to find out if the title company knew the address of the property owner. Aggarwal, 326 Md. at 104, 603 A.2d at 490-91.

273. The court did not address the adequacy of the statute’s method of notice. The statute requires mailing that is generally considered to be reasonably calculated to reach the interested party. See, e.g., Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983); Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 318 (1950).

274. Aggarwal, 326 Md. at 99, 603 A.2d at 488. Aggarwal and his attorney knew that the address they were using corresponded to a vacant lot and would therefore “not serve to accomplish notice.” Id.

275. See id. at 103, 603 A.2d at 490. In applying that requirement to this case, the court stated that...
address is incorrect, it will almost certainly apply a heightened standard for compliance with the statute.\textsuperscript{276} Aggarwal concluded:

[W]here, as here, the plaintiff or his attorney becomes aware that the address given on the tax rolls is a "bad address," . . . the plaintiff and his attorney will be held to "know" an address of the owner within the meaning of the statute when, except for manifest indifference to information shown in the land records or the tax rolls, they would have actually discovered that address.\textsuperscript{277}

c. Recent Application of the Interpretation.—Aggarwal’s interpretation of section 14-839 has been recently applied in two decisions of the Court of Special Appeals: Kennedy v. Cummings\textsuperscript{278} and Scott v. Seek Lane Venture, Inc.\textsuperscript{279} In Scott, the court directly applied the Aggarwal definition of "known" in section 14-839(a)(1)(iii) to conclude that the purchaser in a tax sale failed to comply with the requirements of the statute.\textsuperscript{280} The court concluded that the purchaser did not provide appropriate notice because she ignored information that, if acknowledged, would have resulted in actual notice to the property owner, a defunct corporation.\textsuperscript{281} The court found that "under the facts of this case, Scott’s failure to search for this readily available information constituted a willful refusal to know."\textsuperscript{282}

In Kennedy, the court followed the reasoning of Aggarwal by interpreting section 14-839 (a)(1)(i)—the provision relating to title searches—in a similarly broad manner. The Kennedy court set aside a tax sale, finding that when the purchaser’s search of county records did not reveal the property owner’s address, the purchaser

\begin{itemize}
\item \textsuperscript{276} See id. at 103-04, 603 A.2d at 490-91.
\item \textsuperscript{277} Id. at 103, 603 A.2d at 490.
\item \textsuperscript{278} 91 Md. App. 21, 603 A.2d 1251 (1992).
\item \textsuperscript{279} 91 Md. App. 668, 605 A.2d 942 (1992).
\item \textsuperscript{280} Id. at 685, 605 A.2d at 950.
\item \textsuperscript{281} Id. at 687, 605 A.2d at 951.
\item \textsuperscript{282} Id. at 687-88, 605 A.2d at 951. The Scott court stated that the names of the directors could easily have been found in a search of the circuit court records. \textit{Id.}
failed to comply with the statute’s requirement by not also searching the municipal tax records. The purchasers argued that the search required by section 14-836, which identifies the parties who must receive notice of an action to foreclose the right of redemption, only requires a search of county tax records, and that the limited requirements of searches under section 14-836 govern the title search under section 14-839. The court rejected this argument and held that section 14-839 required a more extensive search.

Section 14-839(a)(1)(i) . . . does not so limit the places to be searched to obtain a defendant’s last known address to three places; the last known address is obtained from “any records examined as part of the title examination.” . . . We believe the legislature intended § 14-839(a)(1)(i) to require a broader search than § 14-836(b)(1)(i) . . . Once a name of a defendant has been determined, it is sensible to conduct a broader search to determine the address of the defendant.

The *Kennedy* decision illustrates that a court should employ a stricter standard for compliance with section 14-839 when purchasers or attorneys are aware that they are dealing with a “bad address.”

5. *Conclusion.*—Clearly, the court’s purpose was to ensure that due process rights guaranteed by the Fourteenth Amendment are protected for Maryland property owners. The approach taken by the Court of Appeals allowed it to find section 14-839 constitutional on its face and to construe it in a manner that insures that it will be constitutional in operation. The result of the *Aggarwal* court’s interpretation of section 14-839(a)(1)(iii) is to demand, based on the given circumstances, a reasonable effort commensurate with the due process standard articulated by the Supreme Court. The decision requires a purchaser to exhaust all reasonable avenues, and further warns purchasers that if they are aware that they possess informa-

284. See MD. CODE ANN., TAX-PROP. § 14-836(b)(1)(i) (1986 & Supp. 1992). Defendants in an action to foreclose the right of redemption shall be "the record title holder of the property as disclosed by a search performed in accordance with generally accepted standards of title examination of the land records of the county, of the records of the register of wills of the county, and of the records of the circuit court for the county." *Id.*
286. *Id.* at 30-31, 603 A.2d at 1255.
287. The *Kennedy* court noted that an important element leading to its decision was the fact that the purchasers "knew the address they had was a 'bad address.' " *Id.* at 34, 603 A.2d at 1257. The court then went on to say that if the purchasers had conducted the required title search they would have discovered the address. *Id.*
tion that could lead to the provision of actual notice, a stricter standard for compliance—often requiring a search beyond the tax and title records—will be applied.

Susan M. Roche

D. Public Employees and Free Speech

In *Hawkins v. Department of Public Safety and Correctional Services*, the Court of Appeals held that the Secretary of Personnel of the Maryland Department of Public Safety did not violate an employee's First Amendment right to free speech by discharging him for directing racist remarks toward a private citizen, even though the employee was off duty, away from work, and out of uniform. Applying what amounted to a rational basis test, the court found that the State's concerns about possible disruption and physical violence at Hawkins's place of employment based on his attitude were reasonable, and therefore the Secretary's action was constitutional.

1. The Case.—On November 27, 1985, Donald Hawkins, a probationary correctional officer at the Maryland House of Corrections, presented his payroll check to Hanaa Elabd, a teller at a Maryland National Bank branch. Hawkins did not have an account with the bank, but he had been cashing his payroll checks there for the previous nine months. On this occasion, however, Elabd refused to cash his check. Hawkins argued with her and eventually spoke to her superior, who instructed the teller to cash the check. After she cashed the check, Hawkins walked away approximately twenty feet and loudly proclaimed, "Hitler should have gotten rid of all you Jews." Elabd was surprised at the remark and motioned to the teller next to her that she was not Jewish. Hawkins watched her reaction and then added, "'and all the Poles too,'" before he turned and left the bank.

289. Id. at 639, 602 A.2d at 720-21.
290. Id. at 622, 602 A.2d at 713.
291. See id. at 638-39, 602 A.2d at 720-21.
292. Id. at 622, 602 A.2d at 712.
293. Id. at 622-23, 602 A.2d at 712-13.
294. Id. at 623, 602 A.2d at 713.
295. Id.
296. Id.
297. Id.
Shortly after Hawkins's outburst, an official from the Maryland Department of Natural Resources entered the bank and learned of the incident. That official reported the incident to the personnel officer at the House of Corrections. Several weeks later, the warden of the House of Corrections reviewed the information regarding the bank incident, along with other deficiencies in Hawkins's record, and terminated his employment.

Hawkins appealed to the Secretary of Personnel, arguing that the termination violated his First Amendment rights. The Secretary held an administrative hearing and found that Hawkins's inflammatory remarks were "mere personal abuse," which did not fall under the shield of the First Amendment. The Secretary concluded accordingly that Hawkins's termination from employment was for a legal and valid reason.

298. *Id.*

299. *Id.* at 623-24, 602 A.2d at 713.

300. *Id.* at 624, 602 A.2d at 713. Hawkins's record apparently included other deficiencies in his work performance, including failures to appear for work. *Id.* The State, however, did not deny that Hawkins's conduct in the bank was a "substantial" or "motivating factor" in its decision to fire him. *Id.* at 624 n.1, 602 A.2d at 713 n.1. Nor did the State argue that it would have discharged Hawkins for these other deficiencies in the absence of his comments in the bank. *Id.*

301. *Id.* at 624, 602 A.2d at 713. The State may discharge probationary employees "without reason and without cause," Small v. Secretary of Personnel, 267 Md. 532, 535, 298 A.2d 173, 174 (1973), as long as the State is not discharging the employee for exercising a constitutional right. See 60 Op. Att'y Gen. 545, 550 (1975).

302. Hawkins, 325 Md. at 625, 602 A.2d at 714. The Secretary apparently relied on the Supreme Court's decision in Connick v. Myers, 461 U.S. 138 (1983), described *infra* text accompanying notes 323-337, to decide that personal abuse is beyond the protection of the First Amendment. Connick, however, did not hold that personal abuse—or even personal speech by public employees—is beyond the protection of the First Amendment. It simply held that federal courts were inappropriate forums for reviewing personnel decisions made by public agencies in reaction to an employee's speech on matters of personal interest. *Id.* Several lower federal courts have extended Connick's holding to include speech characterized as personal grievances. See Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace,* 61 S.C. L. REV. 3, 20 n.95 (1987). The Supreme Court seems to be less inclined than the lower courts to restrict speech and has held that certain types of personal abuse are constitutionally protected. See City of Houston v. Hill, 482 U.S. 451 (1987) (striking down a Houston ordinance that made it illegal to oppose, molest, abuse, or interrupt a police officer in any manner during the execution of his duties and explaining that the First Amendment protects a significant amount of verbal criticism and challenge). Such speech is only prescribable if "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* at 461 (quoting Termiello v. Chicago, 337 U.S. 1, 4 (1949)).

303. *Hawkins,* 325 Md. at 625, 602 A.2d at 714.

304. *Id.*
On appeal, the Circuit Court for Baltimore City reversed and held that although Hawkins's remarks were not on a matter of public concern, they were nevertheless protected by the First Amendment.\textsuperscript{305} The circuit court remanded the case to the Secretary to make findings of fact concerning "whether Hawkins's comments adversely affected the State's ability to perform its functions."\textsuperscript{306}

On remand, the Secretary acknowledged that Hawkins's remarks did not have an adverse effect upon the operation of the House of Corrections.\textsuperscript{307} Nevertheless, the Secretary found that Hawkins's behavior had the potential to disrupt the internal operation of the correctional institution.\textsuperscript{308} The Secretary concluded that Hawkins's termination was valid because the lack of confidence in his ability to perform his job impeded the Division of Corrections's ability to perform its functions.\textsuperscript{309}

Hawkins again appealed to the Circuit Court for Baltimore City.\textsuperscript{310} This time, the court affirmed the Secretary's determination, emphasizing that "the conduct at the bank was rationally related to potential disruption of the employer's operations."\textsuperscript{311} Hawkins appealed to the Court of Special Appeals, but prior to that court's consideration of the case, the Court of Appeals issued a writ of certiorari on its own motion.\textsuperscript{312} By a four-to-three majority, the Court of Appeals affirmed the decision of the circuit court.\textsuperscript{313}

2. Legal Background.—The idea that public employees enjoy First Amendment protection is relatively new.\textsuperscript{314} As recently as 1952, the Supreme Court held that "[people] may work for the [government] upon the reasonable terms laid down by the proper authorities of [the state]. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."\textsuperscript{315}

In 1967, however, the Court rejected the notion that public employment could be conditioned on the surrender of constitutional

\textsuperscript{305} Id. at 625-26, 602 A.2d at 714.
\textsuperscript{306} Id. at 626, 602 A.2d at 714.
\textsuperscript{307} Id. at 627, 602 A.2d at 715.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Id. at 627-28, 602 A.2d at 715.
\textsuperscript{312} Id. at 628, 602 A.2d at 715.
\textsuperscript{313} Id. at 639, 602 A.2d at 721.
\textsuperscript{314} See Massaro, supra note 302, at 8.
rights. In *Keyishian v. Board of Regents*,\(^3\)16 the Court concluded that "'[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'"\(^3\)17

The Court refined its position on public-employee speech in *Pickering v. Board of Education*.\(^3\)18 In *Pickering*, a school board dismissed a teacher for writing a letter to a local newspaper criticizing the board's handling of a bond proposal and its allocation of funds between athletic and academic programs.\(^3\)19 The Court held that unless the teacher knowingly or recklessly made false statements, the board could not base his dismissal on the exercise of his First Amendment rights.\(^3\)20

To reach this conclusion, the Court balanced the teacher's interests in commenting on matters of public concern against the government's interest in promoting the efficiency of the public services it performs.\(^3\)21 Finding that Pickering's public statements neither impeded the proper performance of his daily duties nor interfered with the regular operation of the school, the Court concluded that Pickering's interests in speaking freely on a matter of public concern outweighed the board's interest in maintaining the efficient functioning of its schools.\(^3\)22

The Court applied the *Pickering* test but reached a different result in *Connick v. Myers*.\(^3\)23 Myers, an assistant district attorney in New Orleans, was involved in a dispute with her supervisor concerning her impending transfer to a new department.\(^3\)24 She distributed a questionnaire to her coworkers asking them, *inter alia*, for their views on the office transfer policy, office morale, the need for a grievance committee, the level of confidence in particular supervisors, and whether the coworkers felt pressured to work on political campaigns.\(^3\)25 Upon learning of the questionnaire, Connick fired Myers for insubordination.\(^3\)26

Myers sued, claiming that her termination violated her free

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316. 385 U.S. 589, 605-06 (1967).
317. Id. at 606 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).
319. See id. at 564, 566.
320. Id. at 574-75.
321. Id. at 568.
322. Id. at 572-73.
324. Id. at 140.
325. Id. at 140-41.
326. Id. at 141.
speech rights.\textsuperscript{327} The Supreme Court ultimately decided against her, finding that the district attorney’s interest in preventing the disruption of his office outweighed Myers’s First Amendment interests.\textsuperscript{328} The Court’s decision in \textit{Connick} is distinguishable, however, in that \textit{Pickering} involved a public employee commenting as a \textit{citizen} on a matter of public concern\textsuperscript{329} whereas \textit{Connick} involved a public employee commenting as an \textit{employee} on a matter of personal interest.\textsuperscript{330} The \textit{Connick} Court held that the state’s burden varies depending on the nature of the employee’s expression and the manner, time, place, and context in which the expression occurred.\textsuperscript{331} Because Myers distributed the questionnaire solely to gather ammunition for her personal battle with her supervisor,\textsuperscript{332} and because the questionnaire had the potential to interfere with the close working relationships essential to the running of the office,\textsuperscript{333} the Court decided that \textit{Connick}’s interest in maintaining harmony in his office outweighed Myers’s First Amendment interests.\textsuperscript{334}

The Court warned, however, that its dicta and holdings should not be interpreted as suggesting that speech by public employees on matters of personal concern is “totally beyond the protection of the First Amendment.”\textsuperscript{335} In fact, it explicitly rejected the idea that such speech fell into one of “the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.”\textsuperscript{336} In its closing statements, the majority reiterated that “[a]lthough today the balance is struck for the government, this is no defeat for the First Amendment.”\textsuperscript{337}

In its third major decision involving public-employee speech, \textit{Rankin v. McPherson},\textsuperscript{338} the Court held that a county constable’s discharge of a clerical employee was a violation of the employee’s First Amendment rights.\textsuperscript{339} After hearing of an attempt on President

\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{Id. at} 154.
\textsuperscript{330} \textit{Connick}, 461 U.S. at 147.
\textsuperscript{331} \textit{Id. at} 151-53.
\textsuperscript{332} \textit{Id. at} 153.
\textsuperscript{333} See \textit{id. at} 151-52.
\textsuperscript{334} \textit{Id. at} 154.
\textsuperscript{335} \textit{Id. at} 147.
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id. at} 154.
\textsuperscript{338} 483 U.S. 378 (1987).
\textsuperscript{339} \textit{Id. at} 392.
Reagan's life, the employee had remarked to a coworker, "[I]f they go for him again, I hope they get him." Applying the Pickering balancing test, the Rankin Court held that the content, form, and context of the employee's speech supported the conclusion that the speech was on a matter of public concern.\(^{340}\) The Court then held that the State did not meet its burden of showing that McPherson's speech interfered with the efficient functioning of the office.\(^{341}\) Her speech did not disrupt her work, personnel relationships, or job performance.\(^{342}\) Furthermore, there was no danger that her speech would discredit the office.\(^{343}\) Accordingly, the State failed to demonstrate sufficiently strong counter-interests to outweigh McPherson's First Amendment rights.\(^{344}\)

3. The Court's Reasoning.—In Hawkins, the majority acknowledged that the underlying dispute did not "fully fit within the fact pattern of any of the three principal cases."\(^{345}\) The court nevertheless described, in detail, these cases and the balancing test they applied.\(^{346}\) Instead of using this balancing test, however, the court devised what amounted to a rational basis test, holding that because the State had a reasonable basis for terminating Hawkins, it did not violate his First Amendment rights.\(^{347}\)

To achieve this result, the majority first decided that Hawkins's speech was not on a matter of public concern, stating that "[c]learly,

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\(^{340}\) See id. at 384-87.
\(^{341}\) Id. at 389.
\(^{342}\) Id. at 388-89.
\(^{343}\) Id. at 389.
\(^{344}\) Id. at 388. There are several Maryland cases dealing with public-employee speech. See De Bleecker v. Montgomery County, 292 Md. 498, 438 A.2d 1348 (1982) (holding that the trial court erred in directing a verdict for a public employer when the public employee produced sufficient evidence that his constitutionally protected speech rights were a substantially motivating factor in his discharge, and when reasonable minds could differ on whether the employee would have been discharged anyway because of unprotected conduct); DiGrazia v. County Executive, 288 Md. 437, 418 A.2d 1191 (1980) (holding that the trial court erred in granting summary judgment to a police officer when a genuine issue of fact existed as to whether the County Executive removed him from his position as a punitive measure for exercising a constitutionally protected right of free speech); Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210 (1970) (holding that the Baltimore City Police Department violated the appellant's First Amendment rights by discharging him for statements he made on television because the Department did not establish that the statements adversely affected the Department's public services or made the appellant unfit for his job).
\(^{345}\) Hawkins, 325 Md. at 628, 602 A.2d at 715.
\(^{346}\) See id. at 628-31, 602 A.2d at 715-17.
\(^{347}\) Id. at 639, 602 A.2d at 720-21. See infra note 377 and accompanying text for an explanation of why the test the court applied is really a rational basis test and not a balancing test.
Hawkins was not attempting to stimulate a dialogue on the Holocaust. He was giving vent to his anger, and relying on his fallible ability to identify persons of Jewish heritage, he used speech as a weapon to abuse the teller who had inconvenienced him.\textsuperscript{348} The court then concluded that "[n]o balancing is required because the threshold requirement of speech on a matter of public concern has not been met."\textsuperscript{349}

The Hawkins court did not, however, end its analysis there. It explained that "[s]ome doubt necessarily remains whether a literal application of the Pickering-Connick rule is the appropriate analysis in the instant matter where the speech was away from the job site, outside of business hours, and did not discuss or comment upon any aspect of the public employment."\textsuperscript{350} The court then proceeded to analyze several federal cases involving public-employee speech.\textsuperscript{351} These cases held that certain types of public-employee expression not involving matters of public concern were protected by the First Amendment. The court stated that if the rationale of these cases was applied, Hawkins's comments may have been constitutionally protected.\textsuperscript{352} The court, however, went on to state that if the comments were protected, they were "near the periphery, and not at the core, of that protection."\textsuperscript{353} As a result, the court ruled that any First Amendment protection potentially applicable to Hawkins's speech was not great.\textsuperscript{354}

\textsuperscript{348} Id. at 633, 602 A.2d at 717-18.
\textsuperscript{349} Id., 602 A.2d at 718.
\textsuperscript{350} Id.
\textsuperscript{351} See id. at 634-37, 602 A.2d at 718-20. The court described the facts of several Maryland cases, but concluded that these cases lacked an "all fours" factual analogy to Hawkins's case and, accordingly, did not rely on the cases in its opinion. Id. at 634, 602 A.2d at 718. See supra note 344 for a description of those cases. The court also described the facts and holdings of several federal circuit court cases to support its conclusion that Hawkins's comments may be within First Amendment protection. See Hawkins, 325 Md. at 634-37, 602 A.2d at 718-20. See also Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (holding that a police officer's "off-duty speech had to be accorded the same weight in absolute terms that would be accorded comparable artistic expression by citizens who do not work for the state"); Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) (ruling that the public-concern test does not apply when public-employee, non-verbal, protected expression does not occur at work and is not about work); Waters v. Chaffin, 684 F.2d 833, 837 (11th Cir. 1982) (holding that the plaintiff-police officer's abusive comments about the police chief were within the First Amendment protection because he, "like every citizen, has a strong interest in having the opportunity to speak his mind, free from government censorship or sanction").
\textsuperscript{352} Hawkins, 325 Md. at 637, 602 A.2d at 720.
\textsuperscript{353} Id.
\textsuperscript{354} Id. at 638, 602 A.2d at 720.
Conversely, the court held that the State's fears of disruption and physical violence if Hawkins used similar speech while on the job were well founded. In addition, the court maintained that the warden of the Maryland House of Corrections did not have to wait for an "actual eruption precipitated by Hawkins" to find grounds for terminating him. Thus, the court ruled that the Secretary's conclusion—that Hawkins's termination did not violate his constitutional rights—was correct.

The dissent argued that because Hawkins's speech occurred away from his job, was not about his job, and was not spoken by one who could be identified with the job, it was protected by the First Amendment, regardless of whether it was on a matter of public concern. Finding that the speech was protected by the First Amendment, the dissent claimed that the majority should have applied the second prong of the Pickering test and weighed Hawkins's interest, as a citizen, in engaging in free speech against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In this equation, the dissent deemed the particular value of the speech to be irrelevant. The dissent also argued that the State's interest should extend only to include the disruptive effect the speech actually caused in the department, not potential effects that may occur in the future.

4. Analysis.—Hawkins's challenge to his discharge is complicated for several reasons. First, the Supreme Court has never used the Pickering test in a case resembling Hawkins—where a state discharged a public employee for speech completely unrelated to his employment and not spoken while at work. Consequently, it is unclear whether Pickering and its progeny were meant to extend to such a case. In addition, the Court has never expressly decided whether "hate speech" falls under the shield of First Amendment

355. Id.
356. Id. at 639, 602 A.2d at 720.
357. Id., 602 A.2d at 721.
358. See id. at 641-46, 602 A.2d 721-24 (Bell, J., dissenting).
359. Id. at 646, 602 A.2d at 724 (Bell, J., dissenting) (quoting Pickering v. Board of Educ., 391 U.S. 563 (1968)).
360. Id. at 646-47, 602 A.2d at 724-25 (Bell, J., dissenting).
361. Id. at 648, 602 A.2d at 725 (Bell, J., dissenting).
362. See id. at 622, 628, 602 A.2d at 712, 715.
363. See Flanagan v. Munger, 890 F.2d 1557, 1562 (10th Cir. 1989).
The Court of Appeals's reluctance to break new ground in certain areas of First Amendment jurisprudence attests to these complications. The court avoided deciding whether the Pickering test extended to the Hawkins facts, and additionally, whether "hate speech" is protected under the First Amendment. Instead, it affirmed the legality of the Secretary's decision to discharge Hawkins, using a method unsupported by either First Amendment case law or doctrine.

The court's decision is objectionable not because it refused to extend Pickering or classify Hawkins's speech as unprotected, but because it failed to accept the consequences of these refusals: reversal of the Secretary's decision and reinstatement of Hawkins. Indeed, the factual differences between Hawkins and the applicable Supreme Court cases may justify the court's abandonment of Pickering and its two-prong test. Unlike the statements made in related Supreme Court cases, Hawkins's comments were not employment-related or spoken while on the job. The court, therefore, properly conducted its analysis as if he were a member of the general public. Likewise, the court should not be blamed for declining to add its voice to the din surrounding protection of "hate speech," or for following the

364. See Hawkins, 325 Md. at 647 n.5, 602 A.2d at 724 n.5 (Bell, J., dissenting), questioning whether the then-undecided case of R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), might provide insight into whether "hate speech" is protected speech. In R.A.V., the Supreme Court struck down as unconstitutional an ordinance under which the city of St. Paul prosecuted a teenager for burning a cross inside the fenced yard of a black family. The Court did not directly address the question of whether "hate speech" like Hawkins's is constitutionally protected. It did clarify, however, that state and local governments cannot promulgate statutes or ordinances that proscribe racially based "hate speech." Id. at 2542. See infra note 368 for a discussion of the R.A.V. Court's configuration of the fighting words doctrine. See generally Tribe, supra note 168, at 849-56; Kent Greenawalt, Insults and Epithets: Are They Protected Speech?, 42 Rutgers L. Rev. 287 (1990) (discussing the advantages and disadvantages of protecting "hate speech" in light of the different uses of language); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431 (arguing that face-to-face racist insults are the functional equivalent of fighting words and should not merit constitutional protection). For a discussion of whether the court could have characterized Hawkins's "hate speech" as fighting words, see infra note 368.

365. See Hawkins, 325 Md. at 633, 602 A.2d at 718 (explaining that "[s]ome doubt necessarily remains whether a literal application of the Pickering-Connick rule is the appropriate analysis in the instant matter").

366. Id. at 637, 602 A.2d at 720 (explaining that if Hawkins's comments were protected by the First Amendment, they were only peripherally protected).

367. Id. at 639, 602 A.2d at 721.

368. Neither the Supreme Court nor the Court of Appeals has directly decided whether the First Amendment protects "hate speech." Hawkins, 325 Md. at 647 n.5, 602 A.2d at 724 n.5. The closest either court has come is denying constitutional protection
Supreme Court's reluctance to restrict free expression. Consequently, the court's refusal to delegate Hawkins's speech to one of the narrow classes of unprotected speech was prudent and justified.

The court's decision to limit the First Amendment protection of Hawkins's speech, however, seems less justified. Generally, speech falls either inside or outside the umbrella of First Amendment pro-

to "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Supreme Court in Chaplinsky defined fighting words as those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572. At first glance, this definition seems to cover hate speech such as that uttered by Hawkins. Arguably, the sole purpose of Hawkins's outburst was to injure the teller.

Since Chaplinsky, however, the Court has construed the fighting words doctrine very narrowly, Tribe, supra note 168, at 850, limiting it to words "which 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'" Id. at 850 n.3 (quoting Chaplinsky, 315 U.S. at 573). This narrow construction effectively eliminates from the doctrine those words "which by their very utterance inflict injury." Chaplinsky, 315 U.S. at 572.

The Court of Appeals has followed suit, stating in Downs v. State, 278 Md. 610, 366 A.2d 41 (1976), that "[i]n effect, 'fighting' words have been recognized as having some social value and are punishable not on a 'per se' basis but only when there is a likelihood of imminent disturbance." Id. at 615, 366 A.2d at 44. Thus, the fighting words doctrine as it stands today apparently does not include hate speech unless it is spoken to a person and in a setting in which it is likely to cause an imminent act of violence. Hawkins's speech did not fall into this category. One could hardly expect the teller to react violently to Hawkins's words, given the setting.

Commentators have persuasively argued that hate speech—the only purpose of which is to injure—should be considered the functional equivalent of fighting words, and thus should not be included under the protection of the First Amendment. See, e.g., Lawrence, supra note 364. Lawrence argued that "[t]he experience of being called 'nigger,' 'spic,' 'jap,' or 'kike,' is like receiving a slap in the face. The injury is instantaneous." Id. at 452. He also argued that women and minorities on the receiving end of such words often are in no position to fight back. Id. at 452-54. Accordingly, he argued that white men should not be the only persons to benefit from the fighting words doctrine. Id. at 454 & n.93.

Interestingly, the Court in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) arguably expanded the fighting words doctrine in the fashion advocated by Lawrence. The R.A.V. Court emphasized that fighting words are excluded from the protection of the First Amendment because "their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey." Id. at 2548-49. As an example, the Court suggested that a state could proscribe all "threatening words." Id. Thus, arguably a state or local government also could proscribe all words spoken for the sole purpose of injuring another person. Or a court could include in the definition of "fighting words" all words spoken with the intent to injure another person.

369. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning is expressive conduct protected under the First Amendment).

There is no in-between. The level of protection is not determined by the value of the speech; all protected speech, regardless of its value, receives the same level of protection. Moreover, government can only interfere with protected speech if such interference is narrowly tailored to serve a compelling state interest.

In *Hawkins*—presumably because the State’s action could never pass a compelling-state-interest test—the court abandoned this traditional method for reviewing state actions that interfere with free speech. The court instead created a new test that based the
level of protection on the value of the speech. Because, in the
court's estimation, Hawkins's speech had little value, it applied
something akin to a rational basis test to determine whether the
State's action was constitutional. Using this approach, the court
found that "the State's apprehension of disruption and possible
physical violence at the House of Correction caused by Hawkins's
attitude [was] reasonably based," and, therefore, that the Secre-
tary's discharge was constitutional. Presumably, if Hawkins's
speech had been more valuable, the court would have more care-
fully scrutinized the State's action.

The court could have avoided this unusual result by following
the approach the Tenth Circuit used in Flanagan v. Munger. Flana-
gan, like Hawkins, involved expression by public employees away
from and not involving work. In Flanagan, the chief of police in
Colorado Springs ordered three high-ranking police officers in his
department to remove all sexually explicit videos from a video store
that they partly owned. The three officers sued, alleging a viola-
tion of their First Amendment rights.

Noting that all analogous Supreme Court cases involved speech
occurring at or about work, the Tenth Circuit refused to extend the
public-concern test to nonverbal expression that did not occur at
work and was not about work. The court instead decided that the

376. The court did not expressly state that it was assessing the value of Hawkins's
speech. Rather, it described the relevant speech as being "near the periphery" of First
Amendment protection. Hawkins, 325 Md. at 621, 637, 602 A.2d at 712, 720. The court
also proclaimed that "any first amendment protection applicable to Hawkins's invective
is not great." Id. at 638. These statements make it clear that the court was according
less value and, therefore, less protection to Hawkins's speech than it would have to other
types of speech.

377. The court did not expressly state that it was applying a rational basis test to
determine whether the State's actions were justified. It did, however, proclaim that the
State's apprehension was "reasonably based." Id. at 638, 602 A.2d at 720. Moreover, it
did not require the State to prove that Hawkins's actual words would cause disruption or
disharmony. It instead only seemed to require the State to present a plausible descrip-
tion of how Hawkins's attitude, as revealed by the speech, might cause disruption or
violence in the future. Id. at 638-39, 602 A.2d at 720. Thus, the conclusion that the
court applied a rational basis test seems justified.

378. Id. at 638, 602 A.2d at 720.
379. Id. at 639, 602 A.2d at 721.
380. 890 F.2d 1557 (10th Cir. 1989). The Hawkins opinion discussed Flanagan, see
Hawkins, 325 Md. at 636, 602 A.2d at 719, but did not use its approach when deciding
the case.
381. Flanagan, 890 F.2d at 1562.
382. Id. at 1560-61.
383. Id. at 1561.
384. Id. at 1562.
relevant speech was protected expression, and then applied the second half of the *Pickering* test by balancing the employee's interest in free speech against the employer's interest in the efficient functioning of the government. The *Flanagan* court concluded that the *Pickering* balance tipped in favor of the officers, stating:

"The *Pickering* test balances the plaintiff's interest in engaging in free speech, not the value of the speech itself... Although plaintiffs' speech may not be as "valuable" as political or social comment, we think that this type of off-duty public employee speech must be "accorded the same weight in absolute terms that would be accorded comparable... expression by citizens who do not work for the state." 

Thus, the Tenth Circuit expressly rejected the value-determinative approach that the *Hawkins* court used to decide whether public-employee expression occurring away from the workplace and not concerning work is constitutionally protected.

Besides being contrary to basic First Amendment jurisprudence, there are several problems with the Maryland court's approach in *Hawkins*. First, using value as the determining factor in the strictness of review leaves the task of assessing the value of the speech to the court, based on each judge's own predilections. It ignores the possibility that "[t]he words that the [c]ourt... find... unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation." Our nation is filled with people "who think, act, and talk differently from [the many members of the judiciary]." Indeed, the nation's diversity is one of its greatest assets. Allowing judges to assess the value of speech threatens this diversity. It interferes with the ability to be different. It threatens to require conformity to the majority.

Likewise, if courts decide on a case-by-case basis the level of protection to afford specific speech, citizens will never be sure whether any particular expressive act will find protection under the First Amendment. Consequently, people may hesitate to express...
themselves freely, a possibility contrary to the very ideal of the First Amendment's protection of free speech. As a result, by introducing a "chilling" element, the Hawkins court's decision could undermine the free speech rights of all Marylanders.

5. Conclusion.—In Hawkins, the Court of Appeals held that the state did not violate a public employee's constitutional right to free speech by discharging him for making an ethnic slur while off duty and out of uniform. To achieve this result, the court ignored traditional methods of reviewing First Amendment challenges to state actions. It instead developed a new method for protecting—or limiting the protection of—speech based solely upon its value. Unfortunately, this new emphasis on value could severely limit the free speech rights of all Maryland citizens.

ROBERT D. WING

E. Ineffective Assistance of Counsel in Plea Bargaining

In Williams v. State,\textsuperscript{392} the Court of Appeals defined the standard for proving prejudice when a defendant claims that ineffective assistance of counsel led him to refuse a plea offer.\textsuperscript{393} The court adopted an "inference" standard that permits the post-conviction court to infer from objective evidence that the defendant "may well" have taken the plea had he been given more or better information.\textsuperscript{394} Although the Court of Appeals did not pinpoint a clear basis for this new standard,\textsuperscript{395} it can be justified as a reasonable extension of related Supreme Court precedent.\textsuperscript{396}

1. The Case.—Robert Williams and Alton ("Pete") Grimes were convicted of kidnapping and several other offenses.\textsuperscript{397} Prior to their conviction, the state offered to accept a guilty plea on one of the lesser charges, assault with intent to maim, which would have exposed them to a ten-year maximum penalty.\textsuperscript{398} When counsel discussed the plea offer with his clients, Grimes refused it and Wil-

\textsuperscript{392} 326 Md. 367, 605 A.2d 103 (1992).
\textsuperscript{393} See id. at 382, 605 A.2d at 110.
\textsuperscript{394} Id.
\textsuperscript{395} See infra text accompanying notes 431-446.
\textsuperscript{396} See infra text accompanying notes 409-422.
\textsuperscript{397} Williams, 326 Md. at 370, 605 A.2d at 104.
\textsuperscript{398} Id. at 371, 605 A.2d at 105. The record was silent as to whether the plea offer was conditioned on being accepted by both defendants. Id. at 372, 605 A.2d at 105.
Williams "‘indicated that he wanted to do what Mr. Grimes would.'" 399 Grimes was ultimately sentenced to twenty years in prison. 400 Williams, however, had a prior criminal record and therefore was sentenced to twenty-five years imprisonment with no possibility of parole. 401

After his conviction, Williams filed for post-conviction relief, claiming ineffective assistance of counsel. 402 One basis for his claim was that his attorney had failed to inform him of the possibility of receiving the twenty-five-year mandatory sentence. 403 Williams argued that his attorney's failure to provide information prejudiced him by preventing him from taking advantage of the ten-year plea offer. 404

The post-conviction court upheld Williams's claim, 405 but the Court of Special Appeals reversed, holding that Williams had not shown that he was prejudiced by the alleged error. 406 The Court of Appeals reversed the intermediate appellate court, however, determining that the prejudice requirement was satisfied because the evidence supported an inference that Williams might have accepted the plea if he had been provided with better advice. 407 As relief, the court gave Williams an opportunity to accept the ten-year plea offer. 408

399. Id. (quoting the testimony of Williams's trial attorney at the post-conviction hearing).
400. Id. at 370, 605 A.2d at 104.
401. Id. at 370 & n.3, 605 A.2d at 104 & n.3.
402. Id. at 371, 605 A.2d at 105.
403. Id.
404. Id.
405. Id. at 372, 605 A.2d at 105. The post-conviction court was unclear as to how counsel's failure to tell Williams about the mandatory sentence of 25-years without parole prejudiced Williams, but it did mention several factors: (1) the State agreed to a ten-year plea offer; (2) counsel did not inform Williams about the potential mandatory sentence in a manner that would have enabled him to assess the risks; and (3) Williams took his counsel's advice and did not testify at trial. Id. at 372-73, 605 A.2d at 105-06.
406. Id. at 373, 605 A.2d at 106 (quoting the intermediate appellate court's unpublished opinion). The Court of Special Appeals held that Williams must show that the State offered him the plea separately from Grimes in order to prove prejudice. Id. Williams failed to show separate plea offers, and was, therefore, not entitled to relief. Id.
407. Id. at 382, 605 A.2d at 110. The court also held that the attorney's failure to inform Williams of the possible mandatory 25-year sentence was "deficient conduct." Id. at 379, 605 A.2d at 109.
408. Id. at 383, 605 A.2d at 111. The court noted that "'[a] new trial is not the appropriate remedy since the violation did not impact the fairness of the trial.'" Id. at 382, 605 A.2d at 110.
2. Legal Background.—In *Strickland v. Washington*, the Supreme Court articulated a two-part test to be used in evaluating claims of ineffective assistance of counsel. First, a defendant must show that “counsel’s performance was deficient.” Second, the defendant must prove that “the deficient performance prejudiced the defense.” A defendant can establish prejudice if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

This “reasonable probability” standard represents a compromise between two competing sets of interests: finality of decisions in criminal cases, on one hand, and fairness of the process and the reliability of the result, on the other. The *Strickland* Court defined “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” This definition emphasizes the importance of protecting fairness and the reliability of the trial result, but it nonetheless protects finality because a new trial can be granted only if the attorney’s error undermines confidence in the result.

The *Strickland* Court further illustrated the significance of the two sets of interests by rejecting two other proposed standards. First, the Court disapproved a standard that would have required defendants to show only that the error had “some conceivable effect on the outcome of the proceeding.” The Court noted that every error could meet this test, and, therefore, adopting it would destroy finality. Second, the Court rejected a “more likely than not” standard because, although it served the important interest of finality, it could not consistently assure a fair and reliable result.

In *Hill v. Lockhart*, the Supreme Court extended *Strickland*’s “reasonable probability” standard to cover claims involving ineffec-

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410. *Id.* at 687. Deficient performance is established when “counsel’s representation [falls] below an objective standard of reasonableness.” *Id.* at 688.
411. *Id.* at 687. The *Strickland* Court acknowledged the existence of prejudice only when “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*
412. *Id.* at 694.
413. *Id.*
414. *Id.*
415. *Id.* at 693.
416. *Id.* (adding that “not every error that conceivably could have influenced the outcome undermines the reliability of the result”).
417. *Id.* at 693-94. As a result, “the standard [was] not quite appropriate.” *Id.* at 694.
tive assistance of counsel in the plea process, as well as at trial.\textsuperscript{419} In the plea-bargaining context, the first prong of the test—deficient performance—remains the same;\textsuperscript{420} however, the second prong—prejudice—requires that the attorney's deficient performance actually "affects the outcome of the plea process."\textsuperscript{421} The Hill Court adapted the \textit{Strickland} test to the plea-bargaining context and ruled that a defendant must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."\textsuperscript{422} The Court's close adherence to the \textit{Strickland} test in the plea-bargaining context indicates that the Court maintained its concern for protecting the interests of fairness, reliability, and finality.

In \textit{Harris v. State},\textsuperscript{423} the Court of Appeals adopted the \textit{Strickland} standard.\textsuperscript{424} Five years later, in \textit{Bowers v. State},\textsuperscript{425} the court attempted to define the "reasonable probability" standard more clearly by equating it with the more-established "substantial possibility" standard.\textsuperscript{426} Although the \textit{Bowers} court changed the title of the test from "reasonable probability" to "substantial possibility," it did not attempt to alter the substance of the \textit{Strickland} standard or end its application in Maryland. The court sought only to clarify the meaning of the standard.\textsuperscript{427}

\textsuperscript{419} See id. at 57-58.
\textsuperscript{420} Id. at 58-59.
\textsuperscript{421} Id. at 59.
\textsuperscript{422} Id.
\textsuperscript{423} 303 Md. 685, 496 A.2d 1074 (1985).
\textsuperscript{424} Id. at 695, 496 A.2d at 1079 ("We shall evaluate [the allegedly ineffective attorney's] performance by applying the teachings of \textit{Strickland}. ").
\textsuperscript{425} 320 Md. 416, 578 A.2d 734 (1990).
\textsuperscript{426} According to the \textit{Bowers} court, the "substantial possibility" standard "aptly describes the prejudice standard the Supreme Court adopted in \textit{Strickland}." Id. at 427, 578 A.2d at 739. In \textit{Bowers}, however, the Court of Appeals actually blurred the meaning of the \textit{Strickland} standard by likening it to the equally unclear "substantial possibility" standard, which was intended for use in the dissimilar context of newly-discovered-evidence claims. See id. at 426-27, 578 A.2d at 738-39 (explaining the origin of the "substantial possibility" test). The Supreme Court had previously explained that the interests in the newly-discovered-evidence context are different from those in the ineffective-assistance-of-counsel context. See \textit{Strickland v. Washington}, 466 U.S. 668, 694 (1984). In a claim of newly discovered evidence, the defendant has been convicted only after having been given all the elements of a fair trial, while in a claim of ineffective assistance of counsel, the fairness of the process is called into question. Id. at 693-94. The Supreme Court, therefore, rejected the more-likely-than-not standard, which is sometimes used for newly-discovered-evidence claims. Id. at 693. Even though the \textit{Williams} court did not attempt to apply the more-likely-than-not standard, its application of the substantial-possibility standard is confusing because that standard was created to balance interests unrelated to the plea-bargaining process.
\textsuperscript{427} See \textit{Bowers}, 320 Md. at 425-27, 578 A.2d at 738-39.
3. The Court's Reasoning; Analysis.—Williams presented the Court of Appeals with a claim that had never been considered by either a Maryland court or the United States Supreme Court: that the ineffective assistance of a defendant's counsel prejudiced him by leading him to reject a favorable plea offer. Williams was able to show strong evidence of prejudice because his twenty-five-year mandatory sentence was significantly harsher than the ten-year plea offer he could have accepted. The fifteen-year gap,\(^2\) however, was not an automatic indication of prejudice.\(^2\) The main issue in Williams, therefore, was determining how much evidence Williams was required to provide in order to show that he might have taken the plea. To settle this question, the court adopted an "inference" standard that allowed Williams to establish prejudice by drawing an inference from objective evidence that he might have taken the plea offer.\(^3\)

a. The Inadequacy of the Court's Reasoning.—Despite the ground-breaking nature of the decision, the Court of Appeals offered little analysis to support its new "inference" standard. The Williams court cited six cases from other states in support of the inference standard, claiming that each case focused on an important fact that supported an inference that the defendant would have made a different decision had he received better advice.\(^4\) Only Lloyd v. State,\(^5\) however, specifically discussed the "inference" standard. In Lloyd, the Georgia court required "at least an inference from the evidence that the defendant would have accepted the offer as made or something similar."\(^6\) Lloyd herself did not satisfy the inference standard because the evidence in the record actually supported the conclusion that she would not have taken the offered plea.\(^7\) Lloyd fails to strongly support the inference standard for two reasons: (1) it offers no example of what evidence may create such an inference, and (2) it contains no analysis to justify its preference for the inference standard.

\(^{2}\) The gap actually could have been more than 15 years because the 25-year sentence was mandatory while the 10-year sentence was not. See Williams, 326 Md. at 371-72, 605 A.2d at 105.

\(^{3}\) Id. at 379, 605 A.2d at 109 (holding that the gap between an offered plea agreement and a mandatory sentence renders counsel's error "potentially prejudicial").

\(^{4}\) Id. at 382, 605 A.2d at 110.

\(^{5}\) Id. at 380-81, 605 A.2d at 109-10.

\(^{6}\) 373 S.E.2d 1 (Ga. 1988).

\(^{7}\) Id. at 3.

\(^{7}\) Id. ("Lloyd's remand hearing yielded . . . the unmistakable conclusion that she would not have accepted or even considered the offer to plead guilty. . . .").
Three of the six decisions discussed in *Williams* are actually contradictory to the inference standard because they did not require any evidence beyond the imposition of a harsh sentence at trial and a defendant's self-serving claim that he would have taken the plea had he been better advised. In *Hanzelka v. State*, a Texas court found prejudice simply because Hanzelka would not have served jail time if he had taken the plea. In addition, an Indiana court in *Lyles v. State* held that Lyles was prejudiced because he received a harsher sentence at trial than he could have been given according to the proposed plea bargain. Furthermore, in *State v. Simmons*, a North Carolina court accepted as sufficient evidence of prejudice Simmons's claim that he would have taken the plea had he known of it. Neither of the final two cases, *Curl v. State* from Indiana, and *People v. Whitfield* from Illinois, even mention the prejudice requirement.

The Court of Appeals also sought support for the inference standard in two federal cases: *Turner v. Tennessee* and *Lewandowski v. Makel*. The evidence standard required to establish prejudice in *Turner* and *Lewandowski*, however, was clearly more stringent than Maryland's inference standard. Each case required objective evidence closely related to the plea-bargaining process. The *Turner* court found "objective evidence in the record 'sufficient to undermine confidence in the outcome'" because the defendant responded to a two-year plea offer with a one-year counter-offer. In *Lewandowski*, the objective evidence deemed satisfactory was the defendant's previous guilty plea after he was fully advised of his chances at trial. The evidence standard in these two cases is substantially different from that in *Williams*, in which the court was satisfied by the fact that Williams accepted his counsel's advice not to

436. Id. at 387.
438. Id. at 994.
440. Id. at 498 ("Simmons was clearly prejudiced by his attorney's failure to inform him of the offer.").
441. 400 N.E.2d 775 (Ind. 1980). The *Curl* court refused to accept Curl's argument that she was denied sufficient time to consider a plea offer as a basis for overturning her conviction. Id. at 777.
442. 239 N.E.2d 850 (Ill. 1968). The *Whitfield* court granted post-conviction relief because the defendant was never personally informed of the plea offer. Id. at 852.
443. 858 F.2d 1201 (6th Cir. 1988).
445. *Turner*, 858 F.2d at 1206-07 (quoting the district court opinion).
446. See *Lewandowski*, 754 F. Supp. at 1150.
testify at his trial, a fact unrelated to the plea-bargaining process. In using the federal cases as authority, the Court of Appeals apparently disregarded the obvious factual differences between them and Williams.

b. The Wisdom of the "Inference" Standard.—Instead of attempting to harmonize most of the relevant case law with the inference standard, the Williams court could have supported its conclusion more strongly by explaining the inference standard as a logical extension of the prejudice requirement imposed by Strickland. Williams's "inference" standard balances fairness, reliability, and finality in much the same way that Strickland's "reasonable probability" standard does. This balance is further illustrated by the standards the Williams court did not adopt.

First, the court declined to adopt the completely subjective standard advocated by Williams,\textsuperscript{447} which would have required only a "reasonable probability" that Williams would have accepted the plea offer under the circumstances.\textsuperscript{448} This standard would have destroyed the finality interest in judicial decisions because any defendant, faced with a stricter sentence after rejecting a plea bargain and being convicted at trial, could claim without dispute that she would have taken the plea.\textsuperscript{449} Defendants could thus abuse the standard and capitalize on attorney mistakes to achieve a more

\textsuperscript{447} Williams, 326 Md. at 382, 605 A.2d at 110. The court instead used an inference drawn from "objective" evidence. \textit{Id.}

\textsuperscript{448} See \textit{id.} at 379, 605 A.2d at 109. Williams's view is supported by People v. Pollard, 282 Cal. Rptr. 588, 594 (Cal. Ct. App. 1991), which did not require objective evidence to prove the defendant's previous intentions. Williams also argued that he was sufficiently prejudiced because his attorney's error "precluded him from making a knowing and intelligent decision to accept the offer." Petitioner's Brief at 18, Williams (No. 55); see also Williams, 326 Md. at 379, 605 A.2d at 109. Therefore, he maintained, the probability that he would or would not have accepted the plea was irrelevant. \textit{Id.} Williams's argument for prejudice based on his inability to make a knowledgeable decision is clearly not supported by Strickland or Lockhart. In both cases the Court focused on the reliability of the outcome rather than the sufficiency of the process; a primary goal of the prejudice standard is to protect all reliable results regardless of deficiencies in the process. See Strickland v. Washington, 466 U.S. 668, 691-92 (1984) (explaining that the prejudice requirement exists because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding" (emphasis added)).

\textsuperscript{449} Williams argued that his longer sentence created a reasonable probability that he would have taken the shorter plea offered to him. Williams, 326 Md. at 381-82, 605 A.2d at 110. Because all defendants are indeed likely to take the shortest sentence, the reasonable-probability requirement in Williams's proposed subjective standard would offer little protection against self-serving, insincere claims. See \textit{id.} at 380, 605 A.2d at 109.
favorable result than if the attorneys had performed properly, regardless of whether the mistakes actually caused prejudice.

Second, the court declined to adopt the standard advocated by the State, which would have required defendants to produce purely objective evidence establishing that they would have accepted their plea offers had they been given better legal advice. The State argued that without this evidence requirement, Williams could prove prejudice based only upon his self-serving claim that he would have taken the plea had he known about the possible mandatory sentence. The State's proposed objective standard, however, would have required substantial evidence of Williams's decision-making process, which may have been impossible for him to produce. Under this standard, even if Williams was indeed prejudiced, he may not have been able to produce the necessary evidence to prove it. Results from such a test would be unreliable and possibly unfair.

The Williams court chose an intermediate standard in which objective facts must support an inference that, but for counsel's error, there is a "substantial possibility" that the defendant would have decided differently. This inference standard attempts to balance fairness and reliability with finality in much the same way that the Strickland Court did. The standard places primary importance on fairness and reliability of the result by requiring only limited objective evidence about the defendant's intention to accept a plea. Yet the standard also protects the judiciary's interest in finality because the slight amount of evidence that is required screens out defendants who claim that they were prejudiced when they clearly were not.

450. Defendants could achieve better results in two ways. First, if the post-conviction court gave them an opportunity to accept the plea bargain originally offered, defendants can foreclose the uncertainty of achieving a better result at trial. Second, if the court awarded them a new trial, they would have another chance at acquittal.

451. Williams, 326 Md. at 379, 605 A.2d at 109. The State's view was based on the two federal cases that required objective evidence sufficient to undermine confidence in the outcome of the plea process. See Turner v. Tennessee, 858 F.2d 1201, 1206-07 (6th Cir. 1988); Lewandowski v. Makel, 754 F. Supp. 1142, 1149-50 (W.D. Mich. 1990). See also supra text accompanying notes 443-446.

452. See Brief of Respondent at 27-28, Williams (No. 55).

453. See Williams, 326 Md. at 381-82, 605 A.2d at 110. The inference standard is supported by Lloyd v. State, 373 S.E.2d 1, 3 (Ga. 1988). See supra text accompanying notes 432-434.

454. The court only required enough evidence to allow an inference that he "may well" have taken the plea. Williams, 326 Md. at 381-82, 605 A.2d at 110.

455. Lloyd provides a good example of this screening. Although Lloyd was not informed of the plea offer, the evidence in the record supported the conclusion that she
c. The Future Effect of the "Inference" Standard.—Williams clarified that the inference standard can be satisfied by two types of evidence. First, evidence that the defendant was considering accepting a plea offer would clearly be sufficient.\(^4\)\(^5\)\(^6\) This type of evidence, accepted in *Turner* and *Lewandowski*, would satisfy even the most stringent objective-evidence standard proposed by the state of Maryland and would, therefore, clearly satisfy the inference standard as well.\(^4\)\(^5\)\(^7\) Second, evidence may be sufficient even if it is unrelated to the plea process if it shows that the defendant valued his counsel's advice. This second type of evidence was accepted in *Williams*, as the court found prejudice in Williams's failure to accept a plea offer because he had previously taken his counsel's advice not to testify at trial.\(^4\)\(^5\)\(^8\) While these two types of evidence are clear examples of what may satisfy the inference standard created in *Williams*, this list is not exhaustive. At present, however, the court has not indicated what other types of evidence may qualify.

4. Conclusion.—The inference standard adopted by the Court of Appeals in *Williams*, although inadequately supported in the opinion, may be justified by the rationale the Supreme Court used in *Strickland*. Both courts were concerned about protecting the interests of fairness, reliability, and finality. The exact scope of the standard in Maryland is unclear, however, and only future cases can further define the limits of Maryland's inference standard for post-conviction relief.

David M. Wyand

\(^4\) Williams, 326 Md. at 381, 605 A.2d at 110.
\(^5\) See *Williams*, 326 Md. at 381, 605 A.2d at 110.
\(^6\) See *id.*
\(^7\) See *id.* at 382, 605 A.2d at 110.
II. CONTRACTS

A. Medical Insurance: "Full-time Student" Status and Recovery of Attorneys' Fees

In *Collier v. MD-Individual Practice Ass'n*, the Court of Appeals answered two questions certified by the United States Court of Appeals for the District of Columbia on the issue of health insurance contracts. Finding in favor of the insured party, the court first held that the term "full-time student" in an insurance policy was ambiguous and could cover a student not meeting the college's standard for full-time status. The court then proceeded to deny recovery of attorneys' fees to the insured, despite the possible application of an accepted Maryland rule permitting such recovery. The ruling on attorneys' fees gives a solid indication that the court will be extremely reluctant to create additional exceptions to the American rule on the recovery of attorneys' fees in the future.

1. The Case.—Tom Collier, a nineteen-year-old student at Montgomery College, was injured in September 1987 while playing touch football, rendering him a quadriplegic. The cost of his treatment at two hospitals in Washington, D.C., totaled more than $286,000. At the time of Collier's injury, his mother maintained a health insurance policy with MD-Individual Practice Association, Inc. (MD-IPA). The policy extended coverage to any dependent child between the age of nineteen and twenty-two who was a "full-time student" at a recognized college, university or trade school. From the spring semester of 1987 through the time of his injury, Collier's college had placed him on academic probation, allowing him to register for only six credits per semester. MD-IPA con-

3. See *Collier*, 327 Md. at 3-10, 607 A.2d at 538-41.
4. See id. at 10-17, 607 A.2d at 541-45.
5. See infra note 96 and accompanying text.
8. Id.
9. Id.
10. Id.

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tended that Collier was not covered under the policy because he was not a full-time student according to his college's definition, which required twelve credits per semester.\textsuperscript{11}

The two hospitals "brought diversity actions in the District Court for the District of Columbia against Collier and his mother, both citizens of Maryland," for payment.\textsuperscript{12} Collier answered and also filed a "third-party action against MD-IPA seeking a declaratory judgment respecting his coverage and recovery of his attorneys' fees."\textsuperscript{13} The district court found that the term "full-time student" incorporated the college's definition and, therefore, was not ambiguous.\textsuperscript{14} The court "granted MD-IPA's motion for summary judgment on Collier's breach of contract count" and also entered judgment against Collier in favor of the hospitals for more than $286,000.\textsuperscript{15}

Collier filed an appeal in the United States Court of Appeals for the District of Columbia Circuit, after which MD-IPA and the hospitals reached a settlement that fully satisfied the judgment against Collier.\textsuperscript{16} The circuit court held that the settlement did not render the appeal moot because Collier, in addition to seeking a declaratory judgment, also sought damages for breach of contract, of which attorneys' fees were one component.\textsuperscript{17} The court stated that the attorneys' fees issue could not be addressed unless it was decided that Collier would prevail on the breach-of-contract count.\textsuperscript{18}

Because no firm precedent existed, the contract and the attorneys' fees issues could not clearly be decided under Maryland law.\textsuperscript{19} Recognizing that both issues could have a significant impact on Maryland law, the federal court certified two questions for the Maryland Court of Appeals:

[1] Does the term "full-time student," when used as a condition of coverage in a health insurance policy, unambiguously incorporate the criteria of the relevant educational institution? [and 2] Under Maryland law, may an insured covered by a health insurance policy recover, as an element of contract damages, the attorneys' fees he reasonably in-

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id. at 1502.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id. at 1503-04.
\end{itemize}
curs in order to compel coverage, where the policy does not expressly provide for such recovery and the insurer denied coverage in good faith?\textsuperscript{20}

The Maryland Court of Appeals, in a unanimous opinion written by Judge Rodowsky, found that the term "full-time student" was ambiguous and answered the first certified question in the negative.\textsuperscript{21} Proceeding to the second question, the court held that attorneys' fees could not be recovered,\textsuperscript{22} leaving the United States Court of Appeals to affirm the judgment of the district court.

2. Legal Background.—

a. Ambiguity in Insurance Contracts.—The Court of Appeals has noted that "Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer."\textsuperscript{23} Generally, insurance policies are to be construed in the same manner as any other contract.\textsuperscript{24} The court will look to the intention of the parties, as determined by "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution."\textsuperscript{25} Words are accorded the "ordinary and accepted meanings" that a "reasonably prudent layperson" would attach to them.\textsuperscript{26}

A term in a contract is found to be ambiguous as a matter of law if the language "is 'general' and may suggest two meanings to a reasonably prudent layperson."\textsuperscript{27} Extrinsic evidence—for example, common industry practices and terminologies—should be consulted

\textsuperscript{20} Id. The Maryland Court of Appeals was instructed to answer the second question only if it answered the first question in the negative, holding that the contract term was ambiguous. \textit{Id.} at 1503. If the court were to find the term unambiguous, then the federal court would affirm the summary judgment in favor of MD-IPA, and the attorneys' fees issue would not be reached. \textit{Id.} at 1504.

\textsuperscript{21} \textit{Collier}, 327 Md. at 10, 607 A.2d at 541.

\textsuperscript{22} \textit{Id.} at 17, 607 A.2d at 545.


\textsuperscript{24} \textit{Id.}


[It] seems doubtful whether the rule of [Maryland] is necessarily in conflict with the general rule of construction in favor of the insured, as the latter is understood, applied, and stated, since the general rule is employed only in case of ambiguity or uncertainty when the intention of the parties cannot be determined by the application of the ordinary, or other, rules of construction.

\textit{Id.} at 359 (footnotes omitted).

\textsuperscript{26} \textit{Pacific Indem.}, 302 Md. at 388, 488 A.2d at 488.

\textsuperscript{27} \textit{Id.} at 389, 488 A.2d at 489.
to resolve any ambiguities. If the extrinsic evidence produces a factual dispute, the meaning of the term is a question for a jury. Finally, if the ambiguity remains after considering the extrinsic evidence, the term ordinarily will be construed against the party responsible for drafting the contract.

b. *Recovery of Attorneys' Fees.*—The common practice in the United States is that the prevailing party in a lawsuit cannot recover attorneys' fees. This policy, called the American rule, “has been part of the jurisprudence of this country for nearly 200 years.” The rule is founded upon the deregulation of the legal profession and reasons of public policy. Although Maryland generally follows the American rule, the courts have developed an exception that permits an insured to recover attorneys' fees if he or she succeeds in obtaining a declaratory judgment on the issue of coverage, regardless of who brought the action.

The reasoning behind the Maryland exception to the American

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28. Id.
29. Id.
31. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); see also Collier, 327 Md. at 13, 607 A.2d at 542-43. The prevailing party can recover other basic court costs. Id.
33. Collier, 327 Md. at 13, 607 A.2d at 543.
34. Id. at 13-14, 607 A.2d at 543 (citing John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery,* 47 LAW & CONTEMP. PROBS. 9, 9 (1984)). Initially, fee shifting was a part of a broader system of regulation of fees. Id. Once fees were allowed to be determined by the market, the fee shifting component also disappeared. Id.
36. See Collier, 327 Md. at 12, 607 A.2d at 542.
rule for actions involving liability insurance is unclear. In *Cohen v. American Home Assurance Co.*, the court suggested two theories supporting the exception: authorized expenditure and contract damages. While the authorized-expenditure theory represents an agreement between the parties to pay the prevailing party's fees, the contract theory essentially endorses a benefit-of-the-bargain theory without the restriction of the American rule. If an insured has contracted to have her attorneys' fees paid in the defense of a claim, the insured would effectively be denied that right under the contract if the insurer were able to force the insured into a declaratory judgment proceeding and not be compelled to cover the insured's attorneys' fees in that action as well.

In addition to a benefit-of-the-bargain contract theory, some courts, including the court in *Collier*, have recognized that attorneys' fees in liability insurance cases may be generally viewed as foreseeable consequential damages arising from the breach of the contract. The general rule for the recovery of consequential damages is that "damages are recoverable only for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made." The focus is on reasonable foreseeability, not actual foresight. This general rule was formulated in

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38. See *Collier*, 327 Md. at 14, 607 A.2d at 543. In *Collier*, the court admitted that "[t]he legal theory supporting this rule remains unrefined." *Id.* (citing *Continental Casualty Co. v. Board of Educ.*, 302 Md. 516, 537, 489 A.2d 536, 547 (1985)).


40. See *id.* at 363, 258 A.2d at 239.

41. The authorized-expenditure theory is based on an insurer's promise "to reimburse the insured for expenses incurred at the insurer's request." *Collier*, 327 Md. at 14, 607 A.2d at 543. This theory was not addressed in *Collier*. See *id*.

42. *Collier*, 327 Md. at 14-15, 607 A.2d at 543.

43. See *id.*; Olympic S.S. Co. v. Centennial Ins. Co., 811 P.2d 673, 681 (Wash. 1991) ("[A]n award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue."); Hayseeds, Inc. v. State Farm Fire & Casualty Co., 352 S.E.2d 73, 79-80 (W. Va. 1986) ("[W]e consider it of little importance whether an insurer contests an insured's claim in good or bad faith. In either case, the insured is out of his consequential damages and attorney's fees. To impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain."); Hedgecock v. Stewart Title Guar. Co., 676 P.2d 1208, 1211 (Colo. App. 1983) ("An award of attorney fees merely restores plaintiff to the position she would have occupied had the company honored its contract of insurance in the first instance.").

44. See *Collier*, 327 Md. at 13, 607 A.2d at 543. See also *Olympic*, 811 P.2d at 681 (claiming that avoidance of legal fees is a major reason for purchasing insurance policies).

45. 5 *Arthur L. Corbin, Corbin on Contracts* § 1007, at 70 (1964).

46. *Id.* § 1009, at 77.
the landmark English case of Hadley v. Baxendale:47

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.48

Based on this theory, it follows that if the contemplation of litigation to decide the issue of breach was reasonably foreseeable as a result of one party’s nonperformance, then attorneys’ fees for such an action should be awarded. Although it may be questionable whether attorneys’ fees flow from the breach of a contract, the American rule has evolved as a restriction on general contract law that damages which are foreseeable are generally recoverable.49

3. The Court’s Reasoning.—

a. Ambiguity in Insurance Contracts.—Recognizing that the insurer did not provide its own definition of “full-time student” in the insurance contract, the court first found that there was no existing rule of Maryland law incorporating the relevant school’s criteria as the definition of that term.50 The court next addressed the question of “what is the customary and normal meaning of ‘full time student’ in the context of a group health insurance policy.”51

The court stated that one factor to be used in determining the ordinary and accepted meaning of an undefined contract term is the purpose of the contract.52 Considering other states’ decisions on similar matters, the court found that the purpose of this type of contract is “‘to provide coverage for the student who would not be expected to have access to group health insurance coverage of his own.’”53 Applying a reasonable person standard to determine normal meaning, the court found that this purpose weighed against any construction that would result in individuals “moving in or out of a

48. Id. at 151.
49. See Collier, 327 Md. at 13, 607 A.2d at 543.
50. Id. at 6, 607 A.2d at 539.
51. Id.
52. Id.
covered person status because of fluctuations from time to time in course scheduling."

For this reason, the court found that the term "full-time student" was susceptible to at least two reasonable interpretations and, consequently, was ambiguous.\footnote{54} In support of its conclusion, the court advanced several hypotheticals in which "lay persons" might reasonably conclude that students were covered despite the fact that their course loads did not satisfy the respective institution's requirements for full-time status.\footnote{55} For example, students whose extracurricular activities or medical conditions preclude them from carrying the institution's required number of credits for full-time status might reasonably be considered to be covered by a parent's health insurance because the dependent's "'primary daily occupation was that of a student.'"\footnote{56} The court also recognized that the term "full-time student" had been found to be ambiguous in several other jurisdictions.\footnote{57}

After concluding that the term was ambiguous, the \textit{Collier} court examined extrinsic evidence to resolve the dispute. The only extrinsic evidence, however, was that Montgomery College had a twelve-credit criterion for full-time status.\footnote{58} The court held that this evidence was insufficient as a matter of law to resolve the ambiguity, because it merely confirmed the existence of competing reasonable constructions.\footnote{59} For these reasons, the court answered the first certified question—whether "full-time student" is to be defined by "the criteria of the relevant educational institution"—in the negative.\footnote{60}

\textit{b. Recovery of Attorneys' Fees.}—Because the second certified question was framed solely as a matter of contract damages,\footnote{61} the court refrained from deciding this issue on a theory of liability re-

\footnotesize{54. \textit{Id.}, 607 A.2d at 540.}
\footnotesize{55. \textit{Id}.}
\footnotesize{56. \textit{Id}. at 7-8, 607 A.2d at 540.}
\footnotesize{57. \textit{Id.} (quoting Massey v. Board of Trustees, 500 So. 2d 864, 866 (La. App. 1986), \textit{cert. denied}, 501 So. 2d 775 (La. 1987)).}
\footnotesize{58. \textit{Collier}, 327 Md. at 8-10, 607 A.2d at 540. \textit{See}, e.g., \textit{Massey}, 500 So. 2d at 866 (finding "full-time student" in a health insurance policy to be ambiguous). Perhaps more importantly, the \textit{Collier} court stated that it was unable to find any decision where a court had incorporated a school's definition of "full-time student" into a health insurance policy "to the exclusion of any other construction." \textit{Collier}, 327 Md. at 8, 607 A.2d at 540.}
\footnotesize{59. \textit{See Collier}, 327 Md. at 10, 607 A.2d at 541.}
\footnotesize{60. \textit{Id}.}
\footnotesize{61. \textit{Id}.}
\footnotesize{62. \textit{See supra} text accompanying note 20 for the full text of the second question.}
resulting from collateral litigation. Instead, the court addressed directly whether the costs and expenses of litigation, aside from ordinary court costs, were recoverable in actions for damages. The court first warned that as a general rule such costs and expenses were not recoverable.

Although the court recognized that under Maryland law counsel fees may be recovered by an insured who obtains a declaratory judgment that a liability policy provides coverage, it refused to extend the logic of that line of cases to include declaratory judgment actions concerning health insurance policies. The court stated that the underlying theory of the liability insurance cases permitting recovery is anomalous and in direct conflict with the American rule that the costs awarded to a prevailing party do not generally include counsel fees. Finding the American rule firmly entrenched in Maryland jurisprudence, the court rejected arguments by Collier to extend those decisions.

The court also acknowledged, but rejected, substantial out-of-state authority that permitted recovery of counsel fees under a foreseeable-consequential-damages theory. Although the recovery of these damages could be permitted by contractual provision or statute, the court refused to abrogate the American rule on its own initiative. For these reasons, the court answered the second certi-
fied question in the negative as well.\textsuperscript{73}

4. Analysis.—

a. Ambiguity in Insurance Contracts.—Prior to Collier, Maryland courts had never been asked to construe the term “full-time student.” For this reason, the court could have reached its interpretation in either of two ways. The court could have found the term to be ambiguous and, according to Maryland law, construed it against the drafter—in this case, the insurer.\textsuperscript{74} In fact, several authorities cited in Collier found the definition of “full-time student” to be ambiguous and found coverage for the insured.\textsuperscript{75} Alternatively, the court could have found the term to be unambiguous, but interpreted it to encompass Collier’s particular situation. For example, an Illinois court, in *Margie Bridals, Inc. v. Mutual Benefit Life Insurance Co.*,\textsuperscript{76} held that the term “envisions a person’s enrollment in an academic institution and attendance at classes on a substantial basis. Full-time ordinarily signifies the normal or standard period of time spent in a named activity.”\textsuperscript{77}

Although the *Collier* court chose the former approach,\textsuperscript{78} the choice is of little practical consequence. Under either approach, the relevant school’s criteria would not be incorporated into the meaning of “full-time student,” and the answer to the first certified question would be no. Two further considerations limit the significance of the choice of construction. First, the *Collier* holding is limited to the specific term “full-time student” as used in health insurance contracts. This issue, which had never come before the Maryland courts prior to *Collier*, might well never arise again after *Collier*. Second, insurance companies are free (and likely) to avoid the full impact of this decision by expressly defining “full-time student” in new

\textsuperscript{73} Id.

\textsuperscript{74} See supra note 30 and accompanying text.

\textsuperscript{75} *Collier*, 327 Md. at 1, 610 A.2d at 539-41. See, e.g., *Swint v. Protective Life Ins. Co.*, 779 F. Supp. 532, 538 n.6 (S.D. Ala. 1991) (stating that the term “full-time student” is ambiguous); *Massey v. Board of Trustees*, 500 So. 2d 864, 866 (La. App. 1986) (awarding coverage for a student who took only nine credit hours instead of the twelve required for full-time status); *Society of N.Y. Hosp. v. Malsky*, 382 N.Y.S.2d 433, 436-37 (N.Y. Civ. Ct.) (finding that a “full-time student” could include someone enrolled in either high school or college and therefore should be interpreted against the insurer), aff’d, 390 N.Y.S.2d 512 (N.Y. Sup. Ct. 1976) (per curiam).


\textsuperscript{77} Id. at 65; see also *Blue Cross & Blue Shield v. Cassady*, 496 So. 2d 875, 877 (Fla. App. 1986) (quoting *Margie Bridals*); *Colonial Life Ins. Co. v. Hazelton*, 711 S.W.2d 305, 306 (Tex. App. 1986) (citing *Margie Bridals*).

\textsuperscript{78} *Collier*, 327 Md. at 7, 610 A.2d at 540 (“[F]ull-time student’ is ambiguous, in that it suggests two or more meanings to reasonable laypersons”).
Given the judicial tendency to construe ambiguous contractual terms against the drafter, there is certainly sufficient incentive for the insurers to be more explicit as to the meaning of terms in their policies. Contracts with fewer ambiguities would be advantageous to both the parties and the court system.

b. Recovery of Attorneys' Fees.—Unlike the interpretation of the contract term, the court's holding on the recovery of attorneys' fees may represent a significant turning point in Maryland law. The Collier court noted that the recovery of attorneys' fees in declaratory judgment actions concerning coverage under liability insurance contracts was an exception to the American rule. Nevertheless, the court refused to extend the logic of that exception to permit recovery of attorneys' fees in actions arising out of other insurance contracts. The court's reasoning focused on a view of the Maryland exception as an anomaly, inconsistent with the American rule. A complete analysis of the court's reasoning must encompass the following issues: (1) the soundness of the theory and reasoning in the Maryland declaratory-judgment exception, (2) whether this exception could rightly be extended to health insurance cases, such as Collier, on the basis of its underlying theory and facts, and (3) whether extension of the exception to Collier would be appropriate in light of the American rule.

Rather than distinguishing the cases to which the Maryland declaratory-judgment exception apply from the present case, the

79. This would eliminate the need for a legal construction and save both parties the burden of litigation.

80. See supra note 30 and accompanying text. Furthermore, fee-shifting can be done legislatively. See Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 663-65 (discussing how, in particular types of litigation, one side has the inherent advantage of superior resources, and how legislation has allowed recovery for attorneys' fees to aid the weaker side).

81. Collier, 327 Md. at 13, 607 A.2d at 542-43.

82. Id. at 17, 607 A.2d at 544-45.

83. Id. at 14, 607 A.2d at 543.

84. The cases through which the Maryland exception developed involved insurance policies that expressly included an obligation to defend the insured in suits potentially covered by the policy. See, e.g., Bankers & Shippers Ins. Co. v. Electro Enters., Inc., 287 Md. 641, 415 A.2d 278 (1980) (obligation under aircraft liability insurance policy to pay insured's defense costs). Substantial authority exists to support the argument that to compel an insured to pay for litigation costs arising from a coverage dispute is effectively to deny the insured the benefit of the contract. See 7C JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4691 (Walter F. Berdal ed., 1979):

[T]he insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding, and, even though it loses in such action, compel him to bear the
court interpreted the reasoning supporting those decisions broadly. The court recognized that those decisions could be supported by general contract law regarding the recovery of consequential damages.85

As a general rule, consequential damages are recoverable if the injuries suffered by the non-breaching party are reasonably foreseeable.86 Logic supports the position that, in many contract cases, litigation to compel performance is reasonably foreseeable.87 Despite this foreseeability, there remains substantial authority prohibiting recovery of litigation expenses in breach of contract actions. For example, Professor Corbin asserted that "[i]t seems rather far-fetched to say that the insurer has promised to pay the loss and has also promised to pay the loss [e.g., attorneys' fees] caused by his failure to pay the loss. By such a process, any contract can be resolved into an infinite number of promises."88 The problem with this view is that it does not adequately address the issue of foreseeability of a lawsuit regarding coverage. Furthermore, Professor Corbin failed to list some of the additional promises that might comprise such an infinity. Several courts have also held that fees are not recoverable in such actions.89 Unfortunately, it is not clear whether the courts in these decisions are focusing on contract theory or merely applying the American rule to all litigation. It appears that these courts are doing the latter.90

Assuming that the reasoning in the cases that developed the Maryland exception is sound, Collier's argument to extend the exception to health insurance cases is compelling. There can be no doubt that litigation expenses are foreseeable in insurance cases expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.

Id. at 283. There is no express obligation under health insurance policies to pay defense costs. Thus, the Collier court could have distinguished general health insurance policies from liability agreements on the lack of an express promise to defend the former.

85. Collier, 327 Md. at 13, 607 A.2d at 543.
86. See 5 CORBIN, supra note 45, § 1007, at 70.
87. See supra notes 44-48 and accompanying text.
88. 8 CORBIN, supra note 45, § 1010, at 80-81.
89. See, e.g., Murphy v. O'Donnell, 63 A.2d 340, 342 (D.C. 1948) (refusing to include attorneys' fees as damages in a landlord-tenant dispute without fraudulent behavior); McGaw v. Acker, Merrall & Condit Co., 111 Md. 153, 160, 73 A. 731, 734 (1909) (stating the general rule against recovery of attorneys' fees unless the wrong action forced the plaintiffs into litigation with a third party).
90. Murphy, 63 A.2d at 342 (citing "[t]he general rule"); McGaw, 111 Md. at 160, 73 A. at 734 (same).
such as *Collier*. Given the size of many medical bills,\(^9\) health insurers must expect litigation to arise upon the nonpayment of a claim. It necessarily follows that costs of litigation between the parties of the contract are reasonably foreseeable and do indeed flow from the breach itself. In addition, *Collier* convincingly noted factual similarities to the liability insurance cases in that the health insurer’s promise to pay benefits directly to third parties (the hospitals) is equivalent to a liability insurer’s promise to pay third parties to whom the insured is liable.\(^9\)

Possibly having too much respect for the American rule,\(^9\) the court in *Collier* refused to cut further into the doctrine by extending the declaratory judgment exception to the present case.\(^9\) There is certainly sufficient authority supporting the American rule that the court could rightly uphold it without invoking too much criticism. Although an argument could be made that an extension of the Maryland exception to health insurance policies would have minimal impact upon the American rule, such an extension based on general contract and damages theory could be justified in almost any contract action. The court recognized this potential problem in *Collier* when it stated that such an extension “would probably mark the elimination of the American rule as to contract actions against insurers generally and leave in doubt the efficacy of the American rule as to other types of contracts.”\(^9\) Because the legal theory behind the Maryland exception is so general, it could be applied logically in any contract action, bringing a slow death to the American rule in this area.

Despite theoretical similarities, *Collier* is still factually distinguishable from the line of cases that comprise the Maryland exception. The court chose to limit the exception to the facts of the liability insurance cases; however, in so doing, the court sanctioned a significant inconsistency in Maryland law. There is no practical reason why health insurers and liability insurers should be subjected

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92. *Collier*, 327 Md. at 12-13, 607 A.2d at 542. MD-IPA argued that the rule is distinguishable since it provides “first-party coverage.” *Id.* at 13.
93. For a harsh criticism of the American rule, see, e.g., Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 794 (1966) (referring to the American rule as “a festering cancer in the body of our law without whose excision our society will not be great”).
94. *Collier*, 327 Md. at 17, 607 A.2d at 544-45.
95. *Id.*, 607 A.2d at 544.
to different fee-recovery laws. Policy considerations do not differ among these two groups. Ironically, in trying not to "compound the anomaly," the Collier court has, in effect, done worse by simply creating another anomaly.

The Collier decision gives a clear impression of how the current Court of Appeals will address the recovery of attorneys' fees in the future. While the decision neither expands nor contracts Maryland law on this issue, it draws a line indicating that exceptions to the American rule will be kept within limits. Aside from the problems of inconsistency in Maryland law as described above, the reasoning of the court is sound and should not be overly criticized. The main opponents to this judgment will be those who simply oppose the American rule altogether, but that debate involves a completely separate analysis that is not detailed here.

5. Conclusion.—In finding that the term "full-time student," as used in insurance policies, does not unambiguously incorporate the relevant school's criteria, the Court of Appeals rendered an appropriate decision that will have little effect on Maryland law. By contrast, the court's decision to uphold the American rule regarding recovery of attorneys' fees indicates a willingness to restrict the exceptions to that rule. The practical effect of that decision remains unclear, but the court's adherence to the American rule is a strong indication that recovery of attorneys' fees in other areas is unlikely, absent legislative action.

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96. The best argument in favor of different treatment is that liability insurance contracts involve a duty to defend, while health insurance contracts do not. See supra note 84. Although MD-IPA advanced this argument, the court recognized no such distinction, relying instead on the American rule and the "anomalous" characterization of the Maryland liability exception. Furthermore, on the issue of consequential damages, such litigation expenses may be reasonably foreseeable regardless of the type of contract and whether there is an express promise to defend.

97. Judge Rodowsky has expressed concern in the past about how recovery for attorneys' fees should be limited. See St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 568 A.2d 35 (1990). The majority, in a four-to-three decision, held that the jury, when calculating an award of punitive damages, may consider attorneys' fees incurred by the victorious defamation plaintiff. Id. at 353-54, 568 A.2d at 43. Judge Rodowsky dissented, warning that this decision, while under the majority's reasoning an attempt to more accurately measure punitive damages, was in reality an award of attorneys' fees as compensatory damages and thus an unjustified exception to the American rule. Id. at 363-64, 568 A.2d at 47-48 (Rodowsky, J., dissenting).

98. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975) (disallowing recovery for attorneys' fees, because this would infringe upon the power of Congress to make exceptions to the American rule).
III. CRIMINAL LAW

A. Reckless Endangerment: Deterring the Creation of Risk

In Minor v. State,¹ the Court of Appeals held that under Maryland's recently enacted reckless endangerment statute,² a defendant's conduct must be evaluated objectively to determine whether it is "reckless."³ The court further concluded in this first interpretation that the statute criminalizes reckless behavior regardless of whether harm actually occurs.⁴

In Minor, the court clarified the reach of the reckless endangerment statute and confirmed the statute's public policy goal of deterring the unnecessary creation of dangerous situations.⁵ Moreover, by ruling that the recklessness of the defendant should be evaluated objectively, the court merged the concepts of recklessness and gross negligence under Maryland criminal law.⁶ Although the court found support for its conclusion in the interpretations of similar statutes in other jurisdictions,⁷ it could have drawn support from the statute's legislative history and other interpretations of "recklessness" in Maryland law.

1. The Case.—In the early hours of December 13, 1989, the police arrived at Nelson Minor's residence to discover that Nelson's older brother, Kenneth, had been fatally shot through the mouth.⁸ This was the result of a day's worth of alcohol and drug use that culminated in a game of "Russian Roulette."⁹ According to Minor, he and his brother had been drinking together most of the day and

². The statute reads: "Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both." Md. Ann. Code art. 27, § 120(a) (1992).
³. Minor, 326 Md. at 443, 605 A.2d at 141. The court rejected Minor's argument that a determination of "recklessness" depends on a subjective weighing of the danger of the situation at hand. Id.
⁴. Id. at 442, 605 A.2d at 141.
⁶. See infra text accompanying notes 59-62.
⁷. See Minor, 326 Md. at 442-43, 605 A.2d at 141.
⁸. Id. at 437-38, 605 A.2d at 138.
⁹. Id. at 438, 605 A.2d at 139.
continued drinking that night, in addition to using cocaine and heroin.\textsuperscript{10} Noticing Minor's pump shotgun on the living room table, they began to discuss playing a game of Russian Roulette.\textsuperscript{11} Minor told his brother that they could not actually play Russian Roulette with the shotgun because it did not have a barrel, and once a bullet was loaded in the chamber, the gun was sure to fire.\textsuperscript{12} Despite this statement, Minor said that his brother responded, "'[y]ou know that I will do it,'" and asked for the gun.\textsuperscript{13} Deciding to call his brother's bluff, Minor handed him the shotgun and dared him to play first in their game of Russian Roulette.\textsuperscript{14} To Minor's surprise, his brother put the gun to his head, pulled the trigger, and fatally shot himself.\textsuperscript{15}

When the police arrived, Minor explained the events preceding his brother's death. Minor asserted his belief that his brother was bluffing when he asked for the gun.\textsuperscript{16} Minor further stated that he thought his brother, who knew the gun was loaded and ready to fire, would simply hand it back to him.\textsuperscript{17}

After a trial in the Circuit Court for Baltimore City, Minor was convicted of reckless endangerment and given a four-year suspended sentence.\textsuperscript{18} Minor appealed his conviction to the Court of Special Appeals on two separate grounds. First, he argued that he should not have been convicted because he did not perceive a substantial risk of death or injury, and thus lacked the requisite \textit{mens rea}.\textsuperscript{19} Second, he argued that his actions did not create the risk that led to his brother's death.\textsuperscript{20} Minor asserted that his brother created the risk by his independent act of putting the gun to his head.\textsuperscript{21} The Court of Special Appeals, however, affirmed Minor's conviction, ruling that a defendant's disregard of a substantial risk, even if the chances of harm were low, was sufficient for conviction under the

\begin{itemize}
\item \textsuperscript{10} \textit{Id.}
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.} Rather than saying that a shotgun does not have a "barrel," Minor and the court must have meant to state that a shotgun does not have a cylinder with multiple ammunition chambers, and therefore, "once you put one [bullet] in the chamber, that's it." \textit{Id.}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.} at 437, 605 A.2d at 138.
\item \textsuperscript{20} \textit{Id.}, 583 A.2d at 1106.
\item \textsuperscript{21} \textit{Id.}
\end{itemize}
statute.\textsuperscript{22} The court noted that the offense of reckless endangerment "is not dependent upon intent."\textsuperscript{23} The Court of Appeals granted certiorari to consider an "important issue of public significance"—how to properly interpret the recently enacted statute.\textsuperscript{24}

2. Legal Background.

a. Maryland.—Reckless endangerment, a statutory misdemeanor, was first enacted by the Maryland legislature in 1989.\textsuperscript{25} It has no counterpart in the common law.\textsuperscript{26} The statute is targeted at a range of conduct that, while clearly dangerous, is not deemed criminal until an actual injury results.\textsuperscript{27} According to the Senate Judicial Proceedings Committee, the statute "‘prohibits conduct which, while not criminal under current law, creates a substantial risk that a criminal act will result.'"\textsuperscript{28} The Committee recognized that prior to the statute's enactment "individuals who recklessly [shot] firearms without criminal intent near roads or buildings [could not] be prosecuted. . . ."\textsuperscript{29}

In its first years of enforcement, the statute has been used in two ways. First, the statute has been invoked as the principal charge to punish reckless acts.\textsuperscript{30} In some instances, it has been directed at conduct that apparently did not otherwise constitute a criminal offense. For example, a prostitute was charged under the statute when she continued to practice her trade, even though she was

\textsuperscript{22} See id. at 319, 583 A.2d at 1108-09. The intermediate appellate court wrote that "even though [Minor] believed that [his brother] was ‘bullshitting’ him and would not pull the trigger, [Minor] was aware that his conduct, handing the loaded shotgun to [his brother] following the foregoing conversation, might cause death or serious bodily injury." Id.

\textsuperscript{23} Id. at 316, 583 A.2d at 1107.

\textsuperscript{24} Minor, 326 Md. at 440, 605 A.2d at 140.

\textsuperscript{25} See 1989 Md. Laws 3011 (codified at Md. ANN. CODE art. 27 § 120 (1992)).

\textsuperscript{26} See Minor, 85 Md. App. at 314, 583 A.2d at 1106 (quoting Bill Analysis, H.B. 1448, Senate Judicial Proceedings Committee, 1989 (Floor Report) ("This bill prohibits conduct . . . not criminal under current law.").

\textsuperscript{27} Id.

\textsuperscript{28} See id. (quoting the Senate Judicial Proceedings Committee Floor Report).

\textsuperscript{29} Id.

