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Recent Decisions
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I. COMMERCIAL LAW

A. The Doctrine of Adverse Domination and Tolling the Statute of Limitations

In *Hecht v. Resolution Trust Corp.*, the Maryland Court of Appeals considered whether the doctrine of adverse domination tolled the running of the statute of limitations or delayed accrual of causes of action against former officers and directors of a failed savings and loan association. In answer to this question of first impression, which was certified to it by the United States District Court for the District of Maryland, the Court of Appeals adopted the presumption that claims do not accrue against officers and directors of a corporation until a disinterested majority replaces the culpable directors in control of the board. To rebut this presumption, defendants must demonstrate that someone had the knowledge, ability, and motivation to act on behalf of the corporation against the defendants.

The court's adoption of the disinterested majority version of the adverse domination doctrine represents a significant departure from prior jurisprudence. The decision establishes corporate ability and motivation to bring suit as prerequisites to the commencement of the period of statutory limitation and shifts the burden of proof from the party who invokes the doctrine to the party who claims the benefit of the conventional statutory rule. The *Hecht* decision will protect plaintiffs in circumstances where defendants constitute a majority of the board, but may not go far enough to protect corporations from an unjust imposition of the statute of limitations in other circumstances. Nevertheless, *Hecht* provides a workable solution to the complicated problem of statutory limitations in the context of corporate governance.

2. Id. at 331, 635 A.2d at 398.
4. Hecht, 333 Md. at 352-53, 635 A.2d at 408-09.
5. Id.
6. Id. at 352, 635 A.2d at 408.
1. The Case.—The Hecht controversy arose in the wake of the failure of Baltimore Federal Financial, I.S.A. (BFF), a Baltimore savings and loan institution. After the bank was declared insolvent in 1989, the plaintiff, Resolution Trust Corporation (RTC), sued nine former directors and a former officer of BFF in the United States District Court for the District of Maryland. The complaint alleged simple negligence, gross negligence, breach of contract, and breach of fiduciary duty on the part of the director-defendants, who constituted a majority of the board of directors of BFF from 1983 to 1988.

During the early 1980s, BFF converted much of its loan portfolio from long-term, fixed-rate residential mortgages to higher-risk commercial real estate, development, and construction loans. Following a routine examination in 1985, the Federal Home Loan Bank Board (FHLBB) issued a report criticizing BFF’s commercial real estate loan solicitation program and noting significant deficiencies in record keeping and loan documentation. The following year, the FHLBB compelled BFF to enter into a supervisory agreement to remedy severe accounting and underwriting problems. BFF’s financial condition worsened as its large commercial real estate loans fell into default. In February 1988, the bank entered into a consent agreement that severely limited its ability to make commercial real estate or construction loans and to adjust executive compensation. Robert E. Hecht, Board Chairman and Chief Executive Officer, was forced to resign. On February 7, 1989, the FHLBB determined that BFF was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) conservator. RTC succeeded FSLIC as conservator on August 9, 1989, and was later appointed receiver.

On February 6, 1992, one day before the three-year anniversary of FSLIC’s appointment as conservator, RTC filed suit against the off-

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7. Id. at 327-28, 635 A.2d at 396.
8. Id. at 327-28 & n.2, 635 A.2d at 396 & n.2.
9. Id. at 328, 635 A.2d at 396. The district court eventually dismissed the counts alleging simple negligence. Id. at 328 n.3, 635 A.2d at 396 n.3.
10. Id. at 328 n.2, 635 A.2d at 396 n.2.
11. Id. at 329 n.4, 635 A.2d at 397 n.4.
12. Id. at 328-29, 635 A.2d at 396-97.
13. Id. at 329, 635 A.2d at 397.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
ficers and directors of BFF in federal district court. Each of the defendants raised a limitations defense. The parties agreed that any claims that were viable when FSLIC was appointed conservator on February 7, 1989, would not be barred by the statute of limitations. The instant dispute arose with respect to the viability of the claims on that date. Defendants argued that any claims against them accrued more than three years before FSLIC became conservator and were therefore barred by Maryland’s three-year statute of limitations.

In the initial hearing on the limitations issue, Judge Norman Ramsey ruled against the defendants and predicted that the Maryland Court of Appeals would adopt the doctrine of adverse domination “so as to toll the running of limitations so long as a majority of the corporate board consisted of persons liable for the subject cause of action.” After Judge Ramsey’s retirement, the defendants moved for reconsideration of the ruling. Judge Marvin Garbis agreed that Maryland would adopt adverse domination, but predicted that the doctrine would toll the running of the statute of limitations only until such time as a person reasonably able to bring suit on behalf of the corporation had “knowledge sufficient under discovery rule jurisprudence to trigger the running of limitations.” Judge Garbis then certified the matter to the Court of Appeals for a determination of whether Maryland recognizes the doctrine of adverse domination to toll the running of the statute of limitations or delay accrual of a cause

19. Id. at 327, 329, 635 A.2d at 396, 397. The complaint focused on six loans made between November 11, 1983, and July 13, 1985. Id. at 329-30, 635 A.2d at 397.
20. Id. at 330, 635 A.2d at 397.
21. Id. at 330 n.6, 635 A.2d at 397 n.6. When a federal agency asserts claims it has acquired by assignment, a court engages in a two-step analysis. Id. First, it determines whether the state statute of limitations period expired before the assignment of the claims. If a viable claim existed at the time of assignment, the court must then determine whether the federal statute of limitations expired during the period between assignment and filing of suit. Id. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), a federal agency has three additional years from the date of conservatorship or accrual, whichever is later, in which to file suit on a tort claim, and six additional years in which to file suit on a contract claim. 12 U.S.C. § 1821(d)(14) (1988 & Supp. IV 1992). Because RTC filed against Robert E. Hecht and the other directors in this case within three years of the date of FSLIC’s appointment, the validity of the claims under FIRREA was not disputed. See Hecht, 333 Md. at 329, 330 & n.6, 635 A.2d at 397 & n.6.
22. Hecht, 333 Md. at 330 n.6, 635 A.2d at 397 n.6.
23. Id.; see Md. Code Ann., Cts. & Jud. Proc. § 5-101 (Supp. 1994) (“A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced”).
24. Hecht, 333 Md. at 330-31, 635 A.2d at 397-98.
25. Id. at 331, 635 A.2d at 998.
26. Id.
of action and, if so, in what form and to what extent the doctrine would apply to the facts of Hecht.27

2. Legal Background.—

a. Maryland.—In Maryland, the general rule is that a civil action must be filed within three years from the date it accrues.28 The harshness of this rule, especially in cases where plaintiffs do not know of the initial wrong until the limitations period has run, has led to the creation of several legislative and judicial exceptions.29 In the Courts and Judicial Proceedings Article, the General Assembly has provided exceptions for fraud30 and for persons under a disability.31

Although Section 5-101 of the Courts and Judicial Proceedings Article provides that the statute of limitations begins to run when a cause of action “accrues,” the term “accrue” is undefined.32 Therefore, the question of accrual has been left to judicial determination.33 Although a rule of strict construction has long applied to statute of limitations problems,34 courts have created exceptions to protect plaintiffs in cases where they “may . . . be blamelessly ignorant of the fact that a tort has occurred and thus, ought not be charged with slumbering on rights they were unable to ascertain.”35 The most important of these exceptions, the discovery rule, delays accrual of a claim where the cause of action is “inherently unknowable” and the plaintiff could not have reasonably known of the wrong within the

27. Id.


29. See, e.g., Pennwalt Corp. v. Nasios, 314 Md. 433, 451, 550 A.2d 1155, 1165 (1988) (“[T]he discovery rule has evolved as a means of mitigating the often harsh and unjust results which flow from a rigid application of the statute of limitations.”).

30. See Md. Code Ann., Cts. & Jud. Proc. § 5-203 (1989) (“If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.”).

31. See id. § 5-201 (providing that claims in favor of minors or mental incompetents shall be filed within the lesser of three years or the applicable period of limitations after the disability is removed). Other legislative exceptions include longer limitations periods for specialties, id. § 5-102; absence from state, id. § 5-205; adverse possession, id. § 5-103; and shorter limitations periods for assault, libel, and slander, id. § 5-105.

32. Id. § 5-101.


34. See Booth Glass Co. v. Huntingfield Corp., 304 Md. 615, 623, 500 A.2d 641, 645 (1985) (“We have long adhered to the principle that where the legislature has not expressly provided for an exception in a statute of limitations, the court will not allow any implied or equitable exception to be engrafted upon it.”).

The continuing-course-of-treatment rule delays accrual of a medical malpractice claim until the end of the treatment by the alleged tortfeasor, unless the patient knew or should have known of the injury or harm at an earlier date. Similarly, it delays accrual of contractual claims until the contract is completed.

In Maryland, the party raising a statute of limitations defense generally bears the burden of proving the period of limitations has run. There are, however, some exceptions to this rule. Where the statute of limitations would appear to bar a claim on its face, the plaintiff who wishes to avoid its preclusive effect must demonstrate facts justifying the applicability of an exception. The reason for this departure from the general rule is that "ordinarily, defendant will have no personal knowledge of when plaintiff discovered, or should reasonably have discovered, the facts upon which his cause of action is based."

Prior to the Hecht decision, the specific problem of equitable tolling of a corporation's claim against directors and officers in control of the board of directors had not been addressed by a Maryland court. The state's general law of agency provided, however, that knowledge by an agent whose interests are adverse to those of the principal is not imputed to the principal. Therefore, one could have concluded that knowledge by directors and officers who participated in acts that harmed the corporation should not be imputed to the corporation and should not be sufficient under the discovery rule to trigger the running of the statute of limitations. However, it was unclear by this


38. See Vincent v. Palmer, 179 Md. 365, 374, 19 A.2d 183, 189 (1941). The statute begins to run when the cause of action becomes vested and enforceable, not at the time of the making of a contractual promise. Id.


40. See id. at 725-26, 594 A.2d at 1156-57 (noting that plaintiffs who either attempt to invoke an exception to the statute of limitations or allege that fraudulent concealment prevented filing of an action within the statutory period shoulder the burden of proof).

41. Id.


43. Hecht, 333 Md. at 338, 635 A.2d at 401.

reasoning at what point the corporation would be deemed to have
had notice of a claim as a matter of law.

b. Other Jurisdictions.—Many federal and state courts have
considered the applicability of the doctrine of adverse domination to
delay accrual of a claim or toll the running of the statute of limitations.
Interestingly, adverse domination has had its greatest impact in the
failed savings and loan context.45 The first wave of such cases, de-
cided at the time of the Great Depression, failed to provide a clear
rule for the application of the doctrine.46 Courts disagreed on
whether to apply the doctrine of adverse domination or the general
rule, which holds that in the absence of actual fraud, the statute runs
from the time of the making of the excessive or imprudent loan.47
Those courts that espoused the doctrine of adverse domination dis-
agreed on the degree of domination required to delay accrual or toll
the running of limitations.48

After sixty years of relatively little activity in this area, another
wave of adverse domination cases made its way through the courts in
the late 1980s. Almost without exception,49 the new cases embraced

45. See, e.g., Federal Deposit Ins. Corp. v. Manatt, 723 F. Supp. 99 (E.D. Ark. 1989);
Federal Deposit Ins. Corp. v. Buttram, 590 F. Supp. 251 (N.D. Ala. 1984); Federal Deposit

46. See generally Annotation, Running of Statute of Limitations Against Action Against Bank
Directors or Officers for Making Excessive or Unauthorized Loans, 83 A.L.R. 1204 (1932).

47. Compare San Leandro Canning Co. v. Perillo, 295 P. 1026, 1028 (Cal. 1931) (applying
the "well-settled principle" that the statute of limitations would not run on claims
against directors while they were in full control of the corporation) and Bates St. Shirt Co.
v. Waite, 156 A. 293, 297 (Me. 1931) (holding that the earliest the statute would run in
favor of the directors of the corporation was when they had relinquished control) with
Mobley v. Faircloth, 164 S.E. 195, 195-96 (Ga. 1932) (holding that the limitations period
on claims against the bank directors commenced at the time excessive loans were made)
and Department of Banking v. McMullen, 278 N.W. 551, 554-55 (Neb. 1938) (finding that
a cause of action "accrued when the loan was made").

48. Some courts required the presence of at least one and possibly more than one
disinterested director on the board. See, e.g., Adams v. Clarke, 22 F.2d 947, 959 (9th Cir.
1927) (holding that the statute of limitations did not begin to run in favor of defendants
while they constituted the entire board of directors); cf. Payne v. Ostrus, 50 F.2d 1039,
1042-43 (8th Cir. 1931) (finding that a single disinterested director was sufficient to com-
mence the running of the statute of limitations). Some courts have reasoned that the
directors were trustees of a corporation and held that the statute of limitations did not
begin to run against the institution, or beneficiary of the trust, until it learned of the trust-
ees' wrongdoing or of the effective repudiation of the trust. See, e.g., Greenfield Sav. Bank

49. One recent decision suggests that closely-held corporations are not subject to the
702 (Ind. Ct. App. 1993), the Indiana Court of Appeals rejected the "presidential domina-
tion" theory, which would have extended the period in which shareholders could seek
compensation for the misappropriation of stock by the former president of a family-owned
some form of adverse domination.50 These cases provided no more guidance, however, than the Depression-Era jurisprudence with regard to the degree of control necessary for commencement of the limitations period and the allocation of the burden of proof on the limitations issue. Most courts have now adopted the "disinterested majority" version of the rule.51 Some courts continue to find that the statutory period begins to run as soon as there is a "single disinterested director" on the board.52 Still others have delayed accrual of claims against a particular director until that director has resigned.53 Finally, some courts have applied adverse domination principles without providing any indication of which version of the doctrine they espouse.54 Courts have generally rejected the "illusory control" theory, which provides that domination of a board is broken when a bank comes under the supervision of a governmental agency.55

Even those decisions that have adopted a particular version of the adverse domination doctrine often have been unclear as to which

business. *Id.* at 707-08. This case is distinguishable from other cases in which courts have considered adverse domination not only because it involves a closely-held corporation, but because the shareholders participated in the operation of the business and acquiesced in the former president's conduct. *See id.* at 708-09.

50. The old rule, that a cause of action accrues against a corporate director at the time the wrongs are committed, has been largely repudiated. In Federal Deposit Ins. Corp. v. Bird, 516 F. Supp. 647 (D.P.R. 1981), the first modern case to apply adverse domination in the savings and loan context, the court rejected the Depression-Era case law upon which defendants relied as "suspect and subject to reexamination" and adopted the theory of adverse domination. *Id.* at 651-52; *see also* Federal Deposit Ins. Corp. v. Hudson, 673 F. Supp. 1039, 1043 (D. Kan. 1987) (following the reasoning in *Bird*).

51. *See, e.g.*, Federal Deposit Ins. Corp. v. Howse, 736 F. Supp. 1437, 1441 (S.D. Tex. 1990) ("Under Texas law a cause of action by a corporation against its directors does not accrue until a majority of disinterested directors have discovered or are put on notice of the cause of action."); Federal Deposit Ins. Corp. v. Greenwood, 739 F. Supp. 450, 453 (C.D. Ill. 1989) (finding that the statute of limitations is tolled so long as the wrongdoers constitute a majority of the board of directors); Federal Sav. & Loan Ins. Corp. v. Williams, 599 F. Supp. 1184, 1195 (D. Md. 1984) ("This Court is persuaded that the better rule of law provides for the tolling of the statute of limitations, and the postponement of the accrual of a cause of action until after the culpable defendants have relinquished control of the institution.").

52. *See, e.g.*, Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520, 1522-23 (10th Cir. 1990) (noting that to take advantage of the doctrine of adverse domination a plaintiff had to demonstrate full and exclusive control on the part of the defendants).


54. *See, e.g.*, Bird, 516 F. Supp. at 651 (stating only that a claim does not accrue while culpable directors remain in control of a corporation).

55. *See, e.g.*, Resolution Trust Corp. v. Kerr, 804 F. Supp. 1091, 1095-96 (W.D. Ark. 1992) (finding that whether a consent agreement effectively transferred the control of a bank to the FHLBB involved material issues of fact); *accord Howse, 736 F. Supp. at 1442.*
party bears the burden of pleading and proving the limitations issue.\textsuperscript{56} Sometimes, it has been unclear whether a court applied federal or state law.\textsuperscript{57} There is no question that federal limitations principles apply to the period after assignment of the claims against directors to the federal agency.\textsuperscript{58} Courts have disagreed, however, on whether state or federal law should govern the pre-assignment period.\textsuperscript{59}

3. The Court's Reasoning.—In Hecht, the Court of Appeals adopted the doctrine of adverse domination to delay accrual of claims against directors and officers where the corporation had been prevented from taking action because no one had the knowledge, motivation, and ability to act on its behalf.\textsuperscript{60} The court adopted the "disinterested majority" version of the doctrine, which raises the presumption that, as long as the culpable directors constitute a majority of the board, accrual does not occur.\textsuperscript{61} Defendants can rebut this presumption by providing evidence that someone other than the culpable directors was aware of a potential cause of action and had the ability and the motivation to bring suit.\textsuperscript{62}

To reach this conclusion, the court first considered relevant principles of corporate law.\textsuperscript{63} In Maryland, the board of directors is the primary enforcer of the legal rights of a corporation.\textsuperscript{64} It exercises all

\textsuperscript{56} See, e.g., Williams, 599 F. Supp. at 1192 (denying defendant's motion for summary judgment because he had not "shown beyond any doubt that [the bank] knew or reasonably should have known of the causes of action against the defendant on or before ... the date of the assignment of [the bank's] claim to the FSLIC").

\textsuperscript{57} In Federal Deposit Ins. Corp. v. Greenwood, 739 F. Supp. 450 (C.D. Ill. 1989), for example, the court found that "the adverse domination theory [was] the law that should be applied" and cited federal case law in support of its holding. Id. at 453. But see Hudson, 673 F. Supp. at 1048 ("This court believes that Kansas . . . would adopt the modern 'adverse domination' theory."). Some decisions have been based on both state and federal law. See, e.g., Williams, 599 F. Supp. at 1194. Others have been decided solely on the basis of state law. See Federal Deposit Ins. Corp. v. Buttram, 590 F. Supp. 251, 254 (N.D. Ala. 1984); Bird, 516 F. Supp. at 650. Some courts have referred to adverse domination as a federal common-law doctrine. See, e.g., Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520, 1523 (10th Cir. 1990); Saylor v. Lindsley, 302 F. Supp. 1174, 1184 (S.D.N.Y. 1969).

\textsuperscript{58} See House, 736 F. Supp. at 1440 (noting that if a viable claim existed at the time of assignment, the court must determine whether the applicable federal statute of limitations applies); see also supra note 21.

\textsuperscript{59} Some courts have held that federal law governs the running of limitations in the pre-assignment period. See, e.g., Bryan, 902 F.2d at 1522. But other courts have determined that limitations during the pre-assignment period is a matter of state law. See Hecht, 736 F. Supp. at 1441 (applying Texas law); Carlson, 698 F. Supp. at 180 (applying Minnesota law).

\textsuperscript{60} Hecht, 333 Md. at 353, 635 A.2d at 409.

\textsuperscript{61} Id. at 347, 635 A.2d at 406.

\textsuperscript{62} Id.

\textsuperscript{63} Id. at 331-32, 635 A.2d at 398.

\textsuperscript{64} See id.
powers of the corporation not conferred on or reserved to shareholders.\textsuperscript{65} If suit is brought on behalf of the corporation, it is generally the board rather than shareholders, officers, or individual directors who must initiate the proceeding.\textsuperscript{66}

The court then considered Maryland's law of limitations.\textsuperscript{67} In particular, the court discussed the doctrines of discovery and continuous-course-of-treatment, which operate to prevent the running of the statute of limitations against plaintiffs who lack the knowledge necessary to bring suit within the limitations period.\textsuperscript{68} The court next examined the doctrine of adverse domination, as applied in other jurisdictions.\textsuperscript{69} Finally, the court focused its analysis on the defendants' three principal arguments: that the doctrine of adverse domination was inconsistent with Maryland law, that it was contrary to public policy, and that it achieved nothing more than was already accomplished by existing case law.\textsuperscript{70}

The court found that the doctrine of adverse domination was consistent with the Maryland law of limitations and agency.\textsuperscript{71} It rejected the defendants' assertion that the court's refusal to adopt tolling mechanisms in other cases reflected a judicial precedent inconsistent with adoption of the doctrine of adverse domination.\textsuperscript{72}

The defendants relied on three cases in support of their position. In \textit{McMahan v. Dorchester Fertilizer Co.},\textsuperscript{73} the court refused to expand a statute which tolled the statute of limitations for actions to collect a debt if the debtor had made a payment of interest to a case where the debtor had repaid a portion of the principal.\textsuperscript{74} In \textit{Walko Corp. v. Bur-
The court found that, where nothing had prevented the plaintiff from filing against the defendant directly, the statute was not tolled while the plaintiff attempted to intervene in another related lawsuit. Finally, in *Booth Glass Co. v. Huntingfield Corp.*, the court held that the statute of limitations was not tolled on a claim for negligent installation while the contractor attempted to repair the defective glasswork.

The court distinguished *Hecht* from these cases on the basis that the plaintiffs in each case had actual knowledge of their causes of action and the unfettered ability to bring suit during the limitations period. By contrast, the facts of *Hecht* raised legitimate issues of concealment and control. Furthermore, the cases cited by the defendants involved tolling exceptions in which there was no question of accrual and for which the application of the statute of limitations was clear.

The court further explained that adverse domination was consistent with Maryland's law of agency, which provides that knowledge by an agent with interests adverse to those of the principal is not imputed to the principal. In *Hecht*, the agents, as the directors and officers of the corporation, not only could not reasonably be expected to act upon or communicate knowledge of their wrongdoing, but constituted an "insuperable barrier to [the] corporation's ability to acquire the knowledge and resources necessary to bring suit" on behalf of the corporation. In that sense, the court's decision to delay accrual of the corporation's cause of action represented a logical extension of the discovery rule.

The Court of Appeals rejected the proposition that adverse domination was inconsistent with Maryland legislation. The court found that the enactment of a statute providing for delayed accrual in cases

76. Id. at 215, 378 A.2d at 1104.
77. 304 Md. 615, 500 A.2d 641 (1985).
78. Id. at 624-25, 500 A.2d at 645.
79. *Hecht*, 333 Md. at 344-45, 635 A.2d at 405.
80. See id. at 345, 635 A.2d at 405.
81. Id.
82. Id.
83. Id. at 346, 635 A.2d at 405.
84. Id. The court observed that adverse domination was based on knowledge and not simply on the power to act on that knowledge, because "actual notice of a claim [would] not be possible until the corporation plaintiff [was] no longer under the control of the defendant board members." Id.
85. Id. at 347-48, 635 A.2d at 406.
involving fraudulent concealment did not mean that all claims involving something less than fraud should be subject to the general three-year rule. The court explained that fraudulent concealment was not the only reason a corporation might be "blamelessly unaware" of a cause of action. For example, directors and officers may be so disengaged from their responsibilities that they themselves are unaware of the wrongful conduct.

The court then proceeded to reject the defendants’ second argument: that adverse domination was contrary to public policy. In the realm of corporate governance, where the balance of power is weighted heavily in favor of the majority of the board of directors, which has almost exclusive power to determine whether to sue on behalf of the corporation, the court stated that fairness mandates application of the adverse domination doctrine. Although the court acknowledged that shareholders could institute proceedings in some circumstances, it noted that, as a practical matter, it would be difficult if not impossible for shareholders to gain access to the information and resources necessary to bring suit. For these reasons, the court concluded that "equitable considerations warrant[ed] a shifting of the balance in favor of the corporation or association."

With respect to the defendant’s final argument, that adverse domination achieves nothing more than already accomplished under existing law, the court said that the doctrine went beyond the discov-

87. Hecht, 333 Md. at 348, 635 A.2d at 406.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id. at 350, 625 A.2d at 407. The shareholders must first make a demand to the directors unless making such a demand would be futile. Eisler v. Eastern States Corp., 182 Md. 329, 333, 35 A.2d 118, 119-20 (1943). Where the directors are accused of wrongdoing, a demand would be deemed futile. Parish, 250 Md. at 83, 242 A.2d at 512.
94. Hecht, 333 Md. at 350-51, 635 A.2d at 407-08. The court stated that adverse domination would not render the statute of limitations ineffective. Id. at 349-50, 635 A.2d at 407. Not only is the presumption created by the doctrine rebuttable, but the contemporaneous ownership rule limits the class of potential plaintiffs to those who held shares during the allegedly wrongful conduct. Id. at 350, 635 A.2d at 407. Shareholders cannot sue for acts which took place before they became shareholders. Id.
95. Id. at 351, 635 A.2d at 408.
ery rule, the law of agency, and the state's fraudulent concealment statute. The doctrine extends the discovery rule to the corporate context and uses it to delay accrual not only until a claim is discovered, but until someone has the knowledge, ability, and motivation to act for the corporation. It goes beyond the law of agency to create a presumption that there is no knowledge while wrongdoing directors control the corporation. Finally, the doctrine does not require any fraudulent concealment but is based on the directors' exclusive control over information.

To explain its adoption of the disinterested majority version of the doctrine, the court stated that because defendants had greater access to relevant information and because it was more probable that no one, other than the defendants, was in the position to bring suit, it was appropriate and fair that the defendants bear the burden of proof.

In dissent, Judge Bell argued that the "single disinterested director" version of the doctrine was more consistent with Maryland law. Judge Bell found that, but for the adverse domination, limitations would have run and concluded that the court should have placed the burden on the plaintiff to prove an exception to the ordinary operation of the statute of limitations.

4. Analysis.—

a. Consistency with the Discovery Rule.—That a corporate plaintiff may avoid the preclusive effect of Maryland's statute of limitations during a period when culpable directors dominate the board is not surprising. In other jurisdictions, federal and state courts consistently have reached the same conclusion. What distinguishes Hecht from other cases that involve adverse domination is the Court of Appeals' attempt to reconcile the doctrine with Maryland law on the statute of limitations. With the Hecht decision, the court significantly modifies the operation of the discovery rule and dramatically alters

96. Id. at 351-52, 635 A.2d at 408.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id. at 353, 635 A.2d at 409 (Bell, J., dissenting).
102. Id. at 358, 635 A.2d at 411.
103. See supra notes 50-55 and accompanying text.
104. Other jurisdictions have treated adverse domination as a special case and, in the savings and loan context, have relied heavily on federal precedent. See, e.g., Federal Deposit Ins. Corp. v. Bird, 516 F. Supp. 647, 651 (D.P.R. 1981).
the balance of power in cases that involve misfeasance by officers and directors.

The court's decision to treat adverse domination as a corollary to the discovery rule is significant because the doctrine actually extends that rule considerably. Prior to Hecht, Maryland's discovery rule jurisprudence dealt primarily with bilateral disputes involving tortfeasors on one side and aggrieved parties on the other. Because the plaintiffs in these earlier cases brought suit to redress injuries that they personally had suffered, courts had only to determine when the plaintiffs knew or should have known of their potential claims. In the corporate context, where the plaintiff is the corporation itself, a court must decide who qualifies as a triggering person—that is, one whose knowledge is sufficient to commence the running of the limitations period.  

In Hecht, the court determined that a triggering person was someone with actual knowledge of the corporation's claim and the ability and the motivation to act upon that knowledge. In effect, the court added two prerequisites to the accrual of a claim under the discovery rule: the ability and motivation to bring suit. However, the court's rationale for extending the discovery rule in this case makes it clear that these additional requirements only apply in cases involving claims brought on behalf of a corporation.  

Under both adverse domination and the discovery rule, the standard is actual or constructive knowledge of a claim. In the corporate context, "actual notice of a claim is not possible until the corporate plaintiff is no longer under the control of the defendant board members," that is, until someone other than the wrongdoers has the ability and motivation to act. While many other courts, par-
particularly in the failed savings and loan context, have applied the doctrine of adverse domination to allow the government to bring a claim against directors and officers, few have articulated a clear rule and allocated the burden of proof as the Court of Appeals has in *Hecht*.

A second way in which the version of adverse domination adopted by the *Hecht* court differs from prior limitations law is in the allocation of the burden of proof. *Hecht* holds that in cases where culpable directors comprise a majority of the board, the defendants bear the burden of proving adequate notice to the corporate plaintiff.\(^\text{111}\) The majority, however, did not adequately address the dissent's argument that, in general, a plaintiff who invokes an exception to statutory limitations, such as the discovery rule or the exception for fraudulent concealment, bears the burden of showing why the statute of limitations should not bar the claim.\(^\text{112}\) In *Hecht*, the court simply stated that it was appropriate for the defendants to bear the burden because the defendants enjoyed greater access to information of claims and that it was probable that no one else was in a position to bring suit.\(^\text{113}\)

Although it is not immediately clear why plaintiffs who invoke the discovery rule or the fraud exception should bear the burden of proof while plaintiffs who invoke the doctrine of adverse domination do not, the difference can be explained by the parties' respective access to relevant information. Under the discovery rule, plaintiffs must show that they did not know or have reason to know of a cause of action.\(^\text{114}\) Plaintiffs bear this burden because they are in the best position to ascertain from the surrounding facts whether there is a basis for a claim.\(^\text{115}\) Similarly, culpable members of the corporation's board are likely to have better access to information with respect to who had the knowledge, motivation, and ability to challenge their wrongful conduct.\(^\text{116}\)

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\(^\text{111}\) See *supra* notes 90-95 and accompanying text.


\(^\text{113}\) *Hecht*, 333 Md. at 352, 635 A.2d at 408.

\(^\text{114}\) *Finch*, 57 Md. App. at 241, 469 A.2d at 892.

\(^\text{115}\) *Id.* at 242, 469 A.2d at 892.

\(^\text{116}\) *Hecht*, 333 Md. at 350-51, 635 A.2d at 407-08. Courts have shifted the burden of proof to corporate directors in other situations. For example, in *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), directors sought to dismiss a shareholders' derivative action on the basis that the action had been rejected by the corporation's independent litigation committee. *Id.* at 781. The Delaware Supreme Court determined that the defendant-directors had the burden of proving that the litigation committee had acted inde-
b. Adequacy of Protection.—An important rationale for shifting the burden of proof to the defendants under the doctrine of adverse domination is the probability that no one other than the defendants is in a position to bring suit.\(^1\) Under the "single disinterested director" version of the adverse domination rule, which the Court of Appeals rejected, a plaintiff must, without the benefit of discovery, prove a negative: that no one could have or was willing to bring suit on behalf of the corporation.\(^2\) Under the version of adverse domination adopted by the *Hecht* court, the defendant-directors, who have the best access to relevant information, must establish the existence of one person capable of representing the interests of the corporation to rebut the presumption that the statute of limitations should not run.\(^3\) Naturally, if a suit has not been brought, it is probable that no such person exists.

Although the adoption of the adverse domination doctrine and the shifting of the burden of proof to the defendant-director will allow plaintiffs to bring suits that would otherwise be barred by the statute of limitations, the application of the rule does not provide complete protection to shareholders and corporations. This is because the rule ignores the structural biases inherent in our system of corporate governance. While *Hecht* establishes that knowledge on the part of culpable directors is not adequate notice to a corporation of a cause of action, the court failed to recognize that even knowledge on the part of disinterested directors may sometimes be insufficient notice to a corporation. The court’s sense of the term “disinterested director” would appear to include any director who did not participate in the allegedly wrongful conduct.\(^4\) That might well include directors who are members of corporate management and who would be reluctant,

\(^{117}\) *Hecht*, 333 Md. at 352, 635 A.2d at 408.

\(^{118}\) See *id.* at 353, 635 A.2d at 409 (Bell, J., dissenting).

\(^{119}\) See supra notes 60-62 and accompanying text.

\(^{120}\) See, e.g., *Hecht*, 333 Md. at 327, 635 A.2d at 369 (describing adverse domination by officers and directors as long as they remain in control); *id.* at 340, 635 A.2d at 402 (stating that claims can be brought "only when the culpable directors are replaced by a majority of nonculpable directors"); *id.* at 341, 635 A.2d at 403 (explaining how under the single disinterested director version, a plaintiff would have the burden of showing "full, complete and exclusive control by the culpable directors charged with wrongdoing").
whether out of loyalty, ambition, or fear of reprisal, to bring suit against their superiors.121

Even outside directors may not be truly independent.122 Many directors owe their positions to the corporation's chief executive officer.123 Most are executives of other corporations and understand the role of the outside director to be a passive one.124 The process for selecting board members, the "criteria by which their candidacy and continued service are evaluated, and the motives and rewards that impel nominees and directors to serve on the board all interact to form a highly cohesive group of mutually attractive individuals."125 Such a group is unlikely to initiate litigation against one or more of its members.

Even if outside directors acted with complete independence, they might not have the knowledge necessary to protect the interests of the corporation.126 Many outside directors have backgrounds in industries completely different from those of the corporations on whose boards they sit.127 Their contact with the corporation is limited, and their decisions generally are based on information filtered by management.128

Although Maryland's adoption of the "disinterested director" version of the doctrine of adverse domination removes a significant obstacle to claims against corporate directors, the rule does not, and cannot, completely protect a corporation from the harsh effects of the statute of limitations. The rule adopted in Hecht will facilitate the pursuit of claims so long as the board is comprised primarily of directors

121. See George W. Dent, Jr., The Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care, 61 B.U. L. Rev. 623, 626 (1981) ("The subordinates cannot flout the chief's authority when functioning as directors in his presence. Outside directors, though less subject to the control of the chief executive officer, are still unlikely to be very independent.") (footnote omitted).
122. See id. at 627-28.
123. See id.
124. See id.
125. Directors are selected largely on the basis of personal compatibility with other board members. Individuals who perceive a group, such as their colleagues on the board, as agreeable, tend to desire a continued association with that group. Because of this desire, they tend to conform their actions to the group's views. James D. Cox & Harry L. Munsinger, Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion, 48 Law & Contemp. Prob. 83, 91-92, 98 (1985). The effects of this phenomenon are intensified by the prestige associated with board membership. Id. at 95.
126. Dent, supra note 121, at 627.
127. Id.
128. See id. at 628, 672 ("[F]ew [outside directors] spend more than thirty-six hours per year attending meetings; moreover, many receive little information about the meeting[s] prior to their attendance.").
who participated in the transaction in question. But once the balance of power shifts in favor of directors who did not participate in the wrongful acts, the statute will begin to run, whether or not these directors are sufficiently independent and involved in the affairs of the corporation to represent the corporation's best interests. Unless the plaintiffs—with the benefit of discovery or access to the relevant information—can establish that there was no one with sufficient knowledge, ability, and motivation to bring suit on behalf of the corporation, the directors likely will prevail.

As incomplete as the protection of the disinterested majority standard may be, the Hecht decision represents the outer limits of what the court could reasonably accomplish without completely violating the principles of repose that underlie the statute of limitations.\(^{129}\) A presumption that includes all inside directors or all directors with personal ties to the wrongdoers is simply unworkable. Although a corporation’s directors have superior knowledge of the motivations of other members of the board, it would be unreasonable to ask defendant-directors to prove in each case not only that there had been a shift in control of the corporation, but also that they did not exercise influence over new directors through professional or personal relationships. The better rule, which the Court of Appeals has chosen, assumes that directors who did not participate in culpable conduct have acted in a conscientious manner and requires that a corporate plaintiff produce evidence to the contrary.

5. Conclusion.—In Hecht v. Resolution Trust Corporation, the Court of Appeals adopted the doctrine of adverse domination to ensure that, even in the absence of fraud, the statute of limitations will not run against a corporation dominated by wrongdoers unless the culpable directors can demonstrate that someone else had the knowledge, ability, and motivation to bring suit against them. Because the court classifies any director who did not participate in the wrongful conduct as disinterested, plaintiffs will continue to have the burden of proving actual domination in those cases where a disinterested majority of the board, whether out of loyalty, fear of retaliation, or lack of sufficient knowledge, is unwilling or unable to act for the corporation. In such cases, plaintiffs will have the formidable task of showing that no one

\(^{129}\) See Hecht, 333 Md. at 338, 635 A.2d at 401 (stating that one of the purposes of statutes of limitation is that of "ensuring fairness to plaintiffs by encouraging prompt filing of claims"); Harig v. Johns Manville Prods. Corp., 284 Md. 70, 76-77, 394 A.2d 299, 302 (1978) (explaining that the purposes served by statutes of limitation include "encouraging promptness in instituting actions, suppressing stale or fraudulent claims, and avoiding inconvenience which may stem from delay when it is practicable to assert rights").
could have enforced the rights of the corporation. Despite this handicap, the rule announced in *Hecht* is the most practical solution to a complex problem.

**Kelly Tubman Hardy**
II. CONSTITUTIONAL LAW

A. Local Control Over Alcoholic Beverage Licensing: Ending Gender Discrimination Through the Back Door

In Coalition For Open Doors v. Annapolis Lodge No. 622, Benevolent & Protective Order of Elks, the Maryland Court of Appeals unanimously upheld an Annapolis ordinance which prohibited the renewal of liquor licenses to private clubs that engaged in discriminatory membership practices. The court held that the Annapolis City Council has broad power under Article 2B to regulate alcoholic beverages and that the Annapolis ordinance is not preempted by the state public accommodations law. With Coalition for Open Doors, the court has allowed the City of Annapolis effectively to nullify the exception for private clubs in the public accommodations law.

1. The Case.—Following a hotly contested political debate, the Annapolis City Council enacted an ordinance on April 9, 1990, that prohibited the issuance or renewal of an alcoholic beverage license to any private club that engaged in certain discriminatory practices. Specifically, Ordinance 0-11-90 Revised, which passed on a vote of five to four, provided that “[a]n establishment licensed under the various club classes provisions . . . shall not exclude from membership solely on the basis of race, sex, religion, physical handicap or national origin in its membership.” The ordinance forbade the Annapolis Alcoholic Control Board from issuing new or renewal licenses to any

1. 333 Md. 359, 635 A.2d 412 (1994).
2. Id. at 361-62, 635 A.2d at 413.
4. Coalition for Open Doors, 333 Md. at 362, 635 A.2d at 413.
5. Id.
6. Id. at 363, 635 A.2d at 413.
7. Id. at 365 n.6, 635 A.2d at 415 n.6.

A. An establishment licensed under the provisions of Sections 7.12.240, 7.12.270 and 7.12.330 [various club classes] shall not exclude from membership solely on the basis of race, sex, religion, physical handicap or national origin in its membership.

1. In addition to any other requirements of law, each application for a new license, a transfer of a license, or a renewal of a license, described in [above listed sections], shall be accompanied by an affidavit declaring that the establishment for which the license is sought is not required by any organizational by-laws to engage in any practice described in subsection (A) of this section.

2. The issuance, transfer or renewal of a license described in [above listed sections] shall not be approved if the affidavit required by subsection (A)(1) of this section is not submitted.
private club that failed to submit "an affidavit declaring that the estab-
lishment for which the license is sought is not required by any organi-
zational by-laws to engage in any [discriminatory] practice." To
accommodate clubs that had to apply to a national or international
organization for permission to change their by-laws, the Annapolis
City Council subsequently postponed the effective date of Ordinance
0-11-90 from January 1991 until September 1, 1991.10

Annapolis Lodge No. 622, Benevolent and Protective Order of
Elks, is a Maryland corporation and subordinate to the national frater-
nal organization, the Benevolent and Protective Order of Elks of the
United States of America.11 The national Elks limit membership to
male citizens of the United States and require each subordinate lodge
to adhere to this policy.12 In its clubhouse, the Annapolis Lodge oper-
ates a cocktail lounge that serves only lodge members and their
guests, wives, dependents, and members of the lodge's Women's Aux-
iliary.13 The Annapolis Lodge holds a Class C (club class) alcoholic
beverage license.14 At the national Elks convention in July 1991, the
Annapolis Lodge unsuccessfully requested permission to amend its by-
laws and admit female members.15

In anticipation of the loss of their alcoholic beverage license, the
Annapolis Lodge filed suit in the Circuit Court for Anne Arundel
County on September 3, 1991, seeking both a declaratory judgment to
invalidate the ordinance and an injunction to require the City of An-
napolis to review its license renewal application without regard to the
ordinance.16 In December 1991, the Annapolis Lodge filed a motion
in the same court for summary judgment,17 and argued that the ordi-
nance was invalid because the City of Annapolis lacked the authority
under Article 2B18 to enact Ordinance 0-11-90, and further, that the

5. The provisions of this section shall not be applicable to applications for
Class C alcoholic beverage licenses filed on behalf of organizations formed solely
for religious purposes.

Id. 9. Id.
10. Coalition for Open Doors, 333 Md. at 364, 635 A.2d at 414.
11. Id. at 362, 635 A.2d at 413.
12. Id.
13. Id. at 362-63, 635 A.2d at 413. The court noted that the record contained no refer-
ence to the membership requirements of the Women's Auxiliary. Id. at 365 n.3, 635 A.2d
at 413 n.3.
14. Id. at 362, 635 A.2d at 413.
15. Id. at 364, 635 A.2d at 414.
16. Id.
17. Id.
18. Article 2B, § 1 provides in pertinent part:
ordinance conflicted with the state’s public accommodations law, Article 49B, Section 5(e). In particular, the lodge argued that as a private club not generally open to the public, it fell within the exception to the public accommodations law, namely Section 5(e).

The City of Annapolis acknowledged no dispute as to any material fact and moved for summary judgment upholding the ordinance.

(a) Regulation necessary.—(1) It is hereby declared as the policy of the State that it is necessary to regulate and control the manufacture, sale, distribution, transportation and storage of alcoholic beverages within this State and the transportation and distribution of alcoholic beverages into and out of this State to obtain respect and obedience to law and to foster and promote temperance.

(2) It is hereby declared to be the legislative intent that such policy will be carried out in the best public interest by empowering the Comptroller of the Treasury, the various local boards of license commissioners and liquor control boards, all enforcement officers and judges and clerks of the various courts of this State with sufficient authority to administer and enforce the provision of this article.

(3) The restrictions, regulations, provisions and penalties contained in this article are for the protection, health, welfare and safety of the people of this State.

(b) Powers authorized.—

(3) The powers granted to any official or agency pursuant to this subsection shall not be construed:

(i) To grant to any official or agency powers in any substantive area not otherwise granted to the official or agency by other public general or public local law;

(ii) To restrict the official or agency from exercising any power granted to the official or agency by other public general or public local law or otherwise;

(iii) To authorize the official or agency or officers of the agency to engage in any activity which is beyond their power under other public general law, public local law, or otherwise; or

(iv) To preempt or supersede the regulatory authority of any State department or agency under any public general law.


19. Coalition for Open Doors, 333 Md. at 364-65, 635 A.2d at 414. The Maryland public accommodations law states in pertinent part:

(a) It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of the owner or operator, because of the race, creed, sex, age, color, national origin, marital status, or physical or mental handicap, of any person, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation.

(e) The provisions of this section shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of this section.


as valid. After a hearing, the Circuit Court for Anne Arundel County issued a judgment on April 16, 1992, that declared Ordinance 0-11-90 invalid on both grounds advanced by the Annapolis Lodge. The court granted the lodge’s requested injunction. Specifically, the trial court judge found that the General Assembly intended to preclude a “lesser government” body from regulating discrimination by private clubs, and that the city lacked authority under Article 2B to reach membership discrimination unless it bore some relationship to the consumption of alcohol.

On May 11, 1992, the Annapolis City Council decided not to appeal the circuit court’s judgment. The City Council, however, did not repeal the ordinance. Four days after the council’s decision, a group comprised of the Coalition for Open Doors, the Maryland Commission on Human Relations, and two female Annapolis residents, Pamela Anderson and Carol Gerson, filed a motion to intervene as defendants for purposes of appeal. In a separate motion, the four aldermen who had supported an appeal of the judgment also sought to intervene. The Circuit Court for Anne Arundel County granted the first group’s motion to intervene, but denied the aldermen’s motion for lack of standing.

The Annapolis Lodge appealed from the order allowing the motion to intervene and the intervenors appealed from the injunction and the declaratory judgment invalidating Ordinance 0-11-90.