\textsuperscript{30} For example, two youths were charged with reckless endangerment for throwing rocks, beer bottles, bricks and pieces of wood at passing cars from the side of a roadway and from a bridge. No traveler was seriously injured, but some suffered minor cuts and 21 vehicles were damaged. See Debbie M. Price, 2 Plead Guilty in '89 Rock-Throwing: Repeated Beltway Incidents 'Just Something to Do,' Youth Says, WASH. POST, June 1, 1990, at C4. Similarly, the State charged the owner of three rottweilers with reckless endangerment when he left a fence around his property in disrepair, thereby allowing the dogs to escape. The dogs subsequently mauled a seven-year old girl. Dog Owner Sentenced in Girl's Mauling, WASH. POST, Oct. 17, 1992, at B2.
aware that she carried the AIDS-causing HIV virus.\textsuperscript{31}

Second, the statute has been used to supplement other charges, some of which may involve the more difficult requirement of proving \textit{mens rea}.\textsuperscript{32} For instance, the statute was used to prosecute two women who left their children alone in a Baltimore apartment while natural gas poured out of unlit oven burners.\textsuperscript{33} The police rescued the children uninjured after receiving a complaint of a gas smell.\textsuperscript{34} The women were subsequently charged with attempted murder, child neglect, child abuse, and reckless endangerment.\textsuperscript{35}

\textbf{b. Other Jurisdictions and the Model Penal Code.}—Many other jurisdictions have enacted reckless endangerment statutes.\textsuperscript{36} The Maryland statute appears to be modeled closely after the New York statute, which has virtually identical language.\textsuperscript{37} Both statutes seek to punish individuals who “recklessly engage[] in conduct” that “creates a substantial risk” of serious physical injury or death.\textsuperscript{38} Given an opportunity to decide whether the term “recklessly” should be interpreted from an objective or a subjective viewpoint, the New York Court of Appeals determined that New York’s statute required an objective assessment of the risk produced by a defendant’s conduct.\textsuperscript{39} The defendant’s subjective intentions were

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\textsuperscript{31} \textit{Prostitution Suspect with HIV Released}, \textsc{Wash. Post}, Oct. 4, 1991, at C5. \\
\textsuperscript{32} In a recent case, a husband, who was arguing with his wife, kicked the ladder on which she was standing. His wife died from the injuries sustained in her fall. He was charged with voluntary manslaughter and reckless endangerment. \textit{Charge in Wife’s Death}, \textsc{Wash. Post}, June 20, 1992, at D3. In another case, a caucasian male chased an African American into the path of an oncoming truck, which struck and nearly killed him. The defendant was convicted of assault, racial harassment, and reckless endangerment. \textit{Baltimore Man Convicted in Racial Harassment Case}, \textsc{Wash. Post}, Jan. 31, 1991, at D2. \\
\textsuperscript{33} \textit{2 Baltimore Sisters Accused of Trying to Kill Their Children}, \textsc{Wash. Post}, Dec. 28, 1990, at F2. \\
\textsuperscript{34} \textit{Id.} \\
\textsuperscript{35} \textit{Id.} \\
\textsuperscript{37} New York divides its reckless endangerment statute into two degrees. A defendant is guilty of reckless endangerment in the first degree when he creates a grave risk of death to another person. \textit{N.Y. Penal Law} \textsection{}\textit{120.25} (McKinney 1992). Reckless endangerment in the second degree applies when a defendant creates a risk of serious physical injury to another person. \textit{Id.} \textsection{}\textit{120.20}. \\
\textsuperscript{38} \textit{See Md. Ann. Code art. 27, \textsection{}\textit{120(a)} (1992); N.Y. Penal Law} \textsection{}\textit{120.25}. \\
\textsuperscript{39} \textit{See People v. Davis}, 526 N.E.2d 20, 21-22 (N.Y. 1988). The \textit{Davis} court also concluded that it is well established that the crime of reckless endangerment “may be
deemed irrelevant.\textsuperscript{40}

The genesis of many reckless endangerment statutes was the Model Penal Code's (MPC) codification of the offense in 1981.\textsuperscript{41} While the MPC version bears some similarities to the Maryland statute, it differs in its express requirement that a defendant must have "consciously disregard[ed] a substantial and unjustifiable risk."\textsuperscript{42} The term "consciously" suggests that a defendant must subjectively perceive that a risk is substantial and must then disregard that risk. \textit{Minor} presented the Court of Appeals with an opportunity to settle the conflict over whether the crime of reckless endangerment requires a subjective or an objective determination of a defendant's actions.

3. \textit{The Court's Reasoning; Analysis.}—In \textit{Minor}, the court reached two important conclusions regarding Maryland's reckless endangerment statute. First, a defendant's conduct should be evaluated from an objective viewpoint in determining whether it is "reckless."\textsuperscript{43} Second, the State can prosecute a defendant for the creation of a substantial risk whether or not harm occurs.\textsuperscript{44} Each conclusion assures that the statute's public policy goal of deterring unnecessary risks is effectuated.

\textbf{a. An Objective Determination of Recklessness.}—In \textit{Minor}, the defendant argued that the MPC supported the conclusion that, in order to be found guilty, he had to subjectively perceive a substantial risk and consciously disregard it.\textsuperscript{45} The Court of Appeals, however,
quickly rejected Minor's argument, noting that "neither the Model Penal Code itself, nor its definition of 'reckless' . . . has been adopted in Maryland." 46 Instead, the court decided that an objective assessment of Minor's conduct was appropriate, based exclusively on the interpretations of similar statutes in other jurisdictions. 47 The Maryland court primarily relied on the analysis of the New York Court of Appeals in People v. Davis. 48 The Davis court ruled that "'[r]eckless endangerment . . . is defined in terms of the risk produced by the defendant's conduct, not intent.'" 49 In accordance with Davis, the Minor court concluded that "'[t]he test is whether the appellant's misconduct, viewed objectively, was so reckless as to . . . create the substantial risk that the statute was designed to punish.'" 50 Applying that principle to the facts of Minor, the court examined the totality of the evidence surrounding the death of Kenneth Minor to determine whether his brother's actions were "so reckless as to constitute a gross departure from the standard of conduct that a law abiding person would observe." 51 Due to the abundance of evidence indicating reckless conduct, the court affirmed the conviction. 52

The Court of Appeals could have found further support for its conclusion in the legislative history of the reckless endangerment statute and from other existing statutes. The legislative history of Maryland's reckless endangerment statute contains a direct reference to Maryland's reckless driving statute. 53 The Floor Report of the Senate Judicial Proceedings Committee stated, "'[l]ike [the reckless driving statute], this bill seeks to deter crime before injury or death occurs.'" 54 Based on this reference, the term "reckless" in the reckless endangerment statute can be reasonably expected to be

46. See id. at 442 n.1, 605 A.2d at 141 n.1.
47. Id. at 442-43, 605 A.2d at 141.
49. Id. at 22.
50. Minor, 326 Md. at 443, 605 A.2d at 141.
51. Id. The court enumerated the circumstances it considered important: the defendant handed over the gun, loaded and ready to fire; the two men were intoxicated; the victim had expressed his intent to shoot himself; and the defendant dared his brother to shoot himself. Id.
52. Id.
53. Id. at 142, 605 A.2d at 444.
used in the same way as in the reckless driving statute. The determination of recklessness under the reckless driving statute may be made from an objective viewpoint, because a defendant can be convicted if his driving indicates disregard for persons or property.

Similarly, the reckless boating and reckless flying statutes provide for objective determinations of defendants' conduct.

The Minor opinion also reflects the continued merging of the standards for recklessness and gross negligence under Maryland law. Indeed, recklessness and gross negligence—both of which may be evaluated from an objective viewpoint—already are commingled in the law of manslaughter. In Clay v. State, the Court of Appeals adopted as a test for gross negligence in manslaughter whether the conduct of the defendant, considering all the factors of the case, was such that it amounted to a wanton or reckless disregard for human life. The Clay court considered Clay's actions objectively in determining whether the gross negligence standard may have been met. The Minor holding thus reflects consistency in the interpretation of the term "reckless" under Maryland law.

**b. Criminalizing the Creation of Risk.**—Relying on fundamental principles of statutory construction, the Court of Appeals concluded in Minor that actual harm was not a prerequisite to prosecution

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56. Had the legislature intended a subjective interpretation of the term reckless, it probably would have expressly stated this intention. This argument was discussed in the State's brief to the Court of Appeals. See Brief of Respondent at 4-5, Minor (No. 8).

57. The reckless driving statute reads as follows: "A person is guilty of reckless driving if he drives a motor vehicle: (1) In wanton or willful disregard for the safety of persons or property; or (2) In a manner that indicates a wanton or willful disregard for the safety of persons or property." Md. Code Ann., Transp. § 21-901.1(a) (1992) (emphasis added).

58. The reckless boating statute implies the same objective analysis: "[i]t shall be unlawful for any person to operate any boat . . . in a reckless manner, or in such a manner that may endanger the person or property of others. . . ." Md. Ann. Code art. 27 § 21 (1992) (emphasis added). Similarly, the reckless flying statute states: "(a) Conduct prohibited.—A person may not operate any aircraft in this State . . . (2) [i]n a careless or reckless manner that endangers the life or property of another. (b) [In the d]etermination of . . . reckless operation . . . the standards required by federal law governing aeronautics for safe operation of aircraft shall be considered." Md. Code Ann., Transp. § 5-1006 (1977).

59. See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 234 (1986) (noting, however, that if an objective standard is used, courts usually require that the defendant's conduct create a greater degree of risk than that necessary for ordinary tort negligence).

60. 211 Md. 577, 128 A.2d 634 (1957).

61. Id. at 584, 128 A.2d at 638.

62. Id.
The court believed that the plain meaning of the statute demonstrated an intent "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person." It added that "[i]t is the reckless conduct and not the harm caused by the conduct, if any, which the statute intended to criminalize."

In his appeal, Minor agreed that creation of a risk of harm was the central inquiry under the statute. He argued, however, that it was his brother who created the risk by taking the gun and placing it to his head. Thus, he argued that his action of handing over the gun did not create any risk that his brother would indeed kill himself. The court never directly addressed the issue of causation. Rather, the court presumed that Minor's conduct created the risk of harm and directly proceeded to the issue of whether the determination of recklessness was to be made objectively or subjectively.

Thus, Minor makes clear that a defendant can be convicted of endangering another person even if no harm occurs. Applying this reasoning, the Minor outcome would have been the same even if Kenneth Minor had not shot himself, but instead had reported Nelson Minor's actions to the police and brought charges against him. In fact, there have been numerous prosecutions under the reckless endangerment statute in which no harm occurred. In one such

63. Minor, 326 Md. at 442, 605 A.2d at 141. The court relied on the language of the statute itself. Id. at 441, 605 A.2d at 140. When interpreting statutory language, "the words of the statute must ordinarily be given their natural and usual meaning in the context of the legislative purpose and objective in enacting the statute." Id. at 441-42, 605 A.2d at 140.

In this case the court failed to expressly consider the legislative history that was available from the opinion of the Court of Special Appeals or the briefs of the parties. Dismissing the legislative history as "sparse," the court concluded that the purpose of the statute is "readily evident" from its plain language. Id. at 442, 605 A.2d at 141. Had the Minor court looked further into the legislative purposes underlying § 120(a), however, it could have found additional reinforcement for its decision. See Minor v. State, 85 Md. App. 305, 314, 583 A.2d 1102, 1106 (1991) (quoting from the Senate Judicial Proceedings Committee), aff'd, 326 Md. 436, 605 A.2d 138 (1992). 64. Minor, 326 Md. at 442, 605 A.2d at 141.

65. Id. (emphasis added).

66. Id. at 441, 605 A.2d at 140.

67. Id.

68. Id.

69. See id. at 445, 605 A.2d at 142 (Bell, J., dissenting) (criticizing this presumption as "focus[ing] on the wrong issue").

70. Of course, the incident probably would never have been reported. In his dissent, Judge Bell emphasized that such a scenario is absurd because there would not have been a real danger, merely an opportunity for danger that went unfulfilled. See id. at 448, 605 A.2d at 144 (Bell, J., dissenting).
prosecution, a woman who ran an unlicensed day-care facility was charged with reckless endangerment after she left five children unattended in her locked house while she took her own daughter to a doctor's appointment. 71 A neighbor called the father of one of the children who had been left in the home, and he in turn called the fire department. 72 Firemen broke into the house and found the children unharmed. 73 In another case, a nurse stole morphine-based medications from a storage area and replaced them with a different drug. 74 The tampering was detected before the wrong drugs were administered to a patient—and thus no harm ensued. 75 The nurse was subsequently charged with reckless endangerment. 76

Further support for the lack of a requirement for harm comes from the same case on which the Minor court relied to determine the appropriateness of an objective standard for recklessness. In People v. Davis, 77 the New York court ruled that the reckless endangerment statute seeks “to prevent the risk created by the actor’s conduct, not a particular outcome. . . . The risk of injury alone sustains prosecution.” 78 Therefore, the New York reckless endangerment statute does not require the occurrence of injury. The Minor court clearly agreed.

Significantly, the Minor court opted for a broad interpretation of the “creation of risk” that will justify prosecution under the statute. The court’s interpretation of “creation of risk” includes behavior that encourages and facilitates another person’s actions which could foreseeably result in death or injury. 79 Indeed, Nelson Minor’s conduct alone would not have resulted in injury without his brother’s act of pulling the trigger. 80

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72. Id.
73. Id.
75. Id.
76. Id.
78. Id. at 21.
79. See Minor, 326 Md. at 447, 605 A.2d at 143 (Bell, J., dissenting).
80. Id. at 445, 605 A.2d at 142 (Bell, J., dissenting). The court, however, did not give a detailed analysis of the element of causation, thus failing to give practitioners much guidance. In this respect, Minor is an unusual case of reckless endangerment. There is no question that causation may be interpreted quite broadly under the statute; it requires analysis of the surrounding circumstances. The only other case of reckless endangerment that required the free-willed participation of the victim was Commonwealth v. Penn Valley Resorts, Inc., 494 A.2d 1139 (Pa. Super. 1985). In that case, Penn Valley’s president, aware of the victim’s inebriated condition, grabbed the keys from the
In his dissent, Judge Bell chided the majority for overlooking the issue of causation, and accused the court of defining "creation of risk" too broadly. In his view, Minor's actions did not, by themselves, endanger his brother. Indeed, he argued, the risk of injury was created solely by the independent actions of the victim. As such, Judge Bell believed that the actions of the defendant were too remote to subject him to punishment under the statute.

Judge Bell, however, apparently disregarded the surrounding circumstances in this case. While it is true that handing a loaded gun to another adult is not necessarily dangerous, the preceding conversation and the intoxication of the victim change the picture dramatically. When Minor handed the shotgun to his brother despite their conversation, he created a situation whereby harm was reasonably foreseeable. Had Minor not handed the gun to his brother and had he dropped the subject of Russian Roulette, it seems highly unlikely that the victim would have gotten up, taken the gun, and committed suicide.

4. Conclusion.—In its first interpretation of the reckless endangerment statute, the Court of Appeals held that the recklessness of a defendant's conduct should be evaluated objectively and that the subjective intent of a defendant is irrelevant. It thus applied the more appropriate standard to achieve the statute's public policy goal. Society's interest in deterring unnecessary risks should not depend on how dangerous a particular defendant considers her conduct to be. The Minor court further clarified that if a defendant appears to have recklessly disregarded a risk—whether by her own actions or by encouraging someone else in circumstances where harm is likely to occur—she will be held accountable.

ANDREW W. BAGLEY
B. Refining the Common Law of Accessory After the Fact

In *State v. Hawkins*, the Court of Appeals determined the appropriate remedy when a trial court's erroneous instructions led a jury to return two mutually exclusive convictions for which a defendant was subsequently sentenced. The common law dictated that a defendant could not be guilty as both a principal and an accessory after the fact for the same substantive offense. In light of this principle, the Court of Appeals vacated Hawkins's accessory-after-the-fact conviction and affirmed his murder conviction. In so doing, the court decided that Maryland common law would no longer retain the principle that an accessory-after-the-fact conviction is irreconcilably inconsistent with a conviction for the substantive offense. The *Hawkins* court sought to prevent a defendant from walking away "unscathed" if the conviction for the substantive crime was overturned on appeal. The court concluded that society's interest in preventing such an outcome justified the change in the law.

Nevertheless, *Hawkins* expressed concern with the possibility of disproportionately punishing individual defendants. The court believed that it would be unfair to punish more severely than other involved parties a defendant who assisted his accomplices in evading justice if that conduct was part of the overall criminal transaction. Accordingly, the *Hawkins* court concluded that although a guilty verdict for an accessory-after-the-fact count may stand with a guilty verdict for the substantive offense, a separate sentence may not be imposed on the accessory conviction unless the defendant's conviction for the principal crime is reversed on appeal. Such a sentencing procedure appropriately balances society's interest in punishing reprehensible behavior with defendants' interests in receiving sentences that are not disproportionate to their culpability.

87. See id. at 279, 604 A.2d at 494.
89. *Hawkins*, 326 Md. at 291, 604 A.2d at 500.
90. Id. at 295, 604 A.2d at 502.
91. See id.
92. See id. at 294, 604 A.2d at 501.
93. Id.
94. Id.
95. Id. at 295, 604 A.2d at 502.
1. The Case.—On January 20, 1989, Dana Hawkins and three others checked into a motel room in Joppa, Maryland.\textsuperscript{96} The group spent the night engaging in drug use and sexual activities.\textsuperscript{97} On the following day, one of the four, Dell Noble, was found strangled to death.\textsuperscript{98} Hawkins was subsequently charged both as a principal and an accessory after the fact to that homicide.\textsuperscript{99}

The trial court's instructions to the jury failed to direct the jury to ignore the charge of accessory after the fact if it found Hawkins guilty of murder.\textsuperscript{100} By returning guilty verdicts for both charges, the jury indicated that it was convinced that Hawkins aided and abetted in the commission of the murder,\textsuperscript{101} and that later she assisted in the disposal of evidence.\textsuperscript{102} Hawkins was sentenced concurrently to a term of life with all but fifteen years suspended for the murder conviction, and life with all but ten years suspended for accessoryship after the fact.\textsuperscript{103}

The Court of Special Appeals reversed the trial court's judgment,\textsuperscript{104} concluding that convictions for murder and accessory after the fact were irreconcilable and could not stand together.\textsuperscript{105} Therefore, the court vacated the convictions on both counts and remanded for a new trial.\textsuperscript{106} At the State's request, the Court of

\begin{itemize}
\item \textsuperscript{96} Petitioner/Cross-Respondent's Brief at 3, \textit{Hawkins} (No. 82).
\item \textsuperscript{98} \textit{Id}.
\item \textsuperscript{99} \textit{Id}.
\item \textsuperscript{100} Hawkins, 326 Md. at 289, 604 A.2d at 499. The trial court's instruction to the jury regarding the elements of the offense was identical to the instruction suggested by the Maryland State Bar. \textit{Id} at 287, 604 A.2d at 498.
\item \textsuperscript{101} Hawkins was convicted of felony-murder in the first degree. \textit{Id} at 273, 604 A.2d at 491. When a felony is jointly committed, each felon is liable for those deaths caused by the other felons that were a natural and probable consequence of the crime. \textit{See} 2 \textit{LAFAVE \\& SCOTT, supra} note 59, § 7.5(c). This follows from applying the coconspirator rule to the felony-murder situation. Under this rule, all conspirators are liable for the foreseeable offenses committed by other members of the conspiracy. \textit{See} People v. Friedman, 205 N.Y. 161 (1912).
\item \textsuperscript{102} An accessory after the fact is one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment. \textit{Hawkins}, 326 Md. at 281, 604 A.2d at 495.
\item \textsuperscript{103} \textit{Id} at 273, 604 A.2d at 491. Aside from the question of inconsistent verdicts, the trial court clearly imposed an illegal sentence on the accessoryship conviction. The maximum penalty for accessory after the fact is five years incarceration. Osborne v. State, 304 Md. 323, 337, 499 A.2d 170, 177 (1985). The life sentence imposed by the court, therefore, would have fallen regardless of the court's decision on inconsistency.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} \textit{Id}.
\end{itemize}
Appeals granted a writ of certiorari to review the intermediate appellate court’s determination.\textsuperscript{107}

2. \textit{Legal Background}.—At common law, as well as under present Maryland law, a person can be guilty of a felony in four capacities: as a principal in the first degree, a principal in the second degree, an accessory before the fact, or an accessory after the fact.\textsuperscript{108} An accessory after the fact “is one who, with knowledge of the other’s guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment.”\textsuperscript{109} Maryland is one of the few states that has retained the common law doctrine of accessory after the fact in virtually the same form it existed in the eighteenth century.\textsuperscript{110}

It is generally recognized that three elements must be found for an alleged wrongdoer to qualify as an accessory after the fact.\textsuperscript{111} First, a felony must have been committed prior to the accessory-ship.\textsuperscript{112} Second, the accessory must be aware of the commission of the felony.\textsuperscript{113} And third, the accessory must personally act so as to help or assist the felon in avoiding apprehension, detection, or arrest for the crime.\textsuperscript{114} Commentators have suggested the presence of a fourth requirement—the accessory may not be a principal in either degree in the commission of the felony.\textsuperscript{115}

The Court of Appeals recognized this fourth element in \textit{Shep-}

\textsuperscript{107} \textit{Hawkins}, 326 Md. at 274, 604 A.2d at 492. Hawkins filed a cross petition alleging that a mistrial should have been declared after two officers testifying for the State uttered the word “polygraph.” \textit{Id}. at 274, 604 A.2d at 491. The court held that the use of the word did not require a mistrial for two reasons. First, the witnesses’ use of that word was inadvertent and without nefarious intent. \textit{Id}. at 277, 604 A.2d at 493. Second, neither witness stated that Hawkins had taken a polygraph test or had expressed her willingness or unwillingness to do so. \textit{Id}. at 278, 604 A.2d at 492. Accordingly, the court upheld the trial court’s determination that Hawkins suffered no prejudice. \textit{Id}. at 279, 604 A.2d at 494.

\textsuperscript{110} \textit{See 4 William Blackstone, Commentaries *37 (“An accessory after a fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists a felon.”).}
\textsuperscript{111} \textit{See LaFave & Scott, supra note 59, § 66.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{See Rollin M. Perkins & Ronald N. Boyce, Criminal Law 748-49 (3d ed. 1982); Richard Gilbert & Charles Moylan, Jr., Maryland Criminal Law: Practice and Procedure § 21.4-2 (1983).}
pard v. State" and Osborne v. State. Additionally, even Maryland authority that does not expressly recognize this element does not claim that a person may be both a principal and an accessory after the fact for the same felony. Although the Maryland courts have never offered a rationale for this rule, other jurisdictions have reasoned that the intent required to be an accessory and the intent required to be a principal are mutually exclusive.

In People v. Prado, a California Court of Appeal explained the prohibition against convicting a defendant of both a substantive crime and accessoryship after the fact to that crime. The court stated:

[W]hen an accused is convicted [as an accessory]... which necessarily requires that a principal have committed a specific completed felony and that he knowingly aided that principal with intent that the principal escape arrest, he cannot be convicted as a principal in that completed felony. His state of mind—the intent required to be an accessory after the fact—excludes that intent and state of mind required to be a principal. The requisite intent to be a principal in a robbery is to permanently deprive the owner of his property. Thus, this is a totally different and distinct state of mind from that of the accused whose intent is to aid the robber to escape. These are mutually exclusive states of mind and give rise to mutually exclusive offenses.

The Michigan Court of Appeals reached a similar conclusion in People v. Hartford. The Hartford court reasoned that an accessory after the fact decides to assist the principal only after the felony has been committed. Accordingly, because it is impossible for one involved as a principal not to have known of the crime until after its completion, the intent to commit the substantive felony and the accessoryship after the fact to that felony are mutually exclusive.
Courts have embraced this rule because allowing principals to be convicted and sentenced as accessories after the fact could lead to illogical results. For example, a defendant who actually committed a murder by pulling the trigger could receive a punishment less severe than an accomplice who provided the gun and destroyed it after the murder.\(^{125}\) Such an outcome is possible in jurisdictions that have abolished the distinction between accessories before the fact and principals.\(^{126}\) In such states, both defendants could be convicted and receive the same sentence for the murder. Additionally, the defendant who destroyed the gun could be convicted and sentenced on the accessory-after-the-fact charge. Moreover, in virtually every jurisdiction, the culpability of an accessory after the fact is considered to be substantially different from that of a principal.\(^{127}\) This may reflect an intent to punish as accessories after the fact only those persons who have had no part in causing the felony itself.\(^{128}\)

The justification for the modern treatment of accessoryship after the fact also parallels the common-law justification for not excepting accessories after the fact from the benefit of clergy.\(^{129}\) As noted by William Blackstone, accessoryship after the fact “is always an offense of a different species of guilt, principally tending to evade the public justice.”\(^{130}\) In a discussion of the modern treatment of accessoryship after the fact, Professors LaFave and Scott wrote:

> This development whereby the accessory after the fact is dealt with in a distinct way is a most appropriate one and does not conflict at all with the modern tendency to abolish the distinctions between principals in the first degree, prin-
cipals in the second degree, and accessories before the fact. The latter three types of offenders have all played a part in the commission of the crime and are quite appropriately held accountable for its commission. The accessory after the fact, on the other hand, had no part in causing the crime; his offense is instead that of interfering with the processes of justice and is best dealt with in those terms.  

This conceptual distinction between accessories after the fact and other offenders further supports the view that the crime of accessory after the fact should reach only those defendants who have not participated in the substantive felony, but instead have obstructed justice. The Hawkins court, however, determined that neither the mutually-exclusive-intent argument nor the culpability argument prevented it from revising the common law and establishing that an accessory after the fact may be a principal in the substantive offense.

3. *The Court's Reasoning; Analysis.*—In Hawkins, the Court of Appeals characterized the rule that one cannot be convicted as both a principal and an accessory after the fact to the same crime as a "troublesome element" of the common law. Accordingly, the court removed from the accessoryship offense the common-law requirement that an accessory after the fact not be a principal in the substantive offense. The court was unmoved by the various concerns expressed regarding the mutually exclusive intents involved in committing a substantive crime and participating in later evasion of justice.

Logically, it is possible for a person to harbor the intents to commit both crimes. Knowledge of, and participation in, a substantive felony does not preclude a person from harboring the intent to assist a fellow perpetrator in avoiding apprehension; the absence of the accessory after the fact during the commission of the substantive crime need not be required. Moreover, the court emphasized that the evidence in a particular case could support guilty verdicts for both crimes.

131. LaFave & Scott, supra note 59, at 524.
133. Id.
134. Id.
135. Id. at 294, 604 A.2d at 501.
136. Id.
137. Id. at 285, 604 A.2d at 497.
The court illustrated its disagreement with the common-law requirement with the following scenario:

John Doe is charged with the commission of a felony and with being an accessory after the fact to that felony. The jury determines that he is guilty of the substantive felony. . . . [I]t does not return a verdict on the accessory offense.138 On appeal, the appellate court, called upon to review the sufficiency of the evidence, finds that it was insufficient to sustain the conviction, and reverses the judgment for that reason. The problem is that if there is no verdict on the accessory after the fact charge, the appellate court cannot simply remand for sentencing.139

To prevent such an outcome, the Hawkins court abrogated the common-law prohibition against allowing principals to be convicted as accessories after the fact to the same crime.140

The court recognized, however, that although this change in the common law furthered society's interest in preventing wrongdoers from escaping punishment, "at the same time [it] impinges adversely on a defendant's entitlement to justice."141 The court declared as "a matter of public policy in accord with fundamental fairness"142 that the penalty for the accessoryship conviction can be imposed only if the judgment entered on the conviction of the substantive felony is reversed on appeal.143 Under these circumstances, the case may be remanded to the trial court for sentencing on the accessory-after-the-fact charge.144

The court found support for its prohibition on separate sentences in the doctrine of merger, "under which the imposition of separate sentences is ordinarily barred when a conviction of one offense merges . . . into the conviction of another offense."145 Of-
fenses typically merge when each crime requires proof of facts common to both. The crime of accessory after the fact, however, is separate and distinct from any substantive offense. It shares no common facts with a substantive offense and therefore cannot merge with such an offense. Both situations, however, share the attribute that absent an expressed prohibition, a defendant could be sentenced inordinately for involvement in a single criminal event. As the court indicated, in both cases, fundamental fairness dictates that a sentence should be imposed only for the more serious of the interconnected crimes.

4. Conclusion.—In Hawkins, the Court of Appeals remedied what it regarded as a flaw in the common law of accessoryship by abolishing the doctrine that an accessory after the fact may not be a principal in the same substantive crime. Henceforth, it will no longer be possible for a defendant to walk away “unscathed” if his conviction as a principal is reversed on appeal. The sentencing procedure implemented by the court strikes the appropriate balance between society’s interest in punishing reprehensible behavior and the defendant’s right to fundamental fairness.

JEFFREY M. GILLERAN

C. The Absence of Double Jeopardy in Multiple Convictions for Procuring a Single Act of Arson

In Richmond v. State, the Court of Appeals found no violation of the Double Jeopardy Clause of the Fifth Amendment for convicting and sentencing a defendant for three counts of procuring arson when a fire set in one apartment spread and burned three units in the same building. The court determined that each apartment was a separate “dwelling house” for purposes of Maryland’s arson

both—unless each crime requires proof of facts that the other does not. This means that usually there can be no conviction for both a greater offense and a lesser one. Id.

146. See M. Cherif Bassiouuni, Substantive Criminal Law 505 (1978) (“Whether the material element, mental element, or both, constitute a portion of the same element required for another crime and the proof of these elements arise from identical circumstances which would prove either of the two offenses, the offense requiring the lesser degree or amount of proof or elements will be deemed included in the one requiring the most and will merge therewith.”)


149. Id. at 269, 604 A.2d at 489. The Fifth Amendment provides, in pertinent part: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V.
Therefore, each apartment that burned constituted a separate offense and merited its own sentence, even though only one fire was set.\textsuperscript{151} The court further concluded that setting a fire with reckless and wanton intent disregard for the consequences satisfied the willful and malicious intent requirement of the arson statute.\textsuperscript{152} Accordingly, Richmond did not have to actually intend to burn each apartment for the convictions to stand.\textsuperscript{153}

The \textit{Richmond} court's decision is consistent with both Maryland law and arson's common-law origins, which hold that the perpetrator of a burning is responsible for "the natural and probable consequences of his voluntary acts."\textsuperscript{154} \textit{Richmond} also comports with Maryland decisions involving other criminal offenses in which the prosecution is based on the number of victims rather than the entire criminal transaction.\textsuperscript{155} Such a rule prevents individuals who injure or endanger multiple victims from escaping punishment commensurate with their heightened degree of culpability.\textsuperscript{156}

\textbf{1. The Case.—}On February 5, 1987, a fire broke out at an apartment building in Temple Hills.\textsuperscript{157} At 3:00 a.m., Martha Gobert, a tenant in the building, awoke to the sound of breaking glass.\textsuperscript{158} Gobert realized that her curtains were on fire and alerted her neighbors.\textsuperscript{159} The fire spread, burning two adjacent apartments.\textsuperscript{160}

\begin{itemize}
  \item \textsuperscript{150} Richmond, 326 Md. at 265, 604 A.2d at 487. The arson statute provides: [a]ny person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself, or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not more than thirty years. Md. ANN. CODE art. 27, § 6 (1992).
  \item \textsuperscript{151} Richmond, 326 Md. at 269, 604 A.2d at 489.
  \item \textsuperscript{152} Id. at 268, 604 A.2d at 489.
  \item \textsuperscript{153} See id.
  \item \textsuperscript{155} See, e.g., Brown v. State, 311 Md. 426, 436, 535 A.2d 485, 490 (1988) (finding a defendant, guilty of terrorizing a number of people with a handgun, to be more culpable than a defendant who terrorizes only one victim).
  \item \textsuperscript{156} See Richmond, 326 Md. at 268, 604 A.2d at 489; Brown, 311 Md. at 436, 535 A.2d at 490.
  \item \textsuperscript{157} Richmond, 326 Md. at 259, 604 A.2d at 484.
  \item \textsuperscript{158} Brief and Appendix of Appellee at 2, Richmond (No. 91-59).
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Richmond, 326 Md. at 259, 604 A.2d at 484.
\end{itemize}
Subsequent investigation revealed that Guy Richmond, Gobert's former coworker, had enlisted three people to set fire to her apartment. Richmond's act was in retaliation for a work-related incident in which complaints by Gobert had led to Richmond's suspension. At a bench trial in the Circuit Court for Prince George's County, Richmond was convicted of three separate counts of procuring the burning of the dwelling place of another. The trial court sentenced Richmond to fifteen years of imprisonment on each count, all terms to run consecutively.

Richmond appealed to the Court of Special Appeals on various grounds, but failed to assert a double jeopardy claim. The appellate court affirmed the convictions and sentences in an unreported opinion. Richmond subsequently requested post-conviction relief based on his contention that his lawyer's failure to assert a double jeopardy claim denied him effective assistance of counsel. Before argument was heard by the Court of Special Appeals, however, the Court of Appeals granted a writ of certiorari on its own motion in order to determine the double jeopardy issue. After a full consideration, all three convictions and sentences were affirmed.

2. Legal Background.—

a. Arson.—(1) The Common Law.—At common law, arson was defined as the willful and malicious burning of the dwelling house of another. The mens rea requirement was satisfied if the fire was set with reckless and wanton disregard for the consequences. In addition, it was presumed that a person intended the natural and prob-
The common-law requirement that the burning be of a dwelling house has been held to signify that arson is a crime against habitation rather than property. Residency was the primary factor used to determine whether a structure was a dwelling.

(2) **Maryland Law.**—Maryland followed the common-law definition in its codification of arson. By legislative act in 1809, the common-law offense of arson was to carry a punishment of death or twenty years in prison. In 1904, the legislature added to the common-law offense of arson the burning of one's own dwelling with intent to injure or defraud. Finally, in 1929, the Maryland legislature codified the definition of arson that is currently in use. The arson statute expanded the common-law definition by increasing the list of property covered and making it an offense to procure, counsel, or aid a burning.

The term "dwelling house" is not defined by statute, and thus its common-law meaning has been used by Maryland courts. The Court of Special Appeals in *Poff v. State* held that the test for what constitutes a dwelling house is whether the place is used "regularly as a place to sleep." In applying this test in *Herbert v. State*, the court found that a single motel room could be a dwelling house. In *Jones v. State*, a burglary case, the Court of Special Appeals used the "place to sleep" test and determined that the use of a building for other purposes does not prevent it from being a dwell-

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174. *Id*.
178. *Act of 1929*, ch. 255, § 6, 1929 Md. Laws 773 provides:

Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years.

*Id*.
180. See *id*.
182. *Id* at 189, 241 A.2d at 900 (emphasis added).
184. *Id* at 52, 354 A.2d at 451.
ing house. In *Smith v. State*, the court further explained that "use of one part of the building as a dwelling gives the character of a dwelling house to the entire building if there is internal communication between the part used for dwelling purposes and the part used for other purposes." 

b. Double Jeopardy.—The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This provision protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. The last of these protections was at issue in *Richmond*.

The prohibition against multiple punishments may become a consideration when different statutes punish the same conduct, or when one statute provides for multiple "units of prosecution" for the "same criminal transaction." The Court of Appeals in *Randall Book Corp. v. State* determined that in the latter situation, any conflict that arises should be resolved by examining the legislative intent. Thus, the court held that in a statute prohibiting the display of obscene material, "the legislature intended the unit of prosecution to be each separate magazine, film, book, or other similar item."

The multiple-punishment problem also arose in *Smith v. State*. In *Smith*, the defendant burned a building in which part was used as a restaurant, and part was used as a dwelling. The State contended that because the building contained both a dwelling and a shop, two counts of arson were appropriate. Smith was subsequently charged with two counts of arson. The Court of Special

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186. Id. at 360 n.1, 234 A.2d at 627 n.1.
188. Id. at 115, 355 A.2d at 533.
191. Richmond, 326 Md. at 259, 604 A.2d at 484.
192. Randall Book Corp., 316 Md. at 324, 558 A.2d at 720.
194. Id. at 324, 558 A.2d at 720 ("The key, of course, is legislative intent.").
195. Id. at 328, 558 A.2d at 722.
197. Id. at 114, 355 A.2d at 532.
198. Id.
199. Id. at 113, 355 A.2d at 532.
Appeals held that the burning of both the shop and dwelling within a single building constituted only one offense because the separate areas were not separate dwellings. 200 Thus, the Smith court concluded that the defendant was "twice put in jeopardy" by two convictions for only one arson offense. 201

3. The Court's Reasoning.—In Richmond, the Court of Appeals recognized that if the arson statute did not provide for multiple convictions for one act of setting fire, then Richmond had been subject to double jeopardy. 202 To determine whether multiple convictions could stand, the court looked at the legislative intent behind the arson statute. 203 The court concluded that the unit of prosecution provided by the statute—a dwelling—would dictate whether multiple convictions were appropriate. 204 The court reasoned that the legislature had predominantly adopted the common-law definition of arson. 205 Applying a "commonsensical" analysis of the statutory language, the Court of Appeals concluded that the legislature intended that "any dwelling house" would constitute a unit of prosecution. 206

The court noted that "any dwelling house" was not defined by statute; 207 therefore, it was proper to consider the common-law meaning. 208 At common law, arson was an offense against habitation, rather than property. 209 That is, occupancy, not ownership, was the object of protection. 210 The Richmond court also noted Blackstone's exhortation that a tenant's dwelling was his property during his leasehold. 211

The dual applicability of the definition of "dwelling house" to the common-law offenses of both arson and burglary allowed the Richmond court to look to authority refined in the context of burglary cases. 212 For purposes of burglary, the court pointed out that Blackstone considered "[a] chamber in a college or an inn of court as the

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200. Id. at 115, 355 A.2d at 533.
201. Id. at 115-16, 355 A.2d at 533.
202. See Richmond, 326 Md. at 261, 604 A.2d at 485.
203. See id.
204. See id. at 264-65, 604 A.2d at 487.
205. Id. at 263, 604 A.2d at 486.
206. Id.
207. Id.
208. Id. at 263-64, 604 A.2d at 486.
209. Id. at 264, 604 A.2d at 487.
210. Id.
211. Id. at 487. See 4 BLACKSTONE, supra note 110, at *221-22.
212. See PERKINS & BOYCE, supra note 115, at 280.
'mansion-house of the owner.' Based on these common-law tenets, the court concluded that each apartment was a separate dwelling.

The *Richmond* court further explained that its interpretation was consistent with both the wording of the statute and related case law in Maryland. Relying on *Brown v. State*, the court noted the significance of the word "any" before "dwelling house." *Brown* involved a statute that prohibited the use of a handgun during a crime of violence. The question in *Brown* was whether the statute allowed multiple convictions when several victims were shot in the course of a robbery. The statute prohibited the use of a handgun "in the commission of *any* felony or *any* crime of violence." The *Brown* court interpreted "any" to mean "every," and concluded that multiple convictions could stand. The *Richmond* court adopted this reasoning, holding that "any" meant "every dwelling house" burned.

In addition, the court rejected Richmond's contention that the *mens rea* required for arson was the intent to burn every apartment that caught fire. The court explained that "setting a fire with reckless and wanton disregard for the consequences satisfies the wilful and malicious requirement of [the arson statute]."

The court distinguished *Richmond* from *Smith*, where the Court of Special Appeals held that the use of one part of the building as a dwelling gives the entire building the character of a single dwelling. *Richmond* noted that in *Smith* there was internal communication between the part used as a dwelling and the part used as a restaurant. Moreover, the same person's interests were involved in both parts of the building. The apartments in *Rich-

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213. *Richmond*, 326 Md. at 266, 604 A.2d at 487 (quoting 4 *BLACKSTONE*, supra note 110, at *225*).
214. *Id.* at 265, 604 A.2d at 487.
215. *Id.*
217. *Richmond*, 326 Md. at 266, 604 A.2d at 487.
219. *Id.* at 430, 535 A.2d at 487.
220. *Id.* at 435, 535 A.2d at 489.
221. *Id.* at 435-36, 535 A.2d at 489-90.
222. *Richmond*, 326 Md. at 265, 604 A.2d at 487.
223. *Id.* at 267, 604 A.2d at 488.
224. *Id.* at 268, 604 A.2d at 489.
225. *Id.* at 266-67, 604 A.2d at 488. See supra notes 196-201 and accompanying text for a discussion of *Smith*.
227. *Id.*
mond, in contrast, were separate units inhabited by different tenants. Therefore, "each apartment burning was a separate offense of arson," and the three convictions and sentences did not violate the Double Jeopardy Clause.

4. Analysis.—The Court of Appeals's decision in Richmond is consistent with Maryland law and supports the notion that criminal punishment should be commensurate with culpability. Maryland cases have consistently held that the different property units enumerated in the burglary and arson statutes may be housed in the same building. It would have been highly contradictory for the court to allow motel rooms housed in the same building to constitute separate dwellings for burglary purposes, but then hold that multiple apartment units in a building qualify as only a single dwelling for a charge of arson. It may be argued that burglary requires separate actions of breaking for each dwelling, and is, therefore, distinguishable from Richmond's single act of procuring arson. This distinction, however, is overcome by the fact that the mens rea requirement for arson—wilful and malicious burning—takes into account the natural consequences that may stem from a single action, thereby satisfying the intent element of each offense.

Richmond also reflects the gravity with which arson has traditionally been viewed by the legislature. The first codified sentence for

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228. Id.
229. Id. at 269, 604 A.2d at 489. Additionally, the Richmond court noted that the rule of lenity, which would dictate ruling in favor of the defendant in the light of any ambiguity, did not apply. Id. The court reiterated that it was clear that the legislature intended the unit of prosecution to be each dwelling burned. Id. Therefore, no ambiguity existed, and the rule of lenity could not be invoked. Id.
231. See Herbert v. State, 51 Md. App. 48, 52, 354 A.2d 449, 451 (1976) ("Not every room of a multiple unit 'dwelling house' need be classified as a dwelling. . . . But, having proven one room of the motel to be a dwelling house, the State may not then designate another room a storehouse without further proof."); Jones v. State, 2 Md. App. 356, 234 A.2d 625 (1967) (holding that part of a building constitutes a dwelling even though the other part is a club); cf. Bane v. State, 327 Md. 305, 316, 609 A.2d 313, 319 (1992) ("The subsequent breaking and entering and theft of other apartments within the house, although done in succession, would each constitute a separate offense.") (quoting Ingram v. State, 224 S.E.2d 527, 529 (Ga. App. 1976)).
232. See supra text accompanying notes 181-184.
233. See Jones, 2 Md. App. at 359, 234 A.2d at 627 (noting that proof of a breaking is an essential element in the crime of burglary).
arson in Maryland was twenty years in the penitentiary or death. Presently, the maximum punishment for arson is thirty years. As the Richmond decision confirms, it is unlikely that the legislature intended to limit the punishment for the burning of an indefinite number of apartments to thirty years when burning a single home at one time was a capital offense.

If the court had ruled that an entire apartment building constituted only one dwelling for purposes of the arson statute, absurd results could follow. An individual could burn down a building containing hundreds of units, harming hundreds of separate families, and receive the same punishment as someone who burns a single house. Deterrence would be greatly reduced, allowing the would-be arsonist to disregard the lives and property of the other residents in a multi-unit apartment building. Furthermore, by looking closely at the unit of prosecution, the Court of Appeals has prevented criminals from using the “one criminal transaction” argument to abuse the Double Jeopardy Clause protections.

5. Conclusion.—The Richmond court held that convicting a defendant of a separate count of arson for each apartment burned in a single building by a single fire does not violate the Double Jeopardy Clause. The Court of Appeals determined that each apartment in a building constitutes a separate dwelling house for purposes of Maryland's arson statute. This ruling comports with both common-law and Maryland precedent. Richmond is also in accord with the notion that punishment should be commensurate with criminal responsibility and the seriousness of the crime.

MELISSA L. MENKEL

D. The Intent Requirement for First Degree Murder

In State v. Raines, the Court of Appeals addressed two distinct issues involving the requirement of "intent to kill" in first degree murder cases. First, the court expanded the rule that allows the trier of fact to infer intent when the defendant directed a deadly
weapon at a vital part of the victim's body. In so doing, the court relaxed the evidentiary burden required to establish an intent to kill, and blurred the distinction between "depraved heart" second degree murder and first degree murder.

Second, the Court of Appeals reaffirmed that individualized mens rea was required to establish accomplice liability for first degree murder. In order to convict a defendant as a principal in the second degree for a murder not committed in furtherance of another felony, the State must still prove that he knowingly aided or manifested approval of the crime. This may be accomplished by the mere presence of the party at the scene of the crime, if for the purpose of assisting or encouraging the perpetrator. In the case of first degree murder, an accomplice must possess, or at least be aware of, the perpetrator's intent to kill. In the aftermath of Raines, mere knowledge of an impending criminal act, without knowledge of a specific intent to kill, will not suffice to establish accomplice liability in cases of first degree murder.

1. The Case.—On the morning of January 7, 1990, Lawrence Bentley borrowed his father's pistol and joined his friend, Ronald Raines. After drinking beer together at several bars, the pair decided to take a drive. Raines, the passenger, grabbed the pistol and fired at a passing automobile. In addition, Raines fired shots into the house of an acquaintance, and through the window of a

242. Id. at 592, 606 A.2d at 269-70 (concluding that evidence of a shattered window supported the trial judge's findings that Raines deliberately aimed and fired a pistol at the victim's head).

243. Second degree murder is defined as "the killing of another person without legal justification, excuse, or mitigation, and with either the intent to kill or the intent to inflict grievous bodily harm. Unlike first degree murder, second degree murder does not require premeditation or deliberation." Banks v. State, 92 Md. App. 422, 439, 608 A.2d 1249, 1257 (1992) (citations omitted).

By contrast, "'Depraved heart' murder does not require any specific intent to kill or injure ...." Robinson v. State, 307 Md. 738, 743, 517 A.2d 94, 96 (1986). Rather, it "involves ... the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not." Id. at 744, 517 A.2d at 97.

244. See Raines, 326 Md. at 594-99, 606 A.2d at 271-73.

245. Id. at 599, 606 A.2d at 273.

246. Id. at 596, 606 A.2d at 271.

247. Id.

248. Id. at 585, 606 A.2d at 266.

249. Id.

250. Id.; Joint Record Abstract at E13, Raines (No. 103) (reprinting the unreported opinion of the Court of Special Appeals).
Later in the evening, while passing a tractor-trailer on the highway, Raines announced his intention to shoot at the truck’s tires. Raines then fired the pistol, and the bullet shattered the truck driver’s window, striking Cynthia Southern in the head. She died shortly thereafter.

Raines was later arrested, and after having denied traveling on the highway the evening of the shooting, admitted, “I lied. I shot the driver. I know I did it, but I don’t remember doing it.” In interviews with the police, Raines said that Bentley had given him the pistol. He recalled pointing the gun upward, intending to shoot both the tires and the top of the truck. A detective who had investigated the scene of the crime, however, noted that none of the tires were deflated.

The other defendant, Bentley, offered slightly conflicting testimony after his arrest. Bentley said that he had taken the pistol from Raines at one of the bars and placed it in his truck. Raines, however, found the gun and shortly thereafter announced his intention to shoot the tractor-trailer’s tires. Bentley said, further, that after hearing shots and seeing the tractor-trailer pull off to the side of the road, he had wanted to stop. According to Bentley, Raines first said, “[N]o, ‘[i]t just went through the glass and through the cab.’” Later, Bentley testified that he had lied in his initial account; that in fact, Raines had said that he shot between two trucks.

Raines and Bentley were tried without a jury in the Circuit Court for Baltimore County. Both defendants were convicted of

251. Raines, 326 Md. at 585, 606 A.2d at 266.
252. Id.
253. Id. at 585-86, 606 A.2d at 266. It was stipulated that the bullet that killed Cynthia Southern was fired from Raines’s gun. Id. at 586, 606 A.2d at 266.
254. Id. at 585, 606 A.2d at 266.
255. Id. at 586, 606 A.2d at 266.
256. Id., 606 A.2d at 266-67.
257. Id., 606 A.2d at 267.
258. Id., 606 A.2d at 266.
259. Id., 606 A.2d at 267.
260. Id. at 586-87, 606 A.2d at 267.
261. Id. at 587, 606 A.2d at 267.
262. Id.
263. Id.
264. Id. at 584, 587, 606 A.2d at 266-67.
first degree murder and the use of a handgun in the commission of a crime of violence. Raines was convicted as a principal in the first degree and Bentley as a principal in the second degree. The trial judge found that Raines had directed the pistol at the tractor-trailer window intentionally, deliberately, and with premeditation. He also found that Bentley was a participant in the murder and could be convicted as a principal in the second degree, even without prior knowledge that Raines was going to shoot at the tractor-trailer window.

The Court of Special Appeals reversed both first degree murder convictions, holding that there was insufficient evidence to prove intent to kill. The court believed that the facts in Raines paralleled a classic example of depraved heart killing—the shooting of a rifle into a passing passenger train or automobile. Thus, the court concluded that sufficient evidence was adduced at trial to support a conviction of "depraved heart" second degree murder, and ordered entry of guilty verdicts to second degree murder for both defendants.

The Court of Appeals granted a writ of certiorari and affirmed in part and reversed in part. The court held that there was sufficient physical evidence adduced at trial to conclude that Raines deliberately aimed the pistol at the victim's window. Because an intent to kill may be inferred when a deadly weapon is directed at a vital body part, the court further concluded that the trial judge's

265. First degree murder is defined as "[a]ll murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing. . . ." Md. Ann. Code, art. 27, § 407 (1992).
266. Raines, 326 Md. at 587, 606 A.2d at 267.
267. Id.
268. Id. at 587, 606 A.2d at 267. In an oral opinion, the trial judge said,
   Now, in this case, I don't just have his statement that he rolled the window down and he put the gun out and shot. I have the physical evidence as to where he shot by where the bullet ended up.
   Clearly, he aimed right at the driver's window, and he aimed in the driver's window in such a way that he was bound to hit the driver of the vehicle, from the position where the bullet entered the victim's neck behind her left ear.
   Id. at 587-88, 606 A.2d at 267 (quoting the trial judge) (emphasis added).
269. Id. at 587, 606 A.2d at 267.
270. See id. at 588, 606 A.2d at 267 (referring to the Court of Special Appeals's unreported opinion).
271. Id. at 592, 606 A.2d at 269-70. See Gilbert & Moylan, supra note 115, § 1.6-3, at 21.
272. See Raines, 326 Md. at 588, 606 A.2d at 267-68.
273. See id.
274. Id. at 599, 606 A.2d at 273.
275. Id. at 589-90, 592, 606 A.2d at 268-70.
finding that Raines had deliberately aimed at the victim was not "clearly erroneous." 276 With respect to Bentley, the court held that the evidence failed to establish an intent to kill, or even a belief that his companion possessed such an intent. 277 The court did, however, affirm Bentley's second degree murder conviction. 278

3. Legal Background.—

a. First and Second Degree Murder.—Although Maryland divides murder into two statutory degrees, it retains the common-law definition of the crime as "the unlawful killing of a human being with malice aforethought." 279 In order to convict a defendant of murder in either degree, the State must establish one of four culpable states of mind: intent to kill; intent to inflict grievous bodily harm; intent to commit the underlying crime in a felony-murder; or a reckless indifference to the value of human life, also known as a "depraved heart." 280 When the State establishes that a felonious homicide was committed with malice, it is presumed to be murder in the second degree. 281 Conduct that evinces "depraved heart" recklessness will suffice to establish second degree murder. 282 In Robinson v. State, 283 however, the Court of Appeals explained that "depraved heart" murder must be based on a general recklessness, and not recklessness directed at any particular person. 284

In order for a homicide to be elevated to first degree murder, the State must establish that it was "wilful, deliberate, and premeditated." 285 In Tichnell v. State, 286 the Court of Appeals defined "wil-

276. Id. at 593, 606 A.2d at 270. 277. Id. at 599, 606 A.2d at 273. 278. Id.
279. See, e.g., Chisley v. State, 202 Md. 87, 104, 95 A.2d 577, 585 (1953). See also Perkins & Boyce, supra note 115, at 57-60.
281. See Chisley, 202 Md. at 104-05, 95 A.2d at 585. Malice is defined in this context as "the intentional doing of a wrongful act to another without legal excuse or justification." Id. at 105, 95 A.2d at 585.
282. See Cirincione v. State, 75 Md. App. 166, 171-72, 540 A.2d 1151, 1154 (1988). See generally Perkins & Boyce, supra note 115, at 59-60 (discussing one who shoots into an occupied train or automobile regardless of the consequences). Depraved heart culpability can be characterized as "the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not." Robinson, 307 Md. at 744, 517 A.2d at 97.
284. Id. at 743, 517 A.2d at 97.
286. 287 Md. 695, 415 A.2d 830 (1980).
ful" as a specific purpose and intent to kill.\textsuperscript{287} To be "deliberate," moreover, "there must be a full and conscious knowledge of the purpose to kill."\textsuperscript{288} For the act to be "premeditated," "the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate."\textsuperscript{289}

In Smith v. State,\textsuperscript{290} the Court of Special Appeals explained that when legally sufficient evidence exists to establish an intent to kill, it is also sufficient to establish that such intent was wilful, deliberate and premeditated.\textsuperscript{291} In other words, adequate proof of intent to kill may alone establish the \textit{mens rea} of first degree murder.\textsuperscript{292}

\hspace{1cm} b. \textit{Inferring Intent to Kill}.—Because intent is subjective, it may be inferred from the established facts of the case.\textsuperscript{293} The trier of fact may examine the defendant's acts, conduct, and words,\textsuperscript{294} as well as the circumstances surrounding the crime.\textsuperscript{295} For example, the conscious selection and use of a deadly weapon is a circumstance that reflects a design to kill.\textsuperscript{296}

Because the law presumes that an individual intends the "natural and probable consequences" of his or her conduct, Maryland has long recognized that intent to kill may be inferred from the use of a deadly weapon directed at a vital body part.\textsuperscript{297} On its face, it is unclear whether the words "directed at" require evidence to show that

\textsuperscript{287} Id. at 717-18, 415 A.2d at 842.
\textsuperscript{288} Id. at 717, 415 A.2d at 842.
\textsuperscript{289} Id. at 717-18, 415 A.2d at 842.
\textsuperscript{290} 41 Md. App. 277, 398 A.2d 426 (1979).
\textsuperscript{291} Id. at 283, 398 A.2d at 431.
\textsuperscript{292} Id.
\textsuperscript{293} See Davis v. State, 204 Md. 44, 51-52, 102 A.2d 816, 819-20 (1954).
\textsuperscript{294} Taylor v. State, 238 Md. 424, 433, 209 A.2d 595, 600 (1965).
\textsuperscript{296} See Davis, 204 Md. at 51-52, 102 A.2d at 819-20.
\textsuperscript{297} See id. at 51, 102 A.2d at 819; State v. Jenkins, 307 Md. 501, 504, 515 A.2d 465, 466 (1986) (upholding a conviction for assault with intent to murder where the intent was inferred from a gunshot to the hip); Tichnell v. State, 287 Md. 695, 719, 415 A.2d 830, 843 (1980) (holding that the jury could have inferred intent to kill from gunshots to the back of the victim's head and elsewhere); Taylor, 238 Md. at 433, 209 A.2d at 600 (finding that an intent to kill was properly inferred from a gunshot to the chest); Chisley v. State, 202 Md. 87, 108-09, 95 A.2d 577, 586-87 (1953) (finding that an intent to kill was properly inferred from gunshots to the head and abdomen); Smith v. State, 41 Md. App. 277, 281, 398 A.2d 426, 430 (1979) (holding that intent to kill was properly inferred from a shotgun blast to chest). \textit{See also} Earp, 319 Md. at 167, 571 A.2d at 1233 (ruling that the trial judge's inference—that the defendant intended to inflict serious bodily harm by knifing the victim in the back—was not sufficient to support a conviction for second degree murder); but see Davis, 204 Md. at 52, 102 A.2d at 820 (finding that, from a gunshot that grazed the victim's chest and other evidence, the jury could have reasonably inferred either an intent to kill or merely an intent to maim).
the weapon was purposefully aimed at its target, or if they refer merely to the positioning and use of the weapon, even when the act of aiming is a disputed question of fact.

Although the manner in which the inference is applied is left exclusively to the trier of fact, the cases suggest that other relevant evidence is taken into account to determine whether the weapon was purposefully directed toward a vital part of the victim's body. Such evidence tended to reveal whether the attack arose from a provocation or conflict, and whether the weapon appeared to have been deliberately aimed. In such cases, it is a small inferential step for a trier of fact to conclude that the defendant possessed an intent to kill.

c. Standard of Review.—The degree to which witnesses and other evidence are credited, and whether such evidence gives rise to an inference of an intent to kill, are questions that fall exclusively within the province of the trier of fact. On appellate review, the test used to determine the sufficiency of evidence is “whether the evidence shows directly or supports a rational inference of the facts to be proved.” In Jackson v. Virginia, the Supreme Court held that the relevant question was not whether the reviewing court would have reached the same conclusion as the trial court. Rather, the inquiry should focus on “whether, after viewing the evidence in the light most favorable to the prosecution, any rational inference of guilt as to the defendant could be drawn from the evidence.”

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298. See, e.g., Earp, 319 Md. at 159-60, 165, 571 A.2d at 1229, 1292-33 (describing a stabbing that occurred during a fist fight and after the defendant told the victim that he would “take a piece of [him]”); Ferrell v. State, 304 Md. 679, 682, 500 A.2d 1050, 1052 (1985) (describing a shooting that followed a drug-related dispute); Smith, 41 Md. App. at 279, 398 A.2d at 429 (describing a shooting that occurred after the victim kidded the defendant about “being so ugly that his wife could not be blamed for divorcing him”).

299. See, e.g., Davis, 204 Md. 52, 102 A.2d at 820-21.

300. See, e.g., Ferrell, 304 Md. at 682, 500 A.2d at 1052 (describing the defendant as having aimed the pistol with both hands before firing); Earp, 319 Md. at 160, 571 A.2d at 1229 (“[The victim] felt a punch in his back, and looking over his shoulder saw a knife handle protruding from his back. He felt the knife being pulled down and saw it being withdrawn. [The defendant] then lunged at [the victim] a second time.”). But see Davis, 204 Md. 52, 102 A.2d at 820 (noting that, though the bullet grazed the victim in the chest, a jury could have found that the defendant aimed at the ground in an attempt to frighten the victim away).

301. See Raines, 326 Md. at 590-91, 606 A.2d at 268-69; McMillian v. State, 325 Md. 272, 290, 600 A.2d 430, 439 (1992); Taylor, 238 Md. at 433, 209 A.2d at 600 (“[T]he determination of an accused’s intention is, in the first instance, for the trial judge, when sitting without a jury. . .”).


304. Id. at 318-19.
trier of fact could have found the essential elements of the crime beyond a reasonable doubt."\textsuperscript{305} In Maryland, the Court of Appeals explicitly recognized the \textit{Jackson} standard in \textit{McMillian v. State}.\textsuperscript{306} Consequently, on review, a trial court's judgment should not be set aside unless "clearly erroneous."\textsuperscript{307}

A conviction based upon circumstantial evidence alone is only proper when the circumstances cannot be reconciled with "any reasonable hypothesis of innocence."\textsuperscript{308} In \textit{West v. State},\textsuperscript{309} the Court of Appeals explained that "'[i]f the circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion that would mitigate his guilt.'"\textsuperscript{310} Like other findings of fact, however, the trial court's assessment of alternative hypotheses should not be reversed unless clearly erroneous.\textsuperscript{311}

d. Accomplice Liability.—An accomplice is defined as one who "knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime either as principal or as accessory before the fact."\textsuperscript{312} Accomplice liability attaches to one who does not perform the \textit{actus reus} of a crime, but who nonetheless shares responsibility for either the planned criminal act or acts incidental to the principal offense.\textsuperscript{313} If incidental to the principal offense, the prosecution must establish that the act was committed in furtherance of, or escaping from, that offense.\textsuperscript{314}

A principal in the second degree, as distinguished from an accessory before the fact, must be either actually or constructively present at the moment the criminal act was committed and aid, counsel, command, or encourage another to commit a crime.\textsuperscript{315} In order to establish that a defendant "aided, counseled, commanded

\textsuperscript{305} \textit{Id.} at 319.
\textsuperscript{308} \textit{Id.} at 211-12, 539 A.2d at 238.
\textsuperscript{309} 312 Md. 197, 539 A.2d 231 (1988).
\textsuperscript{310} \textit{Id.} at 211, 539 A.2d at 237 (quoting People v. Galho, 112 N.E. 1041, 1044 (N.Y. 1916)).
\textsuperscript{311} \textit{Id.} at 207, 539 A.2d at 236 ("[M]indful that in reviewing this matter the judgment of the circuit court will not be set aside on the evidence unless clearly erroneous[,] . . . we must consider whether the inference that West was the purse snatcher is adequately supported by the evidence.").
\textsuperscript{314} \textit{Id.} at 123, 538 A.2d at 775.
\textsuperscript{315} \textit{See} \textit{State v. Hawkins}, 326 Md. 270, 280-81, 604 A.2d 489, 495 (1992); \textit{see} \textit{PERKINS \\& BOYCE, supra} note 115, at 722-45.
or encouraged” the principal offender, the State must prove that the
defendant either contributed actual aid or manifested approval in
such a way that it “operated on the mind of the perpetrator.”

With respect to cases where the crime committed was incidental
to another, the Court of Appeals held in Sheppard v. State
that two
or more defendants who participate in a criminal act are not only
liable for the underlying offense, but also for any other crimes that
are committed in furtherance of the original act. In such cases, a
principal in the second degree need not harbor any intent to kill.
In Sheppard, for example, the defendant and several companions
committed armed robbery. Although Sheppard was already in
police custody when his companions shot at police officers during
their escape, the court held that he could still be found guilty of
assault with intent to murder.

In instances where the crime charged is unrelated to an under-
lying offense, the Court of Appeals concluded that a principal in the
second degree must either possess the requisite intent, or manifest
approval of the criminal act. A party who is merely standing by at
the scene of the crime will be held to be a principal in the second
degree if he or she is there for the purpose of aiding or encouraging
the perpetrator. In cases where no actual aid is contributed, an
accomplice’s approval or encouragement must “operate[] on the
mind of the perpetrator.” Conversely, even a party who contrib-
utes actual aid cannot be convicted as an accomplice without mens
rea. Thus, accomplice liability will not attach to a bystander who
neither knows nor has reason to know of the perpetrator’s intent to
kill. In Watson v. State, the defendant was accused of drowning
a newborn infant in a tub of water. The murder was witnessed by

318. Id. at 121-22, 538 A.2d at 774.
319. See id. at 121-23, 538 A.2d at 774-75.
320. Id. at 120-21, 538 A.2d at 774.
321. Id. at 121, 538 A.2d at 774.
322. See Watson v. State, 208 Md. 210, 219, 117 A.2d 549, 553 (1955) (holding that
one who merely witnesses a crime and makes no objection is not liable as an accom-
plice); Pope v. State, 284 Md. 309, 332, 396 A.2d 1054, 1068 (1979) (holding that crimi-
nal intent is necessary to be guilty as a principal in the second degree).
323. Pope, 284 Md. at 332, 396 A.2d at 1068 (1979).
324. Id. at 331, 396 A.2d at 1068.
325. Id. at 332, 396 A.2d at 1068.
326. Id.
327. 208 Md. 210, 117 A.2d 549 (1955).
328. Id. at 213-15, 117 A.2d at 550-51.
a neighbor, who was summoned to assist in the childbirth.\textsuperscript{329} Watson accused the neighbor of being an accomplice to the murder,\textsuperscript{330} as she failed to object or notify the police.\textsuperscript{331}

Because the defendant could not be convicted by the uncorroborated testimony of an accomplice, the \textit{Watson} court addressed the issue of the neighbor’s criminal liability.\textsuperscript{332} The court concluded that she could not be held accountable as an accomplice, reasoning that “[t]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime.”\textsuperscript{333} The court could find no evidence that the neighbor had intended to aid or encourage the murder, and concluded that she could not be liable as an accomplice.\textsuperscript{334}

More recently, the Court of Appeals in \textit{Pope v. State}\textsuperscript{335} similarly concluded that to be guilty as a principal in the second degree of an offense unrelated to any other, the accused must either possess the requisite criminal intent, or have knowledge that the perpetrator harbored such an intent.\textsuperscript{336} In \textit{Pope}, a mother and her child had been the house-guests of the defendant for three days.\textsuperscript{337} Over the course of that time, Pope observed the mother grow mentally unstable.\textsuperscript{338} In the last of several delusional episodes, the mother became convinced that her son was possessed by the devil, and proceeded to brutally beat him to death.\textsuperscript{339}

Pope did nothing to intervene, and later lied to the police about the incident.\textsuperscript{340} Quoting Professor Rollin Perkins, the court explained that “it is the abettor’s state of mind rather than the state of mind of the perpetrator which determines the abettor’s guilt or innocence.”\textsuperscript{341} The court then concluded that Pope neither aided,

\textsuperscript{329} \textit{Id.} at 214, 117 A.2d at 550.
\textsuperscript{330} \textit{Id.} at 216, 117 A.2d at 552.
\textsuperscript{331} \textit{Id.} at 219, 117 A.2d at 553.
\textsuperscript{332} \textit{Id.} at 217-20, 117 A.2d at 552-54.
\textsuperscript{333} \textit{Id.} at 219, 117 A.2d at 553.
\textsuperscript{334} \textit{Id.} at 219-20, 117 A.2d at 553.
\textsuperscript{335} 284 Md. 309, 396 A.2d 1054 (1979).
\textsuperscript{336} \textit{Id.} at 332, 396 A.2d at 1068.
\textsuperscript{337} \textit{Id.} at 313-15, 396 A.2d at 1058-59.
\textsuperscript{338} \textit{See id.}
\textsuperscript{339} \textit{Id.} at 315, 396 A.2d at 1059.
\textsuperscript{340} \textit{See id.} at 315-16, 396 A.2d at 1059-60.
\textsuperscript{341} \textit{Id.} at 332, 396 A.2d at 1068 (quoting \textit{ROLLIN M. PERKINS, CRIMINAL LAW} 662 (2d ed. 1969)).
counseled, commanded, nor encouraged the mother. Rather, she simply "witnessed a terrible event."

In sum, the State is relieved of its burden to establish the accomplice's intent to kill when the crime was committed in furtherance of another underlying offense. When the crime was committed independent of any other, however, the State's burden to establish either an intent to kill or knowledge that the perpetrator possessed such an intent remains.

3. The Court's Reasoning.—Writing for the Court of Appeals, Judge Karwacki concluded that the trial court's finding that Raines had intentionally and deliberately aimed the pistol at the victim was not "clearly erroneous." Emphasizing the trial court's exclusive right to assess the credibility of witnesses, the court held that there was sufficient evidence to find that Raines aimed the pistol at the victim's window. As a result, the trial court was free to avail itself of the "well established" rule that "intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body."

The court distinguished the facts in Raines from the Court of Special Appeals's example of "depraved heart" murder. It explained that when one shoots in the general direction of a passing car or passenger train, it is uncertain whether a person will be in the path of the bullet. By contrast, Raines knew that someone was behind the driver's window and, by aiming at the window, the court could infer that he fired the gun with an intent to kill. The Court of Special Appeals, consequently, was ordered to affirm Raines's initial conviction of first degree murder.

With respect to Bentley, the Court of Appeals held that he could not be a principal in the second degree unless he possessed the requisite criminal intent. The court determined that there was no evidence from which the trial court could conclude that Bentley harbored an intent to kill or even a belief that his compan-

342. Id.
343. Id. at 332-33, 396 A.2d at 1068.
344. See id. at 331-32, 396 A.2d at 1068.
345. Raines, 326 Md. at 593, 606 A.2d at 270.
346. Id. at 592-93, 606 A.2d at 269-70.
347. Id. at 591, 606 A.2d at 269.
348. See id. at 592, 606 A.2d at 269-70.
349. Id.
350. Id. at 592-93, 606 A.2d at 270.
351. Id. at 599, 606 A.2d at 273.
352. Id.
ion had such an intent. Because the Court of Special Appeals concluded that Bentley's knowledge and actions revealed a "depraved heart" state of mind, and because that determination was not challenged by Bentley, the Court of Appeals affirmed his conviction of second degree murder.

4. Analysis.—

a. Expanding the Inference of Intent to Kill.—In Raines, the Court of Appeals first addressed the question of whether the evidence adduced at trial was sufficient to establish Raines's intent to kill. Barring clearly erroneous findings of fact, the court reaffirmed the trial court's exclusive right to draw reasonable inferences from established facts. More importantly, it significantly expanded the rule that an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the body.

Although Maryland courts have applied this inference in numerous cases to establish intent for the crimes of first degree murder and assault with intent to murder, apparently none have relied upon it to decide a case in which the victim was unknown to the defendant or otherwise chosen at random. In prior cases, the facts have disclosed some connection between the defendant and the victim. As a result, it was a small inferential step for the court

353. Id.
354. Id.
355. See id. at 588-89, 606 A.2d at 268.
356. Id. at 591, 606 A.2d at 269.
357. See, e.g., Glenn v. State, 68 Md. App. 379, 411, 511 A.2d 1110, 1127 (1986) (finding, in an assault-with-intent-to-murder case, that the requisite intent to kill "may be inferred from the directing of a dangerous weapon at a vital part of the human anatomy").
358. See, e.g., Tichnell v. State, 287 Md. 695, 701, 415 A.2d 830, 834 (1980) (inferring an intent to kill where the defendant shot a deputy sheriff seven times after being caught breaking into a surplus store); Smith v. State, 41 Md. App. 277, 278-79, 398 A.2d 426, 428 (inferring an intent to kill where the defendant shot the victim in the chest with a shotgun after the victim mocked him about his wife leaving him); Brooks v. State, 38 Md. App. 550, 551, 381 A.2d 718, 720 (1978) (inferring an intent to kill where, after a scuffle, the defendant went to his car, retrieved his shotgun, and twice shot at the victim while he was attempting to run away); Jones v. State, 37 Md. App. 511, 515-16, 378 A.2d 9, 11-12 (1977) (inferring an intent to kill where the defendant stabbed his "girlfriend" six times after being heard saying, "Get up bitch, get up bitch, or I will kill you."); Evans v. State, 28 Md. App. 640, 646, 349 A.2d 300, 307 (1975) (inferring an intent to kill where the defendant stabbed the victim several times after a "pattern of angry and violent confrontations"); Johnson v. State, 18 Md. App. 541, 542-43, 308 A.2d 404, 405 (1973) (inferring an intent to kill where the defendant stabbed the victim three times in the abdomen after the victim attempted to stop an assault against his mother in her bedroom); Coit v. State, 7 Md. App. 70, 71, 253 A.2d 526, 527 (1969) (inferring an
to conclude, considering all of the circumstances, that the defendant intended to kill the victim.

The defendant in *Raines*, however, selected Cynthia Southern's truck at random. 359 This fact does not preclude the possibility that Raines intended to kill an unknown victim. However, because the trial court's inquiry into Raines's intentions was limited to scant physical evidence and statements made by Raines and Bentley about intending to shoot the tires and the top of the truck, 360 the trial court was compelled to expand the scope of the inference to an unprecedented extent.

The Court of Special Appeals had reversed Raines's conviction of first degree murder on the grounds that "movement of the target, poor marksmanship, and alcohol . . . [could] all explain the bullet's final resting place." 361 The Court of Appeals, however, rejected this assertion by referring to the established rule that "under proper circumstances, an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body." 362 The court then proceeded to draw analogies to *Smith v. State* 363 and *Ferrell v. State*. 364 In *Smith*, an inference of an intent to kill was drawn from the defendant's having fired a sawed-off shotgun at point-blank range into the victim's chest. 365 In *Ferrell*, the same inference was drawn from the fact that the defendant aimed a gun in dim light and shot both victims above the torso. 366 Similarly, the *Raines* court reasoned that Raines directed his gun at the driver's window, and from that the trial judge could reasonably find that he had aimed at the driver. 367

intent to kill where the defendant slashed the victim about the head and face with a straight razor during a bar fight.

359. *Raines*, 326 Md. at 585, 606 A.2d at 266 (describing the defendant passing the victim's tractor-trailer while routinely driving on the highway); Joint Record Abstract at E7, *Raines* (No. 103) (reprinting the trial judge's oral opinion that "when you shoot at the driver's window, you know somebody is behind the driver's window, even with the reflection in the glass at night, [even though] you can't see exactly who it is" (emphasis added)); id. at E14 (reprinting the unpublished opinion of the Court of Special Appeals, which described the defendants' selection of a victim as merely, "[t]hey spotted a tractor trailer on the Beltway travelling in the same direction").

360. See *Raines*, 326 Md. at 587-88, 606 A.2d at 267.
361. Id. at 590, 606 A.2d at 268.
362. Id. at 591, 606 A.2d at 269.
365. See *Smith*, 41 Md. App. at 281, 398 A.2d at 430.
366. See *Ferrell*, 304 Md. at 684, 500 A.2d at 1053.
It is important to note, however, that the rule permitting the inference of an intent to kill presumes that the weapon was purposefully directed toward its target.\footnote{368} In a feat of circular reasoning, the Court of Appeals explained that the bullet had shattered the driver's window because Raines had aimed his pistol.\footnote{369} That Raines had aimed his pistol was established by the fact that the bullet had shattered the driver's window.\footnote{370} The court used similar reasoning to distinguish the facts in Raines from the Court of Special Appeals's example of a "depraved heart" murder.\footnote{371} The fact that Raines "deliberately" aimed at the window negated the "general recklessness" required for "depraved heart" murder,\footnote{372} but this too was established only by the path of the bullet.\footnote{373}

The cases that the Court of Appeals relied upon are clearly distinguishable from Raines. In Smith, the defendant fired a shotgun point-blank at a man who had earlier mocked him.\footnote{374} In Ferrell, the defendant aimed a pistol with both hands, shooting one victim between the eyes and another in the neck.\footnote{375} From the circumstances of these cases, it was a small inferential step to conclude that the shots were deliberately aimed at the victims. In Raines, by contrast, there were no other facts that rationally connected the defendant to the particular victim.\footnote{376}

By concluding that the State failed to meet its evidentiary burden of proving intent, the Court of Special Appeals unquestionably substituted its findings of fact for those of the trial court.\footnote{377} Because the original finding was not clearly erroneous, the Court of Appeals was correct in its ultimate conclusion. Nevertheless, by relying on Smith and Ferrell, the Raines court considerably expanded the scope of the rule that an intent to kill may be inferred by the use

\begin{footnotes}
\footnote{368} See id. at 592-93, 606 A.2d at 270 ("Raines's actions in directing the gun at the window . . . permitted an inference that Raines shot the gun with the intent to kill.").
\footnote{369} Id. at 592, 606 A.2d at 269 ("This evidence supported the trial court's finding that Raines aimed and fired the pistol at the victim's head.").
\footnote{370} Id. at 592-93, 606 A.2d at 270.
\footnote{371} See id.
\footnote{372} See Robinson v. State, 307 Md. 738, 743, 517 A.2d 94, 97 (1986) ("[D]epraved heart' murder must be based on general recklessness . . . not directed at any particular person.").
\footnote{373} See Raines, 326 Md. at 592-93, 606 A.2d at 269-70 (explaining that the evidence of the window shattering on the driver's side of the truck supported the finding that Raines aimed and fired the pistol at the driver's head).
\footnote{375} Ferrell v. State, 304 Md. 679, 682, 500 A.2d 1050, 1052 (1985).
\footnote{376} See Raines, 326 Md. at 599, 606 A.2d at 273.
\footnote{377} See id. at 590-91, 606 A.2d at 273.
\end{footnotes}
of a deadly weapon aimed at a vital body part.\textsuperscript{378} In its decision, the court ignored the trial judge's finding that by "[a]iming at the tires on this size truck, there is no way you could possibly misfire and blow out the driver's window of the vehicle."\textsuperscript{379} This statement reflected a consideration of facts beyond those necessary to infer an intent to kill from the use of a deadly weapon directed at a vital part of the victim's body. Had the Court of Appeals availed itself of this statement in its reasoning, it could have limited the scope of its holding.

The impact of this decision may be far-reaching. As random acts of violence occur with increasing frequency,\textsuperscript{380} so too will the question of whether defendants deliberately aimed deadly weapons at particular victims. In the aftermath of \textit{Raines}, a trier of fact could conceivably draw an inference of an intent to kill based solely on the eventual path of the bullet. Now, in a case in which a gunman shot at a moving train and killed a passenger at random, a trier of fact could infer a specific intent to kill that individual passenger merely because the bullet passed from the gun, through the train, and into the victim.

As a practical result, the Court of Appeals has diminished the State's burden of proving an intent to kill beyond a reasonable doubt in cases of random shootings. In so doing, the court has elevated what otherwise would be a second degree "depraved heart" killing to first degree murder.

\textit{b. Clarifying the Intent Requirement for Principals in the Second Degree.}—In \textit{Raines}, the Court of Appeals also addressed the question of whether, at a minimum, a principal in the second degree must be aware of the perpetrator's intent to kill to be convicted of first degree murder.\textsuperscript{381} The court definitively ruled that for Bentley to be convicted as a principal in the second degree to first degree murder, he must either have harbored an intent to kill or known that Raines harbored such specific intent.\textsuperscript{382}

On appeal, the State asserted that Bentley's conduct should be

\textsuperscript{378} \textit{Id.} at 592, 606 A.2d at 268-69.
\textsuperscript{379} Joint Record Abstract at E7, \textit{Raines} (No. 103).
\textsuperscript{381} \textit{Raines}, 326 Md. at 594, 599, 606 A.2d at 271, 273.
\textsuperscript{382} \textit{Id.} at 599, 606 A.2d at 273.
viewed within the legal framework enunciated in *Sheppard v. State*, arguing that Bentley had aided in the underlying offense of shooting at the truck. Further, it maintained that because the actual killing was committed pursuant to the original design, the existence of Bentley's intent to kill was irrelevant. This had been the view of the trial judge, who stated that Bentley could be convicted as a principal in the second degree "provided he is a participant in the act, and in fact, he can be convicted whether he knew the Defendant, Ronald Raines, was going to shoot at the window or not." The Court of Appeals refused to accept *Sheppard* as applicable, however, explaining that nothing in the record supported a finding that Raines shot the victim in furtherance of another criminal act that the two had jointly undertaken. Consequently, the *Raines* court was left with the question of whether to view Bentley's conduct within the established rule of *Watson* and *Pope*, or to expand *Sheppard*'s scope to include offenses that were not committed in furtherance of any other crime.

Although irresponsible, the defendants in *Watson* and *Pope* were essentially bystanders who failed to intervene in the criminal conduct of another. Similarly, Bentley failed to object to or report Raines's previous shootings, prevent Raines from retaking his pistol

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383. 312 Md. 118, 538 A.2d 773 (1988); see Brief of Petitioner at 17-18, *Raines* (No. 103) (arguing that the murder of Southern was committed pursuant to an underlying offense, namely the contemplated action of shooting at the truck). *Sheppard* held that two or more defendants who participate in a criminal act are not only liable for the underlying offense, but for any other crimes that are committed in furtherance of, or escape from, the original act. *Sheppard*, 312 Md. at 123, 538 A.2d at 775.

384. Brief of Petitioner at 17, *Raines* (No. 103). The State did not, however, specify whether the contemplated action of shooting at the truck alone amounted to felony. If the State contemplated the crime of assault with intent to murder, see Md. Ann. Code art. 27, § 12 (1991), one necessary element would be specific intent to kill. See *Glenn v. State*, 68 Md. App. 379, 388, 511 A.2d 1110, 1115 (1986). This, of course, would lead the court back to the initial inquiry of whether Bentley "intended" to kill the victim.

385. "The intended murder of Southern was done in pursuance of the contemplated action of shooting at the tractor trailer, and therefore, Bentley is equally responsible with Raines for first degree murder, even if Bentley did not personally have the intent to kill." Brief of Petitioner at 17, *Raines* (No. 103).

386. See *Raines*, 326 Md. at 593, 606 A.2d at 269-70.

387. Id. at 599, 606 A.2d at 273.

388. See *supra* notes 322-344 and accompanying text.

389. See *supra* notes 317-321 and accompanying text.

390. See *Watson v. State*, 208 Md. 210, 219, 117 A.2d 549, 553 (1955) ("[T]he fact that a person witnesses a crime and makes no objection to its commission and does not notify the police does not make him an accomplice."); *Pope v. State*, 284 Md. 309, 332-33, 396 A.2d 1054, 1068 (1979) (determining that Pope "neither actually aided the mother in the acts of abuse nor did she counsel, command or encourage her," but merely that "Pope 'witnessed a terrible event'").
from the truck, or react to Raines's announced intention to shoot at
the truck's tires. Moreover, like the defendant in *Pope*, Bentley
not only failed to notify the police, but lied when asked about the
murder.

The key element that distinguishes *Watson* and *Pope* from *Shep-
pard* is not the defendant's place in the chain of causation. Rather, it
is the absence of an underlying criminal design. In *Sheppard*, the
defendant and two others committed armed robbery, and the aggra-
vated assault was committed in furtherance of that crime. Removal of the intent requirement in such cases is justified only
because the incidental crime is a foreseeable consequence of the
pre-existing criminal design. The Court of Appeals correctly re-
 fused to invent such a design purely for the purpose of relieving the
State of its burden of proving intent.

Although he was exonerated of deliberately "aiding" the crime,
Bentley nevertheless took affirmative steps that made the crime pos-
sible. It was Bentley who supplied the gun, and it was he who main-
tained a steady speed and direction in the moments preceding
Cynthia Southern's murder. While the State could neither estab-
lish Bentley's purpose to kill or knowledge of Raines's intent, Bent-
ley's actions were inextricably linked in the chain of causation to
Southern's death. Nevertheless, the court correctly held that an
act, regardless of its causal connection to an offense, will not be-
come criminal if committed without *mens rea*.

In the final analysis, *Raines* upholds the principal that even clear
"[a]id or encouragement to another who is actually perpetrating a
felony will not make the aider or encourager guilty of the crime if it
is rendered without *mens rea*." To require less than intent to kill

392. *Id.* at 587, 606 A.2d at 267. *See Pope*, 284 Md. at 316, 396 A.2d at 1060.
393. *See Raines*, 326 Md. at 598, 606 A.2d at 272.
395. *See Raines*, 326 Md. at 598, 606 A.2d at 272 ("Because the assaults were deter-

396. *See id.* at 599, 606 A.2d at 273.
397. *Id.* at 587, 606 A.2d at 267 (explaining that Bentley continued to pass the tractor-

398. *See id.*
399. *Id.* at 596, 606 A.2d at 271-72.

**PERKINS, supra note 341, at 662-63.**
would potentially transform bystanders, blameworthy though they may be, into murderers.

5. Conclusion.—In Raines, the Court of Appeals made two important rulings affecting the intent required for first degree murder. First, the court expanded the rule that intent to kill may be inferred by the use of a deadly weapon directed at a vital part of the victim’s body. By permitting such an inference to be drawn from the path of the bullet alone, the court diluted the intent requirement for first degree murder. In so doing, it blurred the line between first degree murder and “depraved heart” second degree murder.

Second, the court clarified the *mens rea* required to convict a principal in the second degree of first degree murder. In the aftermath of Raines, a defendant must be shown to have either possessed an intent to kill, or at least had knowledge that the perpetrator harbored such an intent. The court correctly refused to invent an underlying crime purely to eliminate the State’s burden of establishing the *mens rea* of first degree murder.

MICHAEL J. YEAGER
IV. CRIMINAL PROCEDURE

A. Attorney-Client Privilege and Fee Arrangement Information

In re Criminal Investigation No. 1/242Q\(^1\) presented the Court of Appeals with the question of whether fee arrangement information is protected from a grand jury subpoena by the attorney-client privilege.\(^2\) The court denied protection in light of the "overwhelming weight of authority" in the federal courts requiring attorneys to disclose their clients' payment records in similar situations.\(^3\) The Maryland Rules of Professional Conduct governing attorney-client confidentiality\(^4\) were ruled inapplicable because the rule of confidentiality does not apply when evidence is sought from an attorney through compulsion of law.\(^5\) Furthermore, the court determined that fee information is not protected by either the Fifth Amendment's self-incrimination clause\(^6\) or the Sixth Amendment's right to counsel.\(^7\)

In his dissent, Judge Bell acknowledged that the court's opinion was well supported in the federal circuits, but raised several policy-based concerns.\(^8\) Judge Bell argued that the majority failed to consider the original purpose of the attorney-client privilege.\(^9\) He maintained that requiring attorneys to become, in effect, chief witnesses against their own clients would have a detrimental, chilling effect on the attorney-client relationship.\(^10\)

2. Id. at 6, 602 A.2d at 1222.
3. See id. at 7, 602 A.2d at 1222.
5. See Criminal Investigation No. 1/242Q, 326 Md. at 4-5, 602 A.2d at 1221-22. See MD. R. PROF. CONDUCT 1.6(b)(4) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to comply with these Rules, a court order or other law.").
6. See Criminal Investigation No. 1/242Q, 326 Md. at 12, 602 A.2d at 1225. The Fifth Amendment states in relevant part that "[n]o . . . person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.
7. See Criminal Investigation No. 1/242Q, 326 Md. at 12-13, 602 A.2d at 1225-26. The Sixth Amendment states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.
8. See Criminal Investigation No. 1/242Q, 326 Md. at 15, 602 A.2d at 1227 (Bell, J., dissenting).
9. See id. at 15-16, 602 A.2d at 1226-27 (Bell, J., dissenting).
10. See id. at 17-24, 602 A.2d at 1228-31 (Bell, J., dissenting). The dissent warned ominously that "this decision may be the beginning of the demise of the attorney-client
1. The Case.—In 1990, the Maryland Attorney General's office undertook a "net worth" investigation of known and suspected drug dealers in an attempt to curb violations of state income tax laws.\(^\text{11}\) Investigators sought to demonstrate the existence of unreported income from narcotics profits by recording large expenditures of money.\(^\text{12}\) One such expenditure was frequently attorneys' fees.