21. Id. at 365, 635 A.2d at 414.
22. Id.
23. Id.
24. Id., 635 A.2d at 415.
25. Id.
26. Id.
27. Id.
28. The Coalition for Open Doors is an organization of civil rights and women’s rights groups, as well as individual advocates, that works toward the integration of private clubs across racial, ethnic, gender, and religious lines. The Maryland Commission on Human Relations, a state agency, is responsible for the enforcement of provisions in Article 49B related to discrimination. Pamela Anderson, a lawyer, and Carol Gerson, a businesswoman, wished to join the Annapolis Elks or other Annapolis private clubs that have discriminated based on gender. Id. at 365 n.7, 635 A.2d at 415 n.7.
29. Id. at 365-66, 635 A.2d at 415.
30. Id.
31. Id. at 366, 635 A.2d at 415.
32. Id.
33. Id. The Court of Appeals upheld the circuit court’s ruling on the intervention issue, noting that “the decision of the losing party [Annapolis City Council] not to appeal certainly justified intervention for purposes of appeal.” Id. at 370, 635 A.2d at 417. The court concluded, “the cases have upheld post-judgment intervention for purposes of appeal when the applicant has the requisite standing and files the motion to intervene
Before the Court of Special Appeals considered the case, the Court of Appeals granted certiorari on its own motion.34

2. Legal Background.—Coalition for Open Doors implicates three major issues: first, the constitutional right of private association; second, the authority of a local government to expand regulation of alcoholic beverages beyond those areas enumerated under a detailed state statute; and third, the conflict between the state's public accommodations law and a local ordinance aimed at ending gender discrimination within private clubs.

   a. Right of Private Association.—The Court of Appeals approached Coalition for Open Doors in light of three recent Supreme Court decisions35 that significantly broadened the power of states to regulate the right of private association. While it has asserted constitutional protection for expressive and intimate associational rights,36 the Supreme Court has carefully balanced these individual and group rights against the state's interest in ending gender discrimination. As stated in Roberts v. United States Jaycees, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."37

Aside from explicit protection for familial rights of association,38 the Court has not defined a test to determine what other kinds of

promptly after the losing party decides against an appeal . . . . The intervenors obviously acted promptly." Id. at 370-71, 635 A.2d at 417.


35. See New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) (approving a New York statute which declared that clubs with over 400 members that provided certain services were no longer considered private); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (holding that application of a California law requiring admission of women did not violate the Rotary Club's First Amendment right of expressive association); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (upholding application of a Minnesota public accommodations law requiring the Jaycees to admit women).

36. In Roberts v. United States Jaycees, the Court distinguished between two types of associational rights, intimate and expressive. 468 U.S. at 617-18. The former includes the freedom "to enter into and maintain certain intimate human relationships" without "undue intrusion by the state." Id. The latter relates to the freedom to engage in activities protected by the First Amendment. Id. at 618.

37. Id.

38. See Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (holding that the state's interest in preventing overcrowding was an unjustified intrusion on the fundamental rights of a family, including an extended family, to choose their living arrangements); see also Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (upholding an ordinance
groups merit protection for their associational rights. The Roberts Court, however, did note several factors to consider in assessing the limits of state authority over the right to associate, including the "size, purpose, policies, selectivity [and] congeniality" of the subject group.

In 1989, the Court of Appeals explored these constitutional issues in *State v. Burning Tree Club, Inc.* The Burning Tree Country Club sought to invalidate a law which conditioned continuance of their favorable tax status upon admission of women into their Montgomery County golf club. The Court of Appeals applied the factors developed by the Supreme Court in *Roberts* and concluded that the Maryland statute violated neither the intimate nor the expressive associational rights of the club. Specifically, the court did not find a 440-member club devoted to playing golf sufficiently "intimate" to escape regulation forbidding gender discrimination. The *Burning Tree* court declared that "governments are under no obligation to sanction, subsidize or support discrimination by private entities . . . ."

**b. Authority to Regulate Alcoholic Beverages.**—The authority to regulate alcoholic beverages has been expressly reserved to the General Assembly under both the Maryland Constitution and Article 23A. With the enactment of Article 2B, the General Assembly attempted to preempt this area with a comprehensive regulatory

restricting the rights of unrelated individuals to live together because the ordinance did not affect intimate associational rights).


40. *Id.*


42. *Id.* at 261, 554 A.2d at 370. This was the third in a series of cases dealing with the Burning Tree Country Club's discrimination policy. *See Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985) (finding unconstitutional that part of the Maryland tax code that exempted clubs which operated with the primary purpose of benefiting one sex); *State v. Burning Tree Club, Inc.*, 301 Md. 9, 481 A.2d 785 (1984) (holding that the Attorney General had no standing to bring a declaratory judgment action challenging the constitutionality of an enactment by the General Assembly).

43. *Burning Tree*, 315 Md. at 277-84, 554 A.2d at 378-80.

44. *Id.* at 280, 554 A.2d at 379 ("The size of Burning Tree's membership is not so small as to suggest that it is entitled to constitutionally protected intimate associational rights.").

45. *Id.* at 289, 554 A.2d at 384.

46. "Nothing in this Article shall be construed to authorize any municipal corporation, by any amendment or addition to its charter, to permit any act which is prohibited by the laws of this State concerning . . . the manufacture, licensing or sale of alcoholic beverages." Md. Const. art. XI-E, § 6.

47. The authority to regulate alcoholic beverages is not listed among the powers granted to municipalities under Article 28A. Md. Ann. Code art. 28A, § 2 (Supp. 1993).
scheme. Article 2B, Section 184(a) delegates authority to county boards of license commissioners which "have full power and authority to adopt such reasonable rules and regulations as they may deem necessary to enable them effectively to discharge the duties imposed upon them by this article."49

One major exception to this system of county-level boards involves the City of Annapolis, which according to Article 2B, Section 158(d) has direct authority to act as the local liquor board.50 Based on this statute, the Annapolis City Council has enacted its own comprehensive regulatory system under Chapter 7.12 of the Annapolis Code51 of which Ordinance 0-11-90 was added as Section 7.12.430.52 Prior to Coalition for Open Doors, the extent of the statutory authority given to Annapolis under Article 2B had not been fully examined.

In Sullivan v. Board of License Commissioners,53 the Court of Appeals simultaneously affirmed and curtailed the authority under Article 2B of local license boards other than in Annapolis.54 Although it acknowledged the broad authority vested under Article 2B,55 the court found that the Board of License Commissioners for Prince George's County had overstepped its discretion in arbitrarily denying permission for a license holder to build a drive-in window.56 The Sullivan court concluded that a local board can exercise its authority only within the boundaries of the controlling statute, but cautioned that

49. Id. § 184(a) (Supp. 1993).
50. Id. § 158(d). In the Maryland counties and Baltimore City, the Boards of License Commissioners are either appointed by the Governor, county commissioners, county executives, or composed of other officials. See id. §§ 148, 148A, 149, 150, 150(c), 150(e), 151A, 153, 159(c)(6) (1957).

Section 158(d)(1) states:

Anne Arundel County.—In Anne Arundel County (1) the Mayor, Counsellor and Aldermen of Annapolis shall have the power to make and enforce such rules, regulations and restrictions, in addition to, or in substitution of, those contained in this article, but not inconsistent therewith, as in the judgment of the Mayor, Counsellor and Aldermen of the City of Annapolis would give the municipality more effective control of each of the places of business.

Id. § 158(d)(1).
52. See supra note 8.
53. 293 Md. 113, 442 A.2d 558 (1982).
54. Id. at 123-24, 442 A.2d at 563-64.
55. "The broad authority vested . . . under §§ 1 and 184(a) of the Act to adopt reasonable rules and regulations as may be necessary to effectively administer the law and to foster and promote temperance in the public interest is both necessary and constitutional." Id. at 123, 442 A.2d at 563.
56. Id. at 124, 442 A.2d at 564.
"the power delegated to an administrative agency to make rules is not the power to make laws."\textsuperscript{57}

In another 1982 case, \textit{Montgomery County v. Board of Supervisors of Elections},\textsuperscript{58} the Court of Special Appeals further limited the power of local voters to regulate alcoholic beverages. The court held that voters could not stop the county from selling alcoholic beverages because the state, and "the State alone, shall regulate and control, within Maryland, the sale, manufacture, distribution, storage, or transportation of alcoholic beverages."\textsuperscript{59} The court concluded that local voters could not "effectively repeal or render nugatory, an act of the General Assembly."\textsuperscript{60}

c. \textit{Preemption by the Public Accommodations Law}.—The Court of Appeals has established three ways in which a state law may preempt a local law: (1) preemption by conflict,\textsuperscript{61} (2) implied preemption,\textsuperscript{62} and (3) express preemption.\textsuperscript{63}

As early as 1909, the Court of Appeals in \textit{Rossberg v. State},\textsuperscript{64} declared invalid local ordinances that either prohibited an activity intended to be permitted by state law or, conversely, permitted an activity intended to be prohibited.\textsuperscript{65} In \textit{City of Baltimore v. Sitnick},\textsuperscript{66} the court further refined this rule to apply only to activities which state law has expressly prohibited or permitted.\textsuperscript{67} More recently, in \textit{Boulden

\textsuperscript{57} Id.

\textsuperscript{58} 58 Md. App. 123, 451 A.2d 1279 (1982).

\textsuperscript{59} Id. at 126, 451 A.2d at 1280.

\textsuperscript{60} Id. at 125, 451 A.2d at 1280.

\textsuperscript{61} \textit{See infra} notes 64-68 and accompanying text.

\textsuperscript{62} \textit{See} \textit{Talbot County v. Skipper}, 329 Md. 481, 488, 620 A.2d 880, 883 (1993) (indicating that local law is implicitly preempted when the Legislature acts with the intent to occupy the entire field); \textit{see also} \textit{Allied Vending, Inc. v. City of Bowie}, 332 Md. 279, 298-99, 631 A.2d 77, 86-87 (1993).

\textsuperscript{63} \textit{See} Montgomery County v. Atlantic Guns, Inc., 302 Md. 540, 549, 489 A.2d 1114, 1118 (1989) (holding that the comprehensive State statute regulating handguns expressly preempted all local laws on the subject).

\textsuperscript{64} 111 Md. 394, 74 A. 581 (1909).

\textsuperscript{65} \textit{Id.} The \textit{Rossberg} court stated:

\textit{Such ordinances must not directly or indirectly contravene the general law. Hence ordinances which assume directly or indirectly to permit acts or occupations which the State statutes prohibit, or to prohibit acts permitted by statute or Constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void.}

\textit{Id.} at 416, 74 A. at 584 (citations omitted).

\textsuperscript{66} 254 Md. 303, 255 A.2d 376 (1969).

\textsuperscript{67} \textit{Id.} at 317, 255 A.2d at 382.
the Court of Appeals reaffirmed the preemption by conflict rule established in Rossberg.

In Allied Vending, Inc. v. City of Bowie, the court examined the concept of implied preemption. In that case, the court determined that although no exact formula existed for deciding whether the General Assembly intended to preempt an entire area by implication, the "primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated the field." Because of the comprehensive nature of the state's licensing scheme, the Allied court therefore held that the General Assembly intended to occupy the field of cigarette sales through vending machines.

The Court of Appeals, however, has been careful to distinguish between those state laws which were intended to permit or to prohibit a particular activity and those which were meant to exempt an area from coverage. In City of Baltimore v. Sitnick, for example, the court found that exclusion from state law not only fails to indicate a legislative intent to preempt local laws but also leaves the field open for supplemental local regulation. The court continued this line of rea-

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69. Id. at 415, 535 A.2d at 479 (holding as invalid a town ordinance limiting the right of appeal under the zoning ordinance when state law expressly permitted the appeal).
70. 332 Md. 279, 631 A.2d 77 (1993).
71. Id. at 287, 631 A.2d at 81. Following a thorough examination of Md. Ann. Code art. 56, §§ 607-631 (1957 & Supp. 1991) as well as other state regulations, the court held that comprehensive state laws governing cigarette sales preempted local laws by implication. Id.
72. Id. at 298-99, 631 A.2d at 87.
73. Id. at 300, 631 A.2d at 87.
74. Id.
76. Id. at 324, 255 A.2d at 385-86. The court stated, "We do not think in this case that the exemption from State regulation, unaccompanied by any prohibition against inclusion in local legislation, was an affirmative guarantee against local regulation." Id. The court summarized Maryland law on this point as follows:

A distillation of the opinions we have cited leaves the residual thought that a political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not expressly permitted. Stated another way, unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation.

Id. at 317, 255 A.2d at 382.
soning in *Mayor of Annapolis v. Annapolis Waterfront Co.*, when it stated that "municipal regulations are not struck down where they are in conformity with the plan or spirit of the State statutes." In a 1981 case, *National Asphalt Pavement Ass'n v. Prince George's County*, the court expressly found that a local ordinance was not preempted by state employment discrimination law. The court upheld a Prince George's County ordinance which prohibited discrimination by employers with fewer than fifteen employees, even though those employers were exempt under Article 49B, Section 15(b). The court noted that "[t]he state statute would have to permit discrimination by employers with less than fifteen employees for there to be a conflict under the test set forth in our cases."

3. Court's Reasoning.—In *Coalition for Open Doors*, the Court of Appeals upheld the Annapolis ordinance on two distinct grounds: first, the City of Annapolis has unique authority under Article 2B, Section 158(d)(1) to control the licensing of alcoholic beverages, and second, the ordinance is valid supplemental legislation of an activity not expressly permitted under state law.

After an examination of Annapolis's authority under Article 2B, the court stressed the comprehensiveness of the regulatory scheme. Specifically, the court noted the broad scope of the statute and its enumeration of a range of issues, from general policy statements to

77. 284 Md. 383, 396 A.2d 1080 (1979) (holding that a city charter provision permitting additional environmentally-based regulation of the construction of wharves did not conflict with state law).
78. Id. at 392, 396 A.2d at 1086 (quoting Reed v. President of North East, 226 Md. 229, 249-50, 172 A.2d 536, 545 (1961)).
80. Id. at 79-80, 437 A.2d at 653-54.
81. Id. The Maryland employment discrimination law states in pertinent part:

    It is hereby declared to be the policy of the State of Maryland . . . to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap . . . and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.
§ 15. Definitions
(b) Employer.—The term "employer" means a person engaged in an industry or business who has fifteen or more employees . . . .

82. *National Asphalt*, 292 Md. at 79 n.3, 437 A.2d at 653 n.3 (citations omitted).
83. *Coalition for Open Doors*, 333 Md. at 377, 635 A.2d at 420.
84. Id. at 382-83, 635 A.2d at 423.
85. Id. at 371, 635 A.2d at 418.
86. Id. at 374, 635 A.2d at 419; see supra note 18.
requirements for uncovered windows. The court pointed out that the lodge had not suggested, nor had the court discovered, any inconsistencies between the Annapolis ordinance and the provisions in Article 2B.

Notwithstanding Annapolis’s detailed regulatory scheme, the court concluded that the General Assembly had left room for local control and had delegated substantial authority to county boards of license commissioners. In addition, the Coalition for Open Doors court attached great weight to Section 158(d)(1) of Article 2B, which the court said gave the City of Annapolis power ‘considerably broader than the authority granted to the county boards of license commissioners.’ As an explicit exception to the system of county-level boards, the court emphasized that the City of Annapolis had direct authority to act as the local liquor board. The court explained that “Ordinance 0-11-90 . . . falls within § 158(d)(1)’s authorization to enact provisions and restrictions ‘in addition to, or in substitution of, those contained in this article . . . ’”

Rejecting the circuit court’s reasoning, the Court of Appeals further noted that express authority under Article 2B is not limited to the regulation of alcohol. In support of this conclusion, the court cited numerous sections of Article 2B that do not directly control the consumption of alcohol, including, for example, criteria for the sizes of golf courses and swimming pools. Other sections of Article 2B likewise describe membership eligibility requirements for various private

87. Md. Ann. Code art. 2B § 122 (1957) (requiring that licensed premises in Charles County must have at least one plain glass window without any curtain or other covering such that a person outside could observe the interior of the premises).
88. Coalition for Open Doors, 333 Md. at 375, 635 A.2d at 419.
89. Id. at 372-73, 635 A.2d at 418.
90. See supra note 50.
91. Coalition for Open Doors, 333 Md. at 372-73, 635 A.2d at 419.
92. Article 2B, § 152 states:
In Annapolis, the Mayor and Aldermen of the City of Annapolis, may constitute the Board of License Commissioners for the city or may delegate all or any portion of the authority to regulate alcoholic beverage licensees to a subsidiary Board established by the Mayor and Aldermen. The Board of License Commissioners of Anne Arundel County shall have no jurisdiction in the City of Annapolis.
94. Id., 635 A.2d at 419-20.
95. Id. at 375-76, 635 A.2d at 420.
96. See Md. Ann. Code art. 2B, § 20(n)(6)(iv) (1957) (requiring country clubs in Harford County with liquor licenses to maintain at least a 9 hole golf course or, in lieu of that, a swimming pool at least 20 by 40 feet in size, and at least 6 tennis courts).
clubs.\textsuperscript{97} The court concluded that "Annapolis Ordinance 0-11-90 has just as much, or just as little, connection with the consumption of alcohol at the club as these provisions of Art. 2B have."\textsuperscript{98}

The court further found that the ordinance had a direct bearing on the sale of alcohol at the club.\textsuperscript{99} Specifically, the court opined that "[t]here may be many women who desire to use the alcoholic beverage service of the Annapolis Lodge" and who are currently excluded.\textsuperscript{100} The court reasoned that since the number of available alcoholic beverage licenses was limited, the City of Annapolis, in awarding licenses to private clubs that do not discriminate, "has decided that a broader range of the adult population should have the opportunity to enjoy alcoholic beverages at clubs."\textsuperscript{101} The court held, therefore, that Annapolis was authorized to enact the ordinance.\textsuperscript{102}

The \textit{Coalition for Open Doors} court next considered the issue of preemption by the state public accommodations law. The court first examined the language of the public accommodations law\textsuperscript{103} and then reviewed the lodge's argument that "the intent of the legislature [in enacting the public accommodations law] was to permit the excluded group [private clubs] to discriminate if they so choose."\textsuperscript{104}

After a recitation of the general rule for preemption by conflict,\textsuperscript{105} the court reviewed case law in which it had declared local laws invalid based on preemption.\textsuperscript{106} The court concluded that "mere exclusion from regulation in the state statute did not indicate a state legislative intent that the excluded entities be free of regulation."\textsuperscript{107} Based on this reasoning, the court rejected the lodge's argument that it was free to discriminate without local regulation.\textsuperscript{108}

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\textsuperscript{97} See \textit{id.} § 20(c)(3)(iii) (stating that the members of any club in Anne Arundel County that obtains a special veterans license must be composed solely of service members who have served in actual wartime).
\textsuperscript{98} \textit{Coalition for Open Doors}, 333 Md. at 377, 635 A.2d at 420.
\textsuperscript{99} \textit{id.}, 635 A.2d at 420-21 ("[A]n ordinance conditioning an alcoholic beverage license upon the removal of a membership restriction does have some connection with who may purchase alcoholic beverages at the club's facilities.").
\textsuperscript{100} \textit{id.} at 378, 635 A.2d at 421.
\textsuperscript{101} \textit{id.}
\textsuperscript{102} \textit{id.}
\textsuperscript{103} See \textit{supra} note 19.
\textsuperscript{104} \textit{Coalition for Open Doors}, 333 Md. at 379, 635 A.2d at 421-22.
\textsuperscript{105} \textit{supra} notes 64-67 and accompanying text.
\textsuperscript{107} \textit{Coalition for Open Doors}, 333 Md. at 381, 635 A.2d at 423.
\textsuperscript{108} See \textit{id.} (finding the court's language concerning preemption in \textit{City of Baltimore v. Sitnick}, 254 Md. 903, 255 A.2d 376 (1969), "directly applicable to Annapolis Lodge's argument in the present case.").
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The court further supported its holding by comparing the language of the state public accommodations law to the language of the state employment discrimination law involved in *National Asphalt.* The *Coalition for Open Doors* court noted that the employers in *National Asphalt* were "not permitted by the state statute to discriminate in their employment practices; they simply [were] not covered." In light of the *National Asphalt* holding, the court disallowed the lodge's argument that the public accommodations law "conflicts with the permission to discriminate embodied in Article 49B, Section 5(e)."

Not only did the court reject outright the Annapolis Lodge's assertion that the public accommodations law permits discrimination, but Judge Eldridge also suggested that such an interpretation still might not change the outcome. In addition, the court dismissed the lodge's argument that under the findings of *Burning Tree,* Article 2B also creates an affirmative authorization to discriminate. If the public accommodations law was so interpreted, the court noted, then "a substantial question about § 5(e)'s validity under Articles 24 and 46 of the Declaration of Rights would be presented. And if § 5(e), as so construed, were invalid, there would be no viable state statute with which Ordinance 0-11-90 conflicted." Based on this reasoning, the court found the lodge's argument unpersuasive.

The court also buttressed its conclusion by citing laws in other states that condition the grant of an alcoholic beverage license on non-discriminatory membership or entrance policies. The court

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109. See *supra* note 19.
110. 292 Md. 75, 437 A.2d 651 (1981); see *supra* notes 79-82 and accompanying text.
111. *Coalition for Open Doors,* 333 Md. at 382, 635 A.2d at 423 (quoting *National Asphalt,* 292 Md. at 79, 437 A.2d at 653).
112. *Id.* at 379, 635 A.2d at 422.
113. *Id.* at 383 n.40, 635 A.2d at 423 n.40.
114. *Coalition for Open Doors,* 333 Md. at 379, 635 A.2d at 422. In *Burning Tree,* the Court of Appeals held as unconstitutional § 8-214 of the Tax Property Article of the Maryland Code, which allowed a periodic discrimination exception to a statute that prohibited gender discrimination at country clubs that agreed to maintain their land for open spaces in exchange for favorable tax treatment. The court found that the provision violated the state's Equal Rights Amendment, Article 46 of the Maryland Declaration of Human Rights. *Burning Tree,* 315 Md. at 294-96, 554 A.2d at 386-87; see *supra* notes 41-45 and accompanying text.
115. *Coalition for Open Doors,* 333 Md. at 383 n.40, 635 A.2d at 423 n.40 (referring to Article 49B, § 5(e)).
116. *Id.* at 383, 635 A.2d at 423.
117. *Id.* at 363 n.5, 635 A.2d at 414 n.5; see, e.g., Benevolent & Protective Order of Elks, Lodge No. 2043 v. Ingraham, 297 A.2d 607, 610 (Me. 1972) (holding that the Maine Liquor Commission had the authority to withhold renewal liquor licenses to 15 Elks lodges under a state statute prohibiting licensees from denying membership based on race), *ap-
thereupon concluded that while the Annapolis ordinance was a "novel approach in Maryland," it did not diverge or conflict with Article 49B, Section 5(e) of the public accommodations law.

4. Analysis.—The decision in Coalition for Open Doors signals a tacit willingness to allow local jurisdictions to assail the private clubs' exception to the public accommodations law. Despite the probable impact of this case on the associational rights of private clubs in Maryland, Coalition for Open Doors avoided all discussion of the policy implications that it had previously considered in Burning Tree. The Court of Appeals instead chose to decide the case on two simply drawn questions: first, whether the City of Annapolis had the authority to enact the ordinance, and second, whether the ordinance was preempted by the Maryland public accommodations law. Within this narrow framework, the court has disguised an agenda to eliminate the exception for private clubs.

In granting summary judgment, the Circuit Court for Anne Arundel County commented on the fact that the parties had not addressed the constitutional questions at issue. Specifically, the circuit court pointed out that the Annapolis Lodge had not challenged the right of an appropriate government to force private clubs to open their membership to women. The court below reflected that the policy aims behind the ordinance were laudable, observing that "[i]t is a proper and beneficial statute to be enacted by an appropriate policy maker." The question for the lower court remained whether the City of Annapolis was the appropriate decision-maker.

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peal dismissed, 411 U.S. 924 (1973); Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 516 N.E.2d 1153, 1158 (Mass. 1987) (upholding the revocation of a liquor license where a nightclub violated a state anti-discrimination statute by barring entrance to African-Americans); Beynon v. St. George-Dixie Lodge No. 1743, Benevolent & Protective Order of Elks, 854 P.2d 513, 518 (Utah) (holding that the Elks club, by possessing a private club liquor license, was a state-regulated enterprise and was therefore subject to the anti-discrimination provisions of the Utah Civil Rights Act), cert. denied, 114 S. Ct. 195 (1993).

118. Coalition for Open Doors, 333 Md. at 363 n.5, 685 A.2d at 414 n.5.
119. Id. at 383, 685 A.2d at 423.
120. See supra note 19.
121. The Annapolis lodge, moreover, did not suggest that the ordinance violated its members' rights of association.
122. Coalition for Open Doors, 333 Md. at 361-62, 685 A.2d at 413.
124. Id.
125. Id. In granting the motion to intervene the circuit court noted that, "I certainly didn't decide a lot of the issues that some people probably think I decided." Id. at 166-67.
126. Id. at 96.
To answer this question, the trial court merged the separate issues of authority and preemption into one question, namely, "whether the grant of power under Article 2B is broad enough to cover a public accommodations law."\(^{127}\) The circuit court traced the history of the public accommodations law\(^ {128}\) to show that the legislature explicitly excluded private clubs from the anti-discrimination clause of the public accommodations law.\(^ {129}\) The lower court held that even a broad grant of power, as under Article 2B, did not enable a local entity to override the exception and pass its own version of a public accommodations ordinance.\(^ {130}\)

The Court of Appeals, however, avoided a direct answer to the question as defined by the court below. By isolating the two lines of reasoning into discrete components—authority and preemption—the court managed to uphold the Annapolis ordinance while claiming to sustain the fragile shell of the private club exception. The court was indifferent to the lower court's view that the ordinance nullified the private club exception and controverted legislative intent.

Perhaps in anticipation of the probable impact of the ruling, the *Coalition for Open Doors* court expressly limited the holding to the City of Annapolis as the only local political body allowed direct authority to regulate alcoholic beverages under Article 2B, Section 158(d)(1).\(^ {131}\) Judge Eldridge cautioned that "[w]hether a county board of license commissioners would have authority to promulgate a regulation like Ordinance 0-11-90 . . . is an issue not before us in this case, and we intimate no views upon the matter."\(^ {132}\)

In a final footnote, Judge Eldridge made it clear, however, that the court most likely would declare unconstitutional any statute which was "construed as affirmatively authorizing discrimination based on race, [or] gender."\(^ {133}\) This express agenda, perhaps, underlies the court's rigid treatment of the issues. In the event of an outright challenge to the constitutionality of the private clubs' exception, the court can return to footnote 40 for support to strike down the exception.

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127. *Id.* at 101.
129. Record at 99. "We therefore find legislative intent to except private clubs. Only the Maryland legislature, not the City of Annapolis, can undo that." *Id.*
130. *Id.* at 102.
131. *Coalition for Open Doors*, 333 Md. at 378 n.38, 635 A.2d at 421 n.38.
132. *Id.*
133. *Id.* at 383 n.40, 635 A.2d at 423 n.40.
This underlying justification may well survive as the most significant effect of the *Coalition for Open Doors* decision.

5. **Conclusion.**—In *Coalition for Open Doors*, the Court of Appeals upheld an Annapolis ordinance which prohibited the renewal of alcoholic beverage licenses for private clubs that engaged in discriminatory membership practices. Although the decision focused strictly on the issues of Annapolis's regulatory authority under Article 2B and preemption by the state's public accommodations anti-discrimination law, the court signaled a readiness to permit the demise of the exception in Article 49B for private clubs.

PAMELA M. MOORE-ERICKSON

**B. A New Direction in Maryland's Rational Basis Review of Economic Regulation**

In *Verzi v. Baltimore County*, the Maryland Court of Appeals held that a county's requirement that only towing operators located within the county may be called by police to tow vehicles disabled by accidents violates the equal protection of the laws guaranteed by Article 24 of the Maryland Declaration of Rights. Under the equal protec-

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Section 24-230 provides in pertinent part:

The chief of police shall retain a current list of all duly licensed towing operators. Whenever the services of a towing vehicle shall be required and request is made to the police department for the providing of such services, the police department shall call the licensed towing operator located in the county whose place of business is closest to the scene of the accident, except when an owner requests a specific licensed towing company; provided that such tow company can respond within a reasonable time.

*Id.*

3. *Verzi*, 333 Md. at 427, 635 A.2d at 975. Article 24 of the Declaration of Rights states: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of Rts. art. 24.

tion doctrine, the Verzi court applied a rational basis test to invalidate an economic regulation even though no fundamental rights were impinged. This case represents a reinvigoration of the court’s rational basis review of economic legislation. By making a searching inquiry into whether the government’s classification of in- and out-of-county towers was rationally related to a legitimate governmental objective, the Verzi court demonstrated that it would not shelter economic regulations behind an essentially insurmountable presumption of constitutionality.

1. The Case.—In February 1987, Douglas Verzi applied to the Baltimore County Department of Permits and Licenses for a towing license for his business “located in Harford County, about two and one-half miles from the Baltimore County line.” When his application was denied, Verzi appealed to the Baltimore County Board of Appeals. The Board also denied Verzi’s application and held that Section 24-230 of the Baltimore County Code, which governs the procedures for dispatching towing operators, prohibits the issuance of licenses to out-of-county towers. The Board relied on the ordinance’s instruction that “the police department shall call the licensed towing operator located in the county . . . .” Although it denied Verzi’s application, the Board admitted that “there was an established need for another tower in the section of Baltimore County that Verzi wished to serve . . . .”

Verzi subsequently appealed the Board’s decision to the Circuit Court for Baltimore County. The court reversed the Board’s decision and held that eligibility for a license was governed by Section 24-229 of the Baltimore County Code, which looks to need, not location, for granting licenses. Section 24-230, the court ruled, did not gov-

4. The rational basis test requires that a legislative classification be rationally related to a legitimate governmental interest and that statutes have a presumption of constitutionality. Murphy, 325 Md. at 355-56, 601 A.2d at 108.

5. Verzi, 333 Md. at 418, 635 A.2d at 970. Courts have construed fundamental rights as those guaranteed by the federal constitution such as First Amendment rights, the right to vote, the right of interstate travel and the right to procreate. Hornbeck, 295 Md. at 641, 458 A.2d at 781.

6. Verzi, 333 Md. at 414, 635 A.2d at 968.

7. Id. at 414-15, 635 A.2d at 968.

8. Id. at 415, 635 A.2d at 968.

9. Id.

10. Id. (quoting BALTIMORE COUNTY, MD., CODE § 24-230 (1988 & Supp. 1993)).

11. Id.

12. Id., 635 A.2d at 969.

13. Id. Section 24-229 provides:
ern the issuance of licenses. Pursuant to the court's order, the county granted Verzi a towing license. After the license was granted, the Baltimore County Police Department nevertheless refused to assign him a towing area. Verzi again filed suit in the circuit court, this time to seek both a declaratory judgment that the location requirement in Section 24-230 was unconstitutional and a writ of mandamus to order the county to assign him an area. The court, however, granted the county summary judgment and declared Section 24-230 constitutional. Verzi appealed to the Court of Special Appeals, but prior to that court's review the Court of Appeals issued a writ of certiorari on its own motion.

2. Legal Background.—When reviewing economic legislation under the equal protection doctrine, courts generally apply a rational basis test. Under this test, 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.” A statute is given a “strong presumption of constitutionality” and will be upheld unless the legislative classification is clearly arbitrary.

(a) New license towers shall be approved by the department of permits and licenses based upon the need for additional service. If the need does not exist, the application will not be approved. The transfer of an existing license shall be treated in the same manner as a new license, and any such transfer shall be subject to all provisions applicable thereto.


14. Verzi, 333 Md. at 415, 635 A.2d at 969; see supra note 2.
15. Verzi, 333 Md. at 415, 635 A.2d at 969.
16. Id.
17. Id.
18. Id.
19. Id. at 415-16, 635 A.2d at 969.
20. To review a legislative classification under the equal protection doctrine, courts first determine what level of scrutiny the classification requires. “Where . . . a statutory classification burdens a ‘suspect class’ or impinges on a ‘fundamental’ right, the classification is subject to strict scrutiny. Such statutes will be upheld . . . only if it is . . . ‘tailored to serve a compelling state interest.’” Murphy v. Edmonds, 325 Md. 342, 356, 601 A.2d 102, 109 (1992). Classifications based on gender, or on the denial of the right to earn a living in the field for which one is qualified and licensed, for example, while not found to require strict scrutiny by the courts, require a more searching review than the rational basis test. Id. at 357, 601 A.2d at 109. This level of review is known as “intermediate scrutiny.” Id. at 358, 601 A.2d at 109. Economic and social legislation that does not trigger strict or intermediate scrutiny will be reviewed under the rational basis test. Id. at 355, 601 A.2d 108.

22. Id. at 356, 601 A.2d at 108.
Traditionally, the Court of Appeals has followed the direction of the United States Supreme Court and has allowed economic legislation to pass the rational basis test if "any state of facts reasonably may be conceived to justify" the legislative classification. Recently, however, the Court of Appeals in Kirsch v. Prince George's County refused to accept the county government's hypothetical justifications for a classification. Notwithstanding the traditional deference given to legislative classifications, the Kirsch court held that a zoning classification based on a tenant's off-premises occupation failed rational basis scrutiny.

3. The Court's Reasoning.—In Verzi, the Court of Appeals applied a more searching review under the rational basis test to Baltimore County's distinction between in- and out-of-county towers by first determining whether the purposes for the classification were legitimate governmental objectives. The county stated that its objectives for the towing ordinance were "to protect the public from fraud, deception and abuses and to decrease traffic congestion and delays in the


Federal courts have refused to subject economic legislation to meaningful rational basis review under the Equal Protection Clause of the Fourteenth Amendment since the Supreme Court's ruling in United States v. Carolene Prods. Co., 304 U.S. 144 (1938). See, e.g., Koch v. Board of River Port Comm'rs, 330 U.S. 552, 555 (1947) (upholding state law requiring completion of apprenticeship term against equal protection challenge in the face of the allegation that the "pilots, having unfettered discretion under the law in the selection of apprentices, had selected with occasional exception, only [their] relatives and friends"). For a brief period, beginning with City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), the federal courts used the rational basis test to strike down arbitrary and irrational economic regulations. See, e.g., Brown v. Barry, 710 F. Supp. 352, 353 (D.D.C. 1989) (striking down a District of Columbia regulation prohibiting operators of bootblack stands from obtaining vending permits for a public place as a violation of the federal constitution's equal protection guarantee). This more searching version of review, though, was banished from the federal courts by FCC v. Beach Communications, 113 S. Ct. 2096 (1993). But cf. Santos v. City of Houston, 852 F. Supp. 601, 607-08 (S.D. Tex. 1994) (holding that city's anti-jitney ordinance "based on pure favoritism" violates the Equal Protection Clause).

25. Id. at 106, 626 A.2d at 380.
26. Id.
27. Verzi, 333 Md. at 425, 635 A.2d at 974.
The court found these reasons to be legitimate governmental objectives. The court next examined whether the in- and out-of-county distinction was rationally related to those objectives. The county argued that “the County Council could have reasoned that... [the location requirement] was rationally related to time and distance factors” affecting the speed in which disabled cars would be cleared from the roads. The court, however, found this justification “spurious” and noted “[i]t is established... that Verzi... is closer to much of the area he intends to serve than are existing in-county towers.” The court further reasoned that “it is not difficult to envision... other situations in which an out-of-county tower will be substantially closer... to an accident scene than are in-county towers.”

Although the county further argued that the in- and out-of-county classification of towers was necessary to administer its regulatory scheme, the court saw “little merit” in this claim. The court found that the county’s powers were broad enough to revoke towing licenses and to investigate and initiate criminal proceedings beyond the county’s borders. The court noted additional difficulties with the classification because the county had already allowed out-of-county towers to work in the county when a motorist requested a particular tower. Moreover, the county allowed the police to summon out-of-county towers when a vehicle was disabled, not because of an accident, but because of a mechanical breakdown.

The court determined that the ordinance prevented nonresidents from conducting “a specific business activity” within the county and found no rational basis for the distinction between in- and out-of-county towers. Consequently, the court arrived at the “more reasonable and probable view that [the classification] was intended to confer the monopoly of a profitable business” upon in-county towers.

28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 426, 635 A.2d at 974.
33. Id. at 425, 635 A.2d at 974.
34. Id.
35. Id. at 426, 635 A.2d at 974.
36. Id.
37. Id.
38. Id. at 427, 635 A.2d at 974.
39. Id. at 426-27, 635 A.2d at 974.
40. Id. at 427, 635 A.2d at 974 (quoting Havre de Grace v. Johnson, 143 Md. 601, 608, 123 A. 65, 67 (1923)).
4. Analysis.—

a. The Transformation of Maryland's Rational Basis Test.—Verzi marks a trend by the Court of Appeals to transform the equal protection doctrine's rational basis test into a more searching review of the constitutionality of economic legislation.41 In the past, the rational basis test essentially was no test at all because of the strong presumption of constitutionality it afforded statutes.42 With the Kirsch decision,43 however, the court appeared to have abandoned the principal barrier to equal protection review of economic legislation, namely, the requirement that statutory discrimination not be set aside if "any state of facts reasonably may be conceived to justify it."44 By refusing to "ride the vast range of conceivable purposes,"45 the Verzi court signaled both the General Assembly and local governments that economic legislation will be subject to meaningful equal protection review.

For many years, Maryland courts maintained the almost insurmountable rule that any conceivable set of facts would sustain a classification and assumed the existence of those facts at the time of the law's enactment.46 Courts took this rule to its logical extreme and allowed this deferential review to operate "'quite apart from whether the conceivable "state of facts" (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) has ever been urged in the classification's defense by those who either promulgated it or have argued in its support.'"47 The test has been "more often than not interpreted to mean any conceivable basis rather than any conceivable rational basis."48 This development has prompted some observers to conclude that a statute subjected to the rational basis test "receives 'minimal scrutiny in theory and virtually none in fact.'"49

41. This more searching standard of review has been called rational basis with a "bite." See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 21 (1972) ("Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination.").
43. See supra notes 24-26 and accompanying text.
44. Waldron, 289 Md. at 707, 426 A.2d at 942 (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).
45. Id. at 722, 426 A.2d at 950.
47. Waldron, 289 Md. at 707, 426 A.2d at 942 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 (1978)).
49. Waldron, 289 Md. at 708, 426 A.2d at 942-43 (quoting Gunther, supra note 41, at 8).
In light of these difficulties, the court, in *Kirsch v. Prince George's County*, refused to accept hypothetical justifications in its application of the rational basis test. At issue in *Kirsch* was whether a Prince George's County ordinance that placed greater zoning requirements on property rented to college students violated the equal protection of the laws. The court held that basing zoning requirements "solely on the occupation which the tenant pursues away from the residence" is an arbitrary classification forbidden by Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution.

The crucial question for the court was "whether the county by adopting the ordinance's classification advances its objective of clearing residential neighborhoods of noise, litter, and parking congestion." The court concluded it did not and noted that occupancy by students and non-students alike "would equally add motor vehicles to a congested parking situation and pose the threat of increased noise and litter." Yet, premises rented to students incurred the extra cost of compliance with more burdensome zoning requirements. In his *Kirsch* dissent, Judge Chasanow noted that "the court seems to be either subtly altering the rational basis test, or paying lipservice to that test by refusing to apply it in the instant case." The *Verzi* holding, however, solidifies the court's shift toward a generally more searching application of the test.

b. *The Rational Basis Test and the Supreme Court.*—Both *Kirsch* and *Verzi* relied on a series of United States Supreme Court decisions in the mid-1980s that applied the rational basis test to economic legislation and found the legislation lacking. The most significant of

52. *Kirsch*, 331 Md. at 91, 626 A.2d at 373.
53. *Id.* at 106, 626 A.2d at 380.
54. *Id.*
55. *Id.*
56. *Id.* at 107, 626 A.2d at 381.
57. *Id.*
58. *Id.* at 108, 626 A.2d at 381 (Chasanow, J., dissenting). Judge Chasanow believed that the zoning ordinance should be held constitutional because rational hypothetical justifications could be made for it. *Id.* at 110, 626 A.2d at 382.
59. *Kirsch*, 331 Md. at 98-104, 626 A.2d at 376-79; *Verzi*, 333 Md. at 418-19, 635 A.2d at 970-71; see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 492 (1985) (invalidating a city ordinance requiring homes for the mentally retarded to obtain special permits); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (invalidating state tax exemption for Vietnam War veterans residing in the state before a certain date); Williams v. Vermont, 472 U.S. 14 (1985) (invalidating vehicle registration tax exemption for cars that were
these cases is City of Cleburne v. Cleburne Living Center, in which the Court wrote that "[t]he state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." More recently, however, the Supreme Court has reasserted the "any conceivable basis" test. In FCC v. Beach Communications, the Court examined whether a law exempting certain cable television facilities from local franchise requirements violated the Equal Protection Clause. The Court found the statute constitutional and stated that legislative classifications will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." The legislature's choice in making a classification "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."

Under the "any conceivable basis" standard presented in Beach Communications, the Verzi court would have found Baltimore County's location requirement for towing operators to be constitutional. Yet, the court stated that it was "particularly distrustful" of geographical classifications, and, after examining the established facts, believed that the classification "was intended to confer the monopoly of a profitable business upon residents" of the county. But under a Beach Communications test, the Court of Appeals could not have disputed the county's justification that its territorial classification was rationally related to the objective of quickly clearing the roadways of disabled vehicles. The county council's assumption that in-county towers would be able to respond more quickly to accidents "may be erroneous, but the


60. 473 U.S. 432 (1985). The Cleburne Court considered whether a city ordinance requiring permits for group homes for the mentally retarded violated the Equal Protection Clause of the Fourteenth Amendment. Id. at 448.

61. Id. at 446-47 (citations omitted).

62. 113 S. Ct. 2096 (1993). The statute in question distinguished between cable facilities that served commonly owned or managed buildings not using public rights of way and those serving separately owned or managed buildings. The former were exempt from franchise rules while the latter were not. Id. at 2101.

63. Id. at 2101-03.

64. Id. at 2102. In his concurrence, Justice Stevens criticized this standard of review and stated that such a test is "tantamount to no review at all." Id. at 2106 n.3 (Stevens, J., concurring).

65. Verzi, 333 Md. at 425, 635 A.2d at 973.

66. Id. at 427, 635 A.2d at 974.
very fact that [it is] 'arguable' is sufficient, on rational-basis review," to find the ordinance constitutional.

c. Assessing Greater Scrutiny.—Critics of a more searching review under the rational basis test for economic legislation argue that such scrutiny permits judges the opportunity to pass judgment on the wisdom of economic legislation. They believe that a more searching review would allow judges to "'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'" Judges, it is argued, should practice self-restraint and allow the democratic process to correct unwise legislation. Critics believe that a more searching review lacks clear principles and provides courts with no guidance in their application of the rational basis test.

Another difficulty that critics have with this more searching rational basis test is a court's determination of the legislature's reasons for a particular classification. In Beach Communications, Justice Thomas declared that because the Court "never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." If the legislature's actual purpose must be examined, courts are faced with the often impossible difficulty of identifying a purpose or resolving the problem of multiple or contradictory legislative purposes. In his Cleburne dissent, Justice Marshall went even further and argued that economic legislation is not covered by the guarantee of equal protection.

[G]overnment is free to move in any direction, or to change directions, in the economic and commercial sphere. The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, or new businesses as old.

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67. Beach Communications, 113 S. Ct. at 2104 (citations omitted).
69. Beach Communications, 113 S. Ct. at 2101.
71. Beach Communications, 113 S. Ct. at 2102.
72. Gunther, supra note 41, at 46-47.
74. Id. (citations omitted).
Equal protection, however, has long been recognized as a necessary limitation on legislative power. As a fundamental guarantee of liberty, equal protection "is essentially a direction that all persons similarly situated should be treated alike."

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

To allow virtually all economic legislation to pass equal protection review, the courts would abdicate their duty to protect citizens from arbitrary government action. Verzi's location requirement for towers, Kirsch's zoning classification based on a resident's occupation, and Cleburne's special permit requirements for group homes for the mentally retarded all exemplify discriminatory legislative classifications that would go unchallenged under the "any conceivable basis" test. While these classifications do not involve "fundamental" or political rights, they do subject citizens to arbitrary and irrational government action. Given the scope and importance of economic legislation in citizens' lives, the distinction between economic and fundamental rights deserves critical reexamination.

75. The philosopher John Locke noted that legislative power must "govern by promulgated established Laws, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough." 2 JOHN LOCKE, An Essay Concerning the True Original, Extent, and End of Civil-Government, in Two Treatises of Government § 142 (Peter Laslett ed., Cambridge Univ. Press 1970) (3d ed. 1698).
76. Cleburne, 473 U.S. at 439.
78. Verzi, 333 Md. at 413, 635 A.2d at 967-68.
80. Cleburne, 473 U.S. at 435.
81. In his opinion in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), Justice Stewart stated:
   The dichotomy between personal and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.
The meaningful application of equal protection to all laws, including economic legislation, however, does not license courts to substitute their views for that of the legislature. A broader equal protection review focuses, rather, on the means by which legislation seeks to achieve its ends. This is a narrow inquiry. The \textit{Kirsch} court, for example, did not find a constitutional infirmity in the county's objective of clearing residential neighborhoods of noise, litter, and parking congestion.\textsuperscript{82} The zoning ordinance violated equal protection because its classification of residents by occupation bore no rational relationship to its objective of maintaining peaceful neighborhoods.\textsuperscript{83} A more searching review "permit[s] the state to achieve a wide range of objectives. The yardstick for the acceptability of the means [is] the purposes chosen by the legislatures . . . ."\textsuperscript{84}

Since the federal courts have refused to guarantee equal protection in the economic sphere, state courts must step in to fill this void.\textsuperscript{85} "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."\textsuperscript{86} State courts, moreover, have a duty to follow the provisions of their own constitutions. The Supreme Court of Minnesota has stated:

\textit{Id.} at 552.

82. \textit{Kirsch}, 331 Md. at 105, 626 A.2d at 380.
83. \textit{Id.} at 107-08, 626 A.2d at 381.
84. Gunther, \textit{supra} note 41, at 21.
85. Many states have used equal protection provisions in their state constitutions to apply a more searching scrutiny of economic legislation first abandoned by the Supreme Court in \textit{Carotene Products Co}., and again in \textit{Beach Communications}. See Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (striking down a program to limit entry into the ranks of commercial fishermen and noting that the court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional [federal] rational basis standard"); Hasegawa v. Maui Pineapple Co., 475 P.2d 679 (Haw. 1970) (holding a statute which required large employers, but not small employers, to pay workers for jury duty violated the equal protection clauses of both the Hawaii and federal constitutions); Murphy v. Commissioner, 612 N.E.2d 1149, 1150 (Mass. 1993) (holding filing fee requirement in workers compensation appeals for those using counsel violates state and federal equal protection guarantees); State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (invalidating a piece of non-economic legislation, for a lack of a "reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals"); Town of Chesterfield v. Brooks, 489 A.2d 600, 604 (N.H. 1985) (holding a town's zoning ordinance governing the location of mobile homes violated property owner's equal protection rights). See generally James C. Kirby, Jr., \textit{Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism}, 48 \textit{Tenn. L. Rev.} 241, 261-68 (1981).
To harness interpretation of our state constitutional guarantees of equal protection to federal standards and shift the meaning of Minnesota's constitution every time federal case law changes would undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens.\textsuperscript{87}

The Supreme Court of Pennsylvania has observed that "state courts may be in a better position to review local economic legislation than the Supreme Court. State courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs."\textsuperscript{88}

Critics further argue that the current three-tier approach of reviewing classifications challenged under the equal protection doctrine—according to strict scrutiny, intermediate scrutiny, and the rational basis test—is overly rigid\textsuperscript{89} and does not adequately explain how courts make their decisions.\textsuperscript{90} Justice Marshall argued that the entire system should be abandoned and replaced with an approach that varies its scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."\textsuperscript{91} Justice Stevens has argued that one true rational basis test should be applied for all classifications reviewed under the equal protection doctrine: whether an "impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."\textsuperscript{92} Both Marshall and Stevens correctly point to the need for an all-encompassing equal protection standard of review to replace the rigidity of the current system. Until the Court of Appeals chooses to reject this system, however, the court's more searching rational basis test for economic legislation remains the best hope for the promise of equal protection under the law.

\textsuperscript{87} Russell, 477 N.W.2d at 889 (citations omitted).
\textsuperscript{92} Id. at 452 (Stevens, J., concurring).
5. Conclusion.—The Verzi court followed Kirsch and refused to apply the rule that economic legislation will not be struck down if there is any conceivable basis for the legislative classification. By its decision, the court overcame a previously formidable barrier to equal protection review. In finding no rational basis for Baltimore County's distinction between in- and out-of-county towers, the Court of Appeals solidified its application of a more searching standard of review and signaled an important trend toward greater scrutiny of economic legislation. The Verzi decision places both state and local governments on notice that commercial legislation is no longer immune from equal protection review.

MARK G. PARENTI

C. Assessing the Constitutional Implications of the Maryland Hate Crimes Statute

In Ayers v. State, the Maryland Court of Appeals upheld a conviction under the Maryland hate crimes statute, which prohibits bias-motivated crimes, but left open the question of whether the statute violates the First Amendment's protection of free speech by proscrib-
ing bias-motivated harassment. The court declined to rule on whether the term "harass" in the statute is overbroad and vague, or a content-based regulation of speech, because the appellant was not charged with "harassing" his victims, and therefore lacked standing to raise these issues. The court raised the possibility, however, that the harassment prong of the statute may not survive future constitutional challenges.

The court also ruled that evidence of a prior racial incident in which the appellant was involved was admissible to establish motive for committing a racially motivated crime, as required by the bias-motivated crime portion of the statute.

While the court was correct in holding that the appellant lacked standing to challenge the harassment prong of the statute, this portion of the statute nevertheless suffers from significant constitutional infirmities and will likely face a successful challenge in the future. Although the use of evidence of biased speech to convict a person of a crime under the statute is valid, there still remain constitutional difficulties for the criminalization of speech based on its content.

petition the Government for a redress of grievances." U.S. CONST. amend. I. It has been held to apply to the states through the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

4. Ayers, 335 Md. at 625, 645 A.2d at 33.

5. An overbroad statute infringes on both protected and unprotected speech. See infra text accompanying notes 79-81.

6. A vague statute is unclear as to what conduct is prohibited and thus fails to give adequate notice to citizens and law enforcement officials, as required by the Due Process Clause of the Fourteenth Amendment. See infra text accompanying notes 74-78.


8. To have standing, a litigant must have suffered some actual or threatened injury. This requirement is mandated by Article III of the Constitution, which gives the federal judiciary power over "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1; see, e.g., Valley Forge College v. Americans United, 454 U.S. 464 (1982); see also infra notes 82-85 and accompanying text.

9. Ayers, 335 Md. at 625, 645 A.2d at 33.

10. Id.

11. Id. at 635, 645 A.2d at 38.

12. This Note will not discuss two other challenges Ayers made to his conviction: (1) that his conviction under the hate crimes statute violates a longstanding rule that a person may not be convicted upon the uncorroborated testimony of an accomplice, because the only evidence of Ayers's racial motivation came from his accomplice Riley, Ayers, 335 Md. at 621, 645 A.2d at 31; and (2) that the court's sentence was so oppressive as to constitute cruel and unusual punishment. Id. The Court of Appeals ruled against Ayers on both of these issues, stating that (1) "corroboration is necessary only when criminal agency has not
1. The Case.—After consuming approximately three six-packs of beer at his home in Silver Spring, Maryland, John Randolph Ayers, age twenty-two, and his friend, Sean Riley, age twenty, set out at 2:00 a.m. on March 3, 1992, to “look for black people to beat up.”\15 They were angered by a racial incident in which they had been involved at a nearby 7-Eleven store several nights earlier.\14 According to the evidence, on February 29, while Ayers was waiting in line behind a group of African-American teenagers to purchase a case of beer, he bumped into one of them, then threw down the beer and left the store.\15 Although Ayers and Riley drove off, gesturing with their fists, they returned within a few minutes.\16 Ayers confronted one of the teenagers, who was knocked down, and shouted racial epithets including “nigger” and “black motherfucker.”\17 Ayers also chased an African-American female teenager, calling her a “black bitch,” a “nigger,” and a “black motherfucker.”\18

As the State’s witness, Riley testified that their anger at this incident motivated them on March 3 to go out “nigger hunting.”\19 Riley testified that after he and Ayers discussed the incident, Ayers initiated the idea of “burning somebody or something,” and then took charcoal lighter fluid from the shelf in his garage.\20

After observing two African-American women walking on Georgia Avenue, Ayers and Riley stopped the car they were driving and began walking behind the women.\21 When the women started to run, Ayers and Riley chased them.\22 The women split up, and Riley chased one, Myrtle Guillory, while Ayers chased the other, Johnnie Mae McCrae.\23

Guillory testified that while running she looked back, saw Ayers grab McCrae, and heard McCrae scream.\24 She also testified that Riley yelled repeatedly to her, “I’m going to kill you, you black bitch.”\25 Guillory reached a friend’s home and screamed for help.\26

\13 Id. at 609-10, 645 A.2d at 40; and (2) the sentence fell within the “considerable discretion” of the sentencing judge, id. at 641, 645 A.2d at 41.
14. Id. at 612, 645 A.2d at 26.
15. Id. at 609, 645 A.2d at 25.
16. Id.
17. Id. at 609-10, 645 A.2d at 25.
18. Id.
19. Id. at 611-12, 645 A.2d at 26.
20. Id. at 612, 645 A.2d at 27.
21. Id. at 610, 645 A.2d at 25.
22. Id.
25. Id.
When her friend opened the door, Riley fled. Guillory's friend called 911. An officer arrived promptly and took Guillory in his car to search for McCrae. During their search, Guillory and the officer observed Riley walking across Georgia Avenue, and the officer apprehended him. When the officer frisked Riley, he found a container of charcoal lighter fluid inside Riley's jacket.

Meanwhile, Ayers had caught McCrae by the back of her coat collar and dragged her into the woods off Georgia Avenue. McCrae testified that Ayers began "banging her head" and told her he was going to kill her. She could not remember anything after that until police led her to an ambulance. The police had found McCrae when she ran out of the woods crying for help. She was hysterical, naked from the waist up, and bleeding from the head. Her pants were wet, and she smelled of lighter fluid.

Riley testified that after he fled from Guillory and her friend, he heard a scream and entered the woods. He saw McCrae lying motionless on her stomach on the ground, and Ayers was kneeling with McCrae's head between his knees, hitting her in the back of the head with his fist. Riley testified that Ayers stood up and sprayed McCrae with the lighter fluid from her waist to her feet. Riley said that Ayers told him to "light her, light her," but Riley took the lighter fluid away from Ayers and put it in his pocket, saying "you're crazy."

The police found Ayers at his home at 3:20 a.m., with blood on his clothing and body. When he was taken into custody, Ayers signed a statement admitting that it was his idea to attack the women, and that he had dragged McCrae into the woods and sprayed her legs with lighter fluid "to scare her."

26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 611, 645 A.2d at 26.
33. Id.
34. Id. at 610, 645 A.2d at 26.
35. Id.
36. Id. at 610-11, 645 A.2d at 26.
37. Id. at 612, 645 A.2d at 27.
38. Id.
39. Id.
40. Id. at 612-13, 645 A.2d at 27.
41. Id. at 613, 645 A.2d at 27.
42. Id. at 611, 645 A.2d at 26.
43. Id.
Ayers later recanted his statement to the police, and claimed that he had only told the police what they wanted to hear.\(^{44}\) He denied striking McCrae and ever having the lighter fluid.\(^{45}\) He further denied that there was any racial motivation for the attack and stated that he was not a “racial person.”\(^{46}\) At trial, Ayers claimed that he and Riley had gone to the woods to drink; he had brought lighter fluid to build a campfire.\(^{47}\) They chased the two people, without knowing their race or gender, according to Ayers, because he thought they had thrown something at the car.\(^{48}\) Ayers claimed that he chased McCrae into the woods, but “blacked out” after that.\(^{49}\)

During the State’s case, the defense objected repeatedly to the introduction of evidence concerning the 7-Eleven incident, on the grounds that it was improper “other crimes” evidence and highly prejudicial.\(^{50}\) The trial court ruled that the evidence was admissible to show motive, which is an element of the offense of a racially motivated crime.\(^{51}\) Defense counsel requested and received two cautionary instructions to the jury to limit the use of the evidence.\(^{52}\)

The jury found Ayers guilty of assault, assault with intent to maim, kidnapping, conspiracy to commit a racially motivated crime, and commission of a racially motivated crime in violation of Section 470A(b)(3)(i) of the Maryland statute.\(^{53}\) The court sentenced him to a total of sixty years imprisonment.\(^{54}\) Ayers appealed, and the Court of Appeals granted certiorari prior to review by the intermediate appellate court to consider Ayers’s constitutional challenge to the Maryland hate crimes statute.\(^{55}\)

2. Legal Background.—During the 1980s, a number of states enacted “hate crimes” statutes, influenced by the Anti-Defamation

\(^{44}\) Id.  
\(^{45}\) Id.  
\(^{46}\) Id.  
\(^{47}\) Id.  
\(^{48}\) Id.  
\(^{49}\) Id.  
\(^{50}\) Id. at 613-16, 645 A.2d at 27-29.  
\(^{51}\) Id. at 617, 645 A.2d at 29. Motive is an element of the crime because the statute makes it an offense to “[h]arass or commit a crime upon a person . . . because of that person’s race, color, religious beliefs, or national origin.” Md. Ann. Code art. 27, § 470A(b)(3)(i) (1992 & Supp. 1994) (emphasis added).  
\(^{52}\) Ayers, 335 Md. at 616-18, 645 A.2d at 29. The trial court, in an admittedly confusing instruction, cautioned jurors that the evidence was not to be used to infer defendant’s involvement in other crimes, but to establish the words that he uttered. Id.  
\(^{53}\) Id. at 618, 645 A.2d at 30.  
\(^{54}\) Id. at 618-19, 645 A.2d at 30.  
\(^{55}\) Id. at 619, 645 A.2d at 30.
League of B'nai B'rith's model statute for criminalizing "ethnic intimidation." Maryland passed its hate crimes statute in 1988. Proponents of ethnic intimidation laws justify them because of the special harm victims of bias-motivated crimes suffer beyond mere physical injury. Critics of such statutes claim that they impermissibly regulate the content of speech, regardless of whether the statutes are directed at speech or conduct, because they attempt to punish the thoughts of the defendant.

a. Speech Issues.—The Supreme Court recently clarified this issue when it held that a content-based regulation of speech in a bias-motivated crime statute violated the First Amendment. In R.A.V. v. City of St. Paul, the Court struck down as facially invalid a city ordinance prohibiting bias-motivated disorderly conduct. Adopting the Minnesota Supreme Court's construction of the statute that it reached only "fighting words," the Court held that the ordinance prohibited otherwise permitted speech solely on the basis of content.

In R.A.V., the petitioner had allegedly burned a cross on an African-American family's lawn and was charged under St. Paul's Bias-Motivated Crime Ordinance, which prohibited the display of a symbol that one knows or has reason to know "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." The Court declared that the First Amendment prohibits the

58. See Gellman, supra note 56, at 340.
59. See generally Gellman, supra note 56.
61. Id. at 2542-47. Relying on the Supreme Court's reasoning in R.A.V., the Maryland Court of Appeals struck down a Maryland cross-burning statute as an impermissible content-based regulation of speech. State v. Sheldon, 332 Md. 45, 64, 629 A.2d 753, 763 (1993).
62. R.A.V., 112 S. Ct. at 2542. Fighting words are not protected by the First Amendment because of their "particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey." Id. at 2544. However, "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." Id. at 2545. But see id. at 2553 (White, J., concurring) (criticizing the majority's "underbreadth" doctrine and the notion that "lawmakers may not regulate some fighting words more strictly than others because of their content"). The Court has defined a limited number of categories of speech that are not protected by the First Amendment. In addition to fighting words, these categories include obscenity and libel. Id. at 2542-43.
63. Id. at 2547. Justices White, Blackmun, O'Connor, and Stevens concurred in the judgment, but on the grounds that the statute was fatally overbroad for criminalizing expression both protected and unprotected under the First Amendment. Id. at 2550-71.
64. Id. at 2541 (quoting ST. PAUL, MINN., CODE § 292.02 (1990)).
government from proscribing speech because of "disapproval of the ideas expressed" and noted that "[c]ontent-based regulations on speech are presumptively invalid." To overcome that presumption, the Court stated, the "danger of censorship" in content-based statutes requires that there be a compelling state interest and that no other means be available to achieve the desired end. Because the city could have passed an ordinance prohibiting all "fighting words," instead of only those involving disfavored subjects, the content-based regulation was not reasonably necessary to achieve its compelling interest in protecting members of groups that historically have been the targets of discrimination.

While the R.A.V. Court made it clear that content-based regulations of speech are invalid, it recently upheld a content-based regulation of criminal conduct. In Wisconsin v. Mitchell, a unanimous Court upheld a statute that enhances the penalty whenever the defendant "intentionally selects the person against whom the crime ... is committed because of [his] race, religion, color, disability, sexual orientation, national origin, or ancestry ...." The Court ruled that the statute does not impermissibly criminalize bigoted thought, but only conduct that is motivated by racial animus and thus unprotected by the First Amendment. The Court declared that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."

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b. Vagueness and Overbreadth.—The due process principles of the Fourteenth Amendment require that one's life, liberty, or property not be jeopardized by an unclear statute. To pass constitutional muster, a statute must be "sufficiently explicit" to give citizens fair no-
tice that certain conduct is proscribed,\textsuperscript{75} and it must provide "legally fixed standards and adequate guidelines" to assist the police, judicial officers, and triers of fact in the application of the law.\textsuperscript{76} A statute will be found "void for vagueness" if it fails to meet these criteria.\textsuperscript{77} These concerns are amplified when a vague statute involves speech. A vague statute could have a chilling effect on speech protected by the First Amendment. Rather than risk prosecution or civil penalties, citizens may curb their protected speech.\textsuperscript{78}

An overbroad statute sweeps within its scope both protected and unprotected speech.\textsuperscript{79} A statute must be narrowly drawn and limited to define and punish specific conduct that is within the state's power to proscribe.\textsuperscript{80} "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."\textsuperscript{81}

c. Standing to Challenge the Constitutionality of a Statute.—An exception to the standing rule\textsuperscript{82} allows a defendant to challenge a portion of a statute under which he was convicted for being overbroad and vague when it could infringe on the First Amendment rights of others.\textsuperscript{83} A defendant may challenge a statute even if it is constitutional as applied to him, but could possibly encompass unconstitutional applications.\textsuperscript{84} Although a defendant may challenge possible unconstitutional applications of the portion of the statute under

\textsuperscript{75} Connally v. General Const. Co., 269 U.S. 385, 391 (1926).
\textsuperscript{77} Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); \textit{see also} NAACP v. Button, 371 U.S. 415, 435 (1963) (stating vague statute may lead to selective application of the law to unpopular causes).
\textsuperscript{78} Grayned, 408 U.S. at 109.
\textsuperscript{79} \textit{Id.} at 114-15; \textit{see also} Gooding v. Wilson, 405 U.S. 518, 519, 527 (1972) (finding unconstitutional a statute prohibiting "abusive" or "opprobrious" language tending to cause a breach of the peace); NAACP v. Button, 371 U.S. at 433 (stating that an overbroad statute threatens, "in the area of First Amendment freedoms . . . sweeping and improper application"); Doe v. University of Michigan, 721 F. Supp. 852, 864 (E.D. Mich. 1989) (noting a law will be deemed overbroad "if it sweeps within its ambit a substantial amount of protected speech . . . .").
\textsuperscript{80} Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
\textsuperscript{81} \textit{Button}, 371 U.S. at 433.
\textsuperscript{82} \textit{See supra} note 8.
\textsuperscript{83} Bowers v. State, 283 Md. 115, 122-23, 389 A.2d 341, 346 (1978); \textit{see also} City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (noting that for a statute to be challenged on overbreadth grounds, a "realistic danger" to the First Amendment rights of parties not before the court must exist).
\textsuperscript{84} Bowers, 283 Md. at 122-23, 389 A.2d at 346.
which he was convicted, he may not challenge a portion of the statute under which he was never charged or convicted. 85

The Court has allowed defendants to challenge a conviction under a statute that includes both constitutional and unconstitutional provisions when it is unclear on which provision the conviction rests. For example, in Stromberg v. California, 86 the Court struck down a statute that prohibited the display of a flag or other symbol in public for one of three enumerated reasons, one of which was an unconstitutional regulation of speech. 87 The conviction in Stromberg rested on a general verdict, making it impossible to say under which clause of the statute the defendant had been convicted. 88 Because the statute was so broad as to prohibit political speech and because it was impossible to determine whether the defendant had been convicted under the unconstitutional prong of the statute, the Court reversed the conviction. 89

Similarly, in Street v. New York, 90 the Court reversed a conviction under a statute making it a misdemeanor to publicly mutilate or cast contempt upon a United States flag "either by words or act." 91 The Court reasoned that the general verdict against the defendant would permit a conviction for uttering contemptuous words about the flag, in violation of the right to free speech. 92 The Court observed that there is no similar hazard when the indictment is in several counts and the conviction explicitly rests on a certain count. 93

d. Evidence of "Other Crimes."—Courts generally prohibit the introduction of evidence of a defendant's prior criminal acts to prove the defendant guilty of the offense for which he is on trial. 94 This rule protects the defendant from punishment for a history of criminal disposition 95 and helps prevent undue juror prejudice against the defendant. 96 The courts recognize exceptions to this rule if the

86. 283 U.S. 359 (1931).
87. Id. at 367-70.
88. Id. at 367-68.
89. Id. at 369-70.
91. Id. at 578.
92. Id. at 580.
93. Id.
95. Straughn, 297 Md. at 333, 465 A.2d at 1168.
96. Terry, 332 Md. at 334, 631 A.2d at 426.
evidence of prior crimes or bad acts "is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on a propensity to commit crime or his character as a criminal." Such evidence is admissible if it tends to establish motive, intent, absence of mistake, a common scheme or plan, or identity. To admit such evidence, the court will (1) determine if it "fits within one of [the above] exceptions," (2) decide whether the defendant's "involvement in the other crimes is established by clear and convincing evidence," and (3) weigh the necessity and probative value of the evidence against "any undue prejudice from its admission." Such evidence is also admissible if the offenses "are so connected or blended in point of time or circumstances" that one offense cannot be fully shown or explained without proving the others.

3. The Court's Reasoning.—

a. Speech Issues.—The Ayers court held that, although the "harassment" prong of Section 470A may raise constitutional concerns, Ayers lacked standing to challenge the statute because he was not charged with the crime of harassment. Ayers's indictment and verdict sheet charged him only with committing racially motivated crimes, and the casual use of the term "harass" by the court and the prosecutor in describing the statute at trial was not enough to lead the jury to convict him of mere harassment. In addition, there was no evidence that Ayers had engaged in any expressive conduct beyond the underlying crimes he had committed.

97. Faulkner, 314 Md. at 634, 552 A.2d at 897; see Terry, 332 Md. at 334-36, 631 A.2d at 426-27 (holding evidence of prior conviction for cocaine possession was inadmissible because it was not substantially relevant to a contested issue, but offered only to prove criminal character); Harris v. State, 324 Md. 490, 501, 597 A.2d 956, 962 (1991) (holding evidence of prior convictions for heroin distribution was inadmissible in trial for distribution of cocaine because it was offered only to show disposition of defendant); Ross, 276 Md. at 671-72, 350 A.2d at 685 (holding evidence of defendant's prior drug dealing was inadmissible because it was not substantially relevant for some other purpose than to show criminal character); see also Md. R. 5-404(a) (1994).

98. Ross, 276 Md. at 669-70, 350 A.2d at 684; see also Md. R. 5-404(b) (1994).

99. Terry, 332 Md. at 335, 631 A.2d at 427 (quoting Faulkner, 314 Md. at 634-35, 552 A.2d at 898).

100. Tichnell v. State, 287 Md. 695, 712, 415 A.2d 830, 839 (1980); see also Bryant v. State, 207 Md. 565, 586, 115 A.2d 502, 511 (1955) (allowing evidence of prior crimes that were not exactly concurrent with, but had an obvious connection to, the offense for which the defendant was on trial).

101. Ayers, 335 Md. at 625, 645 A.2d at 33.

102. Id. at 628, 645 A.2d at 34-35. In addition, the court pointed out that Ayers did not object to the use of the term "harass" during trial, and therefore did not preserve the issue for appellate review. Id. at 627, 645 A.2d at 34.

103. Id. at 628, 645 A.2d at 35.
The court rejected Ayers's argument that he could challenge the harassment prong of the statute for being vague and overbroad under the special rule of standing for First Amendment cases. The court pointed to precedent holding that a defendant may not facially challenge portions of a statute under which he was not convicted. The court distinguished its holding from those in Stromberg v. California and Street v. New York, which Ayers cited to support his argument that a conviction must be reversed if it could have been based on an unconstitutional ground. Unlike the defendants in Stromberg and Street, Ayers did not question the constitutionality of the statute as it applied to him. Because Ayers's indictment contained no count based on the harassment portion of the statute, and because he did not challenge the constitutionality of the portion of the statute that was applied to him, he lacked standing to challenge the statute.

b. Evidence of "Other Crimes."—The court found that evidence of the prior racial altercation at the 7-Eleven store was not prejudicial or irrelevant, and that Ayers was not denied a fair trial by its admission. Because "other crimes" evidence is admissible if it tends to establish a contested issue such as motive, the court reasoned that evidence that the prior incident motivated Ayers's and Riley's attacks on the women was admissible.

The court also rejected Ayers's claim that the statute unconstitutionally permitted the admission of prior racist statements made during the incident at the 7-Eleven store and forced him to prove that he was not a racist. Concluding that the evidence of the incident was not generalized in nature, but rather that there was a "tight nexus" between this incident and the later offense, the court held it proper to admit the evidence to prove motive.

104. Id. at 629, 645 A.2d at 35; see supra text accompanying notes 82-85.
105. Ayers, 335 Md. at 625-26, 645 A.2d at 33 (citing Colton v. Kentucky, 407 U.S. 104, 112 n.3. (1972)).
106. 283 U.S. 359 (1931); see supra text accompanying notes 86-89.
107. 394 U.S. 576 (1969); see supra text accompanying notes 90-93.
108. Ayers, 335 Md. at 625, 645 A.2d at 33.
109. Id. at 627, 645 A.2d at 34.
110. Id. at 629, 645 A.2d at 35.
111. Id. at 636, 645 A.2d at 38.
112. Id. at 631, 645 A.2d at 36.
113. Id. at 633, 645 A.2d at 37.
114. Id. at 638-37, 645 A.2d at 38-39.
115. Id. at 637, 645 A.2d at 39. The "nexus" in this case arises from the proximity of the two events in time and the apparent causal connection between the two as indicated by Riley's testimony. Id. at 631, 634, 645 A.2d at 36, 37.
The dissent, written by Judge Bell and joined by Judges Chasanow and Raker, did not address Ayers’s challenge to the constitutionality of the statute on its face. Instead, the dissenters argued that the testimony about the prior racial incident was inadmissible because it was insufficient to prove motive, and because its probative value was outweighed by the prejudice that it would engender in the jury. The dissent agreed with Ayers that the evidence was introduced to prove his racial bigotry, and therefore directly punish thought in violation of the First Amendment.

4. Analysis.—Although it sustained a conviction under the Maryland hate crimes statute, the Ayers decision opens the door to future challenges to the statute for violation of the First Amendment’s protection of free speech. The court observed that

Section 470A(b)(3)(i)’s prohibition against harassing someone based on race, color, national origin or religious beliefs, if construed to include merely speech that annoys or offends, would appear to target squarely certain speech based upon the destructive nature of its message . . . . [W]hile the term ‘harass’ in the context of § 470A(b)(3) may raise constitutional concerns, we need not here address the statute’s constitutionality on that premise.

Because of Ayers’s standing deficiencies, the court did not address the most important constitutional issues raised by Maryland’s hate crimes statute. If Ayers had had standing to challenge the criminalization of bias-motivated “harassment,” there is reason to believe that the court would have found it an unconstitutional infringement of speech under R.A.V. v. City of St. Paul and State v. Sheldon.

a. Standing.—The court correctly found that Ayers lacked the requisite standing to challenge the harassment portion of Maryland’s hate crimes statute. Because Ayers was charged with and convicted of committing a bias-motivated crime, and not harassment, the typical standing exception for First Amendment issues did not apply to him.

116. Id. at 656, 645 A.2d at 49 (Bell, J., dissenting).
117. Id. at 646-48, 645 A.2d at 43-44.
118. Id. at 625, 645 A.2d at 33.
119. 112 S. Ct. 2538 (1992); see supra notes 60-69 and accompanying text.
120. 332 Md. 45, 629 A.2d 753 (1993).
121. Ayers, 355 Md. at 625, 645 A.2d at 33; see supra text accompanying notes 83-85.
To allow Ayers to challenge the statute's harassment prong, despite the fact that he was not charged with this crime, would open the door for courts to venture beyond the "cases and controversies" before them and to make policy in a vacuum, unconstrained by the facts of the case.\textsuperscript{122} For the court to hear such a challenge, it would have to alter radically its traditional standing requirements, a step that it is unlikely to take in the near future.

\textit{b. Content-Based Limitations on Speech.}—Despite his standing deficiencies, Ayers raised valid arguments that challenge the harassment portion of the statute as a content-based limitation on free speech. The term "harass" contemplates speech by its definition because it includes "words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person."\textsuperscript{123} To prohibit only harassing speech that involves race, color, religious beliefs, or national origin is an impermissible content-based limitation on speech under \textit{R.A.V. v. City of St. Paul}.\textsuperscript{124}

The harassment portion of Maryland's hate crimes statute suffers from the same constitutional infirmities that plagued the St. Paul ordinance struck down in \textit{R.A.V.} That ordinance compares closely with the harassment prong of Maryland's statute in that it prohibited "fighting words"\textsuperscript{125} that one knows or has reason to know "[t]o arouse[ ] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."\textsuperscript{126} One could easily substitute the term "harassment" for "fighting words" and achieve substantially the same meaning.

In order to sustain such a content-based regulation of speech, the Court in \textit{R.A.V.} required a compelling state interest and the unavailability of other means to achieve the desired end.\textsuperscript{127} Presumably, Maryland's state interest, like that cited by the City of St. Paul in \textit{R.A.V.},\textsuperscript{128} is to protect minorities and other groups that historically have been targets of discrimination. However, as the Court pointed out in \textit{R.A.V.}, there are other ways to protect such groups. For example, the state could have passed a statute prohibiting all "fighting words," as

\begin{itemize}
  \item \textbf{122.} \textit{See supra} note 8.
  \item \textbf{124.} 112 S. Ct. 2538 (1992); \textit{see supra} notes 60-69 and accompanying text.
  \item \textbf{125.} \textit{See supra} note 62 and accompanying text.
  \item \textbf{126.} \textit{R.A.V.}, 112 S. Ct. at 2541 (quoting \textit{St. Paul, Minn., Code} § 292.02 (1990)).
  \item \textbf{127.} \textit{Id.} at 2549-50.
  \item \textbf{128.} \textit{Id.} at 2549.
\end{itemize}
the Court suggested in *R.A.V.* The existence of other, content-neutral means to achieve the state's end "'undercut[s] significantly' any defense of such a statute." The existence of other, content-neutral means to achieve the state's end "'undercut[s] significantly' any defense of such a statute."  

**c. Vagueness and Overbreadth.**—The harassment portion of Maryland's hate crimes statute may not survive future scrutiny for vagueness and overbreadth given that it could infringe on permissible speech. The term "harass" in the Maryland statute is not sufficiently clear as to what conduct or speech is prohibited. Given the many definitions of "harass," including "to lay waste [to] . . . an enemy's country" and "to tire out," the fair notice requirement may not be met. The harassment portion of the statute may be overbroad as well because its scope may encompass both protected and unprotected speech. With no guidelines as to what speech is prohibited, however, it is impossible to tell whether the statute covers protected speech. The statute is not drawn narrowly, as courts require for regulations of speech.

**d. Evidence of "Other Crimes."**—The court correctly concluded that evidence of the prior racial incident at the 7-Eleven store was admissible to prove Ayers's racial motivation in committing the crimes against his victim. While evidence of other crimes or prior bad acts is not admissible to prove a defendant's criminal disposition, it is admissible if it has special relevance to prove an essential element of the crime—here, that the defendant committed the crime against his victim because of her race. The nexus between the two events was sufficient to ensure that the evidence was not overly generalized in nature.

In reaching its holding, the court applied the three-part test articulated in *State v. Faulkner* to determine if such evidence meets the exception to the rule against evidence of other crimes. First, mo-
tive, which is an essential element of the crime,¹³⁸ is a recognized exception to the general rule against other crimes evidence.¹³⁹ Second, the court concluded that the evidence of the prior criminal acts was established by clear and convincing evidence by the testimony of two witnesses.¹⁴⁰ Even Ayers admitted on cross-examination that the incident at the 7-Eleven store was racial in nature, and that he chased the teenagers because he was upset at their racial slurs.¹⁴¹

Third, the court concluded that the probative value of the evidence demonstrated Ayers's racial motives and outweighed its possible prejudicial effect on the jury.¹⁴² Given that the 7-Eleven store incident occurred only a few days before the attacks in question, the probative value of the evidence was substantial because of the close nexus between the two events.¹⁴³ In addition, the evidence of the prior incident was necessary for the state to prove that Ayers had a racial motivation for the crime as required by Section 470A of the statute.¹⁴⁴ Finally, the court pointed to the "strong presumption" that judges properly perform their duties in weighing these factors.¹⁴⁵

The dissent asserted that the majority had inappropriately endorsed proof of racial bigotry in order to prove motive as required by the statute.¹⁴⁶ According to the dissent, the state offered the evidence of the prior incident simply to prove Ayers's bigotry.¹⁴⁷ The focus of the evidence was on what he said, not what he did,¹⁴⁸ and therefore had a chilling effect on speech.¹⁴⁹ The dissent, however, failed to address adequately the testimony about Ayers's use of racial epithets.

¹³⁸. Id. at 633, 645 A.2d at 37. Under Article 27, § 470A(b)(3)(i) of the Maryland Code, the defendant must have committed the crime "because of" the person's race or other prohibited category.
¹³⁹. Id. at 631, 645 A.2d at 36.
¹⁴⁰. Id. at 634, 645 A.2d at 37. Clear and convincing evidence renders the proposition at issue "much more likely so than not." JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 406, at 173 (2d ed. 1993). The evidence "need not be established with absolute certainty and that it is to some degree conflicting does not preclude the trial judge from being satisfied that it is nonetheless clear and convincing." Id. at 174 (citing Committee on Civil Pattern Jury Instruction of the Maryland State Bar Association, Inc., MJPI 1:8(b) (2d ed. 1984)).
¹⁴². Id. at 635-36, 645 A.2d at 38. Mere prejudice is not enough to disallow such evidence if its probative value is greater. Id. at 635, 645 A.2d at 38.
¹⁴³. Id.
¹⁴⁴. Id.
¹⁴⁵. Id. at 635-36, 645 A.2d at 38 (citing Beales v. State, 329 Md. 263, 273, 619 A.2d 105, 110 (1993)).
¹⁴⁶. Id. at 643 n.1, 645 A.2d at 42 n.1 (Bell, J., dissenting).
¹⁴⁷. Id.
¹⁴⁸. Id. at 651-52, 645 A.2d at 46-47.
¹⁴⁹. Id. at 648, 645 A.2d at 44.
which showed that the prior event was racially charged and corroborated Riley’s testimony that the prior event had angered Ayers and motivated him to seek retribution against African-American victims.150

The Supreme Court has made it clear that the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime.151 Ayers was convicted not because he is a bigot, but because he selected his victim on the basis of race in violation of the hate crimes statute. Evidence of his racist speech was used in Ayers only to prove that he had the racial animus and the motive to commit the crime.

If Ayers had been charged solely with harassment based on his use of racial epithets, it would have run counter to the First Amendment’s protection of speech. In the case, however, he was charged with bias-motivated criminal conduct. Criminal conduct is not speech, and the use of speech in evidence to prove the motive for a crime does not tread impermissibly on the First Amendment.152

5. Conclusion.—In Ayers v. State, the Court of Appeals upheld a conviction under Maryland’s hate crimes statute, but avoided a full constitutional inquiry into the “harassment” component of the statute. In light of the Supreme Court’s ruling against content-based limitations on speech in R.A.V v. City of St. Paul,153 there remain significant questions about the continued viability of the harassment portion of the statute. While the Court of Appeals made clear that the use of speech as evidence to prove motive for a hate crime is valid, the criminalization of speech based on its content is not.

Meredith B. Parenti

D. Dual Sovereignty: Trumping the Full Faith and Credit Clause

In Gillis v. State,1 the Maryland Court of Appeals held that the Full Faith and Credit Clause of the United States Constitution2 did not bar

150. Id. at 636-37, 656, 645 A.2d at 39, 48. The evidence differed from that in Eier v. State, cited by the dissent, where a prior racial slur that had no relation to any material issue in the case was held inadmissible because it was prejudicial, irrelevant, and collateral. See 63 Md. App. 439, 492 A.2d 1320 (1985).
152. Id. at 2200 (citing Dawson v. Delaware, 112 S. Ct. 1093, 1094 (1992)).
2. Article IV of the Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1. The United
the State of Maryland from prosecuting an individual for murder, even though he previously had been acquitted of the same charge in Delaware. To reach its holding, the court analyzed both the limited application of the Full Faith and Credit Clause in criminal prosecutions and the dual sovereignty exception to the Double Jeopardy Clause of the Fifth Amendment. The court affirmed the state’s interest in protecting the public through the enforcement of its own laws, even in situations where an offender previously has been prosecuted for the same acts in another state.

1. The Case.—In April 1990, Ronald Gillis was tried and acquitted for the murder of Byron Parker in the Superior Court of Kent County, Delaware. In November 1990, Parker’s body was discovered in Kent County, Maryland, less than one mile from the Delaware border. Subsequently, in July 1992, Gillis was indicted in Maryland for the first degree murder of Parker. Gillis filed a motion to dismiss the Maryland charge and argued that because the Full Faith and Credit Clause required Maryland to recognize the Delaware acquittal, the Maryland murder prosecution violated the United States Constitution. The trial judge denied the motion to dismiss and Gillis immediately appealed to the Court of Special Appeals. Prior to consideration by that court, the Court of Appeals granted certiorari to determine whether the Full Faith and Credit Clause barred the Maryland prosecution.

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States Code provides: “Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. § 1738 (1988).

3. Gillis, 333 Md. at 78, 633 A.2d at 892.

4. The Fifth Amendment provides in relevant part: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .” U.S. CONST. amend. V.

5. Gillis, 333 Md. at 71, 633 A.2d at 889.

6. Id.

7. Id.

8. Id.

9. Id. at 71-72, 633 A.2d at 889.

10. Id. at 72, 633 A.2d at 889.

11. Id. Ordinarily, such an appeal will lie only from a final judgment. See Harris v. Harris, 310 Md. 310, 314-15, 529 A.2d 356, 358 (1987). Thus, it would seem that Gillis’s appeal was not properly before the Court of Appeals. Some orders, however, are immediately appealable, even though they are not considered final judgments. See Huff v. State, 325 Md. 55, 61, 599 A.2d 428, 431 (1991). The order must “[1] conclusively determine the disputed question, [2] resolve an important issue, [3] be completely separate from the merits of the action, and [4] be effectively unreviewable on appeal from a final judgment.” Id. In Gillis, the court determined that the order met the Huff criteria and entitled Gillis to appeal before final judgment on the merits. Gillis, 333 Md. at 72 n.2, 633 A.2d at 889 n.2.
2. Legal Background.——

a. Double Jeopardy and the Dual Sovereignty Doctrine.—The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal prosecution from being “twice put in jeopardy of life or limb...”.12 The clause provides three related protections for a criminal defendant: “The Double Jeopardy Clause 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.”13 The historical purposes for these protections were summarized in Green v. United States.14

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.15

Despite these protections, a significant exception exists whereby a defendant can be subject to successive prosecutions for the same acts by different sovereigns—the dual sovereignty doctrine.16 This doctrine is “founded on the common law conception of a crime as an offense against the sovereignty of the government.”17 In United States v. Lanza,18 the Supreme Court considered a case in which both federal and state authorities prosecuted defendants for the same conduct.19 The defendants in Lanza were charged in federal court with the violation of a prohibition statute enacted after the adoption of the Eighteenth Amendment.20 The federal district court dismissed the charges because the Superior Court of Whatcom County, Washington, had rendered a judgment against the defendants based upon the same acts for the violation of another statute in effect before the adop-

12. U.S. CONST. amend. V.
15. Id. at 187-88.
17. Id.
tion of the Eighteenth Amendment. The United States appealed, and the defendants asserted that punishment for the same conduct by both the federal and state governments would violate the Fifth Amendment. The Court held that conviction and punishment in the state court under state law was not a bar to a second prosecution for the same act in a federal court under federal law. Chief Justice Taft wrote that the Eighteenth Amendment provided for concurrent power to the states and to the federal government because "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." The Chief Justice stated that the Fifth Amendment applied exclusively to the federal government and prohibited "a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." In Lanza, the same act was a violation of both state and federal law. Because the defendants committed two different offenses by the same acts, double jeopardy was not implicated if they were punished for both offenses.

Thirty-seven years later, the Supreme Court applied the dual sovereignty doctrine in Bartkus v. Illinois. In Bartkus, the defendant was tried and acquitted for robbery in federal court, then he was tried in an Illinois state court on "substantially identical" facts, for the violation of a state robbery statute. Despite his plea that the second prosecution should have been barred, Bartkus was convicted in the state court and sentenced to life imprisonment. Justice Frankfurter noted that the Double Jeopardy Clause of the Fifth Amendment was not binding on the states. Frankfurter explained that a long history of decisions, in both federal and state courts, permitted successive federal and state prosecutions and provided "irrefutable evidence" that the dual sovereignty doctrine did not violate due process. To bar a state prosecution after a federal prosecution "would be a shocking and untoward deprivation of the historic right and obligation of the

21. Id. at 379.
22. Id. at 378-79.
23. Id. at 385.
24. Id. at 381-82.
25. Id. at 382.
26. Id.
27. Id.
29. Id. at 122.
30. Id.
31. Id. at 127.
32. Id. at 136.
States to maintain peace and order within their confines." In a vigorous dissent, Justice Black maintained that to allow dual prosecutions was a "dangerous practice," and was "contrary to the spirit of our free country." Justice Brennan also dissented, and argued that the state prosecution came about only because dissatisfied federal authorities wanted a second chance to convict Bartkus. In Brennan's view, because a second federal prosecution was barred by the Fifth Amendment, the authorities had solicited the state to initiate a state prosecution. The second prosecution was, in effect, a repeated attempt by the federal authorities to convict Bartkus, and, as such, was prohibited by the Fifth Amendment.

In Abbe v. United States, the defendants pleaded guilty in Illinois state court to charges of conspiring to injure or destroy property and were sentenced to three months in jail. The defendants then were indicted in federal court in Mississippi for violating a federal conspiracy statute based upon the same acts. The Supreme Court concluded that the federal prosecution was not barred by the prior Illinois conviction. The Court relied on the dual sovereignty principle articulated in Lanza to hold that if a state prosecution for the violation of its criminal laws precluded a federal prosecution based on the same acts, "federal law enforcement must necessarily be hindered."

In Benton v. Maryland, the Court determined that the Double Jeopardy Clause of the Fifth Amendment applied to the states. Since Benton, however, the Court has continued to adhere to the dual sovereignty doctrine and has extended the doctrine to additional situations. In Heath v. Alabama, the Court considered successive prose-
cutions for the same act brought by different states. In \textit{Heath}, the defendant left his Alabama home, drove to Georgia, and returned to Alabama with two men he had hired to kill his wife. The two men kidnapped Heath's wife from her home, and she was later found shot to death in the Heath car on a roadside in Georgia. The Georgia and Alabama authorities cooperated to some extent with their respective investigations. In September 1981, Heath was arrested by the Georgia authorities and gave a full confession admitting to his role in the kidnapping and murder. In February 1982, Heath pleaded guilty to malice murder in Georgia in exchange for life imprisonment, thereby avoiding the death penalty.

In May 1982, an Alabama grand jury indicted Heath for capital murder. Heath claimed that the Alabama prosecution was barred under the Alabama and United States Constitutions by his conviction and sentence in Georgia for the same conduct. Heath, nevertheless, was convicted of murder during a kidnapping and sentenced to death. On review, the Supreme Court noted that successive prosecutions were barred by the Fifth Amendment only if the offenses to be prosecuted were the "same" under double jeopardy. The Court explained that had Heath been prosecuted separately within one state for the offenses of "murder during a kidnapping" and "malice murder," the second charge would have been barred by the Fifth Amendment. But the Court held that successive prosecutions by two states for the same conduct were not barred by the Double Jeopardy Clause. The Court noted that "[t]he States are no less sovereign with respect to each other than they are with respect to the Federal Government" and asserted that a "[s]tate's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws." A state, therefore, must be entitled to decide whether a prosecution by

\begin{itemize}
\item[48.] Id. at 83.
\item[49.] Id. at 83-84.
\item[50.] Id.
\item[51.] Id.
\item[52.] Id.
\item[53.] Id.
\item[54.] Id. at 84-85.
\item[55.] Id. at 85.
\item[56.] Id. at 85-86.
\item[57.] Id. at 87.
\item[58.] Id. at 87-88.
\item[59.] Id. at 88.
\item[60.] Id. at 89.
\item[61.] Id. at 93.
\end{itemize}
another state "satisfied its legitimate sovereign interest." According to the Court, "to deny a state the power to enforce its criminal laws because another state has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'" The Court concluded that it has "always understood the words of the Double Jeopardy Clause to reflect [the] fundamental principle" that a single act is an offense against each sovereign whose laws are violated by the act.

b. The Dual Sovereignty Doctrine in Maryland.—In Evans v. State, the Court of Appeals indicated that Maryland common law embraced the dual sovereignty doctrine. A federal court convicted the defendants in Evans of civil rights violations and witness tampering. Indictments were filed by the State of Maryland for murder, conspiracy, and handgun violations for the same acts. The defendants moved to dismiss the state indictments on double jeopardy grounds. The Court of Appeals ruled that the two prosecutions were by different sovereigns and, therefore, did not constitute double jeopardy. Although the Maryland common law originally may have prohibited successive prosecutions by different jurisdictions, the court deter-

62. Id.
63. Id. (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).
64. Id. at 93. The dual sovereignty doctrine has been strongly criticized. See, e.g., Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court, 76 J. CRIM. L. & CRIMINOLOGY 801, 828 (1985) (arguing that the dual sovereignty doctrine should apply only in extraordinary cases); Marc Martin, Heath v. Alabama: Contravention of Double Jeopardy and Full Faith and Credit Principles, 17 Loy. U. Chi. L.J. 721, 757 (1986) (stating that the dual sovereignty doctrine is inconsistent with established double jeopardy principles).