On December 3, 1990, the grand jury for Anne Arundel County issued a subpoena duces tecum to attorney William Murphy, Jr., demanding fee payment records regarding legal services rendered to two of his former clients.\(^\text{13}\) Murphy filed a motion to quash the subpoena, arguing that the information was protected by attorney-client confidentiality and privilege.\(^\text{14}\)

The Circuit Court for Anne Arundel County acknowledged that the attorney-client privilege does not generally protect fee information,\(^\text{15}\) but it interpreted the Maryland Rules of Professional Conduct as having "enlarged the general principle of confidentiality" in Maryland.\(^\text{16}\) Consequently, the court granted the motion to quash.\(^\text{17}\) The State, representing the grand jury, appealed the trial court's ruling.\(^\text{18}\) Prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari.\(^\text{19}\)

2. Legal Background.—

a. The Baird Exceptions.—Baird v. Koerner,\(^\text{20}\) decided by the Ninth Circuit in 1960, is often acknowledged to be the seminal federal opinion on the applicability of the attorney-client privilege to client identity and fee information.\(^\text{21}\) Alva Baird was a tax lawyer with a number of clients who had understated their income to the Internal Revenue Service (IRS).\(^\text{22}\) After reviewing the situation, Baird forwarded the owed amount to the IRS—without disclosing relationship and, hence, privilege in this State.” \textit{Id.} at 23, 602 A.2d at 1231 (Bell, J., dissenting).

\(^{11}\) See \textit{id.} at 3, 602 A.2d at 1221.
\(^{12}\) See \textit{id.}
\(^{13}\) \textit{id.}
\(^{14}\) \textit{id.}
\(^{15}\) \textit{id.} at 3-4, 602 A.2d at 1221.
\(^{16}\) \textit{id.} at 4, 602 A.2d at 1221.
\(^{17}\) See \textit{id.} at 3-4, 602 A.2d at 1221.
\(^{18}\) \textit{id.} at 4, 602 A.2d at 1221.
\(^{19}\) \textit{id.}
\(^{20}\) 279 F.2d 623 (9th Cir. 1960).
\(^{22}\) \textit{Baird}, 279 F.2d at 626.
the names of the taxpayers. In response, the IRS issued a subpoena requiring Baird to reveal his clients' identities. Baird refused, claiming that the information was privileged. The trial court held Baird in contempt for failure to disclose the identities. The Ninth Circuit, however, upheld Baird's objection to the subpoena.

Courts have interpreted Baird as establishing as many as three distinct exceptions to the accepted principle that a client's identity and fee information are generally not protected by the attorney-client privilege. First, a lawyer may not disclose information that would lead to the incrimination of a client in the very crime for which the client sought legal advice. Second, information is privileged if it represents the "last link" in a chain of evidence that would incriminate a client. And finally, revealing fee information is barred if it would ultimately cause disclosure of the substance of a

23. See id.
24. See id. at 627.
25. See id.
26. Id.
27. Id. at 635.
28. See Goode, supra note 21, at 922.
29. See Baird, 279 F.2d at 633. See also In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 247 (2d Cir.) ("We consistently have held that, absent special circumstances, client identity and fee information are not privileged."). cert. denied, 475 U.S. 1108 (1986); United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984) ("It is well established that 'absent unusual circumstances the identity of the client does not come within the attorney-client privilege."); In re Grand Jury Subpoena (Under Seal), 774 F.2d 624, 628 (4th Cir. 1985) ("[T]he attorney-client privilege normally does not extend to the payment of attorney's fees and expenses."). cert. denied, 475 U.S. 1108 (1986); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982) ("We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged."); In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983) ("The federal forum is unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege."); cert. denied, 467 U.S. 1246 (1984); In re Witnesses Before Special March 1980 Grand Jury, 729 F.2d 489, 491 (7th Cir. 1984) ("The general rule is well established that information regarding a client's fees is not protected by the attorney-client privilege because the payment of fees is not a confidential communication between the attorney and client."); Tornay v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988) ("We have said repeatedly . . . that fee information generally is not privileged."); In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1488 (10th Cir. 1990) ("It is well recognized in every circuit, including our own, that the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney-client privilege."); In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1044 (11th Cir. 1990) ("[T]his circuit has consistently held that information concerning payment of attorney's fees is not generally privileged.").
30. See, e.g., United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).
31. See, e.g., Pavlick, 680 F.2d at 1027.
"confidential communication" for which the client has a "legitimate expectation of privacy."

(1) Legal Advice.—The first of the "Baird exceptions" to the general rule of disclosure involves cases where the information sought would lead to implicating a client in the very matter for which he or she obtained legal advice. For example, in Tillotson v. Boughner, the trial court had found an attorney in contempt for refusing to disclose the identity of his client. The attorney had delivered a cashier's check to the IRS on behalf of his client, but had maintained that his client's identity was protected by attorney-client privilege. Acknowledging Baird, the Seventh Circuit agreed with the attorney, explaining that such a revelation "would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice" in that very case. Subsequent courts have made it clear, however, that the legal-advice exception is inapplicable when the privilege would allow on-going crime or fraud to continue, or when the information is subpoenaed as part of a separate investigation.

(2) Last Link.—The second Baird exception was "largely formulated by the Fifth Circuit" in United States v. Jones and In re Grand Jury Proceedings (Pavlick). In Jones, six attorneys were subpoenaed by a federal grand jury investigating possible income tax violations by persons recently convicted or arrested for marijuana

32. See, e.g., Anderson, 906 F.2d at 1491.
34. See Grand Jury Investigation No. 83-2-35, 723 F.2d at 452; Tillotson v. Boughner, 350 F.2d 663, 666 (7th Cir. 1965); In re Grand Jury Witness (Salas), 695 F.2d 359, 361 (9th Cir. 1982); In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach), 695 F.2d 363, 365 (9th Cir. 1982).
35. 350 F.2d 663 (7th Cir. 1965).
36. Id. at 664.
37. See id.
38. Id. at 666.
39. See In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 452 (6th Cir. 1983) ("[T]he legal advice exception may be defeated through a prima facie showing that the legal representation was secured in furtherance of present or intended continuing illegality....").
40. See In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1489 (10th Cir. 1990) (limiting the exception to cases in which "the client sought legal advice about the very activity for which the fee information is sought" (emphasis added)).
41. See id.
42. 517 F.2d 666 (5th Cir. 1975).
43. 680 F.2d 1026 (5th Cir. 1982).
The attorneys were all directed to disclose information regarding their clients, which, for the most part, they did. The attorneys, however, asserted attorney-client privilege and refused to furnish the identities of third parties who might have provided bond money, or paid attorneys' fees for the known clients. The court upheld the attorneys' claim because "so much of the substance of the communications [was] already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions."

According to Jones and Pavlick, the attorney-client privilege protects any information that represents the "last link"—or at least a "substantially probative link"—in a chain of incriminating evidence. Some courts have applied this last-link exception only to cases where the identity of the client is unknown. The last-link exception as interpreted by Jones and Pavlick, however, has been the object of extensive criticism in recent years, eventually being expressly rejected in at least two circuits, and implicitly in several others.

44. Jones, 517 F.2d at 668.
45. See id. at 669.
46. See id.
47. Id. at 674.
48. Pavlick, 680 F.2d at 1027.
49. Jones, 517 F.2d at 674.
50. Id. Jones included in this exception information other than "the client's verbal communication," which is "not normally privileged." Id.
51. See In re Slaughter, 694 F.2d 1258, 1259 (11th Cir. 1982) ("The present case clearly does not fall within the [last link] exception. . . . The identities of attorney and clients are already known by the grand jury."); Pavlick, 680 F.2d at 1027 (limiting the exception to cases involving "the disclosure of the client's identity by his attorney").
52. See, e.g., Goode, supra note 21, at 328-29.
53. See In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 453-54 (6th Cir. 1983) ("Upon careful consideration this Court concludes that, although language exists in Baird to support viability of Pavlick's 'last link' exception, the exception is simply not grounded upon the preservation of confidential communications and hence not justifiable to support the attorney-client privilege."); cert. denied, 467 U.S. 1246 (1984); In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1492 (10th Cir. 1990) ("We believe that the confidential communication exception represents a more disciplined interpretation of Baird than does the Fifth Circuit's last link exception. Thus, we reject the last link exception to the extent it has deviated from the holding of Baird.").
54. See Anderson, 906 F.2d at 1490. In In re Shargel, 742 F.2d 61 (2d Cir. 1984), the Second Circuit adhered to prior decisions recognizing that the purpose of the attorney-client privilege is to enable attorneys to provide informed legal advice by encouraging full disclosure by clients. Id. at 64. The court concluded that requiring attorneys to disclose the source of fees does not impair their ability to provide such advice, and denied protection to evidence indicating payment of one person's legal fees by another. Id. at 64-65. In United States v. Liebman, 742 F.2d 807 (9d Cir. 1984), the Third Circuit
(3) Confidential Communications.—The third exception, protection of confidential communications, is the "current favorite" in federal courts. Under this exception, any information that would lead to the disclosure of confidential communications between a client and his attorney is privileged. Recently, federal courts have tended to interpret Baird as establishing a single confidential-communications exception, thereby rejecting the legal-advice and last-link exceptions. Furthermore, the majority of courts today interpret the "confidential communications" exception narrowly, insist-
ing that only a disclosure regarding the subject matter of a client's problem is protected.59

b. Self-Incrimination and the Right to Counsel.—The Supreme Court has declined to construe the Fifth Amendment's self-incrimination protection broadly enough to include attorney-client privilege.60 The Court has made clear that the Fifth Amendment only protects against "compelled testimonial self-incrimination,"61 and cannot be invoked generally as a protection of "personal privacy."62 As noted by the Court in Fisher v. United States,63 requiring an attorney to produce general information about the attorney-client relationship "would not 'compel' the [client] to do anything—and certainly would not compel him to be a 'witness' against himself."64

The Supreme Court has also rejected the argument that forcing an attorney to disclose confidential information to a grand jury violates the client's Sixth Amendment right to counsel. Unless such a disclosure creates an "actual conflict"65 between the attorney and client after formal criminal proceedings have been initiated,66 several circuits have made it clear that the Sixth Amendment will not automatically prohibit grand jury testimony by the attorney.67 In

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59. See Goode, supra note 21, at 331 ("Narrower in scope than the last link and legal advice exceptions, the [confidential] communication exception produces an easy rejection of most privilege claims. Rarely do courts find that revelation of client identity or fee information is equivalent to discussing the substance of a confidential communication.").

60. See Fisher v. United States, 425 U.S. 391, 401 (1976) ("We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment."); United States v. Nobles, 422 U.S. 225, 233 n.7 (1975) ("The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not [to protect] private information.").

61. See Fisher, 425 U.S. at 399.

62. Id.


64. Id. at 397.

65. See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1130 (5th Cir. 1990) ("Only a showing of actual conflict, rather than mere speculative assertions, may overcome the concrete 'obligation of every person to appear and give his evidence before the grand jury.' ") (citing United States v. Dionisio, 410 U.S. 1, 9-10 (1973)), cert. denied, 111 S. Ct. 1581 (1991).


67. See, e.g., In re Grand Jury Matter (Special Grand Jury Narcotics) (Under Seal), 926 F.2d 348, 351 (4th Cir. 1991); In re Grand Jury Subpoena (Under Seal), 774 F.2d 624, 627-28 (4th Cir. 1985), cert. denied, 475 U.S. 1108 (1986); Reyes-Requena, 913 F.2d at 1130; In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1494 (10th Cir. 1990).
fact, the only time a circuit court has quashed a grand jury subpoena for fee arrangement information on Sixth Amendment grounds was in *In re Grand Jury Matters*, an unusual case in which the timing of the subpoenas suggested harassment as a primary motive.

3. The Court’s Reasoning; Analysis.—

a. Attorney-Client Confidentiality Versus Privilege.—Because the trial court erroneously based its decision on Rule 1.6 of the Maryland Rules of Professional Conduct, the Court of Appeals in *Criminal Investigation No. 1/242Q* first ruled that the general attorney-client confidentiality rule was not applicable in judicial proceedings. This finding is supported by the introductory statement in the Rules, which explains that “these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege.” The court found that the only applicable doctrine was the attorney-client privilege, which in Maryland is guaranteed by statute.

Supported by strong federal case law against protecting fee arrangement information, the Court of Appeals next ruled that such information is merely collateral to the fiduciary aspect of the attorney-client relationship. The court asserted that payment of a fee was a “normal and expected incident” of the attorney-client relationship. Thus, the court stated that fee disclosure “should not chill the attorney-client relationship significantly more than the act of requiring payment of the fee.” Despite the privilege’s vital and historic role in America’s legal system, the Court of Appeals declared that the attorney-client privilege is “not absolute.”
Judge Bell, however, insisted that the majority's ruling minimized the impact that fee information disclosure would likely have on the attorney-client relationship, and ignored the primary purpose of the attorney-client privilege, which is to increase communication between clients and lawyers. Judge Bell predicted that compelling attorneys to testify against their own clients would have a chilling effect on existing attorney-client relationships, as well as on potential clients seeking private counsel.

Several commentators have expressed concerns similar to those held by Judge Bell. Unfortunately, as one commentator noted, "the question whether leaving fee arrangements wholly unprotected would inevitably deter individuals from seeking legal counsel is not susceptible to empirical testing." The commentator argued, however, that:

few targets of grand jury investigations are likely to forego counsel simply out of fear that the prosecution will try to ascertain how much they are paying in legal fees. Even those who conclude that such information could be used as evidence of tax evasion or unexplained wealth indicative of other criminality are not likely to renounce legal counsel entirely. They may purchase less expensive legal advice and, in that sense, be deprived of counsel of their choice. But the [Sixth Amendment] right to counsel does not include the right to hire any lawyer at any price without

80. Id. at 20, 602 A.2d at 1229 (Bell, J., dissenting) ("Stress and strain on the attorney-client relationship undoubtedly will result."); see also In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946 (E.D. Pa. 1976) ("The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship."). Cf. Md. R. Prof. Conduct 1.6 (1992) cmt. ("[T]o the extent a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.").

81. See Criminal Investigation No. 1/242Q, 326 Md. at 17, 602 A.2d at 1228 (Bell, J., dissenting).

82. See id. at 18-19, 602 A.2d at 1228 (Bell, J., dissenting). See also Goode, supra note 21, at 314 ("In analyzing attorney-client privilege issues, therefore, courts must be sensitive not only to the effect of their decisions on the willingness of existing clients to confide in their lawyers but also on the willingness of potential clients to become clients.").

83. See Goode, supra note 21, at 349-55; Capra, supra note 58, at 237; Robert B. Ellis, Attorney Subpoenas: The Dilemma Over A Preliminary Showing Requirement, U. ILL. L. REV. 137, 139 (1991) (suggesting that attorney subpoenas "undermin[e] a client's confidence that information in the hands of an attorney is free from the grasp of the prosecutors").

84. Goode, supra note 21, at 349.
any risk. 85

It is perhaps true, as Judge Bell warned, that, "as instances of fee information being subpoenaed become more and more frequent, counsel will find it necessary to advise potential clients" at the outset that their fee arrangements might possibly be used against them in a future state investigation. 86 The dissent's warning, however, that "this decision may be the beginning of the demise of the attorney-client relationship," 87 appears somewhat overstated. 88

b. Baird Distinguished.—The party asserting a privilege naturally has the burden of proving its relevance. 89 In Criminal Investigation No. 1/242Q, the Court of Appeals found that the attorney's evidence failed to qualify for any of the "Baird exceptions" to the general rule of disclosure. 90 First, the legal-advice exception was inapplicable because the attorney's original case had been terminated and the requested information was part of a separate investigation. 91 Second, the last-link exception did not apply because the client's identity was already known, and therefore, disclosure would not supply the "last link' leading to indictment." 92 Finally, the court explained that the fee payment was a "nonassertive act which was not intended to communicate information" 93 and disclosed nothing about the advice sought, thus failing to qualify for the confidential-communications exception. 94 The fact that the fee information may be incriminating to the client was declared irrelevant by the Maryland court. 95 Moreover, finding that none of the three traditional Baird exceptions applied to this case, the court lacked the opportunity to decide "which, if any, of the identified 'exceptions' [it] should adopt" in more questionable circumstances. 96

85. Id. See also Tornay v. United States, 840 F.2d 1424, 1429 (9th Cir. 1988).
86. Criminal Investigation No. 1/242Q, 326 Md. at 19-20, 602 A.2d at 1229 (Bell, J., dissenting).
87. Id. at 23, 602 A.2d at 1231 (Bell, J., dissenting).
88. See Goode, supra note 21, at 355 ("Requiring lawyers to disclose [fee] information is not likely to deter many potential clients from seeking legal advice . . .").
90. See Criminal Investigation No. 1/242Q, 326 Md. at 10, 602 A.2d at 1224.
91. Id. at 8, 602 A.2d at 1223.
92. Id. at 9, 602 A.2d at 1223.
93. Id. at 10, 602 A.2d at 1224.
94. Id.
95. See id.
96. Id.
4. Conclusion.—The Criminal Investigation No. 1/242Q court adopted the position on fee information held by nearly every federal circuit today—that absent extraordinary circumstances, attorneys can be compelled to reveal such information, even if the information is incriminating to their clients. Unfortunately, this case did not offer the Court of Appeals an opportunity to clarify how Maryland courts should apply the traditional "Baird exceptions" to the general rule of disclosure. In dissent, Judge Bell warned that the majority's ruling ignored the purpose of the attorney-client privilege, namely, to enable accused persons to confide in a lawyer of their choice without fear that confidential and potentially incriminating disclosures would be subsequently used against them. The majority rejected such arguments, however, and upheld the right of grand juries in Maryland to subpoena information about attorneys' fee arrangements.

M. TIMOTHY DOE

B. The Exigent Circumstances Doctrine in Maryland: Adherence to a More Stringent Standard

In McMillian v. State, the Court of Appeals considered the admissibility of evidence seized during a consent search preceded by a warrantless entry. In finding that exigent circumstances did not justify the search, the Court of Appeals reaffirmed that a warrantless search cannot be justified by the threatened destruction of evidence unless police know that seizable evidence is present and reasonably believe that destruction of the evidence is imminent.

The court also concluded that evidence seized during consent searches that are preceded by illegal police conduct will not be admitted unless two distinct hurdles are cleared. A trial court must not only decide whether the consent was voluntary under the totality of the circumstances, but also whether the consent "was sufficiently an act of free will to purge the primary taint of the unlawful invasion." Evidence that fails this second test will be inadmis-

98. See id. at 275, 600 A.2d at 431.
99. Id. at 284, 600 A.2d at 436.
100. See id. at 282-84, 600 A.2d at 435-36.
101. See id. at 288-89, 600 A.2d at 438.
102. Id. at 288, 600 A.2d at 438.
103. Id. at 288-89, 600 A.2d at 438 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)).
ble as "fruit of the poisonous tree." Although the application of this doctrine to consent searches may provide some criminal defendants with an opportunity to argue that evidence should be suppressed, the impact of the court's two-prong test will depend on the willingness of judges to conclude that a voluntary consent was tainted by police misconduct—a ruling that many judges may be reluctant to make.

1. The Case.—Robert McMillian was the manager of the Foxes and Vixens Club, a "private social club" in Baltimore. After hearing from a "reliable source" that someone at the Club was selling drugs, police officer James Rood began covert surveillance. During the next several hours Officer Rood observed twenty or thirty suspected drug transactions. Rood also observed McMillian directing people to the door of the Club. Fellow police officers arrested three individuals seen leaving the Club, two of whom were in

104. See Wong Sun, 371 U.S. at 486 (explaining that a defendant's response to federal agents, who had entered his home without probable cause and arrested him, was "not sufficiently an act of free will to purge the primary taint of the unlawful invasion"). See generally Nardone v. United States, 308 U.S. 338, 341 (1939) (noting that once an illegal search is established "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree" (emphasis added)).

105. The Court of Special Appeals declared that "[t]o conclude that a consent is voluntary, but then to find that it is tainted due to illegal police conduct and therefore invalid, seems to us to be incongruous." McMillian v. State, 85 Md. App. 367, 383, 584 A.2d 88, 96 (1991), rev'd, 325 Md. 272, 600 A.2d 430 (1992).

106. McMillian, 325 Md. at 275, 600 A.2d at 431-32. At the suppression hearing, Officer Rood described the Club as a "social club that sells liquor" without a liquor license. Id. at 275 n.1, 600 A.2d at 432 n.1. He also explained that a person need not be a member to enter, and that McMillian was not acquainted with many of the people who came to the Club. Id. at 275-76 n.1, 600 A.2d at 432 n.1.

The McMillian court assumed that the Club was private. It could be argued, however, that the Club was open to the public, and therefore the entry was not a search within the meaning of the Fourth Amendment. In Maryland v. Macon, 472 U.S. 463 (1985), undercover police officers entered a bookstore and purchased obscene magazines. Id. at 465. The Supreme Court held that the officers' act of "entering the bookstore and examining the wares that were intentionally exposed to all who frequented the business did not infringe upon a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment." Id. at 469. See also Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

107. McMillian, 325 Md. at 276, 600 A.2d at 432. Officer Rood observed the Club from a construction trailer 50 to 60 feet away, and maintained radio contact with other officers who were not within sight of the Club. Id.

108. Id. Bypassers would hand money to someone just inside the door of the Club and receive a small object in exchange. Id.

109. Id. at 277, 600 A.2d at 432.
possession of cocaine.110

As the surveillance continued, the officers discussed what their next step should be. Officer Rood was concerned that both the dealers and the drugs would be gone before the police could obtain a search warrant.111 At approximately 5:50 p.m., Rood ended his surveillance and returned to the police station to meet with other officers involved in the investigation.112 The officers decided that they would enter the Club without a warrant and request consent to search.113 If consent was not forthcoming, the police planned to "secure" the premises and detain those inside while they sought a warrant114—a process they estimated would take between three and five hours.115

At 7:05 p.m., police entered the Club against McMillian's objection,116 and twenty to twenty-five people were frisked for weapons.117 After a brief discussion with Officer Rood, McMillian signed a form consenting to a search of the Club.118 During his conversation with McMillian, Rood described what he had seen outside and told McMillian that he was suspected of involvement with drug trafficking.119 Rood also informed McMillian of his plan to secure the premises if McMillian did not consent, and explained that a judge

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110. Id. at 276-77, 600 A.2d at 432.
111. Id. at 277-78, 600 A.2d at 433.
112. Id. at 278, 600 A.2d at 433.
113. Id.
114. Id. Absent consent, the police could lawfully secure the Club in anticipation of a warrant only under exigent circumstances. See Spiering v. State, 58 Md. App. 1, 10, 472 A.2d 83, 88 (1984). In Spiering, the Court of Special Appeals concluded that evidence seized after police "impounded" the premises would not be admitted unless the State was able to "remove the taint of the illegal entry by establishing either consent or some exigent circumstances that will authorize the intrusion." Id. at 10, 472 A.2d at 88. Thus, in the absence of either exigent circumstances or consent, the police officers in McMillian could not lawfully remain in the Club while they sought a warrant. By threatening to do so, they threatened McMillian with a false claim of lawful authority, and such claims have been held to be powerful evidence that consent was coerced. See Bumpers v. North Carolina, 391 U.S. 543, 548-50 (1968) (finding that a police officer's claimed authority under a warrant to search a home is colorably lawful coercion, and consequently, inconsistent with consent).
115. See Brief of Respondent/Cross-Petitioner at 24-25, McMillian (No. 13).
116. McMillian, 325 Md. at 278, 600 A.2d at 433. An officer entered the Club by attempting to slip in behind a patron. Id. The door was opened by McMillian, who began yelling "police" as he tried to shut the door and bar the officer's entry. Id.
117. Id. at 279, 600 A.2d at 433.
118. Id. The form stated that McMillian was aware of his right to refuse, and that consent was given to Officer Rood "voluntarily and without threats or promises of any kind." Id.
119. Id.
CRIMINAL PROCEDURE

"might or might not" grant a search warrant.\textsuperscript{120}

After the search of the Club produced fifty-nine glassine bags of cocaine,\textsuperscript{121} McMillian and two other men were arrested.\textsuperscript{122} The trial judge denied McMillian's motion to suppress the cocaine.\textsuperscript{123} A jury subsequently convicted him of conspiring to distribute cocaine, as well as maintaining a building as a common nuisance.\textsuperscript{124} The Court of Special Appeals affirmed the convictions,\textsuperscript{125} and the Court of Appeals granted certiorari to consider whether the evidence should have been suppressed.\textsuperscript{126}

2. Legal Background.—

a. The Threatened Destruction of Evidence.—(1) Supreme Court Precedent.—The Fourth Amendment to the United States Constitution requires that searches and seizures be reasonable.\textsuperscript{127} It is often said that searches conducted without a warrant are unreasonable per se, "subject only to a few specifically established and well-delineated exceptions."\textsuperscript{128} These exceptions include those embodied in the exigent circumstances doctrine, which serves as an umbrella for several emergency situations.\textsuperscript{129} While the Supreme Court has long recognized that the threatened destruction of evidence may be one

\textsuperscript{120} Id.
\textsuperscript{121} Id. at 279, 600 A.2d at 433.
\textsuperscript{122} Id. at 280, 600 A.2d at 434.
\textsuperscript{123} See id. at 279-80, 600 A.2d at 434. The trial judge concluded that the warrantless entry was justified by exigent circumstances and that McMillian had voluntarily consented to the search. See id.
\textsuperscript{124} Id. at 280, 600 A.2d at 434.
\textsuperscript{126} See id. at 279-80, 600 A.2d at 434. McMillian also argued that the evidence was insufficient to sustain his convictions, but the Court of Appeals disagreed. See id. at 289, 293, 600 A.2d at 438, 440. The court noted that the proper standard for review was "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. at 289-90, 600 A.2d at 438-39 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).
\textsuperscript{127} See U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." Id.
\textsuperscript{128} Katz v. United States, 389 U.S. 347, 357 (1967). One commentator has suggested, however, that the exceptions are now so numerous that they threaten to swallow the rule. See Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 500-03 (1991).
\textsuperscript{129} See, e.g., Michigan v. Tyler, 436 U.S. 499, 509 (1942) (holding that a firefighter's warrantless entry into a burning building was justified by exigent circumstances).
of those emergencies, the circumstances that justify this particular exception have never been well delineated.

In *People v. Blasius*, the Supreme Court of Michigan observed that the United States Supreme Court has "suggested four varying indicia of exigent circumstances: (1) the threatened destruction or removal of evidence, (2) the imminent threat of destruction of evidence, (3) evidence in the process of destruction, and (4) a 'realistic expectation' that evidence might be destroyed." In the five decisions in which the United States Supreme Court has touched upon the issue most directly, only one—*Schmerber v. California*—upheld a warrantless search based on the threatened destruction of evidence. But the facts of *Schmerber* were unique: the evidence at issue was a driver's blood alcohol content, and the evidence was certain to dissipate unless the police took action.

(2) Conflict Among the Federal Courts.—The Supreme Court's lack of guidance on the scope of the exigent circumstances exception has resulted in a remarkable degree of disarray, causing the
ground rules of the war on drugs—and the Fourth Amendment rights of defendants—to vary widely among the federal circuits.\footnote{139} The circuits differ in both the language they use, and the outcomes they reach in unreasonable search cases.\footnote{140} Professor Barbara Salken has suggested that there is a deeper difference between the circuits—simply put, some courts are more willing than others to scrutinize police conduct.\footnote{141}

The federal circuits do agree that exigent circumstances will not be found unless police have probable cause to believe that seizable evidence is present.\footnote{142} Beyond this point lies semantic chaos. Most decisions hold that the circumstances must also support a reasonable belief that the evidence “may be destroyed,”\footnote{143} “will be destroyed,”\footnote{144} or “would probably be destroyed”\footnote{145} before a warrant can be obtained. The Sixth and D.C. Circuits have held that there must be an “objectively reasonable basis for concluding that the destruction of the evidence is imminent.”\footnote{146} Other decisions speak of a “compelling necessity for immediate action,”\footnote{147} or require the state to show that the entry was “necessary” to prevent the destruction of evidence.\footnote{148} The Fourth Circuit has candidly observed that

merely speculative. The second is whether the threat, although genuine, was foreseeable or otherwise avoidable.” \footnote{id} Although Professor Salken’s analysis is insightful, some circuits have changed their position dramatically since her article was published. \textit{Compare} United States v. Timberlake, 896 F.2d 592 (D.C. Cir. 1990) \textit{with} United States v. Johnson, 561 F.2d 832 (D.C. Cir.), \textit{cert. denied}, 432 U.S. 907 (1977) \textit{and} Salken, \textit{supra}, at 311-12 (discussing the exigent circumstances doctrine in the D.C. Circuit).

\footnote{139} \textit{See} Salken, \textit{supra} note 138, at 300-20 (exploring the circuit courts’ views of destruction of evidence as justification for warrantless searches).

\footnote{140} \textit{See} id. at 310-11 (noting that some decisions accept police allegations of emergency circumstances without critical evaluation of the factual basis for the claims, and without considering whether the police might have avoided the need for a warrantless entry). \textit{See generally} Lyle Denniston, \textit{Restrictions on Use of Force in DWI Case Upheld}, \textit{The Sun} (Baltimore), Dec. 3, 1991, at 10A (“A brief, unexplained Supreme Court order yesterday made it appear that police now have less authority than they have had for a quarter-century to use force to get blood samples from drunken-driving suspects.”); Hammer v. Gross, 932 F.2d 842 (9th Cir.) (holding that a blood test taken under Schmerber could lead to civil liability under § 1983 if the force used by police to extract the blood was not objectively reasonable), \textit{cert. denied}, 112 S. Ct. 582 (1991).

\footnote{142} \textit{See}, \textit{e.g.}, United States v. Halliman, 923 F.2d 873, 878 (D.C. Cir. 1990); United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973).

\footnote{143} United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990); United States v. Rivera, 825 F.2d 152, 156 (7th Cir. 1987).

\footnote{144} Rubin, 474 F.2d at 268.

\footnote{145} United States v. Radka, 904 F.2d 357, 362 (6th Cir. 1990).

\footnote{146} \textit{Halliman}, 923 F.2d at 878 (D.C. Cir. 1991); United States v. Sangineto-Miranda, 859 F.2d 1501, 1512 (6th Cir. 1988).

\footnote{147} United States v. Almonte, 952 F.2d 20, 22 (1st Cir. 1991).

\footnote{148} \textit{See}, \textit{e.g.}, United States v. Lindsey, 877 F.2d 777, 780-81 (9th Cir. 1989).
"there is no precise formula, since emergency circumstances will vary from case to case and the inherent necessities of the situation must be scrutinized."

The Seventh Circuit's decision in United States v. Rivera, however, demonstrates that the difference between the circuits is more than mere semantics. Rivera, a suspected drug courier, was seen leaving a hotel room carrying a bag that was later proved to contain cocaine. After Rivera was arrested, federal agents returned to the room, where they heard radio or television noises from within. The agents entered without a warrant and seized three suitcases. The room was otherwise empty and unoccupied. The Seventh Circuit concluded that "it was not unreasonable [for agents] to fear that a fourth or fifth conspirator might be inside the room, ready to destroy the evidence if his or her compatriots did not return as planned." The court further declared that the officers "reasonably feared [the] imminent destruction of the evidence." Given that federal agents had nothing more than a mere suspicion that someone might be in the room, those statements seem dubious, and other circuits have reached a different result under similar circumstances.

Despite the differences in the language used and outcomes reached, there is a second point on which several of the federal circuits agree—the test for exigent circumstances is objective. These circuits do not consider what the police officers actually believed, but rather what an experienced officer would have believed under the same or similar circumstances.

150. 825 F.2d 152 (7th Cir. 1987).
151. Id. at 155.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id. at 156-57.
157. In United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991), the Eleventh Circuit concluded that "[t]he police in this case simply assumed that Lynch and Digaralomo would grow suspicious if they did not hear from their coconspirators. Such speculation, without any factual support, will not suffice to overcome the warrant requirement." Id. at 1233. See also United States v. Timberlake, 896 F.2d 592, 596-97 (D.C. Cir. 1990) (holding that exigent circumstances did not exist when an undercover police officer thought he smelled PCP coming from an apartment, and officers knew that people were in the apartment because the door was slightly ajar).
158. See Salken, supra note 138, at 503 (noting that the First, Third, and Fourth Circuits apply an objective test).
159. See United States v. Rivera, 825 F.2d 152, 156 (7th Cir. 1987); Timberlake, 896 F.2d at 596.
(3) Maryland Precedent.—In Stackhouse v. State, the Court of Appeals adopted a strict approach to exigent circumstances. There, police officers entered the home of James Stackhouse armed with two warrants for his arrest, and found him hiding in the attic. Immediately following the arrest, police searched the entire attic and recovered a shotgun barrel. In appealing his convictions for armed robbery and burglary, Stackhouse argued that the warrantless search was not justified by exigent circumstances. The State responded by arguing that exigent circumstances did exist because police officers feared that Stackhouse’s foster sister would destroy any evidence in the house before they could return with a warrant.

In reversing the convictions, the Court of Appeals stressed that “[t]he meaning of exigency implies urgency, immediacy, and compelling need.” According to Stackhouse, the threatened destruction of evidence will not constitute exigent circumstances unless police officers know that seizable evidence is present, and reasonably believe that a strong likelihood exists that destruction of the evidence is imminent. The court held that the State had failed on both grounds. In reaching that conclusion, the court’s reasoning suggested that the Maryland test is not an objective one—the court focused on what the officers actually believed at the time of their entry.

161. Id. at 207-08, 468 A.2d at 336.
162. Id. at 208, 468 A.2d at 336.
163. Id. at 206, 468 A.2d at 335.
164. See id. at 218-19, 468 A.2d at 341. Stackhouse also argued that the scope of the search went beyond that permitted as a search incident to arrest, and the Court of Appeals agreed. Id. at 217-18, 468 A.2d at 341.
165. See id. at 218-19, 468 A.2d at 341-42. The woman had previously lied to the arresting officers about Stackhouse’s identity and his presence in the house. Id. at 219, 468 A.2d at 341-42.
166. Id. at 222, 468 A.2d at 343.
167. Id. at 212, 468 A.2d at 338.
168. See id. at 213-14, 468 A.2d at 339.
169. See id. at 219-21, 468 A.2d at 341-43.
170. See id. at 220-21, 468 A.2d at 342-43. The State presented no evidence that the officers actually feared the destruction of evidence at the time the search was conducted. Id.

The view that the Stackhouse test is subjective has strong support in Buie v. State, 320 Md. 696, 580 A.2d 167 (1990). The issue in Buie was whether a “protective sweep” of Buie’s basement was justified because officers had a “reasonable, articulable suspicion” that a man wanted for armed robbery was hiding there. Id. at 699, 580 A.2d at 169. Although the Court of Appeals was divided in Buie, both the plurality and dissenting opinions support the view that the test in Stackhouse is subjective. Although a three-
In Shuman v. State, however, the Court of Special Appeals expanded upon Stackhouse. Police responding to a domestic argument were told that Shuman had hidden a revolver in a guitar case, which the police subsequently searched. Although the presence of a revolver and the potential for physical violence may have constituted exigent circumstances, the Court of Special Appeals concluded that any exigency had ceased once Shuman had been detained and police discovered that the guitar case was locked. Under these circumstances, the court concluded that there was no immediate danger, and the guitar case could not be searched without a warrant.

b. Consent Searches Following Illegal Police Conduct.—

(1) Generally.—The list of established exceptions to the warrant requirement also includes searches conducted pursuant to valid consent. In Schneckloth v. Bustamonte, the Supreme Court held that the appropriate test is whether the consent “was in fact voluntarily given, and not the result of duress or coercion, express or implied.” Whether or not consent was voluntary is a “question of fact” to be determined from “the totality of the circumstances.” Both state and federal courts have identified numerous factors relevant to that determination, including prior illegal con-
duct by the police.\footnote{182}

In cases where a consent search is preceded by police misconduct, lower courts have disagreed about the test to be applied.\footnote{183} The conflict has centered on the application of the Supreme Court's "fruit of the poisonous tree" doctrine, which holds that evidence derived indirectly from a constitutional violation should be suppressed unless that evidence has been obtained by means "sufficiently distinguishable [from the violation] to be purged of the primary taint."\footnote{184} In the case of consent searches preceded by police misconduct, the question to consider is whether consent "was sufficiently an act of free will to purge the primary taint of the unlawful invasion,"\footnote{185} or whether police obtained the consent by exploiting their preceding illegal acts.\footnote{186}

In Brown v. Illinois,\footnote{187} the Supreme Court identified three factors relevant to that analysis: (1) the "temporal proximity" of the illegality and the evidence; (2) the presence of intervening circumstances; and (3) the "purpose and flagrancy of the official misconduct."\footnote{188} Although the federal circuits have routinely applied the Brown factors to consent searches preceded by police misconduct, they have differed somewhat in how they conduct their analysis. Some decisions suggest that there is a single test applicable, and the factors enumerated in Brown are considered in the course of deciding whether the consent was voluntary under the circumstances.\footnote{189} In his influential treatise on search and seizure, however, Professor Wayne Lafave argued that there are two distinct tests, each of which is handled differently.\footnote{190} Courts following Lafave's approach must

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\footnote{182. See David Carey, Consent Searches and Voluntariness: An Analysis of Maryland Cases, 19.2 LAw F. 27 (1990).}
\footnote{183. See Florida v. Royer, 460 U.S. 491, 507-08 (1983) (holding that illegally detaining a suspect rendered a subsequent search of his luggage improper). See also State v. Wilson, 279 Md. 189, 202-04, 367 A.2d 1223, 1231-32 (1977).}
\footnote{184. See 3 LAFAVE, supra note 133, § 8.2(d), at 189-90.}
\footnote{185. Id. at 486.}
\footnote{186. See id. at 488.}
\footnote{187. 422 U.S. 590 (1975).}
\footnote{188. Id. at 603-04.}
\footnote{189. See United States v. Pierre, 932 F.2d 377, 390-91 (5th Cir. 1991); United States v. Campbell, 920 F.2d 793, 797-98 (11th Cir. 1991); United States v. Montilla, 928 F.2d 583, 586-87 (2d Cir. 1991); United States v. McCraw, 920 F.2d 224, 230 (4th Cir. 1990); United States v. Timberlake, 896 F.2d 592, 595 (D.C. Cir. 1990); United States v. George, 883 F.2d 1407, 1415-16 (9th Cir. 1989).}
\footnote{190. See, e.g., United States v. Bradley, 922 F.2d 1290, 1296 (6th Cir. 1991); United States v. Buchanan, 904 F.2d 349, 355-56 (6th Cir. 1990).}
\footnote{191. See 3 LAFAVE, supra note 133, § 8.2(d), at 189-91.}
consider separately whether the consent was voluntary, and whether
the consent was untainted by police misconduct. The evidence
will not be admitted unless it clears both hurdles.

(2) Maryland Precedent.—The Court of Appeals has long held
that a consent to search may be valid despite police misconduct. In Armwood v. State, the Court of Appeals observed that it is “well-
established” in Maryland that evidence obtained following an illegal
arrest may still be admissible, provided that the accused “voluntarily
consented to the search.” Armwood, however, was decided more
than a decade before the Supreme Court’s rulings in either Schneckloth or Brown, and neither the Court of Appeals nor the Court
of Special Appeals had considered how the factors enumerated in
Brown should be applied when an alleged consent to search was pre-
ceded by police misconduct.

3. The Court’s Reasoning; Analysis.—In denying McMillian’s mo-
tion to suppress the cocaine seized during the search of the Club,
the trial judge found: (1) the warrantless entry was justified by exi-
gent circumstances, and (2) McMillian had voluntarily consented to
the search. Although the Court of Special Appeals concluded
that the warrantless entry was illegal, the intermediate appellate
court nonetheless held that McMillian’s consent was voluntary
under the totality of the circumstances. The Court of Appeals
granted certiorari to consider both issues.

a. Exigent Circumstances.—After carefully scrutinizing the con-
duct of the police, the Court of Appeals reached three conclusions. First, the court reasoned that no exigent circumstances could have

192. See United States v. George, 883 F.2d 1407, 1415-16 (9th Cir. 1989) (holding that whether consent was voluntarily given was “only a threshold requirement”).
193. Id. at 1416.
194. See, e.g., Payne v. State, 207 Md. 51, 54, 113 A.2d 93, 94 (1955) (explaining that an illegal arrest does not necessarily mean that the subsequent search was unlawful).
196. Id. at 569, 185 A.2d at 358.
197. Prior to McMillian, the only decision by the Court of Appeals in which the Brown test had been applied was Ferguson v. State, 301 Md. 542, 483 A.2d 1255 (1984). The
issue in Ferguson, however, was whether an extrajudicial identification was tainted by an illegal arrest. Id. at 549, 483 A.2d at 1258.
198. See McMillian, 325 Md. at 279-80, 600 A.2d at 434.
200. See id. at 388, 584 A.2d at 98.
201. See McMillian, 325 Md. at 280, 600 A.2d at 434.
existed prior to the station house meeting. Had the police believed that the imminent destruction of the evidence was likely, the officer in charge would not have convened the stationhouse meeting, effectively removing all officers from the surveillance operation at the Club. Second, the court noted that any exigencies that might have existed prior to the meeting had lapsed during the hour that police were gone from the scene. Finally, because the police had failed to maintain their surveillance and did not resume their observations before entering the Club, the court concluded that the police could not have known at the time of entry that there was seizable evidence inside. This last conclusion leaves the Court of Appeals as one of the few courts—perhaps the only court—that requires more than probable cause before police may invoke the exigent circumstances exception. Whether or not McMillian's holding is "prudent" or "reasonable" is ultimately a question of how one balances the public need for effective law enforcement and the privacy interests protected by the Fourth Amendment.

McMillian presented the Court of Appeals with an opportunity to limit or modify Stackhouse, and the State strongly urged the court to do so. The State proposed an objective test that would be satisfied if officers had probable cause to believe (1) that seizable evidence was present, and (2) that the evidence would be destroyed if they did not enter the premises immediately. The court, however, reaffirmed Stackhouse and emphasized once again that in Maryland the exigent circumstances doctrine requires an "'immediate, urgent, and compelling need for police action.'"

202. See id. at 283, 600 A.2d at 435.
203. See id. at 283-84, 600 A.2d at 435-36. The Fourth Circuit reached a similar conclusion in United States v. Campbell, 945 F.2d 713, 715 (4th Cir. 1991) (concluding that the fact that police delayed one hour before making their entry did not support a finding of exigent circumstances).
204. See McMillian, 325 Md. at 283-84, 600 A.2d at 435-36. The court's conclusion was strengthened by Officer Rood's observation of a half-hour suspension in the suspected drug trafficking activity, during which police surmised that the supply of drugs had run out. Brief of Respondent/Cross Petitioner at 24, McMillian (No. 13). Had the police officers entered the Club just moments after the transactions resumed, the Court of Appeals might well have agreed that exigent circumstances existed.
205. Neither McMillian nor Stackhouse expressly stated that actual knowledge is required. Thus, it remains to be seen whether something less than actual knowledge, but more than probable cause, would suffice to satisfy the court.
206. See Brief of Respondent/Cross Petitioner at 25-29, McMillian (No. 13).
207. Id. at 28. In Maryland, the probable cause standard is satisfied by showing that a "fair probability" of criminal activity existed. See Malcolm v. State, 314 Md. 221, 233, 550 A.2d 670, 676 (1988).
208. McMillian, 325 Md. at 283, 600 A.2d at 435 (quoting Stackhouse v. State, 298 Md. 203, 216, 468 A.2d 333, 340 (1983)).
Whether the *Stackhouse* test is objective or subjective remains uncertain. *McMillian*’s analysis of the police officer’s conduct makes it clear that the Court of Appeals would have found the search illegal under either approach.\(^2\)\(^0\)\(^9\) There are important reasons, however, why a subjective test may be more appropriate. The Supreme Court has repeatedly stressed that the purpose of the exclusionary rule is the deterrence of “lawless conduct” by police officers.\(^2\)\(^1\)\(^0\) That purpose—and the privacy interests protected by the Fourth Amendment—would be better served by a subjective test. A test based on what the officers actually believed would compel them to engage in self-scrutiny before they act, while insuring that an entry “executed in the most cynical bad faith” would not be permitted.\(^2\)\(^1\)\(^1\)

**b. Consent Searches.**—In concluding that McMillian’s consent was “as solid as the Rock of Gibraltar,”\(^2\)\(^1\)\(^2\) the Court of Special Appeals rejected Professor Lafave’s view that the *Brown* attenuation-of-the-taint analysis should be conducted separately from the test for voluntary consent.\(^2\)\(^1\)\(^3\) Instead, the intermediate appellate court held that the only issue was whether the consent was voluntary under the circumstances.\(^2\)\(^1\)\(^4\) The factors enumerated in *Brown*, the court concluded, should be considered in making that determination.\(^2\)\(^1\)\(^5\)

The Court of Appeals, however, concluded that the Court of Special Appeals had “improperly usurped the trial court’s role of weighing the effect that the illegal police entry of the Club had on McMillian’s consent to the search.”\(^2\)\(^1\)\(^6\) After recognizing that “the

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\(^2\)\(^0\)\(^9\) The testimony indicated that officers did believe that exigent circumstances existed, *id.* at 277-78, 600 A.2d at 432-33, but the court concluded that the officers’ beliefs were not reasonable under the circumstances. *Id.* at 283-84, 600 A.2d at 435-36.

\(^2\)\(^1\)\(^0\) See, e.g., *Brown* v. Illinois, 422 U.S. 590, 599 (1975) (explaining that the purpose of the exclusionary rule is to deter unconstitutional searches). In United States v. Leon, 468 U.S. 897 (1984), the Court suggested that deterrence was the only rationale underlying the exclusionary rule. *Id.* at 918-21.

\(^2\)\(^1\)\(^1\) See *Buie* v. State, 320 Md. 696, 706, 580 A.2d 167, 172 (1990) (Atkins, J., dissenting). A subjective test also ensures that the prosecution will not attempt to manufacture exigent circumstances as an after-the-fact excuse, which appears to be precisely what happened in *Stackhouse*. There, the testimony of the police officer who conducted the search made no mention of the possibility that evidence might be destroyed. *Stackhouse* v. State, 298 Md. 203, 220-21, 468 A.2d 333, 342-43 (1983). The Court of Appeals concluded that the officer appeared to have acted solely on the belief that evidence of crime might be found in the attic. *Id.*


\(^2\)\(^1\)\(^3\) See *id.* at 383, 584 A.2d at 96.

\(^2\)\(^1\)\(^4\) *Id.* at 385-86, 584 A.2d at 96-97.

\(^2\)\(^1\)\(^5\) See *id.*

\(^2\)\(^1\)\(^6\) *McMillian*, 325 Md. at 288, 600 A.2d at 438.
trial court's finding of fact is not to be set aside unless clearly erroneous," the Court of Appeals pointed out that the trial judge had mistakenly concluded that the entry of the Club was legal, and therefore had failed to weigh the illegal entry in reaching his conclusion that the consent was voluntary.

The adoption of Professor Lafave's two-prong test may make a small but important difference to some criminal defendants. A trial court's determination that consent was voluntary is treated as a question of fact, and will not be disturbed on appeal unless it is clearly erroneous. Although the Court of Appeals has yet to consider the issue, it is unlikely that a trial judge's application of the Brown taint analysis will be given the same weight on appellate review. As the court suggested in Riddick v. State:

[W]hen we determine the application of a constitutional right . . . we defer to the trial judge with respect to his findings of facts which are disputed, if his findings are not clearly erroneous. But we do not defer to him with respect to his constitutionally based conclusions reached on those facts. Rather, we make our own independent constitutional appraisal.

Whether McMillian will alter a trial judge's decision to deny a motion to suppress is questionable. But by separating the Brown analysis from the question of voluntariness, the court may have shifted a small amount of power from the trial courts to appellate courts, and given some defendants a new argument to raise on appeal.

The success of that argument will ultimately depend on the willingness of appellate judges to find that an otherwise voluntary consent was tainted by unlawful police conduct. Where the federal

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217. Id. at 285, 600 A.2d at 436.
218. Id. at 288, 600 A.2d at 438.
219. Id. at 285, 600 A.2d at 436. See also Gamble v. State, 318 Md. 120, 128-29, 567 A.2d 95, 99-100 (1989) (holding that the trial court was not clearly erroneous in its factual determination).
220. The McMillian court should have conducted the Brown taint analysis itself, rather than remanding that issue to the trial judge. In Brown, the Supreme Court declined to remand the case for further factual findings, noting instead that "[a]lthough the Illinois courts failed to undertake the inquiry mandated by Wong Sun . . . the trial resulted in a record of amply sufficient detail and depth from which the determination may be made." Brown v. Illinois, 422 U.S. 590, 604 (1975). The same was true of the record in McMillian.
222. Id. at 201-02, 571 A.2d at 1249.
223. The decision of the Court of Special Appeals suggests that some of its members will be extremely reluctant to reach such conclusions. See McMillian v. State, 85 Md. App. 367, 383, 584 A.2d 88, 96 (1991) ("To conclude that a consent is voluntary, but
circuits have reached that conclusion, most of the cases involved a consent search preceded by an illegal arrest;\textsuperscript{224} a result that is not surprising. The third and most important of the \textit{Brown} factors focuses on the "flagrancy" of the police misconduct,\textsuperscript{225} and the potential for coercion is seemingly at its greatest when the liberty of a person is unlawfully restrained.

4. \textit{Conclusion}.—In \textit{McMillian}, the Court of Appeals reaffirmed its unique view of the exigent circumstances doctrine adopted earlier in \textit{Stackhouse}. The court also held that when a consent to search is preceded by police misconduct, the evidence seized will not be admitted unless the trial court concludes that the consent was both voluntary under the circumstances and untainted by police misconduct. By taking this position, the court maintained its place among those courts that most closely scrutinize police conduct before permitting an exception to the warrant requirement.\textsuperscript{226} Whether \textit{McMillian}'s Fourth Amendment jurisprudence can expect a long life depends upon the willingness of the Supreme Court to fully address the scope of the exigent circumstances doctrine and consent searches.

\textbf{Stephen J. Paskey}
V. ENVIRONMENTAL LAW

A. The Scope of the Maryland Environmental Standing Act

In *Medical Waste Associates, Inc. v. Maryland Waste Coalition, Inc.*, the Court of Appeals held that the Maryland Environmental Standing Act (MESA) does not relax common-law standing requirements for an organization seeking judicial review of an administrative agency decision. By comparing the language of the statute with similar environmental standing statutes in other jurisdictions, the court found that MESA does not ordinarily grant standing to an organization requesting a review of agency decision making that would not otherwise have standing under common-law principles. Although the court's holding limits the scope of MESA, the ultimate result reached by the court is logically consistent with the legislative purpose of the Act.

1. The Case.—On September 8, 1989, the Maryland Department of the Environment (DOE) issued air quality control and refuse disposal permits authorizing Medical Waste Associates (MWA) to construct a medical waste incinerator in Baltimore City. The Maryland Waste Coalition (Coalition), an environmental interest group, filed two separate actions in the Circuit Court for Baltimore City to request judicial review of the DOE's decision. First, the Coalition filed a complaint under section 9-263 of the Environment Ar-
ticle, calling for the court to vacate the permits on the ground that their issuance was "unreasonable and not necessary for the protection of the public health or comfort." In the second action, the Coalition argued that the DOE's decision was "an abuse of discretion, clearly erroneous, and lacked substantial evidence" under the Maryland Administrative Procedure Act (APA). The DOE and MWA filed motions to dismiss both actions, arguing that the court lacked subject matter jurisdiction under both section 9-263 and the APA. The DOE and MWA also alleged that the Coalition lacked standing to protest the agency action.

The circuit court dismissed both claims, holding that the issuance of the refuse disposal permit was not an "order" under section 9-263. The circuit court also agreed with the DOE and MWA that

10. Medical Waste, 327 Md. at 600, 612 A.2d at 243. Section 9-263 provides:
   Any . . . person dissatisfied with any order, rule, or regulation of the Secretary under this subtitle may commence . . . an action in the circuit court for any county to vacate and set aside the order, rule or regulation on the ground that the order, rule or regulation is unlawful or unreasonable, or that the order is not necessary for the protection of the public health or comfort . . . .
11. See Joint Record Extract of Appellant at E-39, Maryland Waste Coalition, Inc. v. Maryland Dep't of the Env't, 84 Md. App. 544, 581 A.2d 60 (1990) (No. 89-1829) (arguing that the Department abused its discretion by refusing to grant the Coalition an adjudicatory hearing to present evidence regarding the environmental effects of the operation of the medical waste incinerator).
12. The APA provides in relevant part: "A party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section." Md. Code Ann., State Gov't § 10-215 (1984). This action was an appeal under the rule that provides for review of "any final action of an administrative agency by a court where such review is specially authorized by statute . . . ." Md. R. Bl.
14. Medical Waste, 327 Md. at 600-01, 612 A.2d at 243. The APA requires a final agency decision be a "contested case" in order to entitle a party to judicial review. See Md. Code Ann., State Gov't § 10-215 (1984). MWA and the DOE argued that because the administrative proceedings were legislative in nature, they were not "contested cases" authorizing judicial review under the APA. Medical Waste, 327 Md. at 601, 612 A.2d at 243.
15. Medical Waste, 327 Md. at 601, 612 A.2d at 243-44. MWA and the DOE argued that because the Coalition did not have a property interest "separate and distinct from that of its members" it lacked standing to challenge the issuance of the permits. Id.
16. See id., 612 A.2d at 244. The Court of Appeals noted that judicial review under § 9-263 did not apply to the air quality control permit because it was issued under Subtitle 4 of the Environment Article; § 9-263 judicial review is applicable only to orders, rules or regulations issued under Subtitle 2. The refuse disposal permit was issued under Subtitle 2. Id. at 600 n.2, 612 A.2d at 243 n.2. See also Md. Code Ann., Envr. § 9-263 (1987).
the administrative proceedings were legislative in nature, rather than "contested cases" authorizing judicial review under the APA.\textsuperscript{17} In the alternative, the circuit court held that the Coalition lacked standing to bring a cause of action under either section 9-263 or the APA.\textsuperscript{18}

The Coalition appealed both cases, arguing that the court had subject matter jurisdiction under both section 9-263 and the APA to hear the cases,\textsuperscript{19} and urging the court to adopt the less stringent federal position on environmental standing.\textsuperscript{20} The Coalition argued, however, that regardless of which environmental standing position the court adopted, the Coalition had standing under current Maryland law to obtain judicial review of the agency decision.\textsuperscript{21} The Court of Special Appeals upheld the circuit court's denial of judicial review with respect to both subject matter jurisdiction under section 9-263 and standing under Maryland common law;\textsuperscript{22} nevertheless, the court vacated and remanded the circuit court's judgment for a determination of whether the Coalition could maintain standing under MESA.\textsuperscript{23} The Court of Appeals interceded and granted certiorari to settle the issue of whether the Coalition had standing to challenge the issuance of the permits.\textsuperscript{24}

2. \textit{Legal Background}.—

a. \textit{Federal Environmental Standing}.—The 1970s witnessed a spectacular growth in federal environmental regulation.\textsuperscript{25} Access to fed-
eral courts, however, continued to be limited by prudential and constitutional restrictions on standing. The limitations found in Article III of the United States Constitution provide that a federal court has jurisdiction only over a "case" or "controversy." The Supreme Court has held that plaintiffs must allege a "personal stake in the outcome" in order to comply with this provision. Specifically, federal standards dictate that plaintiffs must show that the challenged action will cause them an actual or threatened injury-in-fact, that the injury is fairly traceable to the challenged action, and that the injury is redressable by judicial action. Additionally, the prudential limitation on standing requires the alleged injury to be within the "zone of interests" entitled to protection under the statute alleged to have been violated.

The landmark case of Sierra Club v. Morton represented the first application of federal standing requirements to an environmental matter. In Sierra Club, the Court stated that although an alleged injury to "[a]esthetic and environmental well-being" could constitute an injury-in-fact, the alleged injury must "be more than an injury to a cognizable interest." Because the Sierra Club sued to protect a cognizable interest in the environment without alleging that any of its members would be injured, the organization did not meet the injury-in-fact standing requirement. The Court noted

regulations, the 1970s became known as "the environmental decade"); see also 42 U.S.C. § 4331(a) (1988 & Supp. II 1990) (the National Environmental Policy Act). Enacted in 1970, the Act represented "the continuing policy of the Federal Government ... to use all practicable means and measures, ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." Id. § 4331(a).

29. See id. at 475. But see Percival et al., supra note 25, at 727 (noting that Congress would be able to eliminate this prudential limitation by granting standing to all parties who meet the three constitutional standing requirements).
31. In Sierra Club, the Court relied on the two-prong test established in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). In Data Processing, the Court held that a person has standing to challenge a federal agency action if that person could demonstrate that the alleged injury had caused that person an "injury-in-fact" and was arguably within the "zone of interests" to be protected or regulated by the statute the agency allegedly violated. Id. at 153.
32. Sierra Club, 405 U.S. at 734-35.
33. See id. at 735-36 (holding that the Sierra Club did not meet the "injury-in-fact" test because it sued only as a "representative of the public" and did not allege that any of its members would be injured by the development of the ski resort under dispute).
that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . ."  

Federal courts continue to apply the Sierra Club standing test in environmental cases.

b. Environmental Standing in Other Jurisdictions.—In the early 1970s, several states enacted legislation that relaxed standing requirements and granted private citizens and organizations greater access to the courts for environmental lawsuits. Michigan became the first state to use legislation to expand the scope of standing for citizens with environmental concerns when the state legislature enacted the Michigan Environmental Protection Act of 1970. The Act enables any person to sue for declaratory and equitable relief against either a private person or public agency for the protection of the environment. Furthermore, the Act expressly provides for judicial review of administrative agency decisions.


34. Id. at 739.

35. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990) (holding that although alleged aesthetic and environmental concerns are proper bases to claim an injury-in-fact, there must also be an allegation of an injury-in-fact to be an "aggrieved party" under the Federal Administrative Procedure Act and the injury must be within the "zone of interests" sought to be protected by the APA); Duke Power Co. v. Carolina Env'tl Study Group, Inc., 438 U.S. 59, 73-74 (1978) (stating that aesthetic and environmental harm satisfies the injury-in-fact requirement, and the zone of interest requirement may be satisfied by claiming a violation of an environmental statute).

36. See, e.g., MINN. STAT. ANN. §§ 116B.01-.13 (West 1987); CONN. GEN. STAT. ANN. §§ 22a-1 to -27e (West 1985).

37. See MICH. COMP. LAWS ANN. §§ 691-1201 to -1205 (West 1987). See also Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 887 (Mich. 1975) (noting that the Michigan Environmental Protection Act has served as a model for other states' environmental legislation).

38. See MICH. COMP. LAWS ANN. § 691-1202(1) (West 1987). See also Eyde v. State, 225 N.W.2d 1, 2 (Mich. 1975) (noting that the Michigan Environmental Protection Act "creates an independent cause of action, granting standing to private individuals to maintain actions . . . against anyone for the protection of [the] environment").

39. See MICH. COMP. LAWS ANN. § 691.1205 (West 1987), which provides:

Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, . . . any person . . . [or] organization [may] intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water, or other natural resources or the public trust therein.

Id.
(CEPA). The Connecticut statute provides standing for actions involving conduct that is "reasonably likely" to threaten the environment. The Connecticut Superior Court has interpreted CEPA to cover environmental challenges to state-issued permits. In the same year, the Minnesota state legislature granted standing to persons and organizations contesting administrative decisions on environmental grounds by passing the Minnesota Environmental Rights Act of 1971.

c. Maryland Environmental Standing.—In 1973, the General Assembly joined the trend of increasing citizen participation in environmental litigation by enacting the Maryland Environmental

41. The Connecticut statute provides:
   In any administrative, licensing or other proceeding, and in judicial review thereof made available by law . . . [an] organization . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.
43. See Minn. Stat. Ann. § 116B.10 (West 1987) which provides that an organization with Minnesota residents as members may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state . . . .
   Id. See also County of Freeborn v. Bryson, 210 N.W.2d 290, 295-96 (Minn. 1973) (holding the Minnesota Environmental Rights Act authorizes judicial review to protect the natural resources of the state from "any conduct" which has a "material adverse effect on the environment").
44. See, e.g., Fla. Stat. Ann. § 403.412 (West 1986) (stating that any "citizen of the state may maintain an action for injunctive relief against . . . [any] person or governmental agency . . . to enjoin such persons . . . from violating any laws, rules or regulations for the protection of the air, water, and other natural resources of the state"); Ind. Code Ann. § 13-6-1-1 (Burns 1990) (stating that "a citizen of Indiana . . . may bring an action for declaratory and equitable relief in the name of the state against an individual, . . . a company, a corporation, . . . or other legal entity . . . for the protection of the environment of Indiana from significant pollution, impairment, or destruction").
Policy Act (MEPA). MEPA, however, restricted citizen involvement in environmental matters by maintaining certain traditional constraints such as common-law standing requirements. Consequently, an organization attempting to protect environmental interests under Maryland law was still required to have a "property interest of its own—separate and distinct from that of its individual members." In addition, an organization seeking to redress a public wrong was required to allege that it had suffered "some special damage from such wrong differing in character and kind from that suffered by the general public."

The enactment of the Maryland Environmental Standing Act in 1978 slightly liberalized common-law standing requirements. Although MESA relaxes standing requirements in certain environmental matters, its scope is considerably narrower than that of environmental standing statutes in other jurisdictions. MESA provides that common-law standing is relaxed only in cases where a state official failed either to perform a nondiscretionary ministerial duty required by law or to enforce an environmental quality standard.

3. The Court's Reasoning.—Prior to its decision in Medical Waste, the Court of Appeals had not addressed the scope of standing under MESA. The court was, therefore, forced to rely on the Act's legislative history and a comparison of its language with that of standing statutes in other jurisdictions. The Court of Appeals sought the answers to two questions: (1) whether section 9-263 of the Environment Article, or alternatively, the APA, authorized judicial review of

46. See Leatherbury v. Gaylord Fuel Corp., 276 Md. 367, 380-81, 347 A.2d 826, 834 (1975) (noting that the General Assembly did not intend to create new or enlarged actionable rights under MEPA and that its provisions were to be carried out by state agencies only).
50. See Kim R. Siegert, Comment, The 1978 Maryland Environmental Standing Act, 8 U. Balt. L. Rev. 411, 422 (1979) (finding MESA, in comparison, "substantially more restrictive in scope").
52. Medical Waste, 327 Md. at 614, 612 A.2d at 250.
53. Id. at 618, 612 A.2d at 252.
the agency decision to issue the permits; and (2) whether the Coalition had standing to bring the actions under Maryland law. This second question involved a determination of whether the Coalition met either common-law standing requirements, as reflected in the APA, or the more liberalized standing requirements set forth in MESA.

The court first addressed the issue of whether the Coalition could seek judicial review under either of the two relevant statutes. To resolve the question of whether judicial review was authorized under section 9-263, the court considered whether the administrative agency's grant of the refuse disposal permit constituted an "order." Because its issuance was pursuant to a final agency decision adjudicating the "rights and responsibilities of the parties," the Medical Waste court held that the permit was indeed an "order," and, therefore, judicial review under section 9-263 was authorized.

With regard to judicial review under the APA, the Coalition could challenge the agency decision to issue the permits only if the agency decision was rendered in a "contested case." The Mary-

54. Id. at 606, 612 A.2d at 246.
55. Id.
56. Id. at 611, 614, 612 A.2d at 248, 250.
57. Before addressing substantive issues, the court initially determined that the Court of Special Appeals did not abuse its discretion by raising sua sponte the issue of standing under MESA. The court asserted that Maryland appellate courts have discretion to consider an issue not raised at the trial level. See id. at 605, 612 A.2d at 246; see also Crown Oil & Wax Co. of Va. v. Glen, 320 Md. 546, 561, 578 A.2d 1184, 1191 (1990) (concluding that even if an argument raised an issue for the first time on appeal, the court has discretion under Md. R. 8-131(a) to consider it). The court also noted that the standing issue was raised at the trial court and MESA was simply another basis to support that argument. See Medical Waste, 327 Md. at 605, 612 A.2d at 246.
58. Medical Waste, 327 Md. at 606, 612 A.2d at 246. The court noted that because neither party addressed whether the judicial review provisions of the APA superseded those of § 9-263, it would analyze judicial review under both. The court remarked, however, that the APA appears to have superseded § 9-263 "at least with respect to 'orders' issued by the Secretary." Id. at 607 n.7, 612 A.2d at 247 n.7.
59. Id. at 607, 612 A.2d at 246-47. The refuse disposal permit was the only permit subject to judicial review under § 9-263. Id.
60. Id. The court noted that in adjudicatory proceedings, the terms "order" and "decision" are normally interchangeable. Id.; see Md. Code Ann., State Gov't § 10-214 (1984) ("A final decision or order . . .").
61. The APA provides that "[a] party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section." Md. Code Ann., State Gov't § 10-215 (1984).

land Code defines a "contested case" as "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." Relying on this language, the court concluded that the issuance of both permits involved contested cases for purposes of judicial review under the APA. In so concluding, the court noted that the agency held the required public hearings before deciding to issue the air quality control and refuse disposal permits.

After determining that the present dispute fell within the judicial review provisions of section 9-263 and the APA, the Medical Waste court turned to the question of whether the Coalition met the common-law standing requirement in the APA—being an "agrieved party." The court reasoned that although the Coalition's participation in the administrative proceedings made it a party to the action, the group had neither a separate and distinct property interest from that of its members nor an injury different in character and kind from that of the general public. The Coalition, therefore, was not an "aggrieved party" and lacked common-law standing to properly challenge the agency's issuance of the permits.

Lastly, the court addressed the question of whether the Coa-
tion could maintain standing under MESA.\textsuperscript{70} Because the Coalition did not seek judicial review pursuant to any specific standing provision of MESA, the court directed its inquiry to whether MESA generally relaxed common-law standing requirements for organizations challenging final administrative agency decisions regarding environmental matters.\textsuperscript{71} The court began with an analysis of the legislative policy and intent underlying MESA. The policy declared in MESA provides that:

\begin{quote}
[T]he natural resources and the scenic beauty of the State of Maryland are in danger of irreparable harm occasioned by the use and exploitation of the physical environment . . . [and] the courts of the State of Maryland are an appropriate forum for seeking the protection of the environment and . . . an unreasonably strict procedural definition of "standing to sue" in environmental matters is not in the public interest.\textsuperscript{72}
\end{quote}

Consistent with this policy, the statute confers standing in certain actions "regardless of whether [a plaintiff] possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to [that plaintiff] is threatened."\textsuperscript{73} However, MESA expressly relaxes these common-law standing requirements only in limited situations. Notably absent from MESA is a provision authorizing judicial review of an administrative agency decision.\textsuperscript{74}

Because the legislative history did not provide the court with sufficient insight into whether MESA implicitly provided standing to the \textit{Medical Waste} plaintiff,\textsuperscript{75} the court evaluated MESA in relation to

\textsuperscript{70} See id.
\textsuperscript{71} Id. at 617-18, 612 A.2d at 252.
\textsuperscript{73} Id. § 1-503(a)(3).
\textsuperscript{74} See Md. Code Ann., Nat. Res. § 1-503(a) (1989). The specific actions in which MESA provides standing are as follows:

\begin{quote}
[a]ny person given standing by subsection (a) may bring and maintain an action for mandamus or equitable relief, including declaratory relief against any officer or agency of the State or political subdivision for failure on the part of the officer or agency of the State or political subdivision to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, . . . rule, regulation or order, or for their failure to enforce an applicable environmental quality standard . . . .
\end{quote}

\textit{Id.} § 1-503(b).
\textsuperscript{75} See \textit{Medical Waste}, 327 Md. at 618, 612 A.2d at 252 (noting that "the available Maryland legislative history sheds little light on the intent of the General Assembly" to relax common-law standing beyond the express provisions of the statute).
similar environmental standing statutes in other jurisdictions.\textsuperscript{76} First, the court decided that the General Assembly’s unwillingness to include a distinct provision for judicial review of administrative agency decisions “strongly indicates” that it did not intend to grant standing to an organization that does not meet common-law standing requirements.\textsuperscript{77} Although the court acknowledged that some language in MESA alludes to broadened standing requirements, the court found that those requirements apply only in the limited cases the statute “specifically set[s] forth.”\textsuperscript{78} To further support the position that MESA does not provide standing to the Coalition, the court quoted statutory language indicating that MESA cannot create a new substantive cause of action or confer standing when the contested activity is “in compliance with . . . [a] lawful, current permit.”\textsuperscript{79} In conclusion, the Medical Waste court stated that “a comparison of MESA with the environmental standing acts of other states confirms the view that MESA does not broaden standing requirements in actions for direct judicial review of administrative proceedings.”\textsuperscript{80}

In a final attempt to gain standing, the Coalition urged the court to forego Maryland’s traditional position and adopt the more lax federal standing requirements.\textsuperscript{81} Federal standards would have allowed the Coalition to acquire judicial review of the agency decision by alleging that one of its members would be injured by the incinerator’s construction.\textsuperscript{82} The Medical Waste court, however, re-

\textsuperscript{76} See id. at 618-20, 612 A.2d at 252-53. See also supra notes 36-43 and accompanying text.

\textsuperscript{77} Medical Waste, 327 Md. at 620, 612 A.2d at 253.

\textsuperscript{78} Id. at 621, 612 A.2d at 253-54; Md. Code Ann., Nat. Res. § 1-504(d) (1989) (providing in relevant part: “this subtitle does not broaden, except as specifically set forth, the rights of intervention of persons in administrative hearings and in appeals from the hearings”).

\textsuperscript{79} Medical Waste, 327 Md. at 620, 612 A.2d at 253. MESA provides that relief may not be granted in any action filed under this subtitle with respect to any defendant who shows that the condition, activity, or failure complained of is under and in compliance with . . . [a] lawful, current permit or order of an agency of the State . . . authorized to issue the permit or order . . . Md. Code Ann., Nat. Res. § 1-504(f)(1) (1989) (emphasis added). MESA also cautions that “[t]his subtitle may not be construed to create or authorize any new substantive cause of action or theory of recovery not now recognized by the courts of this state . . . .” Id. § 1-504(a).

\textsuperscript{80} Medical Waste, 327 Md. at 618, 612 A.2d at 252.

\textsuperscript{81} See id. at 623, 612 A.2d at 254.

\textsuperscript{82} See supra notes 27-35 and accompanying text. The federal standing rule is different from Maryland’s standing requirements. The federal position permits an organization to sue on behalf of its members if they allege to have suffered, or will suffer, an injury-in-fact. See NAACP v. Button, 371 U.S. 415, 428 (1963) (noting that a representa-
fused to adopt the federal position and asserted that the General Assembly clearly established that common-law standing requirements should be relaxed only in limited circumstances under MESA. The court ended its analysis by stating that, absent legislative authorization, "it would be inappropriate . . . to expand, beyond that set forth in MESA, organizational standing in judicial actions concerning environmental matters."  

4. Analysis.—The Medical Waste decision relaxes standing in environmental actions where a state officer, agency or political subdivision allegedly fails either to perform a nondiscretionary ministerial duty or to enforce an environmental protection quality standard. For example, if an environmental quality standard were being enforced by a state agency after the incinerator at issue became operational, MESA would provide an organization with standing to sue. The court’s holding, however, clearly indicates that MESA’s future use will be expressly limited to the specific provisions of the statute.

Although the court’s interpretation places strict limits on MESA’s applicability, the court’s analysis is consistent with the General Assembly’s intent. MESA was designed to relax standing requirements to ensure compliance with environmental laws and regulations, yet its drafters placed limits on its scope due to concerns that MESA would initiate “an influx of frivolous suits, cause inevitable long-term delays in industrial and economic projects, impair the powers and effectiveness of administrative boards and agencies, and weaken the authority of the state political subdivisions to

...
issue building permits." The court’s holding, therefore, ensures that the compromise on standing remains intact.

The court’s analysis is also supported by the language of the Maryland statute; MESA expressly places a stronger preference on upholding common-law standing requirements than environmental standing statutes in other jurisdictions. For example, MESA protects defendants who are acting pursuant to a state-issued permit or court order, whereas other jurisdictions do not. This comparison of statutory language provides ample support for the court’s conclusion that the legislature did not intend to relax common-law standing when an organization challenges an environmental action authorized by a state agency.

Although the court’s holding may be consistent with MESA’s legislative intent, the interpretation denies organizations access to the judicial system, effectively preventing them from guarding against future environmental threats in a number of situations. The court’s apparent unwillingness to interfere in environmental agency determinations may be soundly based in the fear that relaxed standing requirements could reach far beyond environmental matters and open the floodgates to lawsuits on a host of administrative decisions, thereby reducing the effectiveness of administrative agency determinations. What the court fails to consider, however, is that administrative agencies may now have less incentive to consider carefully all possible environmental problems and alternatives before issuing decisions, absent any real threat of judicial review.

A policy concern that the Medical Waste court did not address is the diminished effectiveness of public interest groups. Because an organization cannot sue in Maryland on behalf of its members unless it has a separate and distinct property interest, the court’s interpretation of MESA may prevent potentially viable lawsuits involving vital environmental issues from being litigated. Some cases may

88. Siegert, supra note 50, at 418 (noting that these procedural safeguards were instituted after persistent lobbying from business interests who strongly opposed relaxed standing requirements in environmental matters).
89. See id. at 426.
91. See Reply Brief of Petitioner, Cross-Respondent at 14, Medical Waste (No. 90-163).
never be instituted in court simply because individual members do not have the economic or legal resources to bring those suits on their own behalf. The court's holding effectively defeats one of the main purposes of environmental organizations: to seek legal redress on behalf of citizens who may be threatened with environmental injury.

5. Conclusion.—On balance, the Court of Appeals's decision, which limits MESA's scope to those actions specifically enumerated in the statute, has not frustrated the central purpose of MESA. At the same time, however, the decision hampers Maryland environmental interest groups from gaining access to the courts to protect the environment, and frustrates the courts' ability to assist these groups in protecting the environment from potential devastation before actual damage has occurred.

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93. See Save a Valuable Environment v. City of Bothell, 576 P.2d 401, 404 (Wash. 1978) (noting that a party "may be unable to afford the cost of challenging the action himself [and a] class suit may be too cumbersome. An association . . . of persons with a common interest can then be the simplest vehicle for undertaking the task . . ."). The Court of Special Appeals also remarked that the legislature has "recognized that the establishment of organizations and associations represent the only economically viable means of pursuing this involvement." Maryland Waste Coalition, Inc. v. Maryland Dep't of the Env't, 84 Md. App. 544, 561, 581 A.2d 60, 68 (1990), rev'd sub nom. Medical Waste Assocs., Inc. v. Maryland Waste Coalition, Inc., 327 Md. 596, 612 A.2d 241 (1992).
VI. Evidence

A. Confidential Records: Balancing Privacy Against Impeachment

In Zaal v. State, the Court of Appeals held that a defendant accused of sexual abuse had the right to review the educational records of his accuser for the purpose of investigating her credibility. The court found that the appropriate method of review of confidential records must be determined by weighing such factors as the victim's need for privacy, the defendant's need to inspect, and the nature of the information sought. The court rejected an application of the federal standard of in camera review of sensitive or confidential records, stating that in camera review was not always the best option. In so doing, the Zaal court held that when the defendant's need to inspect the records outweighs the victim's right of privacy, the defendant should be permitted access to the records either directly or through an expanded in camera review.

This ruling will have a profound effect in cases where criminal defendants seek to impeach the credibility of witnesses by using sensitive records to which they have gained access. The Zaal decision permits judges wide latitude in balancing the relevant factors and in determining how records should be reviewed. Ultimately, the decision grants judges tremendous discretion to determine the privacy rights of witnesses in criminal prosecutions.

1. The Case.—Iwan Zaal was charged with sexually abusing his twelve-year-old granddaughter. His granddaughter claimed that Zaal fondled her inappropriately. She stated that Zaal placed her on top of him and she felt something go into her vagina, and further claimed that her grandfather forced her to touch his penis. In response, Zaal stated that it was his granddaughter who had acted inappropriately, placing his hand between her legs and touching him while stating, "I did it for my daddy" and "[n]ow my father can

2. Id. at 87, 602 A.2d at 1263.
3. See id.
4. Id. at 86, 602 A.2d at 1263.
5. Id. at 87, 602 A.2d at 1263.
6. Id. at 61, 602 A.2d at 1250.
7. Id.
8. Id.
9. Id.
get you." At trial, Zaal also asserted that he and his son had a poor relationship.

Prior to trial, Zaal subpoenaed the school records of his granddaughter. The Montgomery County Board of Education moved for a protective order under Maryland regulations that protect school records. At a hearing on the motion, Zaal maintained that the records were necessary for him to effectively cross-examine his granddaughter. He argued that because he denied her allegations, the case would turn on the issue of her credibility. He contended that his granddaughter had an emotional disability that might bear on her ability to "observe and relate" and, therefore, he should be able to investigate her motivations, bias, and reputation for veracity.

The trial court conducted an in camera review of the records and granted the school board's motion for a protective order. In so ruling, the trial court found that there was nothing in the records that related to the granddaughter's truthfulness and nothing that would be relevant for impeachment purposes. Zaal appealed, claiming that the trial court had violated his rights to confrontation, compulsory process, due process, and effective assistance of counsel under both the United States and Maryland Constitutions.

The Court of Special Appeals, basing its decision on the

10. Id. at 61-62, 602 A.2d at 1250.
11. Id. at 62, 602 A.2d at 1250. Evidence was presented at trial that Zaal's son had threatened to "get [petitioner] one way or the other." Id.
12. Id., 602 A.2d at 1251.
13. Id. The Maryland regulations provide, in relevant part:
   A. A local school system or educational institution may disclose personally identifiable information from the education records of a student without the written consent of the parent or guardians of the student or the eligible student, if the disclosure is: . . .
      (9) To comply with a judicial order or lawfully issued subpoena . . .
   B. This regulation may not be construed to require or preclude disclosure of any personally identifiable information from the educational records of a student by a local school system or educational institution to the parties set forth in § A, above.
COMAR § 13A.08.02.20A & B.
14. See Zaal, 326 Md. at 62, 602 A.2d at 1251.
15. See id.
16. Id.
17. Id. at 63, 602 A.2d at 1251.
18. Id.
Supreme Court's decision in *Pennsylvania v. Ritchie,* rejected Zaal's claims. The court held that a trial court does not abuse its discretion when it conducts an *in camera* review and determines that a protective order is appropriate. Following that decision, the Court of Appeals granted certiorari to consider the issue of Zaal's right to access his granddaughter's school records.

2. The Federal Standard: Pennsylvania v. Ritchie.—In *Ritchie,* the Court was asked to determine whether Ritchie, accused of sexually abusing his daughter, should be permitted to view investigative files compiled by Children and Youth Services (CYS). Ritchie had subpoenaed CYS for the records of an investigation pertaining to his daughter's present charges against him, as well as the records of a previous investigation stemming from an anonymous report that his children were being abused. CYS refused to disclose the reports, claiming that they were privileged under a Pennsylvania statute preventing disclosure of child abuse reports absent certain enumerated exceptions. The trial court, without reviewing the entire file, denied Ritchie's motion to enforce the subpoena, and he was subsequently convicted.

The Supreme Court analyzed Ritchie's appeal on due process grounds, attempting to balance the public interest in protecting child abuse information with a defendant's right to obtain material evidence from the government. The Court found that although the public interest in protecting information on child abuse was strong, such an interest will not always prevent disclosure of information, especially when a trial court determines that the informa-

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20. 480 U.S. 39 (1987) (holding that the right to confrontation is a trial right only and evaluating a criminal defendant's right to review sensitive information under the Due Process Clause).
23. *Id.* at 43.
24. *Id.*
25. *Id.* at 44-45.
26. The Court rejected Ritchie's argument that nondisclosure violated his right to confrontation by asserting that the right to confrontation is a trial right designed to provide for proper cross-examination that does not affect pretrial discovery. *Id.* at 53. The Court held that Ritchie's constitutional arguments had typically been analyzed in light of the right to due process. *Id.* at 56.
27. According to the Court, "'Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id.* at 57 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).
tion is material to the defense. Consequently, the Court held that the file should be reviewed to determine if it contained information that was material to Ritchie's case.

The Ritchie Court rejected a broad view of the method by which the records should be made available, explaining that the Pennsylvania Supreme Court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree. A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files.

The Court held, however, that Ritchie's interest in a fair trial could be properly protected through in camera review. This form of review would eventually grant Ritchie access to material evidence while safeguarding the State's interest in protecting its child abuse information.

The Ritchie decision thereby established in camera review as the proper method for reviewing confidential records. While this approach has been accepted in a majority of jurisdictions, some

28. See id. at 57-58.
29. See id. at 58.
30. Id. at 59.
31. Id. at 60. The Court explained that denying the defendant the benefit of an "advocate's eye" did not grant excessive discretion to the trial court because the defendant would still be free to request specific information in the files from the court. The Supreme Court also clarified that throughout the trial process, the court would be obligated to disclose information that, although previously deemed immaterial by the court, had become material due to the nature of the trial. Id.
32. See id. Assessing the magnitude of the State's interest, the Court found: To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information . . . . A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected.
states have chosen not to accept such a limited method of review.\textsuperscript{34} These contrary decisions often have been based on state constitutions that arguably afford a defendant greater rights of confrontation and compulsory process than does the United States Constitution.\textsuperscript{35}

3. The Court's Reasoning.—In holding that \textit{in camera} review is not always the proper choice for providing a defendant with access to confidential information, the Maryland court distinguished the privacy interests in \textit{Zaal} from those in \textit{Ritchie}. The court found that the interest in confidentiality in student records was not as great as the need to prevent disclosure of child abuse records.\textsuperscript{36} In \textit{Ritchie}, the right to confidentiality was grounded in the strong public policy

\begin{quote}

35. See, e.g., Miller, 582 A.2d at 7 (holding that the accused's right under the confrontation clause and compulsory process clause of the state constitution had been violated when his counsel was not given access to reports compiled on a rape victim by a rape crisis center).

It has further been asserted that it is improper for judges to take on the role of advocate when reviewing records \textit{in camera} and that other options should be pursued. See Stockhammer, 570 N.E.2d at 1001, in which the court stated:

The Federal standard requiring only an in camera review by the trial judge of privileged records requested by the defendant rests on the assumptions that trial judges can temporarily and effectively assume the role of advocate when examining such records; and that the interests of the State and complainant in the confidentiality of the records cannot adequately be protected in any other way. Neither assumption withstands close scrutiny.

36. See \textit{Zaal}, 326 Md. at 76, 602 A.2d at 1258. In coming to this conclusion, the court underwent a thorough analysis of the Family Education Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (1988), and Maryland's implementing regulations, found in COMAR § 13A.08.02.20. Because Maryland law under § 13A.08.02.20 incorporates the goals of FERPA, the court applied decisions on the privacy right granted under FERPA in analyzing those to be granted under the Maryland law. See \textit{Zaal}, 326 Md. at 68-71, 602 A.2d at 1254-56. See generally 20 U.S.C. § 1232g(b)(2) (1988) (limiting federal education funding to only those institutions conforming to federal guidelines regarding the confidentiality of school records).

The court found that FERPA, and therefore § 13A.08.02.20, was established to prevent schools from haphazardly disclosing private information and provided parents and students with an avenue for reviewing school records to ensure that they contained no inappropriate information. See \textit{Zaal}, 326 Md. at 70, 602 A.2d at 1255. In this light, "'... the underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records ...' " Id. at 71, 602 A.2d at 1255 (quoting Smith v. Duquesne Univ., 612 F. Supp. 72, 80 (W.D. Pa. 1985)). Further, FERPA in no way prevents disclosure of student records if there exists a genuine need for the information. See Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977) (permitting the release of student records in a class action suit brought by bilingual parents who claimed the records were needed to establish inadequate services to bilingual students).
in favor of protecting sources reporting child abuse. The privacy interest in student records, addressed by the Zaal court, did not carry the same weight. The Zaal court found that the heightened interest in protecting child abuse records brought the Ritchie Court to decide that "a trial court, at least temporarily, could assume the role of advocate and, upon a review of records, assess, sufficiently accurately to protect the interests of the State and the accused, whether those records ought to be disclosed to the defense." In contrast, the Zaal court found that where privacy interests were not so pervasive, the Supreme Court had provided defendants with greater access to information than that provided through in camera review.