The federal government has instituted the Petite policy, which prohibits the federal prosecution of an individual already prosecuted by a state court for the same acts, unless "a compelling federal interest would be served by the second prosecution." Allen & Ratnaswamy, supra, at 813 & n.78. The Petite policy was named for Petite v. United States, 361 U.S. 529 (1960), in which the Supreme Court, in the interests of justice, vacated a federal conviction following a state conviction for the same acts. Id. at 531.

66. Id. at 58, 481 A.2d at 1141.
67. Id. at 48-49, 481 A.2d at 1136-37.
68. Id. at 49, 481 A.2d at 1136.
69. Id., 481 A.2d at 1137.
70. Id. at 51, 481 A.2d at 1138; see also Bailey v. State, 303 Md. 650, 660, 496 A.2d 665, 670 (1985) ("Offenses against separate sovereigns are separate offenses for double-jeopardy purposes even if the successive prosecutions are based upon the same acts.").
71. The Evans court cited two cases, King v. Roche, 168 Eng. Rep. 169 (1775), and King v. Hutchinson, 84 Eng. Rep. 1011 (1685), for the proposition that successive prosecutions by different sovereigns for the same offense were prohibited under the common law of
mined that "the common law is not static and may be changed by
decisions of the Court." The court explained that in light of the
history of the dual sovereignty doctrine in the Supreme Court, and
recent articulations of the doctrine by lower federal courts, the Mary-
land prosecution was not barred by the Double Jeopardy Clause.

c. Full Faith and Credit in Criminal Prosecutions.—The Full
Faith and Credit Clause "require[s] a state court to recognize judg-
ments of courts of other states." State courts are "generally required
to give judgments rendered in other states the same effect that they
have in the rendering state." The clause "serves to coordinate the
administration of justice among the several independent legal systems
which exist in our Federation." The concept of full faith and credit
is firmly rooted in the area of civil litigation, but it is generally ac-
cepted that one state will not enforce the criminal or penal laws of
another.

In 1825, Chief Justice Marshall wrote in The Antelope that "[t]he
Courts of no country execute the penal laws of another." This brief
statement was one of the earliest in the United States to mention this
proposition, but the Chief Justice did not elaborate on the issue. In
Huntington v. Attrill, the Supreme Court attempted to resolve the
ambiguity in Marshall's famous formulation. In Huntington, the
plaintiff, who was a creditor of the defendant's insolvent New York
corporation, brought an action against the defendant in Maryland
based on a judgment the plaintiff had recovered in New York. The

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England. The court then examined these cases in light of a provision in the Maryland
Declaration of Rights, which states that "the inhabitants of Maryland are entitled to the

72. Evans, 301 Md. at 57, 481 A.2d at 1141.
73. Id. at 55, 481 A.2d at 1140.
see also supra note 2.
75. Weinberg, 299 Md. at 234, 473 A.2d at 27.
76. Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45
COLUM. L. REV. 1, 2 (1945).
77. Allan D. Vestal, Criminal Prosecutions: Issue Preclusion and Full Faith and Credit, 28
KAN. L. REV. 1, 4-5 (1979).
78. See Jackson, supra note 76, at 9; Robert A. Leflar, Extrastate Enforcement of Penal and
80. Id. at 123.
81. See Leflar, supra note 78, at 195.
82. 146 U.S. 657 (1892).
83. See id. at 666.
84. Id. at 660.
Maryland Court of Appeals dismissed the action based on the determination that the judgment was a penalty, and, therefore, it could not be enforced in Maryland. 85

The Supreme Court reversed and explained that penal laws were in the strictest sense "those imposing punishment for an offence committed against the state." 86 According to the Court, the appropriate test to determine if a judgment of one state is enforceable in another is "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." 87 The Court concluded that the statute under which the New York judgment was obtained provided for a civil remedy against a private individual and thus was not penal in its strictest sense. 88 The Maryland courts were required to give full faith and credit to the New York judgment. 89 Had the particular judgment been based on a "criminal" violation, however, the Court indicated that Maryland would not have been required to enforce the New York judgment. 90

The Supreme Court affirmed the principle that a state is not required to enforce the penal judgment of a sister state in *Nelson v. George*. 91 While serving a sentence in California, the defendant in *Nelson* sought a writ of habeas corpus from a federal court in California to challenge a detainer filed by the state of North Carolina based on a conviction for which he was to serve a subsequent sentence. 92 The Court explained that "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment." 93 Therefore, the State of California had the discretion to decide whether it would give effect to the North Carolina detainer. 94

The Court of Appeals for the Eighth Circuit considered the applicability of the Full Faith and Credit Clause to criminal judgments in *Turley v. Wyrick*. 95 Turley and another defendant were acquitted of bank robbery charges in federal court; thereafter, a prosecution was

85. *Id.* at 663.
86. *Id.* at 667.
87. *Id.* at 668.
88. *Id.* at 676-77.
89. *Id.* at 686.
90. See *id.* at 669.
92. *Id.* at 226.
93. *Id.* at 229.
94. *Id.* The Court noted, however, that upon the completion of George's California sentence, that the state would be required to extradite him to North Carolina under Article IV, § 2, cl. 2 of the Constitution. *Id.* at 229 n.6.
brought against Turley in a Missouri state court.96 Turley filed a motion to dismiss, arguing that the state prosecution was barred by the prior federal acquittal, but the trial court denied the motion, and Turley was convicted.97 After Turley's conviction was affirmed on appeal, he filed a petition for a writ of habeas corpus in federal district court, which denied the petition.98 On appeal, the Eighth Circuit explained that the federal judgment only determined that Turley did not violate federal law, not whether he violated Missouri law.99 Accordingly, the doctrine of full faith and credit did not bar the state prosecution.100

d. Collateral Estoppel in Criminal Prosecutions.—The concept of full faith and credit is closely related to the doctrine of issue preclusion, or collateral estoppel.101 The Supreme Court found a constitutional basis for the doctrine of collateral estoppel in *Ashe v. Swenson.*102 In *Ashe*, the Supreme Court held that in light of its recent decision in *Benton v. Maryland,*103 collateral estoppel was “embodied in the Fifth Amendment guarantee against double jeopardy.”104

According to the Court, under the collateral estoppel doctrine, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”105 In civil litigation, the requirement of mutuality of parties has eroded somewhat.106 In criminal proceedings, however, mutuality is generally required.107 As a result, an acquittal in one jurisdiction will not preclude a subsequent prosecution in a different jurisdiction, because the second prosecuting authority “has never had [its] day in court on the issue.”108

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96. *Id.* at 840-41.
97. *Id.* at 841.
98. *Id.*
99. *Id.* at 842.
100. *Id.*
101. Vestal, *supra* note 77, at 6 (“Issue preclusion . . . is included in full faith and credit . . . .”).
103. 395 U.S. 784 (1969) (holding that the Fifth Amendment guarantee against double jeopardy was applicable to the states through the Fourteenth Amendment).
105. *Id.* at 443.
106. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979) (holding that the doctrine of nonmutual collateral estoppel could apply to plaintiffs who did not join an earlier action but later brought suit on the same issue).
108. *Id.* at 23.
Maryland law on collateral estoppel is consistent with the Supreme Court's holding in *Ashe v. Swenson*. In *Butler v. State*, the Court of Appeals explained that in order for collateral estoppel to apply, "the critical consideration is whether an issue of ultimate fact has been previously determined in favor of the defendant." Mutuality of parties, moreover, is required for estoppel to apply in criminal proceedings.

3. *The Court's Reasoning.*—The Court of Appeals granted certiorari in *Gillis* to consider whether the Full Faith and Credit Clause prohibited a murder prosecution in a Maryland court after an acquittal in a Delaware court for the same alleged crime. The court held that successive criminal prosecutions by Delaware and Maryland did not violate the Full Faith and Credit Clause, and the Maryland murder prosecution could continue.

The court first maintained that successive criminal prosecutions by different states were permitted under the dual sovereignty doctrine and stated that "separate sovereigns deriving their power from different sources are each entitled to punish an individual for the same conduct if that conduct violates each sovereignty's laws." The court explained that the dual sovereignty principle was well established in constitutional jurisprudence as well as a part of Maryland common law.

In light of this precedent, the court speculated that Gillis must have "recognize[d] the futility of challenging the Maryland prosecution as a violation of common law or constitutional double jeopardy," and hoped instead "to use the Full Faith and Credit Clause as a means to circumvent the previously foreclosed double jeopardy challenge." The court frustrated this stratagem when it found that the

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110. Id. at 253, 643 A.2d at 396.
111. See Bailey v. State, 303 Md. 650, 660, 496 A.2d 665, 670 (1985) (holding that collateral estoppel did not apply to a Maryland prosecution after a New Jersey prosecution because the party adverse to the defendant was different in each case); Carbaugh v. State, 294 Md. 323, 329-30, 449 A.2d 1153, 1156 (1982) (same).
112. *Gillis*, 333 Md. at 72, 633 A.2d at 889.
113. Id. at 76, 633 A.2d at 891.
114. Id. at 83, 633 A.2d at 895.
115. Id. at 73, 633 A.2d at 890.
116. Id. at 75, 633 A.2d at 891; see supra notes 47-64 and accompanying text.
117. *Gillis*, 333 Md. at 75, 633 A.2d at 891.
118. Id. at 76, 633 A.2d at 891.
dual sovereignty doctrine applied to the Full Faith and Credit Clause.\footnote{119}{Id.}

The court explained that although the Full Faith and Credit Clause historically applied to civil disputes\footnote{120}{Id., 633 A.2d at 892.} and did not require states "to enforce the penal judgments of other states," it was unclear whether the Full Faith and Credit Clause applied to criminal prosecutions.\footnote{121}{Id. at 77, 633 A.2d at 892.} In this matter, the court found the Eighth Circuit Court's opinion in \textit{Turley v. Wyrick} persuasive.\footnote{122}{Id. at 78, 633 A.2d at 893; see supra notes 95-100 and accompanying text.} Because the Delaware prosecution did not give the State of Maryland the opportunity to determine whether Gillis violated Maryland law, the Delaware acquittal could not affect Gillis's culpability under Maryland law.\footnote{123}{\textit{Gillis}}, 333 Md. at 78-79, 633 A.2d at 892-93. The court concluded that Maryland should not be denied the opportunity to prove such a violation based upon "a misplaced application of the Full Faith and Credit Clause."\footnote{124}{Id. at 79, 633 A.2d at 893.}

To support its conclusion, the court also looked to the doctrine of collateral estoppel to refute Gillis's assertion that the Delaware judgment of acquittal precluded Maryland from relitigating the issue.\footnote{125}{Id. at 78-79, 633 A.2d at 892-93.} The court noted that "estoppel will not be invoked against an individual or his privy who was never afforded the opportunity to be heard on the particular issue."\footnote{126}{Id. at 78, 633 A.2d at 892.} Because Maryland was not a party to the Delaware prosecution, Maryland could not "be estopped from attempting to prove Gillis's culpability under its law."\footnote{127}{Id. at 81, 633 A.2d at 894.} The \textit{Gillis} court also refused to apply the doctrine of nonmutual collateral estoppel, reasoning that it was inappropriate in criminal proceedings because of the state's strong interest in enforcing its criminal laws.\footnote{128}{Id. at 81 n.5, 633 A.2d at 894 n.5. The court noted in dicta that, because Parker's body was found in Maryland, it was questionable whether Delaware initially had subject matter jurisdiction to prosecute Gillis, in which case 'the judgment of a particular state need not be given full faith and credit if that state did not have jurisdiction to render such judgment.' \textit{Id.} at 82, 633 A.2d at 894-95.}

In a brief dissent, Judge Eldridge stated that the motion to dismiss the Maryland prosecution should have been granted.\footnote{129}{Id. at 83, 633 A.2d at 895 (Eldridge, J., dissenting).} He asserted that the Maryland prosecution was barred by common law double jeopardy principles as incorporated into Article V of the Mary-

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119. & \textit{Id.} \\
120. & \textit{Id.}, 633 A.2d at 892. \\
121. & \textit{Id.} at 77, 633 A.2d at 892. \\
122. & \textit{Id.} at 78, 633 A.2d at 893; see supra notes 95-100 and accompanying text. \\
123. & \textit{Gillis}}, 333 Md. at 78-79, 633 A.2d at 892-93. \\
124. & \textit{Id.} at 79, 633 A.2d at 893. \\
125. & \textit{Id.} at 78-79, 633 A.2d at 892-93. \\
126. & \textit{Id.} at 78, 633 A.2d at 892. \\
127. & \textit{Id.} at 81, 633 A.2d at 894. \\
128. & \textit{Id.} at 81 n.5, 633 A.2d at 894 n.5. The court noted in dicta that, because Parker's body was found in Maryland, it was questionable whether Delaware initially had subject matter jurisdiction to prosecute Gillis, in which case 'the judgment of a particular state need not be given full faith and credit if that state did not have jurisdiction to render such judgment.' \textit{Id.} at 82, 633 A.2d at 894-95. \\
129. & \textit{Id.} at 83, 633 A.2d at 895 (Eldridge, J., dissenting).
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land Declaration of Rights. As a result, Judge Eldridge did not reach the full faith and credit issue.

4. Analysis.—

a. Double Jeopardy.—In holding that Gillis could be tried for murder in Maryland, despite his acquittal of the same charge in Delaware, the Court of Appeals faced the difficult task of justifying a decision that is doctrinally correct, but appears to be a clear case of double jeopardy. Yet, not only did the court permit a successive prosecution for the same conduct, the issue of double jeopardy was not formally before the court. The court could have decided Gillis solely on the basis of full faith and credit, the grounds for which certiorari was granted, and the related doctrine of collateral estoppel. But to do so would have left the public to ponder why double jeopardy did not preclude the second prosecution.

To allay double jeopardy concerns, the court appealed to general policy preferences for law and order. The court stressed "the state's obligation to maintain peace and order within [its] confines," as well as the need to punish offenders who threaten Maryland's "peace and dignity." To support its position, the court relied on the well-accepted, though perhaps not widely known, dual sovereignty exception to the Double Jeopardy Clause to demonstrate strong public policy arguments in favor of the successive prosecutions. This put the court in a position to state that its rationale was equally applicable to the Full Faith and Credit Clause.

130. Id.
131. Id.; see supra note 71.
132. According to one commentator:

Even the man in the street knows what "double jeopardy" means. He is rightly shocked when he hears that somebody has been tried twice for the same thing. . . . All advanced systems of law agree with him in abhorring the second prosecution of a man who has already been determined innocent.


133. See Gillis, 333 Md. at 73, 633 A.2d at 890. Gillis challenged the Maryland prosecution solely on full faith and credit grounds. Id.; see supra notes 112-114 and accompanying text.

134. Gillis, 333 Md. at 72, 633 A.2d at 889; see supra notes 101-111 and accompanying text.


136. Id. at 74, 633 A.2d at 890 (citations omitted).

137. See id. at 76, 633 A.2d at 891.
b. Full Faith and Credit.—The convergence of the doctrine of full faith and credit and the dual sovereignty exception provided the foundation for the court’s holding that the Delaware acquittal “has no impact on Gillis’s culpability under Maryland’s murder statute.” When Delaware prosecuted Gillis the first time, it was doing so based on its own penal law. Because states may only enforce their own penal laws, the Delaware acquittal in no way implied that Maryland law was not violated in this case. Maryland still retained the option to determine whether to give full weight to the Delaware acquittal. If, for example, Maryland and Delaware had cooperated in the investigation from the beginning, and both authorities believed that the murder occurred in Delaware, Maryland authorities could have decided that its interest in the administration of justice was sufficiently served by a Delaware judgment. In Gillis, however, Maryland’s interests were not considered by the Delaware prosecution. There was, in fact, no evidence that a crime may have occurred in Maryland until the discovery of the body after the Delaware trial and acquittal.

Because one of the purposes of the Full Faith and Credit Clause is to “help weld the independent states,” the court’s decision to allow a second prosecution is correct. If Maryland were forbidden to prosecute a suspected murderer solely because the Delaware authorities raced to the courthouse first, without a body, justice would be thwarted, and tension might well arise between the two states, particularly among residents living close to the border where the body was found. It would set the two states at odds and leave Maryland residents feeling unprotected within their own borders while a suspected murderer remained free in their midst. As a matter of public policy, Maryland must have the power to allay such fears through active prosecution of criminal acts within its jurisdiction.

A state expresses public policy through its penal laws. Maryland would make an alarming statement about its regard for the safety of its citizens if it were unable to prosecute a murder suspect after

138. Id. at 78, 633 A.2d at 892.
140. Gillis, 333 Md. at 78, 633 A.2d at 892.
141. See Nelson, 399 U.S. at 229; see also supra notes 91-94 and accompanying text.
142. Gillis, 333 Md. at 81 n.5, 633 A.2d at 894 n.5.
143. See id. at 71, 633 A.2d at 889. Gillis was acquitted of the Delaware offense in April 1990, but the victim’s body was not found until November 1990. Id.
145. See supra notes 62-64 and accompanying text.
finding a body within its borders. Failure to prosecute Gillis, moreover, would generally unsettle Maryland's fundamental policy of protecting state interests, in both civil and criminal areas, if it subordinated its sovereignty to a neighboring state.

The presumption that the murder took place in Maryland raises an additional question with regard to Delaware's jurisdiction to decide the case. As the Court of Appeals indicated in dicta, if Delaware did not have jurisdiction to decide the case because the murder may never have occurred in Delaware, Maryland would not be required to give full faith and credit to the Delaware judgment in any case.\(^\text{147}\) Thus, it would be extraordinarily unfair for Maryland to be bound by the first judgment under the Full Faith and Credit Clause without having the opportunity to dispute the issue of Delaware's jurisdiction, simply because Delaware reached the courthouse first.

c. Collateral Estoppel.—The Gillis court's decision is also supported by the doctrine of collateral estoppel. Collateral estoppel will prevent relitigation of an issue only if it was conclusively determined in a prior proceeding between the same parties.\(^\text{148}\)

In Gillis, it was unclear what issues were resolved against Delaware in the first trial.\(^\text{149}\) According to the Court of Appeals, "[s]ince Parker's body had not been found at the time of the Delaware prosecution, the jury may have acquitted Gillis because there was either insufficient evidence of Gillis's criminal agency or insufficient evidence that any crime occurred in Delaware."\(^\text{150}\) The preclusion of a subsequent murder prosecution in Maryland would be an absurd result if a rational jury acquitted Gillis simply because there was insufficient evidence that a crime occurred in Delaware. Maryland does not have any interest in proving where the crime was not committed, but the state has a compelling interest to prove whether that crime occurred within its own borders.

Maryland requires mutuality of parties for the doctrine of collateral estoppel to apply in criminal prosecutions.\(^\text{151}\) For purposes of collateral estoppel, however, the prosecuting authorities of the two proceedings against Gillis obviously were different. Maryland's prosecuting authorities did not participate in the Delaware prosecution.

\(^{147}\) Gillis, 333 Md. at 83, 633 A.2d at 895.
\(^{149}\) Gillis, 333 Md. at 82 n.5, 633 A.2d at 894 n.5.
\(^{150}\) Id., 633 A.2d at 894.
\(^{151}\) Id. at 81 n.5, 633 A.2d at 894 n.5; see Carbaugh v. State, 294 Md. 323, 329-30, 449 A.2d 1153, 1156-57 (1982) (holding that collateral estoppel did not apply since the same parties were not involved in both proceedings).
and, therefore, were not heard on the issue of Gillis’s guilt or innocence at the Delaware trial.\textsuperscript{152} Thus, Maryland has not yet been given its day in court.\textsuperscript{153}

d. Dual Sovereignty Doctrine.—The argument in favor of the Maryland prosecution is further supported by the dual sovereignty doctrine, which permits successive prosecutions by two states for the same conduct despite the Double Jeopardy Clause.\textsuperscript{154} The doctrine is founded on the principle that each state has an “interest in vindicating its sovereign authority through enforcement of its laws.”\textsuperscript{155} When a murder victim is found within Maryland’s borders, the presumption is raised that the killing took place there.\textsuperscript{156} Maryland must be able to maintain peace and order within its boundaries—a task that cannot be vindicated by a Delaware murder prosecution, whether it results in a conviction or an acquittal. Because the actual killing was presumed to have occurred in Maryland, it would be a “shocking and untoward deprivation”\textsuperscript{157} of the State of Maryland’s rights if it were denied the power to prosecute the alleged criminal simply because Delaware won a race to the courthouse and decided to prosecute without a body.

Although it would seem only just that successive prosecutions by different states should not be permitted in cases where it appears that the two sovereigns cooperated with one another to achieve the desired result,\textsuperscript{158} this concern is not raised by the Gillis decision. There is no evidence that Delaware had any involvement in the second prosecution, nor that Maryland had a role in the first.\textsuperscript{159} Maryland authorities took no notice of the Delaware trial and had no way to know at that time that a crime took place within its borders.\textsuperscript{160}

\textsuperscript{152} Gillis, 333 Md. at 81 n.5, 633 A.2d at 894 n.5.
\textsuperscript{153} Id. at 82, 633 A.2d at 894.
\textsuperscript{155} Id. at 93.
\textsuperscript{156} See Breeding v. State, 220 Md. 193, 200, 151 A.2d 743, 747 (1959) (stating that finding “a dead body in a particular county raises a presumption, or supports an inference, that the killing took place there”).
\textsuperscript{158} See Heath v. Alabama, 474 U.S. 82, 95 (1985) (Marshall, J., dissenting) (“[E]ven were the dual sovereignty doctrine to support successive state prosecutions as a general matter, it simply could not legitimate the collusion between Georgia and Alabama in this case to ensure that petitioner is executed for his crime.”).
\textsuperscript{159} Gillis, 333 Md. at 81 n.5, 633 A.2d at 894 n.5.
\textsuperscript{160} See id. at 71, 633 A.2d at 889.
e. Impact of Gillis.—

(i) Narrow Reading.—It is unclear how great an impact the result reached in Gillis will have on Maryland law in the future. A narrow reading of the opinion suggests a case-by-case approach, in which the court examines whether the state’s interest to maintain its sovereign authority through the enforcement of its criminal laws warrants successive prosecutions. Such a discretionary approach may help alleviate fears that to permit successive prosecutions is a “dangerous practice”\(^{161}\) by balancing fairness to a defendant with the state interest.\(^{162}\) For example, this approach would apply in situations similar to Gillis in which a defendant initially acquitted of a crime in one state is prosecuted in Maryland after new inculpatory evidence is uncovered within Maryland’s borders. The courts, moreover, may wish to limit the application of Gillis to serious crimes.

(ii) Broad Reading.—A broader reading of Gillis suggests that the sovereign interests identified by the limited enforcement of criminal judgments under the Full Faith and Credit Clause and the dual sovereignty doctrine apply to all situations where an individual has committed any offense against the state. Under this reading of Gillis, the seriousness of the crime and the outcome of the out-of-state prosecution are irrelevant. The Gillis court appears to favor this broad approach.\(^{163}\) Although it stressed the strong state interest to redress wrongs to the public, the court did not emphasize the particular facts of Gillis by its endorsement of Maryland’s right to prosecute under the constitutional doctrines without qualification.\(^{164}\)

The potential difficulty with such a broad interpretation is that a defendant may, for example, be convicted falsely in one state, serve a lengthy sentence, and be forced to serve another lengthy sentence after evidence reveals that the crime also occurred in Maryland.\(^{165}\) Alternatively, a defendant, induced to plead guilty in one state by a prosecutor’s assurances of a light sentence, may then be tried and convicted in Maryland based on evidence obtained by investigators in the first state that revealed that the crime occurred in Maryland.\(^{166}\)

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162. But see Heath v. Alabama, 474 U.S. 82, 92 (1985) ("If the states are separate sovereigns . . . the circumstances of the cases are irrelevant.").
163. See Gillis, 333 Md. at 83, 633 A.2d at 895.
164. Id.
165. It is unclear whether this would constitute cruel and unusual punishment. U.S. Const. amend. VIII.
166. Such a situation is similar to the facts of Heath. See supra notes 47-64 and accompanying text.
The harsh result illustrated by the above examples suggests that a limited policy of discretionary prosecution may, in the interests of justice, be the best solution. Maryland could institute a policy similar to the federal *Petite* policy, which would prohibit successive prosecutions unless a compelling state interest were served.

5. **Conclusion.**—In *Gillis*, the Court of Appeals held that the Full Faith and Credit Clause of the United States Constitution did not bar the prosecution of a murder suspect, who had already been acquitted of the same charge by a neighboring state’s court. In so holding, the court asserted Maryland’s authority to prosecute individuals who commit offenses that threaten peace and order within the state. The decision justifiably prevents a murder from going unpunished, but may prove unduly harsh in less egregious cases.

LEORA R. SIMANTOV

167. See *supra* note 64.
168. *Gillis*, 393 Md. at 78, 633 A.2d at 892.
III. CRIMINAL LAW

A. Sentencing and the Clouded Waters of Eighth Amendment Proportionality

In *Thomas v. State*, the Maryland Court of Appeals considered whether a thirty-year sentence and a consecutive twenty-year sentence for two common-law batteries violated Maryland common law, the Eighth Amendment, and Article 25 of the Maryland Declaration of Rights. The court held that the twenty-year sentence was grossly disproportionate to the defendant's offense of slapping his wife in a domestic dispute and was therefore unconstitutional; but the thirty-year sentence for the defendant's offense of hitting his wife with a steam iron did not violate either the Eighth Amendment or Article 25 of the Maryland Declaration of Rights. In reaching its decision, the court refused to extend its holding in *Simms v. State* to require that a sentence be limited by the maximum penalty for a crime with which a defendant might have been charged.

In light of proportionality decisions by the Supreme Court, Maryland case law, and the holdings of *Simms v. State* and its progeny, the majority's decision would appear to stand on shaky legal precedent. The court, moreover, incorrectly applies the Supreme Court's limited proportionality analysis. A more soundly reasoned opinion would have avoided a decision based solely on constitutional grounds and simply extended the court's holding in *Simms v. State*.

1. The Case.—On the evening of April 1, 1991, a domestic dispute erupted between George Thomas and his wife, Shirlene, after Mr. Thomas cashed a tax refund check, which was made out to them
Sometime after 1:50 a.m. on April 2, Mr. Thomas slapped his wife across her face, leaving a temporary mark on her cheek. On April 5, Mrs. Thomas obtained an order requiring Mr. Thomas to vacate the home for thirty days. Three days later, Mr. Thomas returned to the home and accused his wife of adultery. Another fight started and Mr. Thomas struck Mrs. Thomas once in the head and twice in the back with a steam iron, causing an eight-centimeter laceration on her head, two bruises on her back, loss of consciousness and post-traumatic problems. A helicopter flew her to the shock trauma unit at the University of Maryland Hospital, and Mr. Thomas turned himself in to the police.

The Circuit Court for Caroline County found Mr. Thomas guilty of battery for the slap to the face and guilty of battery, but not assault with intent to murder, for striking his wife with a steam iron. During sentencing the trial judge commented that if the victim had died, the court could have convicted Mr. Thomas only of manslaughter, which carries a maximum sentence of ten years. Nonetheless, the judge expressed his desire to protect the defendant’s wife and sentenced Mr. Thomas to consecutive terms of twenty and thirty years for the April 2 and April 8 batteries.

Thomas appealed to the Maryland Court of Special Appeals. He argued that the trial court should have extended its holding in Simms v. State and limited his sentence to ten years because this was the maximum sentence he would have received had he been convicted of

8. Id. at 88, 634 A.2d at 3. Although Thomas's wife confronted him at that time, no physical violence occurred. As she testified, "that day was just push and shoving and getting like iron pipes and aluminum bats," with each party threatening the other. Id.
9. Id. at 89, 634 A.2d at 3.
10. Id.
11. Id.
12. Id. at 101-02, 634 A.2d at 9.
13. Id. at 102, 634 A.2d at 9.
14. Id. at 89, 634 A.2d at 3.
15. Id. at 89-90, 634 A.2d at 3-4. The judge also found Thomas guilty of reckless endangerment for swinging the iron, guilty of unlawful use of the telephone for threatening phone calls made from jail, and guilty of violating an order to vacate. Id. at 90, 634 A.2d at 3.
16. Id. at 91, 634 A.2d at 4; see Md. Ann. Code art. 27, § 12 (1957).
17. Thomas, 333 Md. at 90, 634 A.2d at 3-4. The judge stated that his intention was "to send [the defendant] away as long as is necessary to protect [his wife], which essentially is the balance of her life, not his." Id. The defendant was also sentenced to consecutive terms of 60 days for violating the order to vacate, 6 months for unlawful use of the telephone, and a concurrent term of 5 years for reckless endangerment. Id. at 88, 634 A.2d at 2-3. The sentence came to a total of 50 years and 8 months imprisonment. Id. at 88, 634 A.2d at 3.
manslaughter if his wife died. The defendant further argued that each sentence violated Maryland common law, the Maryland Declaration of Rights and the Eighth Amendment. The Court of Appeals issued a writ of certiorari prior to consideration by the Court of Special Appeals.

2. Legal Background. — The Thomas court divided sharply over the proper method of reviewing the defendant’s sentence. While the majority grounded its reasoning in the constitutional prohibition against cruel and unusual punishment, Judge Chasanow’s dissenting opinion argued for an extension of Maryland common law. Two lines of case law provide the background for each respective argument: first, Supreme Court and Maryland Eighth Amendment proportionality decisions; and second, Simms v. State and its progeny.

a. Supreme Court and State Proportionality Decisions. — The proportionality principle of the Eighth Amendment has gradually evolved into a highly debated and, ultimately, convoluted area of law. In Weems v. United States, the Supreme Court first endorsed the principle of proportionality in Eighth Amendment questions. In Weems, the defendant was convicted of falsifying a public document. The Supreme Court held that a sentence of fifteen years requiring the defendant to engage in hard labor while wearing a chain connecting his wrist to his ankle, coupled with the perpetual surveillance and deprivation of the defendant’s political rights, constituted cruel and unusual punishment. The Court reasoned that a punishment may not be greatly disproportionate to the crime charged: “[I]t is a precept of

20. Thomas, 333 Md. at 90, 634 A.2d at 4.
21. Id. at 88, 634 A.2d at 3. The Court of Appeals issued its writ of certiorari to resolve the following questions:
   1. Were the 30- and 20-year sentences for common law battery illegal, disproportionate under the common law, or unconstitutional?
   2. Was the evidence sufficient to sustain defendant’s conviction for telephone misuse?

Id.
22. See id. at 92-103, 634 A.2d at 4-10.
23. Id. at 108-11, 634 A.2d at 14-15 (Chasanow, J., dissenting in part).
27. Id. at 366.
justice that punishment for crime should be graduated and proportioned to offense.”

In *Solem v. Helm*, the Court developed this maxim into a constitutional test to determine whether a criminal sentence violates the Eighth Amendment. The Court held that “a criminal sentence must be proportionate to the crime for which the defendant has been convicted.” The Court stated that objective criteria should guide the proportionality analysis of a criminal sentence. Namely, a court should consider: (1) the seriousness of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals for the same offense within the particular jurisdiction; and (3) the sentences imposed for like offenses in other jurisdictions. The Court added that a reviewing court should grant deference to the legislature when conducting a proportionality analysis.

Eight years later, in *Harmelin v. Michigan*, the Supreme Court significantly clouded the proportionality principles of the Eighth Amendment. The Court held that a sentence of life without parole for the possession of 672 grams of cocaine did not constitute cruel and unusual punishment. The majority, however, split two ways in its reasoning. Justice Scalia, joined by Justice Rehnquist, argued that...
the Eighth Amendment does not contain a proportionality guarantee for non-capital sentences and therefore the analysis employed in Helm "was simply wrong." Rather, they argued, the Eighth Amendment applies only to the method of punishment. On the other hand, Justice Kennedy, joined by Justice O'Connor and Justice Souter argued that the Eighth Amendment contains a "narrow" principle of proportionality. The Eighth Amendment prohibits only sentences that are "grossly disproportionate" to the criminal act. Justice Kennedy's concurring opinion gave only limited guidance as to the precise meaning of "gross disproportionality." However, his opinion did consider the public policy interest in deterring drug use and distribution, as well as the importance of deference to the legislature. Finally, the dissenters, lead by Justice White, subscribed to the principle of proportionality and argued that the Court should have applied the analysis set forth in Helm to reverse the decision of the Michigan Court of Appeals.

Prior to Harmelin, Maryland case law had tracked the holdings of the Supreme Court. In State v. Davis, the Court of Appeals held that a sentence of life without parole for a fourth offense of house-breaking did not violate the Eighth Amendment. The court reasoned that Helm was not factually dispositive, and therefore a proportionality review was unnecessary. The court, nonetheless, conducted a Helm

37. Id. at 965.
38. Id. at 979. The Court of Appeals for the Fourth Circuit has very recently rejected Justice Scalia's opinion that a proportionality analysis is only appropriate for review of capital sentences. See United States v. Krastas, No. 93-5509 (4th Cir. Jan. 17, 1995) (holding that a life sentence for a third drug conviction did not violate the Eighth Amendment's proportionality principle and was therefore constitutional).
40. Id. at 1001.
41. Id. at 1001-08. Although Justice Kennedy did not explicitly call for a reviewing court to consider the seriousness of the defendant's crime, he cited the potential societal effects of the defendant's offense. See id. at 1003-04. After discussing the "pernicious effects" that drugs inflict on society, Justice Kennedy concluded that "the severity of the petitioner's crime brings his sentence within . . . constitutional boundaries . . . . " Id.
42. Id. at 1009-20 (White, J., dissenting).
43. Id. at 1027.
44. 310 Md. 611, 530 A.2d 1223 (1987). In Davis, the Baltimore County Circuit Court convicted the defendant of daytime house-breaking and sentenced him to life in prison without parole pursuant to a recidivist statute. Id. at 613-14, 530 A.2d at 1224-25. The Court of Special Appeals vacated his sentence as a violation of the Eighth Amendment's principle of proportionality, but the Court of Appeals reversed on certiorari. Id. at 613, 530 A.2d at 1224.
45. Id. at 639, 530 A.2d at 1237.
46. Id. at 628-52, 530 A.2d at 1232-33. The Court of Appeals argued that house-breaking in Maryland constitutes a more serious offense than the crime of third degree burglary
analysis and concluded that the defendant's sentence was not disproportionate. In dicta, the court added that the extent to which a proportionality analysis is required is "a question of process" as well as of constitutionality.

According to the Davis court, "a question of process" pertains to the depth of the proportionality analysis conducted by the court in relation to the defendant's criminal record and sentence.

A year later, in Minor v. State, the Court of Appeals again held that a proportionality analysis was not necessary to review a twenty-five year sentence for daytime house-breaking. Alternatively, the court applied a Helm proportionality analysis and concluded that the sentence did not violate the Eighth Amendment. In a concurring opinion, Judge Eldridge argued that common sense would best inform an appellate court whether a criminal sentence violates the Eighth Amendment's proportionality principle.

b. Simms v. State and its Progeny.—In Simms v. State, the Maryland Court of Appeals held that when a defendant is acquitted of

committed in Helm, and therefore the Supreme Court's decision in Helm did not control. Id.

47. Id. at 633-39, 530 A.2d at 1234-37. The court stated that the Maryland legislature considered daytime house-breaking a serious offense. Id. at 635, 530 A.2d at 1234. It compared Davis's sentence to the sentences authorized for other serious crimes and reiterated that Davis received his sentence only because he was a repeat offender. Id. at 635, 530 A.2d at 1235. Finally, the court compared Davis's sentence to sentences for similar convictions in other states and found at least five states that imposed penalties as severe. Id. at 637-39, 530 A.2d at 1236-37.

48. Id. at 628, 530 A.2d at 1231.
49. Id., 530 A.2d at 1231-32.
50. 313 Md. 573, 546 A.2d 1028 (1988). In Minor, the defendant was sentenced to 25 years in prison pursuant to a Maryland recidivist statute. Id. at 574-75, 546 A.2d at 1028-29.
51. Id. at 583, 546 A.2d at 1033.
52. Id. at 584-86, 546 A.2d at 1033-34.
53. Id. at 587, 546 A.2d at 1034-35 (Eldridge, J., concurring). Judge Eldridge stated that he did not believe the Supreme Court's proportionality opinions required a strict classification of criminal sentences into two categories, one requiring no proportionality analysis and the other requiring an extended Helm review. Id., 546 A.2d at 1035. Instead, the courts should determine the actual extent of review on a case-by-case basis. Id. Finally, Judge Eldridge argued that a court's proportionality review need not consider only the three factors in Helm. Id. He noted that the second and third Helm factors were only suggestive. Id. at 587-88, 546 A.2d at 1035. A court may weigh other considerations such as the presentencing investigation report and the facts surrounding the crime. Id. at 588, 546 A.2d at 1035.
54. 288 Md. 712, 421 A.2d 957 (1980). In Simms, the court considered two cases in which two defendants were charged with, inter alia, assault with intent to rob and simple assault stemming from the same conduct. Id. at 715, 421 A.2d at 959. Each defendant was acquitted of assault with intent to rob but convicted of simple assault. Id. The Criminal Court of Baltimore sentenced each to 12 years in prison although the maximum sentence
a greater offense but convicted of a lesser included offense, and both charges arose out of the same conduct, he cannot receive a sentence that exceeds the maximum penalty allowed for the greater, acquitted offense.\textsuperscript{55} The court reasoned that to allow a defendant to receive a penalty that exceeds the maximum for the greater, acquitted charge would “sanction an extreme anomaly in the criminal law”; the defendant would have served himself better by pleading guilty to the greater charge.\textsuperscript{56} If the jury had convicted the defendant of both offenses, the lesser offense would have merged under double jeopardy principles.\textsuperscript{57} Finally, the \textit{Simms} court refused to consider whether the sentence constituted cruel and unusual punishment stating “we have consistently adhered to a policy of not deciding constitutional issues unnecessarily.”\textsuperscript{58}

Four years later the Court of Appeals addressed a similar challenge to a criminal sentence. In \textit{Gerald v. State},\textsuperscript{59} a defendant charged with assault, robbery, and armed robbery was convicted only of assault.\textsuperscript{60} The trial court sentenced the defendant to fifteen years in prison, which was less than the statutory maximum for armed robbery but exceeded the maximum penalty for robbery.\textsuperscript{61} The Court of Appeals, relying on \textit{Simms}, held that a court cannot impose a sentence on a defendant that exceeds the maximum for the next greater, acquitted count.\textsuperscript{62}

In 1987, the Court of Appeals extended the \textit{Simms} reasoning to hold that once jeopardy attaches to both counts, a sentence for a lesser included offense cannot exceed the maximum for a greater charge upon which a \textit{nolle prosequi} was entered.\textsuperscript{63} The court reasoned

\begin{itemize}
  \item \textsuperscript{55} Id. at 724, 421 A.2d at 964.
  \item \textsuperscript{56} Id. at 723, 421 A.2d at 963.
  \item \textsuperscript{57} Id. at 718, 421 A.2d at 960-61.
  \item \textsuperscript{58} Id. at 725, 421 A.2d at 964.
  \item \textsuperscript{59} 299 Md. 138, 472 A.2d 977 (1984).
  \item \textsuperscript{60} Id. at 139, 472 A.2d at 978. The three charges arose out of the same incident and jeopardy attached to each. \textit{Id}.
  \item \textsuperscript{61} Id. at 139-40, 472 A.2d at 978. Had the defendant been convicted of armed robbery, his maximum sentence would have been 20 years imprisonment. \textit{Id}. at 143, 472 A.2d at 980. If the jury had convicted him of robbery, the court could have sentenced him only to 10 years in prison. \textit{Id}.
  \item \textsuperscript{62} Id. at 145-46, 472 A.2d at 981.
  \item \textsuperscript{63} Johnson v. State, 310 Md. 681, 694, 531 A.2d 675, 681 (1987). In \textit{Johnson}, the defendant was charged with various crimes arising out of an attack in Baltimore City. \textit{Id}. at 682, 531 A.2d at 675. After the evidentiary portion of the trial, the State dropped the charges of attempted murder, assault with intent to maim, disfigure or disable, and carrying a deadly weapon with intent to injure. \textit{Id}. at 683, 531 A.2d at 676. The case went to the
\end{itemize}
that the same anomaly addressed in the Simms opinion can result when the prosecution chooses not to continue on a greater charge.\footnote{64}{

3. \textit{The Court's Reasoning}.—In Thomas v. State, the Court of Appeals rejected the defendant's proposed extension of Simms v. State and instead used a constitutional analysis to overturn the twenty-year sentence for a slap to the face but to affirm the thirty-year sentence for the blows with the steam iron.\footnote{65}{ To reach its decision, the court established a proportionality test to determine whether a sentence offends the cruel and unusual punishment prohibition of the Eighth Amendment.\footnote{66}{

Writing for the majority, Judge McAuliffe reasoned that the extension of Simms to cases where the defendant could have been charged with a greater offense would establish "a binding hierarchy of offenses and sentences,"\footnote{67}{ a task better left to the legislature.\footnote{68}{ Because the defendant was not charged with manslaughter or assault with intent to maim, the court did not need to limit either the thirty-year sentence for common law battery to the maximum term for manslaughter,\footnote{69}{ or the twenty-year sentence for common-law battery to the maximum term for assault with intent to maim, disfigure or disable.\footnote{70}{

Rather than apply the Simms logic, Judge McAuliffe chose to construct a constitutional test to determine the validity of each sentence.\footnote{71}{ To analyze an Eighth Amendment challenge, the court first determined whether the imposed penalty appeared "grossly disproportionate."\footnote{72}{ To make this determination, a reviewing court should

\footnote{64}{ Id.}
\footnote{65}{ See \textit{supra} notes 4-7 and accompanying text.}
\footnote{66}{ Thomas, 333 Md. at 95-97, 634 A.2d at 6-7.}
\footnote{67}{ Id. at 92, 634 A.2d at 4.}
\footnote{68}{ Id.}
\footnote{69}{ Id. at 91, 634 A.2d at 4. Judge McAuliffe commented that the trial court erred in its conclusion that the defendant could only have been convicted of manslaughter had he killed his wife in that the evidence could have supported a finding of second degree murder. \textit{Id.} at 101, 634 A.2d at 9.}
\footnote{70}{ Id. at 100, 634 A.2d at 8. The defendant never actually argued that the 15-year maximum sentence for assault with intent to maim, disfigure or disable should serve as the limit for the April 2 battery. The court raised this point in its discussion on proportionality. \textit{Id.} at 99-100, 634 A.2d at 8.}
\footnote{71}{ Id. at 95, 634 A.2d at 6. Judge McAuliffe emphasized that a reviewing court should consider proportionality challenges only when "the punishment is truly egregious." \textit{Id.} at 97, 634 A.2d at 7.}
\footnote{72}{ Id. at 95, 634 A.2d at 6.}
look at the seriousness of the crime, the defendant's criminal history, any articulated support for the sentence, and the importance of deferring to the sentencing court as well as to the legislature.  

If the sentence does not appear to suggest gross disproportionality, the review is at an end. If, however, the review reveals gross disproportionality, the court should conduct a more detailed Helm-type analysis. Judge McAuliffe stated that a court may conduct intra- and inter-jurisdictional analyses of comparable offenses and sentences, consider the effects of the offense upon society, review evidence of improper motive on the part of the sentencing judge, or look to the penological theory of the state. He added that the court must examine the specific facts of the crime as well as the particular characteristics of the defendant.

With respect to Thomas, the absence of any articulated goal by the legislature or the trial court on the deterrence of domestic violence and the lack of any lasting physical injury to Mrs. Thomas suggested that the twenty-year sentence for the slap to the face was grossly disproportionate. After consideration of an inter-jurisdictional analysis, Judge McAuliffe concluded that the twenty-year sentence violated the Eighth Amendment. The thirty-year sentence, while severe, did not appear grossly disproportionate given the seriousness of the injuries to Thomas's wife, and therefore did not constitute cruel and unusual punishment.

In a two-part dissent, Judge Chasanow vigorously chastised the majority's reasoning and argued that the court unnecessarily created a constitutional analysis that gives little guidance to trial judges. In part one, Judge Chasanow stated that he would have joined the majority had they grounded their holding in an extension of Simms v. State. Judge Chasanow reasoned that if two assaults occur, and one, at the most, involved an intent to maim, and the other, at the most, involved an intent to murder, the court should limit the punishment.

73. Id.
74. Id.
75. Id.; see supra notes 29-33 and accompanying text.
76. Thomas, 333 Md. at 95-96, 634 A.2d at 6. Judge McAuliffe cautioned that when conducting an inter-jurisdictional analysis, the reviewing court should remember that the principles of federalism allow a state's legislature to impose a more severe penalty than other states. Id.
77. Id. at 96, 634 A.2d at 7.
78. Id. at 98, 634 A.2d at 7-8.
79. Id. at 100, 634 A.2d at 9.
80. Id. at 102-03, 634 A.2d at 10.
81. Id. at 108-09, 634 A.2d at 14 (Chasanow, J., dissenting in part).
82. Id. at 109, 634 A.2d at 14.
to the maximum for assault with intent to maim consecutive to the maximum allowed for assault with intent to murder. 83

In part two, Judge Chasanow criticized the court’s finding that the twenty-year sentence constituted cruel and unusual punishment. 84 He pointed out that the court has never reversed a sentence that lies within the permissible range of punishment on Eighth Amendment grounds. 85 He further argued that the majority never quite demonstrated why the defendant’s sentence violated the Eighth Amendment. 86 Rather, the majority engaged in a faulty factual analysis that completely ignored the defendant’s two prior assault convictions, the seriousness of the April 8 assault, and the trial judge’s desire to curb spousal abuse. 87 Finally, he noted that longer sentences stemming from less reprehensible conduct have survived Eighth Amendment challenges. 88

Judge Bell concurred with the majority’s holding and reasoning with respect to the twenty-year sentence 89 but dissented from the majority’s decision not to vacate the thirty-year sentence. 90 He stated that the imposition of a sentence equaling the maximum sentence for the acquitted charge of assault with intent to murder created an unjust anomaly. 91 Therefore, the sentence for the April 8 battery should not have exceeded twenty years. 92

Judge Eldridge concurred with the court’s judgment except for the affirmation of the thirty-year sentence. 93 He stated that the proportionality reasoning used to vacate the twenty-year sentence compelled the court to vacate the thirty-year sentence as well. 94

83. Id. at 110, 634 A.2d at 14. Otherwise, a Simms-like anomaly may occur: The State may elect not to charge the greater offense but thereafter seek a greater sentence. Id.
84. Id. at 111, 634 A.2d at 15.
85. Id.
86. Id. at 114, 634 A.2d at 16.
87. Id. at 114-15, 634 A.2d at 16-17.
88. Id. at 116-17, 634 A.2d at 18. Judge Chasanow referred to Hutto v. Davis, 454 U.S. 370 (1982) (holding that a sentence of 20 years for the possession with intent to distribute 9 ounces of marijuana did not violate the Eighth Amendment), and Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence required by a Texas recidivist statute and imposed upon a defendant convicted of obtaining $120.75 by false pretenses as not cruel and unusual punishment). Id. at 117, 634 A.2d at 18.
89. Thomas, 333 Md. at 118, 634 A.2d at 19 (Bell, J., concurring and dissenting).
90. Id.
91. Id. at 120, 634 A.2d at 19-20. Judge Bell argued that an acquittal on a greater charge should prevent the imposition of a penalty that is not only greater but also equal to the maximum penalty for the greater charge. Id. at 120-21, 634 A.2d at 20.
92. Id. at 121, 634 A.2d at 20.
93. Id. at 108, 634 A.2d at 14 (Eldridge, J., concurring in part and dissenting in part).
94. Id.
4. **Analysis.**—In *Thomas v. State*, the Court of Appeals held that a twenty-year sentence for common-law battery was grossly disproportionate, while a thirty-year sentence, also for common-law battery, did not violate the Eighth Amendment or Maryland common law. In reaching its holding, the majority developed a constitutional test from the scattered remnants of the Eighth Amendment's proportionality principle left by the Supreme Court's decision in *Harmelin v. Michigan*. Not only does the reasoning of the majority stand on shaky legal precedent, but it fails to follow the limited guidance provided by the Supreme Court. The *Thomas* court would have better guided future sentencing practices by an extension of *Simms v. State,* rather than by base its decision solely on constitutional grounds.

a. **The Court Offers Little Guidance on Proportionality Analysis.**—The majority in *Thomas* used the Supreme Court's decision in *Harmelin v. Michigan* as the basis for its proportionality review. Yet, as Judge McAuliffe ironically noted, the Supreme Court in *Harmelin* significantly clouded the waters of the Eighth Amendment's proportionality principle. While the *Harmelin* dissent strongly adhered to the proportionality review endorsed in *Solem v. Helm,* the majority split over the very existence of proportionality in non-capital cases. The *Thomas* court ultimately sided with Justice Kennedy's concurring opinion, concluding that the Eighth Amendment prohibits only grossly disproportionate sentences. The court then proceeded to develop its own test by adding pieces from *State v. Davis* and *Minor v. State,* neither of which found a sentence to be disproportionate.

The *Thomas* court should have followed the overall reasoning of *Davis* and *Minor* rather than extract various components of these opinions. In both *Davis* and *Minor*, the Court of Appeals—unsure of the factual applicability of *Solem v. Helm*—analyzed the disputed sentencing with and without a *Helm* proportionality test. It would, likewise,

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95. *See supra* notes 4-7 and accompanying text.
96. 507 U.S. 957 (1991); *see supra* notes 34-41 and accompanying text.
97. 288 Md. 712, 421 A.2d 947; *see supra* notes 54-58 and accompanying text.
99. *Id.* at 93, 634 A.2d at 5.
101. *See supra* notes 34-41 and accompanying text.
102. *See supra* note 41 and accompanying text.
103. 310 Md. 611, 530 A.2d 1223 (1987); *see supra* notes 48-49 and accompanying text.
104. 313 Md. 573, 546 A.2d 1028 (1988).
105. *See supra* notes 44-52 and accompanying text.
106. *See supra* notes 44-52 and accompanying text.
have been logical for the Thomas court—also unsure of the extent of Eighth Amendment proportionality—to examine the case initially by a proportionality analysis similar to Justice Kennedy's review in Harmelin. Then, because of the debated viability of proportionality in non-capital cases, it should have developed a common-law test to review the defendant's sentence.

If the court had followed Justice Kennedy's analysis by considering the public policy interest in curbing the defendant's crime and by deferring to any legislative mechanism that makes substantive penological judgments, it is likely that the sentence would have survived Eighth Amendment review. The defendant's slapping of his wife constituted one part in a pattern of physical and mental abuse commonly known as "domestic violence." The deterrence of domestic violence represents a significant public policy interest that has grown in importance with the realization of its gravity and pervasiveness. Currently, domestic violence is the leading cause of injury for women in the United States. A significant justification exists for substantial sentences in cases involving spousal abuse.

The legislature, moreover, has created a procedure for review of criminal sentences by a panel of three or more trial judges. Thomas elected to have his sentences reviewed, and a panel of three circuit court judges found that his sentences should remain unchanged. Legislative deference would therefore dictate that the defendant's sentence survive Eighth Amendment review.

b. The Court Should Have Extended Simms v. State.—Although the twenty-year sentence would have probably survived a "Kennedy proportionality review," the court could have remanded the case by adherence to its principle that it will not decide a constitutional issue

107. See, e.g., Thomas, 333 Md. at 144, 634 A.2d at 17 (quoting the trial judge as saying "I don't have one particular offense here. I've got a continuation of offenses and they're called spouse abuse . . . .").


110. Thomas, 333 Md. at 113, 634 A.2d at 16 (Chasanow, J., dissenting in part).

111. Id. at 113-14, 634 A.2d at 17. It is worth noting that the Thomas court also stated that a reviewing court should consider deference to the legislature as well as any articulated purpose for the sentence. Id. at 95, 634 A.2d at 6. However, the Thomas court ignored the findings of the legislatively created panel as well as the issue of domestic violence. Id. at 114-15, 634 A.2d at 17 (Chasanow, J., dissenting in part).
The Court of Appeals could have simplified its review had it avoided basing the decision solely on the constitutional issue of proportionality, and instead followed the reasoning of Judge Chasanow and grounded the decision on an extension of *Simms*.

Since the holding in *Simms*, the court has gradually extended the reach of its ruling to ensure that a defendant will not be punished more severely by an acquittal or *nolle prosequi* of a greater charge. Had it taken the next logical step, the court should have held that a sentence for a common-law offense may not exceed the statutory maximum for the greater uncharged statutory offense. For example, the April 2 slap involved at most an intent to maim. Therefore, the sentence for the statutory crime of assault with intent to maim, disfigure or disable should have served as the cap for the April 8 battery. Otherwise, the anomaly addressed by *Simms* and its progeny will continue to exist. The defendant would have fared better had the prosecution charged and convicted him of a greater, statutory crime.

Not only is the above analysis grounded in the fundamental principle of fairness, but it is much simpler in application than the convoluted proportionality review created by the majority. By extending *Simms*, a trial judge has only to ensure that sentences for common-law crimes stay within the legislatively-set maximum penalties for similar statutory offenses, rather than wrestle with the abstractions of proportionality. With today's crowded criminal dockets, trial judges need this sort of simplicity and guidance.

The majority argued, "[w]ere we to apply the *Simms* rule anytime a greater offense might have been charged, we would in effect create a binding hierarchy of offenses and sentences, a task that is truly legislative." Yet by classifying the slap to the face as not "legally serious"

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112. See *Simms*, 288 Md. at 725, 421 A.2d at 964 (stating "we have consistently adhered to a policy of not deciding constitutional issues unnecessarily"). Approximately seven months before the court's decision in *Thomas*, the court refused to address the constitutionality of anticipatory search warrants under the Fourth Amendment, stating, "This Court will not decide a constitutional issue except when the necessity to do so arises from the record before it." *State v. Lee*, 330 Md. 320, 329, 624 A.2d 492, 496 (1993).

113. See supra notes 54-64 and accompanying text.

114. See *Thomas*, 333 Md. at 108-09, 634 A.2d at 14 (1993) (Chasanow, J., dissenting in part) (proposing that common-law assault be limited by the maximum statutory offense involving the same actus reus and mens rea).

115. See id. (stating that the reasoning of *Simms* was based on principles of fairness and not the Eighth Amendment's prohibition against cruel and unusual punishment).

116. Id. at 92, 634 A.2d at 4.

117. Id. at 98, 634 A.2d at 5.
but the blows with the iron as "serious"\textsuperscript{118} the court has, in effect, established two types of common-law assaults.\textsuperscript{119} If the definition of different types of crime belongs to the legislature, then the use of statutory crimes as a guideline to determine a fair sentence for a common-law crime surely defers to legislative judgment.

5. **Conclusion.**—In *Thomas v. State*, the Court of Appeals considered whether a twenty-year sentence for a slap to the face and a thirty-year sentence for repeated blows with a steam iron constituted cruel and unusual punishment, and whether they violated Maryland common law. In reaching its decision that only the twenty-year sentence violated the Eighth Amendment, the court created a complex and convoluted proportionality analysis. The court should have given more guidance to trial judges through the simple extension of its holding in *Simms v. State*.

MATTHEW G. HJORTSBERG

**B. Delivering Justice to Defendants with Unenforceable Plea Bargains**

In *State v. Parker*,\textsuperscript{1} the Court of Appeals held that a defendant's plea agreement that promised prison service in a federal penitentiary was unenforceable because the state sentencing judge lacked authority to order the prison service of a Maryland sentence in the federal system.\textsuperscript{2} In an issue of first impression, the court offered the defendant the choice either to serve his time in Maryland, or to withdraw his plea and renegotiate it, or stand trial.\textsuperscript{3} To fashion its limited remedy, however, the *Parker* court misconstrued case law and ignored more recent trends that favor the award of specific performance in plea agreements.

1. **The Case.**—Anthony Patrick Parker was charged with murder and other related offenses stemming from an incident that occurred at the Coca-Cola Bottling Company in Baltimore County.\textsuperscript{4} On July 8, 1983, Parker entered into a plea agreement which provided that if he pleaded guilty to second-degree murder, testified against co-conspirators...

\textsuperscript{118} Id. at 101, 634 A.2d at 9.
\textsuperscript{119} See id. at 114-15, 634 A.2d at 16-17 (Chasanow, J., dissenting in part) (arguing that the majority has created a new category of "not legally serious" common-law assaults without stating what the constitutional maximum penalty should be).
2. Id. at 607, 640 A.2d at 1119.
3. Id.
4. Id. at 581, 640 A.2d at 1106.
tors, and pleaded guilty to one unrelated count of federal bank robbery, the State would recommend that he serve his time in the federal penitentiary, that his sentence not be more than twenty years, and that it be served concurrently to any federal sentence resulting from the plea agreement. Both federal and state trial courts sentenced Parker to twenty-year terms. Parker fulfilled his part of the agreement and entered the federal penitentiary.

After Parker served seven years, he was paroled. The Baltimore County Police Department immediately exercised a detainer and obtained custody of the defendant. Parker sought release from the balance of his Maryland sentence and argued that because the sentencing judge agreed to allow him to serve his time in the federal penitentiary, the judge intended that the sentences be coterminous. The Circuit Court for Baltimore County granted post-conviction relief and set Parker free from state custody on the basis of the holding in Gantt v. State. The State appealed the decision and argued that the lower court's interpretation and reliance on Gantt to release Parker was in error. The Court of Special Appeals, however, affirmed and concluded that parole was part of his federal sentence and therefore he could not be retained by Maryland until his federal sentence, including parole, was fully served. The Court of Appeals granted the State's petition to consider the post-conviction relief granted to Anthony Parker.

2. Legal Background.—Plea bargains originated in seventeenth century England as a means to alleviate especially harsh punishments. It was not until its 1969 decision in Brady v. United States that the Supreme Court recognized the plea agreement as an effective

5. Id.
6. Id.
7. Id.
8. Id. at 582, 640 A.2d at 1107.
9. Id.
10. Id. at 583, 640 A.2d at 1107.
11. Id.
12. Id.; see Gantt v. State, 81 Md. App. 653, 569 A.2d 220 (1990); see also infra notes 49-55 and accompanying text.
13. Parker, 334 Md. at 583, 640 A.2d at 1107.
and often desirable resolution to a criminal proceeding.\textsuperscript{18} A year later in \textit{Santobello v. New York},\textsuperscript{19} the Court described plea agreements as “essential” and “highly desirable” because they expedite criminal cases, decrease the period of pretrial confinement for those awaiting trial, increase public protection, and increase the potential for effective rehabilitation.\textsuperscript{20} Today, guilty pleas account for the resolution of more than ninety percent of criminal prosecutions in the United States.\textsuperscript{21}

\textit{Santobello} marked the first time the Court dealt with a plea agreement breached by a state. The defendant in \textit{Santobello} withdrew a not-guilty plea to two felonies and pleaded guilty to a lesser charge on the basis of the prosecutor’s promise that he would make no sentencing recommendation.\textsuperscript{22} At the sentencing hearing, a different prosecutor recommended, and the judge ordered, the maximum sentence.\textsuperscript{23} In response, the defendant unsuccessfully tried to withdraw his plea.\textsuperscript{24} On review, the Supreme Court held that “when a plea rests in any significant degree on a promise or agreement of the prosecutor” it is a material element of the plea bargain, and as such, “must be fulfilled.”\textsuperscript{25} The Court asserted that the defendant deserved a remedy but remanded the issue to the state court to determine whether specific performance or withdrawal of the plea was appropriate.\textsuperscript{26}

While the Supreme Court has not specifically addressed the provision of remedies for unenforceable plea agreements, federal circuits and state courts have extended the reasoning and policy concerns found in \textit{Santobello} to fashion appropriate remedies. For example, in \textit{Palermo v. Warden},\textsuperscript{27} the United States Court of Appeals for the Second Circuit considered an illegal plea agreement and held that “the rea-

\begin{itemize}
  \item 18. \textit{Id.} at 752.
  \item 19. 404 U.S. 257 (1971).
  \item 21. Lumpkin, \textit{supra} note 20, at 1059 n.1.
  \item 22. \textit{Santobello}, 404 U.S. at 258.
  \item 23. \textit{Id.} at 259.
  \item 24. \textit{Id.} at 259-60.
  \item 25. \textit{Id.} at 262.
  \item 26. \textit{Id.} at 263.
  \item 27. 545 F.2d 286 (2d Cir. 1976).
\end{itemize}
soning underlying Santobello applies no less when the prosecution makes unfulfillable promises in negotiating a plea.\textsuperscript{28}

In Maryland, courts have long recognized the right to a remedy for a broken plea agreement, including those breached by the government.\textsuperscript{29} The Court of Appeals strongly endorsed the Santobello mandate that when the plea agreement "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled."\textsuperscript{30} The Court of Appeals expanded on the Santobello doctrine in State v. Brockman,\textsuperscript{31} to find that a defendant may be entitled to a remedy where the state breaches, even if the plea agreement was never formally accepted by the court.\textsuperscript{32} The Brockman court explained that specific performance of a plea agreement should be granted when there is a showing of "prejudice arising from the bargain, which prejudice cannot be remedied by permitting the defendant to withdraw his plea and commence anew."\textsuperscript{33} The court further wrote that evidence of prejudice is not necessary if the defendant can show substantial performance with the agreement.\textsuperscript{34}

Until Parker, the provision of a remedy for an unenforceable plea bargain had not been addressed by the Court of Appeals. The issue had been before the Court of Special Appeals twice, in Rojas v. State\textsuperscript{35} and Johnson v. State.\textsuperscript{36} In Rojas, the State offered to drop some charges and to recommend a ten-year suspended sentence with five years probation if the defendant would leave the country within ninety days.\textsuperscript{37}

\textsuperscript{28} Id. at 296; see Raymond E. Dunn, Jr., Note, Enforcing Unfulfillable Plea Bargaining Promises, 13 Wake Forest L. Rev. 842, 850 (1977) (arguing fundamental fairness requires specific enforcement of plea agreement regardless of prosecutor's lack of authority to make the agreement).

\textsuperscript{29} See, e.g., Miller v. State, 272 Md. 249, 322 A.2d 527 (1974).

\textsuperscript{30} Id. at 252, 322 A.2d at 529 (quoting Santobello, 404 U.S. at 262); see also State v. Brockman, 277 Md. 687, 694, 357 A.2d 376, 381 (1976).

\textsuperscript{31} 277 Md. 687, 357 A.2d 376 (1976).

\textsuperscript{32} Id. at 694-95, 357 A.2d at 381-82.

\textsuperscript{33} Id. at 698, 357 A.2d at 383; see also State v. Poole, 321 Md. 482, 496-97, 583 A.2d 265, 272 (1991) (holding trial court bound to the terms of a plea agreement where defendant has fulfilled all parts of his bargain); Meredith Kolsky, Guilty Pleas, 82 Geo. L.J. 926, 931-32 (1994) (reviewing the procedural options of defendant who alleges breach of a plea agreement).

\textsuperscript{34} Brockman, 277 Md. at 698-99, 357 A.2d at 384. The Colorado Supreme Court has taken this idea a step further and asserted that a defendant is entitled to specific performance where "no other remedy is appropriate to effectuate the accused's legitimate expectation engendered by the governmental promise." People v. Fisher, 657 P.2d 922, 931 (Colo. 1983).

\textsuperscript{35} 52 Md. App. 440, 450 A.2d 490 (1982).

\textsuperscript{36} 40 Md. App. 591, 392 A.2d 1157 (1978).

\textsuperscript{37} Rojas, 52 Md. App. at 441, 450 A.2d at 491.
The court found that the state lacked the authority to make this agreement because federal deportation laws controlled, and vacated the defendant's sentence in order to return the parties to their original positions, protect the defendant's constitutional rights, and guard the State's interest in public safety.

In Johnson, the appellant was arrested for violations of Maryland law while on parole from a Pennsylvania conviction. Johnson agreed to serve a thirteen-year sentence for the Maryland violations concurrent to the term imposed by Pennsylvania for his parole violations. He expected to begin serving his Maryland sentence in a Pennsylvania prison, but Pennsylvania had yet to revoke his parole. Consequently, Johnson began his Maryland sentence at the risk of doing all of his time in Maryland and then being recalled to Pennsylvania to serve the remainder of his original term plus any additional sentences related to the parole violations.

In analyzing the case, the Johnson court held that the plea agreement failed to satisfy the voluntariness requirement in the Maryland rule governing the acceptance of plea bargains because the agreement was induced by a promise that was unkept and unenforceable. In addition, the court found that the element concerning place of service was material to his motion to set aside the sentence because it was impossible to determine if the defendant would have pleaded guilty without the concurrency provision. Clearly, the defendant did not receive what he bargained for—immediate return to Pennsylvania to begin a concurrent sentence. The Johnson court considered an order for specific performance, but concluded that it was impossible as Maryland could in no way influence the criminal justice system in Pennsylvania. As an alternative, the court offered the defendant a choice between allowing the plea to stand and accepting the sentence as imposed, or withdrawing the plea.

38. Id. at 442, 450 A.2d at 492.
39. Id. at 446, 450 A.2d at 494.
41. Id. at 591-92, 392 A.2d at 1157.
42. Id. at 592-93, 595, 392 A.2d at 1157, 1160.
43. Id. at 596-97, 392 A.2d at 1160.
44. Id. at 597, 392 A.2d at 1160.
45. Id.
46. Id. at 597-98, 392 A.2d at 1160.
47. Id. at 599, 392 A.2d at 1161.
3. The Court’s Reasoning.—The court began its analysis of Parker with an examination of the lower court’s reliance on Gantt v. State. In Gantt, the Court of Special Appeals held that a defendant on parole was still serving a sentence for the purpose of imposing a consecutive sentence. The Gantt court reasoned that a paroled prisoner “is actually serving a sentence outside the prison walls,” and noted the possibility that a paroled defendant sentenced to a consecutive sentence may, until the completion of the first sentence, remain free from physical restraint.

The Parker court characterized this reasoning in Gantt as “oversimplistic” and “illogical.” Specifically, the court concluded that a literal interpretation of Gantt would not only render meaningless the notion of “constructive paroles” but would compel a result “at odds with the notion of dual sovereignty.” In light of this conclusion, the Parker court disapproved Gantt to the extent it treated time spent on parole and time spent in prison identically in the context of multiple sentences.

The court then examined the specific issues of the case: (1) the authority of the sentencing judge to approve the plea agreement directing that Parker’s sentence be served in a federal institution, (2) the correctional authorities’ ability to reclaim custody of the defend-

48. Before addressing the merits of the case, the court dealt with the defendant’s motion to dismiss. Parker, 334 Md. at 584, 640 A.2d at 1108. Parker asserted that because subsequent to his parole he had been arrested and re-incarcerated in federal prison for multiple parole violations, the issue of Maryland’s right to custody was moot. Id. The court agreed that the case no longer presented an immediate controversy, but it decided to consider the matter of the plea agreement under the “capable of repetition, yet evading review” exception to the moomess doctrine. Id. (quoting Sosna v. Iowa, 419 U.S. 393, 399-400 (1975)). Because in Parker’s case “(1) the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again,” id. at 585, 640 A.2d at 1108, the court denied the motion to dismiss for moomess. Id. at 586, 640 A.2d at 1109.


50. 81 Md. App. at 660, 569 A.2d at 224.

51. Id. at 661, 569 A.2d at 224.

52. Parker, 334 Md. at 598, 640 A.2d at 1110.

53. Constructive parole permits an individual who is sentenced to consecutive sentences to be constructively paroled from one sentence so as to begin serving the subsequent sentences. See id. at 580, 640 A.2d at 1110.

54. Id. at 588-89, 640 A.2d at 1110. The court explained that if a defendant were sentenced to life in Jurisdiction A and paroled, what would happen if he committed an offense in Jurisdiction B while on parole? Under the reasoning in Gantt, Jurisdiction B would effectively lose the right to sentence the defendant to a consecutive sentence. As a result, the jurisdiction could be deprived of its right to punish, a right “essential to an independent sovereign.” Id. at 589, 640 A.2d at 1110.

55. Id. at 591, 640 A.2d at 1111.
ant following his release on federal parole, and (3) the effect of the plea agreement. To address the first issue, the court looked to Article 27, Section 690 of the Maryland Code and concluded that judges do not have the authority to designate an institution, but must instead "sentence such persons to the jurisdiction of the Division of Corrections." The court concluded that by his designation of where Parker would serve, the trial judge stepped beyond his authority not only with respect to the powers of the judicial branch, but also with respect to the jurisdiction of a completely independent sovereign, the federal government.

Citing case law from other jurisdictions, the court asserted that concurrent sentences do not require the second sentencing sovereign to forfeit the jurisdiction or authority necessary to regain custody. The court found no authority for the conclusion that "serving the balance of his [federal sentence of] twenty years on parole will satisfy [Parker's] Maryland sentence." Instead, the court asserted that the Maryland Division of Corrections retained the penal jurisdiction and the independent authority to enforce the sentence.

The conclusion that parole from a concurrent federal sentence did not deprive Maryland of jurisdiction over Parker brought the court to consider the effect of an unauthorized, unenforceable plea bargain that promised service in the federal correctional system. The court acknowledged that Parker bargained for service of his sentence in federal custody in order to ensure his safety. The court further agreed that this safety concern was in fact "a material element"
of the plea agreement. The court then turned to the remedies available under this unenforceable and unfulfillable agreement.

The Parker court first considered the remedy of specific performance but rejected it because the original promise upon which the defendant relied cannot legally be fulfilled. The court further delineated between "unfulfillable bargains" arising out of excess prosecutorial discretion and those simply beyond the power of the court to enforce. In the court's opinion, this latter reason made specific performance in Parker impossible.

To fashion an alternative remedy, the court relied on the Rojas and Johnson decisions to suggest that when a court lacks the authority to specifically perform, it should offer the defendant the choice either to withdraw the plea or allow the sentence to stand as it had been interpreted. As a result, the court reversed the judgment of the Court of Special Appeals and remanded the case for further consideration.

4. Analysis.—The court's holding in Parker represents a departure from the spirit of Santobello and the recent trend that favors the award of specific performance despite the unenforceability of a plea agreement. As a consequence, Parker did not receive an adequate consideration of his rights under the agreement. As precedent, the Parker decision will undermine confidence in the use of plea agreements as an effective resolution to criminal proceedings.

a. Contract Analysis and Due Process.—In its analysis of the limitations on a sentencing judge's authority, the Parker court failed to confront the nature of the defendant's understanding of and reliance on the sentencing judge's unauthorized promise. Rather, the court focused its plea bargain analysis upon Maryland's sovereign authority
to imprison and parole prisoners sentenced under state law.\textsuperscript{73} This latter analysis preserves the Division of Corrections' exclusive right to make parole decisions in the state and protects the concept of constructive parole.\textsuperscript{74} Such reasoning parallels precedent by the United States Court of Appeals for the Fourth Circuit which noted, "[w]hile the situs of the institution determines which parole board shall have supervisory jurisdiction over the prisoner, the designation of the place of confinement in no way determines which parole laws shall apply."\textsuperscript{75} To the extent that the court addressed the relationship between the sentencing judge and the Division of Corrections' respective authority over parole decisions, Parker's argument that the sentencing judge intended the state and federal sentences to be coterminous received little attention.

Underlying the court's focus upon the State's position was a concern that by allowing Parker to remain free on federal parole the defendant received "much more than he bargained for" while the state did not get the "full benefit of its bargain."\textsuperscript{76} As the decision stands, however, the state received much more than it bargained for: the benefit of Parker's testimony plus the imposition of a separate Maryland sentence or the chance to retry the case.\textsuperscript{77} Conversely, despite fulfilling his end of the bargain, Parker received less than what he bargained for: a Maryland sentence coterminous with federal imprisonment.

If the court had adopted a fairness and equity analysis, as used in \textit{Brockman},\textsuperscript{78} instead of a strict contract analysis, a different result would have occurred. This conclusion is reinforced by the \textit{Brockman} court's prior acknowledgement that a strict application of contract law is not in itself dispositive of plea bargains.\textsuperscript{79} Most jurisdictions likewise recognize a qualified application of contract law.\textsuperscript{80} Rather than examine a bargain that involved, in addition to other consideration, the

\textsuperscript{73} See id. at 594-96, 640 A.2d at 1113-14.
\textsuperscript{74} If the court found otherwise, prisoners would be denied the ability to receive parole from one sentence for the purpose of beginning to serve another consecutive sentence. See \textit{Hines} v. Pennsylvania Bd. of Probation & Parole, 420 A.2d 381 (Pa. 1980).
\textsuperscript{75} Gilstrap v. Clemmer, 284 F.2d 804, 808 (4th Cir. 1960).
\textsuperscript{76} \textit{Parker}, 334 Md. at 603, 640 A.2d at 1117.
\textsuperscript{77} See id. at 607, 640 A.2d at 1119.
\textsuperscript{78} State v. Brockman, 277 Md. 687, 697, 357 A.2d 376, 382-83 (1976).
\textsuperscript{79} Id.
\textsuperscript{80} See Kolsky, \textit{supra} note 33, at 928-29 nn.1322-23. For a discussion of the various contractual analyses to plea bargain agreements, see William M. Ejzak, \textit{Plea Bargains and Nonprosecution Agreements: What Interests Should be Protected when Prosecutors Reneg?}, 1991 \textit{U. ILL. L. REV.} 107, 116-20; see also Smith & Dale, \textit{supra} note 65, at 786 (noting the voluntary character of a plea bargain as the consideration for the agreement).
waiver of Parker's constitutional rights, the court myopically focused on the materiality of an unenforceable promise and made no reference to Parker's detrimental reliance. Other jurisdictions place emphasis on the defendant's reliance on the promise and find that, at a minimum, it gives rise to a contractual right to sue the state for specific performance. Moreover, the United States Court of Appeals for the Fourth Circuit asserted that there is "authority to go beyond contract analysis in a situation in which this type of analysis would not have protected the defendant adequately."

In contrast to most other jurisdictions, the Parker court chose not to examine or comment on the voluntariness of the plea. By overlooking the element of voluntariness, the Parker court evaded consideration of the potential involuntary waiver of the defendant's constitutional rights. While it may be sufficient to say that the trial court lacked authority to make the plea agreement, the difficulty with this abbreviated analysis is that it stops short of any meaningful reflection on the defendant, the importance of the plea to him, and his detrimental reliance on it. A fuller examination would necessarily move the court into a constitutional analysis of the rights of the defendant. A constitutional analysis, moreover, would be in line with the Brockman court's proclamation that "the standard to be applied in plea negotiations is one of fair play and equity . . . which, although entailing certain contract concepts, is to be distinguished from . . . the strict application of the common law principles of contracts." As Justice Douglas noted in his Santobello concurrence, the defendant's wishes should control since he is the one whose "fundamental rights

81. See infra note 85 and accompanying text.
82. Smith & Dale, supra note 65, at 784-85.
84. But cf. Johnson v. State, 40 Md. App. 591, 597, 392 A.2d 1157, 1160 (1978). The concurring opinion in Santobello noted the frequency with which the lower courts use the voluntariness analysis: "[t]he lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness.'" 404 U.S. 257, 266 (1971) (Douglas, J., concurring) (citations omitted).
85. In his concurring opinion in Santobello, Justice Douglas referred to the guilty plea as a waiver of rights to a jury trial, to protection against self-incrimination, and to confront witnesses. 404 U.S. at 266; see also Ejzak, supra note 80, at 110.
flouted by a prosecutor's breach." In Parker, the defendant's position was never adequately considered.

b. Impact of Parker.—The shortcomings of Parker are not limited to an incomplete consideration of the defendant's rights; it also failed to promulgate safeguards for future plea agreements and sent a negative message to defendants who wish to plea bargain. Had the sentencing judge included in Parker's commitment papers a precautionary provision relating to the parties' rights in the event the prisoner was paroled from the federal system, both the state and the defendant would have been protected. The Parker decision provides no clear guidance to avoid this problem in future cases. More importantly, the court offers no incentives for the prosecution or the judge to avoid such a plea agreement because the prosecutor has received the benefit of the bargain for relatively little consideration. This result will send a foreboding message to all defendants considering plea agreements: The court recognizes the plea agreement as a tool of the state to be used for its benefit, regardless of the defendant's expectations and constitutional concerns.

The court's avoidance of specific performance because it "would infringe on the exclusive statutory authority and discretion of the Parole Commission and effectively cede the state's penal jurisdiction to federal parole authorities" is unsatisfactory. The court could have delivered effective specific performance that met the defendant's expectations by granting the prejudiced defendant a remedy that would put him and the state in similarly benefited positions. In essence, Parker agreed to do time only in a federal penitentiary. Under the Maryland rules, the "court may modify or reduce or strike, but may not increase the length of a sentence" once a sentence has been im-

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87. 404 U.S. at 267 (Douglas, J., concurring).
88. The court's failure to consider the defendant is underscored by the ease with which the court overcame a reasonable mootness argument. See Parker, 334 Md. at 584-85, 640 A.2d at 1108. The court also ruled upon the plea agreement issue without giving the defendant the opportunity to brief the arguments fully. Id. at 596-97, 640 A.2d at 1114.
89. In People v. Lewis, 564 P.2d 111 (Colo. 1977), the Supreme Court of Colorado faced the same kind of dilemma when a sentencing judge ordered that Lewis's sentence run concurrent to a sentence he was already serving in Nebraska. Id. at 112. The court ruled that there was a defect in the sentencing for failure to provide for the possibility of early release from the underlying sentence. Id. at 114. The court went on to specify that the sentencing order should have specified that Colorado retained jurisdiction and the right to imprison the defendant for any remaining length of the original sentence the state shall deem appropriate. Id. at 115.
90. Parker, 334 Md. at 607, 640 A.2d at 1119.
posed.\textsuperscript{91} Accordingly, to fulfill its end of the bargain, the state could be ordered to: (1) reduce his sentence to time served, (2) commute the sentence, (3) direct the balance of Parker’s sentence be served in the federal system, or (4) remand the case with specific instructions for the Department of Corrections and the court to construct a new solution in the spirit of the original agreement. But the court offered no such guidance; instead, it remanded the case and left the defendant to choose between two unbargained for options.

In circumstances where the original bargain cannot be fulfilled by the state, other jurisdictions have gone so far as to dismiss a case on these grounds.\textsuperscript{92} The United States District Court for the District of Columbia held that where a prosecutor strikes a deal with a criminal defendant but avoids the state’s commitments and where the defendant has performed his obligations under the contract, the proper remedy may include dismissal of the indictment.\textsuperscript{93} In this context, specific performance is especially important when the defendant cannot be restored to status quo ante.\textsuperscript{94} In \textit{State v. Poole},\textsuperscript{95} the Maryland Court of Appeals found that because the defendant performed his part of the bargain and it was “irreversible,” the court had bound itself to the plea agreement.\textsuperscript{96} To the extent that Parker’s testimony is “irreversible,” the court should be bound to at least attempt to deliver effective specific performance. Interestingly, the \textit{Poole} court stated that once a court accepts a bargain, it cannot later go back and refuse...
to carry it out.\textsuperscript{97} This responsibility to fulfill an agreement, moreover, extends not only to the state but to the court as well.\textsuperscript{98}

The impact of \textit{Parker} may well have a chilling effect upon defendants' willingness to enter into plea agreements. Defendants may choose not to turn state's evidence because their fear of retaliation outweighs the uncertainty of the state's promises. Given the frequency in which pleas are used to dispose of criminal cases, the impact of fewer plea agreements could significantly harm the state's ability to expedite criminal cases. Finally, the \textit{Parker} decision may negatively affect the credibility of the courts and the prosecution in the plea bargaining process.\textsuperscript{99}

c. Remedy.—The court's remedy in \textit{Parker} relied on two cases which do not fully support its conclusion. To establish the legal foundation for its solution, the \textit{Parker} court looked to \textit{Rojas v. State} and \textit{Johnson v. State}.\textsuperscript{100} Several key facts and reasoning, however, distinguish both \textit{Rojas} and \textit{Johnson} from \textit{Parker} and suggest that a more faithful application of their precedent would have resulted in a more generous remedy for the defendant.

In \textit{Rojas}, the defendant unilaterally broke his bargain and did not have to provide testimony,\textsuperscript{101} whereas, in \textit{Parker} the defendant fulfilled his end of the bargain while the court failed to meet its promise to the defendant.\textsuperscript{102} In \textit{Rojas} the court chose a remedy that would put "the parties in their original positions, unprejudiced by the mistake of

\begin{footnotes}
\item[\textsuperscript{97}] Poole, 321 Md. at 497, 583 A.2d at 272. \\
We cannot allow the court to renege on its effective acceptance of the plea agreement as conveyed through its conduct, and then simply offer the defendant an opportunity to withdraw his guilty pleas. Nor do we envision a similar situation in which we would permit a trial court to place its imprimatur on a plea agreement, but later withdraw its approval and force the defendant to go to trial. \\
\textit{Id.}

The Federal Rules of Criminal Procedure provide that if the court accepts a plea agreement, "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." \textsc{Fed. R. Crim. P. 11(e)(3)} (Supp. 1993).

\item[\textsuperscript{98}] Poole, 321 Md. at 497, 583 A.2d at 272.

\item[\textsuperscript{99}] See Paul A.S. Spiegel, Note, People v. Calloway: \textit{A Restriction of Remedies for Broken Plea Bargains}, 70 \textsc{Cal. L. Rev.} 1091, 1105 (1982) (identifying one of the benefits of granting specific performance as the encouragement of "actual and perceived judicial responsibility in the plea bargaining process").

\item[\textsuperscript{100}] Parker, 334 Md. at 694-95, 640 A.2d at 1117-18; see supra notes 35-47 and accompanying text.


\item[\textsuperscript{102}] Parker, 334 Md. at 581, 640 A.2d at 1106.
\end{footnotes}
Because there was no way to take back the testimony the defendant had offered as well as the time already served, the option of returning Parker to his original position was impossible. The court has created a situation in which the state can avoid its promises to the defendant and still gain the benefit of its bargain. This outcome is difficult to reconcile with *Rojas*, especially given that court’s observation that both the state and the defendant are “mutually entitled to the benefit of the bargain.”

Finally, the *Rojas* court justified its decision by noting that vacating the sentence “protects the appellant's constitutional rights . . . and protects the State's interest in public safety.” The *Parker* court, however, failed to demonstrate how the defendant’s options to serve time in Maryland or stand retrial protected his constitutional rights and assured the receipt of something in exchange for his contribution to the plea agreement.

The *Parker* court’s reliance on the *Johnson* case was similarly misplaced. The *Johnson* court vacated an unfulfillable sentence because it left the defendant facing no greater penalty than he would have originally faced without a plea. In *Parker*, however, the defendant bargained for his safety in a federal prison and nothing short of keeping him out of the Maryland system could remedy the situation. The *Parker* court’s reliance on *Johnson* is inappropriate because the defendants were not in similarly situated positions that would justify the imposition of identical remedies. Parker could not be returned to his original position nor receive the benefit of his bargain under the *Johnson* rationale.

5. Conclusion.—The Supreme Court has noted that ultimately there must be “fairness in securing agreement between an accused and a prosecutor” if the benefits of the plea agreement are to be realized. The Court further warned that the process “must be attended by safeguards to ensure the defendant what is reasonably due in the [varying] circumstances.” The Court of Appeals in *Brockman* stated that the standard to be applied to plea negotiations is one of fair play

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103. *Rojas*, 52 Md. App. at 446, 450 A.2d at 494. Because its sentence could not be carried out, the *Rojas* court vacated the sentence and remanded the case. *Id.* at 443, 450 A.2d at 493. In *Parker*, the defendant had already served 11 years of a 20-year sentence.

104. *Id.* at 445, 450 A.2d at 494.

105. *Id.* at 446, 450 A.2d at 494.

106. See supra notes 40-47 and accompanying text.


108. *Id.* at 262; see also *Spiegel*, supra note 99, at 1101.
and equity under the facts and circumstances of the case." The defendant who relies on a plea agreement should be protected and provided a reasonable remedy in the case of breach, regardless of the validity of the promise. As it would be impossible to return the defendant in *Parker* to the status quo ante, the court should have provided an effective equivalent of specific performance and vacated the remainder of the defendant's sentence. Such a remedy would have fulfilled the requirement of fairness as well as respected the terms of the plea agreement and preserved the defendant's constitutional rights.

Laura L. Swartz

C. Introduction of a Mistake of Age Defense to a Child Pornography Prosecution

In *Outmezguine v. State*, the Court of Appeals held that Article 27, Section 419A(c) of the Maryland Code does not include knowledge of the child's age as an element of the offense of child pornography. The court also concluded that in the absence of a statutory prohibition, a reasonable mistake of age defense would be available against a prosecution under Section 419A(c). The court rejected the defendant's constitutional scienter arguments and held "that the First Amendment does not require knowledge of the minor's age to be an element of the crime . . . nor does it require a reasonable mistake of age defense." Thus, the *Outmezguine* decision represents a continuation of the court's practice of judicial deference to the General Assembly in the area of strict liability crimes.

1. The Case.—In December 1990, Jennifer H., then fifteen years old, posed for a series of photographs taken by Elan Outmezguine.
Jennifer modelled various items of revealing lingerie. Police later discovered the resulting photographs while executing a search warrant. Among the photographs seized were several depicting Jennifer engaged in "sexual conduct."

Outmezguine's primary defense was factual: that he was not the individual who photographed Jennifer. He also offered an alternative, essentially legal argument: that knowledge of the child's age is a necessary element of the offense, and that the State did not allege or prove that Outmezguine knew Jennifer's age. After a two-day trial, Outmezguine was convicted and sentenced to eight years imprisonment.

Outmezguine appealed his conviction to the Court of Special Appeals, which affirmed the conviction. The Court of Appeals granted certiorari "to consider whether 'scienter [is] an element of the offense of photographing a minor' under § 419A(c)."

2. Legal Background.—
   a. Protected Speech and the Overbreadth Doctrine.—Section 419A(c) of Article 27 makes it a felony to record a visual representation of "a minor engaging in an obscene act or engaging in sexual conduct." Because the statute criminalizes a form of expression, constitutional concerns are raised. As the Supreme Court noted:

   It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.
The First Amendment's protection does not encompass material which is deemed obscene. In *Miller v. California*, the Court enunciated the current standard. In *New York v. Ferber*, child pornography was similarly deemed to be outside the protection of the First Amendment. Because the restrictions in Section 419A(c) are not limited to unprotected expression, the statute may be examined for overbreadth.

The overbreadth doctrine permits a litigant to raise vicariously the constitutional rights of third parties "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." A successful invocation of the doctrine to void a law requires "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." The burden falls upon "the person whose conduct is legitimately proscribable, and who seeks to invalidate the entire law because of its application to someone else, to 'demonstrate from the text of [the law] and from actual fact' that substantial overbreadth exists."

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19. *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by this Court, that obscene material is unprotected by the First Amendment.").


21. The *Miller* test for obscenity has three elements: "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 24 (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). A thorough historical outline of obscenity jurisprudence in Maryland was authored by Judge Wilner in *400 E. Baltimore Street, Inc. v. State*, 49 Md. App. 147, 154-68, 431 A.2d 682, 686-94 (1981), *cert. denied*, 455 U.S. 940 (1982).


23. *Id.* at 764. The Court utilized the *Miller* standard to facilitate its discussion of what constitutes child pornography. *Id.*

24. Section 419A(c) is not limited to obscenity, but extends its prohibition to photographs or films depicting "sexual conduct." Md. ANN. CODE art. 27, § 419A(c) (1992).


26. *Id.* at 612; *see also* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

27. *Broadrick*, 413 U.S. at 615; *see also* Eanes v. State, 318 Md. 436, 465, 569 A.2d 604, 618 (1990) ("[A] court should not resort to [the overbreadth doctrine] unless there is a realistic danger that the statute itself will significantly compromise recognized first amendment protection of parties not before the court.") (citation omitted).

Previously, the Supreme Court has rejected overbreadth attacks on state child pornography statutes.29

b. Strict Liability Offenses and Judicial Deference.—At common law, it was axiomatic that a crime was committed only if there was a concurrence of mens rea and actus reus.30 With the industrialization of American society, however, came a legislative movement to regulate various “activities that affect public health, safety or welfare.”31 The newly-created public welfare offense statutes32 were an “exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.”33 Consequently, courts were willing to accept prosecutions predicated solely upon a wrongful act without regard to a defendant’s mental state.34 By the middle of the twentieth century, the judicial practice of deference to a legislature’s purposes in order to interpret the elements of a crime was well-settled.35

30. The notion has been expressed:
   The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morissette v. United States, 342 U.S. 246, 250 (1952) (foomote omitted).
31. Id. at 254.
32. See Francis B. Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55 (1933) (tracing the early development of these statutory offenses). For a judicial examination of the history of this jurisprudential area, see Justice Jackson’s discussion in Morissette, 342 U.S. at 250-62.
34. See id. at 254. “Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.” Id.; see also United States v. Behrman, 258 U.S. 280, 288 (1922) (holding that an indictment for a statutory offense that does not include an element of knowledge need not charge knowledge).
35. See United States v. Dotterweich, 320 U.S. 277, 280 (1943) (“Regard for [legislative] purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.”); see also Morissette, 342 U.S. at 262 (holding that although not explicitly mentioned in the statute, intent is a necessary element of a prosecution for theft of property belonging to the United States). In Morissette, the Court was willing to read a mens rea requirement into the statute because the underlying offense was, effectively, common law larceny. In distinguishing Balint and Behrman, the Morissette Court remarked:
   Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the act.
Maryland's law has evolved in a similar fashion. In the past six years, the Court of Appeals has examined several statutory crimes to determine the necessity of a *mens rea* element. In *Dawkins v. State*, the defendant was convicted of possession of a controlled dangerous substance and of controlled paraphernalia. The Court reversed the conviction, holding that a prosecution under Section 287 of Article 27 requires the state to prove "a 'knowing' possession on the part of the accused." To reach its conclusion, the Court closely examined the statute and the legislature's purpose in enacting it.