The Zaal court also found that Maryland had followed this trend and provided access to defendants when privacy concerns did not outweigh the defendant's need for the information. In Carr v. State, the Court of Appeals had held that a criminal defendant had the right to obtain and use the written statements of the State's witnesses for purposes of impeachment. In Leonard v. State, the Court of Special Appeals had followed similar reasoning in holding that an accused had a right to see a crucial prosecution witness's written statement, emphasizing that impeachment may be accomplished through statements that are more than mere flat contradic-

38. See Zaal, 326 Md. at 76, 602 A.2d at 1258. The court also looked to Maryland statutes on disclosure of child abuse records and held that the fact that Maryland law made it a criminal offense to disclose child abuse investigative records gave further credence to the higher standard of privacy to be given to child abuse records, as opposed to school records. See id. at 76 n.10, 602 A.2d at 1258 n.10.
39. Id. at 77, 602 A.2d at 1258.
40. See id. The court cited Jencks v. United States, 353 U.S. 657 (1957), and Dennis v. United States, 384 U.S. 855 (1966), to support its assertion that greater access was given to records when privacy was not overriding. In Jencks, the Supreme Court held that a defendant was entitled to view FBI records pertaining to an investigation of his activities, despite the FBI's interest in keeping its sources secret. The Court stated: Because only the defense is adequately equipped to determine the effective use for purpose[s] of discrediting the Government's witnesses and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Jencks, 353 U.S. at 668-69.
42. See id. at 472-73, 397 A.2d at 615.
The Leonard court stated:

[S]ubtle aspects of potential inconsistency, intrinsically subjective, have to be viewed from the defendant's perspective, and can be properly weighed only by defense counsel . . . . The court cannot be expected to view in the same context as defense counsel these more latent and subtle gaps or differences; nor should it purport to do so.45

The Zaal court enumerated several factors that should be considered in determining a defendant's right to, and the form of, access to confidential records. The court stated that the nature of the charges are important, and that to override a privacy interest "some relationship must be shown between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records."46 Another factor deemed important is the nature of the issue before the court. If the issue is one of identity, educational records would become irrelevant.47 If the issue involves a request for specific information that can easily be determined, there would be little need for direct access, and in camera review would be adequate.48 Where, on the other hand, the issue is one of the credibility of the witness, the court found that the State may be required to give the accused direct access to relevant records.49

The defendant's right of access, however, must be balanced against the privacy interests of those whose records are sought.50 The Zaal court recognized that "the victim's educational future could be compromised by the petitioner questioning her extensively about her educational records."51 In this light, in camera review would be more favorable. However, the court found that there are options available other than the limited choice between in camera review, which may deprive the defendant of adequate access, and full disclosure of the records, which may deny the victim's privacy

44. See id. at 638, 421 A.2d at 89.
45. Id. at 638-39, 421 A.2d at 89. The Zaal court recognized that Carr and Leonard were distinguishable in that none of the witnesses in those cases had a right to privacy in their statements. See Zaal, 326 Md. at 81, 602 A.2d at 1260. Nonetheless, the court found them to be significant to the issue at hand. See id.
46. Zaal, 326 Md. at 82, 602 A.2d at 1261.
47. See id.
48. See id.
49. Id. After evaluating these factors, the court found that Zaal had established his need to review the records. See id. at 83, 602 A.2d 1262.
50. See id.
51. Id. at 84, 602 A.2d at 1262.
The Zaal court found that the doubts raised in Carr and Leonard regarding the propriety of judicial review of evidence for the defendant's benefit indicated a need to search for alternatives to in camera review. With this in mind, the court addressed the alternatives considered by the Supreme Judicial Court of Massachusetts in Commonwealth v. Stockhammer. The court noted that in camera review could be expanded to allow counsel for both parties to be present. In addition, counsel could be permitted to review records in their capacity as officers of the courts. These alternatives would provide a defendant with the benefit of having review performed by an "advocate's eye," while sheltering the interests of the victim from undue compromise.

Thus, the court held that when a defendant sought sensitive records for the purpose of determining a witness's credibility, a trial judge should weigh the established need for the documents, the right to privacy, the nature of the information sought, and interests in judicial economy to determine the appropriate method of review. The court further held that in the instant case, controlled access—either through expanded in camera review or through release to both counsel as officers of the court, followed by a hearing on admissibility—was proper.

52. Id. In reaching its conclusion, the court considered the opinion of the Supreme Judicial Court of Massachusetts in Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991), in which the court rejected the standard set forth in Ritchie in favor of other procedures. The Stockhammer court stated that in camera review was not always the best means of protecting the interests of both parties. Id. at 1002. The Stockhammer court expressed the concern that it was the defense, not the judge, who could best determine what evidence may be useful. Id. at 1001. Judges, therefore, could use their broad discretion to shape a procedure for review that would best address the competing interests of both parties. Id. at 1002.

53. See Zaal, 326 Md. at 84, 602 A.2d at 1262.


55. See Zaal, 326 Md. at 86, 602 A.2d at 1263.

56. See id.

57. The victim could be protected by the issuance of a court order restricting disclosure of information contained in the records. See id. at 87, 602 A.2d at 1263. The Zaal court further clarified that, after such a review by counsel was conducted, a hearing would be held on the admissibility and relevance of evidence the defense wished to utilize. See id.

58. See id., 602 A.2d at 1264. The court emphasized that when a court decides to conduct an in camera review without the presence of counsel "the court's review is not to determine whether, and, if so, what, is 'directly admissible;' rather, it is to exclude from the parties' review material that could not, in anyone's imagination, properly be used in defense or lead to the discovery of usable evidence." Id. at 88, 602 A.2d at 1264.

59. See id.
4. Analysis.—The Zaal court’s holding is significant for several reasons. Before rejecting strict adherence to in camera review, the court came to the conclusion that school records do not carry a strong privacy interest. While it may be true that the Family Education Rights and Privacy Act (FERPA), the law underlying disclosure rules in this area, did not intend to give individual privacy rights to students, the court’s emphasis on the statutory interpretation of FERPA and Maryland’s implementing regulations found in Title 13A of COMAR, used to reach this conclusion, is misguided. The court failed to realize that a strong public interest in protecting school records need not originate from the policies outlined in these statutes.

In Ritchie, the Supreme Court gave strong deference to the need to protect child abuse records because of its desire to protect the confidences of those persons, both victims and concerned citizens, who reported abuse. This same interest is present in Zaal. By creating the possibility that student records may be subject to full disclosure to a criminal defendant, there is the potential that students may choose not to be honest and forthcoming with school teachers, principals, and counselors for fear of having to face scrutiny of their records, as well as public scrutiny in court. For young children reporting sexual abuse, this new fear is added to the apprehensions they may already have about reporting such abuse. While school records may not inherently carry with them a strong individual right to privacy, the circumstances surrounding their disclosure should be given greater consideration in determining the level of confidentiality to be attached. In this light, the distinction made by the Zaal court between the privacy interests present in Ritchie and those in Zaal may not be as compelling as the court suggested.

By holding that Ritchie should not always be the model standard, Zaal grants judges broad discretion to weigh the relevant factors and determine which procedure for disclosure is appropriate. For defense counsel, this decision is advantageous because it sug-

60. See id. at 76, 602 A.2d at 1258.
62. See 20 U.S.C. § 1232g (1988); COMAR § 13A.08.02.20. The Zaal court explained that “to discern the purpose of the [COMAR] regulation, it is necessary to determine the purpose of the federal statute.” Zaal, 326 Md. at 70, 602 A.2d at 1255.
64. See Zaal, 326 Md. at 82, 602 A.2d at 1261.
65. See id. at 71, 602 A.2d at 1256.
66. See id. at 81, 602 A.2d at 1260.
gests that even a minor connection between the issue of credibility and the information in the records may lead to increased access if the judge can be convinced that privacy concerns are not overriding.\textsuperscript{67} For prosecutors, it creates a strong impetus to emphasize the strong individual or public interest in the confidential nature of the records being sought. The Zaal court appeared to disfavor \textit{in camera} review because it was apprehensive about a judge's ability to determine what evidence is favorable to the defendant's case. Thus, it is likely that only the strongest of privacy interests will be given the protection afforded by \textit{in camera} review.

It is clear that the court was particularly concerned with the idea that a judge may not be the proper authority to determine what subtle pieces of evidence may be valuable to the accused.\textsuperscript{68} While a genuine concern, the court's emphasis is misplaced. As the Supreme Court pointed out in \textit{Ritchie}, the judge's temporary role as advocate during \textit{in camera} review does not provide the judge with unchecked power.\textsuperscript{69} The \textit{Ritchie} court emphasized:

If a defendant is aware of specific information contained in the file . . . , he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.\textsuperscript{70}

Additionally, the judge's determination regarding what evidence is material to the defendant is still subject to judicial review.\textsuperscript{71} The Zaal court, however, was not comfortable with these checks on the

\textsuperscript{67} It was this concern, that mere assertions of relevance may permit wider disclosure, that brought the Supreme Court of Minnesota to follow the standard of \textit{in camera} review that was later to be set forth in \textit{Ritchie}. \textit{See} State v. Paradee, 403 N.W.2d 640, 642 (Minn. 1987) (rejecting the Supreme Court of Pennsylvania's decision in \textit{Ritchie} to provide full disclosure to the defendant on the grounds that this was "an approach which in effect allows defense counsel easy access to various types of privileged and confidential records simply by asserting that the records might contain material relevant to the defense").

\textsuperscript{68} \textit{See Zaal}, 326 Md. at 86, 602 A.2d at 1263. The Supreme Court apparently shared this concern. \textit{See} Dennis v. United States, 384 U.S. 855, 874-85 (1966) (holding that the defendant was entitled to view grand jury testimony and that \textit{in camera} review was inappropriate). The Dennis Court explained that "[i]n our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." \textit{Id.} at 875.


\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{See Paradee}, 403 N.E.2d at 642.
trial judge's role as advocate. Consequently, the court chose to err on the side of providing greater access to the accused.

Nevertheless, the Zaal court properly recognized that the relative balancing of privacy rights with a defendant's legitimate right of access to material evidence may not always produce the same outcome.\(^{72}\) While courts following Ritchie adhere to in camera review whenever privacy interests must be balanced with a criminal defendant's interest in obtaining relevant evidence,\(^{73}\) Zaal provides Maryland courts with the flexibility to acknowledge that the two interests may not be so equal as to require such limited review. In some circumstances, an accused's right to fully defend himself may greatly outweigh any interest in confidentiality.\(^{74}\) The Zaal decision grants Maryland courts the capability to address such circumstances equitably.

5. Conclusion.—In Zaal, the Court of Appeals rejected a strict application of the federal standard of in camera review when determining the materiality of sensitive records.\(^{75}\) In so doing, Zaal allows courts to seek other alternatives that may better address the defendant's need to have a fair review of the records. While the Zaal decision does not create a bright line rule enabling practitioners to predict a court's ruling on the form of review of sensitive records used for impeachment purposes, it does outline the factors that the court deems relevant to such a determination.\(^{76}\) These factors suggest a strong emphasis by the court on the defendant's right to have the benefit of advocate review of sensitive records.

**TERI KAUFMAN**

**B. A Troublesome Expansion of the Admissibility of "Other Crimes" Evidence and Limitation of Discovery**

In State v. Brown,\(^{77}\) the Court of Appeals held that evidence of "other crimes" that has "special relevance" to a contested issue in a case may properly be admitted, despite Maryland's general rule ex-

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\(^{72}\) See Zaal, 326 Md. at 87, 602 A.2d at 1264.

\(^{73}\) See supra note 33 and accompanying text.

\(^{74}\) See, e.g., Davis v. Alaska, 415 U.S. 308 (1974) (holding that the defendant's right to confrontation was paramount to the interest of the State in protecting the confidentiality of records of juvenile offenders).

\(^{75}\) See Zaal, 326 Md. at 86, 602 A.2d at 1263.

\(^{76}\) See id. at 87, 602 A.2d at 1264.

\(^{77}\) 327 Md. 81, 607 A.2d 923 (1992).
cluding such evidence. The court also held that the State is not required to disclose statements concerning other crimes when made by a defendant to an undercover agent. By treating the two issues as separate and independent questions, the Brown court fashioned a rule whereby certain other-crimes evidence is admissible, but not discoverable. In reaching its decision, the court failed to recognize the unfair position in which many Maryland defendants will find themselves as a result of the rule.

1. The Case.—On February 17, 1988, Special Agent Kenneth Johnson of the Drug Enforcement Administration and paid-informant Reginald Gray purchased an ounce of cocaine at the Brooks Court Apartments in Annapolis, Maryland. The purchase was part of an ongoing investigation of drug activity in the area that had recently focused on the defendant, Shirley Mitchell Brown. Testimony at Brown's trial indicated that on the day in question, Gray spoke to Brown about the price of cocaine while Special Agent Johnson waited in the car. Gray then returned to Johnson and told him, per Brown's request, to move the car further away from where Brown was standing. During that time, Johnson saw Brown speak with another man who went into an apartment and later emerged with the cocaine. The man delivered it to Johnson in exchange for the purchase price. A local police officer, Detective Todd Young, watched the transaction from nearby and provided testimony at trial corroborating this information.

Young also testified at Brown's trial regarding a second undercover purchase involving Brown, which occurred approximately three weeks later on March 7. At that time, Brown, again working through an informant, explained to Young: "'It's not that you're not okay, I just don't deal with anybody new.'" This testimony, as
well as Brown's conviction record from the March 7 transaction, was admitted into evidence at the trial for the February 17 offense for the purpose of establishing Brown's identity.

Brown was convicted of both distribution and conspiracy to distribute cocaine. The Court of Special Appeals reversed the conviction, holding that Brown's statement to Detective Young was discoverable under Maryland Rule 4-263(b)(2), and the State's failure to disclose it prior to trial was grounds for a mistrial. Additionally, the intermediate appellate court found that the trial judge had abused his discretion when he admitted evidence of the March 7 transaction because its prejudicial effect outweighed its probative value.

The Court of Appeals affirmed the decision of the Court of Special Appeals, but for significantly different reasons. The Court of Appeals based its decision solely on the improper admission of the conviction record. The court found that the trial court's admission of Brown's statement was proper because it "had special relevance to a contested issue in the case, was not introduced simply to prove criminal character, and had probative force that substantially outweighed its potential for unfair prejudice." Moreover, the court declared that Young's testimony regarding the events of March 7 was necessary for the jury to understand the significance of the statement. Finally, based on the policy reasons behind Rule 4-263 and previous judicial interpretations of the rule, the court held that Brown's statement was not discoverable because it was made to an undercover state agent during the commission of a

89. Id., 607 A.2d at 925.
90. Id. at 83, 607 A.2d at 924.
92. See id. at 537, 584 A.2d at 171.
93. Brown, 327 Md. at 87, 607 A.2d at 926.
94. Id. at 89-90, 607 A.2d at 927. The court noted that the conviction record might have caused the jury to give more weight to Young's testimony, or indicated to the jury that the judge believed Brown used drugs regularly. See id. The prejudicial effect of the record, therefore, outweighed its probative value, and the court could not rule that its admission was harmless beyond a reasonable doubt. See id. at 90, 607 A.2d at 927.
95. Id. at 86-87, 607 A.2d at 925.
96. Id. at 89, 607 A.2d at 926-27.
97. Rule 4-263 was originally designed "to force the defendant to file certain motions before trial, including a motion to suppress an unlawfully obtained statement." White v. State, 300 Md. 719, 734, 481 A.2d 201, 208 (1984), cert. denied, 470 U.S. 1062 (1985). See also infra text accompanying note 131.
crime. 99

2. Legal Background.—

a. "Other Crimes" Evidence.—Federal Rule of Evidence 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." 100 One noted commentator has stated that the "other crimes" rule is based upon the belief that the state should not be allowed to suggest that the defendant is more likely to have committed the crime for which he is on trial simply because he has committed other crimes. 101 The Court of Appeals has asserted that "few principles of American criminal jurisprudence [are] more universally accepted." 102 In fact, the court recently reaffirmed the need for an "unremitting appreciation of the significant potential for unfair prejudice that is likely to accompany the admission of other bad acts evidence," 103 and concluded that the exclusionary approach advances that end. 104 As the court acknowledged, a policy of general admission of other-crimes evidence would create an "'almost insurmountable'" prejudice against the defendant. 105 Furthermore, it could surprise the defendant unfairly, requiring him to answer for his past actions without adequate preparation. 106 Finally, the general admission of other-crimes evidence would bring in a host of collateral issues that would unnecessarily complicate the trial. 107

The dangers associated with the admission of "other crimes" evidence are numerous, 108 but exceptions have developed that enable courts to admit evidence that is relevant to the direct proof that a defendant committed a crime, rather than the indirect proof offered by a showing of criminal character. 109 The Court of Appeals out-

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99. Brown, 327 Md. at 91-95, 607 A.2d at 928-29.
100. FED. R. EVID. 404(b).
104. Id. at 500, 597 A.2d at 961.
107. See Harris, 324 Md. at 496, 597 A.2d at 959.
108. See supra notes 102-106 and accompanying text.
linded these exceptions in *Ross v. State.*

[E]vidence of other crimes may be admitted when it tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial.

As the *Ross* court noted, however, this list of exceptions is not exhaustive. It is instead “an open-ended list always capable of expansion wherever a clear instance of relevance might arise that somehow fails to fit neatly into one of the pigeonholes.”

The development of exceptions has been described as a “Prosecutor’s Delight” by many who fear that it is too easy to link evidence of prior acts to one of the above-mentioned propositions. Qualification as an exception, however, is only the first step in getting other-crimes evidence admitted. The evidence must also be judged to have probative value that outweighs its prejudicial effect. This judgment is a matter of discretion for the trial court. But the potential for harm to the defendant mandates that the trial judge exercise “rigid scrutiny” in making a determination on admissibility. Taking these concerns into account, the following rule has evolved in Maryland:

[E]vidence of other bad acts is generally not admissible [except] for those instances in which the evidence 1) has special relevance, i.e. is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character, and 2) has probative force that substantially outweighs its potential for unfair prejudice.

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111. *Id.* at 669-70, 350 A.2d at 684.
112. The court pointed out that “[a]dditional exceptions have also been recognized.” *Id.* at 670, 350 A.2d at 684.
115. *See, e.g., Harris,* 324 Md. at 500, 597 A.2d at 961. *See generally* Fed. R. Evid. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .”).
118. *Harris,* 324 Md. at 500, 597 A.2d at 961. In addition, the Court of Appeals has, in some cases, pointed out the importance of comparing the necessity for “other crimes” evidence against the strength of the prosecution’s case. This additional evalua-
b. Discovery of Statements Under Rule 4-263(b)(2).—Also at issue in Brown was Maryland Rule 4-263(b)(2), which provides:

Upon request of the defendant, the State’s Attorney shall:

(2) Statements of the Defendant.—As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant . . . (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement.\(^\text{119}\)

Unfortunately, Rule 4-263 had never been judicially interpreted in connection with “other crimes” evidence prior to Brown.

3. The Court’s Reasoning.—

a. “Other Crimes” Evidence.—The Brown court began by addressing the admissibility of the “other crimes” evidence,\(^\text{120}\) finding that Brown’s statement to Detective Young on March 7 was substantially relevant to the way in which Brown typically sold drugs, and particularly to how he acted during the February 17 transaction.\(^\text{121}\) The Court of Special Appeals held that the evidence was inadmissible because it did not establish a modus operandi unique to the defendant.\(^\text{122}\) The Court of Appeals agreed, acknowledging “that Brown’s use of a ‘runner’ . . . was not ‘so unusual and distinctive as to be like a signature’” and earmark the crime as the handiwork of the accused.”\(^\text{123}\) Evidence of modus operandi is used to identify the criminal actor by showing that he or she was involved in another crime so similar to the one charged that the same person must have

\(^{119}\) Md. R. 4-263(b)(2).

\(^{120}\) The court held the admission of the conviction record to be reversible error, summarily explaining that its prejudicial effect outweighed its probative value. See Brown, 327 Md. at 89-90, 607 A.2d at 927.

\(^{121}\) See id. at 89, 607 A.2d at 926.


committed both.124 An often-cited exception to the rule against other-crimes evidence, modus operandi requires evidence that is unique.125 Brown’s use of a “runner,” however, was not unique in the context of this crime. Moreover, because Brown’s identity was not a contested issue, other-crimes evidence to prove identity, even if sufficient to establish a modus operandi, was not admissible in this case.126 As the court noted, “Were this the only ground of admissibility, the ‘other crimes’ evidence could not be admitted.”127

The regularly-cited exceptions to the rule are not, however, the only grounds for admission. Although approximately ninety-five percent of admissible “other crimes” evidence falls into one of the categories identified in Ross, “[t]he decisive criterion nonetheless remains substantial relevance itself, not merely a convenient but coincidental identification with one of its familiar illustrative examples.”128 In Brown, the court rationalized its decision by explaining that the statement went beyond indicating that Brown participated in another similar crime, but constituted “an admission about the manner in which he acts when carrying on his drug business.”129 It was therefore substantially relevant to the instant transaction, as well as the March 7 transaction.130

b. Discovery of Statements Under Rule 4-263(b)(2).—In reaching the discovery issue, the court reviewed the history of interpretation of Rule 4-263 and its predecessors, and concluded that the Rule’s primary purpose is to make discoverable statements made by defendants that may have been unlawfully obtained.131 Relying primarily on Jennings v. State,132 the court ruled that because statements made to an undercover officer during a crime could not have been obtained unlawfully, they are not discoverable under Rule 4-263.133

4. Analysis.—The Brown court’s ruling on the admissibility of the “other crimes” evidence adhered to the rule in Maryland. However, the court’s decision regarding the discoverability of certain

124. See generally Faulkner, 314 Md. at 638-39, 552 A.2d at 900 (discussing the modus operandi exception).
125. See id. at 639, 552 A.2d at 900.
126. See Brown, 327 Md. at 87, 607 A.2d at 925-26.
127. Id., 607 A.2d at 926.
129. Brown, 327 Md. at 88, 607 A.2d at 926.
130. Id. at 89, 607 A.2d at 926.
131. See id. at 91-94, 607 A.2d at 928-29.
132. 303 Md. 72, 492 A.2d 295 (1985).
133. Brown, 327 Md. at 94, 607 A.2d at 929.
categories of "other crimes" evidence significantly undermines the aim of the rule: to preserve fairness in the courtroom. The court reached this troublesome result only by treating the issues as two unrelated questions.

As the court pointed out in *Harris v. State*,134 “other crimes” evidence must be substantially relevant to a contested issue in the case to be admitted at trial.135 In *Brown*, it was uncontested that the defendant was at the scene of the crime on February 17, but the degree to which he participated in the crime, if at all, was unclear. For example, Special Agent Johnson did not speak with Brown regarding the deal, nor was there any evidence that Brown was directly involved in any way with delivery or payment.136 This lack of evidence of direct involvement created uncertainty. Brown’s statement to Detective Young was offered to explain the lack of direct contact with Johnson. The statement indicated that Brown was acting in accordance with his general method of dealing with new customers, and tended to prove that he was indeed a participant in the February 17 transaction.137 As the rule prohibiting other-crimes evidence demands, the statement had “relevancy . . . beyond any improper suggestion that Brown has a criminal propensity, or that since he dealt drugs on another occasion, he is more likely to have done so in the case charged.”138 Thus, the Court of Appeals deemed the statement properly admitted by the trial court,139 and turned to the question of its discoverability.

The discoverability of a statement that is evidence of other crimes had never before been specifically addressed in Maryland, but earlier opinions made clear the importance of avoiding surprise in conjunction with the presentation of other-crimes evidence. For example, in *Ross v. State*,140 the Court of Appeals acknowledged that a defendant who had not been made aware in advance that evidence of other criminal acts would be used against him could not be properly prepared to defend himself.141 This principle was also recog-

135. Id. at 500, 597 A.2d at 961.
136. *Brown*, 327 Md. at 84, 607 A.2d at 924.
137. See id. at 86, 607 A.2d at 925. The court noted the State's identification of the contested issue as the defendant's participation in the crime, but never directly identified it as such in its own analysis. See id.
138. Id. at 88, 607 A.2d at 926.
139. The court did not discuss the probative value and potential prejudicial effect of the statement because it addressed the admissibility of the evidence only to correct the intermediate court's specific holding. See id. at 87-88, 607 A.2d at 926.
141. See id. at 669, 350 A.2d at 684.
nized in *Worthen v. State*, where the Court of Special Appeals indicated that the defendant had suffered an injustice when he was denied a continuance to investigate prior crimes alleged against him. Finally, in *Harris v. State*, the Court of Appeals noted that one of the dangers traditionally associated with other-crimes evidence has been the element of surprise, where the defendant is compelled, "at a moment's notice, to answer charges concerning the whole of his past life." The *Harris* court admitted that this concern "may have been somewhat alleviated by current disclosure and discovery procedures in criminal cases." The practical effect of the decision in *Brown*, however, is to resurrect the need for such a concern.

By declaring that the State was not required to disclose the statement prior to its use at trial, the court effectively created a situation in which the State may use other-crimes evidence to the severe disadvantage of the defendant. Because a statement, made at a time completely separate from the instant crime, may be used against the accused without notice, a defendant is likely to be unfairly surprised and unable to effectively defend himself.

The court reached its decision on this issue by significantly misconstructing its holding in *Jennings v. State*. Contrary to the *Brown* court's reading of *Jennings*, the fact that the defendant's statements were not unlawfully obtained was not the basis of the earlier court's decision against discoverability. In *Jennings*, the State, after indicating in a discovery response that it knew of no statements by the defendant that might be used at trial, introduced evidence of Jennings's conversation with an undercover agent about the price of drugs sold during the transaction for which he was standing trial. The Court of Appeals held that the State was not required under Rule 4-263 to disclose those statements prior to trial.

Jennings's statements, however, differed from Brown's in two fundamental ways. First, Jennings's statements were made during

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143. See id. at 43, 399 A.2d at 284.
145. Id. at 496, 597 A.2d at 959 (quoting Stone, *supra* note 105, at 957-58).
146. Id.
147. 303 Md. 72, 492 A.2d 295 (1985).
148. See *Jennings*, 303 Md. at 83, 492 A.2d at 300 (acknowledging the importance of the defendant's surprise at the use of his statements against him).
149. See id. at 74-75, 492 A.2d at 296.
150. Id. at 85-86, 492 A.2d at 302.
the commission of the crime for which he was on trial. Second, his statements, unlike Brown's, constituted part of the crime itself. In short, the statements at issue in Jennings were not really "other crimes" evidence.

Similarly, Jennings could hardly claim to have been surprised and unfairly disadvantaged by the presentation at trial of statements that actually constituted the crime charged. Brown's predicament is clearly distinguishable. As the Court of Special Appeals pointed out, "[Brown's] statement was an extraneous remark made at the conclusion of a sale of cocaine conducted almost three weeks after the alleged transaction for which [he] was on trial." In no way should he have been expected to anticipate this evidence at trial and prepare to defend against it.

In Brown, however, the Court of Appeals did not connect the "other crimes" issue to the discovery issue. Rather, the court seemed to operate under the assumption that once evidence of other crimes is deemed admissible, it is no longer deserving of special consideration. This may not be a sound assumption. A decision to admit other-crimes evidence does not mean the evidence is not prejudicial; it means only that, in the interest of ascertaining the truth, it has been judged important enough to be admitted despite its prejudicial effect. Defendants are most in need of protection from the unfair prejudice associated with "other crimes" evidence when such evidence is presented at trial without notice. In fact, the Federal Rules of Evidence have recently been amended to reflect this need. Rule 404(b) now mandates that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any [other-crimes] evidence it intends to introduce at trial." In this way, defendants are given the chance to prepare for their defenses more adequately.

The Court of Appeals, however, could "find no reason to compel the State to produce a statement" like Brown's. Given the opportunity to fashion a rule that would give defendants a chance to better defend themselves against the unfair prejudice caused by "other crimes" evidence, the court elected to separate the discovery

151. See id. at 74, 492 A.2d at 296.
152. See id.
154. FED. R. EVID. 404(b).
155. Brown, 327 Md. at 95, 607 A.2d at 929.
and evidence issues in the case, ignoring the effect such a ruling will have on defendants confronted with other-crimes evidence in the future. As the Jennings court pointed out earlier, the question ultimately revolves around policy concerns.\textsuperscript{156} The Brown court chose a policy that disregards the principles underlying the general rule of excluding “other crimes” evidence, thereby diluting the protections the rule seeks to insure.

5.\textit{ Conclusion.}—In Brown, the Court of Appeals ignored the reasons for the special treatment normally given to “other crimes” evidence and misinterpreted its holding in Jennings v. State. Consequently, the court has created a rule whereby evidence of other crimes is not subject to discovery if it is in the form of a statement made to an undercover officer during any crime. The ruling will strip many Maryland criminal defendants of the protections they deserve with regard to this particularly prejudicial type of evidence.

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KIMBERLY L. LIMBRICK
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\section{C. The Discretionary Power to Exclude Evidence: The Business Records Exception & the “Trustworthiness” Factor}

In Owens-Illinois, Inc. v. Armstrong,\textsuperscript{157} two former Bethlehem Steel employees suffering from asbestosis sued several manufacturers and suppliers of asbestos-containing insulation in a products liability action.\textsuperscript{158} When the defendants sought admission of a potentially exculpatory piece of evidence, namely a favorable asbestos exposure report, the trial judge excluded it because of its “unreliability.”\textsuperscript{159} On appeal, the Court of Appeals took a fresh look at Maryland’s business records exception to the hearsay rule, provided some guidance to trial court judges for its application, and created a presumption of trustworthiness for business records that meet the exception’s technical requirements.\textsuperscript{160}

\subsection{I. The Case.}—Respondents Othello Armstrong and Forrest Wood\textsuperscript{161} originally brought suit in the Circuit Court for Baltimore

\begin{thebibliography}{161}
\bibitem{156} See Jennings, 303 Md. at 84, 492 A.2d at 301.
\bibitem{158} See \textit{id.} at 111, 604 A.2d at 49.
\bibitem{159} See \textit{id.} at 112, 604 A.2d at 49.
\bibitem{160} \textit{Id.} at 116, 604 A.2d at 51.
\bibitem{161} During both the trial and first appeal, two other workers were involved in this suit as plaintiffs. Neither was involved at the Court of Appeals level because the jury found that they did not suffer from asbestosis. See Owens-Illinois, Inc. v. Armstrong, 87
City against Owens-Illinois, Owens-Corning Fiberglas and Eagle-Picher Industries, among others, as the manufacturers, installers, and suppliers of asbestos products, under theories of negligence and strict liability in tort.\textsuperscript{162} Only Owens-Illinois was involved on appeal because Owens-Corning settled and Eagle-Picher's appeal was stayed after it filed for bankruptcy.\textsuperscript{163} Both Armstrong and Wood claimed to have been exposed to heavy clouds of asbestos dust from asbestos-containing insulation that was in use at Bethlehem Steel shipyards during their employment there.\textsuperscript{164} Armstrong had worked there from 1942 to 1963 as both a laborer and a welder; Wood had worked there from 1941 to 1975 as a rigger.\textsuperscript{165} They alleged that this exposure had caused them to contract asbestosis.\textsuperscript{166}

At trial, Owens-Illinois attempted to offer into evidence an asbestos exposure study conducted by a Bethlehem Steel industrial health engineer in 1969.\textsuperscript{167} The report described three air samples "represent[ing] the actual amount of asbestos exposure that [was] claimed by the plaintiffs."\textsuperscript{168} Owens-Illinois claimed that if the report was admitted, it would show that "no measurable amount of asbestos fibers [was] detected."\textsuperscript{169} The trial court recognized that the report met the technical requirements of the business records exception; but, in an exercise of judicial discretion, the court found that the report lacked sufficient reliability to be admitted.\textsuperscript{170}

The Court of Special Appeals concurred with the trial judge's finding.\textsuperscript{171} The appellate court gave a number of reasons for this result: (1) "[t]he investigation and report were not required by law"; (2) the report appeared to be a one-time occurrence; (3) "there was nothing to show that [the study was] a necessary component of the daily operation of [the] business"; (4) the motive behind creating the report was questionable; and (5) "[t]he report lacked

\textsuperscript{162} Armstrong, 326 Md. at 111, 604 A.2d at 49.
\textsuperscript{163} See id.
\textsuperscript{164} See id. at 110-11, 604 A.2d at 48-49.
\textsuperscript{165} Id.
\textsuperscript{166} See id. at 118, 604 A.2d at 52.
\textsuperscript{167} See id. at 112, 604 A.2d at 49.
\textsuperscript{168} Petitioner's Brief at 10, Armstrong (No. 77-1991).
\textsuperscript{169} Armstrong, 326 Md. at 112, 604 A.2d at 49.
\textsuperscript{170} See id.
specificity in the description of the controls in the investigation.\textsuperscript{172} In sum, the Court of Special Appeals found that these factors weighed against admittance either because they indicated the inherent unreliability of the report, or alternatively, because they indicated that the asbestos report was not a "business record" at all. The Court of Appeals granted certiorari to address, among other things, the business records exception in Maryland.\textsuperscript{173}

2. \textit{Legal Background}.—In Maryland, hearsay is defined as a written or oral statement, or assertive nonverbal conduct,\textsuperscript{174} "made somewhere other than from the witness stand before the trier of fact at the trial in progress,"\textsuperscript{175} which is offered at the trial in progress as proof of the matter asserted within the statement or conduct.\textsuperscript{176} The Supreme Court, in \textit{Chambers v. Mississippi},\textsuperscript{177} explained:

The hearsay rule . . . is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination.\textsuperscript{178}

The business records exception\textsuperscript{179} is one category of hearsay

\textsuperscript{172} Id. at 712, 591 A.2d at 550. The study was found not to be a "necessary component of . . . daily operation" because Bethlehem Steel did not appear to depend on the accuracy of the information contained in the report. See id.

\textsuperscript{173} See \textit{Armstrong}, 326 Md. at 112, 604 A.2d at 49.

\textsuperscript{174} See \textit{LYNN McLAIN, MARYLAND EVIDENCE} § 801.3 (1st ed. 1987).

\textsuperscript{175} Id. § 801.2, at 273.

\textsuperscript{176} See id. § 801.1.

\textsuperscript{177} 410 U.S. 284 (1972).

\textsuperscript{178} Id. at 298-99 (citation omitted). For a complete account of the history of the hearsay rule, see 2 \textit{STRONG}, \textit{supra} note 101, § 244; \textit{McLAIN}, \textit{supra} note 174, § 801.1, at 269.

\textsuperscript{179} The authorities are consistent in finding that the present day business records exception is an outgrowth of the common-law "shopbook rule." See \textit{State v. Garlick}, 313 Md. 209, 216, 545 A.2d 27, 30 (1988); Robert E. Powell, \textit{Admissibility of Hospital Records Into Evidence}, 21 Md. L. REV. 22, 30 (1961). See also 2 \textit{STRONG}, \textit{supra} note 101, § 285 (discussing the evolution of the business records exception). This rule was created by
that is admissible because it has proven to be "especially reliable." The exception is based on the notion that "insincerity will be minimized, because the business will want accurate records to rely on and errors are likely to be caught by others in or out of the business." At its core, the exception maintains this notion of reliability. The reliability of such records allegedly derives from the fact that the records are made in the "regular course" of business, and it is the "regular course" of the business to rely on such records.

At present, "Maryland's rules of evidence are not codified; rather, they are found in common-law decisions, legislative enact-

the courts to overcome the problems of evidence facing merchants when testifying about their accounts. Powell, supra, at 30. Its creation allowed merchants' accounts to be admitted into evidence if they could meet a set of strict requirements. Though the requirements varied among jurisdictions, some requirements were that "the books bear an honest appearance," and "each transaction not exceed a certain limited value." See 2 Strong, supra note 101, § 285. Others included:

the entries be regularly made at or about the time of the transaction and as a part of the routine of the business, . . . the party using the book not have had a clerk, . . . the party filed a "supplemental oath" to the justness of each account, . . . witnesses testify from their experience in dealing with the party that the books are honest, . . . the books be used only to prove open accounts for goods and services furnished the defendant . . ., and . . . other proof be made of the actual delivery of some of the goods.


180. See McLain, supra note 174, § 803.1, at 340 ("[E]ach such 'hearsay exception' has circumstantial guarantees of trustworthiness which negate or minimize one or more of the hearsay dangers . . .").

181. Id. § 803(6).1, at 380.

182. See Garlick, 313 Md. at 216, 545 A.2d at 30.

183. See generally 2 Strong, supra note 101, § 286 (explaining "regularly kept records"). The current business records exception in Maryland is located at § 10-101 of the Courts and Judicial Proceedings Article, which states:

(a) Definition of "business."—"Business" includes business, profession, and occupation of every kind.

(b) Admissibility.—A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.

(c) Time of making records.—The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.

(d) Lack of knowledge of maker.—The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility.

ments, and court rules."  

Therefore, in order to fully appreciate the intricacies of the business records exception, it is essential to review the case law surrounding its application. The most influential decision, for purposes of this analysis, was that of the Supreme Court in Palmer v. Hoffman, which helped define the role of the trial judge in determining the "trustworthiness" of a business record offered as evidence.

In Palmer, a train engineer gave his statement about a train accident in which he was involved, to both a railroad representative and a state representative. Though the engineer had since died, his statement was offered into evidence at trial. The Supreme Court found that the engineer's statement was not made "in the regular course of business." Some authorities have interpreted this decision to mean that the report was inadmissible because it was not the railroad's business to make such reports, but according to McCormick, the most reasonable reading of [Palmer] is that it did not create a blanket rule of exclusion for accident reports or similar records kept by businesses. Rather, it recognized a discretionary power in the trial court to exclude evidence which meets the letter of the business records exception, but which, under the circumstances appears to lack the reliability business records are assumed ordinarily to have.

The current federal rule incorporates Palmer through express lan-

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184. Frank M. Carpenter, Jr., Note, Admissibility of Refusal to Submit to a Breathalyzer Test, 51 Md. L. Rev. 701, 704 (1992). (Editor's note: Maryland is currently in the process of codifying its evidence rules.)

185. 318 U.S. 109 (1943).

186. See infra notes 187-193 and accompanying text.

187. Palmer, 318 U.S. at 111.

188. Id.

189. Id.

190. "'[R]egular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business." Id. at 115. See also Joseph F. Murphy, Jr., Maryland Evidence Handbook § 804(A) (1989) ("The train wreck report might be 'prepared in the ordinary course of business,' but it is certainly not in the railroad's ordinary course of business to have train wrecks."); 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 447, at 670 & n.20 (1980) ("A reasonable reading of Palmer is that it adopted a per se rule for accident reports . . . .").

191. 2 Strong, supra note 101, § 288.

192. The Federal Rules define a "business record" as [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that
language giving the trial court discretion to refuse to admit evidence based on the circumstances.\textsuperscript{193}

This discretionary power had never been explicitly recognized in Maryland. Indications that the trial court should retain some form of discretionary power have existed since as early as 1966, when in \textit{Weishaar v. Canestrale},\textsuperscript{194} the Court of Appeals upheld the exclusion of evidence\textsuperscript{195} because the "circumstances indicate[d] an enhanced motive for insincerity."\textsuperscript{196} However, the first mention of \textit{Palmer} in Maryland was not until the 1978 decision, \textit{Pratt v. State}.\textsuperscript{197} In that case, the Court of Special Appeals noted that in other jurisdictions "the trial court possesses discretionary power to exclude reports which appear to be unreliable even though they satisfy the letter of the business record exception," while in Maryland no such flexibility existed.\textsuperscript{198} The court did not reach the issue, however, as it decided the case on other grounds.\textsuperscript{199} It was not until 1988, when the Court of Appeals gave tacit approval to the \textit{Palmer} holding in

\textbackslashtextit{Fed. R. Evid. 803(6).}

\textsuperscript{193} See McLain, supra note 174, § 803(6).2, at 389-90.

[\textit{Federal Rule of Evidence} 803(6) also provides a safety valve: a record otherwise qualified will be inadmissible as a business record if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." ... [This clause was] intended to allow the court to exclude self-serving records made in anticipation of litigation, as well as other records which lack circumstantial guarantees of trustworthiness.\textit{Id.} (footnotes omitted). The \textit{Palmer} decision led to the adoption of this clause. See 4 \textit{Louisell \\& Mueller}, supra note 190, § 447, at 668.

\textsuperscript{194} 241 Md. 676, 217 A.2d 525 (1966).

\textsuperscript{195} See id. at 686, 217 A.2d at 531 (upholding the trial court's exclusion of a bill from the owner-bailor to the bailee offered by the bailee to prove the value of cargo destroyed in an accident).

\textsuperscript{196} McLain, supra note 174, § 803(6).1, at 382. The Court of Special Appeals has commented extensively about the need for reassurances with regard to evidentiary business documents. See Fuget v. State, 70 Md. App. 643, 653-54, 522 A.2d 1371, 1376 (1987) (upholding trial judge's use of discretion in finding that a diagnosis in a hospital record was "made in the normal course of business"); Kline v. Chase Manhattan Bank, N.A., 43 Md. App. 133, 145, 403 A.2d 395, 401 (1979) (noting that circumstantial evidence can be utilized by a trial judge to determine if a record was made in "the regular course of business"); Thomas v. Owens, 28 Md. App. 442, 447, 346 A.2d 662, 665 (1975) (requiring records to meet "the test of necessity and circumstantial guaranty of trustworthiness") (internal quotations omitted)).


\textsuperscript{198} Id. at 456, 387 A.2d at 787-88.

\textsuperscript{199} See id., 387 A.2d at 788.
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State v. Garlick,\(^{200}\) that this discretionary power began to emerge affirmatively in Maryland.

3. The Court's Reasoning.—Owens-Illinois contended that once a record met the requirements of the business records exception, it was automatically admissible, unless the Sixth Amendment Confrontation Clause was implicated.\(^{201}\) This logic dictated that since the trial judge found that the Bethlehem Steel report met the requirements of the exception, the study should have been admitted.\(^{202}\) The Court of Appeals disagreed.\(^{203}\) Relying heavily on Palmer v. Hoffman,\(^{204}\) the court held that the "trial judge has discretion to exclude a document that meets the technical requirements of a business record when the objecting party persuades the judge that the document lacks the degree of reliability and trustworthiness that business records are ordinarily assumed to possess."\(^{205}\) Thus, once a record meets the requirements of a business record, a presumption of trustworthiness attaches, and the objecting party bears a "heavy burden" to show otherwise.\(^{206}\)

In reaching this conclusion, the court cited only one Maryland decision dealing with the business records exception, the 1911 case of Marine Bank v. Stirling.\(^{207}\) In Marine Bank, a bank ledger, which would have otherwise qualified under the business records exception, was deemed inadmissible by the trial judge because it was too uncertain and too unreliable.\(^{208}\) The Armstrong court used the holding in Marine Bank to demonstrate "that, in some instances, business records may be excluded if established to be unreliable or untrustworthy."\(^{209}\)

The court also used the Federal Rules of Evidence to support

\(^{201}\) Armstrong, 326 Md. at 112, 604 A.2d at 49. See McLAIN, supra note 174, § 803(6).1, at 377 ("[W]here the face of the writing indicates unreliability, the confrontation right precludes its admission against a criminal defendant without producing the declarant for cross-examination at trial, if he or she is available.").
\(^{202}\) See Armstrong, 326 Md. at 112, 604 A.2d at 49.
\(^{203}\) See id.
\(^{204}\) 318 U.S. 109 (1943).
\(^{205}\) Armstrong, 326 Md. at 112-13, 604 A.2d at 49-50.
\(^{206}\) See id. at 116, 604 A.2d at 51.
\(^{207}\) 115 Md. 90, 80 A. 736 (1911).
\(^{208}\) See id. at 102-03, 80 A. at 739-40. The court held that "under such circumstances as are shown in this case there is too much indicating the uncertainty and unreliability of this ledger account to permit it to be used as evidence per se, or even in connection with the testimony of the witnesses." Id. at 103, 80 A. at 740.
\(^{209}\) Armstrong, 326 Md. at 114, 604 A.2d at 50.
its holding.\textsuperscript{210} The Federal Rules explicitly recognize an authority vested in the trial judge to exclude evidence that lacks reliability and trustworthiness in both the business records exception, Rule 803(6), and the public records exception, Rule 803(8).\textsuperscript{211}

Citing the reasoning in \textit{Ellsworth v. Sherne Lingerie, Inc.},\textsuperscript{212} the Court of Appeals also used Maryland's public records exception, by analogy, to clarify the business records exception.\textsuperscript{213} In \textit{Ellsworth}, the court construed the public records exception set forth in Federal Rule of Evidence 803(8)(C).\textsuperscript{214} Relying significantly on the Fourth Circuit's opinion in \textit{Ellis v. International Playtex, Inc.},\textsuperscript{215} the \textit{Ellsworth} court found that while a presumption of reliability exists for public records,\textsuperscript{216} the record should be deemed inadmissible if factors are shown to exist that significantly draw this presumption into question.\textsuperscript{217} The burden of proving unreliability was held to be on the party opposing admission.\textsuperscript{218}

The \textit{Armstrong} court then outlined some of the possible factors that can be used by the trial judge to determine whether to exclude a record that meets the letter of the exception.\textsuperscript{219} Those factors include: (1) "the purpose [of the record] and any possible motive to falsify",\textsuperscript{220} (2) "how routine or non-routine the record is and how much reliance the business places on the record for business purposes",\textsuperscript{221} and (3) if "the record contains opinions and conclusions," the validity, speculative nature, and need for interpretation or cross-examination of such opinions.\textsuperscript{222}

In applying these factors to the dust-study report, the \textit{Armstrong} court found seven reasons for not admitting the study,\textsuperscript{223} the majority of which fell into the third category mentioned above. Those reasons were: (1) the study represented a singular, and perhaps irregular, request; (2) there existed a possible reluctance on the part
of the reporter to reveal the severity of the asbestos concentrations; (3) the timing of the study did not adequately coincide with the employment of Armstrong and Wood; (4) the report failed to state what products were being used at the time of the study; (5) the report did not state the conditions under which the study was conducted; (6) no information on the products’ asbestos content was given in the study; and (7) the report lacked “specificity as to the [study’s] methodology.”

4. Analysis.—The Court of Appeals took no revolutionary steps in Armstrong. While it is arguably true that the court expanded trial judges’ discretionary power in this area, it seems to be a proper and necessary expansion in light of the rationale underlying the hearsay rule. In addition, it is an exercise of discretion that many other jurisdictions have already recognized in their formulation of the business records exception.

What is troubling is the lengths to which the court went to “create” this discretionary power. For instance, the court’s reliance on Marine Bank is severely misplaced. In Marine Bank, the bank ledger was not excluded through an exercise of judicial discretion; rather, the court found explicitly that the checks to be entered into the bank ledger “were . . . not entered in due course of business or contemporaneously with the transactions.” Therefore, the ledger was excluded because it failed to meet the technical requirements of the business records exception itself.

The Armstrong court had much less attenuated avenues available in both Maryland statutory and case law at its disposal to reach its result. First, the prior statutory enactments of the business records exception contained clauses that stated, “[a]ll other circumstances of the making of such writing or record . . . including lack of per-

224. See id. Armstrong left Bethlehem Steel six years before the study, and Wood began working there 28 years before the study. Id.

225. See supra note 178 and accompanying text. See also McLain, supra note 174, § 801.1 (discussing the rationale behind the hearsay rule).


227. See supra notes 207-208 and accompanying text.


229. See McLain, supra note 174, § 803(6).1, at 381 (discussing the requirements regarding “the regular practice of the business” and the “timeliness” of entry).
sonal knowledge by the entrant or maker may be shown to affect the weight, but not the admissibility thereof.” The present statute, section 10-101, lacks the “[a]ll other circumstances” portion, and only retains this weight, as opposed to admissibility, mandate with regard to section 10-101(d)—“lack of personal knowledge of the maker of the written notice.” These omissions clearly opened the door for the court to invoke a high level of discretionary power.

Also at the court’s disposal were the aforementioned earlier decisions discussing the business records exception, including those demonstrating a retention of the court’s discretionary power. In addition, there exists a considerable line of authority in Maryland dealing with the business records exception which recognizes that a business record must meet a “circumstantial guarantee of trustworthiness” in order to be admitted.

It is unlikely that the court’s decision will make it more difficult to exclude a record that satisfies the technical requirements of section 10-101. At the same time, it is unlikely to be any easier, in light of the “heavy burden” mandated by the Court of Appeals, to exclude such evidence. It is an exercise of “[s]ound policy and sensible administration” to admit evidence that meets the requirements of the exception absent a showing by the opposing party of underlying trustworthiness.

Nor does it seem likely that trial courts will abuse this discretion, as similar discretionary power already exists to exclude evidence based on relevancy. Although the trial courts have exercised this discretion often, the appellate courts rarely find any abuse. Additionally, the court wisely noted that the study may have been admitted if witnesses were called to remove the suspicions of untrustworthiness.

231. See supra note 183.
232. See supra notes 194-200 and accompanying text.
234. See Armstrong, 326 Md. at 116, 604 A.2d at 51.
235. See LOUISELL & MUELLER, supra note 190, § 447.
236. See id., § 403.1, at 300.
237. See also LOUISELL & MUELLER, supra note 190, § 447, at 678 (“[T]he risk of prejudice arising from any untrustworthiness . . .
5. Conclusion.—In Owens-Illinois v. Armstrong, the Court of Appeals strengthened the integrity of the hearsay rule. By providing for this discretionary power, trial courts will now have the authority to prevent the introduction of information that the hearsay rule sought explicitly to exclude. The Court of Appeals has effectively utilized its authority in a way to “enhance the discovery of the truth and the fair administration of justice.”

Evan S. Stolove

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239. See Note, Admissibility of Records Kept in the Regular Course of Business—Uniform Business Records as Evidence Act, 24 Minn. L. Rev. 958, 960-61 (1940) (explaining how the provisions of the Uniform Business Records as Evidence Act “leave to the discretion of the trial court the question whether ‘the sources of information, method and time of preparation were such as to justify its admission.’”).

240. McLain, supra note 174, § 102.1.
VII. FAMILY LAW

A. Judicial Discretion in Child Support Awards for Affluent Parties

In *Voishan v. Palma*, a case of first impression, the Court of Appeals addressed section 12-204(d) of the Family Law Article, which grants trial judges discretion in calculating child support awards when the combined adjusted actual income of the parents exceeds the highest level specified in the support guidelines schedule. In determining the ramifications of section 12-204(d), the court held that the highest amount listed in the guidelines would provide the presumptive minimum basic award for parents whose combined monthly income exceeded $10,000. The court, however, declined to recognize a cap on the basic child support obligation and upheld the intent of the legislature to allow trial judges discretion in determining awards. Furthermore, the court found that section 12-204(d) does not require a trial judge to extrapolate to determine awards above the maximum figure listed in the guidelines. While extrapolation may serve as a useful guide, a trial judge is obligated to balance the best interests of the child with the parents' financial circumstances to determine awards when parental income exceeds the maximum specified in the guidelines.

1. The Case.—A divorce decree issued by the Circuit Court for Anne Arundel County on June 26, 1981, awarded Margaret Voishan Palma custody of her two daughters and ordered John Voishan to pay $250 per week as child support. An order dated October 7, 1985, increased Voishan's child support obligation to $1400 per month and awarded him certain visitation rights. On March 8, 1991, the circuit court addressed Palma's motion to modify child support. Evidence presented at the March 8, 1991 hearing revealed that Voishan's annual income was $145,000, while Palma was

3. *Voishan*, 327 Md. at 325, 609 A.2d at 323.
4. Id.
5. Id. at 327, 609 A.2d at 324.
6. Id. at 329, 609 A.2d at 325.
7. Id., 609 A.2d at 324.
8. Id. at 331, 609 A.2d at 325.
9. Id. at 321, 609 A.2d at 320.
10. Id., 609 A.2d at 320-21.
11. Id., 609 A.2d at 321.
earning $30,000 per year. Thus, the parties' combined adjusted income was approximately $14,583 per month. Following the hearing, the trial judge entered an order increasing Voishan's child support obligation for the younger daughter, who was still a minor, from $700 per month to $1550 per month.

Voishan appealed the modification of child support to the Court of Special Appeals, but the Court of Appeals granted certiorari prior to consideration by the intermediate appellate court to address the application of the guidelines to parties whose combined income exceeds $10,000 per month.

2. Legal Background.—Prior to the implementation of child support guidelines, the Court of Appeals consistently upheld the use of judicial discretion in determining alimony or child support awards. In Waters v. Waters, the court declared that “[i]n making such an award the court can only use judicial discretion. Of course, there is no special statute or rule governing this discretion. It must be exercised to the necessary end of awarding justice and based upon reason and law.”

This did not give the court free reign in determining an award. The court had to balance the best interests and needs of the child with the parents' financial means. In addition, several factors tempered judicial discretion: the child's station in life, which was later articulated as the family's station in life; the age and physical con-

12. Id. at 324, 609 A.2d at 322.
13. Id. at 321, 609 A.2d at 321.
14. Id.
17. Id. at 441, 62 A.2d at 253.
19. See Wagshal, 249 Md. at 147-48, 238 A.2d at 906.
20. See Unkle, 305 Md. at 597, 505 A.2d at 854; German, 37 Md. App. at 122, 376 A.2d at 117; Kramer, 26 Md. App. at 636, 339 A.2d at 339.
dition of the parties; their financial circumstances; their ability to work; and expenses in educating the children.\textsuperscript{21}

The inadequacies of such a case-by-case approach to awarding child support have been summarized as: "(1) a shortfall in the adequacy of orders, when compared with the true costs of rearing children as measured by economic studies; (2) inconsistent orders causing inequitable treatment of parties in similarly situated cases; and (3) inefficient adjudication of child support amounts in the absence of uniform standards."\textsuperscript{22} In an attempt to temper the seemingly unfettered judicial discretion present in case-by-case adjudication,\textsuperscript{23} Congress enacted the Child Support Enforcement Amendments of 1984.\textsuperscript{24} These amendments required each state to establish guidelines for calculating child support awards while making the guidelines\textsuperscript{25} available to all judges or other officials with the authority to determine such awards.\textsuperscript{26}

Despite the federal provision's effective date of October 1, 1987,\textsuperscript{27} the General Assembly did not enact the Maryland Child Support Guidelines until February 1989.\textsuperscript{28} The General Assembly considered several models for implementing child support guidelines before finally adopting the Income Shares Model.\textsuperscript{29} The premise of this model is that a child should receive the proportion of parental income he or she would receive if the parents remained

\begin{footnotesize}
\begin{enumerate}
\item See Unkle, 305 Md. at 597, 505 A.2d at 854; German, 37 Md. App. at 122, 376 A.2d at 117; Kramer, 26 Md. App. at 636, 339 A.2d at 339.
\item Robert G. Williams, Guidelines for Setting Levels of Child Support Orders, 31 FAM. L.Q. 281, 282 (Fall 1987).
\item See id.
\item The implementing regulations state that the term "guidelines" refers to quantitative standards to be utilized in calculating child support awards. 45 C.F.R. § 302.56.
\item See Williams, supra note 22, at 281.
\item See id.
\item See id.
\item See Tannehill v. Tannehill, 88 Md. App. 4, 11, 591 A.2d 888, 891 (1991). Enactment was done as an emergency measure. Failure to comply with federal provisions mandating the adoption of child support guidelines could have resulted in the loss of up to $35 million in federal funds for Aid to Families with Dependent Children. Id. Originally, the guidelines were advisory, but later the General Assembly amended the figures and mandated their use by April 10, 1990. See id., 591 A.2d at 892.
\item See SEN. JUD. PROC. COMM., 1989 MD. GEN. ASSEMBLY FLOOR REPORT ON S.B. 49, app. at 3 [hereinafter FLOOR REPORT]. First used in the state of Washington, the Income Shares Model was further developed by Dr. Robert Williams of the National Child Support Guidelines Project staff under a grant from the Office of Child Support Enforcement of the U.S. Department of Health and Human Services. Maryland Senate Bill 49 was modeled after Colorado's child support guidelines. Id.; see generally Charles Brackney, Battling Inconsistency and Inadequacy: Child Support Guidelines in the States, 11 HARV. WOMEN'S L.J. 197 (1988) (discussing three models for guidelines).
\end{enumerate}
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together. Accordingly, child support awards are calculated by combining the income of the parents and then prorating the obligation in proportion to each parent’s adjusted gross income.

Under the Income Shares Model, the first step in calculating child support payments requires the determination of each parent’s monthly “adjusted actual income.” Next, the trial judge combines the adjusted actual income of both parents to find the “combined adjusted income” of the parents. The judge then examines the schedule of basic child support obligations in section 12-204(e) to find the corresponding “basic child support obligation” for that combined adjusted actual income and the given number of children. The basic child support obligation is divided between the parents in proportion to their adjusted actual incomes. Finally, work-related child care expenses, child care expenses for a child with special needs, extraordinary medical expenses, and school and transportation expenses are combined and the sum is divided between the parents in proportion to their adjusted actual incomes. Child support obligations calculated according to this formula are presumptively correct. Nonetheless, evidence that the application of the guidelines would be unjust or inappropriate in a particular case can rebut this presumption.

During the period when the guidelines were advisory, a judge who had decided not to adhere to the section 12-202 guidelines had to consider the factors dictated by the preguidelines case law. In Gates v. Gates, a case reviewing a disposition prior to the effective

30. See Floor Report, supra note 29, app. at 3. See also Williams, supra note 22, at 292.
31. See Voishan, 327 Md. at 323, 609 A.2d at 321. Section 12-201(d) of the Family Law Article defines “adjusted actual income” as “actual income minus: (1) preexisting reasonable child support obligations actually paid; (2) except as provided in § 12-204(a)(2) of this subtitle, alimony or maintenance obligations actually paid; and (3) the actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible.” Md. Code Ann., Fam. Law § 12-201(d) (1991).
33. Voishan, 327 Md. at 323, 609 A.2d at 322. Section 12-204(c) provides for extrapolation of the basic child support obligation to the next higher level when the combined adjusted actual income amount falls between amounts in the schedule. See Md. Code Ann., Fam. Law § 12-201(c) (1991).
35. Id. § 12-204(g)-(i).
36. Id. § 12-202(a)(2)(i).
37. Id. § 12-202(a)(2)(ii).
date of the guidelines, the Court of Special Appeals held that the trial judge’s decision to increase a child support award twofold to equal the figure in the guidelines amounted to an abuse of discretion.\textsuperscript{40} The trial court did not address any of the factors that prior decisions found to be necessary in calculating child support awards,\textsuperscript{41} nor did the court address the facts in support of a material change in circumstances.\textsuperscript{42} The factors in the preguidelines case law become relevant once the use of the guidelines would yield inequitable results.

In \textit{Tannehill v. Tannehill},\textsuperscript{43} the Court of Special Appeals held that a child support award calculated according to the guidelines carries a rebuttable presumption that the amount of the award is correct.\textsuperscript{44} Nonetheless, the court noted that a trial court may deviate from the guidelines if the resulting application would be unjust or inappropriate in a particular case.\textsuperscript{45} In such an instance, a court must make a specific finding on the record stating the reasons for deviating from the figures set forth in the guidelines, in addition to stating how its calculation deviated from the guidelines.\textsuperscript{46} Moreover, the court implied that in cases warranting a departure from the guidelines, a trial court must state how the order serves the parties’ best interests.\textsuperscript{47} Thus, the factors applicable in determinations of child support in the preguidelines case law remain applicable in cases where a court finds the application of the guidelines to be unjust or inappropriate.

Robert Williams, a researcher for the Child Support Guidelines Project, lauded the guidelines as a mechanism for increasing settlements because they set expectations for child support levels.\textsuperscript{48} Yet he acknowledged the difficulty that several states have experienced applying the guidelines to both extremes of the income range.\textsuperscript{49} For example, the Colorado Court of Appeals has held that where the parties earn an income in excess of the highest amount set forth in the guidelines, the judge may use her discretion to determine a

\textsuperscript{40} Id. at 664, 577 A.2d at 384.
\textsuperscript{41} See supra notes 19-21 and accompanying text.
\textsuperscript{42} See Gates, 83 Md. App. at 664, 577 A.2d at 384.
\textsuperscript{44} Id. at 13, 591 A.2d at 893.
\textsuperscript{45} See id. at 13-14, 591 A.2d at 893 (citing Md. Code Ann., Fam. Law § 12-202(a)(2)(iv) (1991)).
\textsuperscript{46} Id. at 15, 591 A.2d at 893.
\textsuperscript{47} Id.
\textsuperscript{48} See Williams, supra note 22, at 286.
\textsuperscript{49} Id. at 287.
child support award. In *In re Marriage of Van Inwegen*, the Colorado Court of Appeals concluded that $1000, the amount set forth in the guidelines for one child with parents earning $10,000 per month, is the minimum presumptive amount of child support for one child where the parties’ combined monthly income exceeds $10,000. But the court maintained that this presumption is rebuttable and a trial judge may exercise her discretion to determine a different amount. Nevertheless, the trial judge must consider the factors included in Colorado’s statute before making any discretionary child support obligation determination.

Other jurisdictions have handled child support calculations similarly where the parties earn more than the highest amount established in the guidelines. Two District Courts of Appeals of Florida, for instance, accord with the reasoning of the Colorado court. In *Hinshelwood v. Hinshelwood*, a Florida court noted that the guidelines would retain their relevancy as a point of reference despite the fact that the parties’ combined income exceeded the highest amount set forth in Florida’s guidelines. Consequently, the court found the trial judge erred by failing to consider the factors listed in the guidelines.

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52. Id. at 1120.

53. Id. at 1121. The relevant factors in Colorado’s statute include: “(a) [t]he financial resources of the child; (b) [t]he financial resources of the custodial parent; (c) [t]he standard of living the child would have enjoyed had the marriage not been dissolved; (d) [t]he physical and emotional condition of the child and his educational needs; and (e) [t]he financial resources and needs of the noncustodial parent.” COLO. REV. STAT. ANN. § 14-10-115(1) (West 1987). See also *LeBlanc*, 800 P.2d at 1384 (holding that apportionment of the minimum presumptive amount of child support without considering mandatory factors is error).

54. Id. at 1121.


57. Id. at 141.

58. Id. Citing *Hinshelwood*, the court in *Harrison* found the trial court in error for failing to take the factors outlined in Florida’s statute into account when determining the child support obligation for parties earning greater than the highest amount in the guidelines. See *Harrison*, 573 So. 2d 1018. Florida’s statutory factors resemble those set forth in Maryland case law and include “the needs of the children, their ages and station in life, the parties’ prior standard of living relative to financial status, and each spouse’s ability to meet the children’s needs.” FLA. STAT. ANN. § 61.30(1)(b)2 (West Supp. 1992).
The Supreme Court of Connecticut explained the inapplicability of the guidelines at high income levels by noting that the statistical basis for support guidelines loses its validity as the combined income of the parties increases. The court pointed out that the legislature made no provisions for extrapolation to higher income levels. As a result, the court upheld the findings of the trial court, which had considered the guidelines, found them inappropriate for setting a presumptive support amount, and proceeded to weigh the statutory criteria and other guideline factors to arrive at its final determination.

3. Legal Reasoning.—Voishan required the Court of Appeals to address the issue of the application of the guidelines to upper income range parties for the first time. In Voishan, the court interpreted section 12-204(d) of the Family Law Article to require a balance of judicial discretion and adherence to the guidelines. Because section 12-204(d) lends a subjective quality to the guidelines when applied to upper levels of income, the Voishan court maintained that such awards will not be disturbed unless clearly erroneous. The trial judge’s determination of a child support obligation involved an analysis of the needs of the child and the parents’ financial means. Thus, the trial judge met the subjective element of the statute and did not abuse his discretion in making his findings.

Although the Court of Appeals conceded that the maximum basic child support obligation should provide the presumptive minimum basic child support award for combined monthly incomes above $10,000, the court denied that the legislature intended to

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60. Battersby, 590 A.2d at 429-30.
61. Id. at 430-31.
62. Voishan, 327 Md. at 322, 609 A.2d at 321.
63. Id. at 332, 609 A.2d at 326.
64. Id. For this standard of review, the court relied on Rule 8-131(c), which states that an appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. R. 8-131(c).
65. Voishan, 327 Md. at 333-34, 609 A.2d at 327.
66. Id.
67. Id. at 331-32, 609 A.2d at 326. The court noted that Colorado’s intermediate appellate court has repeatedly held that "there is a rebuttable presumption that the basic child support obligation at the uppermost level of the guidelines is the minimum presumptive amount of support." In re Marriage of LeBlanc, 800 P.2d 1384, 1388 (Colo. App. 1990), cert. denied, 1991 Colo. LEXIS 408 (Colo. 1991).
set a ceiling for the basic child support obligation at the upper limit of the schedule. In reaching this conclusion, the court deferred to legislative intent and disregarded the plain meaning of section 12-204(d), which does not call for mandatory deference to the highest award in the schedule for income above the schedule levels. On the contrary, the Voishan court found that section 12-204(d) confers latitude to the trial court by allowing judicial discretion to influence the determination of child support awards. The court noted that the rationale that a child's standard of living should not deviate from what it would be had the household remained intact conflicts with the artificial ceiling that Voishan's view espoused. Consequently, the court held that the legislature did not intend for the maximum basic child support obligation in the schedule to apply to children whose parents' monthly income exceeds $10,000.

The Voishan court also noted that a strict extrapolation theory, which involves the utilization of a formula to extend the guidelines to the parties' financial circumstances, would significantly impede the judicial discretion granted by section 12-204(d). Analysis of legislative intent further renders the extrapolation argument defective. The court acknowledged the lack of legislative history advocating a cap on awards or a limit on judicial discretion for the upper income levels. Despite the petitioning of several associations for an extension of the guidelines to upper income cases, the General Assembly chose to leave the determinations of awards in the upper income range to the discretion of trial judges. The court concurred with the Attorney General's conclusion that

68. Voishan, 327 Md. at 325, 609 A.2d at 323.
69. Id. at 327, 609 A.2d at 324-25.
70. Id. at 325-26, 609 A.2d at 323.
71. Id. at 326, 609 A.2d at 323.
72. Id.
73. Id. at 327, 609 A.2d at 323-24.
74. Id. at 325-26, 609 A.2d at 323.
75. Id. at 327-28, 609 A.2d at 324. The Fair Family Law Association of Maryland complained that families in the upper income bracket are bereft of any guidelines indicating their obligations and argued that the same percentage of total family income for those earning $10,000 should apply for those earning more than $10,000. See id. Representatives from the Family Law Section of the Montgomery County Bar Association also advocated greater certainty for the obligations of parties falling within the upper income bracket and recommended the extension of the guidelines. See id. at 328, 609 A.2d at 324. Although relegated to a footnote, the court also recognized the approach of the Supreme Court of Connecticut. Id. at 329 n.4, 609 A.2d at 325 n.4 (citing Battersby v. Battersby, 590 A.2d 427, 429-30 (Conn. 1990) (holding that where the legislature failed to provide for strict extrapolation in a statute, the court would not create such a provision)).
at very high income levels, the percentage of income expended on children may not necessarily continue to decline or even remain constant because of the multitude of different options for income expenditure available to the affluent. The legislative judgment was that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family.76

Although the legislature declined to adopt more specific formulae for incomes exceeding the guidelines, the Voishan court declared that the policies underlying the guidelines should be recognized in award determinations.77 To support this contention, the court cited section 12-202(a), which states that "in any proceeding to establish or modify child support . . . the court shall use the child support guidelines set forth in this subtitle."78 Thus, a trial judge must use the schedule to guide his determinations, but his discretion operates to balance the factors in the particular case.79

The court also refused to embrace the theory espoused by the Maryland chapter of the American Academy of Matrimonial Lawyers (AAML) that the trial judge placed "too much reliance on a mechanical application of the guidelines."80 In addition, the AAML argued that the child support obligation should not have been divided into an eighty-three to seventeen ratio.81 In response to this argument, the court invoked the policies underlying the Income Shares Model and preguidelines case law that each parent "share the responsibility for parental support in accordance with their respective financial

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76. Id. at 328, 609 A.2d at 324.
77. See id. at 328-29, 609 A.2d at 324.
78. See id. at 328, 609 A.2d at 324 (citing, with emphasis, Md. Code Ann., Fam. Law § 12-202(a) (1991)).
79. Id. at 329, 609 A.2d at 324 (noting that "[e]xtrapolation from the schedule may act as a 'guide' "). The court found the principles outlined in Unkle to be of relevance to determinations following the establishment of the guidelines. See id., 609 A.2d at 325 (citing Unkle v. Unkle, 305 Md. 587, 597, 505 A.2d 849, 854 (1986)). Further, the court suggested that failure to consider relevant factors may border on abuse of discretion. See id. at 332 n.5, 609 A.2d at 327 n.5 (citing In re Marriage of Van Inwegen, 757 P.2d 1118, 1121 (Colo. App. 1988)).
80. See id. at 329, 609 A.2d at 324. The AAML argued that evidence of actual household expenditures for the income range exceeding the schedule was not presented in formulating the guidelines. Therefore, the AAML contended that the guidelines are completely irrelevant to higher income parents. See id.
81. Id. at 330, 609 A.2d at 325. The AAML's observation that the legislature did not include the phrase "shall be divided between the parents in proportion to their adjusted incomes" in § 12-204(d) neglects its inclusion in § 12-204(a)(1), (g)(1), (h), and (i). See id.
resources.' The court also noted the trial judge's regard for the reasonable needs of the child when calculating each parent's proportionate share. Thus, the Voishan decision is a synthesis of Voishan's and the AAML's polar arguments in that it strikes a balance between the use of judicial discretion and the application of the principles inherent in the Income Shares Model upon which the guidelines are based.

4. Analysis.—Maryland's child support guidelines mark a departure from the relatively unlimited discretion accorded to trial judges prior to their enactment. The schedule imposed by the General Assembly reins in this discretion considerably by providing figures for awards corresponding to the given number of children and the combined monthly income of the parents. Even in cases where the combined monthly income exceeds the scope of the guidelines, the policies underlying the guidelines still apply and a judge may extrapolate to determine an award. While the majority opinion did not regard the guidelines as producing such a narrow limit when applied to parties earning more than $10,000 combined monthly income, it did recognize that the guidelines do signify a balancing of judicial discretion with the application of figures generated from evidence of spending on children.

Regardless of the limits placed on discretion by the underlying principles of the guidelines, the melding of fixed rules and discretion deserves comment. Despite the introduction of judicial discretion in cases where the application of the guidelines would produce unjust or inappropriate results, the application of the guidelines to

82. Id. (quoting Rand v. Rand, 280 Md. 508, 517, 374 A.2d 900, 905 (1977)).
83. Id.
84. The concurring opinion in Voishan accorded with the majority's balancing of the guidelines with judicial discretion. Yet this view held that the principles underlying the guidelines should qualify judicial discretion. The concurring opinion proposed that a presumptive floor and a presumptive ceiling, dictated by the policies inherent in the guidelines, should demarcate the range of discretion. Id. at 335-36, 609 A.2d at 328 (McAuliffe, J., concurring). Judge McAuliffe would set the highest basic child support obligation as the presumptive minimum for combined monthly income exceeding $10,000. Because the maximum schedule payment was 10.4% of the maximum combined income listed in the schedule, the concurring opinion stated that 10.4% of the combined income should be the presumptive maximum. Id. at 336, 609 A.2d at 328 (McAuliffe, J., concurring). Although the concurring opinion faulted the trial judge's method of calculating child support for its latitude in discretion, the figure that the trial judge awarded fell within the range delineated by the presumptive minimum and maximum advanced by the concurring opinion.
86. See Voishan, 327 Md. at 329, 609 A.2d at 324.
the circumstances of the parties generally involves the utilization of fixed rules. In cases where the parties' income exceeds the highest income in the guidelines, however, judicial discretion must predominate, in that numeric criteria only set a range for determinations.

Child support obligation decisions for upper income parties involve a synthesis of an Aristotelian tenet and a Platonic tenet in terms of a fixed rule and discretion dichotomy. Although this dialectical argument may seem spurious at first glance, it has been noted that

[t]he classic debate between legalists advocating justice through fixed rules and empiricists, who argue in favor of justice through discretion, goes back as far as the political philosophies of Plato and Aristotle. Although Aristotle spoke of a "government of laws and not of men" and Plato believed that the wise and fair man presents greater promise for producing just decisions, both philosophies recognized the need for some mix of law and discretion.87

Today, the combination of judicial discretion and fixed rules provides the optimal means of deciding upon child support awards for upper income parties.

Traditionally, discretion has dominated the realm of family law because of a general belief that legal determinations should be fashioned to the unique circumstances of the family.88 Yet, there is a danger inherent in the broad discretion accorded trial judges in the area of family law. Until the implementation of guidelines, discretionary child support standards produced inadequate results whereby "[s]ocial scientists and children's advocates have documented the negative long-term effect of a reduced standard of living on the emotional, intellectual, and physical development of children."89 In addition, such discretion led to inconsistent, inequitable, and unpredictable decisions.90

On the other hand, the legislature has seen fit to allow judicial discretion when the application of the fixed rules would do the par-

88. See Glendon, supra note 87, at 1167.
89. Murphy, supra note 87, at 221.
90. See id. at 222.
ties a disservice.\textsuperscript{91} The allowance of discretion in Maryland's statute suggests that vestiges of the "uniqueness of family" argument linger. Likewise, where the parties' income exceeds the highest amount in the schedule, the interplay of discretion and fixed rules applies.\textsuperscript{92} In that situation, the dual emphasis correctly shifts to discretion guided by the principles underlying the model for the fixed rules, the Income Shares Model.

Because the court has held that the highest child support award in the guidelines is the presumptive minimum award for families with monthly incomes exceeding $10,000, the needs of children of affluent parents have been satisfied. For the legislature to dictate to parents that a certain amount of their wealth, beyond that which meets their children's necessities, must be spent on their children would seem outrageous to many. Such a mandate could be seen as a usurpation of the parental role, in that the state would constructively dictate allowances for children. The court's concurrence with the Attorney General's conclusion regarding the multitude of income expenditure options available to the wealthy supports the admittedly problematic nature of the extension of fixed rules for the wealthy.\textsuperscript{93}

5. Conclusion.—The Voishan court limited unbridled discretion by mandating that a trial judge consider the needs of a child in light of the parents' financial means when setting child support obligations for the affluent.\textsuperscript{94} Yet, the court did not allow the fixed rules of the guidelines to have an overreaching influence over the trial judge's discretion. The refusal to recognize a cap and the disavowal of a requirement to extrapolate suggest a restraining of the application of fixed rules. This balance of judicial discretion and fixed statutory rules will best serve the affluent parties by providing a general expectation of the amount of an award while tailoring the exact determination to the needs of the parties.

LAUREN R. CALIA

\textsuperscript{92} See supra notes 85-87 and accompanying text.
\textsuperscript{93} See supra text accompanying note 76.
\textsuperscript{94} Voishan, 327 Md. at 329, 609 A.2d at 324-25.
B. The Jurisdictional Limits of Parental Kidnapping

In *Trindle v. State*, the Court of Appeals outlined the requirements for obtaining criminal jurisdiction in extraterritorial parental kidnapping cases. The court held that Maryland courts have jurisdiction in such cases if the intended result of the crime has its effect in Maryland. The effect of the offense is felt within the state if the custodial parent is deprived of her rights under Maryland law, even when the physical acts of the crime do not occur within the state. In reaching its decision, the *Trindle* court followed a number of extraterritorial parental kidnapping decisions from other jurisdictions.

1. The Case.—William Trindle and his wife, Alexa Matthai, were divorced in March 1989. The court granted Matthai, who continued to reside in the family home in Kent County, Maryland, custody of their three children, and provided Trindle with reasonable visitation rights. Trindle lived in Overbrook, Pennsylvania, with his new wife, Sharon Marcus. Matthai and Trindle made arrangements for the children to visit Trindle and Marcus on weekends. For these weekend visits Matthai drove the children to Wilmington, Delaware, on Fridays to meet Trindle. On Sundays, Trindle would return the children to Matthai in Wilmington.

In May 1989, Trindle requested an extended weekend visit from Thursday, May 11, through Sunday, May 14, so that the children could accompany him to a special event in Philadelphia. Matthai agreed, and Trindle promised to telephone her at the end of the weekend in order to arrange a time to transfer the children. On Saturday, May 13, Trindle contacted Matthai's aunt and informed her that he would not be returning the children.

96. See id. at 31-32, 602 A.2d at 1235.
97. Id.
98. Id. at 32, 602 A.2d at 1235.
99. See id. at 32-35, 602 A.2d at 1235-37.
100. Id. at 28, 602 A.2d at 1233.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id. at 28-29, 602 A.2d at 1233.
Matthai and the police subsequently learned that on May 13, Trindle, Marcus and the children left by airplane from New York to fly to Amman, Jordan using tickets that had been purchased by Marcus. 109

When Matthai contacted Trindle by phone, he stated that he would only agree to return the children if Matthai renegotiated the property settlement that they had reached in their divorce, granted him joint custody of the children, and deposited a large sum of money in his checking account. 110 In September 1989, Trindle, Marcus and the children were deported from Jordan and forced to return to the United States. 111 When they returned, Trindle and Marcus were arrested and returned to Kent County. Matthai regained custody of her children. 112

Trindle was convicted in the Circuit Court for Kent County of violating section 9-305 of the Family Law Article 113 and section 2 of article 27, 114 the Crimes and Punishments Article. Marcus, who was

109. Id. at 29, 602 A.2d at 1234.
110. Id.
111. Id. at 30, 602 A.2d at 1234.
112. Id.
113. Id. at 26, 602 A.2d at 1232. The Family Law Article provides in pertinent part:
   If a child is under the age of 12 years, a relative who knows that another person is the lawful custodian of the child may not:
   (1) abduct, take, or carry away the child from the lawful custodian to a place outside of this State;
   (2) having acquired lawful possession of the child, detain the child outside of this State for more than 48 hours after the lawful custodian demands that the child be returned;
   (3) harbor or hide the child outside of this State knowing that possession of the child was obtained by another relative in violation of this section; or
   (4) act as an accessory to an act prohibited by this section.

114. Trindle, 326 Md. at 26-27, 602 A.2d at 1232-33. Article 27, § 2 provides:
   Any person who shall without the color of right forcibly abduct, take or carry away any child under the age of twelve years from the home or usual place of abode of such child, or from the custody and control of the parent or parents, or lawful guardian or guardians of such child, or be accessory thereto, or who shall without such color of right and against the consent of the parent or parents or lawful guardian or guardians of such child, persuade or entice from the usual place of abode or house of such child, or from the custody and control of the parent or parents, or guardian or guardians of such child, or be accessory thereto, or shall knowingly secrete or harbor such child, or be accessory thereto, with the intent to deprive such parent or parents, guardian or guardians, or any person who may be in lawful possession of such child, of the custody, care and control of such child, shall be guilty of a felony, and upon conviction shall suffer imprisonment in the penitentiary for a term not exceeding twenty years, in the discretion of the court.

For the purposes of this section, the terms "usual place of abode", "home", and "house" include the real property appurtenant thereto.

tried jointly with Trindle, was convicted only of violating article 27, section 2.\textsuperscript{115} Marcus and Trindle appealed these judgments to the Court of Special Appeals where they challenged the jurisdiction of the Maryland courts over the matter, arguing that none of the alleged conduct took place within the state.\textsuperscript{116} Alternatively, Trindle asserted that Family Law Article, section 9-305 pre-empted the field of parental kidnapping, thereby invalidating his convictions under article 27, section 2.\textsuperscript{117} Marcus took this argument one step further. Because Trindle’s conviction as the principal under article 27, section 2 was invalidated, she argued, her conviction as an accessory under the same statute must also be invalidated.\textsuperscript{118}

The Court of Appeals issued a writ of certiorari before the cases were heard by the Court of Special Appeals.\textsuperscript{119} Unfortunately, Trindle died before the case was argued on appeal, rendering moot all issues he had raised.\textsuperscript{120} The court, however, affirmed Marcus’s conviction under article 27, section 2.\textsuperscript{121}

2. Legal Background; Court’s Reasoning.—

a. Criminal Jurisdiction.—In Trindle, the court upheld the jurisdiction of the Circuit Court of Kent County, relying on the authority of Pennington v. State.\textsuperscript{122} Pennington was charged with obstruction of justice for stabbing a woman in the District of Columbia in order to prevent her from testifying in a case in Baltimore City.\textsuperscript{123} The Pennington court held that a Maryland circuit court had jurisdiction over such a matter.\textsuperscript{124} The court recognized that although Courts and Judicial Proceedings Article, section 1-501 provides that each circuit court “has full common-law and equity powers and jurisdiction in all

\textsuperscript{115} Trindle, 326 Md. at 27, 602 A.2d at 1235.
\textsuperscript{116} Id. at 30, 602 A.2d at 1234.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} See id. at 27-28, 602 A.2d at 1233.
\textsuperscript{120} Id. at 30, 602 A.2d at 1234. Because Trindle had not received the one appeal to which he was statutorily entitled, all convictions and sentences against him were vacated, and his case was remanded with instructions to dismiss the criminal charges against him. Id. See also Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985) (holding that when a “deceased criminal defendant has not had the one appeal to which he is statutorily entitled, it may not be fair to let his conviction stand”).
\textsuperscript{121} Trindle, 326 Md. at 36, 602 A.2d at 1237.
\textsuperscript{122} See id. at 32, 602 A.2d at 1235. See also Pennington v. State, 308 Md. 727, 521 A.2d 1216 (1987).
\textsuperscript{123} See Pennington, 308 Md. at 728, 521 A.2d at 1216.
\textsuperscript{124} Id. at 746, 521 A.2d at 1225.
civil and criminal cases within its county,"\textsuperscript{125} there had been no statutory expansion of criminal jurisdiction, and therefore, the courts must turn to the common law of Maryland to determine such jurisdictional issues.\textsuperscript{126}

"The general rule under the common law is that a state may punish only those crimes committed within its territorial limits."\textsuperscript{127} There is, however, an exception to this rule. If the result of the crime is an essential ingredient of the offense, and the result is caused within the state by conduct that occurs in another jurisdiction, the state in which the result was caused may take jurisdiction over the matter.\textsuperscript{128} In \textit{Pennington}, the court interpreted the obstruction of justice statute in such a way that "causing or attempting to cause a particular result—the obstruction of justice—forms an essential ingredient of the offense."\textsuperscript{129} Underlying the court's reasoning was a previous interpretation of the same statute that found that in a case involving the obstruction of justice, "the ultimate victim is inevitably the court."\textsuperscript{130} When the offense is against the state itself, "[i]t thus would appear to make sense to view the gravamen of those crimes as being the injury to the State and to conclude that jurisdiction exists where the offended agency of the State is located."\textsuperscript{131} Thus, the \textit{Pennington} court's determination that Maryland had jurisdiction over the case was really two-fold: first, the result of the offense had its effect in Maryland, and second, the victim of the offense was the court.

The \textit{Trindle} court focused on the first reason for its determination that Maryland has jurisdiction over the instant case. The court held that Marcus's conduct consisted of "knowingly secreting and harboring Matthai's children" and that her conduct was intended to deprive Matthai of the custody of her children.\textsuperscript{132} The court also stated, "It is clear that the intended result of that conduct, i.e. depriving Matthai of custody, forms an essential ingredient of her offense and had its effect in Kent County, Maryland, although the acts

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\item \textsuperscript{126} See \textit{Pennington}, 308 Md. at 728-30, 521 A.2d at 1216-17.
\item \textsuperscript{127} Id. at 730, 521 A.2d at 1217.
\item \textsuperscript{128} See id. at 731-33, 521 A.2d at 1218-19.
\item \textsuperscript{129} Id. at 734, 521 A.2d at 1219.
\item \textsuperscript{130} Id. at 735, 521 A.2d at 1220. See also \textit{Romans v. State}, 178 Md. 588, 592, 16 A.2d 642, 644 (1940) ("[I]t is quite clear that the corrupt act, or one of threat or force, employed to influence or intimidate or impede any such juror, witness, or officer in the discharge of his duty in a court, must necessarily be, also, an endeavor to obstruct or impede in such court the due administration of justice.").
\item \textsuperscript{131} \textit{Pennington}, 308 Md. at 739, 521 A.2d at 1222.
\item \textsuperscript{132} \textit{Trindle}, 326 Md. at 32, 602 A.2d at 1235.
\end{itemize}
which produced that result took place outside of this State.”

The majority relied on several child custody cases from other jurisdictions to support its decision that Maryland had jurisdiction over this case. For example, in People v. Harvey, the Michigan Court of Appeals held that “[a]cts done outside a state which are intended to produce, and in fact do produce, detrimental effects within the state may properly be subject to the criminal jurisdiction of the courts of that state.” In addition to the fact that the detrimental effect of Harvey’s act occurred in Michigan, the court based its reasoning on the fact that it was a Michigan court’s custody order that was violated. The Trindle majority also relied on case law from Alaska, Wyoming, and Texas to support its decision. The majority, however, rejected the decisions of three states that did not support the view that child abduction or custody interference can be heard in the state where the parental custody has been deprived by acts or omissions that occurred outside the state.

b. Convictions Under Article 27, Section 2.—In response to Marcus’s argument that she could not be convicted under article 27, sec-

133. Id.
135. Id. at 457.
136. Id.
A crime may be “committed” not only where the acts constituting the offense are committed, but also where the harm occasioned by those acts occurs . . . . It is this prohibited result, rather than the proscribed conduct per se, that is the gravamen of the offense, and it is precisely this result that occurred in Alaska. Id. at 1008-10.
138. See Rios v. State, 733 P.2d 242 (Wyo. 1987) (upholding Wyoming’s jurisdiction in an extraterritorial parental kidnapping case, even though the State did not have a statute permitting prosecution for acts occurring outside the state).
139. See Roberts v. State, 619 S.W.2d 161, 164 (Tex. Crim. App. 1981) (“This interest in protecting the viability of its judgments and the rights of possession of its residents gives the State of Texas jurisdiction to punish the acts of a person committed wholly outside the territorial boundaries of Texas when those acts thwart this valid interest.”).
140. See Trindle, 326 Md. at 33-35, 602 A.2d at 1236-37.
141. Id. at 36, 602 A.2d at 1237. See People v. Gerchberg, 181 Cal. Rptr. 505, 506 (Cal. Ct. App. 1982) (“California cannot punish for conduct taking place outside of California unless the defendant has, within this state, committed acts which amount to at least an attempt to commit a crime punishable under California law.”); State v. McCormick, 273 N.W.2d 624, 628 (Minn. 1978) (finding that a “[d]efendant constitutionally and historically can only be tried in the district where the crime occurred”); State v. Cochran, 538 P.2d 791 (Idaho 1975) (deciding that absent proof that the kidnapping occurred in Idaho, jurisdiction does not exist in that state).
tion 2 as an accessory, the court determined that she was not convicted as an accessory, but as a principal in her own right.\textsuperscript{142} The \textit{Trindle} court reasoned that Marcus participated with Trindle both in the preparation and consummation of the plan to "secrete and harbor" the children from Matthai's lawful custody, and that in so doing she was guilty of conduct expressly punishable under article 27, section 2.\textsuperscript{143}

3. \textit{Analysis}.—The opinions of the majority and dissent in \textit{Trindle} represent two different interpretations of Maryland common law, Maryland's child abduction statute, and cases concerning parental kidnapping from other jurisdictions. A comparison of these two approaches makes it clear that the majority opinion is the more rational and better reasoned. While the dissenting opinion, authored by Judge Eldridge, concluded that "a state such as Maryland has no territorial jurisdiction over an offense committed in another state, even if that offense may have had some 'effects' in Maryland,"\textsuperscript{144} a close analysis of the reasoning reveals that this determination is not quite accurate.

\textit{a. The Common Law}.—The majority in \textit{Trindle} relied solely on \textit{Pennington} for its interpretation of Maryland common law.\textsuperscript{145} Therefore, a comparison of the \textit{Pennington} case and the \textit{Trindle} dissent effectively reveals the flaws in the dissent's interpretation of Maryland common law. To support the view that Marcus's conviction was inconsistent with settled Maryland common-law principles,\textsuperscript{146} Judge Eldridge distorted the \textit{Pennington} court's reasoning by selectively reviewing the common-law authority.\textsuperscript{147} For example, the dissent quoted from \textit{Pennington} that "'under the common law . . . a state may punish only those crimes committed within its territorial lim-

\begin{itemize}
  \item \textsuperscript{142} \textit{Trindle}, 326 Md. at 36, 602 A.2d at 1237.
  \item \textsuperscript{143} \textit{Id}.
  \item \textsuperscript{144} \textit{Id}. at 39, 602 A.2d at 1239 (Eldridge, J., concurring in part and dissenting in part).
  \item \textsuperscript{145} See \textit{id}. at 31, 602 A.2d at 1235.
  \item \textsuperscript{146} \textit{Id}. at 37, 602 A.2d at 1238 (Eldridge, J., concurring in part and dissenting in part).
  \item \textsuperscript{147} Compare Judge Eldridge's partial dissent in \textit{Trindle}, 326 Md. at 39, 602 A.2d at 1239 (Eldridge, J., concurring in part and dissenting in part), in which he argued that settled Maryland common-law principles dictate that Maryland has no territorial jurisdiction over an offense committed in another state, even if that offense has an effect in Maryland, with \textit{Pennington} v. \textit{State}, 308 Md. 727, 733, 521 A.2d 1216, 1219 (1987), which established that accepted common-law principles permit Maryland courts to take jurisdiction over a crime when a particular result is an element of the crime and that result is felt within the state.
\end{itemize}
The dissent failed to acknowledge, however, that while the court in *Pennington* cited this statement as the general rule in Maryland, it also enumerated several exceptions, including one which suggests that when the result of certain criminal conduct occurring outside a state has its effect within the state, the effected state may take jurisdiction over the matter. Although the dissent cited *Pennington* extensively, it ignored the ultimate decision reached by that court, and disregarded many of the authorities analyzed in *Pennington* that recognize this exception to the jurisdictional rule.

b. Statutory Construction.—The majority and the dissent agreed that Marcus was convicted under the portion of article 27, section 2 that punishes one who "shall knowingly secrete or harbor such child . . . with the intent to deprive such parent or parents . . . of the custody, care and control of such child . . .," but they disagreed in their interpretations of the statute. The majority recognized that the intent to deprive Matthai of custody of the children is an essential element of the crime, which had its effect in Maryland. By contrast, the dissent recognized that intent to deprive of custody is an element of the crime, but did not acknowledge that this particular offense produced an effect that occurred in Maryland. According to the dissent, "[n]either an act which is an element of the offense nor an effect which is an element of the offense occurred in Maryland." The interpretation adopted by the majority was supported by the meaning given to similar statutes in other jurisdictions, while the dissent offered only weak support for its conclusion.

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148. *Trindle*, 326 Md. at 37, 602 A.2d at 1238 (Eldridge, J., concurring in part and dissenting in part) (quoting *Pennington*, 308 Md. at 730, 521 A.2d at 1217).
149. *See Pennington*, 308 Md. at 730, 521 A.2d at 1217. *See also supra* notes 127-131 and accompanying text.
150. *See Pennington*, 308 Md. at 731-33, 521 A.2d at 1218-19.
153. *Trindle*, 326 Md. at 32, 602 A.2d at 1235.
154. *Id.* at 46, 602 A.2d at 1242 (Eldridge, J., concurring in part and dissenting in part).
155. *Id.*
156. *See infra* notes 158-163 and accompanying text.
157. *See infra* notes 164-175 and accompanying text.
c. Child Abduction Cases from Other Jurisdictions.—The cases cited by the majority carefully analyzed the various interpretations of extraterritorial criminal jurisdiction offered by other jurisdictions. For example, in *Rios v. State*, the Supreme Court of Wyoming reviewed many of the same cases and statutes that were analyzed by the *Trindle* majority. In addition, that court analyzed Wyoming common law in a way comparable to the *Pennington* court's analysis of Maryland common law. In *Wheat v. State*, the Court of Appeals of Alaska also reviewed the cases analyzed by the *Trindle* majority. Like *Trindle*, the courts in both *Wheat* and *Rios* rejected the three cases relied upon by the *Trindle* dissent.

The case law cited by the dissent provided weak support for its position that the Maryland courts did not have jurisdiction over this case. For example, the dissent cited *People v. Gerchberg*, a case in which the California Court of Appeals conceded that its jurisdictional rule concerning extraterritorial kidnappings has been criticized by legal writers. Likewise, in *State v. McCormick*, the Minnesota Supreme Court admitted that there are persuasive arguments for giving Minnesota jurisdiction in extraterritorial parental kidnapping cases, outlining many of the same arguments used by

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158. 733 P.2d 242 (Wyo. 1987).
159. See id. at 248-49 (reviewing People v. Gerchberg, 181 Cal. Rptr. 505 (Cal. Ct. App. 1982); State v. McCormick, 273 N.W.2d 624 (Minn. 1978)).
160. Id. at 245.
162. See id. at 1011.
163. See id. ("In short, to the extent that differences in applicable statutory provisions do not distinguish Gerchberg, McCormick and Cochran from the present case, we find these decisions unpersuasive and decline to follow them."); *Rios*, 733 P.2d at 249 ("With due deference to the rulings of our sister states, and recognizing a difference in statutory language, we conclude that Wyoming properly could exercise subject matter jurisdiction in this instance.").
165. See Gerchberg, 131 Cal. Rptr. at 506. The rule in California, as stated in Gerchberg, is that the state "cannot punish for conduct taking place outside of California unless the defendant has, within the state, committed acts which amount to at least an attempt to commit a crime punishable under California law." Id. The California Court of Appeals seemed to grudgingly follow the rule, stating that "[a]lthough that doctrine has been criticized by legal writers, the Supreme Court continues to adhere to it." Id.
166. 273 N.W.2d 624 (Minn. 1978). See *Trindle*, 326 Md. at 51 n.7, 602 A.2d at 1245 n.7.
167. See McCormick, 273 N.W.2d at 628 ("It is true that Minnesota is the state which has the greatest and perhaps the only interest in the subject of this litigation. In the context of this case, it is equally clear that the custodial parent and her children have significant contacts with this state. The order violated is that of a Minnesota court. Any unwarranted intrusion into the sovereignty of a sister state can be corrected by the re-
the majority in *Trindle*. Nevertheless, the *McCormick* court decided to refuse jurisdiction based on the fact that criminal cases do not enjoy the "same flexibility" in rules governing extraterritorial jurisdiction as civil cases.

In addition to relying on weak case law from other jurisdictions, the dissent attempted to distinguish the cases relied upon by the majority in two ways. First, the dissent claimed that the child abduction statutes from those other jurisdictions are significantly different from Maryland's statute. The dissent pointed out that the Michigan statute relied upon in *Harvey* and the Texas statute relied upon in *Roberts* include the retention of a child in violation of a custody order as an element of the offense. The dissent, however, did not adequately explain why this difference should change the outcome of this case. Although the statutes are different, the Maryland statute clearly was violated because Marcus deprived Matthai of her custody of the children. Furthermore, the statutes relied upon in *Wheat* and *Rios* did not include violation of a court order as an element of the offense.

Second, the dissent noted that in these cases the noncustodial parent was supposed to return the child to the custodial parent in the forum state. Again, the dissent failed to show the significance of this statutory difference. In fact, the location at which the child was to be returned to the custodial parent did not matter, because in those cases the primary issue was that the noncustodial parents deprived the custodial parents of their rights in the forum state.

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fusal of the governor of that state to grant extradition. These are persuasive arguments for approving jurisdiction in Minnesota.

168. *Id.*

169. *Id.*


174. *See* Trindle, 326 Md. at 49-50, 602 A.2d at 1244 (Eldridge, J., concurring in part and dissenting in part).

175. *See* Wheat v. State, 734 P.2d 1007, 1010 (Alaska Ct. App. 1987) ("Crystal's mother was deprived of the lawful custody of her daughter . . . . It is this prohibited result, rather than the proscribed conduct *per se*, that is the gravamen of the offense."); *Roberts*, 619 S.W.2d at 164 ("The act of appellant retaining Tanya in Colorado resulted in violation of a valid judgment of a Texas court that had awarded Beardsley custody of Tanya.").
4. Conclusion.—The differences between the majority and dissenting opinions in Trindle are the result of differing interpretations of Maryland common law, the child abduction statute, and case law from other jurisdictions. Not only are the majority’s interpretations in all three of these areas more logical and the result of more thorough analysis than those of the dissent, but the majority’s decision furthers the public interest by guaranteeing a forum in which a custodial parent can seek justice. As the Wyoming Supreme Court in Rios asked, if the state in which the custodial parent resides does not allow the noncustodial parent to be prosecuted for his criminal behavior, where can the custodial parent seek justice?176

It should also be noted that the Trindle decision differs from parental kidnapping cases in other jurisdictions by its failure to emphasize that Marcus’s actions were in violation of a Maryland court order.177 It is possible that this lack of emphasis was due to the fact that article 27, section 2 does not specifically mention the violation of a court order as punishable behavior.178 Nevertheless, the effect is a broad holding that will provide Maryland courts with greater latitude in the area of extraterritorial criminal jurisdiction in the future.

JAELE. POLNAC

C. Expanding the Scope of the Prohibition Against “Child Selling”

In State v. Runkles,179 the Court of Appeals considered whether article 27, section 35C prohibits a person from receiving compensation for inducing a parent to relinquish custody of his or her child.180 The court held that section 35C contains an expansive prohibition against all types of child selling, rather than a limited


177. Even in states that do not make violation of a court order an element of the offense, the courts do mention that it is an important factor to consider in determining jurisdiction. See Wheat, 734 P.2d at 1012 (“The custody decree violated by Wheat was issued in Alaska, and it is clear that Alaska had homestate jurisdiction over the issue of custody.”); Rios, 733 P.2d at 250 (“In this instance Rios’ ex-wife became a resident of the State of Wyoming, and under many jurisdictional concepts, she would be entitled to enforce the provisions of the New Mexico custodial decree in the courts of the State of Wyoming.”).

178. See supra note 114 for the text of article 27, § 2. See also Trindle, 326 Md. at 50, 602 A.2d at 1245 (Eldridge, J., concurring in part and dissenting in part) (“The failure to return a child to Maryland, in violation of a court order, is not an element of the Art. 27, § 2, offense charged in this case.”).


180. See id. at 391, 605 A.2d at 115.
proscription against only for-profit adoptions.\footnote{Id. at 400, 605 A.2d at 119.} Due to the broad interpretation applied by the Court of Appeals, the Runkles decision is likely to affect subsequent cases involving divorce and child custody, as well as those cases dealing with specialized areas of family law such as surrogacy. Thus, conduct not punishable in the past—participation in surrogacy agreements and certain child custody arrangements—may now draw criminal sanction under Runkles.

1. The Case.—On August 16, 1989, Allen Runkles approached Warren Seymour and informed him that for $4000 he would persuade Seymour’s former daughter-in-law to sign over custody of her six-year-old son to Seymour, the child’s paternal grandfather.\footnote{Id. at 389, 605 A.2d at 114.} In the past, the child’s grandfather had frequently attempted to obtain custody of his grandson, Jason, without success.\footnote{Id. at 389, 605 A.2d at 114.} At the time of this initial contact, Jason and his younger brother, D.J., lived with their mother, JoAnn Bauerlien, as well as Runkles, their mother’s live-in boyfriend.\footnote{Id.}

Pursuant to his conversation with Runkles, Seymour directed his attorney to prepare a Consent to Custody Order for his former daughter-in-law to sign.\footnote{Id. at 389-90, 605 A.2d at 114.} On August 18, when Seymour went to pick up his grandson for his regular visitation time, the child’s mother did indeed sign the transfer of custody papers.\footnote{Id. at 390, 605 A.2d at 114.} Afterwards, the grandfather and Runkles walked out to the garage and, out of the mother’s presence, the child’s grandfather handed Runkles an envelope containing $4000 in exchange for the custody papers.\footnote{Id. at 390, 605 A.2d at 114.}

Unfortunately for Runkles, after their initial conversation, the grandfather had contacted the police and informed them of the proposed transaction.\footnote{Id. at 390, 605 A.2d at 114.} As a result of this information, the police set up surveillance and monitored the entire transaction between Run-
kles and Seymour. Consequently, when Runkles re-entered his home with the $4000, the police immediately arrested him. Runkles was charged with “selling, bartering, or trading a child in exchange for money” in violation of article 27, section 35C.

After Runkles’s arrest, the child’s mother admitted to the police that he had persuaded her to relinquish custody of her son to Seymour, but she denied any knowledge of the money exchange that took place after the signing of the custody papers. Runkles waived his right to a jury trial, and, pursuant to a plea agreement, the trial judge found him guilty of “selling, bartering, or trading a child in exchange for money” in violation of section 35C. Runkles was sentenced to five years in prison, dating from his arrest on August 18. The judge, however, suspended the balance of Runkles’s sentence in favor of five years probation.

Runkles appealed, contending that the evidence presented at his trial was insufficient to sustain his conviction. In a two-to-one panel decision, the Court of Special Appeals reversed the judgment of the lower court, finding that section 35C applied only to adoption situations and not to mere transfers of child custody. Judge Moylan, the dissenting judge on the panel, maintained that the legislature designed section 35C to cover “any commercial trafficking in children” and thus did not intend to limit the statute to prohibiting

189. Id.
190. Id.
192. Runkles, 326 Md. at 390, 605 A.2d at 114. The mother’s explanation for her decision to transfer custody at this time was that she had been experiencing difficulties with her son and that she thought that he would be “better off” living with his grandfather. Id. The Court of Appeals held that the child’s mother did not violate § 35C because she had no knowledge of the money that Runkles received in exchange for the custody transfer and thus she did not intend to sell, barter, or trade her child for anything of value, which the statute explicitly prohibits. Id. at 403, 605 A.2d at 120-21. Intent is a key element of the crime; thus, the court concluded that “[n]o matter how the mother may be judged morally, she was legally blameless; she was an innocent party in the affair.” Id.
193. Id. at 390, 605 A.2d at 114. The trial judge found Runkles guilty because he felt that the transfer of custody was tantamount to the start of adoption proceedings. Id. at 391, 605 A.2d at 114. The trial judge, however, did not specify whether he thought that article 27, § 35C proscribed a wider range of situations than mere for-profit adoptions, as the Court of Appeals later concluded it did. Id. See Md. Ann. Code art. 27, § 35C (1989).
195. Id.
196. Id., 590 A.2d at 556.
only exchanges of children in the adoption context.\textsuperscript{197}

The State petitioned for a writ of certiorari, asking the Court of Appeals to decide whether "the Court of Special Appeals err[ed] in construing Maryland's child selling statute as limited to proscribing for-profit adoptions, rather than any for-profit exchange of child custody..."\textsuperscript{198} After granting the petition and ordering the issuance of the writ,\textsuperscript{199} the Court of Appeals reversed the judgment of the Court of Special Appeals and remanded the case to that court with directions to affirm the judgment of the circuit court.\textsuperscript{200}

Writing for the majority, Judge Orth held that article 27, section 35C was not restricted to prohibiting for-profit adoptions.\textsuperscript{201} Rather, the statute proscribes all for-profit exchanges of child custody.\textsuperscript{202} The court further concluded that the evidence presented was legally sufficient to sustain Runkles's conviction because it established the corpus delicti of the offense charged, as well as the criminal agency of the defendant.\textsuperscript{203}

In his dissenting opinion, Judge Bell contended that it was not necessary to look to section 35C's legislative history because it is clear from the statute's plain and ordinary meaning that the legislature did not contemplate prohibiting the defendant's conduct in this case.\textsuperscript{204} Judge Bell determined that the legislature did not intend to reach "mere transfer[s] of custody" when promulgating article 27, section 35C.\textsuperscript{205} He further concluded that Runkles's conduct merely constituted influence peddling, not statutorily proscribed child selling.\textsuperscript{206}

2. **Legal Background.**—Prior to 1989, there existed no general crime of "child selling." The closest prohibition against such conduct was found in section 5-327 of Maryland's Family Law Article. Section 5-327 states in relevant part:

(1) An agency, institution, or individual who renders any service in connection with the placement of an individual for adoption may not charge or receive from or on behalf

\textsuperscript{197}See id. at 502, 590 A.2d at 557 (Moylan, J., dissenting).
\textsuperscript{198}Brief for Petitioner at 2, \textit{Runkles}, (No. 91-95) (emphasis added).
\textsuperscript{199}See \textit{Runkles}, 326 Md. at 392, 605 A.2d at 115.
\textsuperscript{200}Id. at 406, 605 A.2d at 122.
\textsuperscript{201}Id. at 400, 605 A.2d at 119.
\textsuperscript{202}Id. at 402, 605 A.2d at 120.
\textsuperscript{203}Id. at 406, 605 A.2d at 122.
\textsuperscript{204}See id. at 406-07, 605 A.2d at 122 (Bell, J., dissenting).
\textsuperscript{205}Id. at 408, 605 A.2d at 123 (Bell, J., dissenting).
\textsuperscript{206}Id.
of either the natural parent of the individual to be adopted, or from or on behalf of the individual who is adopting the individual, any compensation for the placement.

(2) This subsection does not prohibit the payment, by an interested person, of reasonable and customary charges or fees for hospital or medical or legal services.\textsuperscript{207}

Section 5-327 is clearly applicable only to adoption proceedings and the violation of this provision is punishable by a fine not to exceed $100 or imprisonment for three months or both.\textsuperscript{208}

Public outcry over two incidents of "baby selling" caused the Maryland legislature to re-assess the sufficiency of the existing law on this subject.\textsuperscript{209} The first incident involved a couple from Anne Arundel County who sold their child for $3500 and three ounces of cocaine.\textsuperscript{210} Because such a transaction was not within the adoption context, it fell outside the scope of section 5-327's prohibition and, therefore, the circuit court judge dismissed the case.\textsuperscript{211} The second incident involved a Pennsylvania couple who offered, by way of an advertisement in a Baltimore newspaper, to put their child up for adoption in return for compensation.\textsuperscript{212} Under a Pennsylvania law comparable to Maryland's section 5-327, but authorizing a harsher penalty, the couple was convicted of child selling.\textsuperscript{213}

The public outrage created by these two cases prompted the Maryland General Assembly to enact "remedial legislation" in order to assuage the public's disenchantment with the existing law.\textsuperscript{214} The purpose of Senate Bill 58,\textsuperscript{215} as initially proposed, was merely to increase the maximum penalty for a violation of section 5-327 from a $100 fine and three months in prison to a $10,000 fine and five years in prison.\textsuperscript{216} By the time the legislature was ready to enact the bill, however, it had undergone a complete transformation. Amendments had removed any mention of adoption from the stat-

\textsuperscript{208} See id. § 5-327(d). This statute is included in Maryland's Family Law Article under the subsection of "Adoption".
\textsuperscript{209} See Runkles, 326 Md. at 388, 605 A.2d at 113.
\textsuperscript{210} Id. at 386, 605 A.2d at 112. The police believed that the couple had previously sold another one of their children for $5000. Id. at 387 n.2, 605 A.2d at 115 n.2.
\textsuperscript{211} See id. at 387, 605 A.2d at 113.
\textsuperscript{212} See id. at 386, 605 A.2d at 112.
\textsuperscript{213} See id. at 387, 605 A.2d at 113.
\textsuperscript{214} See id. at 388, 605 A.2d at 113.
\textsuperscript{215} Md. S.B. 58, 1987 Sess. Senate Bill 58 was initially proposed by Senator Paula Hollinger. It was eventually codified as § 35C in the Crimes and Punishments Article. Runkles, 326 Md. at 398-99, 605 A.2d at 118.
\textsuperscript{216} See Runkles, 326 Md. at 394, 605 A.2d at 119.
Hence, the new provision was not the mere expansion of section 5-327's penalties, as the initial bill had contemplated.

The reason for the bill's transformation arose from concerns that a mere modification of section 5-327 would not satisfy the legislature's ultimate goal of promulgating a general prohibition against baby selling within and beyond the adoption context. Consequently, the General Assembly created an entirely new statute, entitled "Child Selling," and placed it in the Crimes and Punishments Article rather than in the Family Law Article. This new statute, codified as article 27, section 35C, states in pertinent part that "[a] person may not sell, barter, or trade, or offer to sell, barter, or trade a child for money or property, either real or personal, or anything else of value." A violation of this provision may be punishable by a $10,000 fine or five years in prison or both.

3. The Court's Reasoning.—In Runkles, the Court of Appeals addressed two aspects of article 27, section 35C. First, the court addressed whether section 35C prohibits only for-profit adoptions. After determining that the section proscribes more than just for-profit adoptions, the court attempted to determine exactly what conduct the legislature intended the new statute to prohibit. Second, the court attempted to define the type of evidence that is legally sufficient to sustain a conviction against a defendant who

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217. Id. at 399, 605 A.2d at 118.
218. Id.
219. See id. at 398, 605 A.2d at 118.
220. See id. at 399, 605 A.2d at 118. Section 5-327 still exists as part of Maryland's Family Law Article and remains unaltered as a prohibition against for-profit adoptions. Id. at 400, 605 A.2d at 119.
223. See Runkles, 326 Md. at 400, 605 A.2d at 119.
224. After reviewing the legislative history of article 27, § 35C, the court concluded that the scope of the new statute's prohibition must include more than just for-profit adoptions because that was, and still is, section 5-327's function. Id. In particular, the court stated that "[i]t is of particular significance that SB 58 left FL § 5-327 absolutely untouched .... So now there are two statutes in effect, one intended to prohibit the sale of the adoption of a child, and the other intended to prohibit generally the sale of a child." Id. (emphasis added). Because § 5-327 was left entirely intact, the court concluded that § 5-327 would continue to control for-profit adoption situations, while article 27, § 35C would cover a broader range of situations. Id.
225. Id. at 401, 605 A.2d at 119-20.
violates this statute.\textsuperscript{226}

\textit{a. Scope of Article 27, Section 35C.}—The circumstances that led to Runkles's prosecution arose shortly after the effective date of the new statute.\textsuperscript{227} Therefore, the interpretation of article 27, section 35C was a matter of first impression for the court. In order to construe section 35C, the court first looked to the plain meaning of the statute's language.\textsuperscript{228} Had the language been clear on its face, the Runkles court would not have looked any further to determine the provision's meaning.\textsuperscript{229} But, because of the "significant difference of opinion among those learned in the law" as to exactly what the legislature intended this statute to cover, the court found the language of section 35C to be ambiguous.\textsuperscript{230} The court then noted that it was necessary to consider legislative history in order to avoid interpreting the statute in a way that was "unreasonable, illogical or inconsistent" with the legislature's underlying purposes.\textsuperscript{231}

\textsuperscript{226} See \textit{id.} at 403-04, 605 A.2d at 121.

\textsuperscript{227} Article 27, § 35C went into effect on July 1, 1989. The incident that led to the prosecution of Allen Runkles occurred on August 18, 1989. See \textit{id.} at 388, 605 A.2d at 113.

\textsuperscript{228} See \textit{id.} at 392, 605 A.2d at 115. See also State v. Bricker, 321 Md. 86, 92, 581 A.2d 9, 12 (1990) (finding that "[w]hen interpreting a statute, the starting point is the wording of the relevant provisions").

\textsuperscript{229} Runkles, 326 Md. at 392, 605 A.2d at 115. See generally State v. Fabritz, 276 Md. 416, 421, 348 A.2d 275, 278 (1975) (stating that "[w]here there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intention of the Legislature"); Fowell v. State, 206 Md. 101, 105, 110 A.2d 524, 526 (1955) (determining that "[w]here the statutory language is plain and free from ambiguity and so expresses a definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended").

\textsuperscript{230} Runkles, 326 Md. at 392, 605 A.2d at 115.

\textsuperscript{231} Id. at 392-93, 605 A.2d at 115. See also Potter v. Bethesda Fire Dep't, 309 Md. 347, 353, 524 A.2d 61, 64 (1987) (finding that "[i]n construing statutes, . . . results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with the real legislative intention prevailing over the intention indicated by the literal meaning" (citation omitted)). See generally Bricker, 321 Md. at 92, 581 A.2d at 12 (holding that "[i]n the event that ambiguity clouds the precise application of the statute, the cardinal rule of statutory construction is to ascertain and effectuate legislative intent"); Kaczorowski v. City of Baltimore, 309 Md. 505, 513, 525 A.2d 628, 632 (1987) (finding that "where a statute is plainly susceptible of more than one meaning and thus contains an ambiguity, courts consider not only the literal or usual meaning of their words, but their meaning and effect in light of the setting, the objectives and the purpose of the enactment").

The majority in \textit{Runkles} noted that a court may always look to a statute's legislative intent if it will be useful in construing the provision. Specifically, the \textit{Runkles} court stated that a court is never "precluded from consulting legislative history as part of the process of determining the legislative purpose or goal [of a law]." Wilde v. Swanson, 314 Md. 80, 92, 548 A.2d 837, 843 (1988), quoted in \textit{Runkles}, 326 Md. at 393, 605 A.2d at 115.
After reviewing the legislative history, the *Runkles* court determined that the legislature's objective in enacting section 35C was to deter future cases of baby selling that the existing law either did not prohibit or did not adequately punish. The legislature likely believed that such a statute was necessary in order to prevent the emergence of a market for babies.

The *Runkles* court, however, never defined exactly what the legislature contemplated by the phrase "sell, barter, or trade a child." Instead, the court decided to deal specifically with the question at hand—whether Runkles's specific conduct was prohibited under the statute. In keeping with this apparent judicial restraint, the court chose not to "mark the precise boundaries of the entire area which the Legislature intended to cover."

Because of the broad and, as of yet, undefined scope given to article 27, section 35C, the court was free to conclude that the legislature intended to include the mere consent to transfer custody of a child in exchange for money within the prohibition against selling, bartering, or trading a child. The court stated that "[i]n the light of the legislative intent that art. 27, § 35C have a broad reach, we find it patent that ordinarily a consent to the transfer of legal and physical custody of a child for money is proscribed by the statute." The Court of Appeals agreed with the circuit court's decision that it does not matter whether adoption or custody is in question because either way a "child is still being traded for money!"

b. Legal Sufficiency of Evidence.—After determining that Runkles's conduct fell within the ambit of section 35C, the court still had to decide if the evidence against him was legally sufficient to sustain his conviction. The test to determine legal sufficiency is

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232. See *Runkles*, 326 Md. at 393-400, 605 A.2d at 115-19.
233. See Avi Katz, *Surrogate Motherhood and the Baby Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 8 (1986) (discussing the fact that most child selling statutes seem to be "specifically targeted at the elimination of the baby black market").
234. See *Runkles*, 326 Md. at 401, 605 A.2d at 120. Although the court never expressed its opinion as to what exactly the legislature intended section 35C to cover, it concluded that "to say that the legislature intended other than the statute reach far and wide would not only be unreasonable and illogical, but inconsistent with common sense." Id.
235. Id. at 401-02, 605 A.2d at 120.
236. Id. at 402, 605 A.2d at 120.
237. Id.
238. Id.
239. Id. at 391, 605 A.2d at 114 (quoting the trial judge).
240. See id. at 402-03, 605 A.2d at 120-21.
“whether the evidence either shows directly or supports a rational inference of the facts to be proved, from which the trier of fact could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged.” 241 In Runkles, the State was required to prove facts that would establish the corpus delicti of the crime charged, as well as facts that would establish the criminal agency of the defendant. 242

(1) Corpus Delicti.—In order to establish the corpus delicti 243 of the offense charged, the court had to find that Runkles committed the crime created under article 27, section 35C—namely, the sale, barter, or trade of a child for anything of value. 244 If the consent to transfer legal and physical custody in return for money constitutes the sale, barter, or trade of a child under section 35C, then there was legally sufficient evidence to prove the corpus delicti in this case. 245 Under such a construction, the agreed statement of facts presented sufficient evidence to establish that there was a child involved, that the defendant “sold” that child, and that the defendant received something of value in return for the child. 246 Consequently, the prosecution succeeded in establishing the corpus delicti of the offense charged in this case.

(2) Criminal Agency.—Runkles argued that because he had no authority to consent to the transfer of custody of the child in question, he could not be held responsible for trading the child for money. 247 In so arguing, he relied on a well-accepted principle of law that one who uses an intermediary to commit a crime cannot be

242. Runkles, 326 Md. at 404, 605 A.2d at 121.
243. Corpus delicti means “the body of the crime.” The purpose of proving the corpus delicti of an offense charged is to avoid punishing someone for a crime that was never in fact committed. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.4 (b), at 18-19 (2d ed. 1986). LaFave and Scott state:
the corpus delicti embraces the fact that a crime has been committed by someone—i.e., that somebody did the required act or omission with the required mental fault, under the required (if any) attendant circumstances, and producing the required (if any) harmful consequence, without embracing the further fact (needed for conviction) that the defendant was the one who did or omitted that act or was otherwise responsible therefor.”

Id.
244. Runkles, 326 Md. at 404, 605 A.2d at 121.
245. See id.
246. See id.
247. See id.
considered a principle in the first degree. The court, however, concluded that because Runkles caused the consent to the transfer of custody through an innocent human agent, he is legally a principal in the first degree and must be held accountable for the acts and omissions of his intermediary.

4. Analysis.—"Somewhere within most of us there is at least an intuitive reaction that there is something indecent about the prospect of a market for babies," noted one commentator. It was amidst this sort of ideological atmosphere that the Court of Appeals made its decision in Runkles. Although the court purported to exercise judicial restraint in this case, it is clear that Runkles decided far more than was necessary in order to answer the question presented for consideration. Consequently, the court's decision in Runkles will likely have a lasting impact on the state of family law in Maryland.

Because of the strong public sentiment against baby selling and the fact that this case arose soon after article 27, section 35C became effective, the court seemed to be searching for a justification to convict Runkles. The desire to hold him accountable under section 35C led the court to assign this statute an extremely broad reach. In his dissenting opinion, Judge Bell stated that "[u]nlike the [majority], . . . I believe that the terms [of a statute] should be given their plain and ordinary meanings, rather than the meanings which serve to support a desired result." The majority in Runkles concluded that section 35C's prohibition against child selling did not only forbid for-profit adoptions,

248. See id. at 405, 605 A.2d at 121; see also LaFave & Scott, supra note 243, § 6.6 (a), at 569.
249. See Runkles, 326 Md. at 405, 605 A.2d at 121. The Court of Appeals concluded that "[d]espite [the mother's] rationalization, after the fact, to explain why she allowed herself to be persuaded by Runkles, the child would have remained with her except for Runkles's intervention. Certainly, the grandfather so believed; he offered to pay Runkles $4,000 to intervene." Id. See also LaFave & Scott, supra note 243, § 6.6(a), at 570 (noting that "the use of an innocent or irresponsible agent" will not destroy the wrongdoer's principal-in-the-first-degree status).
250. See Runkles, 326 Md. at 405, 605 A.2d at 121.
252. The Court of Appeals stated that "[t]he full sweep of the statute must await another day; we do not now mark the precise boundaries of the entire area which the Legislature intended to cover." Runkles, 326 Md. at 402, 605 A.2d at 120.
253. See id. at 388, 605 A.2d at 113.
254. See id.
255. See id. at 401, 605 A.2d at 119-20.
256. Id. at 407, 605 A.2d at 122 (Bell, J., dissenting).
but proscribed all for-profit transfers of child custody.\textsuperscript{257} The dissent, however, contended that the statutory language was clear and that the legislature did not intend for the statute to reach the defendant’s conduct in this case.\textsuperscript{258} The dissent concluded that the plain meaning of section 35C—“sale, barter, or trade”—suggests that the prohibited conduct includes only those transfers occurring within a commercial context.\textsuperscript{259} Judge Bell insisted that, at most, Runkles was offering to persuade his girlfriend to give up custody of her child, not offering to sell the child itself.\textsuperscript{260}

The majority, however, seemed to believe that the dissent’s reasoning was simply a matter of semantics and, as the trial judge pointed out, any way one looks at it, “a child [was] still being traded for money.”\textsuperscript{261} The majority contended that the arguments set forth by Judge Bell did not adequately reflect the legislative purpose intended by the General Assembly when it enacted this statute—namely, that “[s]elling a baby on the open market is a practice which must be stopped.”\textsuperscript{262}

The \textit{Runkles} court clearly engaged in result-oriented decision making. Its desire to rectify a rapidly intensifying social problem motivated the Court of Appeals to set forth an extremely broad interpretation of section 35C. By punishing Runkles for conduct that was arguably not prohibited by the statute, the court apparently believed that its decision would deter other potential child sellers. The question remains whether the court’s ends really justify its means.

The breadth given to section 35C by the majority left the dissenters worrying about the possible implications of such an interpretation. Because the instant case dealt with conduct that was morally reprehensible, it is likely that the court sought to find a violation of article 27, section 35C even though the conduct was not directly prohibited by the statute. In order to find such a violation and activate the newly enacted statute, the court needed to construe the statute broadly. Consequently, the majority’s decision seems to leave little leeway for future courts to narrow the scope of section 35C.

\textsuperscript{257} See id. at 400-02, 605 A.2d at 119-20.
\textsuperscript{258} Id. at 408, 605 A.2d 123 (Bell, J., dissenting).
\textsuperscript{259} See id. at 407 n.3, 605 A.2d 123 n.3 (Bell, J., dissenting).
\textsuperscript{260} See id. at 408, 605 A.2d at 123 (Bell, J., dissenting).
\textsuperscript{261} Id. at 391, 605 A.2d 114 (quoting the trial judge).
\textsuperscript{262} Id. at 394, 605 A.2d at 116 (quoting the transcript of the testimony of Senator Hollinger, Senate Bill 58's sponsor, in front of the Senate Judicial Proceedings Committee).
Maryland is virtually alone in its enactment of a *specialized* child selling statute. Most states merely have statutes equivalent to section 5-327 of Maryland's Family Law Article, which prohibit receiving compensation in exchange for the *adoption* of a child, with exceptions for reasonable medical and legal expenses.263 Although the statutes in other jurisdictions usually have more stringent penalties for a violation than those that exist under section 5-327, they are explicitly limited to the adoption context.264 Public dismay over the increase in instances of child selling not covered by existing law, combined with the leniency of section 5-327's penalties, compelled the Maryland legislature to enact a separate "child selling" statute.265 At this point, however, no other state has felt the need to enact such specialized legislation.

The court's decision in *Runkles* is likely to have a profound impact on Maryland's family law. It may not only affect specialized areas by prohibiting such things as surrogacy arrangements that are potentially implicated under section 35C,266 but perhaps the most disturbing ramifications of *Runkles'* interpretation of section 35C may come in the context of divorce and child custody proceedings. Anticipating the legal problems created by construing section 35C


264. See Wallisch, *supra* note 263, at 348-49.

265. See *Runkles*, 326 Md. at 398-99, 605 A.2d 118.

266. The legitimacy of surrogacy arrangements has become questionable under section 5-327 of the Family Law Article, though it has only recently come to the forefront of the political arena. *See* Jennifer S. Leete, *Note, Permissible Reimbursement of Birth Mothers' Expenses in Direct Adoptions*, 51 *Md. L. Rev.* 716, 721 n.107 (1992). Leete states that "[i]t is widely recognized that [surrogacy arrangements are] dependent upon large payments to the natural mother. One can only assume that if § 5-327 does in fact limit these payments, surrogacy arrangements will virtually cease in Maryland." *Id.* (citations omitted).
to encompass the transfer of custody for value, the Court of Special Appeals warned:

[t]o read § 35C to include the transfer of custody would render criminally liable any parent (or lawyer) in divorce or custody proceedings wherein as part of a marital agreement, one parent agreed to relinquish a claim to custody in exchange for any other thing of value—visitation, spousal support, or property.\(^{267}\)

The majority in the Court of Appeals found this conclusion to be "unreasonable, illogical, and inconsistent with common sense,"\(^{268}\) and consequently dismissed the intermediate appellate court's argument on this subject, questioning the legitimacy of its concerns.\(^{269}\) Nevertheless, the *Runkles* decision must leave the people of Maryland wondering where exactly the reach of article 27, section 35C will end and what is to prevent courts from holding other people and institutions liable for taking custody of children in exchange for remuneration in other nonadoption contexts.\(^{270}\)

5. Conclusion.—In *State v. Runkles*, the Court of Appeals held that article 27, section 35C prohibited more than just for-profit adoptions.\(^{271}\) The court concluded that the legislature meant to prevent all for-profit transfers of child custody.\(^{272}\) While its decision seemed reasonable under the circumstances, the court may have invited a mass of future litigation due to its broad and result-oriented interpretation of section 35C. If the state chooses to prosecute those involved in surrogacy arrangements and child custody

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268. *Runkles*, 326 Md. at 402 n.8, 605 A.2d 120 n.8. The majority likely dismissed this concern for reasons set forth in Petitioner's Brief, which stated that such "exchange" of custody between the child's parents (even through their lawyers) does not remotely contemplate a sale of the child from one parent to the other. The Court of Special Appeals' scenario implicitly assumes, as it must, that the two parents, prior to any such agreement, shared custody and were, to use the intermediate appellate court's commercial analogy, in effect joint "owners" of the child. Of course, one cannot buy what he already owns. Thus, not only does the Court of Special Appeals' hypothetical offend the spirit of Section 35C, it violates the statute's express language.

Brief for the Petitioner at 13-14 n.4, *Runkles* (No. 91-95).

269. See *Runkles*, 326 Md. at 402 n.8, 605 A.2d at 120 n.8.

270. Notably, if the legislature is dissatisfied with the way in which the court has construed a particular statute, it can always rewrite the provision in order to clarify its intent.

271. See *Runkles*, 326 Md. at 400, 605 A.2d at 119.

272. See id. at 402, 605 A.2d at 120
proceedings pursuant to this new statute, the onus will be on the courts to restrict the boundaries of section 35C by reading *Runkles* narrowly and applying its finding sparingly.

Samantha Rosenberg
VIII. INSURANCE

A. The "Lines of Business" Exception to the Requirement for Terminating Agent Agreements

In *Lincoln National Life Insurance Co. v. Insurance Commissioner*, the Court of Appeals held that an insurance company wishing to terminate a written agreement with an agent is not necessarily required by article 48A, section 234B(b) to provide that agent with a ninety-day written notice of termination. The court relied on distinctions between certain lines of insurance business to justify the exemption of agents who solicit life and health insurance from the coverage of the notice requirement. In construing the notice requirement of section 234B(b), the court considered not only the plain meaning of the statute, but also gave great weight to both the legislative purpose and prior legislative forms of the statute. The court concluded that the interpretation of the statute offered by the Insurance Commissioner was "too rigid an application of . . . [the] rules of statutory construction" and thus rejected the Commissioner's interpretation.

1. The Case.—On January 1, 1985, Gerald Veydt entered into a written insurance agency contract with Lincoln National Life Insurance Company to write life and health insurance policies. The agency agreement between Veydt and Lincoln National provided that either party could terminate the appointment, with or without cause. However, the agreement did not contain a minimum period for notice of termination.

3. See *Lincoln Nat'l*, 328 Md. at 72, 612 A.2d at 1304; see also id. at 68-69, 612 A.2d at 1303 (quoting the Court of Special Appeals's summary of the differences between property and casualty agents and life and health insurance agents).
4. See id. at 75-76, 612 A.2d at 1306. For a discussion of the statute's legislative purpose and prior legislative forms, see infra notes 30-39 and accompanying text.
5. *Lincoln Nat'l*, 328 Md. at 77, 612 A.2d at 1307.
6. Id. at 67-68, 612 A.2d at 1302. Specifically, the contract stated that Veydt shall "solicit applications for Individual Life Insurance, Individual Disability Insurance, Group Insurance, Annuities and solicit subscriptions for securities offered by or through [Lincoln National]." Id. at 67, 612 A.2d at 1302.
7. See id. at 68, 612 A.2d at 1302.
8. Id.
In a letter dated March 28, 1988, Lincoln National informed Veydt that his contract to write life and health insurance policies was being canceled effective March 31, 1988. Veydt subsequently filed a complaint against Lincoln National with the Commissioner alleging that article 48A, section 234B(b) required Lincoln National to give at least a ninety-day notice prior to termination. In response, Lincoln National argued that the notice requirement of section 234B(b) was not applicable to the lines of business covered by Veydt’s contract with Lincoln National—health and life insurance. Thus, the question presented to the Commissioner centered on the construction of section 234B(b).

The Commissioner concluded that Lincoln National’s conduct violated section 243B(b). In particular, the Commissioner ruled that Lincoln National failed to comply with the ninety-day notice requirement and ordered Lincoln National to reinstate the contract. In construing the statute’s application, the Commissioner focused on the omission of the word “agents” from the second exception. While the first exception expressly excludes certain “agents or brokers or policies”—thereby not affording agents the protection of a

9. Id.
10. Id.
11. Id. At the hearing, Lincoln National presented expert testimony detailing the differences in the company-agent relationship when an insurance agreement involves life and health insurance agents, on the one hand, and when the agreement involves property and casualty agents, on the other. Id.
12. See id. at 69-70, 612 A.2d at 1303. See also MD. ANN. CODE art. 48A, § 234B(b) (1991). Subsection (b) provides in part:

If an insurer intends to cancel a written agreement with an agent or broker, or intends to refuse any class of renewal business from the agent or broker, the insurer shall give the agent or broker not less than 90 days written notice. Notwithstanding any provision of the agreement to the contrary, the insurer shall continue for not less than one year after termination of the agency agreement to renew through the agent or broker any of the policies which have not been replaced with other insurers as expirations occur. This subsection shall not apply to: (1) agents or brokers or policies of a company or group of companies represented by agents or brokers who by contractual agreement represent only that company or group of companies if the business is owned by the company or group of companies and the cancellation of any contractual agreement does not result in the cancellation or refusal to renew any policies of insurance; or (2) life, health, surety, wet marine and title insurance policies.

Id.
13. See Lincoln Nat’l, 328 Md. at 69, 612 A.2d at 1303.
14. See id.
16. MD. ANN. CODE art. 48A, § 234B(b)(1) (1991). Article 48A defines an agent as “a person who for compensation in any manner solicits, procures, or negotiates insurance contracts, including contracts for nonprofit health service plans, dental plan organiza-
ninety-day notice requirement in certain circumstances—the second exception simply refers to "life, health, surety, wet marine and title insurance policies." The omission of the word "agents" from the second exception was considered by the Commissioner to be intentional. Consequently, the Commissioner ruled that an insurer must give a ninety-day notice of termination to an agent who sells life, health, surety, wet marine and title insurance policies.

Lincoln National appealed the Commissioner's decision to the Circuit Court for Baltimore City, claiming that the Commissioner's interpretation of article 48A, section 234B(b) was incorrect as a matter of law. The circuit court reversed, holding that Lincoln National was not required to give Veydt a ninety-day notice. That court concluded that because Veydt sold life and health insurance policies, he fell within the second exception to section 234B(b). The statute, therefore, did not protect him.

Both Veydt and the Commissioner appealed the decision to the Court of Special Appeals, which reversed the trial court. On petition by Lincoln National, the Court of Appeals granted certiorari and reversed the Court of Special Appeals.

2. Legal Background.—

a. Legislative History and Adjudication of Article 48A, Section 234B(b).—In order to provide greater protection to both the agent and the insured, courts and legislatures have begun to erode the American Agency System. In particular, many state legislatures
have adopted statutes protecting an insurance agent’s right to renewal commissions on his or her expirations, mandating notice requirements for termination, or both. Some states have limited these protections to agency agreements involving only certain lines of insurance business and/or certain types of agents.

Maryland’s efforts to afford greater protection to agents and insureds is evident in article 48A, sections 234A through 234C, first enacted in 1970. The legislature intended for these sections to “establish standards of fairness in insurance underwriting and treatment of agents or brokers, and to confer authority on the Insurance Commissioner to remedy failure to observe such standards.”

Originally, section 234B provided protection to insurance agents and brokers by prohibiting insurers from canceling or amending written agreements with agents or brokers if the cancellation or amendment was arbitrary, capricious, or discriminatory.

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27. Expirations refer to an agent’s work product or information collected by the agent with regard to his or her client including “a copy of the policy issued to the insured or records containing the date of the insurance policy, the name of the insured, the date of its expiration, the amount of insurance, premiums, property covered and terms of insurance.” V. L. Phillips & Co. v. Pennsylvania Threshermen & Farmers’ Mut. Cas. Ins. Co., 199 F.2d 244, 246 (4th Cir. 1952), cert. denied, 345 U.S. 906 (1953).


No insurer may cancel or amend a written agreement with an agent, or broker, or refuse to accept business from such agent or broker if the cancellation or amendment is arbitrary, capricious, unfair, discriminatory, or based in whole or
tion did not, however, specify either a notice requirement or a minimum renewal period for the policies of a terminated agent.

In 1972, the General Assembly considered House Bill 444 for the purpose of amending article 48A. As originally proposed, the bill addressed only motor vehicle liability insurance. Prior to enactment, the Joint Committee on Economic Matters expanded the scope of the proposed legislation to include all insurance agents or brokers by striking language that limited its application to motor vehicle insurance. But before approving the expanded legislation, the General Assembly added an exception to section 234B(b), covering life and health insurance policies. Apparently, the General Assembly did not want the expanded version of section 234B to apply to agents or brokers soliciting insurance policies in certain lines of business.

In 1975, the legislature added a second exception to section 234B(b). The purpose of the change was to exempt "certain agents or brokers of a company or group of companies from certain notice requirements where the business is owned by the company or group of companies and the cancellation of any contractual agree-

part upon the race, creed, color, religion, national origin, place of residency of the agent or broker, his applicants or policyholders.

Id.

34. See id.
35. See id.

If an insurer intends to cancel a written agreement with an agent or broker, or intends to refuse any class of renewal business from the agent or broker, the insurer shall give the agent or broker not less than 90 days written notice. Notwithstanding any provision of the agreement to the contrary, the insurer shall continue for not less than one year after termination of the agency agreement to renew through such agent or broker any of the policies which have not been replaced with other insurers as expirations occur. This subsection shall not apply to life, health, surety, wet marine and title insurance policies.

Id. (emphasis added).


This subsection shall not apply to: (1) agents or brokers or policies of a company or group of companies represented by agents or brokers who by contractual agreement represent only that company or group of companies if the business is owned by the company or group of companies and the cancellation of any contractual agreement does not result in the cancellation or refusal to renew any policies of insurance; or, (2) life, health, surety, wet marine and title insurance policies.

Id. (emphasis added).
ment does not result in the cancellation or refusal to renew any policies of insurance."\textsuperscript{39}

To summarize, section 234B(b), in its present form, "states two rules in absolute terms and then states two exceptions."\textsuperscript{40} In the first and second sentences, the subsection defines the "notice rule" and the "renewal rule."\textsuperscript{41} The third sentence states two numbered exceptions: (1) the "captive agent exception," and (2) the "lines of business exception."\textsuperscript{42} Ultimately, the court framed the issue in Lincoln National as whether the lines-of-business exception applied to both rules or only to the renewal rule.\textsuperscript{43}

There has been little prior judicial review of section 234B. In fact, Travelers Indemnity Co. v. Merling\textsuperscript{44} is the only case in which the Court of Appeals had previously examined the section.\textsuperscript{45} In that case, Merling brought suit alleging that Travelers Indemnity had interfered with his property and contract rights in expirations by sending renewal policies to Merling's former clients after his employment was terminated.\textsuperscript{46} Merling relied on the American Agency System's view that an insurance company is prohibited from interfering with an agent's property rights in his or her expirations.\textsuperscript{47} The circuit court agreed and ruled that Merling was entitled to his commissions as long as his customers continued with the company.\textsuperscript{48} The Court of Appeals reversed, claiming that the 1972 amendment to section 234B, which included the notice and renewal

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\textsuperscript{39} Act of Apr. 8, 1975, ch. 229, § 234B, 1975 Md. Laws 1219. These type of agents are often referred to as "captive agents."

\textsuperscript{40} Lincoln Nat'l, 328 Md. at 67, 612 A.2d at 1302.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} 326 Md. 329, 333, 605 A.2d 83, 85 (1992).

\textsuperscript{45} See id. at 339-42, 605 A.2d at 88-89. Prior to Merling, the Court of Special Appeals conducted a limited review of 234B(d), restricting its evaluation to the substantiality of the evidence in satisfying a showing of arbitrary, capricious, unfair, or discriminatory action by an insurance company under subsection 234B(d). See Nationwide Mut. Ins. Co. v. Insurance Comm'r, 67 Md. App. 727, 736, 509 A.2d 719, 723 (1986).

\textsuperscript{46} See Merling, 326 Md. at 334, 605 A.2d at 85. Merling was an independent agent whose agreements to write property and casualty coverages for Travelers Indemnity and two of its subsidiaries were canceled. See id. at 332-33, 605 A.2d at 84-85. Merling filed a complaint with the Commissioner but the Commissioner concluded that his termination was lawful under article 48A, section 234B. See id. at 333, 605 A.2d at 85. After the expiration of the mandated minimum one-year renewal period that followed Merling's termination, Travelers Indemnity began soliciting business from Merling's former clients. See id. at 333-34, 605 A.2d at 85.

\textsuperscript{47} See id. at 338, 605 A.2d at 87.

\textsuperscript{48} Id. at 335, 605 A.2d at 86.
rules, was the legislature's attempt to curtail the American Agency System.49 The court suggested that the legislation was a compromise between an agent's property rights in expirations and the state's interest in protecting the insureds from cancellations and nonrenewals.50 Consequently, the solicitation about which Merling complained was held to be not only lawful, but required by section 234B.51

In *Merling*, the court focused on a small portion of section 234B. Thus, prior to *Lincoln National* there had been no judicial review of the application of the section 234B(b) exceptions. As a case of first impression, the outcome of *Lincoln National* rested solely on the court's construction of that section.

**b. Rules of Statutory Construction.**—"[T]he cardinal rule of statutory construction is to determine legislative intent,"52 or "the ends to be accomplished" in enacting a statute.53 The primary source for determining legislative intent is the language of the statute.54 Words should "be given their ordinary and natural" meaning,55 without resorting to strained, subtle, or forced interpretations for the purpose of extending or limiting the operation of the statute.56 Further, "no word, clause, sentence or phrase should be rendered surplusage, superfluous, meaningless, or nugatory."57 Thus, a con-
struction of a statute that "renders every word operative, rather than one which may make some idle," is preferred.\textsuperscript{58} In addition, a court should not add words or attribute to words meanings that are not otherwise appropriate.\textsuperscript{59} It logically follows that when the legislature uses certain words in one part of a statute and omits them from others that the omission was intentional.\textsuperscript{60}

When there is no ambiguity or obscurity in the language of a statute, there is some suggestion that a court should not look elsewhere to determine legislative intent.\textsuperscript{61} The Court of Special Appeals, however, has noted that clarity and lack of ambiguity in statutory language \textit{does not} preclude a court from consulting external evidence to determine the goal or purpose of a statute.\textsuperscript{62} The Court of Appeals reiterated that position in \textit{Morris v. Prince George's County},\textsuperscript{63} explaining that a court is always free to look at the context of the statutory language and consult legislative history to determine the purpose or goal of the law, even when the words in a statute carry a definite meaning.\textsuperscript{64}

The context of a statute may include the "bill's title and function paragraphs, amendments that occurred as it passed through the


\textsuperscript{60} \textit{See} American Sec. & Trust Co. v. New Amsterdam Cas. Co., 246 Md. 36, 41, 227 A.2d 214, 216-17 (1967) (stating that "the express imposition of one qualification shows a deliberate rejection of any other").

\textsuperscript{61} \textit{See} Bledsoe v. Bledsoe, 294 Md. 183, 189, 448 A.2d 353, 356 (1982) (warning that "when such language is clear and unambiguous, it must be held to mean what it expresses"); Travelers Ins. Co. v. Benton, 278 Md. 542, 545, 365 A.2d 1000, 1003 (1976) (noting that "where there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the legislature"); Purifoy v. Mercantile-Safe Deposit & Trust Co., 273 Md. 58, 66, 327 A.2d 483, 487 (1974) (stating that "where statutory language is plain and free from ambiguity ... courts are not at liberty to disregard the natural import of the words").


\textsuperscript{63} 319 Md. 597, 573 A.2d 1346 (1990).

\textsuperscript{64} \textit{See id.} at 604, 573 A.2d at 1349. Prior to \textit{Morris}, the Court of Appeals had concluded that legislative intent is more accurately described as legislative goal or purpose and should be defined by "considering the language of the statute in the context within which it was adopted." \textit{Rucker v. Comptroller of Treasury}, 315 Md. 559, 565, 555 A.2d 1060, 1063 (1989) (citations omitted). This view is consistent with the position of the Supreme Court, which stated that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" \textit{Watt v. Alaska}, 451 U.S. 259, 266 (1981) (citations and footnote omitted).
legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal.\textsuperscript{65} By looking at the context, a court is considering the statute as a whole, rather than reading particular language in isolation;\textsuperscript{66} considering not only the literal or usual meaning of words in a statute, but the meaning of the words in light of the setting, objectives, and purpose of the legislation.\textsuperscript{67} Finally, any construction by a court must aim to avoid absurd or illogical results.\textsuperscript{68} Therefore, it is proper for courts, in construing a statute of doubtful meaning and application, to consider the consequences of a proposed construction so that results that are unreasonable or inconsistent with common sense will be avoided.

c. Review of Administrative Agency Decisions.—Statutory interpretation necessarily involves the resolution of questions of law. As such, a reviewing court may reverse quasi-judicial decisions of the Commissioner if the reviewing court finds that the Commissioner made an error of law.\textsuperscript{69} A reviewing court may adopt the statutory interpretation advanced by an administrative agency, but the agency's interpretation will not be presumed correct.\textsuperscript{70} Thus, when an agency's decision is predicated solely on an error of law, no def-

\textsuperscript{65} Kaczorowski v. City of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 632 (1987).
\textsuperscript{67} See Baltimore County Coalition Against Unfair Taxes v. Baltimore County, 321 Md. 184, 204, 582 A.2d 510, 520 (1990).
\textsuperscript{68} See Kaczorowski, 309 Md. at 513, 525 A.2d at 632; see also Pan Am. Sulphur Co. v. State Dep't of Assessments & Taxation, 251 Md. 620, 627, 248 A.2d 354, 358 (1968) ("[W]herever possible an interpretation should be given to statutory language which will not lead to absurd consequences.").
\textsuperscript{69} See Md. Ann. Code art. 48A, § 40(5) (1991). Section 40(5) provides in part that: The court may affirm the decision of the Commissioner or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (i) In violation of constitutional provisions; or (ii) In excess of the statutory authority or jurisdiction of the Commissioner; or (iii) Made upon unlawful procedure; or (iv) Affected by other error of law; or (v) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or (vi) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the Commissioner and including de novo evidence taken in open court; or (vii) Unsupported by the entire record, as submitted by the Commissioner and including de novo evidence taken in open court; or (viii) Arbitrary or capricious.
ference to the agency is necessary.71

The history of an administrative agency's construction of a statute, however, is important in determining the weight afforded to the agency's statutory interpretation. For example, when an administrative agency places a construction on a statute soon after its enactment, the Court of Appeals has said that such a construction "is [a] strong, persuasive influence in determining the judicial construction."72 Likewise, an agency's continuous, long-standing construction of a statute with legislative approval or acquiescence warrants considerable weight.73 Such long-standing acquiescence by the legislature is indicative that legislative intent is being carried out. Finally, consideration should be given to the nature of the process through which the agency arrived at its interpretation, such as whether the interpretation is the product of an adversarial proceeding or formal rule promulgation.74

The degree of ambiguity in the language of a statute may further temper the weight given to an agency's interpretation. If a statute is ambiguous and thus susceptible to more than one interpretation, the construction given it by an administrative agency soon after its enactment deserves deference from a reviewing court and should not be disregarded, except for the strongest and most urgent reasons.75 On the other hand, if the statutory language is clear and unambiguous, the administrative agency's construction is not given weight, no matter how long-standing and entrenched it is.76

74. See Baltimore Gas & Elec., 305 Md. at 162, 501 A.2d at 1315. Little weight is afforded to an interpretation that was reached without either a contested adversarial proceeding or a formal rule promulgation. Id.
76. See Macke Co., 302 Md. at 22-23, 485 A.2d at 257.
3. The Court's Reasoning; Analysis.—It is clear that Lincoln National and the Commissioner differed fundamentally in their explanations of the plain meaning and legislative intent of section 234B(b). The court rejected the Commissioner's rigid statutory construction process in favor of a "reasoned elaboration" approach.77 Under this approach, the court not only considered the plain meaning of the statute, but also examined the legislative intent in light of both the insurance industry's practice and the statute's prior legislative forms. Weight given to the Commissioner's decision was appropriately minimized by the lack of evidence of any long-standing, consistent construction by the Commissioner.78

Relying on the presumption that the General Assembly knows the difference between a subsection and a sentence,79 the Court of Appeals based most of its textual analysis on the use of the phrase "[t]his subsection shall not apply to . . ."80 The court found that because of this wording, each exception applies to both rules of the subsection.81 Had the court concluded otherwise, the word "subsection" would have been rendered meaningless and superfluous, in violation of a well-established maxim of statutory construction.82 Because the language is clear, the Lincoln National court concluded that the only reason to reject such an interpretation would be if the construction manifested an absurd or illogical result.83

The Court of Appeals logically reasoned that less protection is necessary for life and health insurance agents.84 Although the Commissioner held a different view, believing that the public interest may be harmed by treating life and health insurance agents differently with regard to the notice requirement, the court rejected this view as merely an erroneous opinion, not entitled to any deference.85

77. See Lincoln Nat'l, 328 Md. at 77, 612 A.2d 1307. An agency has followed a process of "reasoned elaboration" when it "clearly demonstrates that it has focused its attention on the statutory provisions in question, thoroughly addressed the relevant issues, and reached its interpretation through a sound reasoning process. . . ." Baltimore Gas & Elec., 305 Md. at 161, 501 A.2d at 1314.

78. See Lincoln Nat'l, 328 Md. at 77, 612 A.2d at 1307.

79. See id. at 71, 612 A.2d at 1304.


81. Lincoln Nat'l, 328 Md. at 71, 612 A.2d at 1304 (asserting simply that "[t]hat is what the language says").

82. See supra note 58 and accompanying text.

83. See Lincoln Nat'l, 328 Md. at 71-72, 612 A.2d at 1304.

84. See id. at 72, 612 A.2d at 1304.

85. Id., 612 A.2d at 1304-05. The court did note that the Commissioner's opinion was not a conclusion that differential treatment was absurd or illogical. Id., 612 A.2d at 1304.
The court bolstered its argument for treating life and health insurance agents differently than property and casualty agents by citing *Merling* as evidence that the legislature had drawn a distinction between the two types of agents with the 1972 amendment to section 234B(b). Property rights were not an issue for life and health insurance agents because their policies continued for a defined period of time and their commissions had already vested. It was therefore logical to conclude that the minimum ninety-day notice provision was part of the same compromise that sought to protect insureds from nonrenewal. In exchange for limited property rights in expirations, those same agents obtained a right to a ninety-day notice of termination.

A significant weak point in the *Lincoln National* court’s reasoning was the assumption the court made in drawing the line between the two types of agents. The court assumed that the agreements referred to in both the notice rule and the renewal rule are of the same type—agreements dealing with lines of business that renew and have expirations. Notably, section 234B(b) delineates two separate events that may trigger the ninety-day notice requirement: (1) cancellation of the agent’s written agreement, or (2) refusal of a class of renewal business. The second event, given its renewal nature, is reasonably limited to property and casualty agreements. The first event—cancellation of the agent’s written agreement—however, carries no implication that it refers only to property and casualty agreements. In fact, if both events are limited to property and casualty agreements, the court notably failed to offer any justification for the legislature listing them separately, instead of expressly applying the ninety-day requirement only to property and casualty agreements.

A second weakness in the court’s opinion was its analysis regarding the omission of the word “agents.” The captive-agent exception begins “agents or brokers or policies,” while the lines-of-business exception refers only to “policies.” Generally, it is held

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86. See id. at 72-73, 612 A.2d at 1305. It is important to note that both the Commissioner and the Court of Special Appeals were without the benefit of the *Merling* ruling at the time of their decisions. *Id.* at 73 n.3, 612 A.2d at 1305 n.3.
87. See id. at 72-73, 612 A.2d at 1305.
88. *Id.* at 74, 612 A.2d at 1305.
89. *Id.*
90. See id. at 83-85, 612 A.2d at 1310-11 (Bell, J., dissenting).
92. *Id.* § 234B(b)(1).
93. *Id.* § 234B(b)(2).
that when the legislature uses certain words in one part of a statute and omits them from others, it is assumed that the omission was intentional. The Commissioner followed this reasoning and strictly read the language to conclude that the lines-of-business exception did not include agents. As the dissent pointed out, such a literal reading would also avoid a "strained or forced" interpretation. In addition, because the language of this sentence is not clear on its face, deference should have been given to the interpretation of the administrative agency. The majority, however, did not consider the presence of the terms "agents" or "brokers" in the captive-agent exception to be the "keystone of the interpretation arch." Consequently, it refused to give any deference to the Commissioner's rigid view of statutory construction. The Lincoln National court concluded that it was appropriate and necessary to consider the context of the statute more broadly by examining the underlying objective and purpose of the statute and prior legislative forms.

In 1972, when only the lines-of-business exception existed, the Commissioner would have been hard pressed to argue that life and health insurance agents were not exempt from the notice requirement yet life and health insurance policies were. Because securing a policy necessarily involves an agent, it is difficult to have an agreement without an agent. Similarly, the insertion of the captive-agent exception in 1975 may logically be construed as an effort to further narrow the scope of both the notice and renewal rules, instead of only limiting the obligations under the renewal rule. Apparently, the Lincoln National court placed greater weight on considering the context and evolution of the statute, rather than on a strict and narrow reading of the language. In addition, the court apparently permitted the addition of explanatory words to a statute if such an addition would be necessary to fulfill the statute's purpose and carry out the legislative intent.

Finally, the dissent also criticized the majority for its reliance on Merling. The dissent argued that the use of Merling to support the

94. See supra note 60 and accompanying text.
95. See Lincoln Nat'l, 328 Md. at 69-70, 612 A.2d at 1303 (quoting the Commissioner's finding).
96. See id. at 87, 612 A.2d at 1312 (Bell, J., dissenting).
97. See supra note 61 and accompanying text.
98. Lincoln Nat'l, 328 Md. at 77, 612 A.2d at 1307.
99. Id.
100. Id. at 77-78, 612 A.2d at 1307.
101. Id. at 90, 612 A.2d at 1313 (Bell, J., dissenting).
proposition that the legislature intended to draw a line between a certain excepted line of business and property and casualty business written by noncaptive agents was dependent on "inference and indirection." Because the legislature did not say in clear and unambiguous terms that the section related only to property and casualty business, the line drawing appeared to be the action of the court rather than the legislature.

4. Conclusion.—*Lincoln National* turned on the statutory construction of article 48A, section 234B(b). In light of the plain meaning of the language and the context of the statute, the Court of Appeals had little difficulty justifying its position that life and health insurance agents need not be entitled to the same notice requirements as property and casualty agents. Treating the two types of agents differently is consistent with the characteristics of their respective practices and the apparent legislative intent. The court sent a message with *Lincoln National* that statutory construction need not always be a rigid exercise. When there is any doubt, it is best to evaluate the statute in its full context, including purpose and prior legislative forms.

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B. Surplus Line Insurers Exempt From Forty-Five-Day Notice Rule

In *Smith v. Underwriters at Lloyd's of London*, the Court of Appeals ruled that insurance companies writing only "surplus line" policies in Maryland are not required to provide their policyholders the degree of notice that other insurers must provide when terminating a policy. By definition, surplus line insurers provide coverage of risks that cannot be insured within the ordinary insurance system. Although insurance companies that offer other types of insurance in Maryland are bound by a forty-five-day notice require-
ment,107 the Court of Appeals construed the notice section to exclude surplus line insurers.108

The court, however, rejected the contention that surplus line insurance falls entirely outside the ordinary state insurance regulatory scheme as a matter of “geographical jurisdiction.”109 This conclusion could have far-reaching implications for surplus line insurers: a case-by-case determination will now be required in order to determine whether the legislature intended other provisions of the Insurance Code to apply to such insurers.110

1. The Case.—Harry Smith had owned and operated an auto body shop in Baltimore City since 1974.111 Unable to obtain fire insurance for the shop through ordinary insurance channels, Smith’s insurance broker, Mayer & Steinberg, Inc. (M&S), purchased “surplus line” insurance through All Risks, Ltd., a surplus line insurance broker licensed to operate in Maryland.112 All Risks in turn “placed” the surplus line insurance coverage with a syndicate of underwriters affiliated with Lloyd’s of London.113

The surplus line fire insurance policy was renewed annually for several years.114 On April 2, 1984, coverage was extended for another year.115 In July 1984, All Risks arranged an inspection of the body shop; following the inspection, All Risks asked Smith to repair

107. Id. § 240A(a)(3). This section contains the requirement that “[t]he insurer shall see that written notice . . . is sent to the insured not less than 45 days prior to the date of the proposed cancellation or expiration of the policy.” Id. The term “insurer” is broadly defined, and “includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance.” Id. § 3. A “person” is defined as “an individual, insurer, company, association, organization, Lloyds, society, reciprocal or interinsurance exchange, partnership, syndicate, business trust, corporation, and any other legal entity.” Id. § 4. Thus, nearly every conceivable type of entity involved in the business of providing insurance is covered by the notice provision in § 240A.

108. See Smith, 326 Md. at 611-15, 606 A.2d at 279-81; see also infra notes 148-165 and accompanying text.

109. Smith, 326 Md. at 609, 606 A.2d at 278. The “geographical jurisdiction” argument claims that insurance policies issued geographically outside the state are not subject to the state’s regulatory jurisdiction. See id. at 608, 606 A.2d at 277.

110. See infra notes 179-180 and accompanying text.

111. Smith, 326 Md. at 601-02, 606 A.2d at 274.

112. Id. at 602, 606 A.2d at 274.

113. Id. This syndicate was described in the insurance policy as “certain Underwriters at LLOYD’S, LONDON,” directed by John Michael Poland, a resident of England. Id. The Court of Appeals refers to Poland in its decision as the representative of the Underwriters at Lloyd’s of London. Id. at 602 n.3, 606 A.2d at 275 n.3. This note, however, will refer to both the underwriting syndicate and Poland as “Lloyd’s of London.”

114. Id. at 602, 606 A.2d at 274.

115. See id.
certain defects that the inspection had revealed. On November 14, claiming that Smith had failed to provide notice that he had made the requested repairs, All Risks informed Smith that the underwriting syndicate was canceling his policy, effective November 24, 1984.

On February 10, 1985, slightly less than three months after the notice of cancellation was sent, Smith’s body shop was heavily damaged by fire. When Lloyd’s of London refused to cover the loss, Smith sued both M&S and Lloyd’s. Smith did not allege that Lloyd’s of London had no right to cancel the policy; rather, Smith argued that he was entitled to forty-five days advance notice.

Lloyd’s moved for summary judgment on the ground that the statutory provision requiring a forty-five day notice period for cancellation of policies was inapplicable to surplus line insurance carriers. The circuit court granted summary judgment for Lloyd’s of London, and both Smith and M&S appealed. Prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari to consider whether surplus line insurers are exempt from the forty-five-day notice requirement.

2. Legal Background.

a. Statutory Provisions.—Subtitle 15 of the Maryland Insurance Code, entitled “Unfair Trade Practices,” contains the forty-five-day notice requirement at issue in this case. That provision states:

The insurer shall see that written notice of intention to cancel for a reason other than nonpayment of premium or notice of intention not to renew a policy issued in this State is sent to the insured not less than 45 days prior to the date

116. Id.
117. Id. The insurance policy contained a provision that allowed the syndicate to cancel the policy on ten days’ notice. Id. at 602 n.2, 606 A.2d at 274 n.2.
118. See id. at 602, 606 A.2d at 275.
119. Id.
120. Id.
121. Id. at 602-03, 606 A.2d at 275.
122. Id.
123. Because M&S and Lloyd’s were codefendants, a grant of summary judgment in favor of Lloyd’s might subject M&S to a greater share of total liability. In addition, there was an unresolved issue of whether M&S had failed to fulfill a contractual obligation to replace the surplus line insurance coverage in the event of cancellation. See Brief for Appellee John Michael Poland at 4, Smith (No. 92).
124. Smith, 326 Md. at 603, 606 A.2d at 275.
126. Smith, 326 Md. at 603, 606 A.2d at 275.
of the proposed cancellation or expiration of the policy, as the case may be.\textsuperscript{128}

The Court of Appeals noted that this case essentially involved a question of statutory construction: Was section 240A(a)(3) intended to apply to surplus line insurers like Lloyd's of London?\textsuperscript{129} Although Lloyd's falls under the definition of "insurer" in section 3 of the Insurance Code,\textsuperscript{130} surplus line insurers generally are governed by a separate part (Subtitle 13) of article 48A.\textsuperscript{131} And unlike ordinary, state-approved insurers, surplus line insurers such as Lloyd's of London are categorized as "alien,"\textsuperscript{132} "unauthorized" insurers.\textsuperscript{133}

The statutory definition of surplus line insurance, in section 184(a), states that "'[s]urplus line' insurance means the full amount or policy of insurance required to protect the interest of the insured which cannot be obtained . . . from insurers authorized to do business in this State. . . .'"\textsuperscript{135} The only major requirements imposed upon surplus line insurers are that each insurer must file an affidavit with the Insurance Commissioner supporting its eligibility to be such an insurer,\textsuperscript{136} and that every policy must bear a conspicuous endorsement or legend on the first page stating that the policy "'is issued by a nonadmitted insurer not under the jurisdiction of the Maryland Insurance Commissioner.'"\textsuperscript{137} If the surplus line insurance is purchased through a broker, the broker must be licensed in Maryland.\textsuperscript{138} The important remaining question, therefore, was

\textsuperscript{128} Id. § 240A(a)(3).
\textsuperscript{129} See Smith, 326 Md. at 603, 611, 606 A.2d at 275, 279.
\textsuperscript{130} "'Insurer' includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance." Md. Ann. Code art. 48A, § 3 (1991).
\textsuperscript{131} Id. §§ 183-99.
\textsuperscript{132} Id. § 6. This section classifies insurers as either "domestic," meaning "formed under the laws of this State," § 6(1); "foreign," meaning "formed under the laws of any jurisdiction other than this State," § 6(2); or "alien," meaning "formed under the laws of any country or jurisdiction other than the United States of America, its states, districts, territories, and commonwealths," § 6(3).
\textsuperscript{133} Id. § 7. Under this section, insurers are designated as either "authorized," meaning "duly authorized, by subsisting certificate of authority issued by the [Insurance] Commissioner, to engage in the insurance business in this State," § 7(1); or "unauthorized," meaning an insurer that "is one not so authorized." § 7(2).
\textsuperscript{134} Smith, 326 Md. at 604, 606 A.2d at 275.
\textsuperscript{135} Md. Ann. Code art. 48A, § 184(a).
\textsuperscript{136} Id. § 185.
\textsuperscript{137} Id. § 186.
\textsuperscript{138} See id. § 184(b)(1). The Court of Appeals noted that the broker in this case, All Risks, was "a Maryland licensed surplus line broker." Smith, 326 Md. at 602, 606 A.2d at 274.
whether the statutory notice provision governs insurers, like Lloyd's, who satisfy these definitions.

b. Statutory Construction: Plain Meaning vs. Legislative Intent.— The Court of Appeals generally has endorsed the "plain meaning" approach to statutory construction.\(^1\)

[A] statute should be construed according to the ordinary and natural import of its language, since it is the language of the statute which constitutes the primary source for determining the legislative intent. Where there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intention of the Legislature. Thus, where statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, courts are not at liberty to disregard the natural import of words with a view towards making the statute express an intention which is different from its plain meaning.\(^2\)

According to such reasoning, a court interpreting a statute "is generally not at liberty to surmise a legislative intent contrary to the letter of the statute, or to indulge in the license of inserting or omitting words with the view of making the statute express an intent which is not evidenced in the original form."\(^3\) The fact that the Smith court began its analysis directly with the issue of legislative intent presupposes its conclusion that the "plain meaning" of the statute was unclear.\(^4\)

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139. See, e.g., Comptroller of the Treasury v. Fairchild Indus., Inc., 303 Md. 280, 284, 493 A.2d 341, 343 (1985) (stating that the words of a statute should be construed according to their "ordinary and natural import," and that "where statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, no construction or clarification is needed or permitted").

140. State v. Fabritz, 276 Md. 416, 421-22, 348 A.2d 275, 278 (1975) (citations omitted), cert. denied, 425 U.S. 942 (1976). Accord Willis v. State, 302 Md. 363, 374, 488 A.2d 171, 177 (1985) (holding that because "the cardinal rule of statutory construction is to determine the legislative intent," the court should "resort to extrinsic aids to divine the legislative intent and purpose" only if the language of the statute is ambiguous).


142. Resolving the ambiguity of § 240A(a)(3) was the basis for the grant of certiorari. See Smith, 326 Md. at 603, 606 A.2d at 275. The court first analyzed "the history of the development of the notice requirement," then performed a comparison of the notice provision with other provisions of the section, and finally construed the section in light of "the legislative policy toward substandard property insurance risks." See id. at 611-15, 606 A.2d at 279-81.
3. The Court's Reasoning.—Pointing to certain sections of the Insurance Code that expressly except surplus line insurers from their scope,143 Smith and M&S argued that, by comparison, all other sections of the Code were intended to govern surplus line insurers. The legislature, they urged, expressly excluded surplus line insurers from the scope of every section that it intended should not apply to such insurers.144 Because an express exception for surplus line insurers is absent from section 240A, they argued, the forty-five-day notice rule should apply to Lloyd's of London.145

Lloyd's, on the other hand, argued that Subtitle 13—entitled "Surplus Lines"—was the only portion of the Insurance Code that the legislature had intended to apply to surplus line insurance; any sections in other subtitles that expressly excepted surplus line insurers from their scope were simply reiterating the fact that those subtitles did not apply.146 Furthermore, Lloyd's argued, surplus line insurance has never been subject to Maryland regulation because it is an "exported risk" that, by definition, falls outside the geographic jurisdiction of the State.147

Although the Court of Appeals noted its agreement with portions of each party's argument, it declined to announce as broad a rule as either party desired.148 First, the court rejected Lloyd's of London's "geographical jurisdiction" argument. The court declared:

by having All Risks cause the Policy issued by [Lloyd's] to be delivered to Smith in Maryland on a Maryland risk for a premium ultimately to be paid to [Lloyd's] by a Maryland resident, [Lloyd's]'s contacts with Maryland are sufficient to permit Maryland to legislate concerning the terms and provisions of the Policy. The true legal issue in this case is whether the General Assembly has done so in § 240A.149

The court then turned to the question of whether the legislature intended section 240A to apply to surplus line insurers. Although the organization of the Insurance Code suggests that stat-

143. See, e.g., Md. Ann. Code art. 48A, § 201(a) (1991) (providing inter alia that "[t]his section shall not apply to: . . . (2) Surplus lines insurance . . . "); id. § 211A (providing that "[t]he provisions of this subtitle shall not apply to the following: . . . (e) Insurance effected in accordance with the Surplus Line Insurance Law, Subtitle 13 . . . ").
144. See Smith, 326 Md. at 607-08, 606 A.2d at 277.
145. See id. at 608, 606 A.2d at 277.
146. See id., 606 A.2d at 277-78.
147. See id.; 606 A.2d at 277.
148. See id. at 609, 606 A.2d at 278.
149. Id.
utory sections pertinent to surplus line insurance will be found under the Surplus Lines Subtitle,\textsuperscript{150} the Court of Appeals noted that this general organizational scheme does not eliminate the possibility that other regulatory measures will be found elsewhere in the code.\textsuperscript{151} Therefore, it may not be assumed that a statutory section in the "Unfair Trade Practices" subtitle—such as section 240A—would not pertain both to surplus line insurance carriers and ordinary insurance carriers.\textsuperscript{152} Thus, the Smith court concluded that it is necessary to perform a complete and separate analysis for each statutory section in order to determine whether the legislature intended that section to apply to surplus line insurers.\textsuperscript{153}

In order to answer the question whether the legislature intended the forty-five-day notice provision in section 240A to apply to surplus line insurers, the court performed a three-step analysis. The court (1) examined the legislative history of the section; (2) drew analogies from the classes of insurers covered by other portions of the section; and (3) considered the legislative policy behind certain other sections of the Insurance Code.\textsuperscript{154} After reading the legislative history, the Smith court concluded that "exportable risks" placed with surplus line insurers probably were not covered by the original notice provision: "[I]t seems unlikely that the General Assembly intended 'insurer,' as used in original § 240A, to embrace an unauthorized insurer or surplus line carrier."\textsuperscript{155} Later amendments

\textsuperscript{150} For example, surplus line policies are "written pursuant to Subtitle 13," Md. Ann. Code art. 48A, § 43(3) (1991), or "effectuated in accordance with . . . Subtitle 13." \textit{Id.} § 211A(c).

\textsuperscript{151} \textit{Smith}, 326 Md. at 609-10, 606 A.2d at 278. The court, however, stated in its discussion of the potential applicability of Subtitle 15: "the absence of any express exclusion of surplus lines carriers from all of subtitle 15, or from the operation of § 240A, does not compel the result that surplus lines carriers are thereby included." \textit{Id.} at 610-11, 606 A.2d at 279.

\textsuperscript{152} \textit{Id.} at 610, 606 A.2d at 278.

\textsuperscript{153} The Court of Appeals noted that in Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc., 88 Md. App. 672, 596 A.2d 687 (1991), \textit{cert. denied}, 326 Md. 435, 605 A.2d 137 (1992), the Court of Special Appeals held § 226 (in Subtitle 15 of the Insurance Code) applicable to surplus lines insurers. The Court of Appeals concluded, however, that because this was a different statutory section (pertaining to anti-rebating provisions rather than to notice requirements), no analogy could be drawn. \textit{See Smith}, 326 Md. at 608 n.7, 606 A.2d at 277 n.7.

\textsuperscript{154} \textit{See Smith}, 326 Md. at 611, 606 A.2d at 279.

\textsuperscript{155} \textit{Id.} at 612, 606 A.2d at 279. This conclusion was based on the fact that the notice provision in § 240A initially was intended to cover only motor vehicle liability insurance. Because motor vehicle insurance was not initially considered an "exportable" risk, and was not eligible for coverage by surplus lines insurance, it was unlikely that the legislature intended the notice provision to apply to surplus lines insurance as well as to motor vehicle insurance. \textit{Id.} at 611-12, 606 A.2d at 279.
to the same section also supported this conclusion.\textsuperscript{156}

Next, the Court of Appeals drew an analogy from the classes of insurers covered by section 240A(b).\textsuperscript{157} The court concluded that "[t]he term 'insurer' appearing in subsection (b) is not specially defined. Ordinarily, one would read 'insurer' in (b) in the same way in which one would read the same term as used in (a) [the notice provision]. From the context of (b), surplus lines insurers are not contemplated."\textsuperscript{158} Therefore, it is likely that surplus line insurers also were excluded from the other subsections of section 240A.\textsuperscript{159}

Finally, the court turned to Subtitle 27A of the Insurance Code, the Maryland Property Insurance Availability Act,\textsuperscript{160} to find "[a] relatively clear expression of Maryland public policy concerning the minimum period for notice of cancellation of property insurance, in relation to the substandard market. . . ."\textsuperscript{161} This subtitle provides an alternative to surplus line insurance for coverage of risks that are no longer insurable in the standard market.\textsuperscript{162} Underwriters issuing policies under this program may shorten the policy cancellation period under certain conditions.\textsuperscript{163} Given the similarities between this "substandard risk" insurance and surplus line insurance, the Smith court reasoned that if the legislature allowed "substandard risk" underwriters to shorten the minimum notice period for cancellation, there could be no public policy reason for requiring surplus line carriers to meet the forty-five-day notice requirement.\textsuperscript{164} In light of this analysis, the court concluded that the scope of the notice requirement in section 240A was not intended to include surplus line insurers.\textsuperscript{165}

\textsuperscript{156} Id. at 614, 606 A.2d at 280 ("Once again . . . the General Assembly did not contemplate that the § 240A 'insurer' included surplus lines carriers whose Maryland insureds already owned risks treated by the industry as substandard, or unusual.").


\textsuperscript{158} Smith, 326 Md. at 614, 606 A.2d at 281.

\textsuperscript{159} See id. at 614-15, 606 A.2d at 280-81.


\textsuperscript{161} Smith, 326 Md. at 615, 606 A.2d at 281.

\textsuperscript{162} See id. at 615-16, 606 A.2d at 281.


\textsuperscript{164} See Smith, 326 Md. at 616, 606 A.2d at 281.