In *State v. McCallum*, the defendant was convicted of driving with a suspended license and sentenced to one year of incarceration with all but ninety days suspended. The Court of Appeals reversed the conviction and concluded that the offense in question was not a strict liability offense because it was "both regulatory and punitive," the punishment was significant, and because a defendant could not avoid violating the statute if he did not know his license was suspended. Thus, proof of *mens rea* was required.

In *Garnett v. State*, the defendant was convicted of second degree rape. The Court traced contemporary scholarly criticism of

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*Id.* at 262. Thus, examined together, *Balint, Behman, Dotterweich*, and *Morissette* represent a consistent approach to the examination of the need for a mental element in a statutory offense.


38. *Id.* at 640, 547 A.2d at 1042; see Md. Ann. Code art. 27, § 287(a) & (d) (1992).


40. *Id.* at 649-51, 547 A.2d at 1046-47. The *Dawkins* court overruled its earlier ruling in *Jenkins v. State*, 215 Md. 70, 137 A.2d 115 (1957) (holding that knowledge of the contents of a package containing narcotics was not an element of the possession offense). In large part, this about-face was the result of the evolution of the statute governing the possession of controlled substances. The revised statute, unlike that under which Jenkins was charged, had "[t]he purpose of imposing a penalty upon possession of narcotics . . . to punish and deter immoral behavior having serious consequences, rather than to merely regulate conduct." *Dawkins*, 313 Md. at 651, 547 A.2d at 1047. Thus, the court's shift is consistent with its preference to recognize legislative intent.


42. *Id.* at 452, 583 A.2d at 250.

43. *Id.* at 456-57, 583 A.2d at 252-53.

44. *Id.* at 457, 583 A.2d at 253.


46. *Id.* at 575, 632 A.2d at 799. Under Maryland law, "A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . . Who is under 14 years of age and the person performing the act is at least four years older than
strict liability crimes and noted the acceptance by many state legislatures and appellate courts of mistake of age defenses in similar prosecutions. The court then explored the plain language of the statute and its legislative history and concluded that "the current law imposes strict liability on its violators." Although troubled by a harsh result, the court strongly maintained that the judiciary will defer to the legislature's purpose when determining whether a statutory offense requires proof of knowledge.

c. Statutory Interpretation and the Legislative History of Maryland's Child Pornography Statute.—The paramount judicial goal in the construction of a statute "is to ascertain and effectuate legislative intention." The "first recourse in doing so is to the words of the statute, giving them their ordinary and natural import." Nevertheless, this "plain-meaning rule does not force [the court] to read legislative provisions in rote fashion and in isolation." Instead, the court should "construe statutory language in light of the Legislature's general purpose and in the context of the statute as a whole," with recourse to legislative history when appropriate.

The facts of Garnett were striking. The defendant was a 20-year-old retarded man, with an I.Q. of 52 and the social skills of an 11-year-old boy. Garnett, 332 Md. at 574, 632 A.2d at 798. The victim was 13 years old; however, both she and her friends had told Garnett that she was 16. Id. at 577, 632 A.2d at 800. The defendant entered the victim's room at the latter's invitation, and the intercourse was consensual. Id. Garnett received a sentence of five years incarceration, which the trial court suspended and replaced with five years of probation; both the sentence and the conviction were affirmed. It.

47. Id. at 578-82, 632 A.2d at 800-02.
48. Id. at 582-84, 632 A.2d at 802-03.
49. Id. at 587, 632 A.2d at 804-05.
50. See id. at 588, 632 A.2d at 805 ("[D]efendants in extraordinary cases, like [Garnett], will rely upon the tempering discretion of the trial court at sentencing.").
53. Kaczorowski v. City of Baltimore, 309 Md. 505, 514, 525 A.2d 628, 632 (1987). The court, in attempting to clarify the application of the plain-meaning rule, noted that "the rule comports with common sense, because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal. But the plain-meaning rule is not rigid." Id.
54. Crescent City Jaycees, 330 Md. at 468, 624 A.2d at 959; see also Williams v. State, 329 Md. 1, 15-16, 616 A.2d 1275, 1282 (1992) ("We attempt to divine legislative intent from the entire statutory scheme, as opposed to scrutinizing parts of the statute in isolation.").
55. NCR Corp., 313 Md. at 125, 544 A.2d at 767.
In 1978, the General Assembly passed Maryland's first child pornography statute.\textsuperscript{56} That law, in part, made it an offense to "photograph or film a person under 16 years of age in an obscene act."\textsuperscript{57} As the Court of Special Appeals noted, "the Legislature limited the reach of the statute to conduct or materials that were 'obscene,'" ostensibly to avoid First Amendment challenges.\textsuperscript{58} The statute was subsequently amended twice in response to the Supreme Court's opinion in \textit{Ferber},\textsuperscript{59} first in 1985,\textsuperscript{60} and again one year later.\textsuperscript{61}

The most recent amendment to the statute occurred in 1989, when the age of the victim was changed to eighteen.\textsuperscript{62} Prior to passage, the draft amendment "contained a provision that '[a] mistake of age is not a defense to a prosecution under this section' (emphasis added), but the legislature deleted that statement . . . apparently in response to a concern registered by a representative of the American Civil Liberties Union."\textsuperscript{63} Additionally, the title of the 1989 bill originally "provided that the purpose of the bill was, in part, to 'prohibit[ ] a certain defense to prosecution.'"\textsuperscript{64} This language was also deleted.\textsuperscript{65} Thus, the current version of Section 419A(c) is silent as to a requisite state of mind for conviction.

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57. Id. This initial enactment was, in some respects, similar to the Protection of Children Against Sexual Exploitation Act of 1977, codified at 18 U.S.C. §§ 2251-2253 (1988), which had been passed by Congress three months earlier. \textit{See} \textit{Outmezguine} v. State, 97 Md. App. 151, 159-63, 627 A.2d 541, 545-46 (1993). For a discussion of the development of the federal statutes, see \textit{id.}; see also United States v. United States Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 537-38 (9th Cir. 1988) (examining "whether scienter as to age is an element of the offense [proscribed by 18 U.S.C. § 2251(a)].").
59. 458 U.S. 747 (1982); \textit{see supra} notes 22-23 and accompanying text.
60. Ch. 494, 1985 Md. Laws (increasing the applicable penalty, detailing evidentiary methods, and adding the phrase "sexual conduct").
61. Ch. 112, 1986 Md. Laws (making it criminal to photograph a "person under 16 years of age" performing "sexual conduct").
62. \textit{See} Md. Ann. Code art. 27, § 419A (1992). The amendment removed the "person under 16 years of age" language and replaced it with the word "minor." \textit{Id.} "Minor" is defined as "an individual under 18 years of age." \textit{Id.}
64. \textit{Outmezguine}, 335 Md. at 46 n.16, 641 A.2d at 883 n.16 (quoting H.B. 243, 1989 Md. Laws 1).
65. \textit{Id.} at 47 n.17, 641 A.2d at 883 n.17.
3. **The Court’s Reasoning:**

   a. **Defendant’s First Amendment Challenge.**—The Court of Appeals first addressed Outmezguine’s contention that without a scienter requirement the statute would be unconstitutionally overbroad and thus facially void.\(^6\) Outmezguine asserted that if Section 419A(c) operates as a strict liability offense, then “a photographer may decide not to take pictures of adults engaging in nonobscene sexually explicit conduct because of a fear that a minor, posing as an adult, is the subject of the photographs.”\(^6\) The issue was whether Section 419A(c), which proscribes constitutionally unprotected speech,\(^8\) would likely chill protected forms of expression. The court concluded that “the vast majority of [adult pornographers] would continue to produce their work even if they were faced with a strict liability child pornography statute.”\(^9\) Therefore, the court held that the First Amendment does not prevent a state from protecting its children against sexual exploitation with a statute that imposes strict liability upon its violators.\(^7\)

   The court examined opinions from other jurisdictions that have addressed similar cases\(^7\) and found that knowledge of a minor’s age is not required for a conviction under Section 419A(c).\(^7\) In acknowledgment that the Supreme Court has mandated “some element of scienter,”\(^7\) the court asserted that under Section 419A the “defendant photographer must have knowledge that he or she is taking pictures of sexual conduct as defined in § 416.”\(^7\) Therefore, a sufficient scient-

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66. *Id.* at 34-38, 641 A.2d at 875; *see supra* notes 26-29 and accompanying text.

67. *Outmezguine*, 335 Md. at 31, 641 A.2d at 875.

68. “[C]hild pornography . . . is unprotected speech subject to content-based regulation.” *New York v. Ferber*, 458 U.S. 747, 766 n.18 (1982); *see supra* notes 20-25 and accompanying text.


70. *Id.* at 38, 641 A.2d at 878-79.

71. *Id.* at 38-39, 641 A.2d at 879-80 (citing, *inter alia*, United States v. United States Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 537-38 (9th Cir. 1988) (holding that “knowledge of the minor’s age is not necessary for a conviction under section 2251(a) [producing materials depicting a minor engaged in sexually explicit conduct].”)); *Hicks v. State*, 561 So. 2d 1284 (Fla. Dist. Ct. App. 1990) (holding that ignorance of a victim’s age is not a defense to a charge of using a minor in a sexual performance); *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989) (holding “that the first amendment does not preclude strict liability [for an offense of employing or permitting a minor to engage in sexual performance]”).

72. *Outmezguine*, 335 Md. at 40-41, 641 A.2d at 880.


74. *Outmezguine*, 335 Md. at 40, 641 A.2d at 880.
ter element exists within Section 419A to satisfy the requirement of Ferber.  

b. Strict Liability Precedent and Legislative Intent.—Historically, the Court of Appeals has read a scienter element into statutory offenses. But the court distinguished Outmezguine from this precedent by focusing upon legislative intent. In Dawkins and McCallum, for example, the court concluded that the legislature “intended to provide a mens rea requirement” despite the absence of such a term in the statute. The court was unwilling, however, to draw a similar conclusion about the legislature’s purpose in drafting Section 419A(c). Instead, the court found similarities in the legislative purposes of the statutes in question in Outmezguine and Garnett v. State and followed Garnett’s call for deference to the legislature.

The court examined the language of Section 419A(c) to see if knowledge of the victim’s age was intended as an affirmative element of the offense, and to determine if a mistake of age defense was available to one charged with the offense. Because Section 419A(c) is silent as to the requisite mental state, the court examined other subsections of 419A to discern the legislature’s intent. As both subsections (b) and (d) of 419A explicitly require knowledge, the court concluded that “the Legislature deliberately and purposefully chose not to make knowledge of the child’s age an element of the

75. Id.; see also Hamling v. United States, 418 U.S. 87, 123 (1974) (determining that it is sufficient for an obscenity prosecution to prove that the defendant had knowledge of the general “character and nature of the materials,” and therefore unnecessary to show knowledge that they were legally obscene).

76. See supra notes 36-44 and accompanying text.
77. 319 Md. 638, 547 A.2d 1041 (1988); see supra notes 37-40 and accompanying text.
78. 321 Md. 451, 583 A.2d 250 (1991); see supra notes 41-43 and accompanying text.
79. Outmezguine, 335 Md. at 42, 641 A.2d at 881.
80. Id. at 41-43, 641 A.2d at 881. “[W]e are unable to say that the Legislature intended to include a requirement that the State affirmatively prove that a photographer or filmmaker of child pornography had knowledge of the child’s minority.” Id. at 42-43, 641 A.2d at 881.
81. 332 Md. 571, 632 A.2d 797 (1993); see supra notes 45-50 and accompanying text.
82. Outmezguine, 335 Md. at 43-44, 641 A.2d at 881-82.
83. Id. at 41-43, 641 A.2d at 881-83.
84. Id. at 43-45, 641 A.2d at 883-84.
86. See supra notes 51-54 and accompanying text.
87. Section 419A(b), in pertinent part, makes it illegal to “knowingly permit[ ] a minor to engage as a subject in the production of obscene matter or ... sexual conduct ....” Md. Ann. Code art. 27, § 419A(b) (1992).
88. Section 419A(d) prohibits “knowingly promot[ing], distribut[ing], or possess[ing] with intent to distribute any matter ... that depicts a minor engaged as a subject in sexual conduct.” Md. Ann. Code art. 27, § 419A(d) (1992).
crime [in subsection (c)]."89 The court also noted that at the time of the original enactment, the General Assembly had surveyed other child pornography bills, several of which had express knowledge requirements.90 It therefore concluded "that knowledge as to the minor's age is not an element of the offense."91

The second part of the legislative intent analysis concentrated upon the 1989 amendment of the statute.92 The court inferred from the removal of the prohibition against the mistake of age defense that the legislature intended to leave the viability of that excuse intact.93 The court concluded that "a defendant indicted under § 419A(c) [is permitted] to argue that he was reasonably mistaken about a child's age."94

c. Burden of Proving Mistake of Age and its Inapplicability to Outmezguine.—Although the court concluded that scienter is not an element of the offense, the court ruled that mistake of age is still a defense.95 Outmezguine argued that the two positions were incompatible.96 However, the court characterized its determination that "scienter is not an element but mistake of age is a defense which may be raised by the defendant" as "not unreasonable."97 Both Outmezguine and the State agreed that the ultimate burden of persuasion on this issue cannot be placed upon the defendant.98 Accepting this position, the court adopted mistake of age procedures, articulated by Judge Bell in his dissent to Garnett v. State, which state that:

89. Outmezguine, 335 Md. at 45, 641 A.2d at 882. The court reinforced this conclusion by noting the language of Article 27, Section 420. See id. at 45 n.15, 641 A.2d at 882 n.15.
90. Id. at 45, 641 A.2d at 882; see also Outmezguine v. State, 97 Md. App. 151, 162, 627 A.2d 541, 546 (1993) ("The question of whether to include such a requirement was thus squarely before the Legislature, and, by enacting the bill that it did, it chose not to do so.").
91. Outmezguine, 335 Md. at 45, 641 A.2d at 882-88.
92. See supra notes 61-65.
93. Outmezguine, 335 Md. at 47, 641 A.2d at 883.
94. Id.
95. Id. at 49, 641 A.2d at 884.
96. Id.
97. Id. Outmezguine's position was that a mistake of age defense is possible only when "a crime invol[es] a culpable mental state . . . ." Id. The court responded that this contention was "erroneous," but did not expressly elaborate. Id. at 49, 641 A.2d at 885. Effectively, the court's position infers a presumption, not that the defendant had per se knowledge of the victim's age, but that the defendant intended to make a sexually-explicit, visual reproduction of a minor. The defendant may produce enough evidence to raise a mistake of age defense in an effort to rebut the initial presumption. At this point, the state would assume the burden of proving beyond a reasonable doubt the defendant's knowledge.
98. Id. at 50, 641 A.2d at 885.
Before the State’s burden affirmatively to prove the defendant’s mental state kicks in, the defendant must have generated the issue by producing “some evidence” supporting his or her claim of mistake of fact. If the defendant generates the issue, the State must prove beyond a reasonable doubt that the act was committed without any mistake of fact—that the defendant acted intentionally and knowingly.99

4. Analysis.—The primary holding in Outmezguine, that knowledge of the victim’s minority is not an element of the offense prescribed by Section 419A(c) of Article 27,100 is a pragmatically reasoned decision that preserves the legislative intent to create strict criminal liability while at the same time recognizes the right of a defendant to present a mistake of age defense. The court’s conclusion that First Amendment protections of free expression are not substantially impaired by such an interpretation of Section 419A is supported by well-established constitutional jurisprudence upholding statutory proscription of child pornography.101 The state’s legitimate interest in protecting children from sexual exploitation is sufficiently compelling to withstand an overbreadth analysis.102 The relative ease with which pornographers can modify their conduct so as to protect against criminal liability fortifies the court’s interpretation of the statute.103

99. Id. at 51, 641 A.2d at 885 (quoting 332 Md. at 594 n.3, 692 A.2d at 808 n.3 (Bell, J., dissenting)). The process discussed by Judge Bell in Garnett and now applicable to prosecutions under § 419A(c) stem from those utilized in self-defense cases. Id. Judge Bell dissented in Outmezguine in order to affirm his position in Garnett regarding mistake of age and to object to the majority’s First Amendment holding. Outmezguine, 335 Md. at 53, 641 A.2d at 886 (Bell, J., dissenting). Judge Bell also rejected the court’s conclusion regarding the defendant’s failure to preserve the mistake of age issue. Id. at 54-55, 641 A.2d at 887-88.

The majority’s final determination on the matter was that Outmezguine failed to preserve the mistake of age issue for appeal. 335 Md. at 51-52, 641 A.2d at 886. The court reasoned that Outmezguine’s defense was “I did not know how old she was,” not “[I] reasonably thought Jennifer was 18 or older . . . .” Id. The former statement was insufficient to generate the issue of the defendant’s knowledge of the victim’s age. Id. at 52, 641 A.2d at 886. By failing “to raise the defense of reasonable mistake of age . . . [he] consequently waived his right to appellate review on that issue.” Id.

100. Outmezguine, 335 Md. at 45, 641 A.2d at 882-83.

101. Id. at 34-41, 641 A.2d at 877-80; see, e.g., Osborne v. Ohio, 495 U.S. 103, 111 (1990) (“Given the gravity of the State’s interests in this context, we find that [a state] may constitutionally proscribe the possession and viewing of child pornography.”); Ferber v. New York, 458 U.S. 747, 773 (1982) (stating, with respect to a child pornography law similar to Maryland’s, that “[w]e consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.”).

102. Outmezguine, 335 Md. at 36-38, 641 A.2d at 879.

103. See id. at 37, 641 A.2d at 878.
The objection may be raised that identification of age is easily falsified and even a good-faith attempt to verify the information may fail to reveal the deception of a minor. Such hoaxes have already resulted in child pornography prosecutions in other jurisdictions. But the availability of a mistake of age defense renders such an objection virtually moot in Maryland prosecutions.

There are, nevertheless, sound policy reasons that rebut the objections to the lack of a knowledge element in the offense. Surely, minors who are desperate enough to lie about their age in order to participate in this exploitative and dangerous industry are those most in need of the protections that are derived from strict criminal liability. As the dissenting opinion in District Court argued:

Congress intended to protect children like Traci Lords, who try to pass themselves off as adults to appear in pornography. Such children are in grave danger of sacrificing their physiological, emotional, and mental health—more in danger as they have begun to accept the sordid world of child pornography as a way of life. These children are inexperienced and uneducated; most important, they lack the foresight we attribute only to adults. Congress has chosen to protect such children against their own immaturity, against the unseasoned, desperate choices children are wont to make.

The imposition of strict criminal liability on photographers who elect to use victims of suspect age, regardless of the photographer's level of knowledge, is the only realistic means to implement the legislative purpose.

It is significant that the Court of Appeals concluded that a reasonable mistake of age defense is available to a defendant charged under Section 419A(c), notwithstanding Outmezguine's failure to pre-

104. See, e.g., United States v. United States Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 536 (9th Cir. 1988) (explaining how "purveyors of smut from coast to coast were taken in by an arful, studied and well-documented charade whereby [the actress Traci] Lords successfully passed herself off as an adult.").


106. See Outmezguine, 335 Md. at 47, 641 A.2d at 883; see also infra notes 108-111 and accompanying text. The Ninth Circuit has also tempered the perceived injustice of strict liability for such deceptions by minors by permitting a mistake of age defense. District Court, 858 F.2d at 542.

107. District Court, 858 F.2d at 544 (Beexer, J., dissenting).

108. Outmezguine, 335 Md. at 47, 641 A.2d at 883.
serve this issue for review. This dicta reflects the court’s conclusion that the legislative intent will be read to permit a reasonable mistake of age defense, although it is not a final determination. In practice, a defendant tried for violating Section 419A(c) may now plausibly raise a reasonable mistake of age defense, absent any further legislative amendment to the statute.

The court’s opinion may also be read as a judicial message to the General Assembly. Deference to the Legislature has been integral to the Court of Appeals’s approach to strict statutory liability. Although its conclusion that a mistake of age defense is available remains dictum, the majority has informed the legislature of the court’s reading of the statute’s history. If the court’s view is correct, there need be no legislative action and the defense will be available to future defendants. However, if the court is incorrect in its reading of legislative intent, the General Assembly is invited to amend the statute and proscribe the defense.

109. *Id.* at 52, 641 A.2d at 886. Because the issue was not before the Court of Appeals, it is possible to construe Parts IV(B) and V of the majority opinion as advisory. *See infra* notes 112-115 and accompanying text.

110. *See Outmezguine*, 335 Md. at 45, 47, 641 A.2d at 883, 885.

111. The defendant who raises the mistake of age defense is still required to offer some evidence of a reasonable belief that the minor was at least 18 years of age. Ignorance of the child’s age is insufficient. *Id.* at 52, 641 A.2d at 886. The State will then have to prove beyond a reasonable doubt that the defendant knew the subject of the photographs was a minor. *Id.* at 50-51, 641 A.2d at 885; *see also* Garnett v. State, 332 Md. 571, 594 n.3, 632 A.2d 797, 808 n.3 (1993) (Bell, J., dissenting). This method of applying the defense is constitutionally sound. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975); *cf.* District Court, 858 F.2d at 543-44 (accepting a mistake of age defense which requires the defendant to meet the burden of persuasion upon the issue by clear and convincing evidence). Moreover, it is compatible with the court’s conclusion that the offense does not require knowledge of the victim’s age. *See Outmezguine*, 335 Md. at 49, 641 A.2d at 884-85. By adopting this procedure, the court’s decision still comports with the strict liability model: a defendant who either knows that the victim is a minor or is ignorant of the child’s age will be convicted upon sufficient proof that the defendant produced sexually-oriented materials; however, a defendant who attempted to work only with adult subjects will have the opportunity to assert an affirmative defense.

112. The court sent a more overt dispatch with its Garnett opinion. *See Garnett*, 332 Md. at 588, 632 A.2d at 805 (“Any new provision introducing an element of *mens rea*, or permitting a defense of reasonable mistake of age, ... should properly result from an act of the Legislature itself, rather than judicial fiat.”).

113. *See supra* notes 36-50 and accompanying text.

114. *See Outmezguine*, 335 Md. at 50-51, 641 A.2d at 885-86.

115. The *Outmezguine* court was particularly careful to impress its position: “Therefore, we hold that the First Amendment does not require scienter to be an element of the offense, nor does it require that a reasonable mistake of age defense be available to defendants ...” *Id.* at 38, 641 A.2d at 879; *see also id.* at 40-41, 641 A.2d at 880.
5. Conclusion.—The Court of Appeals' conclusion that knowledge of the child's age is not an element of a prosecution under Article 27, Section 419A(c) is consistent with the court's long-standing deference to legislative intent with respect to strict criminal liability. The acceptance of a reasonable mistake of age defense is an essential component of the court's decision and, absent legislative response to Outmezguine, the defense will be available to a defendant charged under Section 419A(c). Because the court relied upon a legislative intent analysis rather than upon a constitutional analysis to reach its decision, the way remains open for the General Assembly to reexamine these issues.

Matthew G. Zaleski III
IV. ENVIRONMENTAL LAW

A. Common-Law Tort Liability of Prior Lessees of Commercial Property

In Rosenblatt v. Exxon Co., the Maryland Court of Appeals considered whether a cause of action in strict liability, negligence, trespass, or nuisance could be maintained against a prior lessee of commercial property for economic losses sustained by a subsequent lessee as a result of the prior lessee's alleged chemical contamination of the property. The court held that a subsequent lessee who fails to inspect the property adequately before taking possession could not assert any of these actions against a prior lessee. In so holding, the court maintained the current status of the law by refusing to broaden the scope of these tort claims.

1. The Case.—Exxon Company, U.S.A. (Exxon) leased real property in Prince George's County from 1951 until 1985. Throughout this thirty-four year period, Exxon sublet the property to independent dealers who operated a gasoline station on the site. Upon the termination of its lease, Exxon removed the underground gasoline storage tanks that it had previously installed in 1951.

Rosenblatt, who had intentions of opening an automotive quick lubrication business, leased the same property "as is" in July 1986. Rosenblatt's rental payments, however, remained contingent on his receipt of the necessary building permits to construct a facility and on a special exception to permit the operation of his proposed "Grease-N-Go" business.

After execution of the lease agreement, Rosenblatt requested and paid for a geotechnical study of the property. A report dated January 30, 1987, recommended that an environmental study of the property be undertaken due to suspected hydrocarbon contamination of the soil and groundwater. Rosenblatt, however, did not immediately request this second study. In May 1988, Rosenblatt obtained the

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1. 335 Md. 58, 642 A.2d 180 (1994).
2. Id. at 62-63, 642 A.2d at 182.
3. Id. at 75-80, 642 A.2d at 188-91.
4. Id.
5. Id. at 63, 642 A.2d at 182.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
special exception to operate the business and he began to pay rent the following October.\textsuperscript{13}

In January 1989, nearly two years after the date of the geotechnical study, Rosenblatt informed Exxon about the possibility of hydrocarbon contamination of the property.\textsuperscript{14} Exxon denied any responsibility because no environmental report existed to verify the contamination.\textsuperscript{15} Subsequently, in March 1989, Rosenblatt commissioned an environmental study.\textsuperscript{16} The report revealed “extensive petroleum contamination of the soil and groundwater”\textsuperscript{17} and the Maryland Department of the Environment (MDE) was notified.\textsuperscript{18} Shortly thereafter, Exxon began remediation of the site.\textsuperscript{19} Rosenblatt’s efforts to prepare the property for his lubrication business proceeded during remediation, although he had to coordinate the work with Exxon’s cleanup.\textsuperscript{20} Rosenblatt’s bank, however, informed him that it would not finance the project, due in part to the environmental condition of the property.\textsuperscript{21} Consequently, Rosenblatt was unable to open his business.\textsuperscript{22}

Rosenblatt sued Exxon in the Circuit Court for Prince George’s County for the costs he incurred due to the petroleum contamination of the property, as well as the loss of future profits.\textsuperscript{23} Exxon moved for summary judgment on the strict liability, negligence, trespass, and nuisance claims.\textsuperscript{24} The circuit court granted the motion and held that these actions were “available only to occupants of neighboring land or others to whom a duty was owed by the defendant.”\textsuperscript{25} Rosenblatt appealed,\textsuperscript{26} but before the Court of Special Appeals could review the

\begin{footnotes}
\item 13. \textit{Id.} at 64, 642 A.2d at 182.
\item 14. \textit{Id.}
\item 15. \textit{Id.}
\item 16. \textit{Id.}
\item 17. \textit{Id.}
\item 18. \textit{Id.}, 642 A.2d at 183.
\item 19. \textit{Id.} Although MDE required Exxon to do a hydrogeological study, \textit{id.}, Exxon’s remediation efforts were apparently voluntary. Brief of Appellees at 5, Rosenblatt v. Exxon Co., 335 Md. 58, 642 A.2d 180 (1994) (No. 93-1364).
\item 20. \textit{Rosenblatt}, 335 Md. at 64, 642 A.2d at 183.
\item 21. \textit{Id.} at 65, 642 A.2d at 183.
\item 22. \textit{Id.}
\item 23. \textit{Id.} at 64, 642 A.2d at 183.
\item 24. \textit{Id.} at 65, 642 A.2d at 183. After Rosenblatt filed the initial action in the circuit court, Exxon successfully removed the case to the United States District Court for the District of Maryland. \textit{Id.} That court granted Exxon’s motion for summary judgment on all counts except the negligence, strict liability, nuisance, and trespass claims. \textit{Id.} The district court then remanded the case to the circuit court for further proceedings. \textit{Id.}
\item 25. \textit{Id.}
\item 26. \textit{Id.}
\end{footnotes}
case, the Court of Appeals granted certiorari\textsuperscript{27} to consider the availability of these tort claims to a lessee of commercial property who incurs economic damages as a result of the prior lessee's toxic contamination of that property.\textsuperscript{28}

2. Legal Background.—

\textit{a. Strict Liability.—}In \textit{Yommer v. McKenzie}\textsuperscript{29} the Court of Appeals embraced the modern rule\textsuperscript{30} that imposes strict liability on those who carry on abnormally dangerous activities.\textsuperscript{31} The \textit{Yommer} court adopted Section 520 of the \textit{Restatement (Second) of Torts} to determine whether an activity would be considered abnormally dangerous.\textsuperscript{32} In applying the factors listed in Section 520, the court concluded that

\begin{itemize}
\item \textsuperscript{27} Rosenblatt v. Exxon Co., 333 Md. 429, 635 A.2d 976 (1994).
\item \textsuperscript{28} Rosenblatt, 335 Md. at 62-63, 642 A.2d at 182.
\item \textsuperscript{29} 255 Md. 220, 257 A.2d 138 (1969).
\item \textsuperscript{30} The original rule was articulated over a century ago in the English case of Fletcher v. Rylands. L.R. 1 Ex. 265 (1866), \textit{aff'd}, Rylands v. Fletcher, L.R. 3 H.L 380 (1868). The \textit{Rylands} rule has been stated as "[one] who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."
\item \textsuperscript{31} \textit{Rylands}, L.R. 1 Ex. at 279; \textit{see also} Rosenblatt, 355 Md. at 69, 642 A.2d at 185; Toy v. Atlantic Gulf & Pac. Co., 176 Md. 197, 213, 4 A.2d 757, 765 (1939) (holding that the \textit{Rylands} doctrine did not apply unless the defendant had control over the land where the activity occurred); Baltimore Breweries' Co., Ltd. v. Ranstead, 78 Md. 501, 508, 28 A. 273, 274 (1894) (applying the \textit{Rylands} doctrine to hold defendant brewery liable for discharging water onto plaintiff's property).
\item \textsuperscript{32} The House of Lords, affirming the Exchequer Chamber, limited the \textit{Rylands} doctrine to "non-natural use" of the land. \textit{Rylands}, L.R. 3 H.L at 339. The modern doctrine of strict liability considers non-natural use as a factor in considering whether an activity is abnormally dangerous. \textit{Restatement (Second) of Torts} § 520 cmt. j (1977); \textit{see also infra} note 32.
\item \textsuperscript{31} \textit{Yommer}, 255 Md. at 223-24, 257 A.2d at 140. Section 519 of the \textit{Restatement} provides:
\begin{enumerate}
\item One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
\end{enumerate}
\item \textsuperscript{32} \textit{Yommer}, 255 Md. at 224-25, 257 A.2d at 141. Section 520 of the \textit{Restatement} provides:
\begin{enumerate}
\item In determining whether an activity is abnormally dangerous, the following factors are to be considered:
\begin{enumerate}
\item existence of a high degree of risk of some harm to the person, land or chattels of others;
\item likelihood that the harm that results from it will be great;
\item inability to eliminate the risk by the exercise of reasonable care;
\item extent to which the activity is not a matter of common usage;
\item inappropriateness of the activity to the place where it is carried on; and
\item extent to which its value to the community is outweighed by its dangerous attributes.
\end{enumerate}
\end{enumerate}
\end{itemize}

\textit{Restatement, supra} note 30, § 519.

\textit{Restatement, supra} note 30, § 520.
the defendants' gasoline station was an abnormally dangerous activity for which they were strictly liable, thus relieving the plaintiffs from the necessity of proving negligence. The court strongly emphasized that "the appropriateness of the activity in the particular place where it [was] being carried on" was the "most crucial factor" in qualifying an activity as abnormally dangerous.

In Toy v. Atlantic Gulf & Pacific Co., a case that preceded the explicit adoption of Sections 519 and 520 of the Restatement, the court limited the Rylands doctrine to those who occupy "land in the sense that [their] occupancy is possession taken for the purpose of exercising control of the land." The Toy court held that the defendant was not strictly liable for its dredging activities because it did not have the requisite control over the land; it was merely depositing excavated material onto land under the government's control. The court restricted its application of the Rylands doctrine because of the great potential for liability it imposed on property owners. Maryland courts have subsequently limited the doctrine of strict liability to activities considered abnormally dangerous with respect to the location where they were carried on and to actors who had control over the land when engaged in the questionable activities.

b. Negligence.—The Court of Appeals has limited negligence actions to the class of foreseeable plaintiffs to whom a defendant has a duty. This policy choice to limit the potential liability is also evident in the requirement that the cause of injury be proximate. To decide whether to impose a duty the court also considers the relationship of the actors.

With respect to the parties to a commercial real estate transaction, Maryland courts continue to require the general duty of

33. Yommer, 255 Md. at 224-27, 257 A.2d at 140-41.
34. Id. at 225, 257 A.2d at 140.
35. 176 Md. 197, 4 A.2d 757 (1939).
36. Id. at 213, 4 A.2d at 765; see also supra note 30.
37. Toy, 176 Md. at 213-14, 4 A.2d at 765.
38. Id. at 213, 4 A.2d at 765. In Kelly v. R.G. Indus., Inc., 304 Md. 124, 497 A.2d 1143 (1985), the Maryland Court of Appeals reaffirmed its holding in Toy stating, "[t]his court has refused to extend the abnormally dangerous activity doctrine to instances in which the alleged tortfeasor is not an owner or occupier of land." Id. at 133, 497 A.2d at 1143.
39. Henley v. Prince George's County, 305 Md. 320, 333-34, 503 A.2d 1333, 1340 (1986) ("[Foreseeability] is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm.").
40. Id. The court recognized that the limitations that foreseeability places on duty and the limitations that proximity places on causation are similar. Id. at 334, 503 A.2d at 1340.
inspection that the doctrine of *caveat emptor*\(^42\) imposes on a lessee or vendee.\(^43\) Under some circumstances, however, a vendor may be liable for known dangerous conditions on the property after the transfer, but this exception "applies only where bodily harm is suffered."\(^44\)

c. *Trespass and Nuisance.*—Maryland courts recognize a claim in trespass "when a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land."\(^45\) While defendant's control or possession of the property adjacent to the plaintiff's land is not necessary,\(^46\) actions in trespass have only been permitted where the interference was to land in possession of another.\(^47\) Nuisance is the interference with an occupier's use and enjoyment of land.\(^48\) Like trespass, nuisance has traditionally been applied only between contemporaneous occupiers of land.\(^49\)

\(^{42}\) *See* RESTATEMENT (SECOND) OF TORTS §§ 352-53 (1965). The *Restatement* notes:

> Under the ancient doctrine of *caveat emptor*, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. . . . The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer. Still less is he liable to any third person who may come upon the land, even though such entry is in the right of the vendee.

*Id.* § 352 cmt a.

\(^{43}\) *Council of Co-Owners,* 308 Md. at 37-38, 517 A.2d at 346.

\(^{44}\) *Id.* at 38, 517 A.2d at 346. This exception is one of fairness. It is more fair to hold a prior occupier of land, who knew or should have known of the dangerous condition, liable when the current occupier could not have discovered the condition through a reasonable inspection, but instead discovers the condition only when someone is physically injured. The court in *Council of Co-Owners,* however, held that when a developer violates a building code meant as a safety measure, the developer is liable merely for creating a risk of death or bodily injury even if no actual injury has yet occurred. *Id.* at 40-41, 517 A.2d at 348.

\(^{45}\) Rosenblatt v. Exxon, 335 Md. 58, 78, 642 A.2d 180, 189 (1994).

\(^{46}\) *See* Rockland Bleach & Dye Works Co. v. H.J. Williams Corp., 242 Md. 375, 385, 219 A.2d 48, 53 (1966) (holding that the plaintiff had presented a prima facie case of trespass even though the defendants did not own the adjacent property).

\(^{47}\) *Rosenblatt,* 335 Md. at 78, 642 A.2d at 189.

\(^{48}\) Meadowbrook Swimming Club, Inc. v. Albert, 173 Md. 641, 645, 197 A. 146, 148 (1938). A plaintiff may bring a claim in both trespass and nuisance based on the same circumstances. Both causes of action are usually asserted in a toxic tort action because the statute of limitations and the burden of proof may differ for each claim. Hershel J. Richman et al., *Toxic Tort Litigation: Theories of Liabilities and Damages,* in ENVIRONMENTAL LITIGATION 90, 96-97 (Janet S. Kole et al. eds., 1991).

3. **The Court’s Reasoning.**—

   a. **Strict Liability.**—The Rosenblatt court declined to extend the doctrine of strict liability for abnormally dangerous activities to prior lessees of land for economic damages sustained by current lessees of the same land.\(^5\) The court’s holding rejected the reasoning employed by the New Jersey Supreme Court in *T & E Industries v. Safety Light Corp.*\(^5\) and emphasized the limited situations in which Maryland courts have applied strict liability for abnormally dangerous activities.\(^5\) The court then reiterated policy reasons behind the strict liability doctrine.\(^5\)

In *T & E Industries*, the New Jersey Supreme Court held that a prior occupier whose abnormally dangerous activity contaminated the land was liable to the current occupier for economic damages.\(^5\) The *T & E Industries* court rejected the argument that an “as is” clause in the sales contract amounted to an assumption of the risk by the buyer that released the defendant from any liability and held that one can only knowingly and voluntarily assume the risk of an abnormally dangerous activity.\(^5\)

The Rosenblatt court rejected this reasoning and emphasized that a cause of action in strict liability is available to adjacent landowners because they are unable to protect themselves from the harm that might result from neighbors who engage in abnormally dangerous ac-

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50. Rosenblatt, 355 Md. at 73, 642 A.2d at 187.
51. 587 A.2d 1249, 1257 (N.J. 1991) (permitting a subsequent occupier of contaminated land to maintain an action in strict liability against the previous occupant).
52. Rosenblatt, 335 Md. at 72, 642 A.2d at 186. “[W]e have applied the doctrine only to claims by an occupier of land harmed by the activity abnormally dangerous in relation to the area, which is carried on by a contemporaneous occupier of neighboring land.” *Id.*
53. See Rosenblatt, 335 Md. at 69-76, 642 A.2d at 185-88. “We have taken care to limit the application of this doctrine because of the heavy burden it places upon a user of land.” *Id.* at 73, 642 A.2d at 187.
activities. Subsequent purchasers or lessees, on the other hand, are in a position to avoid harm by "inspect[ing] adequately before taking possession of the property."

The court strictly interpreted Section 519 of the Restatement (Second) of Torts to underscore its refusal to extend the abnormally dangerous activity doctrine. Section 519 imposes liability on "[o]ne who carries on an abnormally dangerous activity [which results in] harm to the person, land or chattels of another." The court reasoned that the harm caused by Exxon did not occur to the person or property "of another" because Exxon occupied the property when it was contaminated. The court also noted that economic damages did not fall within the scope of the Restatement because economic injury is not injury to person or property.

b. Negligence.—The Rosenblatt court held, as a matter of law, that Exxon did not owe Rosenblatt a duty. In applying the "foreseeability of harm" test, the court concluded that there was no relationship between the parties and therefore it was not foreseeable that Exxon's acts or omission would harm Rosenblatt. The court emphasized the need to balance "the burdens... in avoiding harm" with the right of occupiers of land to the unrestrained use of their property.

The court reasoned that a lessee is in the better position to avoid the

57. Rosenblatt, 335 Md. at 73-74, 642 A.2d at 187-88.
58. Id. at 75, 642 A.2d at 188.
59. Id.
60. Restatement, supra note 30, § 519.
61. Rosenblatt, 335 Md. at 73-74, 642 A.2d at 187-88. The Rosenblatt court found support for this argument in Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990). Rosenblatt, 335 Md. at 95, 642 A.2d at 187. The Wellesley court stated that "[i]t would be nonsensical to even formulate a rule that an actor is strictly liable for harm inflicted on his or her own property or person." Id. at 102; see also Futura Realty v. Lone Star Bldg. Centers, 578 So. 2d 363, 365 (Fla. Dist. Ct. App. 1991) (accepting the Wellesley Hills Realty Trust analysis and affirming the lower court's summary judgment for defendant).
62. Rosenblatt, 335 Md. at 75, 642 A.2d at 188.
63. Id. at 78, 642 A.2d at 189; accord Wellesley Hills Realty Trust, 747 F. Supp. at 93 (holding that no duty is owed to future owners and recognizing that the purchaser can avoid the harm through inspection); Allied Corp. v. Frola, 730 F. Supp. 626 (D.N.J. 1990) (same); Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950 (R.I. 1994) (same).
64. Rosenblatt, 335 Md. at 77, 642 A.2d at 189; see supra notes 39-41.
65. Rosenblatt, 335 Md. at 77, 642 A.2d at 189. Presumably, the relationship the court found lacking was that of vendor/vendee or lessor/lessee.
66. Id.; accord Wellesley Hills Realty Trust, 747 F. Supp. at 100 ("[S]uch a duty would unreasonably interfere with a landowner's right of ownership; the right to do with his or her property as desired without liability so long as he or she does not interfere with the interests of others.").
harm particularly where the "condition . . . could have been discovered with reasonable diligence prior to occupancy."\(^6\)

c. **Trespass and Nuisance.**—The Court of Appeals noted the lack of legal authority supporting Rosenblatt’s arguments to broaden actions in trespass or nuisance to include injuries to subsequent lessees of land.\(^6\) The court rejected the rule set forth in Section 161 of the *Restatement (Second) of Torts*, which states, "[a] trespass may be committed by the continued presence on the land of a structure, chattel or other thing which the actor has tortiously placed there."\(^6\) The *Rosenblatt* court was persuaded by holdings of other courts that have rejected a subsequent occupier’s action in trespass or nuisance against a prior occupier.\(^7\)

4. **Analysis.**\(^7\) —

a. **Strict Liability.**—In *Rosenblatt*, the Court of Appeals held that a subsequent lessee of commercial land did not have a cause of action in strict liability for economic damages against the former lessee for alleged contamination of the land.\(^7\) The court’s narrow interpretation of Section 519 of the *Restatement* and its emphasis on the rights of possessors to use land freely, precludes the use of strict

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68. *Id.* at 78-80, 642 A.2d at 189-91.

69. *Restatement*, *supra* note 30, § 161. The court reasoned that § 161 applies to the land of another, and is not applicable to this case because Exxon contaminated the land during its own occupation; consequently, Exxon’s conduct was not tortious. *Rosenblatt*, 335 Md. at 78, 642 A.2d at 190.


71. This analysis will not examine the extension of trespass or nuisance doctrines to claims for economic damages because of the unlikeliness that a court will allow such an action to be asserted against a former lessee. *See* *Chen & McSlarrow*, *supra* note 49, at 1043-44 (arguing that trespass and nuisance have limited application to environmental problems between subsequent and prior property owners). Courts faced with these questions have overwhelmingly rejected these actions. *See supra* note 70.

liability by a subsequent lessee against a prior lessee for economic loss.\textsuperscript{73} The court reasoned that vendees and lessees can avoid harm by adequately inspecting the property.\textsuperscript{74} However, a subsequent lessee who incurs noneconomic harm to person or property as a result of a former lessee's abnormally dangerous activity may still be able to assert a cause of action. Unlike the circumstances in \textit{Rosenblatt}, if the harm occurs to "the person, land or chattels of another," it would satisfy the court's strict interpretation of Section 519.\textsuperscript{75} Thus, if the subsequent lessee completed an adequate inspection of the property which did not uncover the prior lessee's abnormally dangerous activity, the strict liability claim should, theoretically, be available.\textsuperscript{76} In practice, however, the claim will be precluded by the burden of inspection imposed under the doctrine of \textit{caveat emptor}, which applies to commercial real estate transactions.\textsuperscript{77}

By embracing \textit{caveat emptor} as the means by which subsequent lessees assume the risk of a prior lessee's abnormally dangerous activities,\textsuperscript{78} the court created a potential anomaly. It is possible that a potential plaintiff, who may have had a strict liability claim if harmed while the creator of the abnormally dangerous activity still occupied the land, may lose it if the harm arises after the land has transferred possession. For example, the court left open the question of whether third parties may bring strict liability claims against prior occupiers for injuries to their person or property caused by the prior occupiers' abnormally dangerous activity.\textsuperscript{79} It hardly seems likely, or fair, that the current occupier, who has not carried on the abnormally dangerous

\textsuperscript{73} Id. at 75-76, 642 A.2d at 188.
\textsuperscript{74} Id. at 75, 642 A.2d at 188.
\textsuperscript{75} \textit{Restatement}, supra note 30, § 519. In \textit{Rosenblatt}, the court employed a temporal argument to determine whether a subsequent lessee's person or property is harmed by a former lessee's undetected abnormally dangerous activity. If the harm is to the person or property, it is as if the former lessee still occupied the land. \textit{See Rosenblatt}, 335 Md. at 75, 642 A.2d at 188.