\textsuperscript{165} See id.
4. Analysis.—If the Court of Appeals had simply held that surplus line insurers were not subject to the forty-five-day notice requirement in section 240A(a)(3) of the Insurance Code, the impact would not have been far-reaching. Instead, the court also found it necessary to reject the commonly held notion that surplus line insurance carriers are generally outside the "geographic jurisdiction" of the State. The geographic jurisdiction argument asserts that surplus line insurers are not subject to the general state insurance regulatory scheme because surplus line insurance policies are not issued "within" the State. This means both that surplus line insurance carriers are not authorized to sell ordinary insurance in the State, and that surplus line insurance carriers, often not physically present within the State, are represented by surplus line insurance brokers. Thus, as in the present case, an ordinary state-authorized insurance broker (like M&S) can request coverage from a licensed surplus line insurance broker (like All Risks); the surplus line insurance broker then can contact a "foreign," or "alien," "unauthorized" insurer that has filed the appropriate affidavit with the insurance commissioner (like Lloyd's of London); and

166. In many federal cases, the Supreme Court has held that surplus line insurers are not subject to state regulation. See, e.g., Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) (holding that California could not tax premiums paid by an insurer to a reinsurance company in California for coverage of a risk in California); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922) (holding that Arkansas could not tax premiums paid to an out-of-state insurer for an insurance policy covering risks within Arkansas when that insurer was not authorized to do business within the state); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (holding that Louisiana could not make it a misdemeanor for an out-of-state insurance company to insure in-state risks).

167. Smith, 326 Md. at 609, 606 A.2d at 278.
168. See id. at 608, 606 A.2d at 277.
170. See id. § 184(b)(1) (providing that the surplus line broker must be licensed in Maryland).
171. See id. § 6(2).
172. See id. § 6(3).
173. See id. § 7(2).
174. See id. § 185.
finally, the surplus line broker can arrange or "place" the surplus line insurance coverage—all without any need for direct contact between the surplus line insurance carrier and the state of Maryland. In such cases, the surplus line insurance policy truly is issued "outside" the jurisdiction of the State, and at all times is administered within the State through a state-authorized surplus line insurance broker.

Absent some compelling reason to exempt surplus line insurers from part or all of the ordinary state insurance regulatory scheme, however, surplus line insurance policies still should fall, at least partially, within the realm of the State’s insurance regulatory powers—if for no other reason than that the policies and their coverage purport to protect the property interests of Maryland citizens. Many other states do regulate surplus lines insurers, although less stringently than they regulate ordinary insurers.175

Surplus line insurers argue that there are at least two compelling justifications in favor of exemption or limited regulation. First, because the risks that are placed with surplus line insurers are those risks for which ordinary insurance could not be found among state-authorized insurers, surplus line insurance carriers must be freed from the onerous regulatory burdens that are imposed upon "authorized" insurers. If they were subject to the strict regulatory scheme, surplus lines insurers would be unable to offer surplus line insurance in a cost-effective manner.176 Second, under Maryland’s

175. See, e.g., Arkansas-Oklahoma Gas Corp. v. Lukis Stewart Price Forbes & Co., 816 S.W.2d 571, 575 (Ark. 1991) (holding that the insurance regulatory scheme was intended to provide more freedom for surplus lines insurers through regulation of surplus lines brokers); Villagonza v. Hawaii Ins. Guar. Ass’n, 772 P.2d 1193, 1196 (Haw. 1989) (observing that the Hawaii Revised Statutes makes a separate provision for those surplus insurance coverages that authorized insurers are unwilling to provide); Farmers & Merchants State Bank v. Bosshart, 400 N.W.2d 739, 742-43 (Minn. 1987) (noting that, although Minnesota law regulates surplus line insurers, it primarily regulates the insurance agents and brokers who sell the insurance); Railroad Roofing & Bldg. Supply Co. v. Financial Fire & Casualty Co., 427 A.2d 66, 68 (N.J. 1981) (holding that the provisions of the state insurance guaranty act did not apply to surplus line insurers). But see Veal v. Interstate Fire & Casualty Co., 325 So. 2d 795, 798 (La. 1975) (finding "no intent to exempt from this requirement policies issued through Louisiana-licensed brokers for coverage of Louisiana-based automobiles and Louisiana policyholders"). The dissent in Veal argued that "[t]he policy in this case was procured by the broker on behalf of the insured from the unauthorized insurer outside the state and was not solicited or issued by the unauthorized insurer within the state. The unauthorized insurer was not, therefore, transacting business in Louisiana." Id. at 801-02 (Summers, J., dissenting).

176. Insurance for these risks usually cannot be purchased from ordinary insurers because these insurers would have to charge a premium higher than the statutorily permitted rate in order to adequately match the risk with the cost of insuring the risk. Surplus line insurers can accept these higher risks by pooling large numbers of similar high risks
scheme of statutory organization, all of the regulations that are pertinent to surplus line insurers are collected within Subtitle 13. To the extent that Subtitle 13 is not completely parallel to the regulatory scheme applicable to ordinary or "authorized" insurers, that discrepancy exists because surplus line insurers are exempt from more-onerous regulatory burdens.

Whether or not these or other reasons adequately justify the exemption of surplus line insurers from statutory provisions such as the forty-five-day notice requirement, it seems intellectually disingenuous to discard the geographic jurisdiction argument without providing at least nominally compelling reasons. The Court of Appeals justified its holding that surplus line insurance carriers are not exempt from Maryland's geographic jurisdiction for three reasons: (1) the policy was delivered to Smith in Maryland; (2) the policy covered a Maryland risk; and (3) the premium ultimately was paid to Lloyd's of London by Smith, a Maryland resident. Except for policies issued to residents of other states, it is difficult to imagine a surplus line insurance policy that would fail to qualify for Maryland regulation under this three-prong test. The Smith court's brief treatment of the geographic jurisdiction argument seems inadequate to dispose of the point so completely.

Having rejected the geographic jurisdiction and statutory organization arguments advanced by Lloyd's, the Court of Appeals found it necessary to reject a "plain meaning" interpretation of the statute. In so doing, the court embarked upon a journey through the legislative history of most of the Maryland Insurance Code in order to ascertain the meaning of the section at issue. The court seemed unconcerned that similar complex analyses will be needed in the future to determine whether other particular sections of the Insurance Code were meant to apply to surplus line insurers. In effect, the court was willing to adopt a case-by-case analysis rule for determining the applicability of Insurance Code sections to surplus line insurers.

Although the Smith decision reaches a conclusion that seems both fair and well-justified under the history of the pertinent legis-

and charging higher premiums that reflect the actual loss expectation—but only if free (from a regulatory perspective) to price the insurance coverage accurately.

177. Smith, 326 Md. at 609, 606 A.2d at 278.

178. The court simply held: "[Lloyd's of London]'s contacts with Maryland are sufficient to permit Maryland to legislate concerning the terms and provisions of the Policy." Id.

179. See id. at 611-14, 606 A.2d at 279-80.
tive sections, the court actually may have opened the door to the possibility that more, not fewer, sections of the Insurance Code will be applied against surplus line insurers in the future. This outcome could result from the court's rejection of both the "geographic jurisdiction" and "exported risk" arguments. Therefore, the court may have simultaneously increased the complexity of adjudicating each surplus line insurance case and granted the Maryland Insurance Commissioner greater latitude to promulgate more restrictive regulations for surplus line insurers.

Similarly, by rejecting the "statutory organization" argument, the court may have increased the number of future insurance cases that will involve a surplus line insurer's failure to comply with statutory sections codified outside the bounds of Subtitle 13. In these cases, the courts will have to search the legislative history of the contested section and perform a complete case-by-case factual analysis. Both results will increase the difficulty of adjudicating cases, cloud the commercial expectations of surplus line insurers doing business with Maryland brokers, and may increase the frequency and complexity of litigation and appeals.

5. Conclusion.—It remains to be seen whether the Maryland Insurance Commissioner will use this case to justify further regulation of surplus line insurance carriers. Similarly, the legislature may need to clarify its intention concerning the organization of the Insurance Code as a result of the Smith decision. But most significantly, through its process of deciding that surplus line insurers need not provide forty-five-day notice of cancellation to policyholders, the Court of Appeals may have severely restricted surplus line insurers' overall freedom from state regulation.

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180. As described supra notes 139-142 and accompanying text, a court applying the Maryland rules of statutory construction would not have to review the statute's legislative history if the "plain meaning" of the section in question is clear. Absent such clarity, the court will have to delve into the "legislative intent" behind the provision.
IX. JUVENILE LAW

A. Never Too Late For Maryland Juveniles

In In re Keith G., the Court of Appeals held that dismissal of a delinquency petition is not necessarily the appropriate sanction when an intake officer has violated the timing requirement of the juvenile intake procedures of the Juvenile Causes Act, sections 3-810(c) and (e). The Court of Appeals construed sections 3-810(c) and (e) as not requiring dismissal of the petition, reversing the Court of Special Appeals. In so doing, the court contravened prior decisions interpreting juvenile statutes and manipulated the purpose of section 3-810 to achieve a desired result.

1. The Case.—On February 1, 1990, the Department of Juvenile Services (DJS) received a complaint charging Keith G., a juvenile,


The Court of Special Appeals proceeded under the 1989 version of the statute, while the Court of Appeals referenced the 1991 version. The 1991 amendment, effective July 1, 1991, inserted present subsections (b) and (k) and redesignated the other subsections accordingly. All relevant text remained unchanged. Section 3-810 (c)(1) provides:

Except as otherwise provided in this subsection, in considering the complaint, the intake officer shall make a preliminary inquiry within 15 days as to whether the court has jurisdiction and whether judicial action is in the best interests of the public or the child. The intake officer may, after such inquiry and in accordance with this section:

(i) Authorize the filing of a petition;
(ii) Conduct a further investigation into the allegations of the complaint;
(iii) Propose an informal adjustment of the matter; or
(iv) Refuse authorization to file a petition.


(1) The intake officer may conduct a further investigation if based upon the complaint and the preliminary inquiry, the intake officer concludes that further inquiry is necessary in order to determine whether the court has jurisdiction or whether judicial action is in the best interests of the public or the child.
(2) The further investigation shall be completed and a decision made by the intake officer within 10 days, unless that time is extended by the court.

Id. § 3-180(e). Subsequent to the case, chapter 19, Acts 1992, approved April 7, 1992, rewrote subsection (c), extending the time during which a preliminary inquiry must be made from 15 to 25 days, and deleted (e). See Md. Code Ann., Cts. & Jud. Proc. § 3-810 (Supp. 1992).

with felony theft and related offenses. Twenty-six days later, on February 27, 1990, the intake officer conducted a conference with Keith G. and his parents. Immediately after the conference, the intake officer recommended that the State file a formal delinquency petition against Keith G. in Juvenile Court. The State filed the petition on March 19, 1990. Keith G. argued that the intake officer's failure to complete the initial interview within the fifteen-day time frame prescribed by section 3-810(c) and (e) mandated the dismissal of the State's petition. The Juvenile Court agreed and dismissed the petition.

The Court of Special Appeals agreed with Keith G. and affirmed the Juvenile Court's holding. Relying on the obligatory language of section 3-810(c)(1), the court reasoned that "to hold that the intake officer can ignore, at his or her discretion, the time frames prescribed by the intake procedure would render that portion of § 3-810(d)(2) meaningless." The State argued that dismissal was not the appropriate sanction for a violation of a time requirement within the juvenile system. The court, however, held that dismissal was appropriate because the parties, rather than the court, were in control of complying with the timing requirements. Finally, the intermediate appellate court recognized that in order to do what is in the best interest of the juvenile, it is necessary to abide by the procedural requirements of section 3-810.

The Court of Appeals granted certiorari "to consider the important public issue presented in the case." By a six-to-one majority, the court reversed the Court of Special Appeals, holding that dismissal is not the appropriate sanction for a violation of the time limitations of section 3-810(c)(1) and (e).

4. Keith G., 325 Md. at 541, 601 A.2d at 1108.
5. Id., 601 A.2d at 1108-09.
6. Id.
7. Id.
8. Id.
9. Id.
11. Id. at 666, 587 A.2d at 1166.
12. Id. at 668, 587 A.2d at 1167.
13. See id. at 665, 587 A.2d at 1165-66.
14. Id. at 669, 587 A.2d at 1168.
15. Id.
17. See Keith G., 325 Md. at 541, 601 A.2d at 1109.
18. See id. at 547, 601 A.2d at 1112.
In his dissent, Judge Eldridge objected to the court’s permissive interpretation of section 3-810. He advocated the lower court’s approach, arguing that it was more in accordance with the legislative intent underlying section 3-810.

2. Legal Background.—

a. Generally.—In McKeiver v. Pennsylvania, the Supreme Court first recognized the importance of the intake procedure of the juvenile system. The Court held that trial by jury is not a constitutional requirement in the juvenile system. In his concurrence, Justice White remarked, “To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury.” That is, the intake officer assumes the role of the jury for factfinding purposes and statutory limitations on the officer’s discretion preserve fairness in that system.

Two years later, the Court of Special Appeals, in In re Davis, examined the legislative purpose behind Maryland’s Juvenile Causes Act. Finding protection of the juvenile to be the underlying concern of the Act, the court instructed “judges, in making dispositions in juvenile cases, [to] think not in terms of guilt, but of the child’s need for protection or rehabilitation.”

Reaching essentially the same conclusion with respect to the purpose of the Juvenile Causes Act, the Court of Appeals, in In re Laurence T., specifically addressed the intake officer’s role in the juvenile system. While the court conceded that “§ 3-810 . . . vests broad discretion in intake officers to determine whether a petition should be filed,” it warned that “such discretion must be exercised...
within constitutional limits." 30

b. Sanctions for Violations of Time Requirements of the Juvenile Causes Act.—Maryland has recognized several “timing” violations of the Juvenile Causes Act that may not be cured by dismissal of the petition. In In re Dewayne H., 31 the Court of Appeals held that a violation of Maryland Rule 915, which requires that a disposition hearing be held within thirty days, did not warrant dismissal of the juvenile petition. 32 The court relied on two grounds to support its holding.

First, the court reasoned that dismissal of a petition in the post-adjudicatory stage would violate the purpose of providing a program of treatment and rehabilitation for delinquent juveniles. 33 Second, because neither the State nor the juvenile had control over the scheduling of the disposition hearing, neither party should suffer or benefit from a dismissal of the petition. 34 The following year, the Court of Special Appeals relied on the same reasoning to hold that dismissal was not the appropriate sanction for a failure to conduct the adjudicatory hearing within the time requirements set forth in Maryland Rule 914. 35

In 1983, the Court of Special Appeals once again invoked the Dewayne H. “rehabilitative purpose” and “parties’ control” reasoning to deny dismissal as a sanction for failure to hold a restitution hearing in a timely fashion. 36 The court explained that an untimely restitution hearing “is less deleterious to the juvenile’s interests than delayed disposition.” 37 Additionally, the court concluded that dismissal of the case would violate the purpose of section 3-829, 38 that being to compensate the victim. 39

30. Id. at 627, 403 A.2d at 1259.
32. See id. at 402, 430 A.2d at 77.
33. See id. at 405-07, 430 A.2d at 79-80.
34. Id. at 407, 430 A.2d at 80.
35. See In re Howard L., 50 Md. App. 498, 438 A.2d 939 (1982). Rule 914, in pertinent part, provides that “[a]n adjudicatory hearing shall be held within sixty days after the juvenile petition is served on the respondent unless a waiver petition is filed . . . .” Md. R. 914(b). See also In re Keith W., 310 Md. 99, 527 A.2d 35 (1987) (holding dismissal inappropriate as a sanction for an untimely adjudicatory hearing).
37. Id. at 499, 462 A.2d at 1249.
38. Md. Code Ann., Cts. & Jud. Proc. § 3-829 (1989) (“A restitution hearing to determine the liability of a parent, a child, or both, shall be held not later than 30 days after the disposition hearing and may be extended by the court for good cause.”).
c. Sanctions for Violation of Intake Procedures.—While some violations of the Juvenile Causes Act may not be cured by dismissal, violations of intake procedures have traditionally culminated in dismissal of the juvenile petition. In 1980, the Court of Appeals, in In re James S.,40 authorized dismissal for the State’s failure to observe section 3-812(b), requiring the State’s Attorney to file the delinquency petition within fifteen days after receiving a referral from the intake officer.41 First, the James S. court invoked a cardinal rule of statutory construction: Courts should “ascertain and carry out the real legislative intent.”42 The court further clarified this rule:

A corollary to this rule is that if there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly . . . . A court may not insert or omit words to make a statute express an intention not evidenced in its original form . . . .43

Applying this rule, and the rule that the word “shall” is presumed to be mandatory,44 the court held that section 3-812 was mandatory and, therefore, its violation required dismissal of the petition.45 As another justification, the court noted “[t]he General Assembly[’s] . . . desire that such matters proceed expeditiously.”46 Finally, the James S. court added that if the General Assembly did not intend for the section to be mandatory, it could pursue legislative measures to cure the judicial interpretation.47

Because the General Assembly did not disturb the James S. holding through legislative measures, the Court of Appeals once

41. The State exceeded the mandate of the statute by approximately one week. Id. at 704, 410 A.2d at 587.
42. Id. at 705, 410 A.2d at 587 (quoting Police Comm’r v. Dowling, 281 Md. 412, 418, 379 A.2d 1007, 1010 (1977)).
43. Id. (quoting Dowling, 281 Md. at 418-19, 379 A.2d at 1010-11).
44. Id. at 706-09, 410 A.2d at 588-89. See also Moss v. Director, 279 Md. 561, 564-65, 369 A.2d 1011, 1013 (1977) (“It is now a familiar principle of statutory construction in this State that use of the word ‘shall’ is presumed mandatory unless its context would indicate otherwise.”).
45. See James S., 286 Md. at 713, 410 A.2d at 591.
46. Id. at 712, 410 A.2d at 591.
47. See id. at 713-14, 410 A.2d at 592. The court stated:

We are told of many problems that may be created if we hold this provision to be mandatory. We do not deny that such might be the case, but the General Assembly is in session and it no doubt will take prompt corrective action if it does not mean the sections to be mandatory.

Id.
again authorized dismissal in *In re Patrick A.* In *Patrick A.*, the State's Attorney violated section 3-810 by filing a delinquency petition prior to completion of intake procedures. In holding that dismissal was the appropriate remedy, the Court of Appeals once again looked to the mandatory nature of the statute. The court explained that although the State's Attorney "shares a viable role in ensuring that a juvenile is rehabilitated . . . , [i]t does not follow . . . that the State's Attorney may intentionally ignore the required procedure in doing so." The next use of the dismissal sanction preceded *Keith G.* by two years. In *In re Steven B.*, the intake officer bypassed section 3-810 by automatically forwarding the case to the State's Attorney. The court once again stressed that "[i]n order to ensure that the best interests of the child are advocated, it is necessary that both DJS and the State adhere to the procedural requirements of § 3-810 as mandated by the General Assembly." Furthermore, the court reasoned that because the fifteen-day time limit on conducting the preliminary inquiry had lapsed, there was "no possible way that the matters [could] be referred back to the intake officer for compliance with § 3-810[(c)](3)(ii)." Therefore, dismissal was the appropriate sanction.

3. *The Court's Reasoning.*—In *Keith G.*, the Court of Appeals confronted the question of "whether dismissal of a juvenile delinquency petition is an appropriate sanction where the intake officer's preliminary inquiry exceeded, without a court order, the time requirement prescribed by . . . § 3-810 . . . ." The majority began its analysis by discussing several rules of statutory construction. First, the court introduced the rule set

49. See id. at 484-85, 540 A.2d at 811.
50. Id. at 484, 540 A.2d at 810.
51. See id. at 490, 540 A.2d at 814 ("We conclude the Legislature intended that the preliminary investigation by the intake officer be mandatory under the circumstances of this case.").
52. Id. at 491, 540 A.2d at 814. See also id. at 492-93, 540 A.2d at 815 ("To hold that the intake procedure can be ignored at the discretion of the State's Attorney would render the statutory language meaningless.").
54. See id. at 6, 578 A.2d at 226.
55. Id. at 7, 578 A.2d at 226.
56. Id. at 9, 578 A.2d at 227-28.
57. *Keith G.*, 325 Md. at 540, 601 A.2d at 1108.
58. See id. at 542, 601 A.2d at 1109.
forth in Kaczorowski v. City of Baltimore.\(^5\) "To ascertain and effectuate the legislative intention, a statute is to be construed reasonably with reference to its purpose, aim, or policy."\(^6\) While statutory language is the primary source of legislative intent, the language must be construed in light of the overall legislative scheme.\(^6\) In accordance with these rules of statutory construction, the court reviewed section 3-802, which embodies the purpose of the Juvenile Causes Act.\(^6\)

The primary purpose of the Juvenile Causes Act is to provide a program of treatment and rehabilitation that is consistent with the child's best interest and "remove from children committing delinquent acts the taint of criminality."\(^6\) The Keith G. court adhered to this purpose by asserting "that the foremost consideration in a juvenile proceeding after a determination of delinquency is to provide children with a program of treatment and rehabilitation."\(^6\) Given this "special purpose," dismissal was found to be ordinarily inappropriate as a sanction for procedural violations of the Juvenile Causes Act.\(^5\)

Thus, in In re Keith W.\(^6\) and In re Dewayne H.,\(^6\) respectively, the Court of Appeals held that dismissal of the juvenile petition was inappropriate "where the adjudicatory hearing was not held within the time period prescribed by Maryland Rule 914,"\(^6\) or "where the disposition hearing was scheduled one day later than permitted by Maryland Rule 915."\(^6\)

While the court acknowledged the importance of the intake procedure,\(^7\) it distinguished the instant case from In re Steven B.,\(^7\) where the intake officer failed to conduct the preliminary investiga-

\(^{59}\) 309 Md. 505, 525 A.2d 628 (1987).
\(^{60}\) Keith G., 325 Md. at 542, 601 A.2d at 1109 (citing Kaczorowski, 309 Md. at 518, 525 A.2d at 632).
\(^{61}\) Id.
\(^{63}\) Id. § 3-802(2). See also In re Davis, 17 Md. App. 98, 299 A.2d 856 (1973).

The raison d'etre of the Juvenile Causes Act is that a child does not commit a crime when he commits a delinquent act and therefore is not a criminal. He is not to be punished but afforded the supervision and treatment to be made aware of what is right and what is wrong so as to be amenable to the criminal laws.

\(^{64}\) Keith G., 325 Md. at 544, 601 A.2d at 1110. See also In re Patrick A., 312 Md. 484, 487, 540 A.2d 810, 812 (1988).
\(^{65}\) Keith G., 325 Md. at 545, 601 A.2d at 1110-11.
\(^{67}\) 290 Md. 401, 490 A.2d 76 (1981).

\(^{68}\) See Keith G., 325 Md. at 544, 601 A.2d at 1110 (explaining the Keith W. holding).
\(^{69}\) Id. at 545, 601 A.2d at 1111 (explaining the Dewayne H. holding).
\(^{70}\) See id. at 543-44, 601 A.2d at 1110.
tion prior to the filing of the delinquency petition. Similarly, the court distinguished *In re James S.*, reasoning that dismissal was appropriate in that case because the violated provision was in the nature of a statute of limitations. Had the legislature intended for section 3-810 to serve as a statute of limitations, the *Keith G.* court reasoned, "[it] would not have empowered the court to extend the time period for the intake officer to complete his investigation." Thus, in examining the "totality of the circumstances" of *Keith G.*'s case and the purpose of Juvenile Causes Act, the Court of Appeals held that dismissal of the case would be inappropriate. 

4. Analysis.—

a. Statutory Construction of Section 3-810.—There are two rules of statutory construction, supported by Maryland case law, that the majority in *Keith G.* ignored. The first rule—that "[a] court may not insert or omit words to make a statute express an intention not evidenced in its original form"—was used by the *James S.* court to hold that section 3-812(b) was mandatory, and therefore, that dis-

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72. See *Keith G.*, 325 Md. at 546, 601 A.2d 1111. See also *Steven B.*, 84 Md. App. at 6, 578 A.2d at 226.
73. 286 Md. 702, 410 A.2d 586 (1980).
74. See *Keith G.*, 325 Md. at 546, 601 A.2d at 1111. In *James S.*, the State failed to comply with § 3-812(b) of the Courts and Judicial Proceedings Article. See *James S.*, 286 Md. at 703-04, 410 A.2d at 586-87.
75. *Keith G.*, 325 Md. at 547, 601 A.2d at 1111.
76. Id., 601 A.2d at 1112. Maryland Rule 1-201(1) provides:

When a rule, by the word "shall" or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those prescribed by these rules or by statute. If no consequences are prescribed, the court may compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule. Md. R. 1-201(1) (emphasis added). See also *In re Patrick A.*, 312 Md. 484, 491, 540 A.2d 810, 814 (1988) ("When deciding whether dismissal of a juvenile petition is the proper sanction, we have instructed the trial judge to examine the totality of the circumstances . . . .").
77. See *Keith G.*, 325 Md. at 547, 601 A.2d at 1112.
78. See id. at 548, 601 A.2d at 1112 (Eldridge, J., dissenting). Judge Eldridge commented:

[It] is the expressed provision for a court-ordered extension of time which confirms the legislative intent that dismissal of the petition should ordinarily be the sanction where the intake officer's investigation exceeds the statutory time limit. If the General Assembly had intended that dismissal not be the sanction, there would have been no reason to have provided for a court-ordered extension.

Id.
missal was the best sanction for noncompliance. Comparing section 3-812 to section 3-810, both of which using the word "shall" and providing for a court-ordered extension of time, the court explained: "[h]ad the legislature intended a more flexible time period . . . the legislature would have used the word "may" or would have allowed for an extension of the 15 day time limit." Similarly, had the legislature intended Keith G. 's flexible interpretation of section 3-810, it could have used “may" instead of “shall" and provided for extension without a court order.

The second rule of statutory construction overlooked by the Keith G. court is that a statute should be construed so that no part of it is rendered meaningless. For example, when the State filed a delinquency petition before complying with the intake procedures of section 3-810, the Patrick A. court dismissed the petition and remarked: "[t]o hold that the intake procedure can be ignored at the discretion of the State's Attorney would render the statutory language meaningless." Despite this rule of statutory construction, the court in Keith G. allowed the intake officer to ignore the timing requirements of section 3-810(c) and (e), thereby rendering an apparent statutory mandate meaningless.

b. Legislative Intent.—The Keith G. court also ignored the legislative intent underlying section 3-810. While the court recognized that "the foremost consideration in a juvenile proceeding after a determination of delinquency is to provide children with a program of treatment and rehabilitation," it extended that consideration to apply before any finding of delinquency is ever made. Although this is certainly the legislative intent for the adjudication and disposition phases of the juvenile system, it is not the intention for the intake phase. Keith G. misinterprets the statute by applying the rehabilitative and treatment-centered intent to the intake stage of the juvenile system.

80. See James S., 286 Md. at 713, 410 A.2d at 591.
81. Id. at 704, 410 A.2d at 587 (quoting the trial judge).
82. See id. at 705, 410 A.2d at 587 (reiterating that statutes should "be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory" (quoting Dowling, 281 Md. at 419, 379 A.2d at 1011)).
84. Keith G., 325 Md. at 544, 601 A.2d at 1110 (emphasis added).
85. In In re Patrick A., 70 Md. App. 191, 520 A.2d 743 (1987), the Court of Special Appeals distinguished Dewayne H., a case in which the juvenile had already been adjudicated delinquent, from Patrick A., a case in which the juvenile had not yet been adjudicated delinquent. The court noted: "[T]here has not yet been any showing that [the latter] is necessarily in need of treatment and services." Id. at 205, 520 A.2d at 750.
Keith G. simply ignores the true legislative intent for the intake stage: to promote expediency\(^86\) in an otherwise languid system.\(^87\) After an examination of the legislative intent behind section 3-810, the James S. court concluded: “[t]he General Assembly has made plain in the juvenile causes subtitle its desire that such matters proceed expeditiously.”\(^88\) If the legislature had an alternate intent in mind, it could have amended section 3-810 after James S.\(^89\) It did not do so. The Keith G. court, ignoring this, likely contravened the legislative goal of expediency by allowing the intake officer to disregard the fifteen-day limit on conducting the initial investigation.

c. Purpose of Section 3-810.—While the court acknowledged that the purpose of the Juvenile Causes Act is to provide for the best interests of the juvenile,\(^90\) the court failed to carry out this purpose. In Steven B., the Court of Special Appeals instructed that “[i]n order to ensure that the best interests of the child are advocated, it is necessary that both DJS and the State adhere to the procedural requirements of § 3-810 as mandated by the General Assembly.”\(^91\) The Court of Appeals has recognized that the “discretion conferred upon intake officers . . . must be exercised within constitutional limits.”\(^92\) Logically, that discretion also must be exercised within statutory limits and procedures.

Finally, the Supreme Court has highlighted “accurate factfinding”\(^93\) and “procedural orderliness”\(^94\) as integral parts of the juvenile system. Initial delays may detrimentally affect the court’s factfinding function in a number of ways. Delay often “clouds” the memories of witnesses.\(^95\) Additionally, “[w]hen a child does go to court, Juvenile Court masters say the initial delays wreak havoc with

\(^{86}\) See James S., 286 Md. at 712-13, 410 A.2d at 591.
\(^{87}\) See Scott Shane, A First Lesson in Justice: Juvenile Court Cases Routinely Stall for Months, THE SUN (Baltimore), July 21, 1992, at A1. “In many cities, police give the child and parent a date a few weeks away [from the arrest] for the child to report to authorities. In Baltimore, no date is set, and [a] stall in [a juvenile’s] case is by no means unusual.” Id. at A7.
\(^{88}\) James S., at 712, 410 A.2d at 591.
\(^{89}\) See id. at 715-14, 410 A.2d at 592 (predicting that the General Assembly “will take prompt corrective action if it does not mean the sections to be mandatory”).
\(^{90}\) Keith G., 325 Md. at 542-43, 601 A.2d at 1109.
\(^{91}\) In re Steven B., 84 Md. App. 1, 7, 578 A.2d 223, 226 (1990).
\(^{94}\) Id. at 545.
\(^{95}\) See Shane, supra note 87, at A7. Juvenile Court Judge David B. Mitchell repeatedly said, “You can’t say for sure the case would have come out differently if it had been held much earlier. But the delay is unconscionable.” Id.
their work, making it impossible to know the extent of a child’s arrest record.”

In short, the court’s holding in Keith G. amounts to an approval of further delays in an already sluggish system. These delays will undoubtedly diminish “accurate factfinding” and “procedural orderliness” in a Juvenile System to which they are integral. Unless initial delays are avoided by compliance with the intake procedures, the best interests of the child are sacrificed to the conveniences of the intake officer.

5. Conclusion.—In the Juvenile System, “[t]he immediacy of the response is more important than the severity of the response.”

In In re Keith G., the Court of Appeals first announced that an intake officer’s failure to conduct the initial investigation within the time frame prescribed by section 3-810(c) and (e) will not result in dismissal of the juvenile petition. Although the court noted that there may be an administrative sanction for the violation, the court not only disregarded previous interpretations and the legislative intent of section 3-810, but the best interests of the juvenile as well.

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96. Id. at A1. The delays also make it difficult to track down a juvenile, and “[w]hen efforts to find a juvenile fail, charges eventually are dropped, prosecutors say.” Id.

97. See McKeiver, 403 U.S. at 543.

98. Shane, supra note 87, at A7 (quoting Juvenile Master James P. Casey).

X. Property

A. Joint Tenancy: Creation and Severance

In Downing v. Downing, the Court of Appeals held that by simply placing the words “joint tenancy” in a deed, parties have sufficiently manifested their intention to create a joint tenancy. Moreover, neither a mortgage on the property executed by all joint tenants, nor an agreement between joint tenants conferring upon one the exclusive right to receive income from the property, will sever the joint tenancy. The holding in Downing reflects the Maryland court’s favorable view of joint tenancy. Specifically, the court expounded a policy that will allow the parties’ intent to prevail, despite slight procedural problems in the creation of the joint tenancy.

1. The Case.—On August 7, 1972, Helen Downing conveyed her farm to a “straw man” in fee simple. The “straw man” immediately reconveyed the farm “unto HELEN S. DOWNING, widow, and JOHN ROBERT DOWNING, as joint tenants, their heirs and assigns, forever in fee simple.” However, two other parties had property interests in the Downing farm. First, prior to the conveyances of August 7, 1972, Helen Downing, with the knowledge and assistance of her son, John Downing, entered into an agreement with John Meyers, providing that Meyers would make payments to Helen Downing in exchange for the right to raise and harvest crops on the farm. Second, on October 31, 1985, Helen and John Downing jointly executed a mortgage of the farm. The mortgage also named Helen and John as joint tenants.

Helen Downing died on January 15, 1987. Pursuant to her will, the residue of her estate was to be evenly divided between John

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2. See id. at 478, 606 A.2d at 213.
3. See id.
4. Id. at 470, 606 A.2d at 209. The old common law rule did not allow a grantor to create a joint tenancy in himself and another. See id. at 470 n.1, 606 A.2d at 209 n.1. Practitioners would evade this rule by conveying the land to a third-party “straw man” who would then immediately convey the land back to the grantor and the other grantees as joint tenants. See id.
5. Id. at 470, 606 A.2d at 209.
6. Id. at 471, 606 A.2d at 209.
7. Id.
8. Id.
9. Id.
10. Id.
Downing and Bonnie Downing, Helen's daughter.11 Bonnie Downing, as personal representative of the estate, filed a complaint requesting the court to construe the deed of August 7, 1972, as having created a tenancy in common, as opposed to a joint tenancy.12 Although John Downing failed to respond to the complaint and an order of default was granted in favor of Bonnie, he did appear at the hearing before the master for determination of the appropriate relief.13 At that time, John presented evidence from which the master concluded that a joint tenancy had not been created.14 The master based his conclusion on the fact that there was no provision in the deed for the right of survivorship, the chief incident of a joint tenancy.15 The master also noted that the mortgage and the farming agreement would have destroyed any joint tenancy possibly created.16

John Downing appealed. On review of the master's report, the Circuit Court ruled that the deed did create a joint tenancy, but the execution of the mortgage severed the joint tenancy, leaving John Downing and the estate of Helen Downing as tenants in common.17 The Court of Appeals, on its own motion, granted certiorari18 prior to consideration by the Court of Special Appeals.19

2. Legal Background.—There are three types of tenancies under which two or more people may hold title to a parcel of property. These three concurrent estates are: tenancy in common, joint tenancy, and tenancy by the entirety.20 A tenancy in common requires that each tenant have an equal right of possession and use of the entire property.21 On the death of a tenant in common, the decedent's interest in the property passes to the decedent's estate.22 By contrast, a joint tenancy is characterized by a right of survivorship, which provides that on the death of a joint tenant, the decedent's interest in the property does not pass to the decedent's estate, but is

11. Id.
12. Id. at 472, 606 A.2d at 209-10. Under this arrangement, an undivided one-half of the farm would be placed in Helen's estate. Id.
14. Id.
15. Id.
16. Id.
17. Id.
21. Id. § 5.2, at 196.
22. See Downing, 326 Md. at 475, 606 A.2d at 211.
shared proportionately by the surviving joint tenants.\textsuperscript{23} At common law, the four unities of time, title, interest, and possession were essential to the existence of a joint tenancy.\textsuperscript{24} The unities of time and title require that all joint tenants acquire their interests at the same time and by the same instrument.\textsuperscript{25} The unity of interest requires that all joint tenants hold the same fractional share, type of interest, and quality of estate;\textsuperscript{26} the unity of possession demands that all joint tenants have an equal right to possession and enjoyment of the property.\textsuperscript{27} Lastly, a tenancy by the entirety is essentially the same as the joint tenancy except that the tenants must be husband and wife.\textsuperscript{28} The tenancy by the entirety, like the joint tenancy, is characterized by the right of survivorship.\textsuperscript{29}

\textit{a. Creation of Joint Tenancy.---}At common law, there was a presumption that a conveyance of land to two or more people created a joint tenancy.\textsuperscript{30} Maryland has reversed this presumption by statute. Section 2-117 of the Real Property Article creates a presumption against joint tenancy in favor of tenancy in common.\textsuperscript{31} The statute provides that a written instrument of conveyance will not create a joint tenancy unless it "expressly provides that the property granted is to be held in joint tenancy."\textsuperscript{32}

Although the statute uses the phrase "expressly provides," Maryland courts have not construed this to require the words "joint tenancy."\textsuperscript{33} Rather, the standard set forth by the Court of Appeals requires the use of any express language that manifests an intent of the grantor to vest the entire estate in the survivor.\textsuperscript{34} Several Maryland cases have explained that "[i]n the case of a joint tenancy[, in-}

\begin{footnotes}
\item[23] See id.
\item[26] Id. at 202-03.
\item[27] Id. at 203.
\item[28] See id. § 5.5, at 210.
\item[29] Id.
\item[31] See MD. CODE ANN., REAL PROP. § 2-117 (1988). See \textit{also} Young v. Young, 37 Md. App. 211, 216-17, 376 A.2d 1151, 1155 (1971) (explaining that "[j]oint tenancies in Maryland are thus not favored legislatively but they are, of course, recognized").
\item[32] MD. CODE ANN., REAL PROP. § 2-117 (1988). The full text of the statute reads as follows: "No deed, will, or other instrument which affects land or personal property, creates an estate in joint tenancy, unless the deed, will, or other written instrument expressly provides that the property granted is to be held in joint tenancy." Id.
\item[33] See Young, 37 Md. App. at 217, 376 A.2d at 1155; Michael v. Lucas, 152 Md. 512, 514, 157 A.2d 287, 288 (1927).
\item[34] See McManus v. Summers, 290 Md. 408, 413, 430 A.2d 80, 82 (1981).
\end{footnotes}
tent] must be so clearly expressed as to have no doubt of the intention [to create a joint tenancy]." This standard seems to require a court to evaluate the factual circumstances when determining the intent of the parties with respect to the property interest sought to be created.

The Maryland decisions involving the creation of joint tenancies can be divided in general into two basic categories. The first involves cases in which the chief incident of joint tenancy, the right of survivorship, was expressly stated in the deed, thereby sufficiently manifesting the parties' intent to create a joint tenancy. The other category of cases involves situations in which there was a failed attempt to create a tenancy by the entireties. In these cases, the court has explained that the nature of the relationship between husband and wife, or even those who in good faith believe they are husband and wife, is such that, at common law, a right of survivorship is automatically implied, and conclusively presumed to be the intent of the parties. In any event, in each of these two categories, either the intent to create the joint tenancy was obvious on the face of the instrument, or the intent could readily be inferred from the circumstances. Because none of these cases presented an ambiguous intent, the court never expressed specifically what language and factual circumstances are required for the creation of a joint tenancy, despite the statutory presumption to the contrary. Cases of this type will involve questions of both construction and intent.

b. Severance of Joint Tenancy.—As discussed earlier, the four unities of time, title, interest, and possession are essential to the existence of a joint tenancy. If any of the four unities cease to exist during the tenancy, the joint tenancy is destroyed and transformed into a tenancy in common. Accordingly, a conveyance of joint-tenancy property by less than all of the joint tenants will terminate

35. See Hammond v. Dugan, 166 Md. 402, 409, 170 A. 757, 760 (1934); see also Marshall v. Security Storage & Trust Co., 155 Md. 649, 652, 142 A. 186, 187 (1928) (explaining that the express provision requirement is met if the will clearly demonstrates the decedent's intent to create a joint tenancy); Boyd v. Boyd, 24 Md. App. 497, 503, 332 A.2d 328, 331-32 (1975) (asserting that there must be no doubt of the grantor's intent to create a joint tenancy).
36. See, e.g., Michael, 152 Md. at 514, 137 A. at 288.
37. See, e.g., McManus, 290 Md. at 422, 430 A.2d at 87.
38. Id. at 421, 430 A.2d at 86-87 ("The words used, 'tenants by the entirety,' mean in law that the parties wanted the property to be inalienable by either during their joint lives, and on the death of one they wished the survivor to take all.").
39. See supra notes 24-27 and accompanying text.
the joint tenancy. For example, conveyance by one joint tenant of a leasehold, or of a mortgage, will terminate the joint tenancy. Also, where all joint tenants convey their entire interest in the joint-tenancy property, the tenancy will be severed. A more difficult issue arises, however, in the case of an execution of a mortgage by all joint tenants. This question had not been addressed by the Court of Appeals prior to its decision in Downing.

3. The Court's Reasoning.—The Downing court first addressed whether a joint tenancy was created by the language used in the deed of August 7, 1972. After noting that the common-law presumption in favor of joint tenancies had been reversed by statute to favor tenancies in common, the court examined the language of the deed to determine whether it satisfied the statutory requirement that the intent to create a joint tenancy be expressly provided. The court held that the deed created a valid joint tenancy because the use of the words "joint tenancy" in both the granting and habendum clauses of the deed was a sufficient manifestation of intent.

The court then discussed whether the execution of the mortgage by both tenants severed the joint tenancy and converted it into a tenancy in common. The court held that although a mortgage by one joint tenant destroys the joint tenancy, a mortgage by all of the tenants would not destroy the joint tenancy because the joint

41. Id. at 520, 253 A.2d at 364.
42. See id. at 521-22, 253 A.2d at 365. Conveyance of a leasehold would destroy the unities of interest and possession because the grantor's interest changes from a present possessory interest to a reversionary interest. Id. at 522, 253 A.2d at 365.
43. See Eder v. Rothamel, 202 Md. 189, 195, 95 A.2d 860, 863 (1953) (conveyance of a mortgage destroys the unity of title). Because Maryland is a "title-theory" state regarding mortgages, the joint tenant who conveyed the mortgage would have only equitable title to the joint-tenancy property, while the other joint tenant would retain both legal and equitable title. See infra notes 65-76 and accompanying text.
45. This is because although the conveyance of a mortgage by all joint tenants converts their title from legal to equitable, the unity of title is arguably not destroyed because all joint tenants have the same title at all times. See infra notes 65-76 and accompanying text.
46. Downing, 326 Md. at 474-76, 606 A.2d at 211-12.
47. See id. at 475-78, 606 A.2d at 211-13. The court has held that a clear manifestation of an intent to create a joint tenancy satisfies the requirements of the statute, and deeds manifesting that intent should be effectuated. See McManus v. Summers, 290 Md. 408, 412-13, 430 A.2d 80, 82-83 (1981).
48. Downing, 326 Md. at 478, 606 A.2d at 213.
49. See id. at 479, 606 A.2d at 213.
tenants would maintain the same interest and title to the property.\footnote{Id.} For these reasons, the Court of Appeals reversed the circuit court and remanded the case with instructions to order that all rights in the farm passed to John Downing, as surviving joint tenant, upon the death of Helen Downing.\footnote{Id. at 479-80, 606 A.2d at 213.}

4. Analysis.—

a. Creation of Joint Tenancy.—The Downing court established an important precedent by substantially diluting the statutory presumption against joint tenancies. Although expanding the range of language deemed sufficient to create a joint tenancy, this decision is wholly consistent with Maryland precedent—the intention of the parties should prevail over technical deficiencies in language and structure.\footnote{See Mitchell v. Frederick, 166 Md. 42, 49, 170 A. 733, 736 (1934) ("The lawful intention of the parties, in short, is to be carried out, and they are not to be deprived of freedom to convey whatever they wish, in order to conform to one of the more usual forms and classifications of ownership.")}. Accordingly, the Downing court concluded that when the parties provide in their agreement that the purchasers are to take the property as joint tenants, there is sufficient evidence to show that the parties intended to create a joint tenancy.\footnote{See Downing, 326 Md. at 478, 606 A.2d at 213.} Even though there was no suggestion of the critical element of right of survivorship, either by wording or by circumstances, the court recognized that the words "joint tenancy" constituted sufficient evidence of an intent to create such a right.\footnote{Id.}

Many states have taken a statutory approach similar to Maryland's by reversing the common law presumption favoring tenancies in common. New York, for example, has adopted a statutory presumption providing that "[a] disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy."\footnote{N.Y. Est. Powers & Trusts Law § 6-2.2(a) (McKinney 1992).} Accordingly, New York courts have concluded that a deed that simply uses the phrase "as joint tenants" in the granting clause is sufficient to establish a joint tenancy.\footnote{See Schwab v. Schwab, 112 N.Y.S.2d 354, 355-56 (N.Y. App. Div. 1952).} The New Jersey Supreme Court, confronted with a similar statute,\footnote{See N.J. Stat. Ann. § 46:3-17 (West 1989) ("[N]o estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy . . . .").} also

\footnote{50. Id.}
\footnote{51. Id. at 479-80, 606 A.2d at 213.}
\footnote{52. See Mitchell v. Frederick, 166 Md. 42, 49, 170 A. 733, 736 (1934) ("The lawful intention of the parties, in short, is to be carried out, and they are not to be deprived of freedom to convey whatever they wish, in order to conform to one of the more usual forms and classifications of ownership.").}
\footnote{53. See Downing, 326 Md. at 478, 606 A.2d at 213.}
\footnote{54. Id.}
\footnote{55. N.Y. Est. Powers & Trusts Law § 6-2.2(a) (McKinney 1992).}
\footnote{57. See N.J. Stat. Ann. § 46:3-17 (West 1989) ("[N]o estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy . . . .").}
concluded that the use of the words "joint tenants" in the proper places in the deed is sufficient to create a joint tenancy.\textsuperscript{58} In California, the statute creating a presumption against joint tenancies provides that "[a] joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy . . . ."\textsuperscript{59} The California courts have ruled that a deed using the language of "joint tenancy" establishes a prima facie case for such a tenancy.\textsuperscript{60}

The statutes outlined above, which are almost identical to the Maryland statute, create a "rebuttable presumption" against joint tenancies.\textsuperscript{61} As a consequence of \textit{Downing}, however, the Maryland statute will likely be construed as creating a much weaker presumption against joint tenancies. The \textit{Downing} court's ruling, that "[t]he Court need look no further than the deed itself to conclude that a valid joint tenancy came into being,"\textsuperscript{62} implies that once the grantor uses the necessary language, a nearly irrebuttable presumption of a joint tenancy is established. Consequently, the court appears to have attributed a significantly different effect to Maryland's statute than that given to similar statutes by other state courts. Other states consider extrinsic evidence to demonstrate that there was no intent to create a joint tenancy, even though the requisite language was used.\textsuperscript{63}

The Court of Appeals appears wisely to have chosen a method of construction of deeds that will be most adept at effectuating the parties' intent. Common sense dictates that use of the technical language "joint tenancy" clearly indicates an intention to create a joint tenancy. Moreover, since it is often the case, as in \textit{Downing}, that the grantor of the deed in question is no longer living, it will usually be difficult to prove any intent whatsoever. It thus seems the court has

\begin{itemize}
\item \textsuperscript{58} See Coudert v. Earl, 18 A. 220, 221 (N.J. Ch. 1889). Although § 46:3-17 had not been codified prior to the \textit{Coudert} decision, the New Jersey Court of Chancery was confronted with an earlier version that had language nearly identical to that of § 46:3-17. \textit{See id.}; N.J. STAT. ANN. § 46:3-17 (West 1989).
\item \textsuperscript{61} See, e.g., \textit{In re Levinsky's Will}, 258 N.Y.S.2d 613, 619 (N.Y. App. Div. 1965) ("[T]he applicable New York statute] creates only a rebuttable presumption of tenancy in common; and where the muniment of title is ambiguous, and parol evidence shows that the parties to the transaction so intended, a joint tenancy may be found . . . .")
\item \textsuperscript{62} \textit{Downing}, 326 Md. at 478, 606 A.2d at 213.
\item \textsuperscript{63} For example, California has held that the use of the language "joint tenancy" only creates a prima facie case for a joint tenancy. The parties may still offer evidence of an intent to create an interest other than a joint tenancy. \textit{See Schindler}, 272 P.2d at 568-71.
\end{itemize}
chosen a path that will lead to both the effectuation of the parties' intent and a decrease in the administrative burden on the courts.

b. Severance of Joint Tenancy.—The Downing court's determination that the joint execution of a mortgage by both tenants does not sever the joint tenancy at first glance seems theoretically inconsistent with language contained in prior decisions. The Court of Appeals has concluded previously that "there can be little doubt that a conveyance of the legal title by all the joint tenants destroys the joint tenancy . . . ."64 In addition, Maryland follows the title theory with regard to mortgages.65 According to this theory, the execution of a mortgage is functionally equivalent to the execution of a deed, and thus, actually transfers legal title of the property to the mortgagee.66 The fact that Maryland is a "title-theory state" would seem to compel the conclusion that a mortgage, even one executed by all joint tenants, necessarily destroys the joint tenancy. Yet, the Downing court held that "where all joint tenants join in the mortgage, none of the unities are destroyed, and there is no reason why the joint tenancy should not continue."67

This theoretical inconsistency can be reconciled by examining the court's prior decisions discussing transfer of legal title by all joint tenants. In Register of Wills v. Madine,68 the court's statement concerning the destruction of the joint tenancy by a transfer of legal title by all joint tenants was not made in the context of separate legal and equitable titles.69 Rather, the statement concerned the fact that a transfer of all title in joint-tenancy property destroys any joint tenancy in the proceeds of the sale.70 In fact, the court's subsequent treatment of an argument in Madine that focused on the separation of legal and equitable title is arguably consistent with the holding in Downing. In Madine, the court was presented with the argument that because a deed executed by all joint tenants was not recorded, legal title had not passed to the grantee and the joint tenancy was not

65. See Bieber v. State, 8 Md. App. 522, 545, 261 A.2d 202, 214 (1970). The Bieber court explained that "in Maryland a mortgage is a deed, for in this State, as distinguished from lien theory states, we take the common law view of a mortgage, as transferring title of the property to the mortgagee." Id.
66. Id. See MD. CODE ANN., REAL PROP. § 1-101(c) (1988) (including a mortgage in the definition of a deed).
67. Downing, 326 Md. at 479, 606 A.2d at 213.
69. See id. at 441-42, 219 A.2d at 247.
70. See id.
destroyed. The court disposed of this argument by stating that the deed, prior to recording, "operated as a contract to convey which would pass to the State equitable title and the right to formal legal title." 

Although the Madine court acknowledged that legal and equitable title represent separate estates, its decision to treat the joint tenancy as destroyed was based upon the conclusion that both legal and equitable title passed, or would pass by right in the future, to the grantee. Thus, the transfer of title in Madine destroyed the necessary unity of title because all title, legal and equitable, would pass to the grantee. By contrast, the court in Downing was confronted with a mortgage that, while transferring legal title to the mortgagee, retained equitable title in the mortgagors. Therefore, unity of title was not destroyed because the Downing mortgagees retained some identical title in the property even after the mortgage was executed.

The conclusion in Downing achieves the beneficial and practical result of maintaining joint tenancies where such a result furthers the intentions of the parties. Very often family members, as in the Downing case, jointly mortgage their property without intending to destroy the joint tenancy. A decision to the contrary would obviously frustrate those parties' intention with no substantial theoretical or practical benefit.

5. Conclusion.—The Downing decision sets an important precedent in regard to joint tenancies. Not only is the presumption against joint tenancies diluted, but the decision establishes a strong presumption in favor of joint tenancies where the requisite intent is demonstrated by clear language in the deed. Perhaps even more importantly, the court has set a general tone in favor of both the creation and maintenance of joint tenancies. By refusing to treat a mortgage executed by all joint tenants as destroying the necessary unity of title, the court's decision will not frustrate the intentions of

71. Id. at 442, 219 A.2d at 248.
72. Id. at 443, 219 A.2d at 248 (emphasis added).
73. See id.
74. See id.
75. See Downing, 326 Md. at 471, 606 A.2d at 209.
76. See id. This approach is consistent with the holding in Gardner v. Gardner, 25 Md. App. 638, 335 A.2d 157 (1975). In that case, the Court of Special Appeals held that where joint tenants bought property as joint tenants, and simultaneously assumed an existing mortgage on the property, the joint tenancy was not destroyed. Id. at 656, 335 A.2d at 162.
joint tenants who need to mortgage their property, but do not desire to terminate their joint tenancy or rights of survivorship.

DAVID M. KAPLON
XI. STATE AND LOCAL GOVERNMENT

A. Safeguarding "Home Rule" Rights

In *Ficker v. Denny*, the Court of Appeals held that once the sponsors of a petition for referendum obtain the requisite number of signatures, they must file that petition. In so holding, the court reaffirmed principles of statutory construction and agency law while clarifying the relationship between the circulators and signers of a referendum petition. Despite the questionable application of established rules to the facts of this case, the decision appropriately advances the aims of the Maryland Constitution.

1. **The Case.**—In reaction to rapidly increasing property taxes in Montgomery County, Fairness in Taxation (FIT), a non-profit, nonpartisan political group was organized under the chairmanship of Robert Denny. In 1990, FIT circulated a petition pursuant to article XI-A, section 5, of the Maryland Constitution to amend the Montgomery County Charter. The proposed amendment was designed to limit both the portion of Montgomery County's operating budget derived from real property tax and the amount of annual increase permissible in the real property tax rate.

FIT successfully obtained enough signatures to place its proposal on the ballot. Before FIT filed the petition, however, the Mont-
Maryland County Council proposed its own tax reform amendment.\(^7\) In response, FIT announced that it would support the Council's proposed amendment and therefore not submit its original proposal.\(^8\)

Robin Ficker and three other signatories\(^9\) of FIT's petition brought an action in Montgomery County Circuit Court against Denny, seeking injunctive relief to compel FIT to submit the petition.\(^10\) When the Circuit Court denied relief, Ficker requested that the Court of Special Appeals issue a temporary injunction pending appeal.\(^11\) Upon denial by the Court of Special Appeals, Ficker filed for a writ of certiorari in the Court of Appeals.\(^12\) The Court of Appeals granted certiorari,\(^13\) and reversed the Circuit Court's decision by ordering that court to enter judgment requiring FIT to submit the petition.\(^14\)

a. **Article XI-A of the Maryland Constitution: Home Rule.**—In 1915, the Maryland General Assembly adopted article XI-A, the "Home Rule" amendment, to the Maryland Constitution.\(^15\) Article XI-A confers upon the people of Baltimore City and the counties of Maryland the power to govern themselves; it is, thus, the basis for all city

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7. *Ficker*, 326 Md. at 629-30, 606 A.2d at 1061. The Council’s proposal was designed to limit the annual real property tax increase to 100% of the rate of inflation. *Id.* at 630, 606 A.2d at 1061.

8. *Id.* at 630, 606 A.2d at 1061. In addition to the proposed charter amendments by FIT and the County Council, there was a third amendment proposal limiting real property taxes already on the ballot. Ironically, this proposal was submitted by the Plaintiff. In addition, prior to county elections two years earlier, Ficker had circulated a petition and obtained the requisite number of signatures for a similar amendment, but the amendment was never placed on the ballot because he failed to properly submit that petition. *Id.* at 637 n.2, 606 A.2d at 1065 n.2. See also *Ficker v. Montgomery County Bd. of Elections*, 670 F. Supp. 618 (D. Md. 1985), in which Ficker successfully argued that a Maryland prohibition against "payment of money or other inducements to any individual for securing signatures on a petition" for referendum violated the First Amendment.

9. The other named plaintiffs were George Sauer, John Thomas, and Albert Ceccone. Sauer and Ceccone both supported the Council’s proposed amendment. *Ficker*, 326 Md. at 636 n.1, 606 A.2d at 1065 n.1.

10. *Id.* at 630, 606 A.2d at 1062.

11. *Id.* at 631, 606 A.2d at 1062.

12. *Id.*


and county charters in Maryland. Section 5 of article XI-A sets forth the method for proposing amendments to charters adopted pursuant to its authority. Under section 5, amendments may be proposed by submitting a petition signed by the lesser of either 10,000 registered voters or twenty percent of the city or county electorate. Article XI-A provides that such a petition “shall be filed with . . . the President of the County Council” and then placed upon the ballot of the next general or congressional election for ratification by the voters. Because FIT circulated its petition under the authority of article XI-A, section 5, Ficker argued that the mandatory language of the provision required FIT to file the petition regardless of the newly proposed County amendment. The Court of Appeals agreed and held Denny responsible for submitting the petition.

2. The Court’s Reasoning.—

a. Statutory Construction.—Basic principles of statutory construction dictate that absent some contrary indication in the context, use of the word “shall” specifies mandatory intent. This rule is well established in Maryland. For example, in Barnes v. State ex rel.

16. See Md. Const. art. XI-A, § 1; Ritchmount, 283 Md. at 55-56, 388 A.2d at 528-29 (describing the purpose of Article XI-A as being “to restore and revitalize local government by giving citizens of counties and municipalities the power to legislate . . . local matters free from undue encroachment by state legislatures”). Article XI-A gives to Baltimore City and the counties of Maryland many of the powers formerly reserved for the state general assembly, thereby increasing those subdivisions’ powers of self-government. See Cheeks, 287 Md. at 597, 415 A.2d at 256.


18. Id.

19. Id.

20. See Ficher, 326 Md. at 630, 606 A.2d at 1062.


23. See, e.g., In re James S., 286 Md. 702, 709, 410 A.2d 586, 589 (1980); Moss v. Director, 279 Md. 561, 564-65, 369 A.2d 1011, 1013 (1977) (finding it “a familiar principle of statutory construction in this State”). The rule is clearly established in other jurisdictions as well. See, e.g., Anderson v. Yungkav, 329 U.S. 482, 485 (1947) (“The word ‘shall’ is ordinarily ‘The language of command.’”); Janus Petroleum, Inc. v. New York State Tax Appeals Tribunal, 583 N.Y.S.2d 983, 984 (N.Y. 1992) (“Although the legislature’s use of mandatory language, such as shall or must, is not conclusive, ‘such a word of command is ordinarily construed as preemptory in the absence of circumstances suggesting contrary legislative intent.’”); City of Dover v. Cartanza, 541 A.2d 580, 582 (Del. 1988) (“It is generally presumed that the word ‘shall’ indicates a mandatory requirement.”).
Pinkney,24 the Court of Appeals reasoned that a statutory provision stating that every signature on a referendum petition “shall” be supported by a statement of the signer’s residence and voting precinct, did, in fact, indicate a legislative demand for this information to be included.25 Similarly, the Court of Appeals has found statutory language instructing that a criminal defendant “shall” be taken before an officer of the court without unnecessary delay upon arrest to create a “compulsory rule for police conduct.”26

There are instances, however, when a statutory provision is merely directory rather than mandatory despite the legislature’s choice to use the word “shall.”27 The interpretation must ultimately rest upon the intention of the legislature.28 In Pressley v. Warden,29 for example, the Court of Appeals held that article IV, section 23, of the Maryland Constitution, which specifies that a judge “shall” render a decision within two months after a case is argued, is not mandatory, but directory.30 Similarly, in Maryland State Bar Ass’n v. Frank,31 the court held that a statutory provision stating that a bar association “shall” bring charges against an attorney within a given time period was also only directory.32

b. Petition Circulator’s Degree of Control.—In Ficker, the Court of Appeals concluded that the circulator of a petition “has no greater or lesser right of control over the petition than any other signer.”33

25. See id. at 574, 204 A.2d at 792. The court noted that other state constitutions have used the word “may” in their versions of this particular provision. Of particular relevance to the present case, for example, Washington provides that “[w]hen the person, committee, or organization proposing any such referendum . . . shall have secured . . . the signatures of thirty thousand legal voters . . . he or they may submit said petition to the Secretary of State.” 1913 Wash. Laws 418 (emphasis added).
27. See Barnes, 236 Md. at 574, 204 A.2d at 792. Mandatory statutes are those that, if violated, invalidate the transaction or subject the violator to some penalty stated in the statute. Directory statutes are those that, because they have a permissive element, involve no consequences for the violator. 1A Singer, supra note 22, § 25.03, at 441-42. See In re James S., 286 Md. 702, 710, 410 A.2d 586, 590 (1980).
28. See Barnes, 236 Md. at 574, 204 A.2d at 792.
30. See id. at 406, 219 A.2d at 26.
32. Id. at 533, 325 A.2d at 721 (overriding the presumption that “‘shall’ indicates a mandatory provision” because “the broad policy of the law regulating conduct of attorneys authorized to practice law in this State is designed for the protection of the public, . . . and that purpose would be largely vitiated if [a mandatory] interpretation were to prevail”).
33. Ficker, 326 Md. at 632, 606 A.2d at 1063.
Although this principle is new to Maryland law, several other states have made similar assertions. For example, in *La Fleur ex rel. Anderson v. Frost*, the Supreme Judicial Court of Maine found to be unconstitutional a city ordinance that contained a provision giving the original circulators the power to withdraw the petition in their "sole and exclusive judgement." The Maine court determined that the circulators are not inherently more interested in the outcome of the petition than any other signer and questioned the appropriateness of forcing all the petition signatories to be subject to the mercy of "six whom they did not select, whom they may or may not know, and in whom they may or may not have confidence."

The Maryland Court of Appeals realized that a signer may wish to withdraw his or her support and signature from a petition before it is submitted. The court acknowledged that all signers have this right; however, such a decision is personal and can be exercised only by the individual signer. The circulator lacks the authority to unilaterally withdraw a person's name from the petition or to withdraw any part of the petition she circulated that a voter has signed. Thus, the court found that Ficker had as much right to have the petition submitted as FIT had to drop its support. Moreover, while FIT had the right to withdraw its own name, it did not have the right to effectively withdraw the name of every other signer by simply refusing to submit the petition.

c. Petition Circulator as Agent of the Signer.—In *Ficker*, the court applied the principles of agency to define the scope of the duty owed by a petition's circulator to other signers. Maryland law had established that the circulator of a petition is the agent of all its signatories; however, before *Ficker*, the scope of the circulator's agency had never been clarified. The *Ficker* court examined the rela-

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34. 80 A.2d 407 (Me. 1951).
35. See id. at 415; see also *State ex rel. Howell v. Superior Court*, 166 P. 1126, 1128 (Wash. 1917) (the rights of the circulator "are no greater than each of the other several thousand signers").
36. See *La Fleur*, 80 A.2d at 415.
37. Id. at 416.
38. See *Ficker*, 326 Md. at 633, 606 A.2d at 1063.
39. Id.
40. See id. at 633-34, 606 A.2d at 1063-64; see also *State ex rel. Hindley v. Superior Court*, 126 P. 920, 923 (Wash. 1912) ("The right to withdraw, like the right to sign, is a personal privilege, and can be exercised only by the person directly concerned.").
41. See *Ficker*, 326 Md. at 634, 606 A.2d at 1064.
42. See id. at 632-34, 606 A.2d at 1063-64.
43. See *Tyler v. Secretary of State*, 229 Md. 397, 403, 184 A.2d 101, 104 (1962).
tionship between the circulator and the signers and concluded that the petition sponsor implicitly guaranteed to the signatories "that once enough signatures are obtained, the measure will be placed on the ballot." In essence, once those signatures are obtained, the circulator must fulfill that promise. Applying Maryland principles of agency, the *Ficker* court held that the organization served as Ficker's agent and, therefore, FIT was obligated to file the petition.\(^4\)

3. Analysis.—By reasoning that the use of the word "shall" in article XI-A, section 5, imposes a mandatory obligation upon the circulator of a petition to file that petition once all prerequisites are met, the majority mechanically applied the longstanding rule in Maryland that absent a contextual indication to the contrary, the word "shall" will be presumed mandatory.\(^4\) Nonetheless, the majority's straightforward application of that principle in this case is questionable. In fact, when read as a whole, the command that the petition "shall be filed with the Mayor of Baltimore or the President of the County Council"\(^4\) simply appears to specify where the petition "shall be filed" once it is submitted, not that the petition must be filed.\(^4\) Had the legislature's purpose been to create an absolute duty to file the petition, the General Assembly could have drafted a shorter provision such as: "A petition shall be filed." The dissent pointed out that many statutory provisions containing the phrase "shall be filed" are not ordinarily interpreted as creating a duty to file.\(^4\)

Nonetheless, the majority opinion is not necessarily incorrect. The majority's agency argument alone is strong enough to support its conclusion that FIT violated Maryland law by failing to submit the petition. The basis of the court's agency argument was that the circulator of a petition implicitly promises to submit that petition if

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44. *Ficker*, 326 Md. at 633, 606 A.2d at 1063.
45. See id.
46. *Id.* at 632, 606 A.2d at 1063.
48. *Ficker*, 326 Md. at 638, 606 A.2d at 1066 (Chasanow, J., dissenting).
49. See *id.* at 638-39, 606 A.2d at 1066 (Chasanow, J., dissenting). For example, the Courts and Judicial Proceedings Article states that "[a] civil action at law shall be filed" no later than three years from the date it accrued. *Md. Code Ann., Cts. & Jud. Proc.* § 5-101 (1989) (emphasis added). However, the dissent's contention that the majority's holding would require everyone with a civil cause of action to file a suit is not quite accurate. Even if the language does create an "enforceable duty," that duty can only be enforced when someone with standing can prove "irreparable injury" would result from a failure to file such a suit. See *Ficker*, 326 Md. at 637, 606 A.2d at 1065 (Chasanow, J., dissenting).
enough signatures are obtained. People do not sign petitions simply to give the circulator a mere option of filing at a later date. Thus, the agency relationship created an obligation on FIT to submit the final document, an obligation enforceable by any petition signer.

The dissent contended that FIT had the right to withhold the petition because a corollary rule of agency dictates that if unforeseen circumstances arise, and the agent cannot reasonably communicate with the principal, the agent has the authority to take necessary steps to prevent the principal from suffering a loss. By arguing that the Council's proposal of an amendment constituted an unforeseen circumstance, the dissent found that FIT had authority to withhold the petition.

Yet the dissent's conclusion is troubling for two reasons. First, it is not clear that Denny, as agent, was unable to communicate with the principals before taking action contrary to their specific instructions. In fact, Denny acknowledged that he could have easily obtained enough written withdrawals in a short time period to bring the number of signatures below the required number for petition submission. FIT, as agent of the signers, had no right to withhold the petition before attempting this course of action.

Second, the dissent argued that having more than one similar amendment on the ballot would constitute a “loss” to the signers sufficient to grant FIT the authority to take steps to prevent its occurrence. Yet, the assertion that increased choices on the ballot is a “loss” is questionable at best. Certainly Ficker did not consider it a “loss,” and apparently neither did a majority of the Court of Appeals.

50. See Ficker, 326 Md. at 633, 606 A.2d at 1063.
51. See id. While the court clearly held that the circulator of a petition under § 5 of article XI-A implicitly creates an enforceable promise to the signers to file that petition, it is unclear whether promises the circulator makes to signers that are not part of the express statutory requirements of that section are also enforceable.
52. Id. at 641, 606 A.2d at 1067 (Chasanow, J., dissenting).
53. See id. at 641-42, 606 A.2d at 1067-68 (Chasanow, J., dissenting).
54. Id. at 647, 606 A.2d at 1070 (Chasanow, J., dissenting). The majority and the dissent agreed that if enough signers withdrew so that the number of signers fell below 10,000, the petition need not be submitted. See id. at 634, 648, 606 A.2d at 1064, 1070.
55. In fact, following the initial denial of Ficker's injunction, FIT did send a letter advocating support for the Council's amendment to every signer of the petition. Id. at 646, 606 A.2d at 1069 (Chasanow, J., dissenting). It clearly was not unreasonable to expect FIT to communicate with the signers.
56. See id. at 641-42, 606 A.2d at 1067-68 (Chasanow, J., dissenting).
The court's strongest argument for holding FIT responsible for submitting the petition is the principle that the circulator of a petition should have neither greater nor lesser control over the petition than any other signer.\textsuperscript{57} As the Maine court so appropriately reasoned in \textit{La Fleur ex rel. Anderson v. Frost},\textsuperscript{58} "There is no justification for saying the [petition's sponsors] are the most interested citizens or that the citizen, who later signs . . . , has not exactly the same interest in the proposal [as the sponsors]."\textsuperscript{59} While this reasoning is subject to the practical argument that, in reality, the sponsor of an amendment is likely to be more interested in its outcome than most of the petition signers, from a theoretical standpoint the \textit{La Fleur} court's argument directly addressed the objectives of Maryland's article XI-A.

The primary objective of article XI-A is to increase popular participation in the governing of local matters\textsuperscript{60} and to give each citizen a direct voice in local government and lawmaking.\textsuperscript{61} To achieve these objectives, all interested citizens must have an equal voice. The power derived from government participation should not be confined to those with the capacity and resources to initiate referendum and petition drives.

4. Conclusion.—The Ficker court took important steps to further the objectives of the Maryland Constitution and insure that powers granted by the Home Rule Amendment remain vested in all the people. Although each of the approaches used by the court cannot independently justify its conclusion, on the whole they adequately support the final decision.

HUGH M. BERNSTEIN

B. State Liability for Auto Accidents: Full Speed Ahead in Tort Claims

In \textit{State v. Harris},\textsuperscript{62} the Court of Appeals held that a person injured in a car accident with a state motor vehicle could sue the State

\begin{itemize}
  \item 57. See id. at 632, 606 A.2d at 1063.
  \item 58. 80 A.2d 407 (Me. 1951).
  \item 59. Id. at 416 (adding that once the necessary number of signatures has been obtained, the sponsors "become neither more nor less than voters who have signed, and they have neither greater nor less right nor authority than other signers").
  \item 60. See Ritchmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 56, 388 A.2d 523, 529 (1978).
  \item 61. See Ficker, 326 Md. at 633, 606 A.2d at 1063.
\end{itemize}
without first having to file a claim with the State Treasurer.\textsuperscript{63} The court considered the potentially conflicting application of two Maryland statutes, both of which purported to give plaintiffs a right to sue the State for negligent use of state vehicles: section 17-107(b) of the Transportation Article\textsuperscript{64} and the Maryland Tort Claims Act (MTCA).\textsuperscript{65} The State argued that because the MTCA had repealed section 17-107(b) by implication, the plaintiff was required to comply with the MTCA's rigorous procedural requirements.\textsuperscript{66} The Harris court, however, found that both statutes could co-exist independently, thereby providing the plaintiff with two legal remedies from which to choose.\textsuperscript{67}

1. \textit{The Case}.—Albert Harris alleged that his car was negligently struck by a vehicle owned by the State of Maryland and driven by Thomas Gross, a state employee.\textsuperscript{68} The accident occurred on October 14, 1983,\textsuperscript{69} and resulted in physical injuries to Harris.\textsuperscript{70} Less than three years later, Harris filed suit in the Circuit Court for Baltimore City against both the State and Gross.\textsuperscript{71} Harris claimed that the Transportation Article authorized suits against the State based on negligent operation of a governmental vehicle on official business.\textsuperscript{72} At that time, section 17-107(b) of the Transportation Article read:

\begin{quote}
An owner or lessee of any motor vehicle registered under Title 13 of this article may not raise the defense of sovereign or governmental immunity, to the extent of benefits provided by the security accepted by the Administration under § 17-103 of this subtitle, in any judicial proceeding in which the plaintiff claims that personal injury, property damage, or death was caused by the negligent use of the motor vehicle while in government service or performing a
\end{quote}

\textsuperscript{63} \textit{Id.} at 41, 607 A.2d at 556-57.
\textsuperscript{66} \textit{Harris}, 327 Md. at 38, 607 A.2d at 555.
\textsuperscript{67} \textit{Id.} at 41, 607 A.2d at 556-57.
\textsuperscript{69} \textit{Harris v. Gross}, 87 Md. App. at 765, 591 A.2d at 576.
\textsuperscript{70} \textit{Complaint} at 2, \textit{Harris v. Gross} (No. 86283027/CL56698) (Cir. Ct. for Baltimore City 1986).
\textsuperscript{71} \textit{Harris}, 327 Md. at 35, 607 A.2d at 554.
\textsuperscript{72} \textit{Id.} at 36, 607 A.2d at 554.
task of benefit to the government.\textsuperscript{73}

The trial court rejected Harris’s Transportation Article claim, finding that the MTCA dictated the legal remedy for this situation.\textsuperscript{74} At the time of the accident, section 5-403 of the MTCA waived the State’s sovereign immunity for a variety of claims, including “[a]n action to recover damages caused by the negligent maintenance or operation of a motor vehicle by a State employee.”\textsuperscript{75} Among other restrictions and limitations, the MTCA required a claimant, before going to court, to file a complaint with the State Treasurer, who then had six months to settle the case.\textsuperscript{76} Because Harris had not first filed his claim with the State Treasurer, the trial court dismissed the case.\textsuperscript{77}

The Court of Special Appeals reversed the lower court’s decision,\textsuperscript{78} finding that the Transportation Article and the MTCA each separately authorized suits against the State.\textsuperscript{79} In so doing, the court rejected the State’s argument that the MTCA repealed the Transportation Article’s language by implication.\textsuperscript{80} The court relied heavily on language in the MTCA purporting not to “limit any other law that . . . waives the sovereign immunity of the State.”\textsuperscript{81} The court also supported its finding by reference to an earlier Court of Special Appeals decision, \textit{Collier v. Nesbitt},\textsuperscript{82} which found that pas-

\textsuperscript{73} MD. CODE ANN., TRANSP. § 17-107(b) (1984). The section was passed during the 1981 legislative session and became effective July 1, 1981. \textit{Harris}, 327 Md. at 37-38, 607 A.2d at 554-55.
\textsuperscript{74} \textit{Harris}, 327 Md. at 35-36, 607 A.2d at 554; Denial of Plaintiff’s Motion at 1, Harris v. Gross (No. 86283027/CL56698) (dismissing the case) [hereinafter Denial].
\textsuperscript{75} MD. CODE ANN., CTS. & JUD. PROC. § 5-403(a)(1) (1983). The MTCA was passed during the same legislative session and signed by the Governor on May 21, 1981, the same day as § 17-107 of the Transportation Article. \textit{Harris}, 327 Md. at 37, 607 A.2d at 554. However, the MTCA did not become effective until July 1, 1982, a year after the effective date of § 17-107(b). \textit{Id.} at 38, 607 A.2d at 555.
\textsuperscript{76} MD. CODE ANN., CTS. & JUD. PROC. § 5-406(a) (1980 & Supp. 1983). The section read:
\begin{quote}
[A]n action may not be instituted . . . unless the claimant has first presented the claim in writing to the State Treasurer or his designee and the claim has been finally denied. . . . The failure of the State to notify the claimant of a final denial within 6 months of receipt of the claim shall, at the option of the claimant, be deemed a final denial of the claim for purposes of this section.
\end{quote}
\textit{Id.}
\textsuperscript{77} \textit{Harris}, 327 Md. at 35-36, 607 A.2d at 554.
\textsuperscript{79} \textit{Id.} at 769, 591 A.2d at 577.
\textsuperscript{80} \textit{Id.} at 768-69, 591 A.2d at 577.
\textsuperscript{81} \textit{Id.}; MD. CODE ANN., STATE GOV’T § 12-103 (1984).
\textsuperscript{82} 79 Md. App. 729, 558 A.2d 1242 (1989).
sage of the MTCA had not repealed another section of the Trans-
portation Article waiving the State's immunity.\textsuperscript{83}

The Court of Appeals granted certiorari\textsuperscript{84} "to consider the sig-
nificant issue of public importance raised in the case."\textsuperscript{85} In its brief, the State argued that the language in the Transportation Article did not constitute an actual waiver of its sovereign immunity.\textsuperscript{86} Alternatively, the State requested that the MTCA's filing requirement be read into section 17-107(b).\textsuperscript{87} Harris echoed the logic of the Court of Special Appeals, claiming that the two Acts presented him with two options for suing the State.\textsuperscript{88}

2. Legal Background.—The Court of Appeals in \textit{Harris} ad-
dressed two significant legal issues. First, the court considered
whether section 17-107(b) of the Transportation Article remained
valid after the passage of the MTCA.\textsuperscript{89} This required an examination
of the method of statutory construction when two statutes are
potentially in conflict. Second, the court considered whether sec-
tion 17-107(b) constituted an effective waiver of the State's immu-
nity from suit.\textsuperscript{90} This required an examination of the process by
which a state can waive its immunity.

\textit{a. Sovereign Immunity.—}The concept of sovereign immunity ex-
tends deep into the history of Maryland, federal and British law.\textsuperscript{91}
Originally, this immunity was based on the idea that "[t]he King can

\begin{itemize}
\item \textsuperscript{83} Harris \textit{v}. Gross, 87 Md. App. at 769, 591 A.2d at 578. The Collier court examined § 7-702, which waived the immunity of the Mass Transit Administration (MTA) and found that the MTCA and § 7-702 both remained viable, stating:

[w]hile both effect a waiver of sovereign immunity, they do so to varied extents. Section 7-702 of the Transportation Article pertains only to torts committed by MTA personnel in the course of their employment. By contrast, the Tort Claims Act is a gap-filler provision authorizing suits where no specific sovereign immunity waiver otherwise exists.

\textit{Collier}, 79 Md. App. at 733, 558 A.2d at 1244.

\item \textsuperscript{84} See \textit{State} \textit{v}. Harris, 324 Md. 686, 598 A.2d 755 (1991).

\item \textsuperscript{85} Harris, 327 Md. at 37, 607 A.2d at 554.

\item \textsuperscript{86} Petitioner's Brief at 14-17, \textit{Harris} (No. 91-104).

\item \textsuperscript{87} \textit{Id}. at 19-20. The State argued that the legislature would not logically have passed one law requiring filing for auto accident suits and, at the same time, pass another law which would allow plaintiffs to circumvent the filing requirement. \textit{Id}.

\item \textsuperscript{88} Respondent's Brief at 4-5, \textit{Harris} (No. 91-104).

\item \textsuperscript{89} Harris, 327 Md. at 38-40, 607 A.2d at 555-56.

\item \textsuperscript{90} \textit{Id}. at 41, 607 A.2d at 556-57.

\item \textsuperscript{91} See Comment, \textit{The State as a Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland}, 36 Md. L. Rev. 653, 654-58 (1977) (giving a brief history of sovereign immunity in Maryland).
\end{itemize}
do no wrong."\(^\text{92}\) In England, it was assumed that no court had authority over the King.\(^\text{93}\) Therefore, the King could not be brought into court for suit or have an adverse judgment enforced against him.\(^\text{94}\) In the United States, the concept of sovereign immunity survived the American Revolution, and courts granted both federal and state governments a comprehensive shield from legal suits.\(^\text{95}\)

The Court of Appeals has found that "[t]he doctrine of sovereign immunity is firmly embedded in the law of Maryland."\(^\text{96}\) No longer justified on the presumed infallibility of the sovereign, the immunity is justified by public policy.\(^\text{97}\) According to the court, the immunity "protects the State from burdensome interference with its governmental functions and preserves its control over State agencies and funds."\(^\text{98}\)

The general doctrine of sovereign immunity allows the State to waive its immunity from suit through a two-step process.\(^\text{99}\) First, the State must give its clear consent to be sued.\(^\text{100}\) Second, the State must provide or authorize the expenditure of money necessary to pay any adverse judgments.\(^\text{101}\) Consent without money authoriza-

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92. 3 WILLIAM BLACKSTONE, COMMENTARIES *254.
93. See id.
95. See id.
96. Katz v. Washington Suburban Sanitary Comm’n, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979). The court has consistently recognized its existence. See Board of Trustees v. John K. Ruff, Inc., 278 Md. 580, 584, 366 A.2d 360, 362 (1976) ("Once venerated, recently vilified, and presently substantially limited, the doctrine of sovereign immunity has been long recognized by this Court. We have applied the doctrine for over a century. . . ."); Davis v. State, 183 Md. 385, 393, 37 A.2d 880, 885 (1944) ("One of the highest attributes of sovereignty is the immunity of the State from suit at law and in equity by its own citizens or the citizens of any other State, unless it waives this immunity."). See also Foor v. Juvenile Servs. Admin., 78 Md. App. 151, 162-63, 552 A.2d 947, 952-53 (stating that the first broad waiver of sovereign immunity by the legislature in modern times came about in 1976), cert. denied, 316 Md. 364, 558 A.2d 1206 (1989).
97. See State v. Baltimore & O.R.R., 34 Md. 344, 374 (1871) (stating that parties with claims against the government should present them to the legislature, rather than pursue a court action), aff’d sub nom. Railroad Co. v. Maryland, 88 U.S. (21 Wall) 456 (1875).
98. Katz, 284 Md. at 507, 397 A.2d at 1030.
tion does not constitute an effective waiver. Additionally, the State may condition or limit its waiver; it may also place procedural requirements on plaintiffs seeking to take advantage of the consent to be sued.

In 1981, the legislature passed the MTCA, which waived Maryland's sovereign immunity for certain enumerated state actions, including "negligent maintenance or operation of a motor vehicle by a State employee." Although the MTCA purported to expand the State's exposure to suits, immunity was waived only "to the extent and in the amount that the State is covered by a program of insurance." Also, the waiver did not allow for an award of "punitive damages," "interest prior to judgment," "individual


103. See Schultz v. Greater New Orleans Expressway Comm'n, 250 F. Supp. 89, 92 (E.D. La. 1966) ("It is true that a state may waive its immunity from suit and specify such limitations on the exercise of that immunity as it deems proper. . . .").


105. MD. CODE ANN., CTS. & JUD. PROC. § 5-403(a)(1) (Supp. 1983). In 1985, the State eliminated the list of specific actions in this statute and substituted general language. See Simpson v. Moore, 323 Md. 215, 219, 592 A.2d 1090, 1092 (1988). See also David E. Beller & Carolyn A. Quattrocki, Tort Claims Act, 22 MD. BAR. J. 17 (July/Aug. 1989). This article explains:

106. See Collier v. Nesbitt, 79 Md. App. 729, 733, 558 A.2d 1242, 1244 (1989) (describing the MTCA as a "gap-filler"). Section 5-402 stated that the MTCA operated "in addition to and not in limitation of any other law waiving the sovereign immunity of the State in tort or authorizing the State to purchase or otherwise provide insurance for tortious conduct." MD. CODE ANN., CTS. & JUD. PROC. § 5-402(b) (Supp. 1983).

107. MD. CODE ANN., CTS. & JUD. PROC. § 5-403(a) (Supp. 1983). The State Insurance Program is now codified in §§ 9-101 through -107 of the State Finance and Procurement Article. Section 9-105(c) reads: "To the extent that funds are available in the State budget, the Treasurer shall provide sufficient self-insurance, purchased insurance, or both to cover the liability of the State and its units and personnel under the Maryland Tort Claims Act." MD. CODE ANN., STATE FIN. & PROC. § 9-105(c) (1988).
claims in excess of $100,000," or "[a]n aggregate of claims arising from the same occurrence in excess of $500,000."108 Section 5-406 of the MTCA required that a claimant first present a claim to the State Treasurer. Only after the Treasurer either denied the claim or six months had expired could the claimant go into court.109 The Court of Appeals consistently found that the MTCA provided both elements necessary for an effective waiver of sovereign immunity.110

During the same 1981 legislative session, the State approved language in the Transportation Article that barred the defense of sovereign immunity for governmental operation of motor vehicles to the extent of the minimum required auto insurance.111 Unlike the MTCA, which waived only the State's immunity, section 17-107(b) established liability for state and local governments.112 In addition, section 17-107(b) contained none of the various procedural requirements found in the MTCA.

The stated purpose of section 17-107(b) was to prevent local governments from avoiding liability for torts involving their vehicles.113 The Court of Special Appeals had previously found that section 17-107(b) constituted such a waiver, and it reiterated that

108. Md. Code Ann., Cts. & Jud. Proc. § 5-403(b) (Supp. 1983). See also Beller & Quattrocki, supra note 105, at 19 ("The 1985 amendment[s to the MTCA] abolished the statutory limitations on recovery, providing instead that the State will be liable to the extent of insurance coverage. . . .").


111. See supra text accompanying note 73 for section 17-107(b)'s language. After amendments made in 1990, the section now reads: "An owner or lessee of any motor vehicle registered under Title 13 of this article may not raise the defense of sovereign or governmental immunity as described under § 5-399.4 of the Courts and Judicial Proceedings Article," Md. Code Ann., Transp. § 17-107(c) (1992). Section 5-399.4 reads:

An owner or lessee of any motor vehicle registered under Title 13 of the Transportation Article may not raise the defense of sovereign or governmental immunity, to the extent of benefits provided by the security accepted by the Motor Vehicle Administration under § 17-103 of the Transportation Article, in any judicial proceeding in which the plaintiff claims that personal injury, property damage, or death was caused by the negligent use of the motor vehicle while in government service or performing a task of benefit to the government.


113. See Harris, 327 Md. at 39, 607 A.2d at 556 (citing Letter from the Secretary of Maryland Department of Transportation (Feb. 25, 1981)).
belief in *Harris v. Gross.* However, prior to *State v. Harris,* the Court of Appeals had never directly ruled on whether section 17-107(b) constituted a waiver of governmental immunity or whether it was implicitly repealed by the passage of the MTCA.

b. **Repeal by Implication.**—In numerous instances, the Court of Appeals has held that without an explicit indication of legislative intent, it will be very reluctant to infer that one statute replaces, overturns or modifies an earlier one. The court has referred to this policy as a "fundamental principle," based on the assumption that the legislature is aware of all existing laws when it passes a new one. That is, if the legislature intended to repeal an existing law, it would have stated that intent explicitly in the new law. This doc-


115. In another decision, however, the court applied § 17-107(b) as valid law without directly addressing its potential conflict with the MTCA. *See Nationwide Mut. Ins. Co. v. USF&G,* 314 Md. 131, 148, 550 A.2d 69, 77 (1988).

116. *See Green v. State,* 170 Md. 134, 140, 183 A. 526, 529 (1936) ("It has been frequently said in this court and elsewhere that repeals by implication are not favored . . . ."); *Beard v. State,* 74 Md. 130, 134, 21 A. 700, 701 (1891) ("It is a fundamental principle that the law does not favor repeals by implication. . . ."); *Garitee v. Mayor of Baltimore,* 53 Md. 422, 435 (1880) ("This is a canon of construction which is as well established as any principle of law.").

117. Department of Natural Resources v. France, 277 Md. 432, 460, 357 A.2d 78, 94 (1976); *Beard,* 74 Md. at 134, 21 A. at 701. The doctrine has received considerable criticism from some commentators. *See,* e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 806 (1983) (declaring that most canons of statutory construction, of which the disfavor of implied repeals is one, are "just plain wrong").

118. *See Farmers & Merchants Nat'l Bank v. Schlossberg,* 306 Md. 48, 61, 507 A.2d 172, 178 (1986) ("[T]he General Assembly is presumed to have intended that all its enactments operate together as a consistent and harmonious body of law. . . ."); 1A *Singer,* supra note 22, § 23.10, at 346 ("The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation.").

However, this presumption has been attacked as largely fictional. *See* William D. Popkin, *The Collaborative Model of Statutory Interpretation,* 61 S. Cal. L. Rev. 541, 616 (1988) ("Real legislative awareness of the prior statute is usually either lacking or simply asserted without proof by the court. . . ."); Posner, *supra* note 117, at 812 (claiming that the doctrine of implied repeals is based on "impl[ied] legislative omniscience in a particularly uncompromising and clearly unrealistic form, for if Congress could foresee every possible application of a new statute and make provision for it, there would be no need for judicial interpretation at all"). *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Legislative Scholarship and Pedagogy In the Post-Legal Process Area,* 48 U. Pitt. L. Rev. 691, 721, 724 (1987) (noting that Ronald Dworkin and other "new legal process theorists" have argued that courts should more forcefully overrule obsolete statutes and have advocated far more expansive lawmaking roles for judges).
trine is followed by the Supreme Court\textsuperscript{119} and courts throughout the country.\textsuperscript{120}

In determining whether one statute has repealed another by implication, the Maryland Court of Appeals has considered two factors: whether there is strong evidence that the legislature intended to repeal a statute despite the fact that it did not explicitly refer to the statute in the new law\textsuperscript{121} and the degree of inconsistency between the two statutes.\textsuperscript{122}

\begin{enumerate}
\item \textit{The Intent of the Legislature.---}The court has considered a number of key factors in determining whether the legislature intended one statute to repeal a prior one. For example, the court has considered subsequent amendments made by the legislature to the first statute as an argument against an implied repeal. From the court's perspective, the fact that the legislature made certain changes but not others signified its belief that the statute in question remained valid and did not need any corrections other than those made.\textsuperscript{123}

The court has also noted the legislature's response, or lack

\textsuperscript{119} See American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 868 (1983); Morton v. Moncari, 417 U.S. 535, 549 (1974); Red Rock v. Henry, 106 U.S. 596, 601-02 (1883). The Morton Court stated, "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." 417 U.S. at 551.


\textsuperscript{121} See Mayor of Baltimore v. Clerk of the Superior Court, 270 Md. 316, 319, 311 A.2d 261, 263 (1973) ("[T]he intention of the Legislature to . . . [repeal] must be clear and manifest. . .."); Pressman v. Elgin, 187 Md. 446, 450, 50 A.2d 560, 563 (1947) ("No court should ever hold that a statute has been repealed except where the language of a later statute shows plainly that the Legislature intended a repeal."); State v. Clifton, 177 Md. 572, 574, 10 A.2d 703, 704 (1940) ("No Court should ever adjudge that a repeal has occurred except when it is inevitable or the language of the act shows plainly that the Legislature intended it. Such a legislative intent is never presumed.").

\textsuperscript{122} See Weller v. Maryland Bay Co., 176 Md. 59, 71, 3 A.2d 736, 741 (1939) (determining the existence of "an irreconcilable repugnancy in the terms of the acts which make inevitable the conclusion that there was an intention to repeal by the later act some portion of the earlier one").

thereof, to decisions of the courts\textsuperscript{124} and opinions of the Maryland Attorney General\textsuperscript{125} applying the purportedly repealed statute. Because these decisions and opinions provide an opportunity for the legislature to overturn the decision or judgment by expressly repealing the statute, the court has viewed the legislature's failure to respond as acquiescence in the continued viability of the older statute.\textsuperscript{126}

A third factor the court has considered is the breadth of the scope of the more recent statute. If the statute in question covers an entire subject comprehensively, it might be found to preempt the operation of an earlier, more specific statute.\textsuperscript{127} However, this is not a hard and fast rule of the court: the court has also found a narrow statute to constitute an exception to a broad statute.\textsuperscript{128}

\textsuperscript{124} See, e.g., Williams v. State, 292 Md. 201, 210, 438 A.2d 1301, 1305 (1981) ("The General Assembly is presumed to be aware of this Court's interpretation of its enactments and, if such interpretation is not legislatively overturned, to have acquiesced in that interpretation.").

\textsuperscript{125} See, e.g., Leitch v. Gaither, 151 Md. 167, 176, 134 A. 317, 320 (1926) ("[B]y implication the Legislature acquiesced in the construction placed upon the act by the Attorney General as a correct expression of its intention.").

\textsuperscript{126} However, this failure to respond might also indicate that the Legislature could not muster the political support for a change, had too many other items on its agenda, or was jointly mistaken along with the court and Attorney General.

\textsuperscript{127} See Hitchcock v. State, 213 Md. 273, 279, 131 A.2d 714, 716 (1957) (concluding that "a complete scheme of regulation ... is a substitute for existing laws on the subject, and repeals those earlier laws"); Appeal Tax Court v. Western Md. R.R., 50 Md. 274, 296 (1879) (holding that "if the later Act covers the whole subject of the first Act ... it will operate as a repeal of that Act"). See also 1A SINGER, supra note 22, § 23.13 ("The intent to repeal all former laws upon a subject is made apparent by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with that subject.").

\textsuperscript{128} See Farmers & Merchants Nat'l Bank v. Schlossberg, 306 Md. 48, 63, 507 A.2d 172, 180 (1986) ("It is well settled that when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute."). See also Popkin, supra note 118, at 616 ("The assumption is that the legislature intends the more specific statute to prevail, given the close attention to detail implied by the statute's specificity.").

Courts in other states have taken additional factors into consideration. For example, if both statutes were passed during the same legislative session, courts have found a strong presumption that the two statutes were intended to operate together. See People v. Benton, 261 N.E.2d 793, 795-96 (Ill. App. Ct. 1970); Dunkle v. State, 173 N.E.2d 657, 659 (Ind. 1961); Chappuis v. Reggie, 62 So. 2d 92, 95 (La. 1952); County of Saratoga v. Saratoga Harness Racing Ass'n, Inc., 176 N.Y.S.2d 654, 659 (N.Y. 1958); City of Richmond v. Board of Supervisors, 101 S.E.2d 641, 645-46 (Va. 1958). See also 1A SINGER, supra note 22, § 23.17 ("In the absence of an irreconcilable conflict between two acts of the same session, each will be construed to operate within the limits of its own terms in a manner not to conflict with the other.").

Some courts have also considered language that indicates a general repeal of any previous, inconsistent statutes. However, giving force to a general repeal seemingly
Disagreement Between Statutes.—The degree of disagreement required to show a repeal is uncertain, given the previous decisions of the Court of Appeals. In describing the extent of clash needed, the court has said that the two acts must be "inconsistent," 129 "irreconcilable," 130 or "repugnant." 131 The court has supplemented these terms with modifiers such as "plainly," 132 "manifest," 133 and "unavoidable." 134 These phrases imply that a substantial degree of inconsistency is necessary before an implied repeal can be found, contradicts the basis of courts' traditional disfavor of implied repeal—the assumption that a legislature is aware of all of the existing law. Compare State ex rel. Dahl v. District Court of Fourth Judicial Dist., 333 P.2d 495, 498 (Mont. 1958) (holding that general "repeated repealer sections . . . mean that all acts and parts of acts in conflict therewith are hereby repealed") with State v. Becker, 234 P.2d 897, 899 (Wash. 1951) ("Such a repealing clause does not constitute a direct repeal and does not have the effect of repealing any part of the prior act which would not be repealed in its absence.") and State ex rel. Thompson v. Morton, 84 S.E.2d 791, 796 (W. Va. 1954) ("A general repealing clause in a statute is only declaratory of what would be the legal effect of the statute without the repealing provision.") (quoting State v. Jackson, 199 S.E. 876, 877 (W. Va. 1938)).

Conversely, several courts have found that there can be no implied repeal when the more recent statute contained language explicitly stating that no previous statutes were intended to be repealed. See, e.g., Rojo v. Kliger, 801 P.2d 373, 378 (Cal. 1990) ("By expressly disclaiming a purpose to repeal other applicable state laws . . . we believe the Legislature has manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination."). The California statute at issue in Rojo, the Fair Employment and Housing Act (FEHA), expressly stated that "[n]othing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination. . . ." CAL. GOV'T CODE § 12993(a) (West 1992). This statute created certain remedies for employees facing discrimination but required complainants to file an administrative complaint first. The common-law remedy allowed direct access to court. Rojo, 801 P.2d at 376. The court declared that a plaintiff could proceed under FEHA or common law. Id. at 383.


131. Smith, 267 Md. at 155, 297 A.2d at 725; Davis, 120 Md. at 405, 87 A. at 691. See also Adams v. County Comm'rs, 180 Md. 550, 554, 26 A.2d 377, 379 (1942) (requiring "repugnancy").

132. Davis, 120 Md. at 405, 87 A. at 691; Appeal Tax Court v. Western Md. R.R., 50 Md. 274, 296 (1879).

133. France, 277 Md. at 460, 357 A.2d at 94; Kirkwood, 205 Md. at 55, 106 A.2d at 107; Green, 170 Md. at 140, 183 A. at 529.

134. Mayor of Cumberland v. Magruder, 34 Md. 381, 386 (1871).
but offer little help in defining precisely the standard of requisite disagreement.

Often, the court has avoided the issue of repeal-by-implication by finding that the statutes in question can be brought into "harmony" by merging them. Thus, "the requirements of one will be construed as embodying the provisions of the other." Alternatively, the court has attempted to "give effect to both" acts by allowing each one to operate independently. The court has failed to explain clearly how it determines whether two acts should be merged or allowed to exist separately.

135. Smith, 267 Md. at 155, 297 A.2d at 725; Welsh v. Kuntz, 196 Md. 86, 97, 75 A.2d 343, 347 (1950).

136. See Police Comm'r v. Dowling, 281 Md. 412, 423, 379 A.2d 1007, 1013 (1977) (harmonizing a statute allowing a law enforcement officer to appeal a trial board's decision to dismiss him, with a second granting the police commissioner power to dismiss an officer, by finding that an officer had the right to appeal a commissioner's decision); Commission on Medical Discipline v. Bendler, 280 Md. 326, 329-30, 373 A.2d 1232, 1233-34 (1977) (harmonizing a statute allowing a state employee to appeal to a court of law a final agency decision to fire him or her, with a second stating that the Board of Review made final decisions for the Department of Health and Mental Hygiene, by finding that a Board of Review determination constituted a final agency decision that could then be challenged in court). See also Mayor of Baltimore v. Clerk of the Superior Court, 270 Md. 316, 320, 311 A.2d 261, 264 (1973) (finding no conflict between a statute requiring a plaintiff to pay all trial court costs in an eminent domain suit, and a second exempting a city or county from all court costs; the second constituted an exception to the first).

137. Clerk of the Superior Court, 270 Md. at 319, 311 A.2d at 263.


139. See Welsh, 196 Md. at 98, 75 A.2d at 348. In Welsh, one statute required that mortgages include a schedule of future loans and advances. The other described the necessary elements of mortgages in Baltimore and Prince George's counties and did not include a schedule requirement. The court found that the second statute constituted an exception to the first. Id. See also Chesapeake Beach Hotel Co. v. Hall, 121 Md. 643, 652, 89 A. 445, 449 (1913) (allowing one statute prohibiting alcohol sales between 12 a.m. and 5 a.m. but approving them at all other times, and a second outlawing alcohol sales on Sundays, to operate independently such that no alcohol could be sold at either time).

140. In one case, the defendant was alleged to have used a forged check. The action fell under both the False Pretense Act and the Worthless Check Act. Each Act included different requirements and penalties. The court considered allowing both laws to operate, giving prosecutors a choice as to which law to use, but instead found an implied repeal. Waye v. State, 231 Md. 510, 516, 191 A.2d 428, 431 (1963). The court said: "[W]e do not believe that the Legislature intended to create such an anomalous and incongruous situation as to limit the penalty, when a worthless check and property valued at less than $100 are involved, to $50 and eighteen months' confinement when the prosecution is under § 142 [of the Worthless Check Act], but to permit a much higher and more severe penalty under identical facts simply because someone decides to bring the prosecution under § 140 [of the False Pretense Act]."
In the rare case where two statutes are truly incompatible, the court has favored the more recent statute over the earlier one, considering it the most recent expression of legislative intent. However, it is sometimes difficult to determine which statute is the most recent. The court has considered different stages in the legislative process as critical. In some cases, the court has found that the last statute passed by the legislature dominates. In other cases, the court has given preference to the law that was more recently signed by the Governor.

3. Analysis.—

a. Sovereign Immunity.—Without explanation, the Harris court dismissed as “sheer folly” the State’s contention that section 17-107(b) of the Transportation Article did not constitute a waiver of sovereign immunity. Presumably, the court agreed with the argument of the Court of Special Appeals that section 17-107(b) contained both elements needed for a waiver. Thus, the statutory language indicating that a vehicle owner could no longer “raise the defense of sovereign or governmental immunity” provided the consent element even without the use of the word “waiver.” Likewise, the statute’s inclusion of language about insurance in the form of “security” provided the needed authorization for paying judgments. Unfortunately, the lack of any detailed explanation will


143. See, e.g., State v. Davis, 70 Md. 237, 239-40, 16 A. 529, 529 (1889). The court has also said that the act “enacted most recently” prevails. Schlossberg, 306 Md. at 61, 507 A.2d at 178-79. Among the definitions of “enact” is “to make (as a bill) into law.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 409 (1983). As such, the focus is on when the Governor signs a bill and makes it a law. Two acts signed by the Governor on the same day are presumed to have been signed in numerical order. Davis, 70 Md. at 239-40, 16 A. at 529.

144. Harris, 327 Md. at 41, 607 A.2d at 557.


147. See id.
most likely prevent the case from having any broad impact on Maryland sovereign immunity law.

b. Repeals by Implication.—In analyzing whether section 17-107(b) and the MTCA were in conflict, the court recited the old precept that "the law does not favor repeals by implication." It found no clear legislative intent for a repeal. Of the shopping list of intent indicators described earlier, the court mentioned some but not others. The Harris court noted that the legislature had "repealed and reenacted, with amendments" section 17-107(b) several times after the enactment of the MTCA. Also, the court used the MTCA's no-repeal language to refute the State's argument that the legislature intended the MTCA to cover fully the area of sovereign immunity waiver and thereby preempt section 17-107(b). Interestingly, the fact that both Acts were passed by the same legislature went unnoted, although it could have served as another argument against implied repeal.

After finding no intent to repeal, the court held that there was also no "manifest repugnancy," "irreconcilable inconsistency," or "irreconcilable conflict" between the two statutes. The court noted that the two statutes set different liability limits and that section 17-107(b) exposed local governments to suits, unlike the MTCA, which only applied to the state government. Harris concluded, "In light of the differences between the two statutes . . . , they may be construed in harmony with each other. . . ." Although the court used its "harmony" rhetoric, it refused to merge the two statutes and read the MTCA's filing requirement into section 17-107(b).

Although the court avoided having to choose which law re-

148. Harris, 327 Md. at 39, 607 A.2d at 555.
149. See id.
150. See supra notes 123-128 and accompanying text. See also supra note 128 for a discussion of factors other states have considered.
151. Harris, 327 Md. at 40, 607 A.2d at 556.
152. Id.
153. Id. at 38, 41, 607 A.2d at 555, 557.
154. Id. at 38, 607 A.2d at 555.
155. Id. at 39, 607 A.2d at 555.
156. See supra notes 104-113 and accompanying text for a more complete description of the differences between the MTCA and § 17-107(b).
157. Harris, 327 Md. at 41, 607 A.2d at 557.
158. See id., 607 A.2d at 556-57. The Harris court declared: "There is absolutely no basis in our view for the State's contention that the MTCA notice of claim requirement as a condition precedent to the waiver of the State's sovereign immunity is somehow implicitly implanted within the provisions of § 17-107(b.)." Id.
pealed the other, it indicated that MTCA would have prevailed.\textsuperscript{159} The court noted that the MTCA had a higher chapter number and therefore was presumably signed second by the Governor.\textsuperscript{160} Thus, the court considered the MTCA to be the most recent expression of legislative intent.\textsuperscript{161} However, the \textit{Harris} court never examined whether the legislature had passed one law before the other; nor did the court acknowledge that section 17-107(b) took effect first.\textsuperscript{162}

The court applied legal principles without fully explaining how and why they were being applied and without exploring the contours of those principles. As a result, \textit{Harris} provides little guidance to lower courts as to how to harmonize two seemingly conflicting statutes. Further, the legislature is left without much advice as to how to ensure that its intent will be given full effect.

4. \textit{Conclusion}.—The most significant impact of \textit{Harris} will occur in actions by plaintiffs against the State for motor vehicle accidents. For plaintiffs whose persons or property are damaged by state vehicles, \textit{Harris} affirms an important legal alternative to the MTCA. Each statute presents plaintiffs with different strategic advantages and disadvantages. As the court has now firmly established, the plaintiff gets to choose which way to proceed.

\textbf{Matthew H. Joseph}

\footnotesize
\textsuperscript{159} \textit{Id.}, 327 Md. at 38, 607 A.2d at 555.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} See \textit{id.}
\textsuperscript{162} Section 17-107(b) took effect July 1, 1981, while the MTCA took effect July 1, 1982. \textit{See id.} Had the court considered this factor, the MTCA would still have prevailed.
XII. Torts

A. "Fixing" Punitive Damages and the Advent of State-of-the-Art Knowledge in Maryland

In *Owens-Illinois, Inc. v. Zenobia*,, the Court of Appeals held that evidence of state-of-the-art knowledge was admissible against manufacturers, as well as suppliers and installers, of asbestos in a strict products liability failure-to-warn claim. By permitting the admission of state-of-the-art evidence against both manufacturers and suppliers, the decision will undoubtedly affect the cost of many consumer products. Although admission of this evidence may be justified with regard to manufacturers, its admission against suppliers and installers is likely to bring about unjust results.

Further, the court held that "actual malice," as demonstrated by clear and convincing evidence, was required to support an award of punitive damages in all non-intentional tort actions. The heightened standard of proof to support an award of punitive damages—that is, a standard of clear and convincing evidence—was held to apply even beyond non-intentional torts, to all tort actions.

There were two additional parts of the Court of Appeals' holding. First, the court held that a seller of products has a continuing duty to warn of the dangers associated with its product. Thus, the seller in *Zenobia* was "not entitled to automatic relief from its continuing duty to warn merely because it no longer manufacture[d] a defective product." Second, the court held that a nonparty manufacturer is not liable for contribution, and therefore reversed the granting of the cross-claims against Raymark in the *Zenobia* cases.

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2. *Id.* at 437, 442-43, 601 A.2d at 641, 644.
3. *Id.* at 460, 469, 601 A.2d at 652, 657. The heightened standard of proof to support an award of punitive damages—that is, a standard of clear and convincing evidence—was held to apply even beyond non-intentional torts, to all tort actions. *Id.* at 469, 601 A.2d at 657.
1. The Case.—In 1948, William Zenobia worked as a painter for four months in the shipyard of the Bethlehem Steel Corporation at Sparrows Point, Maryland.\(^5\) Zenobia later worked for eighteen months as a pipe fitter at the Maryland Shipbuilding and Drydock Company shipyard.\(^6\) Louis Dickerson was a laborer in both the shipyard and the steel mill of the Bethlehem Steel Corporation at Sparrows Point between 1953 and 1963.\(^7\) During their respective employments, neither worker received any warnings regarding the toxic effects of the asbestos fibers present in their work environment.\(^8\) Years later, both workers were diagnosed as suffering from pleural and parenchymal asbestosis.\(^9\)

Zenobia and Dickerson filed complaints in the Circuit Court for Baltimore City against various manufacturers, suppliers, and installers of the asbestos products seeking damages for injuries resulting from their exposure to asbestos.\(^10\) Both plaintiffs named manufacturer Owens-Illinois, as well as suppliers-installers MCIC and Porter Hayden Company, as defendants.\(^11\) In addition, Zenobia named supplier-installer Anchor Packing Company as a defendant in his case.\(^12\) Dickerson also named manufacturers Eagle-Picher Industries and Celotex Corporation as defendants in his case.\(^13\) By the

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5. Zenobia, 325 Md. at 428, 601 A.2d at 637.
7. Zenobia, 325 Md. at 428, 601 A.2d at 637.
8. See id. at 427-28, 601 A.2d at 636. Studies have indicated that during the last 40 years, more than 21 million Americans have been significantly exposed to the dangers of asbestos products. See Erving J. Selikoff, Report to the U.S. Dep’t of Labor, Disability Compensation for Asbestos-Associated Disease in the United States 4 (1982). An estimated 200,000 people will die from asbestos-related cancer by the end of the century. Id. The overwhelming majority of these Americans still do not know that they have been exposed to this potentially lethal substance. See Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1323 (5th Cir. 1985) (comparing these figures to the 20,000 personal injury lawsuits that had been filed as of 1985), cert. denied, 478 U.S. 1022 (1986).
9. Zenobia, 325 Md. at 428, 601 A.2d at 636. Asbestosis has been defined as “a kind of lung disease caused by the . . . prolonged inhalation of asbestos dust . . . [that] has been shown to be a cause of cancer, especially of the bronchial tubes and pleura [the membrane that covers the interior surfaces of the lung].” 1 Schmidt’s Attorneys’ Dictionary of Medicine A-397 (17th ed. 1991).
10. Zenobia, 325 Md. at 428, 601 A.2d at 636.
12. Id., 601 A.2d at 637.
13. Id., 601 A.2d at 636. A number of additional defendants had either been granted summary judgment or had settled their cases with the plaintiffs at different stages prior to or during the trial. Id. at 428 n.1, 601 A.2d at 637 n.1.
time of trial, both plaintiffs had abandoned all theories of liability except for strict products liability premised on the defendants' failure to warn of the dangers of asbestos.\(^\text{14}\) Their cases were consolidated for the purposes of trial and appeal.\(^\text{15}\)

A Baltimore City jury awarded Zenobia $1,200,000 in compensatory damages against all four defendants in his case.\(^\text{16}\) The jury also awarded Zenobia a total of $237,500 in punitive damages.\(^\text{17}\) The jury awarded Dickerson compensatory damages in the amount of $1,300,000 against all five defendants in his case, as well as punitive damages totalling $609,500.\(^\text{18}\)

The Court of Special Appeals affirmed all the damages awards, except for the punitive damages award assessed against Porter Hayden.\(^\text{19}\) The Court of Appeals granted plaintiffs' and defendants' cross petitions for writs of certiorari, vacated the decision of the Court of Special Appeals, and remanded the case to the Circuit Court for Baltimore City to apply the proper damages standards.\(^\text{20}\)

2. Legal Background.—

a. State-of-the-Art Knowledge.—State of the art has been defined as knowledge that "includes all of the available knowledge on a subject at a given time, . . . [including] scientific, medical, engineering, and any other knowledge that may be available. State of the art includes the element of time: What is known and when was this knowledge available."\(^\text{21}\) Essentially, when a defendant is imputed with state-of-the-art knowledge, that defendant is held to the level of the


15. \textit{Zenobia}, 325 Md. at 428, 601 A.2d at 636.

16. \textit{Id.} at 429, 601 A.2d at 637.

17. \textit{Id.} The punitive damages in favor of Zenobia were assessed against Owens-Illinois in the amount of $235,000 and Porter Hayden in the amount of $2,500. \textit{Id.}

18. \textit{Id.} Dickerson's punitive damages were assessed against Owens-Illinois in the amount of $235,000, Porter Hayden in the amount of $2,500, and Celotex in the amount of $372,000. \textit{Id.}


20. Zenobia, 325 Md. at 475-76, 601 A.2d at 660.

21. \textit{Lohrmann v. Pittsburgh Corning Corp.}, 782 F.2d 1156, 1164 (4th Cir. 1986). \textit{See generally} Ellen Wertheimer, \textit{Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back}, 60 U. Cin. L. Rev. 1183, 1207 n.78 (1992) (surveying the approaches that a number of different jurisdictions have taken towards state-of-the-art knowledge before concluding that "[v]arious definitions of state of the art exist in various jurisdictions").
highest expert in the land. 22

The concept underlying state-of-the-art knowledge can be found in Maryland case law as early as 1958. In Babylon v. Scruton, 23 the Court of Appeals stated that "'a person who undertakes such manufacturing will be held to the skill of an expert in that business and to an expert's knowledge of the arts, materials, and processes.' "24 Despite this language, it is important to note that the rule in Babylon was not initially applied to hold manufacturers to the level of state of the art. In fact, the courts ignored any suggestion that Babylon stood for the imposition of state-of-the-art knowledge and consistently applied a negligence-based "reasonableness" standard when determining the liability of manufacturers. 25 Under this standard, manufacturers could rely on compliance with industry standards as evidence of their reasonableness. 26

In 1976, the Court of Appeals adopted the Restatement doctrine of strict liability in tort. 27 Once this theory of liability was established in Maryland, there remained an unanswered question as to what degree of knowledge, if any, was required for strict liability failure-to-warn claims. 28

Two courts addressed this question before it was conclusively decided by the Court of Appeals in Zenobia. In 1985, the Court of

22. See Dartez v. Fibreboard Corp., 765 F.2d 456, 463 (5th Cir. 1985) (holding that the deposition of the former medical director of a non-party asbestos manufacturer was admissible to show the existence of state-of-the-art knowledge on the part of the defendant); Eagle-Picher Indus., Inc. v. Balbos, 84 Md. App. 10, 91, 98, 578 A.2d 228, 269, 271 (1990) (holding that the minutes of an American Textile Institute meeting, as well as the deposition of the president of the Industrial Health Foundation, were admissible despite defendant's claim that it was not a member of either organization), aff'd in part and rev'd in part, 326 Md. 179, 604 A.2d 445 (1992).


24. Id. at 304, 138 A.2d at 378 (quoting 2 Fowler V. Harper & Fleming James, Jr., The Law of Torts § 28.4 (1956)).

25. See, e.g., Twombley v. Fuller Brush Co., 221 Md. 476, 494, 158 A.2d 110, 119 (1960) (citing Babylon, but framing the issue as "'whether or not the defendant knew or ought to have known that its [product] was likely to be dangerous when put to its intended use"); Frericks v. General Motors Corp., 274 Md. 288, 304, 336 A.2d 118, 128 (1975) (citing Babylon, but holding that "a manufacturer or a dealer is liable only if he knew of or could have by reasonable care discovered the defect").

26. See, e.g., Honolulu Ltd. v. Cain, 244 Md. 590, 224 A.2d 433 (1966). In Cain, the Court of Appeals held that "'conformance to an industry standard is, of course, often weighty evidence that the action in question is reasonable and non-negligent. It is not, however, conclusive evidence.'" Id. at 598, 224 A.2d at 437.


28. Although products liability is generally thought to impose liability without fault, thus making the defendant's knowledge irrelevant, this is not usually so in failure-to-warn claims. See infra text accompanying note 71.
Special Appeals confronted the issue in *Troja v. Black & Decker Manufacturing Co.* Although the court expressed a willingness to hold that state-of-the-art evidence was admissible in strict liability failure-to-warn claims, *Troja* did not conclusively decide the question because the court found that the relevant testimony referred to the state of the art at the time of trial, instead of at the time of manufacture. Less than one year later, the United States Court of Appeals for the Fourth Circuit addressed the state-of-the-art question in *Lohrmann v. Pittsburgh Corning Corp.*, finding "that in Maryland, state of the art can be considered in a strict liability tort case where the claimed defect is a failure to warn."

The application of state-of-the-art knowledge was also addressed by the Court of Special Appeals in *Eagle-Picher Industries, Inc. v. Balbos*. In *Balbos*, the intermediate appellate court held that evidence of state-of-the-art knowledge was admissible in a negligence-based failure-to-warn claim. However, the question of whether the Court of Appeals would adopt the Fourth Circuit’s *Lohrmann* holding or narrowly construe the *Balbos* holding to limit the application of state-of-the-art evidence to negligence-based products liability claims remained open until the *Zenobia* decision. The *Zenobia* court opted to follow *Lohrmann*’s lead, holding that state-of-the-art knowledge was relevant and admissible in a strict products liability failure-to-warn claim.

### b. Supplier's and Installer's Liability.

Prior to the advent of strict liability in Maryland, the general rule in negligence-based products liability cases was that a nonmanufacturing supplier or installer was equally as liable as a manufacturer. In *Woolley v. Uebelhor*, the court held that "a vendor, like a manufacturer, is subject to liability if, although ignorant of the dangerous character or condition, he could

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30. *See id.* at 112, 488 A.2d at 521 (referring to "a direct admonition by the court that it was concerned with the status of the technology as it existed in 1976 [the date of manufacture], not 1984 [the trial date]"). *Cf. Robert D. Klein, 'Old Products': The Admissibility of State of the Art Evidence in Product Liability Cases, 9 J. PROD. LIAB. 233, 258 (1986)* (categorizing *Troja* as conclusively establishing the admissibility of state-of-the-art evidence in failure-to-warn claims).
31. 782 F.2d 1156 (4th Cir. 1986).
32. *Id.* at 1164.
34. *Id.* at 48-49, 578 A.2d at 246-47.
35. *Zenobia*, 325 Md. at 437, 601 A.2d at 641.
36. 239 Md. 318, 211 A.2d 302 (1965).
have by the exercise of reasonable care discovered it by utilizing the peculiar opportunity and competence which he has or should have as a dealer in such chattels.”

In *Phipps v. General Motors Corp.*, which introduced strict liability in Maryland, the court implied that both manufacturers and suppliers would be held to the same standard by holding that “[f]or a seller to be liable under § 402A, the product must be both in a ‘defective condition’ and ‘unreasonably dangerous’ at the time that it is placed on the market by the seller.” The use of the generic term “seller” suggested that the *Phipps* court did not distinguish between manufacturers and suppliers or installers of defective products. This equal treatment of manufacturers and suppliers was reaffirmed by the Court of Special Appeals in *Balbos*.

In *Balbos*, the court revitalized the “peculiar competence” rule and applied it in a negligence-based products liability case. The court treated the installer of asbestos-containing products in exactly the same manner as the manufacturer, holding them equally liable. The question of whether this equal treatment would be extended to strict products liability claims, however, remained open until *Zenobia*. In *Zenobia*, the court decided that it would be so extended.

c. Punitive Damages.—The landmark case of *Knickerbocker Ice Co. v. Gardiner Dairy Co.* established a cause of action for torts arising out of contract in Maryland. In addition, *Knickerbocker* held that punitive damages were recoverable in such an action if malice was

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37. Id. at 325, 211 A.2d at 306 (emphasis added).
39. Id. at 344, 363 A.2d at 959 (emphasis added).
41. See id. at 50, 578 A.2d at 247.
42. Id. at 49-50, 578 A.2d at 247.
43. *Zenobia*, 325 Md. at 441-42, 601 A.2d at 643.
44. 107 Md. 556, 69 A. 405 (1908).
45. See id. at 566, 69 A. at 409 (“It may be safely said that, if wrongful or unlawful means are employed to induce the breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort.”). See also Gary I. Strausberg, *A Roadmap Through Malice, Actual or Implied: Punitive Damages in Torts Arising Out of Contract in Maryland*, 13 U. BALT. L. REV. 275, 275 (1984) (“A tort arises out of a contract when the act of breaching an agreement gives rise to a separate cause of action in tort.”).

The Court of Appeals found that the *Zenobia* case properly fit within the “tort arising out of contract” framework because “the injuries of the plaintiffs are surrounded by ‘contractual’ relationships, e.g., the employment contract, the contracts to produce/supply asbestos, etc.” *Zenobia*, 325 Md. at 452, 601 A.2d at 649.
shown.\textsuperscript{46} In Smith v. Gray Concrete Pipe Co.,\textsuperscript{47} the court deviated from prior Maryland decisions and allowed a showing of implied malice for recovery of punitive damages.\textsuperscript{48} Implied malice does not require the evil intent to injure found in actual malice.\textsuperscript{49} Instead, implied malice encompasses conduct of an extraordinary nature characterized by extreme recklessness and wanton behavior.\textsuperscript{50} The Smith doctrine of implied malice was originally intended to be a limited holding, "confined to a wanton or reckless disregard for human life, and to the operation of a motor vehicle."\textsuperscript{51} However, the implied malice doctrine was gradually applied in a variety of situations, eventually becoming stretched beyond its originally intended scope.\textsuperscript{52} With two types of malice available, many felt that a plaintiff had the choice of proving actual malice or the less-burdensome implied malice in order to support a claim for punitive damages.\textsuperscript{53}

The companion cases of H & R Block v. Testerman\textsuperscript{54} and Wedeman v. City Chevrolet Co.\textsuperscript{55} refined the existing case law. Taken together, these cases established the "arising out of contract" distinction re-

\begin{itemize}
\item \textsuperscript{46} \textit{Knickerbocker}, 107 Md. at 569-70, 69 A. at 410. At this point in Maryland's legal history, there existed only one "type" of malice—actual malice. \textit{See id.} at 569, 69 A. at 410. "Actual malice" has been defined as "the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and wilfully injure the plaintiff." Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 352, 283 A.2d 392, 398 (1971).
\item \textsuperscript{48} \textit{See id.} at 168, 297 A.2d at 731.
\item \textsuperscript{49} \textit{Id.} at 161, 297 A.2d at 728.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} H & R Block, Inc. v. Testerman, 275 Md. 36, 47, 338 A.2d 48, 54 (1975), \textit{overruled by} Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992). \textit{See also} Smith, 267 Md. at 166, 297 A.2d at 731 (expressing concern regarding "the danger of formulating a test which may be so flexible that it can become virtually unlimited in its application").
\item \textsuperscript{52} \textit{Compare Smith}, 267 Md. at 168, 297 A.2d at 731 (defining implied malice as a "wanton or reckless disregard for human life" (emphasis added)) \textit{with} Wedeman v. City Chevrolet Co., 278 Md. 524, 533, 366 A.2d 7, 13 (1976) (stretching the concept of implied malice to include an "utter disregard for the rights of others" (emphasis added)), \textit{overruled by} Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992).
\item \textsuperscript{53} For example, in Testerman v. H & R Block, Inc., 22 Md. App. 320, 324 A.2d 145 (1974), \textit{rev'd}, 275 Md. 36, 338 A.2d 48 (1975), the Court of Special Appeals held that, although there was no showing of malice, the negligent preparation of tax returns "was in reckless disregard of the rights of others, and would support an award of punitive damages." \textit{Id.} at 351, 324 A.2d at 161-62 (footnote omitted).
\end{itemize}
garding punitive damages. In Testerman, the Court of Appeals held that when the tortious conduct occurs after a contractual relationship is established—that is, the tort "arises out of" the contract—actual malice is required for an award of punitive damages. Conversely, Wedeman held that if the tort occurs before the contract exists, then the action is a "pure" tort action requiring only a showing of implied malice to support an award of punitive damages.

The Court of Special Appeals, in American Laundry Machinery Industries v. Horan, attempted to apply the Testerman-Wedeman distinction to a products liability action. The court decided that although sales of products in consumer transactions do involve contracts, a products liability action does not "arise out of" that contract when the injured plaintiff is not a party to the contract. Therefore, the American Laundry court found that the plaintiffs could properly be awarded punitive damages on a showing of implied malice alone, in compliance with the Testerman-Wedeman distinction. Because malice is not normally found within a products liability setting, the court set forth the following definition of implied malice for products liability actions: "Wanton and reckless conduct... requires, in this context, [1] direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and [2] a gross indifference to the danger."

In Zenobia, the Court of Appeals overruled the Testerman-Wedeman distinction, as well as the doctrine of implied malice set

56. Prior to Zenobia, this distinction had been upheld by the Court of Appeals in Schaefer v. Miller, 322 Md. 297, 587 A.2d 491 (1991). The future of the distinction seemed tenuous at best, however, even in Schaefer. Although it was reaffirmed, the Testerman-Wedeman distinction endured strong criticism from Judge Eldridge in his concurring opinion. Id. at 312, 587 A.2d at 498 (Eldridge, J., concurring in the judgment). Eldridge, who wrote for the Zenobia majority that overruled the Testerman-Wedeman distinction, attacked the rule as having "utterly no relationship to the purposes of punitive damages, leading to irrational results, and [as having] been arbitrarily and inconsistently applied." Id., 587 A.2d at 499 (Eldridge, J., concurring in the judgment).

57. Testerman, 275 Md. at 47, 338 A.2d at 54. General Motors Corp. v. Piskor, 281 Md. 627, 381 A.2d 16 (1977), further refined the holding in Testerman by requiring that there be a "direct nexus" between the tortious conduct and the contract to the extent that "[i]n one form or another... the tort arose directly from performance or breach of the contract." Id. at 637, 381 A.2d at 21.

58. Wedeman, 278 Md. at 529-31, 366 A.2d at 11-12.


60. Id. at 116, 412 A.2d at 419.

61. Id. The Court of Special Appeals limited its holding in American Laundry to punitive damages arising from a negligence cause of action because the Court of Appeals had not yet ruled on the propriety of punitive damages in a strict liability action. Id. at 111, 412 A.2d at 416.

62. Id. at 117, 412 A.2d at 420.
forth in Smith. In so doing, the court rejected twenty years of Maryland precedent surrounding the law on punitive damages. The Zenobia court held that in all non-intentional tort cases "the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud—'actual malice.'"65

3. The Court's Reasoning.—

a. State-of-the-Art Knowledge.—The Zenobia court reasoned that evidence of state-of-the-art knowledge was admissible in a strict liability failure-to-warn claim by conducting an in-depth analysis of Restatement section 402A.66 Section 402A, along with all of the accompanying official comments, was expressly adopted in Maryland under the holding in Phipps v. General Motors Corp.67 In its analysis, the Zenobia court recognized that Comment j, which defines strict liability for failure to warn, "create[s] an exception to the basic rule set out in § 402A."68 The court conceded that the "exception" requires some element of knowledge in a strict liability action in this context.69 Therefore, "negligence concepts to some extent have been grafted onto strict liability."70

Once the line between negligence and strict liability became blurred, the court was free to acknowledge the "general rule" that a manufacturer is not strictly liable in a failure-to-warn case when the absence of a warning is directly attributable to the manufacturer's

63. Zenobia, 325 Md. at 453, 460, 601 A.2d at 649, 652.
64. See id. at 460 n.21, 601 A.2d at 653 n.21 (defining non-intentional tort actions as including all negligence and strict liability claims).
65. Id. at 460, 601 A.2d at 652.
66. See id. at 433-38, 601 A.2d at 639-41.
68. Zenobia, 325 Md. at 433, 460, 601 A.2d at 639. The "basic rule" of § 402A is that strict liability imposes liability upon the seller without any showing of fault, thereby making the defendant's knowledge irrelevant. Id. at 432, 601 A.2d at 639.
69. Id. at 433, 601 A.2d at 639.
70. Id. at 435, 601 A.2d at 640. The line between negligence and strict liability in failure-to-warn cases has always been less than clear. In fact, as the Court of Appeals noted, some commentators have suggested that the distinction is illusory and should be rejected. See James A. Henderson, Jr. and Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. REV. 265, 272 (1990) (advancing this proposition).

However, the Zenobia court also pointed out that there remains one important difference between strict products liability and a negligence-based products liability claim: contributory negligence is not a defense to a strict liability claim. Zenobia, 325 Md. at 435 n.7, 601 A.2d at 640 n.7.
lack of knowledge regarding the danger. However, in order to circumvent this general rule, the Zenobia court relied on the Fourth Circuit's interpretation of Comment j. In Lohrmann v. Pittsburgh Corning Corp., the Fourth Circuit held that Comment j encompasses state-of-the-art knowledge "because it requires the seller to give a warning if he has knowledge, 'or by the application of reasonable, developed human skill and foresight should have knowledge,' of the danger." The Lohrmann interpretation, coupled with the court's concession that negligence concepts play a role in this type of strict liability action, led the Zenobia court to its ultimate conclusion that state-of-the-art evidence is necessary to establish knowledge in a failure-to-warn claim.

b. Supplier's and Installer's Liability.—The issue of the liability of the suppliers and installers in Zenobia arose in the context of a dispute concerning the admissibility of certain deposition testimony. The Court of Appeals relied on Comment f of section 402A, entitled "Business of Selling," to support its holding that the asbestos

71. Zenobia, 325 Md. at 433, 601 A.2d at 639.
72. Id. at 436, 601 A.2d at 640-41.
73. 782 F.2d 1165 (4th Cir. 1986).
74. Id. at 1165 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)) (emphasis added).
75. See Zenobia, 325 Md. at 438 n.8, 601 A.2d at 641-42 n.8. Some jurisdictions, however, have concluded that state-of-the-art knowledge is an affirmative defense to a negligence-based failure-to-warn claim, whereby the defendant can escape liability by proving that no one in the land knew that the product was dangerous at the time of its manufacture. See Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982) (concluding that "state-of-the-art is a negligence defense. . . . [that] seeks to explain why defendants are not culpable for failing to provide a warning"). See also Wertheimer, supra note 21, at 1207 ("Under this [state-of-the-art] defense as originally constituted, the defendant was allowed to escape liability by proving that the product was as safe as the technology at the time of its manufacture made possible.").
76. See Zenobia, 325 Md. at 439, 601 A.2d at 642.
77. Comment f of § 402A reads, in pertinent part:

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. . . .

The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965).
manufacturers were "predecessors in interest" of the suppliers and installers, and therefore, the depositions were admissible.\textsuperscript{78} The court also relied heavily on the hornbook statement that

when a manufacturer or assembler markets without adequate warnings, a reseller is subject to liability without negligence in reselling the product without adequate warning. Thus, all those in the marketing chain subsequent to a sale by the manufacturer are liable without negligence for the negligence of the manufacturer in failing to warn or adequately to warn.\textsuperscript{79}

Although the issue is couched in terms of an evidentiary dispute, the real import of the Zenobia court's holding on this point is that state-of-the-art evidence is equally relevant and admissible against suppliers and installers of defective products, as well as manufacturers of those products.\textsuperscript{80}

c. Punitive Damages.—The Court of Appeals embarked on its analysis of the law of punitive damages in Maryland by commenting on the "proliferation of claims for punitive damages in tort cases, and awards of punitive damages [that] have often been extremely high."\textsuperscript{81} In its analysis, the Zenobia court confronted the companion cases of Testerman\textsuperscript{82} and Wedeman,\textsuperscript{83} as well as Smith v. Gray Concrete Pipe Co.,\textsuperscript{84} and chose to overrule each in turn.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{78} See Zenobia, 325 Md. at 442-44, 601 A.2d at 644. A "predecessor in interest" is defined as any party who has motives to develop a certain line of testimony that are similar to those of the objecting party. \textit{Id.} at 440, 601 A.2d at 643. The central idea is that if the objecting party's predecessor in interest was present at the deposition then all of the relevant questions were asked. Therefore, the objecting party was not prejudiced in any way by not being present at the deposition, and the deposition should be admissible. \textit{Id.} at 440-41, 601 A.2d at 643.
\item \textsuperscript{79} \textit{Id.} at 442, 601 A.2d at 643-44 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 697 (5th ed. 1984)) (emphasis omitted). Note, however, that Prosser and Keeton was discussing products liability claims grounded in negligence. It does not necessarily follow that the same rules apply to products liability actions grounded in strict liability. The Zenobia court, however, failed to address this point.
\item \textsuperscript{80} Zenobia, 325 Md. at 441-43, 601 A.2d at 643-44 (holding that the absence of an adequate warning, as required by the state of the art, makes "middlemen or intermediate sellers of the defective product . . . strictly liable to the plaintiff user just as the manufacturer is liable to the plaintiff").
\item \textsuperscript{81} \textit{Id.} at 450, 601 A.2d at 648.
\end{itemize}
The court first subjected the Testerman-Wedeman distinction—the "arising out of contract" rule—to strict scrutiny in light of the fundamental purposes of punitive damages: punishment and deterrence. The court reasoned that the "arising out of contract" rule does not effectively deter a defendant's behavior because the rule "focuses on when the conduct occurred rather than on the nature of the conduct." The rule was found illogical because the tortious conduct is equally as offensive whether it occurs before or after the formation of a contractual relationship. Furthermore, the rule has led to irrational results and inconsistent applications that "undermine[] the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award." The Court of Appeals therefore concluded that this troublesome rule "has no relationship to the purposes of punitive damages" and wisely chose to abandon it.

When the Testerman-Wedeman distinction was overruled the court was left with two possible standards for awarding punitive damages, actual malice and implied malice. In choosing between the standards, the court reasoned that "the implied malice standard would not further either objective of punishment or deterrence." Likewise, the doctrine of implied malice had been applied too broadly and was, by its very definition, too vague to serve as an effective deterrent. The Zenobia court recognized that if a defendant cannot ascertain what conduct is acceptable and what is not, he will be incapable of altering his behavior to conform to the limits of that which is acceptable.

Before completely overruling it, the court attacked the Smith doctrine of implied malice for departing from established Maryland

85. See Zenobia, 325 Md. at 453, 460, 601 A.2d at 649, 652.
86. See id. at 453-55, 601 A.2d at 649-50.
87. Id. at 454, 601 A.2d at 650.
88. See id., 601 A.2d at 649.
89. Id. at 455, 601 A.2d at 650.
90. Id. at 454, 601 A.2d at 650.
91. Id. at 455, 601 A.2d at 650.
92. Id. at 456, 601 A.2d at 650.
93. See id. at 459, 601 A.2d at 652.
94. See id. Another problem, as the court noted, is that a vague and inconsistent standard for punitive damages could lead to the result that "[a] potential defendant will . . . become too cautious, refusing to engage in socially beneficial behavior." Id. at 459-60 n.19, 601 A.2d at 652 n.19 (quoting 2 Linda L. Schlueter & Kenneth R. Redden, PUNITIVE DAMAGES app. B at 418-19 (2d ed. 1989)).
law, relying on out-of-state authority,\textsuperscript{95} and neglecting to analyze whether the doctrine of implied malice would further the underlying goals of punitive damages.\textsuperscript{96} The court acknowledged, however, that the \textit{Smith} court intended to limit its holding, and that the problem had developed in subsequent cases when this holding was "freely applied to other non-intentional torts."\textsuperscript{97} Thus, the \textit{Zenobia} court clarified this doctrinal confusion in Maryland law.

In its holding, the court announced that a showing of actual malice will now be required to support an award of punitive damages in all non-intentional tort actions.\textsuperscript{98} Turning to the facts in \textit{Zenobia}, the court acknowledged that because this standard is "characterized by evil motive, intent to injure, ill will, or fraud, [it] does not translate easily into products liability cases . . . [because] it is not likely that a manufacturer or supplier of a defective product would specifically intend to harm a particular consumer."\textsuperscript{99} The \textit{Zenobia} court therefore customized its new standard to fit products liability settings.\textsuperscript{100} A products liability plaintiff must now prove "(1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect" in order to justify the jury's consideration of punitive damages.\textsuperscript{101}

\begin{itemize}
  \item \textsuperscript{95} But see id. at 463-65, 601 A.2d at 654-55 (relying almost exclusively on out-of-state authority to hold that punitive damages are not inconsistent with a strict products liability claim).
  \item \textsuperscript{96} Id. at 456, 601 A.2d at 650-51.
  \item \textsuperscript{97} Id. at 457, 601 A.2d at 651.
  \item \textsuperscript{98} Id. at 460, 601 A.2d at 652. As noted previously, the \textit{Zenobia} court also held that a heightened standard of proof—that of "clear and convincing evidence"—will now be required to support an award of punitive damages in all tort cases. \textit{Id.} at 469, 601 A.2d at 657. The court gave two reasons for this decision: (1) punitive damages tend to stigmatize the defendant due to their quasi-criminal nature, and (2) the need to insure that punitive damages are properly awarded. \textit{Id.} at 468, 601 A.2d at 656.
  \item \textsuperscript{99} Id. at 460-61, 601 A.2d at 653.
  \item \textsuperscript{100} See id. at 462, 601 A.2d at 653.
  \item \textsuperscript{101} Id. See infra notes 140-141 and accompanying text for a comparison of the holding in \textit{Zenobia} to that of the Court of Special Appeals in \textit{American Laundry Mach. Indus. v. Horan}, 45 Md. App. 97, 412 A.2d 407 (1980).

In the course of its holding, the \textit{Zenobia} court also laid to rest the popular argument that punitive damages are inconsistent with the nature of a strict products liability action because they require an element of fault whereas strict liability imposes liability without fault. \textit{Zenobia}, 325 Md. at 463-65, 601 A.2d at 654-55. The court maintained that there is no inconsistency and explained simply that different levels of proof must be met in order to recover. \textit{Id.} at 465, 601 A.2d at 655. For example, a plaintiff may submit state-of-the-art evidence to support his claim for compensatory damages, and then take his case a step further, in order to support his claim for punitive damages, by submitting evidence that the defendant actually knew of the defect and consciously disregarded the danger. \textit{Id.}
4. Analysis.—The Court of Appeals addressed two issues that were not raised by any of the parties to the litigation.\textsuperscript{102} The 
Zenobia\textsuperscript{a} case thus appears to be simply a vehicle by which the Court of Appeals chose to steer Maryland law away from what it perceived to be excessive, runaway jury verdicts and towards a solid foundation of compensatory relief for injured plaintiffs.

\textit{a. State-of-the-Art Knowledge.—} In its analysis of the Restatement, the Court of Appeals concluded that strict liability failure-to-warn claims necessarily incorporate some negligence concepts, such as the requirement of knowledge.\textsuperscript{103} The fundamental problem with the analysis is that the court did not provide any justification for its holding that state-of-the-art knowledge, an arguably high standard, is the appropriate degree to require.\textsuperscript{104}

\textit{Zenobia} represents a transition in Maryland from reliance on industry standards as evidence of a manufacturer's reasonableness to the strict scrutiny imposed by state-of-the-art knowledge.\textsuperscript{105} This

\textsuperscript{102} As to the admissibility of state-of-the-art evidence, the court admitted that "neither side . . . challenged the trial court's ruling that a knowledge component or 'state of the art' is pertinent in a strict liability failure to warn case." \textit{Zenobia}, 325 Md. at 436, 601 A.2d at 640.

Additionally, as to the correct standard to support an award of punitive damages, the court ordered the parties to brief and argue this issue in the following court order: "In light of the concurring opinion of Judges Eldridge, Chasanow, and Cole in \textit{Schaefer v. Miller}, 322 Md. 297, 312-332, 587 A.2d 491 (1991), what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and products liability cases, \textit{i.e.}, gross negligence, actual malice, or some other standard." \textit{Zenobia}, 325 Md. at 450, 601 A.2d at 647.

\textsuperscript{103} \textit{Zenobia}, 325 Md. at 435, 601 A.2d at 640.

\textsuperscript{104} In other words, the court did not explain its conclusion that if an expert has knowledge of the dangers of a product, then the manufacturer "should have knowledge" of that danger as well. \textit{id.} at 437, 601 A.2d at 641. It should go without saying that this is not necessarily true. It often takes years for new medical discoveries to be disseminated to the public, and even longer for the implications of these discoveries to be absorbed and understood by manufacturers. Because courts have overlapped strict liability with negligence concepts, \textit{Zenobia} could have chosen to require a showing of actual or implied knowledge instead of state-of-the-art knowledge. \textit{See, e.g.}, \textit{O'Connor v. Kawasaki Motors Corp.}, 699 F. Supp. 1538, 1543 (S.D. Fla. 1988) (holding that "[a] retailer or distributor may be held liable for a design defect only if it can be charged with actual or implied knowledge of the defect"). Although the court provides no justification for its choice, on the continuum of possible knowledge requirements, state-of-the-art knowledge does seem to be most in accord with the traditional principles of strict liability—that is, liability without fault.

\textsuperscript{105} Industry standards are very different from state-of-the-art knowledge in that "[s]tate of the art is a higher standard because scientific knowledge expands much more rapidly than industry can assimilate the knowledge and adopt it as a standard." \textit{Lohrmann v. Pittsburgh Corning Corp.}, 782 F.2d 1156, 1164 (4th Cir. 1986). While the \textit{Lohrmann} court assumed that once an industry is aware of the state-of-the-art knowledge it will always choose to adopt it as an industry standard, \textit{id.}, this may not always be the
development has dramatically changed Maryland law, and not without societal costs. First is the recognition that manufacturers will no longer be able to cloak themselves in the safety that industry standards previously afforded them. The days of the "that was common practice throughout the industry" defense are effectively over. Now held to the level of an expert, manufacturers will be forced to seriously rethink their current research and development policies, which will invariably have economic implications for the consumer.\(^{106}\) Secondly, *Zenobia* will affect Maryland law and practice because of the increased importance it places on discovery proceedings in products liability cases. In order to establish state-of-the-art knowledge, there will doubtless be a need for additional depositions of expert witnesses, interrogatories, and requests for documents, with their subsequent costs both to the litigants and to society.\(^{107}\)

Although state-of-the-art knowledge is an arguably high standard, there are jurisdictions that have concluded that knowledge is totally irrelevant in products liability actions.\(^{108}\) In such jurisdictions, no element of knowledge is required in order for the plaintiff to recover, not even that of state of the art. A manufacturer in these jurisdictions will be held liable even if none of the relevant experts knew of the product's dangers at the time of its manufacture. Such holdings are normally reached by concluding that the fundamental purpose of products liability is some combination of the following: compensation for the unwitting victim, risk spreading, and accident avoidance.\(^{109}\) Regardless of how it is described, this is virtually ab-
solute liability.\textsuperscript{110} Manufacturers across Maryland can be thankful that the Court of Appeals rejected this absolutist approach and realized "that '[d]espite the use of the term "strict liability" the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product.'"\textsuperscript{111}

\vspace{1em}b. Supplier's and Installer's Liability.—After analyzing Comment f of Restatement section 402A,\textsuperscript{112} the court concluded that sellers are equally as liable as manufacturers in strict liability failure-to-warn claims when a warning was required "in light of the state of the art."\textsuperscript{113} The obvious flaw with this analysis is that Comment f does not mention state-of-the-art knowledge, nor is it likely that such a standard was being applied by the courts when the Restatement was published in 1965.\textsuperscript{114}

Moreover, the court's reliance on Eaton Corp. v. Wright\textsuperscript{115} and Nissen Corp. v. Miller\textsuperscript{116} seems misplaced because both of those cases are factually distinguishable from Zenobia. In Eaton Corp., the retailer of the propane fuel canister that exploded was never even named in the plaintiff's suit.\textsuperscript{117} In Nissen Corp., the court did not even address the question of a seller's liability; it focused on the fact that the defendant was a corporate successor to the original seller of a defective product, and was not involved in the original sale.\textsuperscript{118} However, the result-oriented reasoning of the Zenobia court failed to take these inconsistencies into account.

The decision in Zenobia, coupled with the subsequent decision

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\textsuperscript{110} See id. at 545-48 (relying on these policy concerns despite the defendant's contentions that it is being held absolutely liable).
\textsuperscript{111} Zenobia, 325 Md. at 437, 601 A.2d at 641 (quoting Phipps v. General Motors Corp., 278 Md. 337, 351-52, 363 A.2d 955, 963 (1976)).
\textsuperscript{112} See supra note 77 for the relevant text.
\textsuperscript{113} Zenobia, 325 Md. at 441, 601 A.2d at 643.
\textsuperscript{114} See Restatement (Second) of Torts § 402A cmt. f (1965). Roberts v. May, 583 P.2d 305 (Colo. Ct. App. 1978), appears to be the earliest case to apply a state-of-the-art standard as it is currently recognized in Maryland. Notably, Roberts was not decided until 1978, thirteen years after the Restatement was published.
\textsuperscript{115} 281 Md. 80, 375 A.2d 1122 (1977).
\textsuperscript{116} 323 Md. 613, 594 A.2d 564 (1991).
\textsuperscript{117} See Eaton Corp., 281 Md. at 83 n.1, 375 A.2d at 1124 n.1. The distributor of the canister, the Coleman Company, was sued by the plaintiff. Id. at 82, 375 A.2d at 1123. However, Coleman had placed its own label on the canister prior to distribution. Id. Therefore, this placed Coleman squarely within the ambit of Restatement (Second) of Torts § 400 (1965) (imposing liability on a seller for a product manufactured by another when the seller represents that product as his own).
\textsuperscript{118} Nissen Corp., 323 Md. at 624, 594 A.2d at 569.
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by the Court of Appeals in *Eagle-Picher Industries, Inc. v. Balbos*,119 created three different categories of failure-to-warn claims and assigned to suppliers and installers a slightly different standard of care in each category. First, the court decided that a strict liability failure-to-warn claim will be evaluated under a "should have known" standard.120 In this category, state-of-the-art evidence will play a role in determining what the supplier or installer should have known.121 In a negligence-based failure-to-warn claim, the *Balbos* court held that the proper standard depends upon the degree of involvement of the supplier or installer.122 Therefore, the second category is that of a negligence-based failure-to-warn claim in which the supplier or installer does "something more than merely act as a conduit of goods."123 This category is also governed by a "should have known" standard.124 However, the critical difference is that under the second category, the *Woolley* "peculiar competence" rule125 will play a role in determining what the supplier or installer should have known.126 Finally, the last category is that of a negligence-based failure-to-warn claim in which the supplier or installer acts as "nothing more than a conduit between a manufacturer and a customer."127 This category is evaluated under the significantly lower "reason to know" standard.128

The distinctions that the court drew in categorizing the different types of failure-to-warn claims do have a certain logical ap-

120. See id. at 199-200, 604 A.2d at 455 ("In *Zenobia* we held that a supplier-installer . . . is held to a 'should have known' standard when the action is based on the principles of strict liability under § 402A of the Restatement."). The "should have known" situation arises when "a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists." *Restatement (Second) of Torts* § 12(2) (1965).
121. *Zenobia*, 325 Md. at 442-43, 601 A.2d at 644 (holding that "intermediate sellers such as the suppliers/installers in the present case have the same interest as the manufacturers in attempting to show that the state of the art did not require a warning").
122. *Balbos*, 326 Md. at 202-03, 604 A.2d at 456.
123. Id. at 203, 604 A.2d at 456.
124. Id., 604 A.2d at 457.
127. Id. at 202, 604 A.2d at 456.
128. Id. at 202-03, 604 A.2d at 456. The "reason to know" situation arises when "the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." *Restatement (Second) of Torts* § 12(1) (1965).
Problems arise, however, with the enhanced "should have known" standard that the court created to govern two of these categories. For example, in a strict liability failure-to-warn claim, it seems inherently unfair to hold a supplier or installer to the same standard as a manufacturer. Imposing state-of-the-art knowledge on a manufacturer may be reasonable in light of the fact that manufacturers often have extensive research and development departments to test the safety of their products. However, it seems inherently unfair, and misconceived for policy reasons, to require suppliers and installers of products to set up similar testing facilities before they decide to sell or install a particular product. Yet, this is what Zenobia foreshadows.

Similarly, it may be time for the court to rethink the underlying justifications for the Woolley "peculiar competence" rule as it is used in negligence-based failure-to-warn claims. The rule in Woolley effectively creates an irrebuttable presumption that nonmanufacturing installers have a "peculiar competence" regarding the products they install, imposing liability on them simply because of that presumption. This justification is severely outdated. With today's

129. Note, however, that the court has created the anomaly that a supplier of products who can properly be labelled a mere "conduit" will be fully liable to the plaintiff in strict liability, but will escape all liability for negligence. This is because in the strict liability claim state-of-the-art evidence is admissible against the supplier, but in the negligence claim the supplier is not liable unless he had "reason to know" of the defect. This emphasis on form over substance merely turns the issue of liability into one of proper pleading.

130. Note that the broader references to both suppliers and installers in this paragraph, as well as the narrower references to only installers in the next paragraph, are intentional. This is because in a negligence-based failure-to-warn claim, governed by the Woolley rule, if a corporation is merely a supplier of products it will probably be deemed a "conduit" and therefore subject to the "reason to know" standard.

131. See Woolley v. Uebelhor, 239 Md. 318, 325, 211 A.2d 302, 306 (1965). The "peculiar competence" rule in Woolley was applied by the Court of Appeals to the installers in the products liability asbestos case of Eagle-Picher Industries, Inc. v. Balbos, 326 Md. 179, 604 A.2d 445 (1992). Ask yourself critically whether you think that a general contractor has a "peculiar competence" in the toxic effects of the building materials he uses. Would he continue to surround himself and his workers with such materials if he did? Often times such a contractor installs the asbestos-containing products at the specific direction of the owner of the building. Should the installer still be liable in this situation?

The Balbos court took special notice of the fact that "Porter [the installer] was formed by former employees of Johns-Manville [the manufacturer], a company that dealt almost exclusively in asbestos products. Porter installed or otherwise supplied asbestos products acquired almost exclusively from Johns-Manville." Id. at 204, 604 A.2d at 445. The court in Balbos seemed to be making a special reference to the close relationship that existed between the installer and the manufacturer in that case. However, with regards to the liability of other installers, shouldn't Balbos create an exception rather than the general rule?
high-technology products, even installers of products have little, if any, "peculiar competence" with regard to the products they install.\textsuperscript{132}

This problem of fairness to suppliers or installers, even when they act as more than mere "conduits," is further exacerbated by the fact that the dangers of asbestos fibers are arguably latent dangers. Some jurisdictions have taken the following approach when confronting latent defects:

An installer or handler of a piece of equipment or machinery, manufactured by another, is under no duty to make more than a visual inspection of the manufactured article for defects, in the absence of some circumstance which a jury could reasonably believe would put a reasonably prudent man, under the same or similar circumstances, on notice that the equipment contained some latent defect.\textsuperscript{133}

The creation of such a "latent defect exception" seems to be a reasonable approach.\textsuperscript{134} It is simply unnecessary to make a pool of defendants that has virtually no way of knowing of the dangers of a product open to a plaintiff's attack.\textsuperscript{135} The plaintiff will be ade-

\textsuperscript{132} In fact, the holding in Frericks v. General Motors Corp., 274 Md. 288, 306, 336 A.2d 118, 128 (1975), seems to directly contradict the rule in Woolley. There the court stated that "'[d]esign negligence . . . in most instances involves questions of specialized knowledge which the retailer cannot be expected to have.'" Id. at 305, 336 A.2d at 128 (quoting 2A Louis R. Frumer & Melvin I. Friedman, Products Liability § 18.04 (1991)). Although the authors were referring to the liability of retailers in negligence-based defective-design claims, that same rationale logically applies to the liability of installers in strict liability failure-to-warn claims.

\textsuperscript{133} Hubbard v. Gray Tool Co., 307 S.W.2d 599, 600 (Tex. Civ. Ct. App. 1957) (emphasis added). See also 5 Fowler v. Harper et al., The Law of Torts § 28.29 (2d ed. 1986) (advocating a rule that would hold sellers to a duty of discovering only those defects discoverable upon a visual inspection).

\textsuperscript{134} This also seems to be the direction in which the Court of Special Appeals was moving with its holding in De Chello v. Johnson Enterprises, 74 Md. App. 228, 236, 536 A.2d 1203, 1207 (1988) ("Maryland has long recognized a duty on the part of sellers to warn of latent dangers attendant upon a proper use of the products they sell, where injury is foreseeable.") (emphasis added), cert. denied, 312 Md. 601, 541 A.2d 964 (1988). The Zenobia court seems to have totally ignored the possibility that De Chello created a "latent defect exception," which would require that the dangers of a latent defect be foreseeable by the supplier or installer before liability will be imposed.

\textsuperscript{135} Consider once more the holding in Frericks, 274 Md. at 306, 336 A.2d at 128, where the dealer of an allegedly defectively designed automobile was absolved from liability in negligence and strict liability because "'[t]he dealer who had nothing to do with the design of the car cannot be presumed to know of the defective design."' Id. at 305, 336 A.2d at 128. The same argument applies with even more force in a failure-to-warn claim. The supplier or installer—who had nothing to do with the research, testing, and manufacture of the product—has no way of knowing that the product requires a warning.
quately compensated through the imposition of liability on the manufacturer.\textsuperscript{136}

c. Punitive Damages.—Certain judges on the Court of Appeals, noticeably concerned with the state of punitive damages law in Maryland, had on prior occasions come to the conclusion that “the law of punitive damages is ‘broke’ and needs ‘fixing.’”\textsuperscript{137} In Zenobia, the court manufactured an opportunity to “fix” what it perceived to be the deficiencies in Maryland punitive damages law. By overruling the Testerman-Wedeman distinction, the court reclaimed some of the consistency, rationality, and logic that had been lost in the application of that rule. No longer will an award of punitive damages turn on whether the tortious conduct occurred before or after the existence of a contractual relationship. This is a welcome change to Maryland law, as deterrence will be far better served by a rule that does not turn on such an arbitrary distinction. The Court of Appeals has finally realized that there is a reason why “[n]o other jurisdiction has opted to march to the Testerman drum beat, dance to Wedeman’s tune, or vocalize Piskor lyrics.”\textsuperscript{138}

However, the Zenobia court went further. The court abandoned the Smith v. Gray Concrete Pipe Co. doctrine of implied malice and required that actual malice be shown in all non-intentional tort cases to support an award of punitive damages.\textsuperscript{139} In the products liabil-

\textsuperscript{136} Consider also the insurance implications of the court’s holdings. When Zenobia and Balbos are read together with earlier Maryland cases, it appears that an installer now has an even greater duty than that of a manufacturer with respect to the product being installed. An installer can still be held liable for negligent installation of the product and any act of negligence that occurs during the installation process. \textit{See} Johnson v. Mitchell Supply, Inc., 33 Md. App. 99, 363 A.2d 657 (1976) (negligent stacking of building materials); Ambassador Apartment Corp. v. McCauley, 182 Md. 275, 34 A.2d 333 (1943) (negligent installation of window screen); Holland Furnace Co. v. Rollman, 179 Md. 510, 20 A.2d 500 (1941) (negligent installation of hot air furnace).

\textit{Zenobia} and \textit{Balbos} add to the existing liabilities of installers all of the liabilities associated with the manufacture of a product, regardless of the fact that the installer played no part in the manufacturing process. \textit{See}, \textit{e.g.}, Zenobia, 325 Md. at 442-43, 601 A.2d at 644 (holding installers strictly liable for failing to warn of the dangers of asbestos). The effect of these holdings may have a disastrous effect on the future of installers across Maryland once insurance companies fully comprehend the extent of the installers’ potential liability.


\textsuperscript{139} Zenobia, 325 Md. at 460, 601 A.2d at 652. One can only speculate as to whether the “inferred actual malice” doctrine of Henderson v. Maryland Nat’l Bank, 278 Md. 514, 366 A.2d 1 (1976), survives the holding in \textit{Zenobia}. In \textit{Henderson}, the court held that punitive damages were properly awarded based on evidence, though circumstantial, that
ity setting, this appears to be, at most, a nominal change. The Court of Special Appeals, in *American Laundry Machinery Industries v. Horan*,¹⁴⁰ had previously held that the implied malice standard translated into the products liability area by requiring that there be "[1] substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and [2] a gross indifference to the danger."¹⁴¹ If, as it appears, the standard has remained virtually the same after *Zenobia*, and only the name has been changed from implied to actual malice, this begs the question: "Why make this change in a products case?"

The court’s rationale was that the standard should be raised to actual malice because so doing will punish only behavior that is characterized by an actual evil motive, intent to injure, ill will, or fraud.¹⁴² By creating this "bright line," a potential defendant becomes aware of what types of behavior are punishable by punitive damages.¹⁴³ Thus, the defendant will be able to avoid those types of behavior, and the underlying goal of deterrence will be realized.¹⁴⁴ The critical flaw in the court’s reasoning is that, although the new standard realizes deterrence in the limited class of cases characterized by actual malice, it leaves wholly unaffected all other cases characterized by outrageous conduct.¹⁴⁵

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¹⁴⁰ *Id.* at 522, 366 A.2d at 6. *Henderson* may prove instrumental in the future to lessen the plaintiff’s burden of showing actual malice, and to afford some degree of flexibility within the doctrine of actual malice itself.

¹⁴¹ *Id.* at 117, 412 A.2d at 420 (emphasis added). Compare this to the holding in *Zenobia*, which defined the actual malice standard as requiring: "(1) actual knowledge of the defect on the part of the defendant, and (2) the defendant’s conscious or deliberate disregard of the foreseeable harm resulting from the defect." *Zenobia*, 325 Md. at 462, 601 A.2d at 653 (emphasis added). This analysis should result in a conclusion that the definition of malice, whether it is labelled as implied or actual malice, has not been changed substantively as it has evolved from *American Laundry* to *Zenobia*.

The customized definition of malice for a products liability case seems both reasonable and workable. Its reasonableness is found in the fact that it requires an element of culpability before punitive damages will be imposed. After all, given that the goals of punitive damages are punishment and deterrence, it logically follows that a defendant should be culpable in some sense before punishment is imposed. The workability of the definition is manifested in the line of cases, dating back to *American Laundry* in 1980, that have successfully used it to govern awards of punitive damages.

¹⁴² *Zenobia*, 325 Md. at 460, 601 A.2d at 652.

¹⁴³ *Id.* at 455, 601 A.2d at 650.

¹⁴⁴ *Id.* at 456, 601 A.2d at 650.

¹⁴⁵ This is essentially the same point made by Judge Bell in his concurring and dissenting opinion. Judge Bell stated that:

The long and short of it is that changing the standard for punitive damages will eliminate numbers of cases, in which, heretofore, punitive damages would have
Recklessness can and should be deterred.\textsuperscript{146} Recklessness, by definition, requires that an actor be aware of the dangerous circumstances surrounding him, yet choose to disregard those dangers.\textsuperscript{147} The very fact that the actor chooses his course of conduct, while being aware of the dangers, means that deterrence can play a role. If, at the moment of choice, the potential defendant is at all affected by the thought that his conduct may be subject to punitive damages, deterrence has been realized. In this sense, the law can become proactive, affecting future behavior, rather than merely reactive to past events.\textsuperscript{148}

To this end, the law of punitive damages did need some reworking. However, the Court of Appeals went too far in abandoning the \textit{Smith} doctrine of implied malice and resurrecting the "insurmountable roadblock"\textsuperscript{149} of actual malice. The desired re-

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\textsuperscript{146} Few would argue that deterrence is not one of the major purposes of criminal law. Many jurisdictions, including Maryland, have enacted criminal "reckless endangerment" statutes in order to deter reckless behavior. \textit{See Md. Ann. Code art. 27, § 120} (1992). It is difficult to comprehend why the Court of Appeals, by enforcing this criminal statute but denying civil punitive damages for reckless behavior, has taken the approach that recklessness is capable of being deterred in criminal cases, but not in civil cases.

\textsuperscript{147} \textit{See} Minor v. State, 326 Md. 436, 439, 605 A.2d 138, 139 (1992) (interpreting Maryland's reckless endangerment statute as requiring "that the defendant consciously disregarded a substantial risk").

\textsuperscript{148} Consider the following example: A day care center is hiring new employees. During the job interview, one applicant confesses to the owner of the day care center that he is a pedophile. Although the owner harbors no malice towards any of the children, he hires the pedophile on the mistaken assumption that the pedophile would not molest any of the children with whom he works. Several children are molested; the pedophile is convicted and sentenced to prison. The children's parents bring a tortious action for negligent supervision and hiring against the center's owner. Under \textit{Zenobia}, no punitive damages will lie because the defendant did not act with actual malice. Is this a desired result? As a matter of public policy, wouldn't society rather have the owner stop and consider the implications of hiring a pedophile to work at the day care center? \textit{See also} Zenobia, 325 Md. at 482-83, 601 A.2d at 664 (Bell, J., concurring and dissenting) (formulating another hypothetical example where punitive damages should properly be awarded).

Consider also the effects of Murphy v. Edmonds, 325 Md. 342, 370, 601 A.2d 102, 116 (1992), which would limit the parent's non-economic damages (including emotional distress, pain and suffering, etc.) to $350,000. Taken together, are \textit{Edmonds} and \textit{Zenobia} enough to stifle this litigation altogether? Is this a desired result?

suits could have been achieved by overruling the Testerman-Wedeman distinction, increasing the standard of proof to that of "clear and convincing evidence," setting the general rule for an award of punitive damages to require actual malice, but retaining the doctrine of implied malice for use as an exception to this general rule. Abolishing the Testerman-Wedeman "arising out of contract" distinction would return consistency and logic to the application of punitive damages. The heightened standard of proof would exclude many undeserving cases. The establishment of actual malice as the general rule for punitive damages would set the tone that Maryland law will allow punitive damages only in the most egregious of cases. However, the court would still be free to review, on a case-by-case basis, whether a particular case is shocking enough to fall within an exception under which a showing of implied malice would be sufficient.

5. Conclusion.—The practical effects of Zenobia include the creation of a more relaxed standard for products liability plaintiffs to establish the liability of corporate defendants, through the use of state-of-the-art evidence. Additionally, those plaintiffs now have a larger pool of potential defendants from which to choose, because suppliers and installers are now equally as vulnerable as manufacturers. Therefore, compensatory damages will be easier to recover. Products liability defendants, however, have been spared the

150. This "exception to the general rule" approach regarding the doctrine of implied malice is distinguishable from the approach taken by Judge Bell in his concurring and dissenting opinion. Judge Bell advocated the retention of implied malice for use as "a floor, not a ceiling." Zenobia, 325 Md. at 480, 601 A.2d at 663 (Bell, J., concurring and dissenting). The problem with Judge Bell's approach is that it would return Maryland to the post-Smith, pre-Testerman-Wedeman days, when the law of punitive damages was characterized by a general confusion over whether the plaintiff was allowed to show implied malice or required to show actual malice in any given case.

151. The appeal of this approach is that it will encourage plaintiffs who cannot show actual malice to plead punitive damages only in certain cases. These cases arise when plaintiffs have a good faith belief that the defendant's conduct was so egregious that it will compel the court to allow the case to fall within the exception to the actual malice requirement. In this sense, judicial efficiency will be furthered by the elimination of frivolous punitive damages claims. See supra note 53 and accompanying text. Hopefully, the Maryland courts have learned their lesson from the post-Smith confusion regarding punitive damages and will employ a standard of strict scrutiny before a case is classified as falling within the exception. The criteria for falling within the exception may vary considerably. Nevertheless, some suggestions include reckless conduct that results in: grievous bodily harm to an innocent plaintiff, a decrease in the plaintiff's quality of life, or severe emotional or psychological harm to a young child. See supra note 148.

152. Zenobia, 325 Md. at 441, 601 A.2d at 643.
imposition of punitive damages unless the plaintiff can prove, by clear and convincing evidence, that the defendant had actual knowledge of the defect and deliberately disregarded its dangers. 

Thus, punitive damages have been severely limited.

Zenobia was decided in a products liability setting. However, the Court of Appeals chose not to limit the punitive damages aspect of its holding to the field of products liability. Therefore, in any non-intentional tort action in the future, the plaintiff will have to prove that the defendant acted with actual malice in order to support an award of punitive damages. Far from serving the Court of Appeals’s stated goals of punishment and deterrence, the practical effect of this aspect of Zenobia may be to leave a large amount of tortious conduct unpunished and undeterred.

ERIC B. BRUCE

B. Account Malpractice and Contributory Negligence

In Wegad v. Howard Street Jewelers, Inc., the Court of Appeals addressed the availability of the contributory negligence defense in accountant malpractice actions, holding that a client who unreasonably relies on an accountant’s advice may be found contributorily negligent. The court ruled that the Circuit Court for Baltimore County properly declined to give a jury instruction offered by Howard Street Jewelers, which would have obviated the contributory negligence defense by requiring the jury to absolve a client of fault for its losses even if the client unjustifiably relied on its accountants.

Although the Wegad decision builds on extensive Maryland precedent in the areas of the propriety of jury instructions and general

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153. See id. at 469, 462, 601 A.2d at 657, 653.
154. See id. at 460, 601 A.2d at 652.
155. Id.
157. See id. at 417-22, 605 A.2d at 127-30.
158. Howard Street Jewelers requested that the following specific jury instruction accompany the general instruction for contributory negligence:
The client can rely on the accountant’s knowledge and skill. It is not contributory negligence for a client to follow an accountant’s instructions, or rely on his advice, or to fail to consult with another accountant or to discover the source of a financial problem itself where the client has no reason to suspect his accountant’s advice and instructions are wrong.

Id. at 412-13, 605 A.2d at 125.
159. See id. at 417-18, 605 A.2d at 128.
contributory negligence law, it warrants criticism for its failure to address the two conflicting standards developed by other state courts for determining the availability of such a defense in accountant malpractice actions. While it did not explicitly recognize either standard, the court's decision belies a preference for allowing accountants to raise the contributory negligence defense any time they can contend that the client's negligence contributed to its loss. It appears that, in the future, accountants in similar situations may escape liability even if their failure to perform their professional obligations is unrelated to the negligence of their clients.

1. The Case.—Gilbert Wegad had been employed as Howard Street Jewelers's accountant since 1948. Wegad sent Howard Street Jewelers an annual engagement letter, which stated in part "that his services did not include an audit and would not be designed and cannot be relied upon to disclose fraud, defalcations or other irregularities." The same letter also stated that Howard Street Jewelers would be informed "of any matters that come to [Wegad's] attention which cause [him] to believe that the information furnished . . . is not correct." The evidence did not meet the high standard for proving that Howard Street Jewelers's actions had any relation to Wegad's negligence. See generally, Eric R. Dinallo, Note, The Peculiar Treatment of Contributory Negligence in Accountants' Liability Cases, 65 N.Y.U. L. Rev. 329, 355-61 (1990) (providing several examples of the use of the contributory negligence defense in different situations, and assessing the possibility of success under the two different standards).

161. Compare National Surety Corp. v. Lybrand, 9 N.Y.S.2d 554, 563 (1939) (limiting the contributory negligence defense to situations in which the client's negligence proximately caused the accountant's breach of duty) with Craig v. Anyon, 208 N.Y.S. 259, 268 (1925) (applying the contributory negligence defense with no limitation).

162. A court applying the National Surety standard, see infra notes 227-234 and accompanying text, to the facts of this case would not have found contributory negligence as a matter of law, because the evidence did not meet the high standard for proving that Howard Street Jewelers's actions had any relation to Wegad's negligence. See generally, Eric R. Dinallo, Note, The Peculiar Treatment of Contributory Negligence in Accountants' Liability Cases, 65 N.Y.U. L. Rev. 329, 355-61 (1990) (providing several examples of the use of the contributory negligence defense in different situations, and assessing the possibility of success under the two different standards).


164. See Wegad, 326 Md. at 417 n.3, 605 A.2d at 127 n.3.

165. Id.

puted by the parties; however, at the time, Howard Street Jewelers did seek to guard against theft by sales personnel.

In 1984, Lore Levi, the wife of Howard Street Jewelers's founder, became suspicious that Betty Mauck, the store's cashier, was embezzling funds. Mauck handled ninety percent of Howard Street Jewelers's cash, was responsible for maintaining all sales and layaway receipts, and "closed out" the cash register at the end of each business day. Julius Levi, however, dismissed his wife's theory, refusing to believe that Mauck, who had been with the business for many years and was "highly respected," would steal from the business.

Nonetheless, a month's worth of Mauck's work was provided to Wegad for his review. Unfortunately for Howard Street Jewelers, Wegad found nothing, despite suspicious discrepancies in the records. After Wegad's review, store management took no further action to investigate the activities of Mauck.

By pure chance, Howard Street Jewelers later discovered Mauck's embezzlement scheme. While Mauck had the day off, a customer attempted to make a payment on an item the customer had laid away on the previous day. No sales slip could be found. The next day, when Mauck returned to work, the slip was immediately found. The store conducted an investigation of the layaway sales transaction and discovered Mauck's defalcations.

Howard Street Jewelers filed suit against Wegad for professional malpractice on the ground that he had failed to detect that Mauck was embezzling funds. In February, 1990, the case went to trial before a jury in the Circuit Court for Baltimore County. At the close of trial, the court refused to issue a jury instruction

167. See id. at 354 n.2, 589 A.2d at 1286 n.2 ("[Howard Street Jewelers] denies that it was told by [Wegad] at the year end meeting in 1983 that theft was a possible source of the problem. [Wegad] presented evidence to that effect, however.").
168. Id. at 354, 589 A.2d at 1286.
169. See id.; see also Wegad, 326 Md. at 421 n.5, 605 A.2d at 130 n.5.
170. See Wegad, 326 Md. at 421, 605 A.2d at 129-30.
171. Id. at 421 n.5, 605 A.2d at 130 n.5. Mrs. Levi's son also dismissed the suspicions, believing his mother to be "paranoid."
173. Wegad, 326 Md. at 422, 605 A.2d at 130.
174. Id.
175. See Howard Street Jewelers, 87 Md. App. at 355 n.3, 589 A.2d at 1287 n.3.
176. Id.
177. Id.
178. Wegad, 326 Md. at 411, 605 A.2d at 125.
179. Id. at 411-12, 605 A.2d at 125.
offered by Howard Street Jewelers to specifically address the contributory negligence issue in the context of accountant malpractice, supplementing the general contributory negligence instruction. Instead, the court issued an instruction that set forth the general standard for contributory negligence. The jury found Wegad negligent; however, because Howard Street Jewelers was found contributorily negligent, judgement was entered in favor of the accountant. Howard Street Jewelers appealed, contending that the trial judge "erred in refusing to give a requested jury instruction."

The only issue addressed by the Court of Special Appeals was whether "the trial court err[ed] in refusing to give a requested instruction that a client's reliance on his accountant is not contributorily negligent [sic] in an action against the accountant for malpractice." The Court of Special Appeals reversed the judgment of the trial court, concluding that Howard Street Jewelers was entitled to a refined contributory negligence instruction to inform the jury "that [Howard Street Jewelers] could justifiably rely upon its accountant's knowledge and skill and, further, that it is not

180. *Id.* at 412-13, 605 A.2d at 125.
181. The trial court gave the following instruction on contributory negligence to the jury:

> Now, the plaintiff cannot recover if his or her or its, in this case we are talking about a corporation, own negligence is the cause of the plaintiff's damage or injury. Since the plaintiff in this case is a corporation, the issue of contributory negligence as it is called is to be considered in relation to the acts or omissions on the part of the corporation's principals or agents. So, in this case the issue relates to the consideration of acts or omissions on the part of either Julius Levi, Lore Levi, or Alvin Levi [the principals]. And negligence, as I instructed you a moment ago is doing something that a person using ordinary care would not do or not doing something that a person using ordinary care would do. Ordinary care being that caution, attention or skill that a reasonable person would use under similar circumstances.

> And so with respect to the issue of contributory negligence, the defendant has the burden of proving by a preponderance of the evidence, which I will explain later, that the plaintiff's negligence was a cause of the plaintiff's damage or loss.

> So that means that if you find from the evidence that one or more of the plaintiff's principals was guilty of negligence which was a direct cause of the plaintiff's loss or damage, then your verdict must be for the defendant. And that would be regardless of whether you find that the defendant was also negligent and regardless of whose negligence was greater.

*Id.* at 413, 605 A.2d at 125-26 (brackets in original).
182. *Id.* at 412, 605 A.2d at 125.
183. *Id.*
185. *Id.* at 364, 589 A.2d at 1291.
contributory negligence to do so, at least where it had no reason to suspect that the advice and instructions given were wrong."

After granting Wegad's petition for certiorari, the Court of Appeals reviewed the case and reversed.