\textsuperscript{76} \textit{Rosenblatt}, 335 Md. at 75, 642 A.2d at 188. The \textit{Rosenblatt} court stated, "we have applied the doctrine only to claims by an occupier of land harmed by an activity abnormally dangerous in relation to the area, which is carried on by a contemporaneous occupier of neighboring land." \textit{Id.} at 72, 642 A.2d at 186. Note, however, that the court has never held that the injured party must be a contemporaneous occupier of land. \textit{See} John G. Anderson, Comment, The Ryland v. Fletcher Doctrine in America: Abnormally Dangerous, Ultra-hazardous, or Absolute Nuisance?, 1978 Ariz. Sr. L.J. 99, 105-06 (arguing that the Rylands doctrine, though most often applied to contemporaneous landowners is not so restricted).

\textsuperscript{77} \textit{Rosenblatt}, 335 Md. at 75 n.7, 642 A.2d at 188 n.7 (Under common law, absent an "express agreement, the vendor of land was not liable to the vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer."); \textit{see Restatement}, supra note 30, § 352 cmt. a.

\textsuperscript{78} \textit{Rosenblatt}, 335 Md. at 74, 77-78, 642 A.2d at 188, 189.
\textsuperscript{79} \textit{See supra} note 76.
activity, should be held strictly liable to a third party who incurs harm as a result of the prior occupier’s abnormally dangerous activity.\textsuperscript{80}

The better reasoned approach is that of the Supreme Court of New Jersey in \textit{T \& E Industries}. The New Jersey court rejected \textit{caveat emptor} and held that one can only knowingly and voluntarily assume the risk of an abnormally dangerous activity.\textsuperscript{81} This approach makes it difficult for those who carry on such activities to escape strict liability for long-term consequences, and it encourages lessees of commercial property to operate their businesses safely.\textsuperscript{82}

\textbf{b. Negligence.}—In applying the foreseeability of harm test, the \textit{Rosenblatt} court held that the lack of a relationship between the parties prevented the imposition of a duty on the prior lessee, particularly where the subsequent lessee should have known of the contamination.\textsuperscript{83} However, if the subsequent lessee has no reason to suspect contamination, and the risk is that of bodily harm, it is possible that the court may relax the relationship requirement.

In \textit{Tadjer v. Montgomery County},\textsuperscript{84} the prior lessee operated a landfill on leased land from 1950 until 1962 when it covered the landfill and vacated the property.\textsuperscript{85} In 1977, after the property had changed ownership several times, the plaintiff purchased it.\textsuperscript{86} In 1980, an explosion at the auto body repair shop built by the plaintiff on the site caused bodily injury.\textsuperscript{87} The injured party sued the plaintiff, now in the position of a subsequent occupier, who then filed a third party claim against the operator of the landfill alleging that methane gas emitted from buried waste caused the explosion.\textsuperscript{88} The Court of Special Appeals held that,

\begin{itemize}
  \item \textsuperscript{80} The lack of a strict liability claim would not, of course, bar the injured party from pursuing other theories of recovery that apply to occupiers of land. \textit{See} discussion \textit{infra} Part 4.b.
  \item \textsuperscript{81} \textit{T \& E Indus.}, 587 A.2d at 1259.
  \item \textsuperscript{82} The \textit{Rosenblatt} court did not decide whether the gasoline station was an abnormally dangerous activity; however, for the purpose of ruling on the defendants’ summary judgment motion, the trial court accepted Rosenblatt’s allegations that it was abnormally dangerous. Joint Record Extract at 12, \textit{Rosenblatt v. Exxon Co.}, 335 Md. 58, 642 A.2d 180 (1994) (No. 93-1364).
  \item \textsuperscript{83} \textit{Rosenblatt}, 335 Md. at 78, 642 A.2d at 189. The court stated that one who leased property knowing its former use as a gasoline station knew or should have known that contamination was likely, and was therefore in a position to avoid the consequences of the contamination. \textit{Id.}
  \item \textsuperscript{84} 61 Md. App. 492, 487 A.2d 658 (1985).
  \item \textsuperscript{85} \textit{Id.} at 494, 487 A.2d at 659.
  \item \textsuperscript{86} \textit{Id.} at 495, 487 A.2d at 659.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.}
\end{itemize}
[If the prior occupiers of land] knew or should have known that the artificial condition created by them involved an unreasonable risk of physical harm to others, then they have a duty to make safe or warn of the dangerous condition. Knowledge of the risk at the time the condition was created is a prerequisite to liability.\textsuperscript{89}

Thus, even though there was no vendee/vendor relationship, the Court of Special Appeals imposed a duty on the prior lessee.

The Tadjer court relied, in part, on the holding set forth in Hussey \textit{v.} Ryan.\textsuperscript{90} In Hussey, the Court of Appeals held that the creator of a dangerous condition on leased property could be held liable for damages caused by that condition even though the harm occurred after the lessee had surrendered his leasehold.\textsuperscript{91} The injury in Hussey occurred when a fence constructed on the property by the former tenant collapsed and injured a passerby.\textsuperscript{92}

In Tadjer, unlike Rosenblatt, the subsequent lessee did not know or have reason to know of the property's former use as a landfill. However, in both Tadjer and Rosenblatt, there was no relationship between the parties. A reading of the holding in Tadjer, which imposed a duty even though there was no relationship between the parties, in conjunction with the holding in Hussey, which imposed a continuing duty on a prior lessee, suggests that a prior lessee's liability arguably extends to subsequent lessees and occupiers who are reasonably unaware of dangerous conditions on the property.\textsuperscript{93}

5. \textit{Conclusion.}—The court in Rosenblatt did not allow a subsequent lessee to sustain a cause of action in strict liability, negligence,

\textsuperscript{89} \textit{Id.} at 502, 487 A.2d at 663 (citations omitted).
\textsuperscript{90} 64 Md. 426, 2 A. 729 (1886).
\textsuperscript{91} \textit{Id.} at 434, 2 A. at 731.
\textsuperscript{92} \textit{Id.} at 426-27, 2 A. at 729. Because the former tenant constructed and continued to own the fence and exercised the right to enter the premises, the court held that mere relinquishment of the lot did not warrant an exception to the "general principle that the originator of a nuisance is liable for injuries occasioned thereby." \textit{Id.} at 494, 2 A. at 731.
\textsuperscript{93} Numerous cases that involved only toxic waste abatement and not bodily injury influenced the Tadjer court's holding. \textit{See} Tadjer, 61 Md. App. at 500-02, 487 A.2d at 662-63.

In the vendor/vendee context the court has stated that "where the [dangerous] condition existed at the time of transfer, the vendor's duty to third parties and to the vendee will survive the sale and transfer if the vendor knew or had reason to know of the condition and of the risk involved, and failed to disclose that information to the vendee." \textit{Council of Co-Owners v. Whiting-Turner}, 308 Md. 18, 37, 517 A.2d 336, 346 (1986). The court noted that if the vendor did not actively conceal the condition, the liability extended only until the vendee had a reasonable amount of time to discover it, regardless of whether it was discovered. \textit{Id.} at 37 n.6, 517 A.2d 346 n.6; \textit{see supra} notes 42-44.
trespass, or nuisance to recover economic damages resulting from a prior lessee's contamination of the property. In so holding, the court emphasized the traditional application of these actions between contemporaneous land owners, the lack of duty owed a subsequent lessee, and the importance of occupiers of land to remain unburdened in the use of their property. Because subsequent lessees can inspect property before purchase or lease, they are in a better position than adjacent landowners to avoid the dangerous conditions created by prior lessees. *Rosenblatt,* however, may have left open the possibility that a subsequent lessee or a third party who suffers harm to person or property can assert a cause of action in strict liability or negligence if a reasonable inspection failed to uncover the danger and the prior lessee knew or should have known of the potential risk.

RICHARD J. FACCIOLI

B. Compliance with Federal Court Order Not a Defense to State Law Nuisance Action

In *Washington Suburban Sanitary Commission v. CAE-Link Corp.*, the Maryland Court of Appeals held that a common-law suit for nuisance damages, which arose from activity taken by a bi-county water authority (WSSC) to comply with federal court orders, was not preempted by the federal environmental statute under which the federal court orders were issued. The *CAE-Link* court held that such nuisance damages merely represented a part of the overall cost of compliance with the federal court orders. The court also reaffirmed that, under Maryland law, plaintiffs are not required to show negligence in nuisance claims.

1. *The Case.*—*CAE-Link* was the most recent case in a twenty-year series of legal actions that followed upon violations of the Federal Water Pollution Control Act (Clean Water Act) at the Blue Plains

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3. *Id.* at 139, 622 A.2d at 757.
4. *Id.* at 124-32, 622 A.2d at 749-53.
sewage treatment plant, located near the Potomac River in Washington, D.C.  

During this lengthy litigation, the United States District Court for the District of Columbia entered several orders that concerned the development of a new sewage sludge composting facility. Pursuant to the district court's order of May 18, 1978, Montgomery County identified an undeveloped parcel of land known as "Site 2" for a composting facility. Montgomery County then was ordered by the court to acquire and develop a sludge composting facility and have it operational by July 1979. Site 2 is located in the Montgomery Industrial Park near the border with Prince George's County. Prince George's County opposed the development of a composting facility at Site 2 and attacked the plan in several different forums.  

As a result of these actions, the district court entered several additional orders. On April 25, 1980, the district court required WSSC to restore funding for the project that had been removed by WSSC commissioners who represented Prince George's County. On June 27, 1980, in response to two state suits initiated by Prince George's County to enforce the Clean Water Act, Congress authorized federal district courts to hear private enforcement suits under the Act. See id. § 1365; see also infra note 23.

6. See United States v. District of Columbia, 654 F.2d 802, 803 (D.C. Cir.), cert. denied sub nom. Prince George's County v. United States, 454 U.S. 1082 (1981). In September 1973, the Virginia Water Control Board, Fairfax County, and the District of Columbia sued the WSSC in federal district court for exceeding its allotted use of the Blue Plains plant and causing the plant to discharge inadequately treated sewage into the Potomac River. Id. at 803-04. The United States intervened as a party-plaintiff and alleged that excess untreated flow from the plant violated the Clean Water Act. Id. at 804. Montgomery County, Prince George's County, and the State of Maryland intervened as parties-defendants. Id. Before trial, the parties agreed to limit the flow of sewage to the plant, to develop a plan for disposal of sludge generated by the plant by June 30, 1976, and to implement the plan by December 31, 1977. Id. The federal court incorporated this agreement into its Consent Decree of July 29, 1974. Id. After the parties failed to agree on a permanent sludge disposal plan, the United States filed another civil suit on November 9, 1977. Id. This suit resulted in a consent order that required the parties to devise a permanent solution by January 15, 1978. Id.  

7. See supra note 6.  

8. CAE-Link, 333 Md. at 120, 622 A.2d at 747.  

9. Id. at 120, 622 A.2d at 748.  

10. Id. At the composting site, wood chips would be mixed with the sludge and aerated for 30 to 45 days. United States v. District of Columbia, 654 F.2d at 804.  

11. United States v. District of Columbia, 654 F.2d at 805. Prince George's County unsuccessfully appealed the issuance of the health permit for the facility granted by the Maryland Department of Health and Hygiene. Id. The county also brought suit in the Circuit Court for Prince George's County to enjoin the acquisition of Site 2 on the grounds that it had not given the necessary approval for WSSC to fund the project. Id. In March 1980, the three WSSC commissioners from Prince George's County blocked funding for Site 2 in the WSSC budget for fiscal year 1981. Id.  

12. CAE-Link, 333 Md. at 120, 622 A.2d at 748.
County, the federal district court enjoined WSSC from complying with state court injunctions and ordered WSSC to proceed expeditiously with the development of the sludge composting facility. The court further enjoined all parties from initiating actions in state court that would frustrate the district court's orders and ordered Prince George's County to withdraw from the three state suits and to seek any modification of its orders in the federal district court or the United States Court of Appeals for the District of Columbia Circuit.

Following the orders of the district court, WSSC began a condemnation action to acquire Site 2 in the Circuit Court for Montgomery County. Shortly thereafter, WSSC filed a second suit in the circuit court against neighboring landowners, including CAE-Link Corporation. This suit sought a declaratory judgment that the restrictive covenants attached to Site 2 were not compensable property rights. The neighboring landowners counterclaimed, alleging, *inter alia*, nuisance. After the two cases were consolidated, the circuit court found that the restrictive covenants were compensable property interests and denied WSSC declaratory relief. The trial court, however, granted WSSC partial summary judgment on the nuisance claim and required the defendants to prove that WSSC negligently created the nuisance. The court found no evidence that the composting facility was negligently constructed or operated, nor that there was substantial interference in the use of the neighboring properties. The court then granted WSSC's motion for judgment on the nuisance claim. The neighboring property owners appealed; WSSC cross-appealed.

The Court of Special Appeals held that the neighboring property owners' state-law nuisance claims were not preempted by federal law because of the Clean Water Act's savings clause. The court further

13. *Id.* at 120-21, 622 A.2d at 748.
14. *Id.* at 121, 622 A.2d at 748.
15. *Id.*
16. *Id.* at 121-22, 622 A.2d at 748.
17. *Id.* at 122, 622 A.2d at 748.
18. *Id.*
19. *Id.,* 622 A.2d at 749.
20. *Id.* at 123, 622 A.2d at 749.
21. *Id.*
23. CAE-Link Corp. v. Washington Suburban Sanitary Comm'n, 90 Md. App. 604, 615, 602 A.2d 239, 244 (1992); 33 U.S.C. § 1365. Subsection 1365(e) provides: 'Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard of limitation or to seek any other relief (including relief against the Administrator) or a State Agency).' *Id.* § 1365(e).
held that nuisance law in Maryland was a matter of strict liability and did not require a showing of negligence.\textsuperscript{24} Both WSSC and the property owners filed petitions for certiorari.\textsuperscript{25} The Court of Appeals granted WSSC's petition, but denied the petition of the property owners.\textsuperscript{26}

2. Legal Background.—
   a. Nuisance and Strict Liability.—
      (i) The Restatement.—Section 822 of the Restatement (Second) of Torts states:

      One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

      (a) intentional and unreasonable, or
      (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.\textsuperscript{27}

      The Restatement considers private nuisance solely a matter of tort liability.\textsuperscript{28} Nuisance, like tort liability in general, has moved away from strict liability towards liability based on conduct.\textsuperscript{29} According to the Restatement, confusion about the strict liability nature of nuisance is a result of the distinction between the character of private nuisance (defined by the property interest invaded) and negligence (defined by the conduct that subjects an actor to liability).\textsuperscript{30} Under the Restatement, intentional invasions of any sort must be "unreasonable" to be actionable.\textsuperscript{31} With respect to the use and enjoyment of land, the rule is likewise expressed in terms of unreasonableness and requires that

\textsuperscript{24}CAE-Link, 90 Md. App. at 616, 602 A.2d at 244.
\textsuperscript{25}CAE-Link, 333 Md. at 124, 622 A.2d at 749.
\textsuperscript{26}Id.
\textsuperscript{27}RESTATEMENT (SECOND) OF TORTS § 822 (1977).
\textsuperscript{28}Id. § 822 cmt. a.
\textsuperscript{29}Id. § 822 cmt. b.
\textsuperscript{30}Id.
\textsuperscript{31}Id. § 822 cmt. g. Comment g states:
an intentional invasion be unreasonable before one is liable for causing it.\textsuperscript{32}

(ii) Maryland.—Maryland case law on nuisance has consistently focused upon whether there has been a substantial and unreasonable injury or interference with another's use and enjoyment of his property and not on questions of negligence.\textsuperscript{33} It makes no difference, moreover, that the alleged nuisance is a business that is "lawful and one useful to the public and conducted in the most approved method."\textsuperscript{34} Nevertheless, not every interference with the use or enjoyment of land constitutes an actionable nuisance.\textsuperscript{35} The nuisance complained of must interfere seriously with the ordinary comfort and enjoyment of the property.\textsuperscript{36} Moreover, the nuisance must cause actual physical discomfort and annoyance to those of ordinary sensibilities, tastes, and habits.\textsuperscript{37} In response to the specific question of whether a defendant is liable for damages that result from the escape of harmful gases or fumes from his premises, the Court of Appeals has concluded that it is not necessary for the plaintiff to prove negligence.\textsuperscript{38}

\textsuperscript{32} Id.

\textsuperscript{33} See, e.g., Bishop Processing Co. v. Davis, 213 Md. 465, 474, 132 A.2d 445, 449 (1957) (finding that the odors complained of caused physical discomfort and injury to the appellants' properties that was "of such a character as to diminish materially their value as dwellings, and to interfere seriously with the ordinary comfort and enjoyment thereof."); Gorman v. Sabo, 210 Md. 155, 159, 122 A.2d 475, 476 (1956) ("If noise causes physical discomfort and annoyance to . . . the ordinary comfort and enjoyment of their homes, and this diminishes the value of the use of their property rights, it constitutes a private nuisance."); Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 277, 20 A. 900, 901 (1890) ("Nor can any use of one's own land be said to be a reasonable use, which deprives an adjoining owner of the lawful use and enjoyment of his property.").

\textsuperscript{34} Meadowbrook Swimming Club v. Albert, 173 Md. 641, 645, 197 A. 146, 148 (1938).

\textsuperscript{35} Adams v. Michael, 38 Md. 123, 125-26 (1873) ("It is not every inconvenience, however, in the nature of a nuisance to a party's dwelling, especially in a large commercial and manufacturing city, that will call forth the restraining power of a Court of Chancery by injunction.").

\textsuperscript{36} See supra note 33.

\textsuperscript{37} Bishop Processing Co., 213 Md. at 474, 132 A.2d at 449.

\textsuperscript{38} See Susquehanna Fertilizer Co., 73 Md. at 276, 20 A. at 900 ("[A]n action will lie . . . although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business.").
b. Federal Preemption.—The Supremacy Clause of the Constitution provides that “the Laws of the United States . . . shall be the supreme law of the Land.”§39 The Supreme Court has identified three situations in which federal law preempts state law: when Congress has “define[d] explicitly the extent to which its enactments preempt state law,”§40 when state law seeks to regulate conduct in a field that Congress intended the federal government to occupy exclusively, §41 and when state law actually conflicts with federal law. §42

Although the Supremacy Clause is most often cited for authority to resolve conflicts between federal and state statutes or regulations, §43 federal law may also preempt state common-law causes of action. §44

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39. U.S. CONST. art. VI, cl. 2.


41. English, 496 U.S. at 79; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”). State law may be preempted implicitly: if federal regulation of the field is pervasive, Virginians for Dulles v. Volpe, 394 F. Supp. 573, 579 (E.D. Va. 1972) (concluding that federal regulations and laws concerning aircraft noise were so pervasive as to preempt federal common law of nuisance), aff’d in part and rev’d in part, 541 F.2d 442 (4th Cir. 1976); if the federal interest is sufficiently dominant to preclude state enforcement, Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972); or if the federal statutory goals and scheme indicate an intent to preclude state authority, City of Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981).

Preemption may also be inferred if it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); or if state law is an obstacle to compliance with federal law, Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Nevertheless, implicit preemption will not easily be inferred by the courts. City of Milwaukee, 451 U.S. at 312-18 (stating that the analysis begins with an assumption that the police powers of the states were not to be superseded without a clear and manifest purpose of Congress).

42. English, 496 U.S. at 79; see also Florida Lime & Avocado Growers, 373 U.S. at 142-43 (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . . .”); Hines, 312 U.S. at 67 (“Our primary function is to determine whether . . . Pennsylvania’s law [requiring registration of aliens] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the federal Alien Registration Act].”).


44. See CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1742-43 (1993) (holding that common-law negligence was preempted as a matter of law by compliance with federal regulation); Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2620-22 (1992) (holding that common-law negligence claim was preempted). But cf. English, 496 U.S. at 87-89 (holding state tort law was not preempted implicitly by federal Energy Reorganization Act of 1974);
International Paper Co. v. Ouellette, Vermont property owners brought a nuisance suit in a Vermont state court against the operator of a New York pulp and paper mill. The property owners alleged that pollutants discharged by the New York mill made the water in Vermont "foul, unhealthy, smelly, and unfit for recreational use," and thus, constituted a "continuing nuisance." After removal of the action to federal district court, the mill operator moved for summary judgment, arguing that the state-law action was preempted by the federal Clean Water Act. The district court held, and the Supreme Court affirmed, that federal courts can apply state common-law nuisance to address interstate water pollution as long as the law applied is that of the discharging state.

3. The Court's Reasoning.—In CAE-Link, the Court of Appeals addressed two major issues: First, the court considered the appropriate standard of liability under state nuisance law. Second, it considered whether state-law nuisance claims were preempted by federal court orders issued to enforce the Clean Water Act.

To address the appropriate standard of liability under nuisance law, the court began by reiterating Maryland's long-held rule that "proof of nuisance focuses not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff's use and enjoyment of his or her property." Although it conceded that Maryland historically has employed a strict liability analysis for nuisance claims, WSSC argued that the court should create an exception because WSSC's actions were not voluntary but compelled by federal court orders. WSSC also argued that it

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46. Id. at 483.
47. Id. at 484.
48. Id.
49. Id.
50. Id. at 493-97.
51. CAE-Link, 330 Md. at 119, 622 A.2d at 747.
52. Id.
53. Id.
54. Id. at 126, 622 A.2d at 750 (citation omitted).
55. Id. at 126-27, 622 A.2d at 750-51. In particular, WSSC claimed that the district court ordered it "to build and operate a specific type of sludge composting facility, at a specific location and by a specific date." Id. at 127, 622 A.2d at 751. WSSC relied upon Toy v. Atlantic Gulf & Pac. Co., 176 Md. 197, 4 A.2d 757 (1939), for the proposition that "[t]he basic concept underlying the rule [of strict liability for maintaining a dangerous condition] is that a person who elects to keep or bring upon his land something that exposes the adjacent land or its owner or occupant to an added danger should be obliged to prevent its
should not be placed in a position where good-faith compliance with one court's order should cause it to be held strictly liable in another.\textsuperscript{55} The Court of Appeals responded that, while the federal district court ordered WSSC to build a sewage sludge composting facility in Montgomery County, it did not select the site nor mandate how the construction should proceed.\textsuperscript{56} Those choices were made by WSSC.\textsuperscript{57} Finding no reason to change the traditional standard of proof, the court held that WSSC was strictly liable for the nuisance it created.\textsuperscript{58}

WSSC argued, in the alternative, that the court adopt the standard of liability found within Section 822 of the \textit{Restatement (Second) of Torts.}\textsuperscript{59} The court rejected this request and stated that the strict liability standard for nuisance has a "pedigree of long standing in this state" and that adoption of the \textit{Restatement} by other jurisdictions was "not the unanimous verdict."\textsuperscript{60}

The second major issue addressed in \textit{CAE-Link} was WSSC's argument that federal court orders issued pursuant to the Clean Water Act preempted state-law nuisance claims.\textsuperscript{61} WSSC first argued that the savings clause contained in Section 505 of the Clean Water Act,\textsuperscript{62} which preserves the right of individuals to seek relief, did not apply to the emergency federal court orders issued pursuant to Section 504 of the Act.\textsuperscript{63} Relying on \textit{International Paper Co. v. Ouellette},\textsuperscript{64} WSSC argued doing damage." \textit{Id.} at 213, 4 A.2d at 765 (emphasis added); see \textit{supra} notes 8-9 and accompanying text.

55. \textit{CAE-Link}, 330 Md. at 127, 622 A.2d at 751.

56. \textit{Id.} at 131, 622 A.2d at 753.

57. \textit{Id.}

58. \textit{See id.} The court cited Taylor v. Mayor of Baltimore, 130 Md. 133, 99 A. 900 (1917), to support its decision. In \textit{Taylor}, the plaintiff brought a nuisance claim after the City of Baltimore, pursuant to state law, erected a sewage disposal plant 1500 feet from her property. \textit{Id.} at 135, 99 A. at 901. The \textit{Taylor} court held that a municipal corporation could be held liable for nuisance even if it acted pursuant to legislative authority. \textit{See id.} at 145, 99 A. at 905. Applying the logic of \textit{Taylor} to \textit{CAE-Link}, the court concluded that "[t]he United States District Court for the District of Columbia 'cannot be presumed, from general grant of authority, to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another.'" \textit{CAE-Link}, 330 Md. at 131-32, 622 A.2d at 753 (quoting \textit{Taylor}, 130 Md. at 145, 99 A. at 905).

59. \textit{CAE-Link}, 330 Md. at 140-41, 622 A.2d at 757-58; see \textit{supra} text accompanying note 27.

60. \textit{CAE-Link}, 330 Md. at 141-42, 622 A.2d at 758.

61. \textit{Id.} at 133, 622 A.2d at 754.


63. \textit{CAE-Link}, 330 Md. at 133-34, 622 A.2d at 754. Section 504 provides:

\begin{quote}
Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States
\end{quote}
that the savings clause applied only to Section 505 of the Act. The Court of Appeals rejected this argument, stating that the Supreme Court itself noted that "the savings clause specifically preserves other state actions, and nothing in the Act bans aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State." WSSC also argued that the strict liability standard of Maryland's nuisance law was preempted because the federal court orders made it impossible for WSSC to comply with state law. The Court of Appeals, however, found no conflict. The court noted that the federal district court did not order WSSC to build and operate a composting site that would emit obnoxious orders. It merely ordered WSSC to comply with the Clean Water Act by developing a composting facility. The cost of compliance with state nuisance law was no different in nature than those incurred in condemning the land or extinguishing the restrictive covenants that previously benefitted the land. The court further reasoned that the elimination of odors, or the compensation of those affected, was simply a cost of building a facility that emitted obnoxious odors.

4. Analysis.—

a. Strict Liability and Section 822 of the Restatement.—Although seemingly limited to the facts of a complex case, CAE-Link is a significant decision from a land-use perspective. The CAE-Link court affirmed the application of strict liability in nuisance actions under Maryland common law, which heretofore was only implied in previous
case law, often through dicta. Of equal note, however, is the court's emphatic attempt to distinguish the *Restatement* from Maryland's traditional nuisance liability standard, two positions that are not necessarily irreconcilable.

When it rejected WSSC's argument that the negligence-based standard of Section 822 of the *Restatement* was the appropriate rule, the Court of Appeals simply reiterated that the controlling factor in a nuisance claim is the unreasonable interference with the ordinary use and enjoyment of a plaintiff's property. The court's requirement that the invasion be unreasonable is not inconsistent with paragraph (a) of Section 822 of the *Restatement*. Paragraph (a) states that one is subject to liability if the invasion of another's land is "intentional and unreasonable." Because the court implied that the invasion was "unreasonable," it would need only to have found that the invasion was intentional for its opinion, and Maryland law, to accord with paragraph (a) of Section 822 of the *Restatement*. The *CAE-Link* opinion simply lacks a discussion of whether the intentional operation of the composting site caused an invasion of noxious odors.

This oversight may be understood in the context of the court's effort to reject WSSC's argument that paragraph (b) of Section 822, which requires negligence, recklessness, or abnormally dangerous conduct on the part of the defendant, should be the appropriate standard. To rebut WSSC's assertion, the court had only to repeat its conclusion in *Susquehanna Fertilizer Co. v. Malone*, that a plaintiff need not show negligence in order to prevail in a nuisance action for the invasion of noxious odors. The court wisely declined WSSC's invitation to adopt the negligence standard of paragraph (b) because the application of the strict liability standard of paragraph (a) was sufficient and consistent with precedent as well as more appropriate to the facts of the case.

b. *Federal Jurisdiction and State-Based Nuisance Claims.*—WSSC argued that it built and operated the sludge composting facility merely to comply with the order of the federal district court and, therefore, that it should be granted an exception to the strict liability

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73. See supra notes 33-38 and accompanying text.
74. See supra notes 27-32, 59-60 and accompanying text.
75. *CAE-Link*, 330 Md. at 125-26, 622 A.2d at 750.
76. See supra notes 33, 36-37 and accompanying text.
78. *CAE-Link*, 330 Md. at 139, 622 A.2d at 757.
80. 73 Md. 268, 276, 20 A. 900, 902; see supra note 38 and accompanying text.
provision of nuisance law. Because the federal court order followed upon a set of options that WSSC had presented to that court, WSSC's argument was disingenuous. The Court of Appeals properly rejected WSSC's arguments because Montgomery County, not the federal district court, chose the site and because WSSC, not the court, chose a method of composting that resulted in the invasion of noxious fumes onto the neighbors' property. The Court of Appeals noted that the federal district court "can not be presumed, from a general grant of authority, to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another."  

CAE-Link would also appear to represent an interesting post-Ouellette test of the reach of the Clean Water Act over Maryland law and whether, and to what degree, the Act preempts state-law remedies. The Court of Appeals' holding in CAE-Link, however, should be narrowly construed for two reasons. First, in contrast to Ouellette, the facts of CAE-Link did not present an interstate jurisdictional dilemma. Consequently, the Court of Appeals' opinion strictly limited itself to an analysis of the pervasiveness of federal regulation of water pollution within Maryland. Because the nuisance in CAE-Link was only a secondary product of water pollution—sludge—and not a point-source of water pollution, the court's conclusion that common-law nuisance claims by the neighbors of Site 2 did not "thwart the goal of the Clean Water Act" was understandable and justified. It was not impossible to obey both the federal court orders and Maryland nuisance law: "[E]limination of odors, or compensating those affected, is . . . [simply an additional] cost of the facility if the plant emits the odors."

Second, because Ouellette settled the issue of whether the savings clause of Section 505 of the Clean Water Act preserves a state-law right of action for private parties, the entire preemption analysis in CAE-Link turned on whether the savings clause applied to emergency court orders issued under Section 504 of the Act. The Court of Appeals observed that, as a preliminary matter, federal court orders may be insufficient to invoke the preemption doctrine. The court noted

81. CAE-Link, 330 Md. at 126, 622 A.2d at 751.
82. Id. at 131-32, 622 A.2d at 752 (quoting Taylor v. Mayor of Baltimore, 130 Md. 133, 145, 99 A. 900, 905 (1917)) (citations and internal quotation marks omitted).
83. See supra notes 46-50 and accompanying text.
84. CAE-Link, 330 Md. at 137, 622 A.2d at 756.
85. Id. at 139, 622 A.2d at 757.
86. Id. at 134, 622 A.2d at 754-55.
that preemption applies to the "Constitution and the laws of the United States." Moreover, the court did not have to decide whether the federal court orders were issued under Section 504 of the Clean Water Act, because it concluded that the savings clause was not limited to Section 505. The court appropriately concluded that, because common-law nuisance claims would not interfere with Congress's intent to reduce water pollution, the claims fell within the savings clause. Therefore, there was no issue of federal preemption.

5. Conclusion.—In CAELink, the Court of Appeals held that compliance with court orders, issued pursuant to the federal Clean Water Act, was not a defense to state-law nuisance claims. Under the circumstances of the case, the court held that nuisance damages represented merely part of the overall cost of complying with federal court orders. The court also reaffirmed that, in Maryland, nuisance claims are based upon strict liability and require no showing of negligence. Accordingly, it appears that the key factor in Maryland nuisance claims will continue to be whether there has been an unreasonable interference with the use and enjoyment of the plaintiff's property, and not whether there has been any negligence on the part of the defendant.

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87. Id. at 134 n.11, 622 A.2d at 755 n.11.
88. Id. at 137, 622 A.2d at 756.
89. Id.
90. Id. at 132-42, 622 A.2d at 753-58.
91. Id. at 139, 622 A.2d at 757.
92. Id. at 124-32, 622 A.2d at 749-53.
A. Residency Status Defined for Members of the Armed Services in Divorce Proceedings

In *Wamsley v. Wamsley*, the Court of Appeals held that an individual who had established a domicile in Maryland prior to entering military service, but had not lived in Maryland since, met the jurisdictional residency requirement to petition for divorce on grounds that occurred outside the state. The court addressed Section 7-101 (a) of the Family Law Article, which requires that one of the parties to a divorce action must have resided within the state for at least one year prior to the initiation of the action if the grounds for the divorce occurred outside the state. Recounting case law that equates "residence" with "domicile" in a constitutional provision or statute, the court listed the special circumstances that determine whether there is an intent to abandon a domicile. The court held that a service member who chooses Maryland as his "home of record" while in the military, registers to vote in the state, pays state income tax, registers a vehicle in the state, and maintains a state driver's license is a resident within the meaning of Section 7-101 (a).

1. The Case.—In June 1981, seventeen-year-old Richard Wamsley left his home in Allegany County, Maryland to join the United States Navy. In February 1985, Mr. Wamsley married Johanna Wamsley in Harrison County, Mississippi. During the following years, the couple moved frequently due to changes in Mr. Wamsley's duty assignments. In January 1986, they moved to Norfolk, Virginia; in April 1988, to Sicily; and in July 1991, back to Norfolk where they lived with their daughter and son until they separated on May 26, 1992.

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2. Id. at 464, 635 A.2d at 1326-27; see infra notes 38-41 and accompanying text.
3. *Wamsley*, 333 Md. at 456, 635 A.2d at 1323. Section 7-101 (a) provides: "If the grounds for the divorce occurred outside of this State, a party may not apply for a divorce unless 1 of the parties has resided in this State for at least 1 year before the application is filed." *Md. Code Ann., Fam. Law § 7-101(a)* (1991).
4. See infra note 36.
6. Id. at 463, 635 A.2d at 1326.
7. Id. at 456, 635 A.2d at 1322.
8. Id.
On May 21, 1992, while still living in Norfolk, Mr. Wamsley filed for a limited divorce from Mrs. Wamsley and for the custody of their minor children in the Circuit Court for Allegany County. At trial on March 9, 1993, the court sua sponte raised the issue of subject matter jurisdiction. By application of the general presumption that where a person actually lives is his or her domicile, the trial court found that neither party resided in Maryland for one year prior to the initiation of the action as required by the statute. The court thereupon dismissed the action for lack of subject matter jurisdiction. Mr. Wamsley appealed to the Court of Special Appeals; but prior to review before that court, the Court of Appeals issued a writ of certiorari on its own motion.

2. Legal Background.—
   a. Residency Requirement for Divorce.—In 1841, the Maryland General Assembly enacted the state's first divorce statute. This statute required that a petitioner to a divorce action be a state resident if the grounds for divorce occurred outside the state. As in the cur-

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12. Wamsley, 333 Md. at 456, 635 A.2d at 1323. Jurisdiction over divorce actions whose grounds have occurred outside the state is found within Md. CODE ANN., FAM. LAW § 7-101(a) (1991). See supra note 3.
14. Id. The trial judge stated:
   The presumption of the law is that where a person actually lives is his domicile, though this is a rebuttable presumption.
   ... [I]f the presumption in this State is that where a person personally actually lives is his domicile I cannot construe the State of Maryland as being the domicile for either of these two people. ... [C]ertainly I recognize the gentleman has made this his place to vote, hasn't changed that, registered cars, pays taxes here. None of those factors it seems to me overcomes the basic presumption that your domicile is where you live.
15. Wamsley, 333 Md. at 457, 635 A.2d at 1323.
17. Section 5 of the 1841 Act provided that "no person shall be entitled to make application for a divorce under this act where the causes for divorce occurred in another State,
rent Family Law Article, the 1841 Act did not specifically require that one of the parties to the divorce action be a Maryland resident if the grounds for the action occurred within the state. It was not until the turn of the century, in Adams v. Adams, that the Court of Appeals addressed the question of residency as a general requirement in every suit for divorce. In Adams, the wife, a five-month resident of Dorchester County, brought a complaint for divorce on the grounds of her husband's adultery. Although the adultery had occurred within the State of Maryland, both wife and husband were, at that time, residents of Delaware. Reversing the trial court's dismissal for lack of jurisdiction, the court held that for subject matter jurisdiction to exist, at least one spouse must have a bona fide domicile in the state at the time the complaint was filed. In 1993, in Fletcher v.
Fletcher, a Maryland appellate court reexamined this jurisdictional requirement for the first time since Adams. The Court of Special Appeals held that changes in the law during the intervening years had not sapped the “vitality of the Court’s clear, fixed pronouncements in Adams v. Adams.” A majority of states share the Adams view that a court has subject matter jurisdiction over a cause for divorce if one of the spouses has maintained a domicile within the state.

b. Domicile of a Member of the Armed Services.—While the law governing domicile is well-established in Maryland, until Wamsley the
Court of Appeals had only twice considered the domicile of a member of the armed services. In *Walsh v. Crouse* and *Hawks v. Gottschall*, soldiers stationed at Fort Meade made claims against the Unsatisfied Claim and Judgment Fund as a result of accidents with uninsured motorists. Applying the fundamental principle that an existing domicile remains unchanged until a new domicile is acquired, the court ever he is absent, the intention of returning. The controlling factor in determining a person's domicile is his intent. One's domicile, generally, is that place where he intends it to be. The determination of his intent, however, is not dependent upon what he says at a particular time, since his intent may be more satisfactorily shown by what is done than by what is said. Once a domicile is determined or established a person retains his domicile at such place unless the evidence affirmatively shows an abandonment of that domicile. In deciding whether a person has abandoned a previously established domicile and acquired a new one, courts will examine and weigh the factors relating to each place. This Court has never deemed any single circumstance conclusive. However, it has viewed certain factors as more important than others, the two most important being where a person actually lives and where he votes. Where a person lives and votes at the same place such place probably will be determined to constitute his domicile. Where these factors are not so clear, however, or where there are special circumstances explaining a particular place of abode or place of voting, the Court will look to and weigh a number of other factors in deciding a person's domicile.


32. *Hawks*, 241 Md. at 148-49, 215 A.2d at 746; *Walsh*, 232 Md. at 387, 194 A.2d at 108. The Unsatisfied Claim and Judgment Fund permitted Maryland residents to petition the court for payment of judgments obtained against uninsured motorists who have no property or assets to satisfy those judgments. *Md. Code Ann.*, art. 661/2, §§ 150-179 (1957, 1962 Supp.). Just four days prior to the trial court's judgment in *Walsh*, the Court of Appeals held that the word "resident" as found in § 150(g) of the statute is equivalent to "domiciliary." See Maddy v. Jones, 230 Md. 172, 179, 186 A.2d 482, 485 (1963).

33. *Hawks*, 241 Md. at 152, 215 A.2d at 748; *Walsh*, 232 Md. at 388, 194 A.2d at 108. This principle is in accord with holdings in other jurisdictions. See, e.g., *Nora v. Nora*, 494 So. 2d 16, 18 (Ala. 1986) (holding that a person inducted into military service retains residence in the state from which he is inducted until initial residence is abandoned); *In re Marriage of Thornton*, 185 Cal. Rptr. 388, 392 (Cal. Ct. App. 1982) ("One in military service retains the domicile or residence in the state from which he entered the service, and may institute a divorce action there until he establishes a new residence or domicile."); *Perry v. Perry*, 623 P.2d 513, 515 (Kan. Ct. App. 1981) ("Government employees, and particularly servicemen, may retain the residence from which they entered service no matter how long they are physically away, so long as there is no intent to change."); *Weintraub v. Murphy*, 244 S.W.2d 454, 455 (Ky. 1951) (holding that a military service member, because he has no choice as to his assignment locations, cannot be said to have any home other than that which he has left); *Blessey v. Blessey*, 577 P.2d 62, 63 (N.M. 1978) (holding that, in the absence of an intention to change domicile, one's domicile is not affected by entering the military); *Zinn v. Zinn*, 475 A.2d 132, 133 (Pa. Super. Ct. 1984) ("The domicile of servicemen generally remains unchanged when temporarily stationed at a particular place while in the line of duty."); *Carroll v. Jones*, 654 S.W.2d 54, 55 (Tex. Ct. App. 1983) (stating that a member of the military does not acquire a new domicile merely by virtue of being stationed in a particular place); *cf. Lauterbach v. Lauterbach*, 392 P.2d 24, 25 (Alaska
stated in both cases that a person does not automatically lose one domicile and acquire another upon entry into military service, unless there is an intent to abandon the existing domicile and adopt a new one.\textsuperscript{34} Because neither soldier demonstrated sufficient evidence of intent to abandon his domicile in his native state, the court found that neither soldier had established a new domicile during his tour of duty in Maryland.\textsuperscript{35}

3. \textit{Legal Reasoning}.—In \textit{Wamsley}, the Court of Appeals began its analysis with an examination of the meaning of “reside” as found in Section 7-101(a) of the Family Law Article. As it had in prior interpretations of constitutional provisions or statutes,\textsuperscript{86} the court stated that

1964) (holding that a statute, which provides that a person in the military who has been continuously stationed at a military base within the state shall be deemed a state resident in good faith for purposes of conferring jurisdiction on a court in a divorce action, renders a domicile requirement unnecessary); Crownover v. Crownover, 274 P.2d 127, 132 (N.M. 1954) (“The legislature has said, however, that a member of the military ‘continuously stationed’ at a base in New Mexico for one year . . . shall be deemed a resident of New Mexico with the necessary domiciliary intent [to establish the court’s jurisdiction].”). \textit{But see} Gordon v. Gordon, 369 So. 2d 421, 423 (Fla. Ct. App. 1979) (holding that, although couple was married in Florida and lived there for one and a half years before husband entered the Air Force, and husband was assigned to an Air Force base in Plattsburgh, New York by military orders, wife’s complaint for divorce entered upon her return to Florida after her separation from husband must be dismissed because, as her previous domicile was New York, she had not resided within the state for six months as required by statute).

34. \textit{Hawks}, 241 Md. at 152, 215 A.2d at 748; \textit{Walsh}, 232 Md. at 388, 194 A.2d at 108.

35. In \textit{Walsh}, the soldier left his home in Florida, where he lived with his mother and stepfather, and enlisted in the Army. \textit{Walsh}, 232 Md. at 387-88, 194 A.2d at 108. After boot camp and a 17-month assignment in Germany, he was transferred to Ft. Meade where he lived on post. \textit{Id.} at 388, 194 A.2d at 108. Upon departing the service, he left Ft. Meade and moved to Pittsburgh where his mother and stepfather had moved. \textit{Id.} The court concluded that “[t]he record is devoid of any evidence, direct or inferential, that [the soldier] intended to abandon his Florida domicile by entering the armed forces, and to acquire a Maryland domicile.” \textit{Id.}

In \textit{Hawks}, the soldier entered the Army from his home in Pennsylvania. \textit{Hawks}, 241 Md. at 149-50, 215 A.2d at 747. At trial, he and his wife testified that during his assignment at Ft. Meade, and before the accident with the uninsured motorist, he formed his intention to abandon his domicile in Pennsylvania and reside permanently in Maryland. \textit{Id.} at 150-51, 215 A.2d at 747-48. The court noted, however, that the soldier retained his Pennsylvania driver’s license and motor vehicle registration, continued to claim Pennsylvania as his “home of record” in his Army personnel files, applied and received a war bonus reserved for Pennsylvania residents who were Korean War veterans, and had provided a Pennsylvania address in the State of Maryland accident report with the uninsured motorist. \textit{Id.} at 150, 215 A.2d at 747. Balancing the testimony at trial with the uncontradicted evidence of his continuing ties to his native state of Pennsylvania, the court concluded that the soldier had failed to demonstrate sufficient evidence that he had intended to acquire a Maryland domicile at the time of the accident. \textit{Id.} at 152, 215 A.2d at 748.

36. \textit{Wamsley}, 333 Md. at 458, 635 A.2d at 1924 (“We have held consistently that ‘the words “reside” or “resident” in a constitutional provision or statute delineating rights, duties, obligations, privileges, etc., would be construed to mean “domicile” unless a contrary
"residence" is the equivalent of domicile. Recognizing that entry into military service is not enough to show an intent to abandon an existing domicile and establish a new one, and that the location of a person's residence during a military tour of duty is not dispositive of intent, the court looked to Walsh and Hawks to identify other, more important factors that determine objective intent. Based on the trial court's findings that Mr. Wamsley was domiciled in Maryland at the time he entered the Navy, had listed Maryland as his "home of record" for military purposes, had maintained a Maryland driver's license and automobile registration, was registered to vote within the state, paid state taxes, and considered himself a Maryland resident throughout his time in the service, the Court of Appeals concluded that Mr. Wamsley did not intend to abandon his Maryland domicile. Because Mr. intent is shown." (quoting Bainum v. Kalen, 272 Md. 490, 496, 325 A.2d 393, 396 (1974) (per curiam)).

37. Wamsley, 333 Md. at 458, 635 A.2d at 1324. The court also noted that "the Court of Special Appeals had recently reached that same conclusion." Id. at 458-59, 635 A.2d at 1324; see Fletcher v. Fletcher, 95 Md. App. 114, 124, 619 A.2d 561, 565 (1993) ("[B]ona fide' residence, for the purpose of an action for divorce, is the equivalence of domicile.").

38. Wamsley, 333 Md. at 460, 635 A.2d at 1325.

39. Id. at 463, 635 A.2d at 1326. The court stated: "[A]lthough the location of an individual's residence may be a strong indication of intent, it is not necessarily so." Id.