2. Legal Background.—

a. Contributory Negligence in Maryland.—To determine the availability of the requested contributory negligence jury instruction in accountant malpractice actions, the Court of Appeals relied on Maryland case law concerning the propriety of jury instructions, contributory negligence in medical malpractice cases, and general contributory negligence cases. It is a well-settled principle of Maryland law that in order to successfully invoke the doctrine of contributory negligence, "it must be demonstrated that the injured party acted, or failed to act, with knowledge and appreciation, either actual or imputed, of the danger of injury which his conduct involve[d]." Courts have consistently held that the injured party is

186. See id. at 360-62, 589 A.2d at 1289-90. In making its decision, the intermediate appellate court relied upon Santoni v. Schaerf, 48 Md. App. 498, 428 A.2d 94 (1981), rev'd on other grounds sub nom. Moodie v. Santoni, 292 Md. 582, 441 A.2d 323 (1982). In Santoni, a medical malpractice action, the surviving spouse and personal representative of the decedent-patient sued the Baltimore City Health Department for failing to diagnose a hepatitis condition caused by mandatory drug treatment of all city employees for the treatment and prevention of tuberculosis. The intermediate appellate court held that "it is not contributory negligence for a patient to follow a doctor's instructions or rely on his advice . . . or to fail to diagnose his own illness . . ." Id. at 507, 428 A.2d at 100. While the patient could be held accountable "for what a reasonably prudent person in his position would have done," id. at 511, 428 A.2d at 101, the Court of Special Appeals found that the facts of Santoni were not legally sufficient for the issue of contributory negligence to reach the jury. See id. at 519-20, 428 A.2d at 105-06.


188. See id. at 360-62, 589 A.2d at 1289-90. In making its decision, the intermediate appellate court relied upon Santoni v. Schaerf, 48 Md. App. 498, 428 A.2d 94 (1981), rev'd on other grounds sub nom. Moodie v. Santoni, 292 Md. 582, 441 A.2d 323 (1982). In Santoni, a medical malpractice action, the surviving spouse and personal representative of the decedent-patient sued the Baltimore City Health Department for failing to diagnose a hepatitis condition caused by mandatory drug treatment of all city employees for the treatment and prevention of tuberculosis. The intermediate appellate court held that "it is not contributory negligence for a patient to follow a doctor's instructions or rely on his advice . . . or to fail to diagnose his own illness . . ." Id. at 507, 428 A.2d at 100. While the patient could be held accountable "for what a reasonably prudent person in his position would have done," id. at 511, 428 A.2d at 101, the Court of Special Appeals found that the facts of Santoni were not legally sufficient for the issue of contributory negligence to reach the jury. See id. at 519-20, 428 A.2d at 105-06.

189. See id. at 414, 417-19, 605 A.2d at 126-28. In Sergeant Co. v. Pickett, 285 Md. 186, 401 A.2d 651 (1979), the Court of Appeals set forth the general rule regarding jury instructions as a two-part test: "(1) the instruction must correctly state the law, and (2) that law must be applicable in light of the evidence before the jury." Id. at 194, 401 A.2d at 655. Even if a requested jury instruction passes the Pickett test, however, the trial judge is not obliged to give the specific requested instruction "if the matter is fairly covered by instructions actually given" by the trial court. See Md. R. 2-520(c); see also State Roads Comm'n v. Parker, 275 Md. 651, 688, 344 A.2d 109, 129 (1975) (holding that no requirement exists to grant a specific requested instruction if the instruction given by the trial court "fully and fairly" covers the issues in a particular case).

190. See id. at 194-16, 605 A.2d at 126-27.

191. See id. at 417-19, 605 A.2d at 127-28.

charged with the standard of care of an "ordinarily prudent person under the same or similar circumstances, and not that of a very cautious person . . . ."\textsuperscript{193}

Before \textit{Wegad}, the Court of Appeals had not addressed the issue of contributory negligence in accountant malpractice actions. In general, such actions come under the scope of section 522A of the \textit{Restatement (Second) of Torts}, which states that "[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying."\textsuperscript{194} As in other contributory negligence actions, the injured party is held to the standard of care of a reasonably prudent person.\textsuperscript{195}

Because \textit{Wegad} was a professional malpractice action, the views of the court with respect to other professional malpractice actions are instructive.\textsuperscript{196} In \textit{Moodie v. Santoni},\textsuperscript{197} a medical malpractice action, the Court of Appeals held that a contributory negligence instruction must be given to the jury unless there was "‘no evidence of acts or conduct from which a reasonable mind could find or infer negligence on [his] part,’”\textsuperscript{198} reversing the decision of the Court of Special Appeals.\textsuperscript{199}

In \textit{Santoni}, the Court of Special Appeals had relied on the "disparity between the knowledge and skill of a doctor and that of a patient"\textsuperscript{200} to find a patient not contributorily negligent as a matter of law, even though there was indirect evidence that the patient knew of the risks of taking a certain medication.\textsuperscript{201} The intermediate appellate court held that, as a matter of policy, "the patient has a right to rely on the doctor's knowledge and skill,"\textsuperscript{202} especially when the doctor is in a better position to recognize any adverse


\textsuperscript{194} \textit{Restatement (Second) of Torts} § 552A (1977).

\textsuperscript{195} \textit{See id.} cmt. a.


\textsuperscript{197} 292 Md. 582, 441 A.2d 323 (1982).

\textsuperscript{198} \textit{id.} at 591, 441 A.2d at 328 (quoting Kantor v. Ash, 215 Md. 285, 293, 137 A.2d 661, 666 (1958)).


\textsuperscript{200} \textit{id.} at 507, 428 A.2d at 100.

\textsuperscript{201} \textit{See id.} at 509, 428 A.2d at 101.

\textsuperscript{202} \textit{id.} at 508, 428 A.2d at 100.
symptoms. While "[t]here was a possibility of contributory negligence," it was not "a more likely than not conclusion to draw from the ambiguous factual predicate erected by the defendants."204

The Court of Appeals framed its analysis in Santoni by noting that Maryland is extremely liberal in allowing "meager evidence of negligence . . . to carry a case to a jury,"205 as long as that evidence is legally sufficient to prove negligence.206 Only when reasonable persons cannot differ on the issue of contributory negligence is the trial court entitled to bar the defense as a matter of law.207 The Santoni court relied on the test set forth in Lindenberg v. Needles,208 which held that the issue of contributory negligence should not reach the jury "if there was no evidence from which a reasonable mind could find or infer that he had directly contributed to his own injury by behaving as an ordinarily prudent man would not behave, under the circumstances."209 Thus, when any evidence exists from which a reasonable mind could find or infer that a patient was contributorily negligent, the issue of contributory negligence belongs in the province of the jury.210 This principle may be applied to accountants as follows: when any evidence exists from which a reasonable person could find that a client was negligent in his bookkeeping or supervision of employees, the question of contributory negligence should go to the jury.

b. Other States.—Other state courts—in particular, those of New York—have considered the availability of the contributory negligence defense to accountants. Different jurisdictions have answered this question with varying results supported by differing rationales.211 The main distinction between jurisdictions is that some require the client's negligence to be the proximate cause of the accountant's negligence in order for the accountant to raise the

203. See id. at 510, 428 A.2d at 101.
204. Id. at 518-19, 428 A.2d at 105-06.
205. Santoni, 292 Md. at 587, 441 A.2d at 326 (citing Fowler v. Smith, 240 Md. 240, 213 A.2d 549 (1965)).
206. See id. at 588, 441 A.2d at 326 (quoting Fowler, 240 Md. at 246, 213 A.2d at 554 (citing Ford v. Bradford, 213 Md. 534, 541, 132 A.2d 488, 492 (1957))).
208. 203 Md. 8, 97 A.2d 901 (1953).
209. Id. at 15, 97 A.2d at 903-04.
210. See Santoni, 292 Md. at 590-91, 441 A.2d at 327.
211. See David L. Menzel, The Defense of Contributory Negligence in Accountant's Malpractice Actions, 13 Seton Hall L. Rev. 292, 292 (1983) (noting that "[p]erhaps the most interesting issue presented by accountant's malpractice cases is the availability of the defense of contributory negligence").
contributory negligence defense, whereas other jurisdictions make no such causation requirement.\(^{212}\)

In *Craig v. Anyon*,\(^{213}\) the New York Supreme Court first addressed whether the contributory negligence defense could be raised in an accountant malpractice action.\(^{214}\) In *Craig*, a stock brokerage firm brought an action against its accountants for failure to detect defalcations by one of the firm’s employees.\(^{215}\) At trial, the client contended that this failure constituted negligence.\(^{216}\) The accountants responded by claiming that the client had been contributorily negligent in not discovering the employee’s scheme.\(^{217}\) After the jury found the accounting firm negligent and awarded damages equal to the employee’s defalcations,\(^{218}\) the trial judge entered a judgment solely for the amount of the accountants’ fees.\(^{219}\) On appeal, the New York Supreme Court agreed with the jury’s finding that the accountants had been negligent.\(^{220}\) However, the court refused to award damages, finding that such damages did not flow directly from the accountants’ negligence.\(^{221}\) The court was "of the opinion that the loss was not entirely the result of the negligence of the defendants, but also resulted from the careless and negligent manner in which the [client] conducted [its] business."\(^{222}\)

The dissent in *Craig* set forth a principle that was later adopted by other authorities.\(^{223}\) The dissent argued that an accountant is hired for the very purpose of protecting the client from the client’s own failure to discover defalcations.\(^{224}\) Yet under the rule put forth by the court, accountants who had failed to save the client from the

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212. See id. at 293 (analyzing the contributory negligence defense as applied to accountant negligence suits in various jurisdictions); see also Carl L. Hawkins, *Professional Negligence Liability of Public Accounts*, 12 VAND. L. REV. 797, 809-12 (1959); Dinallo, supra note 162, at 332.

213. 208 N.Y.S. 259 (1925), aff’d, 152 N.E. 431 (N.Y. App. 1926).


216. Id.

217. Id. at 260-61.

218. Id. at 261.

219. Id.

220. Id. at 261-62.

221. Id. at 268.

222. Id. at 267. The court found that the client "could have prevented the loss by the exercise of reasonable care, and that they should not have relied exclusively on the accountants." Id. at 267-68.

223. See Menzel, supra note 211, at 295.

224. See *Craig v. Anyon*, 208 N.Y.S. 259, 269-70 (1925) (Clarke, P.J., dissenting).
consequences of the client's "failure and neglect" could escape liability.225 In other words, client negligence could allow the accountants to be excused from their failure to perform their contractual obligations.226

The Craig dissent's concerns were addressed in *National Surety Corp. v. Lybrand.*227 National Surety was the first in a line of cases limiting the extent to which a client can be contributorily negligent to situations in which the client's negligence is a proximate cause of the accounting firm's breach of duty.228

In *National Surety*, a surety company was defrauded by an employee who embezzled from the company's petty cash.229 The surety company sued its accountants on the grounds that the accountants were negligent in not discovering the employee's embezzlement scheme.230 The accountants responded by asserting that the surety company was contributorily negligent for failing to properly maintain its records, preparing certain internal documents in pencil, and failing to discover obvious discrepancies in its records.231 The trial court dismissed the complaint for failure to "make out a case for submission to the jury;"232 however, the appellate court ruled that the evidence was sufficient to send the case to a jury.233

In response to the accountants' argument that the client had established no case because the client had been contributorily negligent, the New York court stated, as controlling, the principle first announced by the Craig dissent:

Accountants, as we know, are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible. Accordingly, we see no reason to hold that the accountant is not liable to his employer in such cases. Negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth.234

225. See *id.* at 270 (Clarke, P.J., dissenting).
226. See *id.*
227. 9 N.Y.S.2d 554 (1939). The court did not explicitly reject the analysis in Craig, but did enunciate a different standard. See Dinallo, *supra* note 162, at 346.
228. See *National Surety*, 9 N.Y.S.2d at 563.
229. *Id.* at 556.
230. *Id.* at 557.
231. *Id.* at 558.
232. *Id.* at 557.
233. *Id.* at 562-63.
234. *Id.* at 563.
As noted by one commentator, “[t]he court was unwilling to find accountants immune from their negligence because the client was negligent in conducting [its] business.”

3. The Court’s Reasoning.—Before the Wegad decision, the issue of contributory negligence in accountant malpractice cases had not been addressed by the Maryland courts. Finding Wegad’s appeal to be “implicitly based upon the principle that a ‘litigant is entitled to have his theory of the case presented to the jury,’” the court examined the propriety of the requested instruction within the framework of the Pickett test for jury instructions.

The Wegad court first examined the substance of the requested jury instruction. Howard Street Jewelers based its requested instruction on the language in Santoni—that a patient has a right to rely on a doctor’s knowledge and skill. To define “the standard for contributory negligence which incorporates a client’s ability to rely on the advice of its accountant,” the Wegad court looked to the Santoni decision, where it held that a patient’s failure to protect himself “is not in every case justified by his reliance on his doctor’s knowledge and skill.” Accordingly, when examining an accountant malpractice action, the court held that the focus should be on whether the client “took appropriate precautions to protect his own interests.”

The court also examined the specific language of Howard Street Jewelers’s requested instruction, holding that the instruction strayed from the principle set forth in Santoni in that it did not require reasonable or justifiable reliance. The court discussed general principles of Maryland contributory negligence law to find that

235. Menzel, supra note 211, at 299. Menzel pointed out that the National Surety court attempted to align its decision with Craig by claiming that the facts in Craig supported the decision to present the issue of contributory negligence to the jury. Menzel found, however, that the National Surety court’s attempted rationalization did not withstand scrutiny. Id.

236. Wegad, 326 Md. at 414, 605 A.2d at 126.

237. See id. See supra note 189 (setting forth the Pickett test).

238. See Wegad, 326 Md. at 414, 605 A.2d at 126.

239. See id. at 414-15, 605 A.2d at 126. See supra notes 197-205 and accompanying text.

240. Wegad, 326 Md. at 414, 605 A.2d at 126.

241. Id. at 415-16, 605 A.2d at 127.

242. Id. at 416, 605 A.2d at 127.

243. Id. at 417, 605 A.2d at 127.

244. See id. at 416, 605 A.2d at 127. This is in contrast to the Court of Special Appeals, which held that Howard Street Jewelers “sought to have the jury instructed that it could justifiably rely upon its accountant’s knowledge and skill...” Howard Street
a client may be contributorily negligent when it unreasonably relies on its accountant's advice. The court held that Howard Street Jewelers's requested instruction failed to "require that the jury consider whether the client should have known that the accountant might have been in a worse position than the client to detect the embezzlement." Thus, the instruction did not adequately state the substantive law, failing the first prong of the Pickett test. Furthermore, as the court found sufficient evidence for a jury to reach the conclusion that Howard Street Jewelers was in a better position than Wegad to discover Mauck's embezzlement, it held that Howard Street Jewelers's instruction did not adequately cover the applicable law in light of the evidence before the jury, thus failing the second prong of the Pickett test.

The court also discussed a policy argument against Howard Street Jewelers's attempt to advise the jury that "'[i]t is not contributory negligence for a client . . . to fail . . . to discover the source of a financial problem where the client itself has no reason to suspect his accountant's advice and instructions are wrong.'" The court held that, under this language, a client could "rely on its accountant's advice, and thereby discharge its duty to protect itself, providing it has no reason to believe that the advice is wrong." Conceivably, if such an instruction was found to be appropriate, a client could avoid its duty to guard against business risks and to take independent measures to confront those risks "merely by employing an accountant."

Finally, the court held that the charge the trial judge gave to the jury adequately covered the contributory negligence issue.

4. Analysis.—It is likely that the court would have accepted Howard Street Jewelers's proposed instruction if the language of the instruction was altered to read: "It is not contributory negligence for a client to reasonably follow an accountant's instructions,

245. See Wegad, 326 Md. at 417-19, 605 A.2d at 127-28.
246. Id. at 419, 605 A.2d at 129.
247. See supra note 189.
248. See Wegad, 326 Md. at 421-22, 605 A.2d at 130.
249. See id. at 420, 605 A.2d at 129.
250. See supra note 189.
251. Wegad, 326 Md. at 420, 605 A.2d at 129 (quoting the proffered jury instruction).
252. Id.
253. Id.
254. See id. at 422, 605 A.2d at 130.
or justifiably rely on his advice." As modified, there would appear to be little basis for the Court of Appeals to reverse the Court of Special Appeals's decision approving the instruction.255 The Court of Appeals was correct, however, that the instruction's lack of a reasonableness requirement removed the issue of contributory negligence from the rightful province of the jury, in that it denied the contributory negligence defense as a matter of law.256

In an apparently unrealized effect of allowing the trial court's general contributory negligence instruction to stand alone, the court has in effect created the substantive Maryland law concerning the contributory negligence defense in accountant malpractice actions. While the trial court's description of general contributory negligence law is correct, the Court of Appeals's acceptance of the trial court's instruction reveals a failure to grasp the complexities of the on-going debate among various authorities over the use of contributory negligence in accountant malpractice actions.257 It is probable that the Wegad court's approval of the general contributory negligence instruction as a valid statement of state substantive law will lead to general contributory negligence principles serving as the basis for jury decisions concerning contributory negligence in specialized accountant malpractice actions.

By holding that only general contributory negligence instructions must be provided to the jury, the Court of Appeals has implicitly decided to favor the Craig standard over the National Surety standard.258 The court has stated no requirement that a client's negligence must be the proximate cause of an accountant's negligence in order for the issue of contributory negligence to reach the jury.259 The policy implications of the court's decision may be severe. Commentators agree that the Craig standard is the weaker of the two standards, in that it allows an accounting firm to escape liability even when it performs its professional duties in a negligent manner.260 In the future, a client who hires an accounting firm to

255. See id. at 416, 605 A.2d at 127 (noting that the requested instruction, on its face, failed to require reasonableness or justifiable reliance and, consequently, the intermediate appellate court had misread it).
256. See supra text accompanying notes 195-212.
257. See supra text accompanying notes 213-235.
258. See supra notes 213-233 and accompanying text.
259. See Wegad, 326 Md. at 409-22, 605 A.2d at 123-30.
260. See Menzel, supra note 211, at 310 ("[T]he better reasoned view, and the view supported by the weight of authorities which have considered the question, is that the negligence of a client in managing his business should not generally be a defense in accountant's malpractice actions .... In other words, the better rule is that set forth in National Surety."); see also Hawkins, supra note 212, at 811 ("[C]ontributory negligence
discover the source of defalcations, and believes the firm to be negligent, will be prevented from vigorously pursuing an action against that accountant, who can now claim that the client was contributorily negligent in failing to discover the defalcation.

5. Conclusion.—The Wegad court has limited the tort liability of accountants by providing them with the full power of a general contributory negligence defense. The Court of Appeals relied solely on state precedent and the Restatement to reach its decision, choosing to ignore the major debate that has arisen concerning contributory negligence in the context of accountant malpractice. The court's holding will unnecessarily allow negligent accounting professionals to escape liability for failing to discover the very defalcations they were hired to detect. Because the full scope of the issue was not directly addressed by the court, however, it is possible that in future cases an argument posited in favor of the National Surety standard may convince the court to re-examine the sole use of the general contributory negligence instruction in accountant malpractice actions.

WILLIAM S. HEYMAN

C. Negligence As a Matter of Law in Obstructed-View Left Turns

In Myers v. Bright, the Court of Appeals held that a driver who attempts to make a left-hand turn off of a roadway and across the oncoming flow of traffic, and whose view is obstructed, is negligent as a matter of law if he fails to check to make sure that the oncoming lane is free of approaching vehicles and subsequently collides with an oncoming motorist. In upholding the trial court's granting of a motion for judgment on liability in favor of the oncoming driver, the court agreed with the trial judge that no reasonable jury could conclude that the turning driver was not negligent or that the

must be accepted as a theoretical defense, but it applies only if the plaintiff's conduct goes beyond passive reliance and actually affects defendant's ability to do his job with reasonable care."). But see Dinallo, supra note 162, at 362 (noting that the National Surety standard's bias towards plaintiffs "prevents accountants in a majority of jurisdictions from using the contributory negligence defense to the extent it is available to other professionals").

262. Id. at 403, 609 A.2d at 1186.
263. Maryland Rule 2-519(a) provides for a "motion for judgment" to be made at the close of all the evidence. Thus, "motion for judgment" is the term now used for what was formerly termed a "motion for directed verdict." See id. at 411-12, 609 A.2d at 1190.
oncoming driver was contributorily negligent. The court also reaffirmed that the "boulevard rule," which holds that drivers entering favored boulevards are negligent as a matter of law if they collide with vehicles on that boulevard, does not apply to left turns off of roadways. Rather, a state statute governing left turns off of roadways provided the guideline for determining whether the turning driver breached the standard of reasonable care.

The Myers court stated that in certain circumstances, a driver may reasonably, but wrongly, believe that the turn can be made safely, thereby presenting a jury question. However, if the driver does not even attempt to gauge the location or speed of oncoming vehicles, he is negligent as a matter of law. The court also recognized that evidence of contributory negligence on the part of the oncoming driver would normally create a factual issue to be decided by the jury. The court held, however, that in this case the trial court was correct in keeping this issue from the jury because the turning driver failed to present evidence legally sufficient to support a finding of contributory negligence.

1. The Case.—On May 5, 1987, Ida Myers was driving in the right-hand southbound lane of Pennsylvania Avenue (U.S. Route 11) in Hagerstown, Maryland. Myers was approaching a Burger King restaurant on her right. In the left lane, a line of vehicles waiting to turn left extended back from an intersection about fifty feet beyond the restaurant entrance.

Matthew Bright was travelling northbound on Route 11 and wanted to turn left across both southbound lanes into the Burger King entrance. The driver of a pickup truck in the southbound line of vehicles motioned for Bright to turn in front of him. The turn was unsuccessful. Myers testified that she saw Bright's car

264. See id. at 399-403, 609 A.2d at 1184-86.
265. See infra notes 286-296 and accompanying text.
266. See Myers, 327 Md. at 404, 609 A.2d at 1186.
268. See Myers, 327 Md. at 401-02, 609 A.2d at 1185.
269. See id. at 402, 609 A.2d at 1185.
270. See id. at 408, 609 A.2d at 1188.
271. See id. at 410, 609 A.2d at 1189.
273. Myers, 327 Md. at 397, 609 A.2d at 1182.
274. Id., 609 A.2d at 1182-83.
275. Id., 609 A.2d at 1183.
276. Id.
emerge from in front of the truck "maybe a split second" before the crash. She braked as hard as she could, but was unable to prevent the collision.

Myers brought suit against Bright in the Circuit Court for Washington County. After the presentation of evidence, the trial judge granted Myers's motion for judgment on the issue of liability, precluding the jury from considering whether Bright was liable for primary negligence or whether Myers was contributorily negligent. The jury awarded Myers $30,000 in compensatory damages.

The Court of Special Appeals reversed the judgment of the trial court and remanded the case for a new trial. The court ruled that the trial judge had erroneously applied the boulevard rule to the facts of the case. According to the intermediate appellate court, the trial court should have focused solely on the state statute governing left turns off of roadways, which, unlike the boulevard rule, does not create an absolute right-of-way. The Court of Appeals granted Myers's petition for certiorari, reversed the Court of Special Appeals, and reinstated the trial court's judgment in favor of Myers.

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277. Id. 278. Id. 279. Id. 280. See id. at 397-98, 609 A.2d at 1183. The trial judge noted:

Mr. Bright had a duty to yield the right of way to Mrs. Myers. And that duty to yield was not lessened by any third party direction. He crossed into her right of way. He either saw but did not yield or failed to see what was obviously there. And there is no other response that any trier of fact would come to but that he is negligent as a matter of law and also she has the right to assume that no one is going to take the right of way from her. I don't see that she did anything that contributed to the accident at all. . . . She was traveling perhaps in excess of the posted speed limit. But that by itself is not evidence of contributory negligence from one who must assume that no one is going to take the right of way.

Id. 281. See id. at 398, 609 A.2d at 1183. 282. See Bright v. Myers, 88 Md. App. 296, 306, 594 A.2d 1177, 1182 (1991), rev'd, 327 Md. 395, 609 A.2d 1182 (1992). 283. See id. at 303, 594 A.2d at 1180 (noting that "this case was not one to which boulevard law should have been applied"). 284. See Bright, 88 Md. App. at 304, 594 A.2d at 1181 (discussing Md. Code Ann., Transp. § 21-402(a) (1987)). Because it reversed on this ground, the Court of Special Appeals deemed it unnecessary to consider another ground for Bright's appeal—whether the trial court abused its discretion in denying certain pre-trial discovery motions. See id. at 305-06, 594 A.2d at 1181-82. 285. See Myers, 327 Md. at 410, 609 A.2d at 1189.
2. Legal Background.—

a. The Boulevard Rule.—Many of the Maryland motor tort cases in the last half-century have fallen under the "boulevard rule."\(^{286}\) Under this rule, a driver who is legally required to yield the right-of-way at an intersection (the unfavored driver) is automatically negligent as a matter of law if that driver collides with a driver traveling along the favored highway (the favored driver).\(^{287}\) Only in very rare cases could an unfavored driver convince the jury of contributory negligence on the part of the favored driver.\(^{288}\) Also, courts have consistently found unfavored-driver plaintiffs contributorily negligent as a matter of law, completely barring their recovery.\(^{289}\) The boulevard rule, however, only applies to vehicles entering a boulevard.\(^{290}\) It does not apply to vehicles exiting a boulevard, including those turning left through oncoming traffic.\(^{291}\)

The courts' rigid adherence to this rule led to exceedingly harsh results in some cases. Favored-driver defendants almost invariably prevailed, regardless of their own unlawful acts.\(^{292}\) In 1977, 

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\(^{287}\) See Debelius, supra note 286, at 224.

\(^{288}\) See, e.g., Kopitzki v. Boyd, 277 Md. 491, 355 A.2d 471 (1976) (allowing the question of the favored driver's negligence to be submitted to the jury where testimony revealed that the favored driver was traveling nearly twice the speed limit and that another speeding driver was able to avoid collision); Hensel v. Beckward, 273 Md. 426, 330 A.2d 196 (1974) (finding that a favored driver's excessive speed will not ordinarily be considered a cause contributing to the accident).

\(^{289}\) See, e.g., Creaser v. Owens, 267 Md. 238, 245, 297 A.2d 235, 239 (1972) ("If the unfavored driver is a plaintiff, his suit is defeated unless the doctrine of last clear chance rescues his claim.").

\(^{290}\) See Safeway Trails, Inc. v. Smith, 222 Md. 206, 212, 159 A.2d 823, 826 (1960) ("By its express terms, the boulevard law controls entrance onto the favored highway; exit from it is not mentioned.").

\(^{291}\) See Tates v. Toney, 231 Md. 9, 12-13, 188 A.2d 283, 285 (1963) (finding the boulevard rule inapplicable where a driver attempted to turn left off of a roadway, across oncoming traffic, and collided with a vehicle in the oncoming lane).

\(^{292}\) See, e.g., Hensel, 273 Md. 426, 330 A.2d 196 (finding the unfavored-driver plaintiff contributorily negligent as a matter of law, completely barring his recovery, even though he stopped at a stop sign, looked both ways, and proceeded carefully, and the favored vehicle was being driven at high speed and without headlights on a moonless night). In perhaps the harshest application of the rule, Johnson v. Dortch, 27 Md. App. 605, 342 A.2d 326 (1975), the unfavored-driver plaintiff was hit almost immediately upon making
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the rule was relaxed when the Court of Appeals, in *Covington v. Gernert*, held that if a favored driver proceeds unlawfully and an accident ensues, the boulevard rule would not automatically hold an unfavored-driver plaintiff contributorily negligent as a matter of law. This decision was based largely on the statutory redefinition of "right-of-way" in 1970. Unlike the prior wording, the present definition requires a person to be driving lawfully to claim the right-of-way. A favored driver may therefore lose his absolute right-of-way if proceeding unlawfully.

b. The Maryland Left Turn Cases.—Maryland appellate courts have addressed the propriety of finding a left-turning driver negligent as a matter of law in several prior cases. In *Kelch v. Mass Transit Administration*, the Court of Special Appeals addressed a trial judge's decision to grant a directed verdict in a case concerning the current left turn statute. A bus driver stopped his bus while making a left-hand turn when he saw a motorcycle approaching him on the intersecting road. The motorcycle collided with the bus, which extended into the motorcyclist's lane. However, testimony of the bus driver and a passenger on the bus revealing that the bus had been at a standstill for several seconds before the collision—possibly giving the motorcyclist time to avoid the accident—was found to be sufficient to present a question of the motorcyclist's contributory negligence, and necessitated the submission of the case to a jury.

The Court of Special Appeals has recognized that the duty of a driver making a left-hand turn is that of exercising reasonable care, and the driver cannot be charged with absolute liability whenever an

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a right turn onto a favored highway. Even though the driver of the favored vehicle was intoxicated, speeding, and driving without headlights on the wrong side of the road, the plaintiff's recovery again was completely barred due to his contributory negligence. *See id.* at 606-11, 342 A.2d at 327-30.


294. *See id.* at 323-25, 373 A.2d at 624-25. The favored driver was traveling the wrong way on a one way-street. *Id.* at 324, 373 A.2d at 625.

295. *See id.* at 323-25, 373 A.2d at 624-25.


298. *Id.* at 292, 400 A.2d at 442.

299. *See id.* at 305, 400 A.2d at 448-49.
accident occurs during the turn. The Freudenberger v. Copeland court found that a left-turning driver could not be held negligent as a matter of law simply because his turn across the flow of traffic was followed by a collision. When the defendant turned left through the oncoming lane and was struck by the plaintiff, an oncoming driver, the question whether the defendant was liable was a proper one for the jury to resolve, given the facts of the case.

In Bennett v. Bass, the case most factually similar to Myers, a passenger sued the driver of a car in which she was riding and the driver of another car. The cars collided when her driver attempted to make a left turn even though her view of oncoming traffic was obstructed by a large truck. The trial court found insufficient evidence to submit the issue of the favored driver's negligence to the jury and granted a directed verdict for the favored driver. The Court of Appeals affirmed, finding that the negligence of the unfa-vored turning driver was the sole cause of the accident.

3. The Court's Reasoning.—

a. Primary Negligence of Left-Turning Drivers.—The Myers court began its analysis by recognizing that the basis for determining whether a left-turning driver has exercised reasonable care is a Maryland left turn statute, which provides:

If the driver of a vehicle intends to turn to the left in an intersection or into an alley or a private road or driveway, the driver shall yield the right-of-way to any other vehicle that is approaching from the opposite direction and is in the intersection or so near to it as to be an immediate danger.

The court rejected the argument presented by Bright that he should not be held liable under this statute because the term "right-of-way" as presently defined requires a favored driver to travel "in a lawful manner." Bright contended that if Myers was speeding, she

301. Id. at 178, 289 A.2d at 609.
302. Id.
304. Id. at 262, 235 A.2d at 715-16.
305. See id. at 266, 235 A.2d at 717-18.
306. See id. at 399-400, 609 A.2d at 1184.
308. Id. § 21-101(r). See supra note 296.
would not have been driving "in a lawful manner" and should not be afforded the right-of-way under the statute. The court rejected this argument because the turning motorist should have anticipated that vehicles would be approaching in the southbound lane. The oncoming driver's speed could not relieve the turning driver of his duty to anticipate such other vehicles.

However, the court did recognize that if the turning driver had seen a vehicle approaching and nevertheless attempted the turn, believing that he could safely make it across, a jury question of the turning driver's primary negligence might have been presented. In certain circumstances, a turning driver might make a reasonable observation of the oncoming traffic and still be unable to judge its speed. Thus, a speeding vehicle might not appear to constitute "an immediate danger" to a turning driver, and it might be reasonable for the driver to believe that he could safely make the turn. Although drivers are ordinarily entitled to presume that other drivers are obeying the law, visual or aural information that others are driving unlawfully may act to overcome that presumption—but such information is not available in every case.

Bright could not claim such a defense because he failed even to watch for oncoming traffic, never attempting to gauge the speed of any southbound vehicles. The court held that "turning blindly into oncoming traffic is negligence regardless of what that traffic is doing." The fact that the turning motorist was waved on by the driver of the pickup truck did not relieve Bright of his duty to observe the oncoming traffic. As the court stated, "Someone wanting to make a left turn is not relieved of responsibility because another motorist signals that the coast is clear."


309. See Myers, 327 Md. at 400, 609 A.2d at 1184.
310. See id. at 400-01, 609 A.2d at 1184.
311. See id. at 401, 609 A.2d at 1184.
312. Id., 609 A.2d at 1185.
313. Id.
314. See id.
315. See id. at 401-02, 609 A.2d at 1185.
316. See id. at 402, 609 A.2d at 1185.
317. Id.
319. See Myers, 327 Md. at 402, 609 A.2d at 1185.
that the highway was clear before proceeding across. Because the
evidence is uncontroverted that he did not do so, Bright was negli-
gent as a matter of law."320 Finally, the court held that this neglig-
ence was "unquestionably a proximate cause of the accident."321

b. Contributory Negligence of Oncoming Traffic.—Addressing the
issue of contributory negligence, the Myers court did not hold that
Bright was absolutely barred at trial from arguing that Myers was
contributorily negligent due to the speed at which she was traveling.
On the contrary, the court recognized that a turning driver is enti-
tled to allege contributory negligence by oncoming traffic.322 The
court held, however, that in this case Bright had simply presented
legally insufficient evidence to support a finding of contributory
negligence, and that therefore the trial court was correct in keeping
this issue from the jury.323 After noting that "there is no hard evi-
dence that Myers was, in fact, speeding[],"324 the court held that,
even if Myers was speeding, Bright had presented insufficient evi-
dence to demonstrate that Myers’s speed was a proximate cause of
the accident.325 The existing evidence could only lead a jury to spec-
ulate that Myers’s alleged speeding caused the accident.326 Specifi-
cally, the court held that the oncoming motorist was entitled to be in
her southbound lane and could not have avoided the collision at a
lawful speed.327 Only if there was sufficient evidence that, had she
been driving at a lawful speed, Myers could have stopped or
swerved, might a jury question have been presented.328

320. See id. at 402-03, 609 A.2d at 1185.
321. See id. at 403, 609 A.2d at 1186.
322. See id. at 405-09, 609 A.2d at 1186-89.
323. See id. at 404, 609 A.2d at 1186.
324. Id.
325. See id. at 405-09, 609 A.2d at 1186-89. See Alston v. Forsythe, 226 Md. 121, 130,
172 A.2d 474, 477 (1961) ("Exceeding the speed limit does not constitute actionable
negligence unless it is a proximate cause of the injury or damage."); 2 Keith C. Miller,
Automobile Accident Law and Practice § 19.10 (1991) ("To show merely excessive
speed is ordinarily not enough to support a verdict based on negligence unless there is
some further showing that this excessive speed is a direct and proximate cause of the
injury.").
326. See Myers, 327 Md. at 405, 609 A.2d at 1187.
327. Id. at 406, 609 A.2d at 1187 ("[S]peed in excess of the posted speed limit is not
the proximate cause of an accident when the vehicle is where it is entitled to be and the
driver would not have been able to avoid an accident even had he been driving at the
lawful speed.").
328. See id. at 408, 609 A.2d at 1188. The court likewise rejected the argument that
speeding was a proximate cause because were it not for her speed, the oncoming motor-
ist would not have been at the accident site at the precise moment when Bright made his
turn. Id. at 408-09, 609 A.2d at 1188-89. Speeding can proximately cause an accident
In so holding, the Court of Appeals disagreed with the intermediate appellate court's determination that the trial court had misapplied the boulevard rule; the high court found that the trial judge was "merely making an aside about the boulevard rule and recognized that Myers' contributory negligence would have precluded recovery." 329

c. Judge Bell's Dissent.—Judge Bell filed a dissenting opinion in which he argued that both issues—Bright's primary negligence and Myers's contributory negligence—should have been decided by a jury. First, he agreed with the intermediate appellate court that the trial court misapplied the boulevard rule and that a jury was required to decide the factual issue of whether Myers's car was "'an immediate danger' of which Bright should have been aware." 330 Second, concerning the contributory negligence issue, Judge Bell noted the evidence in the record that Myers may have been speeding and asserted that the record simply did not show whether this speeding may have been a proximate cause of the collision. 331 Therefore, he argued, this ambiguous issue should have been left to the jury, and the court improperly engaged in "conjecture and speculation" in making the factual finding that there was no contributory negligence. 332

4. Analysis.—

a. Primary Negligence of Left-Turning Drivers.—The Court of Special Appeals was correct in holding that the boulevard rule did not
apply to the facts of *Myers.* An earlier decision, *Tates v. Toney,* specifically held that the boulevard rule did not apply to a left-hand turn exiting a boulevard across the oncoming lane. Notably, the Court of Appeals did not find error in the intermediate appellate court’s interpretation of the boulevard rule; rather, it found error in its interpretation of the trial record. The Court of Appeals determined that the trial judge did not even apply the boulevard rule to the case, but was merely “making an aside” about the rule. Had the boulevard rule been applicable, Bright, as the unfavored turning driver, automatically would have been held negligent as a matter of law. While evidence of the oncoming driver’s contributory negligence would have been admissible, only in “rare cases” has the unfavored-driver defendant been able to demonstrate contributory negligence by the favored-driver plaintiff.

The Court of Appeals held that the Maryland statute governing left-hand turns off of roadways was applicable to the facts of the *Myers* case as a guide to determining the reasonableness of Bright’s conduct. Unlike its predecessor, the statute’s current version encompasses turns into private roads and driveways, not just intersecting streets. But unlike violations of the boulevard rule, violations of this statute are not automatically treated as negligence as a matter of law. Such violations merely represent evidence of negligence, which should ordinarily be presented to the jury.

Nevertheless, given the particular facts of *Myers,* the court appropriately found the violator negligent as a matter of law. The evidence was uncontroversial that Bright’s view was obstructed and that he attempted to make the turn without even trying to look for

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334. 231 Md. 9, 188 A.2d 283 (1963).
335. See id. at 12-13, 188 A.2d at 285.
336. *Myers,* 327 Md. at 404, 609 A.2d at 1186.
339. Previously, the statute provided: “The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.” Md. Ann. Code art. 66½, § 232 (1957). The statute was changed to its present form during the revision of the motor vehicle code in 1970. See Act of May 5, 1970, ch. 534, 1970 Md. Laws 1472.
oncoming vehicles. Moreover, the evidence clearly demonstrated that this was a proximate cause of the accident. Thus, Bright obviously violated the left turn statute—which necessarily implies that a left-turning driver must look for any "immediate danger”—and, most important, Bright's conduct was patently unreasonable. In light of these facts, Judge Bell's assertion in his dissent—that a jury is required to determine whether Myers's car was an "'immediate danger' of which Bright should have been aware[]"—is unpersuasive.

The court was also correct in refusing to consider the favored driver's speed in determining the turning driver's primary negligence. In so doing, the court appropriately limited the question of Bright's negligence to Bright's own acts, not the acts of others. Although the statute states that the turning driver should yield the right-of-way to a vehicle that is actually "so near as to constitute an immediate danger," the question is not necessarily one of where the other vehicle is actually located or how it is proceeding, but whether the turning driver reasonably believes that the oncoming vehicle is travelling in such a manner as to constitute "an immediate danger." Thus, Myers's speed might have been relevant if Bright had looked, seen Myers, and attempted to gauge her speed before proceeding. Because Bright did not even check for oncoming vehicles, however, Myers's speed was irrelevant.

b. Contributory Negligence of Oncoming Traffic.—Because the court limited its inquiry into primary negligence to the turning driver's acts and beliefs under the circumstances, it held that evidence of the oncoming driver's speed could only be raised to show contributory negligence. Boulevard rule cases have often held that it is improper to submit the issue of contributory negligence to the jury if the jury must indulge in "nice calculations of speed, time and distance" in order to find the favored driver contributorily negligent. Applying this standard to the facts of Myers, although not a boulevard rule case, the court found insufficient evidence for a jury to find Myers contributorily negligent without engaging in such cal-

342. See Myers, 327 Md. at 397-400, 609 A.2d at 1183-85.
343. See id. at 400, 609 A.2d at 1185.
344. See id. at 411-12, 609 A.2d at 1190 (Bell, J., dissenting).
345. See id. at 403, 609 A.2d at 1186.
culations.\textsuperscript{347} However, the court's holding in the 1977 case of \textit{Dean v. Redmiles}\textsuperscript{348} seemed to relax the strict requirements previously imposed upon individuals alleging negligence by a favored-driver, at least in the context of the boulevard rule.\textsuperscript{349} The \textit{Dean} court suggested that if the evidence is sufficient to support a conclusion that the favored driver's speed was a proximate cause of the accident, then it should be submitted to the jury in a suit against the favored driver.\textsuperscript{350} The \textit{Myers} court's refusal to allow the jury to consider the evidence marks a turning away from the \textit{Dean} holding.

Maryland law recognizes that if there is "any evidence, however slight, legally sufficient as to prove negligence," the evidence should be submitted to the jury.\textsuperscript{351} "Legally sufficient" implies that the party with the burden "cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture that such other party has been guilty of negligence, but such evidence must be of legal probative force and evidential value."\textsuperscript{352} The \textit{Myers} court seems strict, if not grudging, in its application of this standard, but Maryland courts have usually been hesitant in submitting the issue of a favored driver's negligence to juries when the only evidence of unlawful driving is of possible excessive speed, especially when the alleged speeding is a mere five or ten miles per hour above the speed limit,\textsuperscript{353} as was the case with \textit{Myers}.\textsuperscript{354} Most

\textsuperscript{347} Testimony of the parties and a motorcyclist regarding the parties' speed and the speed limit on the road was very uncertain. \textit{See Myers}, 327 Md. at 404, 609 A.2d at 1186.
\textsuperscript{348} 280 Md. 137, 374 A.2d 329 (1977).
\textsuperscript{349} \textit{See id.} at 161, 374 A.2d at 342.
\textsuperscript{350} \textit{See id. But see id.} at 171, 374 A.2d at 347 (Murphy, C.J., dissenting) (expressing fear that "virtually all cases involving evidence of excessive speed on the part of the favored driver, regardless of circumstances, will become jury questions").
\textsuperscript{351} \textit{See} Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549, 554 (1965) (emphasis added).
\textsuperscript{352} \textit{Id.} at 247, 213 A.2d at 554. However, \textit{Fowler} also stated that "Maryland has gone almost as far as any jurisdiction that we know of in holding that meager evidence of negligence is sufficient to carry the case to the jury."
\textit{Id.} at 246, 213 A.2d at 554 (emphasis added). Therefore, it would appear that the standard for declaring evidence sufficient to submit to a jury would fall somewhere between a "scintilla" and merely "meager." Un fortunately, these are vague terms and offer courts little guidance.
\textsuperscript{353} \textit{See}, e.g., Tippet v. Quade, 19 Md. App. 49, 61-62, 309 A.2d 481, 489 (1973) (refusing to submit the issue of contributory negligence to the jury, despite testimony that the favored driver was travelling 70 miles per hour in a 55 miles per hour zone, because there was no evidence to indicate that the favored driver could have avoided the collision had he been travelling within the speed limit); \textit{but see} Kopitzki v. Boyd, 277 Md. 491, 355 A.2d 471 (1976) (submitting the issue of negligence by the favored driver to the jury when evidence indicated that the favored driver was traveling at a speed of 70-90 miles per hour, nearly twice the posted speed limit).
cases imposing liability on favored drivers have involved some sort of inattention by the favored driver. On the whole, such a strict application will prevent a jury from making determinations based on mere conjecture. Although Judge Bell's dissenting argument—that the trial judge in this case had to engage in "conjecture and speculation" himself in order to find that any speeding by Myers was not a proximate cause of the collision—is not without merit, public policy concerns may have understandably motivated the Court of Appeals to prefer that a court make this judgment, rather than a jury. Because Maryland remains in the minority of states that still recognizes the doctrine of contributory negligence, which completely bars plaintiffs from recovery, rather than comparative negligence, which allows a jury to apportion damages according to the degree of fault of the parties, a strict application of the evidentiary standard will better protect the plaintiff's right of recovery.

5. Conclusion.—In Myers, the Court of Appeals recognized that ordinarily evidence of an allegedly negligent left turn off of a roadway should be submitted to the jury; however, the court carved out an exception to that rule. If such a violation involves a driver whose view is obstructed, and who does not even pause to look for oncoming traffic before colliding with an oncoming vehicle, then that driver will be held negligent as a matter of law. In the future, unfavored drivers may be able to escape such a finding only by offering

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354. See Myers, 327 Md. at 404, 609 A.2d at 1186.
355. See, e.g., Green v. Zile, 225 Md. 39, 170 A.2d 753 (1961) (involving a driver, who, with his vision unobscured, failed to notice a large tractor-trailer turning across his lane until he was only 30 feet away and could not avoid colliding with the trailer); Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961) (involving a driver, who, while talking with her passengers, failed to notice a vehicle that stalled while attempting to cross through her lane at an intersection); see also Kopitzki, 227 Md. at 499, 355 A.2d at 476 (Murphy, C.J., dissenting) ("Evidence legally sufficient to find the favored driver's negligence to be a proximate cause of the accident must be positive evidence of inattention or lack of due care not based on 'nice calculations of speed, time, or distance.' " (citations omitted)). But see Dean v. Redmiles, 280 Md. 137, 374 A.2d 329 (1977) (allowing the favored driver's speed to be submitted to the jury even though there was no further evidence of inattention).

In Myers, the turning driver did in fact attempt to introduce evidence of inattention by the favored driver because she had taken medication that morning. See Myers, 327 Md. at 409-10, 609 A.2d at 1189. Both the trial court and the Court of Appeals, however, found the testimony insufficient to support the allegation. See id.
356. See Myers, 327 Md. at 415, 609 A.2d at 1192 (Bell, J., dissenting).
357. As of 1988, 44 states had adopted some form of comparative negligence. The only jurisdictions still clinging to contributory negligence at that time were Alabama, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 471 & n.30 (5th ed. 1984 & Supp. 1988).
evidence that, upon pausing to look, external conditions prevented them from being able to correctly gauge the location and speed of the oncoming vehicles. The *Myers* court also recognized that the defense of contributory negligence is available to violators of the left turn statute, but refused to allow the issue to be submitted to the jury when the turning driver alleged that the favored driver was only slightly speeding. Without strong evidence of inattention or excessive speeding by a favored driver, the court will not hesitate to take the matter away from the jury, carefully guarding the favored driver's right of recovery.

CHARLES J. KRESSLEIN

D. Contributory Negligence and Assumption of the Risk in Work-Related Accidents

In *Brady v. Ralph M. Parsons Co.*,358 the Court of Appeals held that a violation of the Occupational Safety and Health Act (OSH Act)359 and the Maryland Occupational Safety and Health Act (MOSH Act)360 does not preclude the defenses of contributory negligence and assumption of the risk.361 Affirming the Court of Special Appeals, the Court of Appeals held that although a violation of such a safety statute constitutes evidence of negligence, neither statute was intended to relieve workers of a duty to use reasonable care for their own safety.362 The court further held that the doctrine of "nondelegable duties" does not preclude the application of either defense.363 By permitting the application of both defenses, the *Brady* court may have placed a difficult burden on employees who are unable to protect themselves from the failure of their employers to obey such safety statutes.

1. The Case.—In 1981, the Mass Transit Administration (MTA) was in the process of developing the Baltimore subway.364 The MTA, an instrumentality of the Maryland Department of Transportation, was the owner of the subway system, and hired several in-

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361. See *Brady*, 327 Md. at 285, 294, 609 A.2d at 302, 306.
362. *Id.* at 291, 609 A.2d at 305.
363. *Id.* at 284-85, 609 A.2d at 301-02.
364. *Id.* at 279, 609 A.2d at 299.
dependent contractors to oversee and complete the construction.\textsuperscript{365} Hensel-Phelps Construction Company, the general contractor for the project, hired Rocky Mountain Skylight, Inc. to install skylights over the platforms of various subway stations.\textsuperscript{366} The decedent, Donald Brady, was a Rocky Mountain employee.\textsuperscript{367}

In its construction of the subway, the MTA also sought the assistance of Baltimore Regional Insurance Transit Services (BRITS) and the Ralph M. Parsons Company.\textsuperscript{368} BRITS was responsible for administering insurance and safety programs, while Parsons was to serve as the construction manager for the subway project.\textsuperscript{369} In its contract with the MTA, Parsons agreed to oversee the project and to ensure that all safety precautions were taken.\textsuperscript{370}

On June 18, 1981, Brady was working at the Cold Spring Lane subway station site.\textsuperscript{371} He and his working team attempted to install a piece of aluminum cladding to a horizontal beam that was to support a skylight over the station.\textsuperscript{372} Brady instructed and assisted his team in erecting a ten-foot scaffold directly under the horizontal beam from which they planned to install the cladding.\textsuperscript{373} In order to make the installation possible, Brady and his coworkers assembled a guardrail on one side of the scaffold, but left the other three

\begin{itemize}
\item a) Implement the MTA's safety program to eliminate accidents, promote maximum efficiency through safe work methods and conditions and the reduction of direct and indirect costs of accidents.
\item b) Make frequent and unscheduled inspection of the work in progress and report hazards or unsafe practices to the Resident Engineers for immediate action or remedy.
\item c) Conduct regular safety meetings with the Contractor's foreman and representatives of the various crafts employed on the construction program.
\item d) Assure compliance with OSHA and MOSHA safety requirements and applicable codes.
\item e) Ensure the contractors' compliance with the provisions of the MTA Construction Safety Manual.
\end{itemize}


\textsuperscript{366} Brady, 327 Md. at 279, 609 A.2d at 299.

\textsuperscript{367} Id.

\textsuperscript{368} Id. at 280, 609 A.2d at 299.

\textsuperscript{369} Id.

\textsuperscript{370} See Brady v. Ralph M. Parsons Co., 82 Md. App. 519, 526, 572 A.2d 1115, 1119 (1990), \textit{aff'd}, 327 Md. 275, 609 A.2d 297 (1992). According to its contract with the MTA, Parsons was to

\begin{itemize}
\item a) Implement the MTA's safety program to eliminate accidents, promote maximum efficiency through safe work methods and conditions and the reduction of direct and indirect costs of accidents.
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\item f) Ensure the contractors' compliance with the provisions of the MTA Construction Safety Manual.
\end{itemize}

\textsuperscript{371} Brady, 327 Md. at 279, 609 A.2d at 299.

\textsuperscript{372} Id. at 286-87, 609 A.2d at 302-03.

\textsuperscript{373} Id.
sides unprotected.\textsuperscript{374} According to one of the workers, if “remaining guardrails had been attached, the top rails would have been higher than the horizontal beam above the scaffold, and no part of the scaffold could have been beneath the horizontal beam. This . . . would have made the installation of the final piece of cladding more difficult, if not impossible . . .”\textsuperscript{375}

After beginning to work on the horizontal beam, Brady fell off the scaffold and plummeted thirty-seven feet to his death.\textsuperscript{376} The facts relating to the events just prior to Brady’s fall were in dispute.\textsuperscript{377} According to one of Brady’s coworkers, Brady disappeared behind a nearby wall shortly after starting to work on the horizontal beam.\textsuperscript{378} Another witness claimed that after climbing from the scaffold onto an adjacent wall, Brady fell when he was hit in the face by an air-conditioning duct placed there by a coworker.\textsuperscript{379}

Brady’s survivors sued Parsons for negligence, claiming that its failure to maintain a safe workplace caused Brady’s death.\textsuperscript{380} At trial, the Circuit Court for Baltimore City granted Parsons’s motion for summary judgment after concluding that the MTA was Brady’s statutory employer, and that Parsons, having assumed some of the MTA’s duties, was entitled to the MTA’s immunity from suit as outlined in the Workmen’s Compensation Act.\textsuperscript{381} The Court of Appeals reversed and remanded the case back to the trial court, holding that the MTA was not Brady’s statutory employer, and that Parsons was not entitled to any immunity under the Workmen’s Compensation Act.\textsuperscript{382}

\textsuperscript{374} Id. at 287, 609 A.2d at 303.
\textsuperscript{375} Id.
\textsuperscript{377} See Brady, 327 Md. at 288, 609 A.2d at 303.
\textsuperscript{378} Id.
\textsuperscript{379} Id.
\textsuperscript{380} See id. at 281, 609 A.2d at 299.
\textsuperscript{381} See Brady v. Ralph Parsons Co., 308 Md. 486, 494, 520 A.2d 717, 722 (1987), appealed after remand, 82 Md. App. 519, 576 A.2d 1115 (1990), aff’d, 327 Md. 275, 609 A.2d 297 (1992); see also MD. ANN. CODE art. 101, § 15 (1985). According to Maryland’s workers’ compensation laws, an employer is required to pay benefits to the employee, which precludes the employee from taking other legal action. Id.
\textsuperscript{382} Brady, 308 Md. at 508, 512-13, 520 A.2d at 729, 731-32. According to the Court of Appeals:

The words “employer” and “employee” in the [Workers’ Compensation] statute are equivalent to and synonymous with the words “master” and “servant.” . . . Therefore, the test for determining the existence of an employer and employee relationship . . . [is] whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done.
At a second trial, a jury entered a special verdict and found not only that Parsons was negligent, but also that Brady had assumed the risk and was contributorily negligent. On appeal, Brady's survivors argued that the circuit court erred by permitting the defenses of contributory negligence and assumption of the risk to be submitted to the jury. The Court of Special Appeals affirmed the judgment, holding that those defenses were available in this type of action. The Court of Appeals granted the appellants a writ of certiorari.

The survivors argued before the Court of Appeals that the circuit court should have been reversed for three reasons. First, they argued that both defenses were unavailable to Parsons because the duty it owed to Brady was "nondelegable." Second, the survivors argued that both defenses were unavailable because of Parsons's violation of a safety statute. Finally, the survivors argued that there was insufficient evidence to support either defense. The Court of Appeals rejected each argument and affirmed the judgment of the Court of Special Appeals.

2. Legal Background.—

a. Existence of a Tort Duty.—It is generally the rule that a tort duty is not created by the mere fact that parties to a contract have undertaken to perform duties that neither of them have a legal duty to perform. Although the parties to the contract may be responsible to each other for a breach of their agreement, the breaching party is not ordinarily liable to third persons to whom the party

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Id. at 499, 520 A.2d at 724. After the first Brady court held that the MTA was not Brady's statutory employer, it further held that if the MTA could not seek immunity from liability through the Workers' Compensation laws, then neither could Parsons. Id. at 508, 520 A.2d at 729.


384. Id. at 524, 572 A.2d at 1118. Brady's survivors were also unsuccessful in arguing that the trial judge improperly excluded the expert testimony of an engineer who would have testified that Brady could not have realized the risk involved in his work and that Parsons was capable of minimizing the risk. Id. at 537-39, 572 A.2d at 1125-26.

385. Id. at 539, 572 A.2d at 1126.


387. Brady, 327 Md. at 281, 609 A.2d at 300.

388. Id.

389. Id.

390. Id.

391. Id. at 295-96, 609 A.2d at 306.

owed no previously existing tort duty. This is because there has been no direct transaction between the party breaching the contract and the third person. Without any contractual privity between the parties, it is argued, there is no logical basis upon which the breaching party may be required to perform the contract for the benefit of the third party.

Despite this general rule, courts have held that a tort duty to third persons may be created by contract under certain circumstances. For example, in *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*, a condominium developer entered into a contract with the defendant independent contractors, who were to conform with applicable building codes when constructing condominiums bought by the plaintiffs. The Court of Appeals found for the plaintiffs and held “that privity [of contract] is not an absolute prerequisite to the existence of a tort duty.”

Relying on section 93 of *Prosser and Keeton on the Law of Torts*, the court explained:

[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

In addition, although a contract does not ordinarily create a previously non-existent tort duty to third persons, a party may by contract share its tort duties to those third persons with the other party to the contract. The duties assumed under the contract by that other party do not ordinarily exceed those owed by the first party to third persons.

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393. See *Brady*, 327 Md. at 282, 609 A.2d at 300.
394. See *Keeton et al.*, supra note 357, § 93, at 667.
395. See id. The privity requirement is therefore an obstacle unless the contract has been made expressly for the benefit of the third person or the contract has been assigned to him. *Id.*
396. 308 Md. 18, 517 A.2d 336 (1986).
397. *Id.* at 22-23, 517 A.2d at 338-39.
398. *Id.* at 32, 517 A.2d at 343.
399. *Id.* at 27, 517 A.2d at 341 (quoting *Keeton et al.*, supra note 357, § 93, at 667-68).
400. See *Brady*, 327 Md. at 282, 609 A.2d at 300.
401. See *id.*
b. Nondelegable Duties.—There are some instances in which courts view a tort duty as so imperative that they will not permit a party to delegate the performance of that duty to another.\textsuperscript{402} This type of duty, commonly referred to as a "nondelegable duty," cannot be avoided by the employment of an independent contractor.\textsuperscript{403} The term nondelegable is something of a misnomer because the party on whom it is imposed is free to delegate the duty of performance to another.\textsuperscript{404} The party is actually only prevented from delegating the risk of nonperformance to another.\textsuperscript{405} Duties imposed by statute are often determined to be nondelegable.\textsuperscript{406} In Maryland, the duty to maintain a safe workplace for independent contractors has been held to be nondelegable and is imposed upon the landowner.\textsuperscript{407}

c. The OSH and MOSH Acts.—In 1970, Congress enacted the OSH Act in order to address the "alarming epidemic of industrial injuries and deaths."\textsuperscript{408} The goal of this legislation was to ensure that employees were provided with safe environments in which to work.\textsuperscript{409} To achieve this goal, the OSH Act empowered the Secretary of Labor to promulgate regulations establishing workplace health and safety standards that, if violated, would subject an employer to civil and criminal penalties imposed by the Occupational Safety and Health Review Commission.\textsuperscript{410}

The OSH Act permits states to preempt these federal regulations by enacting similar legislation to ensure worker safety within their borders. Upon approval of the Secretary of Labor, states may develop their own occupational safety and health plans, provided that they are equivalent to, or more stringent than, the OSH Act.\textsuperscript{411}

\textsuperscript{402} See 5 HARPER ET AL., supra note 133, § 26.11, at 83.
\textsuperscript{403} See Brady, 327 Md. at 285, 609 A.2d at 302.
\textsuperscript{404} See Rowley v. Mayor of Baltimore, 305 Md. 456, 466, 505 A.2d 494, 499 (1986).
\textsuperscript{405} Id.
\textsuperscript{406} See generally 5 HARPER ET AL., supra note 133, at § 26.11 (discussing numerous examples of statutory duties that have been found to be nondelegable).
\textsuperscript{407} See Rowley, 305 Md. at 466, 505 A.2d at 499.
\textsuperscript{409} See id.
\textsuperscript{410} The Secretary of Labor is granted the power to promulgate safety and health standards in section 655 of the OSH Act; the Occupational Safety and Health Review Commission is established by section 661; and the civil and criminal penalties are outlined in section 666. See Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 655, 661, 666 (1988).
\textsuperscript{411} See 29 U.S.C. § 667(b) (1988). Subsection (b) provides:

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety or health standards relating to
Such a plan was implemented in Maryland with the adoption of the MOSH Act in 1985.\textsuperscript{412}

Whether violation of regulations promulgated under the OSH Act creates a civil remedy on the part of injured parties has been the subject of much debate. According to section 653(b)(4) of the Act:

\textit{Nothing in this chapter shall be construed} to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.\textsuperscript{413}

Some courts have interpreted section 653(b)(4) as precluding the initiation of any private action on the basis that an employer has been cited for violations of OSH Act regulations.\textsuperscript{414} Other courts have held that although section 653(b)(4) might afford plaintiffs the use of OSH Act regulations in determining the standard of care in negligence suits, violations of these regulations do not constitute negligence per se.\textsuperscript{415} Section 653(b)(4) has not stopped still other courts from applying the negligence-per-se standard.\textsuperscript{416}

The issue of the availability of contributory negligence and assumption of the risk as defenses in cases involving these violations is equally unsettled. Some courts have held that allowing these affirmative defenses is completely inconsistent with the goals of safety laws like the OSH Act.\textsuperscript{417} Nevertheless, other courts permit defend-
ants to assert contributory negligence or assumption of the risk in such cases.\textsuperscript{418}

3. The Court's Reasoning.—In Brady, the appellants made three arguments to the court. First, they suggested that contributory negligence and assumption of the risk were unavailable because Parsons owed Brady a "nondelegable duty."\textsuperscript{419} Thus, according to the appellants, Brady could not be held accountable for his own actions because Parsons was not in a position to delegate to Brady any part of its duty to provide a safe workplace.\textsuperscript{420}

The second argument focused on Parsons's failure to comply with OSH Act and MOSH Act regulations.\textsuperscript{421} They argued that sections 483 and 496F of the \textit{Restatement (Second) of Torts} state that contributory negligence and assumption of the risk are unavailable when dealing with statutes that are enacted to place the entire responsibility for compliance upon the defendant.\textsuperscript{422} Brady's survivors claimed that the OSH and MOSH Acts are the type of safety statutes addressed by these two \textit{Restatement} sections and that, for this reason, neither defense was available.\textsuperscript{423}

Finally, the appellants contended that there was insufficient evidence to support the jury's special verdict that Brady was contributorily negligent and had voluntarily assumed the risk.\textsuperscript{424} Finding no merit in any of these arguments, the Court of Appeals held that Brady's contributory negligence and assumption of the risk barred

\textsuperscript{418} See, e.g., Ries v. National R.R. Passenger Corp., 960 F.2d 1156, 1162 (3d Cir. 1992) (permitting the defendant to assert contributory negligence); Albrecht, 808 F.2d at 332-33 (allowing contributory negligence as an affirmative defense); Minichello v. United States Indus., 756 F.2d 26, 29-30 (6th Cir. 1985) (holding assumption of the risk to be a valid defense); Bertholf, 402 F. Supp. at 172-73 (finding that the OSH Act is inapplicable to FELA cases and therefore does not bar contributory negligence); Lawrence v. Cavanaugh, 249 Md. 176, 180-81, 238 A.2d 859, 862 (1968) (acknowledging the availability of contributory negligence and holding that assumption of the risk is equally available in Maryland—prior to the enactment of the MOSH Act).

\textsuperscript{419} Brady, 327 Md. at 284, 609 A.2d at 301.

\textsuperscript{420} Id.

\textsuperscript{421} Id. at 291-95, 609 A.2d at 305-07.

\textsuperscript{422} See id. at 291, 609 A.2d at 305; \textit{Restatement (Second) of Torts} §§ 483, 496F (1965).

\textsuperscript{423} Brady, 327 Md. at 291, 609 A.2d at 305.

\textsuperscript{424} Id. at 286-91, 609 A.2d at 302-05.
his survivors' recovery.\textsuperscript{425}

Before addressing the appellants' arguments directly, the court began its analysis with a "note in passing" questioning the existence and extent of any tort duty owed to Brady by Parsons.\textsuperscript{426} The court recognized that any such tort duty would have to arise out of the duties assumed by Parsons in its contract with the MTA.\textsuperscript{427} The court suggested that there were significant questions concerning the existence of any tort duty.\textsuperscript{428} However, because both parties to the appeal proceeded on the assumption that Parsons owed a tort duty to Brady, the court indulged that assumption and addressed only those issues presented to it.\textsuperscript{429}

The court found that the appellants' first argument misconstrued the meaning of "nondelegable duty."\textsuperscript{430} The court stated that the term ordinarily refers to a duty for which the risk of nonperformance cannot be avoided by the employment of an independent contractor.\textsuperscript{431} The court thus concluded that the concept of nondelegable duties is irrelevant to the availability of the defenses of assumption of the risk or contributory negligence.\textsuperscript{432} Without citing prior precedent, the court further concluded that these defenses are ordinarily available in actions based upon a breach of a nondelegable duty.\textsuperscript{433}

The court next rejected the appellants' assertion that the OSH and MOSH Acts placed the entire responsibility for Brady's safety on Parsons, and held that their reliance on sections 483 and 496F of the Restatement was misplaced.\textsuperscript{434} The court explained that regulations promulgated under the OSH and MOSH Acts were designed to encourage a combined effort by employers and employees to maximize worker safety.\textsuperscript{435} Thus, the court held that contributory

\begin{footnotesize}
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\item See id. at 295-96, 609 A.2d at 307.
\item See id. at 282, 609 A.2d at 300.
\item Id.
\item See id.
\item See id. at 284, 609 A.2d at 301.
\item Id.
\item Id. at 284-85, 609 A.2d at 301.
\item Id. at 285, 609 A.2d at 302.
\item Id.
\item See id. at 291-93, 609 A.2d at 305-06.
\item See id.; see also 29 U.S.C. § 651 (1988) (explaining that the purpose of the OSH Act is to "encourage[e] employers and employees in their efforts to reduce the number of occupational safety and health hazards at their place of employment"); Md. Code Ann., Lab. & Empl. § 5-102(b) (1991) (suggesting "that employers and employees have separate but dependent responsibilities and rights with respect to making working conditions safe and healthful").
\end{enumerate}
\end{footnotesize}
negligence and assumption of the risk were still factors to be considered, because neither Act relieved Brady of the responsibility for maximizing his own safety.\textsuperscript{436}

Finally, the court rejected the appellants' sufficiency-of-the-evidence argument.\textsuperscript{437} The court explained that despite the differing testimony provided by two of Brady's coworkers, "[c]learly, the jury could have found that Brady should not have climbed onto the wall, and was negligent in doing so."\textsuperscript{438} The court also found that the risk of a fall was apparent to Brady, and that there was no evidence suggesting that Brady was forced to assume such a risk.\textsuperscript{439}

4. Analysis.—Although the Court of Appeals recognized that regulations under the OSH and MOSH Acts can be considered in determining the standard of care that independent contractors owe other workers, the court limited the influence of these regulations. By applying the mere-evidence standard and by retaining the availability of the affirmative defenses of contributory negligence and assumption of the risk, the Brady court put workers at a severe disadvantage in cases involving job-related injuries and deaths.

a. Existence of a Tort Duty.—Judge McAuliffe, writing for the court in Brady, began the opinion by noting "in passing" that there was a question as to whether Parsons actually owed any tort duty to Brady.\textsuperscript{440} It is unclear whether the court’s discussion of this issue should be considered as part of the holding or mere dicta, because the court was not required to decide whether Parsons owed a duty to Brady.\textsuperscript{441} Regardless, because of the length and detail of the court’s discussion of this issue, the decision will undoubtedly be cited in future opinions discussing the issue directly. For this reason, the court’s reasoning is well worth considering.

In making this "passing" comment, the court first turned to its earlier Council of Co-owners decision, in which the Court of Appeals held that a contract between named parties does not create a "non-existent tort duty to a third person."\textsuperscript{442} The Council of Co-owners

\begin{footnotes}
\begin{footnote}{436}{See Brady, 327 Md. at 292-93, 609 A.2d at 305-06.}
\begin{footnote}{437}{See id. at 288-91, 609 A.2d at 303-05.}
\begin{footnote}{438}{Id. at 288, 609 A.2d at 303.}
\begin{footnote}{439}{Id. at 288-89, 609 A.2d at 303-04. The sufficiency-of-the-evidence issue will not be further addressed by this Note.}
\begin{footnote}{440}{See id. at 282-84, 609 A.2d at 300-01.}
\begin{footnote}{441}{See id.}
\begin{footnote}{442}{See id. at 282, 609 A.2d at 300; Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 32, 517 A.2d 336, 343 (1986).}
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court explained that "[w]hile a contract may serve to define the nature of the obligation undertaken, and thus serve to identify the allocation or assumption of duties among various parties, it will not create a legal duty where one does not exist." In Brady, the court applied this language to suggest that by signing a contract with the MTA, Parsons could not have assumed "new tort duties" to anyone other than the MTA. The court also explained that any tort duties owed by Parsons to Brady could "not ordinarily exceed those owed by MTA to Brady."

The court was unclear in its discussion as to whether the duty to provide a safe workplace would be considered a "new tort duty." The Restatement suggests that a person, like Parsons, who contracts with an employer to provide protection to a third party, may be held to a duty "to use reasonable care to protect his undertaking." Despite this language, the court relied on Rowley v. Mayor of Baltimore, which "pointed out the anomaly of providing greater protection to employees of an independent contractor than to the defendant's own employees . . . ." The Rowley court suggested that an owner's employees may only rely on workers' compensation, and therefore, it would be unfair to allow an independent contractor's employees to collect damages simply because they were not the direct employees of the owner. Thus, the Brady court did not clearly explain whether the Rowley decision precludes courts from finding a "new tort duty" arising out of a contract between an owner and an independent contractor. Perhaps this question will be resolved in the future when the issue is properly before the court.

The court next focused on the extent of the MTA's duty in order to determine to what extent Parsons owed a duty to Brady. As noted earlier, Judge McAuliffe suggested that "the duties assumed by Parsons would not ordinarily exceed those owed by MTA to Brady." By using this standard in future cases, courts will es-

443. Council of Co-Owners, 308 Md. at 32, 517 A.2d at 343.
444. See Brady, 327 Md. at 282, 609 A.2d at 300.
445. Id.
446. See id. at 282-83, 609 A.2d at 300-01.
447. Id. at 282 n.2, 609 A.2d at 300 n.2 (citing Restatement (Second) of Torts § 324A (1965)).
448. 305 Md. 456, 505 A.2d 494 (1986).
449. Brady, 327 Md. at 282-83, 609 A.2d at 300-01 (citing Rowley, 305 Md. at 466-75, 505 A.2d at 499-504).
450. Rowley, 305 Md. at 468-69, 505 A.2d at 500.
451. See Brady, 327 Md. at 282-83, 609 A.2d at 300-01.
452. See id. at 283-84, 609 A.2d at 301.
453. Id. at 282, 609 A.2d at 300.
sentially put independent contractors in the shoes of their employers, and their contracts will have the effect of holding the independent contractors liable only for those duties originally owed by their employers.\textsuperscript{454} Thus, to determine Parsons's duty, the court examined the extent of the MTA's duty.\textsuperscript{455} In so doing, Judge McAuliffe relied on section 414 of the \textit{Restatement}, which provides that:

One who entrusts work to an independent contractor, but who \textit{retains the control} of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.\textsuperscript{456}

The court explained that "control", as used in \textit{Restatement} section 414, implies more than the ability to have work stopped or modified. Control involves "a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."\textsuperscript{457} The court "indulged" in the parties' assumption that "the degree of control retained by MTA, and by contract shared with Parsons, was sufficient to give rise to a duty flowing from Parsons [to Brady] . . . ."\textsuperscript{458}

The court's interpretation of section 414 has several flaws in logic. For instance, suppose that the facts in \textit{Brady} were changed slightly, and that the MTA had completely relinquished control by its contract with Parsons. Because the MTA would no longer have retained control, it could use section 414 to escape liability. Additionally, Parsons could escape liability because his duty "cannot ordinarily exceed" the duty owed by the MTA. Therefore, if Brady had not assumed the risk or been contributorily negligent, Brady's survivors would have been left with no remedy, merely because the MTA gave Parsons free rein over the project's safety. The court's interpretation leaves another question unanswered: Does an employer need to relinquish control before the court will recognize a duty owed by an independent contractor? If not, a contract will allow potential plaintiffs to have two sources of liability for their injuries—the employer and the independent contractor.

\textsuperscript{454} See id.
\textsuperscript{455} See id. at 283-84, 609 A.2d at 301.
\textsuperscript{456} \textit{Restatement (Second) of Torts} § 414 (1965) (emphasis added), \textit{quoted in Brady}, 327 Md. at 283, 609 A.2d at 301.
\textsuperscript{457} \textit{Brady}, 327 Md. at 283-84, 609 A.2d at 301.
\textsuperscript{458} \textit{Id.} at 284, 609 A.2d at 301.
b. Nondelegable Duties.—After "indulging" in the assumption that Parsons owed a tort duty to Brady, the court held that a violation of a nondelegable duty does not abrogate the common-law defenses of contributory negligence and assumption of the risk.459 As explained earlier, the appellants argued that the nondelegable duty of the independent contractor prohibited Parsons from delegating any part of its duty of care to Brady.460 Therefore, according to the appellants, Brady could not have been held to owe any duty to himself with regard to maintaining a safe workplace.461 This is an odd, but interesting, argument.

The doctrine of nondelegable duties is a tool ordinarily used in two ways. It may be employed by defendants to escape liability by asserting that a third party was not permitted to delegate a duty to the defendant.462 Alternatively, plaintiffs may use this doctrine to claim that the defendant cannot escape liability because the defendant was not in a position to delegate the duty to a third party.463 In Brady, the appellants made a creative attempt to implement the doctrine to avoid the consequences of Brady's contributory negligence and assumption of the risk.

In disposing of the appellants' argument, the court relied on the Rowley court's categorization of nondelegable duties as a "misnomer."464 As Judge McAuliffe explained, an owner is free to delegate the performance of a duty, but may not delegate "the risk of non-performance."465 Unfortunately, the court provided no adequate explanation as to why this would not abrogate the two defenses.466 Judge McAuliffe merely asserted that "contributory negligence and assumption of the risk are ordinarily available in an action based on breach of a nondelegable duty."467 This is not to

459. See id. at 284-85, 609 A.2d at 301-02.
460. Id. at 284, 609 A.2d at 301.
461. Id.
462. See id. at 292, 609 A.2d at 305 (quoting Restatement (Second) of Torts § 414 cmt. c (1965)). The comment provides the example of a statute that prohibits the sale of firearms to minors. See Restatement (Second) of Torts § 414 cmt. c (1965). The purpose of such a statute is clearly to protect minors against their own "inexperience, lack of judgment, and tendency toward negligence." Id.
463. See Rowley v. Mayor of Baltimore, 305 Md. 456, 505 A.2d 494 (1986). The plaintiff in Rowley tried to argue that the defendant had a nondelegable duty to maintain a safe workplace; however, the court shifted the duty onto the independent contractors, who were responsible for the upkeep of the premises. Id. at 474-75, 505 A.2d at 503-04.
464. See Brady, 327 Md. at 285, 609 A.2d at 302; see also Rowley, 305 Md. at 466, 505 A.2d at 499.
465. Brady, 327 Md. at 285, 609 A.2d at 302.
466. See id.
467. Id. (emphasis added).
suggest that the availability of assumption of the risk and contribu-
tory negligence should be restricted in cases involving the breach of
a nondelegable duty. To the contrary, there is little reason why
these affirmative defenses should not be available; otherwise, de-
fendants would be subject to liability for any and all negligent be-
behavior of potential plaintiffs. While there is little basis for
questioning the court's conclusion, the court failed to provide any
authority or reasoning to support its broad assertion.468

c. Violation of the OSH and MOSH Acts.—

(1) Statutes Placing Duty of Compliance Completely on Defendant.—
In their argument, the appellants relied on the Restatement (Second) of
Torts sections 483 and 496F, which provide that in cases of statutory
violation, contributory negligence and assumption of the risk are
barred if the goal of the statute is to place the burden of compliance
completely on the defendant.469 In rejecting this argument, the
court chose to interpret the OSH and MOSH Acts very narrowly—a
decision that may have broad implications.470 The Brady
court pointed to Comment c of section 483, which explains that "[a] stat-
ute may be found to have that purpose [of placing the entire respon-
sibility on the defendants] particularly where it is enacted to protect . . . persons against their . . . inability to protect themselves."471
According to Judge McAuliffe, the OSH and MOSH Acts are not the
type of statutes covered by sections 483 and 496F because the pur-
pose of the Acts was to encourage employers and employees to have
"separate but dependent responsibilities" in maintaining a safe and
healthy workplace.472 Thus, the Brady court concluded that the ef-
fect of the two safety statutes is not to place the entire duty upon the
employers, but to encourage employees to take some responsibility
in ensuring their own safety and health.473

The court conceded that there was clear support for precluding

468. See id.
469. See id. at 291, 609 A.2d at 305; Restatement (Second) of Torts § 483, 496F
(1965).
470. Brady, 327 Md. at 291-93, 609 A.2d at 305-306.
471. Id. at 292, 609 A.2d at 305; Restatement (Second) of Torts § 483 cmt. c
(1965).
472. Brady, 327 Md. at 291-93, 609 A.2d at 305-06. See 29 U.S.C. § 651 (1988); Md.
473. See Brady, 327 Md. at 292-93, 609 A.2d at 305-06.
the two affirmative defenses.\textsuperscript{474} In \textit{Martin v. George Hyman Construction Co.},\textsuperscript{475} a District of Columbia court provided compelling support for the abrogation of contributory negligence and assumption of the risk in cases involving the violation of safety statutes.\textsuperscript{476} According to the \textit{Martin} court:

The congressional determination that “most . . . accidents are due to lack of proper supervision and control” . . . is an implicit recognition that wage earners will not always exercise due care for their own safety. Finding that these accidents “could be avoided if proper safety measures were taken” . . . , Congress imposed upon employers . . . the sole responsibility for avoiding those accidents. . . . To hold that a wage earner’s contributory negligence is a defense for the employer would impermissibly ignore the congressionally imposed duty.\textsuperscript{477}

The \textit{Martin} court took a similar stance with regard to the abrogation of assumption of the risk. According to the District of Columbia court, to retain the assumption of the risk defense in worker safety cases would impose a “take it or leave it” decision upon the workers who are supposed to be protected by regulations like the OSH Act.\textsuperscript{478} The court explained:

To hold that the theoretical availability of the alternative of declining to continue in the normal activities of the wage earner’s employment might relieve the duty to assure safe working conditions would be to place upon the wage earner the responsibility of weighing the risks of employment hazards against the benefits that might be derived from encountering those risks. The imposition of such a burden hardly serves to encourage an employer’s conformance to the congressionally mandated duty of care. To the contrary, it would encourage employers to hire and retain only those wage earners who demonstrated a willingness to encounter the risks which Congress has determined must be eliminated.\textsuperscript{479}


\textsuperscript{475} 395 A.2d 63 (D.C. App. 1978).

\textsuperscript{476} Id. at 71-74.

\textsuperscript{477} Id. at 70.

\textsuperscript{478} Id. at 73.

\textsuperscript{479} Id. at 73-74. The \textit{Martin} court suggested that the assumption of the risk defense should at least be limited, and the defendant should have the burden of proving:
Thus, the court in *Martin* feared that the availability of the two defenses would impermissibly place the wage earners at risk in their work environments.\(^{480}\)

In *Brady*, the Court of Appeals found equal support for preserving the availability of the two defenses.\(^{481}\) Some courts rely on section 653(b)(4) of the OSH Act, which prohibits parties from using the regulations to "enlarge or diminish . . . the common law" rights of an employer.\(^{482}\) It is possible to construe the abrogation of contributory negligence and assumption of the risk as affecting the employer's common-law rights; however, the *Brady* court did not explain why it chose to adopt this view rather than abrogate the two defenses.\(^{483}\) By simply choosing one view rather than the other, the court failed to recognize and weigh in its analysis the lower bargaining position of many employees in the workplace.\(^{484}\)

Perhaps it is true that Brady was in a good position to protect himself, and could have done so had he taken certain precautions before he mounted the scaffold.\(^{485}\) Nevertheless, there are countless other workers who have considerably less control over their work environment than Brady had over his. In *Wren v. Sullivan Electric, Inc.*,\(^ {486}\) the Sixth Circuit wrote:

"The [worker safety] statute was passed under the police power of the state for the purpose of protecting those who are unable to protect themselves, occupying as they necessarily do a position much inferior in financial security to that of their employers . . . . It would defeat this beneficent purpose if it should be admitted as a sound principle that a

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(1) that there was available to the wage earner an alternative to encountering the risk; (2) that the wage earner's choice between the risk and such alternative was fully voluntary; (3) that such alternative afforded the wage earner the safety mandated by statute, rule, or regulation; and (4) that the wage earner's determination to encounter the risk was, under the circumstances, made with willful, wanton, or reckless disregard for his own safety.

*Id.* at 74.

\(^{480}\) See *id.* at 69-74.


\(^{482}\) 29 U.S.C. § 653(b)(4) (1988); see, *e.g.*, *Bertholf*, 402 F. Supp. at 173 (explaining that contributory negligence is available in FELA cases, when the OSH Act is the applicable safety statute).

\(^{483}\) See *Brady*, 327 Md. at 294-96, 609 A.2d at 306-07.

\(^{484}\) See *id.*

\(^{485}\) See *id.* at 286-91, 609 A.2d at 302-305.

\(^{486}\) 797 F.2d 323 (6th Cir. 1986).
failure of the employer to obey the statute could be con-
doned by the employee." 487

It is this group of workers discussed in Wren that the Court of Ap-
peals failed to protect in Brady.

(2) Negligence Per Se or Strict Liability.—It has been well estab-
lished in Maryland that a statutory violation constitutes mere evi-
dence of negligence. 488 Therefore, it is not surprising that the court in 
Brady decided that the violation of OSH and MOSH Act regu-
lations constitutes mere evidence of negligence rather than negli-
gence per se. 489

By attacking this categorization issue, the appellants were prob-
ably attempting to avoid the ultimate issue of contributory negli-
gence and assumption of the risk. 490 If the court had accepted the 
appellants' argument that violations of the OSH and MOSH Acts 
constitute negligence per se, then the appellants would have estab-
lished an irrebuttable presumption of negligence, and Brady's negli-
gence would not have been an issue. 491 Nevertheless, the court 
rejected the negligence-per-se argument and shifted its focus onto 
Brady's own negligence. 492

As the court explained, there is a wealth of authority supporting 
both the mere-evidence 493 and negligence-per-se 494 standards. Some courts argue that section 653(b)(4) prohibits the negli-
gence-

487. Id. at 326-27 (quoting American Zinc Co. v. Graham, 179 S.W. 138 (Tenn. 
1915)).
(1986); Gardenvillage Realty Corp. v. Russo, 34 Md. App. 25, 30, 366 A.2d 101, 105 
of a statute can be viewed by the courts in two ways: as mere evidence or negligence per se).
489. See Brady, 327 Md. at 294-95, 609 A.2d at 306-07.
490. See id. at 285, 291-95, 609 A.2d at 302, 305-07.
(explaining the abrogation of contributory negligence and assumption of the risk in cer-
tain statutory violation cases).
492. See Brady, 327 Md. at 293-96, 609 A.2d at 306-07.
493. See Albrecht v. Baltimore & O.R.R., 808 F.2d 329, 332-33 (4th Cir. 1987); Penn-
sylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n, 737 F.2d 
350, 354 (3d Cir. 1984); Wendland v. Ridgefield Constr. Servs., Inc., 439 A.2d 954 
(Conn. 1981); Whirlpool Corp. v. Occupational Safety & Health Review Comm'n, 645 
F.2d 1096, 1098 (D.C. Cir. 1981); Central of G.R.R. v. Occupational Safety & Health 
Review Comm'n, 576 F.2d 620, 623 (5th Cir. 1978).
Portland Terminal Co., 783 F.2d 255, 264-65 (1st Cir. 1985); Dixon v. International 
Harvester Co., 754 F.2d 573, 581 (5th Cir. 1985); Kelley v. Howard S. Wright Constr. 
per-se standard, because the enforcement of the standard would infringe on the employers common-law rights.\textsuperscript{495} This argument has been refuted by many courts that have adopted the negligence-per-se view.\textsuperscript{496} For instance, the court in \textit{Pratico v. Portland Terminal Co.}\textsuperscript{497} explained that:

[allowing OSHA regulations to act as "guides for the determination of standards of care," \ldots should not be viewed as expanding the liability of employers. The doctrine of negligence per se does not have the effect of turning reasonable, nontortious behavior into unreasonable, tortious behavior. Rather it simply allows the presence of a statutory regulation to serve as irrefutable evidence that particular conduct is unreasonable.\textsuperscript{498}

Despite this persuasive support for the adoption of the negligence-per-se standard, the \textit{Brady} court once again merely chose one standard over another without providing a reason.\textsuperscript{499} Given the court's past reluctance to apply the negligence-per-se standard in other areas of law, it is not surprising that the court repeated its unwillingness to subscribe to the negligence-per-se view.\textsuperscript{500}

5. \textit{Conclusion}.—There are many instances in which owners, like the MTA, hire independent contractors to comply with federal and state safety regulations. Despite these contractual arrangements, the \textit{Brady} court showed an unwillingness to bar contributory negligence and assumption of the risk when workers are injured in this context.\textsuperscript{501} The court was equally reluctant to afford OSH and MOSH Act violations a great amount of evidentiary weight.\textsuperscript{502} The notion of allowing negligence per se in statutory violation cases has long been avoided in Maryland,\textsuperscript{503} and the Court of Appeals made no exception in \textit{Brady}. Therefore, in cases involving the interplay of OSH and MOSH Act regulations and the relationships between independent contractors and their employees, the mere-evidence

\begin{itemize}
\item \textsuperscript{495} See \textit{Albrecht}, 808 F.2d at 332-33; \textit{Wendland}, 439 A.2d at 956-57.
\item \textsuperscript{496} See \textit{Wren}, 797 F.2d at 325-27; \textit{Pratico}, 783 F.2d at 264-65; \textit{Dixon}, 754 F.2d at 581; \textit{Kelley}, 582 P.2d at 508.
\item \textsuperscript{497} 783 F.2d 255 (1st Cir. 1985).
\item \textsuperscript{498} Id. at 265.
\item \textsuperscript{499} See \textit{Brady}, 327 Md. at 294, 609 A.2d at 306.
\item \textsuperscript{500} See id.
\item \textsuperscript{501} See id. at 294-96, 609 A.2d at 306-07.
\item \textsuperscript{502} See id.
\end{itemize}
standard will continue to thrive in Maryland, and potential plaintiffs will still be in danger of falling victim to contributory negligence and assumption of the risk defenses.

JEFFREY ROSENFELD
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