40. Id. at 460-61, 635 A.2d at 1325. "We see no reason why the same principle at work in Hawks and Walsh should not be applied to a member of the military who originally established a domicile in Maryland but who has lived elsewhere during his or her service." Id. at 461, 635 A.2d at 1325.

41. Id. at 463-64, 635 A.2d at 1326.

Consistent with the Wamsley decision, other jurisdictions have identified these and similar factors to conclude that an armed service member had met the state jurisdictional requirements necessary to maintain a divorce action. See, e.g., Eckel v. Eckel, 522 So. 2d 1018, 1021 (Fla. Dist. Ct. App. 1988) (holding that a retired Air Force serviceman who transferred to West Germany as a civilian employee of the Department of Defense but who still owned a house in the state, maintained an account with a credit union in the state, had a current state driver's license, and voted by absentee ballot in the state was entitled to maintain a divorce action within the state); Orejuela v. Orejuela, 494 N.E.2d 329, 331 (Ind. Ct. App. 1986) (holding that a Navy officer living in Norfolk, Virginia, at the time he filed for divorce, was a resident of Indiana because he continued to vote in Indiana via absentee ballot, paid Indiana state income tax, retained his Indiana state driver's license, listed Indiana as his "home of record," and was considered by his university to be a resident of Indiana, even though evidence was offered to show that he intended to accept employment outside of Indiana upon retirement); Israel v. Israel, 121 S.E.2d 713, 713-16 (N.C. 1961) (holding that the state of residence of a soldier in a divorce action remained the state where he entered the service, even though he had been stationed in many different places during his nineteen years in the Army, because he never intended to change his domicile); Brunson v. Brunson, 472 P.2d 586, 587-88 (Wash. Ct. App. 1970) (holding that there was substantial evidence to uphold a trial court's finding that a soldier who initiated an action for divorce was a resident of Washington because his parents claimed Washington as their domicile, he owned property in the state on two occasions, he listed his "home of record" as Washington, and he stated that Washington had always been his home).
Wamsley continued as a domicile of the state, the trial court had subject matter jurisdiction over the Section 7-101(a) divorce action.\textsuperscript{42}

4. \textit{Analysis}.—The first issue that the court faced in \textit{Wamsley} was the statutory construction of "reside" as found in Section 7-101(a) of the Family Law Article. Although it had not previously addressed this issue in connection with divorce actions, the court looked to a substantial quantity of case law that interpreted "reside" in other statutes and constitutional provisions.\textsuperscript{43} By applying this jurisprudence to Section 7-101(a), the Court of Appeals arrived at the logical result that, unless the context clearly suggests otherwise, "reside" means "domicile."\textsuperscript{44} The \textit{Wamsley} court's examination of this residency requirement is likely to be significant, moreover, for reasons other than statutory construction.

Although stated matter-of-factly, the court recognized that the residency requirement of Section 7-101(a) must be met for subject matter jurisdiction to exist.\textsuperscript{45} In support of this proposition, the court cited its 1905 decision in \textit{Adams} and the more recent decision of the Court of Special Appeals in \textit{Fletcher}.\textsuperscript{46} In so doing, the court implicitly affirmed its holding in \textit{Adams}. For subject matter jurisdiction to exist in any divorce action, at least one spouse must be domiciled within the state at the time the complaint is filed.\textsuperscript{47} For courts and practitioners, determination of the spouses' domicile(s) remains a critical element in a divorce action. When the domiciliary requirement is not met, the court has no subject matter jurisdiction. Any judgment of divorce rendered by a court lacking subject matter jurisdiction is void.

\textsuperscript{42} \textit{Wamsley}, 333 Md. at 464, 635 A.2d at 1326-27.
\textsuperscript{43} \textit{See supra} note 36.
\textsuperscript{44} \textit{Id.} at 458, 635 A.2d at 1324.
\textsuperscript{45} \textit{Id.} at 457-58, 635 A.2d at 1323.
\textsuperscript{46} \textit{Id.} at 458, 635 A.2d at 1323-24.
\textsuperscript{47} \textit{See supra} notes 21-25 and accompanying text.
and can be attacked directly and, occasionally, collaterally.\textsuperscript{48} Ancillary

\textsuperscript{48} See, e.g., Gregg v. Gregg, 220 Md. 578, 582, 155 A.2d 501, 503 (1959) (affirming the trial court's ruling that a divorce obtained by the husband in Nevada from nonresident wife, who was not personally served in Nevada and did not appear in the proceedings, was null and void because the date at which the husband formed his intention to remain in Nevada did not occur until two weeks prior to filing for divorce and therefore did not satisfy the residency requirement of the Nevada statute); Brewster v. Brewster, 207 Md. 193, 201-02, 114 A.2d 53, 57 (1955) (affirming Chancellor's declaration that an Arkansas divorce decree was void because the resident wife had met the burden of establishing that her husband had not established a "bona fide" domicile in Arkansas); cf. Ewald v. Ewald, 167 Md. 594, 175 A. 464 (1934) (reversing trial court's decree nullifying a marriage on the grounds that the wife's divorce from her first husband was void for lack of domicile when suit was filed, because there was a reasonable basis for her to assert in the divorce action that she was a Maryland resident when the suit was filed, even though additional evidence produced twelve years later had convinced another Chancellor that the decree was erroneous in its determination of the jurisdictional fact of residency); Brody v. Midgette, 16 Md. App. 647, 653, 299 A.2d 124, 138 (1973) (holding that a Florida divorce was valid because the wife had established a home in Florida, entered her boys in school there, obtained employment there, closed her Maryland bank account and opened a Florida account, registered her automobile in Florida, obtained a Florida driver's license, and never returned to Maryland, where the marriage had taken place, even though she remained a few weeks after the divorce and moved one month later to North Carolina where her new husband had previously lived).

These views accord with those of other jurisdictions. See, e.g., In re Marriage of Passi- ales, 494 N.E.2d 541, 547 (Ill. App. Ct. 1986) (affirming the trial court's grant of a wife's petition to set aside a divorce granted two years earlier because the plaintiff husband had not met the Illinois one-year residency requirement); In re Marriage of Morton, 726 P.2d 297, 298 (Kan. Ct. App. 1986) (stating that "a judgment is void if the court that rendered it lacked personal or subject matter jurisdiction"); Barth v. Barth, 189 S.W.2d 451, 455 (Mo. Ct. App. 1945) ("[T]he court below was without jurisdiction to grant plaintiff a divorce, and defendant is entitled to have the judgment granting him a divorce set aside.").

While permitting direct attacks on divorce decrees, Maryland courts are reluctant to recognize collateral attacks. See Leatherbury v. Leatherbury, 233 Md. 344, 348, 196 A.2d 883, 885 (1964) ("This Court has given indication that one who was not a party to a divorce decree granted in a case wherein husband and wife were before the court may not collaterally attack the decree."); cf. Old Colony Trust Co. v. Porter, 88 N.E.2d 135, 140 (Mass. 1949) (holding that the parties to the divorce proceeding, bound by res judicata, were limited to making a direct attack on the decree while non-parties whose rights would be impaired if effect were given to the decrees, could make a collateral attack).

Procedurally, a motion to rescind or amend a judgment of divorce filed 30 days after entry of judgment can only be made on the grounds of fraud, mistake, irregularity, or clerical error. See Md. R. 2-535(b)&(d). A motion to rescind a judgment of divorce for lack of subject matter jurisdiction is the equivalent of a "mistake" under the Rule. See Home Indem. Co. v. Killian, 94 Md. App. 205, 217, 616 A.2d 906, 912 (1992) ("As used in the Rule, a 'mistake' does not mean merely an error, or even an error of law. It is confined to what have been termed 'jurisdictional' mistakes, i.e., where the court has no power to enter the judgment.")., cert. granted, 330 Md. 458, 624 A.2d 954 (1993); Hamilos v. Hamilos, 52 Md. App. 488, 450 A.2d 1316 (1982) ("Mistake . . . means a jurisdictional mistake."); aff'd sub nom. Johnston v. Johnston, 297 Md. 40, 465 A.2d 436, and aff'd, 297 Md. 99, 465 A.2d 445 (1983). Although Rule 2-535(b) requires only a showing of fraud, mistake, or irregularity, case law imposes upon the moving party the requirements of good faith, ordinary diligence, and a meritorious cause of action or defense. See, e.g., Platt v. Platt, 302 Md. 9, 13, 485 A.2d 250, 252 (1984) ("[A] circuit court has revisory power and control over a
matters contained within the divorce decree—such as alimony, child support, and property division—that do not have an independent basis are likely void and subject to attack.\textsuperscript{49}

To address the issue of a military service member's domicile, the court placed \textit{Wamsley} within well-established case law.\textsuperscript{50} While entry into military service does not itself effect a change of domicile, the \textit{Wamsley} court identified numerous factors upon which a determination of intent to abandon an original domicile and adopt a new one can be made.\textsuperscript{51} These factors include the state in which the individual entered military service, the military "home of record," the state of record for automobile registration and driver's license purposes, the state in which the individual pays taxes, and the state considered the individual's place of residence.\textsuperscript{52} \textit{Wamsley} will assist both practitioners and courts in determining the domicile of an armed service member not only for the purpose of divorce, but for any statute that incorporates a residency requirement.

5. \textit{Conclusion}.—Although \textit{Wamsley} was not a difficult decision—the court's holding is consistent with existing Maryland case law and in accord with the decisions of many other courts—\textit{Wamsley}'s significance is twofold. First, it implicitly acknowledges Maryland's long-held rule that, for a court to have subject matter jurisdiction in a divorce action, at least one party must be domiciled within the state at the time the complaint was filed. Second, it identifies factors to assist

\textsuperscript{49} See, e.g., Barry v. Barry, 606 So. 2d 1391, 1393 (La. Ct. App. 1992) (affirming the trial court's judgment nullifying its prior order that granted the wife of a retired serviceman child support and alimony, because the trial court lacked subject matter jurisdiction over the divorce action and the incidental demands of alimony and child support); Wyman v. Wyman, 212 N.W.2d 368 (Minn. 1973) (holding that trial court did not have subject matter jurisdiction to grant husband's counterclaim for divorce, which was filed when he was no longer a resident of the state, because it asserted a new cause of action based on grounds for divorce which did not exist at the time of original pleadings). \textit{Compare} Wilson v. Wilson (No. 86-J-38) 1988 WL 34621, *2-3 (Ohio Ct. App. 1988) (holding that the trial court had subject matter jurisdiction over a sailor's counterclaim for divorce, although he was not a resident of the state, because the wife, although no longer a resident of Ohio, was a resident of the state at the time she filed her action for alimony).

\textsuperscript{50} See supra note 29.

\textsuperscript{51} \textit{Wamsley}, 333 Md. at 463, 635 A.2d at 1326.

\textsuperscript{52} Id.
courts and practitioners in determining the domicile of a member of the armed services.

JAMES M. CONNOLLY

B. Limiting the Scope of Equitable Adoption

In *Board of Education v. Browning*, the Maryland Court of Appeals held that an equitably adopted child was not entitled to inherit by intestate succession from the sister of her equitably adoptive mother. In so holding, the court limited the reach of the doctrine of equitable adoption in Maryland to the adoptive parent and child. The *Browning* decision, moreover, clarified the bounds of equitable adoption within previously enumerated guidelines and underscored sound policy reasons for requiring strict compliance with formal adoption procedures.

1. The Case.—Eleanor G. Hamilton, a resident of Montgomery County, died without a will on August 19, 1990, and left an estate valued at $394,405.57. Because Hamilton died intestate and without any legal heirs, the Board of Education of Montgomery County (Board) claimed that it was entitled to Hamilton's estate pursuant to Maryland escheat laws. On May 21, 1991, Paula M. Browning was appointed personal representative of Hamilton's estate.

Browning was born out of wedlock as Pauline M. Gibbons on October 4, 1919, to Lawrence E. Hutchison and Martha Gibbons. In 1921, Hutchison, who resided in the District of Columbia, legally

2. Id. at 295, 635 A.2d at 380.
3. Id.
4. Id. at 283, 635 A.2d at 375.
5. Id. at 283-84, 635 A.2d at 375. "Escheat" is a term that describes the reversion of property to the state when no individuals exist who are legally entitled to inherit the property. See *United States v. Board of Comm'rs of Pub. Sch.*, 432 F. Supp. 629, 630-31 (D. Md. 1977). Since 1798, Maryland statutes have provided that funds of a person who dies intestate and without heirs revert to the state and its educational institutions. *Id*. The current Maryland law of escheat, as set forth in the Estates and Trusts Article of the Maryland Code, provides that "the net estate shall be converted to cash and paid to the board of education in the county in which the [escheat] letters were granted, and shall be applied for the use of public schools in the county." *Md. Code Ann., Est. & Trusts* § 3-105(a) (1991).
6. *Browning*, 333 Md. at 283, 635 A.2d at 375.
7. Id.
adopted Browning.\(^8\) Shortly after adopting Browning, Hutchison married Marian E. Gibson (Marian), Hamilton’s sister.\(^9\)

Following her appointment as estate representative, Browning filed a complaint in the Circuit Court for Montgomery County for a declaratory judgment that she was the equitably adopted child of Marian\(^10\) and, therefore, could inherit Hamilton’s entire estate pursuant to Maryland intestacy law.\(^11\) At the same time, Browning filed a motion for summary judgment.\(^12\) In support of her motion, Browning submitted an affidavit in which she stated: (1) that throughout her life she maintained a normal parent-child relationship with Lawrence and Marian Hutchison; (2) that both when she was a child and later as an adult, the Hutchisons told her they had adopted her; and (3) that in 1984 Marian specifically told Browning that she had adopted her.\(^13\)

The Board answered with a motion to dismiss for failure to state a claim upon which relief can be granted.\(^14\) The Board argued that Browning had not alleged sufficient facts to establish equitable adoption.\(^15\) In the alternative, the Board contended that, even if Browning were Marian’s equitably adopted daughter, as a matter of law, she could not inherit from the estate of her aunt by equitable adoption.\(^16\)

In December 1992, the circuit court granted Browning’s motion for summary judgment.\(^17\) The court held that Browning, as an equitably adopted daughter, could inherit from the estate of her equitably

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8. Id.
9. Id.
10. Id. at 284, 635 A.2d at 375. Browning maintained that she did not learn that Marian had not legally adopted her until 1992 when she was asked to produce proof of her adoption for the instant litigation. Id.
11. Id. Browning argued that the District of Columbia’s intestacy law should govern the action because the relevant facts that give rise to her claim for equitable adoption occurred in the District of Columbia, where Browning lived with the Hutchisons. Plaintiff’s Response Memorandum in Opposition to Defendant’s Motion to Dismiss at 23, Browning v. Board of Educ., No. 92358 (Cir. Ct. Montgomery County, Md. 1992). Indeed, courts prefer to use the law of the state where the adoption occurred. See, e.g., In re Estate of McConnell, 268 F. Supp. 346, 347 (D.D.C. 1967) (holding that the law of the site of the alleged adoption takes precedence when determining whether equitable adoption occurred), aff’d sub nom. Prather v. District of Columbia, 393 F.2d 665 (D.C. Cir. 1968). Nevertheless, the Court of Appeals looked to Maryland law to decide whether Browning could inherit from Eleanor Hamilton. See Browning, 333 Md. at 290, 635 A.2d at 378.
12. Browning, 333 Md. at 284, 635 A.2d at 375.
13. Id.
14. Id. The Board asked the circuit court to dismiss and declare that: (1) Browning was not entitled to inherit from Hamilton’s estate; and (2) the estate escheated to the Board of Education of Montgomery County. Id. at 285, 635 A.2d at 375.
15. Id. at 284, 635 A.2d at 375.
16. Id.
17. Id. at 285, 635 A.2d at 376.
adoptive mother's sister. The Board appealed the decision to the Court of Special Appeals. Before the intermediate court could hear the case, the Court of Appeals issued a writ of certiorari on its own motion to consider whether, as a matter of law, an equitably adopted child has a right to inherit from an equitably adoptive parent's sibling.

2. Legal Background.—

a. Legal Adoption.—Unknown at common law, adoption is a statutory creation in this country. In 1892, Maryland first enacted an adoption statute, which conveyed upon the adopting parent and child all the legal characteristics of a natural parent-child relationship. These attributes included "the rights to custody of the child and to his earnings . . . , the duty to support the child . . . and provision for inheritance by the child from the parent in the event of intestacy." Under current Maryland law, an adopted child continues to hold the status of a natural child of the adoptive parents. Accordingly, a legally adopted child possesses the same inheritance rights as a natural born child and inherits from and through his adopting parents in the same manner as a child by birth.

Legislatures and courts have always insisted on formal adoption procedures. Maryland law requires prospective parents to file a petition for adoption in circuit court and submit to a judicial review.

18. Id., 635 A.2d at 375-76. The circuit court concluded that the Board had conceded that Browning had been equitably adopted by Marian. Id., 635 A.2d at 375. The Board maintained on appeal, however, that the circuit court's conclusion was erroneous because the Board had specifically argued that Browning's complaint failed to allege sufficient facts to support a finding of equitable adoption. Id. at 285 n.2, 635 A.2d at 375 n.2.
19. Id. at 285, 635 A.2d at 376.
22. John S. Strahorn, Jr., Adoption in Maryland, 7 MD. L. REV. 275, 275 (1943).
23. Id.
25. Id. The Court of Appeals has held: [The laws of inheritance] do not distinguish between a legally adopted child and a child by birth, to the end that such adopted child shall take from, through and as a representative of its adopting parent or parents and the lineal or collateral kindred of such adopting parent, or parents in the same manner as a child by birth.
Gutman v. Safe Deposit & Trust Co. of Baltimore, 198 Md. 39, 42, 81 A.2d 207, 208 (1951).
Because the child's interests are paramount, a legal adoption in Maryland, "is not a contract alone between the parties," but requires a "judicial determination of the advisability of permitting such action." When the court grants an adoption, it usually issues a formal decree. The requirement for judicial approval of the adoptive parent or parents reduces the chance that a young child will find a home with unfit adoptive parents. In addition, an executed adoption agreement in Maryland extinguishes all rights of the natural parents to the child and frees them of all legal obligations. Finally, compliance with statutory provisions ensures that all parties to the adoption agreement realize the serious consequences of an adoption decree.

b. Equitable Adoption.—

(i) The Recognition of Equitable Adoption.—Courts formulated the doctrine of equitable adoption because strict adherence to statutory adoption procedures often impaired the allegedly adopted child's inheritance rights. Because any deviation from the statutory procedure allowed other heirs or collateral kin of the intestate adoptive parent to challenge the adoption, a defective adoption could ef-

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28. See, e.g., In re Adoption No. 9979, 323 Md. 39, 57, 591 A.2d 468, 477 (1991) (Eldridge, J., concurring) (explaining that the underlying concern of adoption proceeding is the interest and welfare of the child); In re Lynn M., 312 Md. at 462-64, 540 A.2d at 800-01 (noting that the predominant theme of all adoption statutes is to preserve and protect the interests of the child).

29. Besche v. Murphy, 190 Md. 539, 544, 59 A.2d 499, 501 (1948). Although adoption in Maryland is based on a court decree, some jurisdictions have discussed it in terms of a contract to adopt. See id. (noting that adoptions are solely contractual in other states). Such terminology can be misleading, however, since a legal adoption cannot be accomplished by a mere contract between the interested parties. Id. "In order to create the status of adoption there must be some formal legal act; and as the common law knows no such status, it can only be created in strict and formal conformity to the terms of some statute. It cannot be created by contract or agreement." Menees v. Cowgill, 223 S.W.2d 412, 417 (Mo. 1949).

30. Menees, 223 S.W.2d at 417.


33. See McGarvey v. State, 311 Md. 233, 240-41, 533 A.2d 690, 694 (1987) (explaining that extensive statutory procedures reflect a belief that "as a matter of general policy, termination of the natural parental rights and the creation of a wholly new parent-child relationship may be accomplished only by following elaborate and carefully devised statutory procedures").

34. George C. Sims, Comment, Adoption by Estoppel: History and Effect, 15 Baylor L. Rev. 162, 164 (1963); see also Besche v. Murphy, 190 Md. 539, 549, 59 A.2d 499, 504 (1948) (noting that some courts will not recognize an adoption if statutory requirements are not met); Strahorn, supra note 22, at 278 (outlining examples of the Maryland judiciary's adherence to the statutory requirements for adoption).
fectively deprive the "adopted" child of any inheritance right.\textsuperscript{35} In response to this circumstance, the doctrine of "equitable adoption"\textsuperscript{36} permits the intestate inheritance of a child from a parent who intended to adopt the child but for some reason did not comply with formal adoption procedures.\textsuperscript{37} Thus, equitable adoption is usually invoked to avoid an unfair result in the application of intestacy laws.\textsuperscript{38}

The doctrine is recognized by Maryland\textsuperscript{39} as well as a majority of other jurisdictions.\textsuperscript{40} Most courts base equitable adoption upon one of two well-established theories: specific performance of the contract to adopt or promissory estoppel.\textsuperscript{41} Courts that have applied specific performance against the intestate estate of an equitably adoptive parent have upheld the child's limited right of inheritance under concepts drawn from contract law.\textsuperscript{42} Although courts will not enforce an adoption agreement between the child's natural and adoptive parents nor declare the legal validity of the adoption, courts do allow the child to obtain specific enforcement of the benefits that would have accrued from a legal adoption.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{35}Sims, \textit{supra} note 34, at 164.
  \item \textsuperscript{36}The doctrine is also referred to as "adoption by estoppel" or "virtual adoption." McGarvey v. State, 311 Md. 233, 234, 533 A.2d 690, 690 (1987); see also Baker v. Henderson, 69 S.E.2d 278, 280 (Ga. 1952) (holding that virtual adoption allows children who were not legally adopted to attain the same rights as if their parents had complied with adoption statutes); Cavanaugh v. Davis, 235 S.W.2d 972, 973 (Tex. 1951) (recognizing that adoption by estoppel served to prevent "those claiming under the adoptive parents [from denying] the validity of the instrument of adoption").
  \item \textsuperscript{37}Besche, 190 Md. at 547, 59 A.2d at 503.
  \item \textsuperscript{38}Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973).
  \item \textsuperscript{39}See Besche, 190 Md. at 547-48, 59 A.2d at 502-04 (recognizing the doctrine, although declining to invoke the principle on the facts of the case); McGarvey, 311 Md. at 234-38, 533 A.2d at 690-92 (holding the doctrine to exist in Maryland but noting it does not operate to reduce the inheritance tax for equitably adopted children).
  \item \textsuperscript{41}See Menees v. Cowgill, 223 S.W.2d 412, 416 (Mo. 1949). Maryland does not favor one theory over the other to substantiate equitable adoption. See Besche, 190 Md. at 547-48, 59 A.2d at 502-04; McGarvey, 311 Md. at 234-38, 533 A.2d at 690-92.
  \item \textsuperscript{42}In re Estate of McConnell, 268 F. Supp. 346, 347 (D.D.C. 1967). To support a finding of equitable adoption under the theory of specific performance, the claimant must show: an agreement between the natural and adoptive parents; performance by natural parents in relinquishing custodial rights; performance by the youth by residing with the adoptive parents; part performance by the adoptive parents by giving the child a home and acting like natural parents; and the intestacy of the adoptive parents without a will. Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973).
  \item \textsuperscript{43}John C. Jeffries, Jr., \textit{Note, Equitable Adoption: They Took Him into Their Home and Called Him Fred}, 58 VA. L. REV. 726, 731 (1972). Jeffries explains that because equitable
As an alternative to the theory of specific enforcement, some jurisdictions, most notably Texas, rely on the concept of promissory estoppel to support a finding of equitable adoption.\textsuperscript{44} This "adoption by estoppel" rests upon the notion that adoptive parents who receive the benefits of love, affection, and filial obedience from a child cannot deny the responsibilities incident to adoption by failing to file the forms that the statute has prescribed.\textsuperscript{45} Moreover, because the adoptive parent's "promises, acts and conduct, . . . those claiming under or through [the parent] are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child."\textsuperscript{46}

Whether a court relies on specific performance or estoppel to support a finding of equitable adoption, two factors remain constant: First, courts uniformly require a party to support a claim of equitable adoption with a written or oral agreement showing the intentions of all parties to the adoption by clear and convincing evidence.\textsuperscript{47} Second, equitable adoption entitles the child to recover from the promisee's estate whatever portion of the property the child would have been entitled to receive under the laws of inheritance had the adoption contract been fully executed.\textsuperscript{48} As the United States District Court for the District of Columbia explained,

[The doctrine of] equitable adoption does not change the status of the child to that of being legally adopted but is merely a recognition by courts of equity . . . that the child is entitled to receive upon the death of his . . . parents, what he would have received had their contract to adopt been carried out during their lifetime.\textsuperscript{49}

\textsuperscript{44} Jones v. Guy, 143 S.W.2d 906, 909 (Tex. 1940).
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Besche v. Murphy, 190 Md. 539, 548-49, 59 A.2d 499, 504 (1948).
\textsuperscript{48} Id. at 547, 59 A.2d at 503; see also In re Estate of McConnell, 268 F. Supp. 346, 348 (D.D.C. 1967) (holding specific enforcement of contract to adopt secures the adopted child a share of intestate adoptive parent's estate); Poucny v. Garner, 626 S.W.2d 337, 341 (Tex. Ct. App. 1981) (finding that adoption by estoppel permits adopted child to inherit from alleged adoptive parents).
(ii) The Scope of Equitable Adoption.—Courts have uniformly invoked equitable adoption to permit an adopted child to inherit from the estate of the child’s adopting parent.50 The majority of the courts that recognize equitable adoption, however, have declined to use the doctrine to permit the equitably adoptive child to inherit from a blood relative of the adoptive parent.51 These courts reason that equitable adoption cannot extend to those who are not “in privity” with the parties to the adoption agreement.52

In a similar recognition of the doctrine’s limited applicability, the Court of Appeals has held that equitable adoption does not entitle an equitably adopted child to be taxed as a direct heir of the child’s decedent parent.53 In McGarvey v. State, an equitably adopted child argued that her inheritance from her equitably adoptive parent should be subject to a one percent lineal descendant tax rate as opposed to a ten percent rate imposed on “collateral or nonlineal” descendants.54 The court held that Maryland was entitled to its ten percent share because an equitably adopted child was not a lineal descendant within the meaning of both the Estates and Trusts Article and the Family Law Article of the Maryland Code,55 even though the court recognized that “an equitably adopted child may take property from an equitably adoptive parent by intestate succession.”56

In a lone exception to the prevailing jurisprudence on equitable adoption, the West Virginia Supreme Court of Appeals held in First

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50. See supra notes 39-40 and accompanying text.
51. See, e.g., In re Estate of Olson, 70 N.W.2d 107, 110 (Minn. 1955) (determining that the alleged adopted child who had lived twenty-three years with the adoptive parent had no enforceable rights in the estate of his adoptive parent’s brother); Menees v. Cowgill, 223 S.W.2d 412, 418 (Mo. 1949) (holding that the equitably adopted child could not inherit from adoptive father’s sister); Pouncy, 626 S.W.2d at 342 (noting that a child adopted by estoppel cannot inherit from “collateral kindred”). But see First Nat’l Bank v. Phillips, 344 S.E.2d 201, 204-05 (W. Va. 1985) (allowing an equitably adopted child to inherit as if a blood-related sister from other children of her equitably adoptive parent). See generally George A. Locke, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 97 A.L.R.3d 347, 366-67 (1977 & Supp. 1994).
52. See Pouncy, 626 S.W.2d at 342. As used in equitable adoption cases, privity is defined as “the legal relationship between parties incident to succession on the part of [the adopted child] to an estate or interest formerly held by the [adoptive parent].” Id. at 341 (citations omitted). For example, the natural child of a parent would have no legal relationship to a child equitably adopted by the same parent. The two children would not be in privity and therefore, would be unable to claim an inheritance by succession through each other.
54. Id. at 234-35, 533 A.2d at 690-91.
56. McGarvey, 311 Md. at 238, 533 A.2d at 692.
National Bank in Fairmont v. Phillips that an equitably adopted child may inherit from another child of the adoptive parent. In Phillips, the West Virginia court required no proof of an express or implied contract to support an equitable adoption. Instead, the Phillips court required that "the equitably adopted child . . . prove by clear, cogent and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to a formally adopted child." Such an adoptive status qualified the adoptee to inherit from a natural child of the equitably adoptive parent.

3. Court's Reasoning.—In Browning, the Court of Appeals considered whether an equitably adopted child could inherit through her equitably adoptive parent. After outlining the general history of equitable adoption, the court discussed the principles of specific performance and promissory estoppel that underlie the doctrine. Within this context, the court acknowledged that Maryland recognizes the doctrine of equitable adoption as it applies to the child who seeks to inherit by intestate succession from the estate of an equitably adoptive parent.

The court next examined the scope of equitable adoption in Maryland. After a review of authority from other jurisdictions, the court noted that the majority of jurisdictions have not expanded the scope of adoption beyond that of the parent-child relationship and have refused to allow an equitably adopted child to inherit from the relatives of an adoptive parent. The court specifically rejected the reasoning of the West Virginia court in Phillips, which permitted an equitably adopted child to inherit through the children of her adoptive parents. The court further noted that the Phillips court ex-
pressly limited its holding to the case at bar and declined to determine whether an equitably adopted child could inherit from the adoptive parents’ relatives. 67

The court then concluded that Browning, as an equitably adopted child, could not inherit from her adoptive mother’s sister. 68 The court explained that it would be unfair to permit Browning to inherit from Hamilton because Hamilton, a collateral relative, made no promises to Browning and was not a party to the adoption agreement. 69 Additionally, the court rejected Browning’s claim that she was the most logical heir of Eleanor Hamilton’s property because “the only other party seeking to inherit [was] the local Board of Education through escheat laws.” 70 Although it conceded that escheat is disfavored at law, 71 the court nonetheless denied Browning’s claim because Maryland’s law stipulates that the Board of Education inherits property if an individual dies intestate and without legal heirs. 72

In his dissenting opinion, Judge Eldridge argued that Browning should inherit from Hamilton because “the equitably adopted child who has served as a dutiful family member” has a greater claim to her relative’s estate than the state. 73 Judge Eldridge asserted that it was illogical to prevent Browning, an equitably adopted child who has gained the entitlements of a legal heir, from inheriting Hamilton’s estate. 74 He pointed out the inconsistency in the court’s reasoning, which would allow Browning to be the “legal heir” of Marian Hutchinson as her stepmother, but not a “legal heir” of Hutchinson’s sister, her “aunt.” 75 Judge Eldridge concluded that, presumably, Hamilton

67. Id.
68. Id. at 293, 635 A.2d at 380.
69. See id. at 293-94, 635 A.2d at 379-80. The court noted: “Under both contractual and estoppel notions, the equities that clearly exist in favor of permitting an equitably adopted child to inherit from an equitably adoptive parent do not exist when that child seeks to inherit from a sibling of the child’s adoptive parents.” Id.
70. Id. at 294, 635 A.2d at 380.
71. Id.; see also United States v. 198.73 Acres of Land, 800 F.2d 434, 435-36 (4th Cir. 1986) (noting that society prefers to keep property within the family as most broadly defined).
72. Browning, 333 Md. at 294-95, 635 A.2d at 380 (“Maryland is crystal clear that if no legal heir exists, the decedent’s property escheats to the local Board of Education.”).
73. Id. at 297, 635 A.2d at 381 (Eldridge, J., dissenting). Eldridge conceded that a legal heir would have inheritance priority over Browning, but pointed out that, “unlike those who would be entitled to take as heirs, the State has no ‘family’ connection to the intestate decedent.” Id.
74. Id. at 297-98, 635 A.2d at 381.
75. Id. at 298, 635 A.2d at 381.
would have preferred her estate be left to Browning, a long-time family member and legal heir of her sister.\textsuperscript{76}

4. Analysis.—In \textit{Browning}, the Court of Appeals held that an equitably adopted child could not inherit from her equitably adoptive mother's sister.\textsuperscript{77} Although the Court of Appeals has consistently held that equitable adoption permits an alleged adoptive child to inherit from her intestate adoptive parent's estate, the court had never determined the effect of the doctrine on collateral relatives.\textsuperscript{78} By its refusal to expand the scope of equitable adoption beyond the adoptive child and parent, the \textit{Browning} court strictly delineated the bounds of the child's inheritance rights in Maryland.

In addition, the \textit{Browning} decision accords with Maryland precedent on equitable adoption. In \textit{McGarvey v. State}, the court refused to invoke equitable adoption against the state because the state was not in privity with the parties to the adoption agreement.\textsuperscript{79} Based on this logic, equitable adoption should not operate against Hamilton's estate because she, too, was not a party to the adoption agreement.

Most importantly, the Court of Appeals in \textit{Browning} underscored the importance of strict compliance with Maryland's adoption statutes, which, if followed, guarantee the legal rights of the adopted child in accordance with public policy.\textsuperscript{80} The statutory requirement, that all parties to an adoption agreement receive judicial approval, protects the youth by helping ensure a proper home for the child and impresses upon all parties the ramifications and responsibilities incident to the adoption agreement.\textsuperscript{81}

Because equitable adoption permits a circumvention of statutory adoption procedures, other jurisdictions have wisely limited its application by requiring clear and convincing evidence of a binding contract to adopt,\textsuperscript{82} and by limiting its application to those in privity to the adoptive agreement.\textsuperscript{83} By its decision to follow the weight of authority from other courts, the \textit{Browning} court effectively limited circumvention of statutory adoption procedures and promoted the underlying public policy. If the court had awarded Browning the status of heir for all purposes, it would have, in effect, eliminated the

\begin{itemize}
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 295, 635 A.2d at 380.
\item \textsuperscript{78} See McGarvey v. State, 311 Md. 233, 238, 533 A.2d 690, 692 (1987).
\item \textsuperscript{79} Id. at 241-43, 533 A.2d at 694-95.
\item \textsuperscript{80} See supra notes 27-32 and accompanying text.
\item \textsuperscript{81} McGarvey, 311 Md. at 240-41, 533 A.2d at 694.
\item \textsuperscript{82} See supra note 60 and accompanying text.
\item \textsuperscript{83} See supra notes 52-53 and accompanying text.
\end{itemize}
need for formal adoption procedures. As one Ohio court explained:

If taking a child into a home, rearing such child, giving it the family name, calling such a child a daughter, and holding such child out to relatives and friends as a daughter, is sufficient to establish a lawful adoption, then there would be no need for any statutory authority or judicial proceedings.

To allow an equitably adopted child to inherit from collateral relatives to the adoptive parents could overburden courts with considerable litigation. "In today's society, where divorce, remarriage and extended households are commonplace, each such relationship could create potential claims to the estates of numerous relatives."

The court's denial of Browning's right to inherit from her aunt, moreover, was not inconsistent with Browning's status as Marian's stepdaughter. Her status as a stepchild, like that of an equitably adopted child, did not provide Browning with unlimited inheritance rights. Indeed, courts show considerable reluctance to allow participation in the estate of a stepparent on the basis of equitable adoption. It is significant that, as a stepdaughter, Maryland law affords Browning no right to inherit from the blood relatives of Marian, which surely would undermine the same inheritance claims based on equitable adoption.

5. Conclusion.—In Browning, the Court of Appeals narrowly limited the equitably adopted child's inheritance rights to an adoptive parent's estate. The court's decision, moreover, clarified the scope of equitable adoption in a manner consistent with prior Maryland jurisprudence on the doctrine. Finally, by holding that Browning was not entitled to inherit her aunt's estate, the Court of Appeals reinforced the significance that Maryland's judiciary and legislature have tradi-

85. Id.
87. Id.
89. Jeffries, supra note 43, at 737.
90. See supra note 88.
tionally placed upon strict compliance with the statutory procedures for adoption.

ELIZABETH A. GAUDIO

C. Clarifying the Best Interest Standard in Maryland

In *In re Adoption No. A91-71A*,\(^1\) the Court of Appeals addressed two issues: whether separate counsel must be appointed to represent a child who is the subject of an independent adoption; and the proper application of the best interest standard in terminating the rights of a natural parent who contests the independent adoption.\(^2\) First, the court held that under Section 5-323 of the Family Law Article, a court must appoint counsel to represent an individual who is the subject of an independent adoption proceeding.\(^3\) In so holding, the court reaffirmed the need for trial courts to appoint counsel, previously codified in Article 16, Section 77B(a)(4).\(^4\)

Second, the court held that when a natural parent contests a third party's adoption petition, the presumption that it is in the child's best interest to remain with the natural parent is rebuttable.\(^5\) Evidence of parental unfitness or the existence of exceptional circumstances that could render it detrimental for the child's well-being to remain with the natural parent may rebut the presumption.\(^6\) Specifically, the court held that under Section 5-312 of the Family Law Article, behavior that is not extreme enough to render the natural parent unfit may still be a potential factor that could give rise to exceptional

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2. The Court of Appeals also examined a third issue dealing with timing requirements under § 5-312(b) of the Family Law Article. See infra note 7. Ernest, the biological father, contended that the statute requires that the prospective adoptive parents maintain custody of the child for six months and that the child be out of the natural parents' custody for one year prior to the filing of the adoption petition. Based on the plain meaning of the language used in § 5-312(b), the court held that the time periods refer to the granting of the petition and not to the filing of the petition. *Adoption No. A91-71A*, 334 Md. at 565-66, 640 A.2d at 1098-99.
3. Id. at 559, 640 A.2d at 1095; see MD. CODE ANN., FAM. LAW § 5-323 (1991). Section 5-323 provides in pertinent part:
   (a) Certain appointments required—In a proceeding for adoption or guardianship, the court shall appoint separate counsel to represent:

   (4) in an involuntary termination of parental rights, an individual who is the subject of the proceeding and an indigent parent.

   Id. § 5-323(a)(4).
5. *Adoption No. A91-71A*, 334 Md. at 561, 640 A.2d at 1096.
6. Id.
The court enumerated several factors that may prove the existence of exceptional circumstances. By emphasizing the importance of exceptional circumstances in terminating parental rights, the court clarified the proper analysis of the best interest standard.

1. The Case.—Ernest M. and Mellisa R., both unmarried, began living together in June 1990. Shortly thereafter, Mellisa discovered she was pregnant with Ernest’s child. Mellisa then informed Ernest of her pregnancy and her choice to put the baby up for adoption. With the help of an independent facilitator, Mellisa selected James and Darlene D. as adoptive parents. Initially, Ernest expressed no
interest in Mellisa's pregnancy or her decision to put the child up for adoption. Ernest later changed his mind, however, and informed Mellisa's attorney that he would not consent to the adoption.

On March 16, 1991, in the presence of Mrs. D., Mellisa gave birth to a baby boy (Baby G.). Two days later, with Mellisa's consent, the D.s filed a complaint for Independent Adoption and Change of Name. On the same day, the court granted the D.s temporary custody of Baby G.

On April 9, 1991, Ernest filed a Notice of Objection, requesting proof of his paternity and indicating that if the child was his he would seek custody. The test results proved that Ernest was Baby G.'s biological father. In response, Mellisa filed a Conditional Revocation of Consent to Independent Adoption, which stated that if the court refused to finalize the adoption because of Ernest's non-consent, she would revoke her consent and assume custody of Baby G.

At the adoption hearing held from April 27 through 29, 1992, the court denied the D.s' petition for adoption, but ordered Baby G. to remain in the D.s' custody. The court stated that under Section 5-312 it had not been proven by clear and convincing evidence that Ernest was unfit; therefore, the court could not hold that it was in

88 years old, had been in the construction business for 17 years, and Mrs. D., 37 years old, was the manager of service representatives in a local company. Id. at 546 n.2, 640 A.2d at 1089 n.2. Carol Popham, a social worker employed by the Anne Arundel County Department of Social Services, recommended that the D.s' petition for adoption be granted after a court-ordered investigation of both the natural parents and the D.s. Id.

15. Id. at 544, 640 A.2d at 1088. In January and February 1991, Mellisa's attorney telephoned Ernest concerning the upcoming adoption. Ernest told the lawyer, "If the bitch wants to give it away, she can." Id. Subsequent correspondence between Ernest and Mellisa's attorney confirmed Ernest's willingness to consent to the adoption. Id.

16. Id. The investigation revealed that Ernest's "sudden interest" in Baby G. seemed the result of his mother's influence. Id. at 546, 640 A.2d at 1089.

17. Id. at 545, 640 A.2d at 1088.

18. Id.

19. Id.

20. Id., 640 A.2d at 1089.

21. Id. In later testimony, Ernest revealed that he hoped the paternity test would let him "off the hook." Id.

22. Id.

23. Id. at 548, 640 A.2d at 1090. Previously, on December 20, 1991, the court held a hearing to decide whether Ernest's request for custody and visitation and his motion to dismiss the adoption petition should be granted. Id. at 547, 640 A.2d at 1089. The trial court found: (1) while it did not have the authority to grant the adoption, it would not dismiss it; (2) it was not in the child's best interest to grant Ernest custody or visitation privileges; and (3) that the D.s would continue to have custody pending the adoption proceedings. Id.
Baby G.'s best interest to terminate Ernest's parental rights. The court also held that it had not been proven by clear and convincing evidence that Ernest failed to contribute to the physical care and support of Baby G., a factor for consideration under Section 5-312.

On June 10, 1992, the D.s filed a Notice for In Banc Review, pursuant to Article IV, Section 22, of the Maryland Constitution and Maryland Rule 2-551. Three issues were raised by the D.s at the review:

1. whether the trial court erred by failing to appoint counsel for [Baby G.] in violation of § 5-323;
2. whether under § 5-312, the trial court erred in equating the best interest standard with Ernest's fitness; and
3. whether the court erred in finding that Ernest had not failed repeatedly to contribute to [Baby G.'s] support under § 5-312(b)(4)(ii).

The in banc panel held that although the trial court violated Section 5-323 by failing to appoint counsel for the child, Baby G.'s interests had, nevertheless, been adequately represented at trial. The panel further held that the trial court had focused solely on Ernest's fitness, essentially had equated the best interest standard with Ernest's fitness, and had neglected to analyze the child's best interest. In addition, the panel found that the D.s presented sufficient evidence at trial to establish that Ernest had failed to contribute financially to Baby G.

24. *Id.* at 549, 640 A.2d at 1090. Evidence of Ernest's drug possession charge, his history of instability in living arrangements, and his abandonment of Mellisa when she became pregnant were not enough to overcome the presumption favoring the natural father. *Id.*, 640 A.2d at 1091.

25. *Id.;* see supra note 7. At trial, Ernest testified that he had offered to make payments to the D.s for Baby G.'s support by giving two checks to his attorney to tender to the D.s. *Adoption No. A91-71A*, 334 Md. at 549, 640 A.2d at 1091. The D.s testified that Ernest had never offered to contribute financially to Baby G., and that they had never received any checks from Ernest or anyone else on his behalf. *Id.* at 550, 640 A.2d at 1091.

26. *Id.;* see Md. R. 2-551 (1993). Rule 2-551 provides:

- Generally—When review by a court in banc is permitted by the Maryland Constitution, a party may have a judgment or determination of any point or question reviewed by a court in banc by filing a notice for in banc review. Issues are reserved for in banc review by making an objection in the manner set forth in Rules 2-517 and 2-520. Upon the filing of the notice, the Circuit Administrative Judge shall designate three judges of the circuit, other than the judge who tried the action, to sit in banc.

Md. R. 2-551.

27. *Adoption No. A91-71A*, 334 Md. at 550, 640 A.2d at 1091.

28. *Id.* at 551, 640 A.2d at 1091.

29. *Id.*

30. *Id.*
Upon these findings, the panel reversed the trial court's judgment and remanded the case with instructions to grant the adoption.\textsuperscript{31}

Ernest appealed the decision to the Court of Special Appeals.\textsuperscript{32} In an unreported opinion, the court held that the in banc panel did not have the authority to make an independent finding as to Baby G.'s best interest.\textsuperscript{33} The court concluded that it was unclear whether the trial court had misconstrued the best interest analysis by an application of the evidence presented at trial only towards a finding of fitness, or whether it had permissibly applied evidence of Ernest's fitness toward a finding of no exceptional circumstances.\textsuperscript{34} The court remanded the case to the trial court to determine "by clear and convincing evidence based on the totality of the circumstances, that it is in the best interest of [Baby G] to terminate [Ernest's] rights to the child."\textsuperscript{35} Ernest and the D.s filed separate petitions for writs of certiorari, which the Court of Appeals granted.\textsuperscript{36}

2. \textit{Legal Background.---}

\textbf{a. Statutory Authority.---}The power to decree an adoption is purely statutory in Maryland.\textsuperscript{37} This power is granted to courts of equity by Sections 5-307(a) and 5-309(a) of the Family Law Article. When read together, these sections expressly provide that "[a]ny individual . . . may be adopted by [a]ny adult."\textsuperscript{38} Section 5-308(b) states that an adopted child "[i]s the child of the petitioner for all intents and purposes."\textsuperscript{39} Unless the natural parents' rights have been termi-
nated by a judicial proceeding, an individual may not be adopted without the consent of both natural parents under Section 5-311.40

When a natural parent expressly withholds consent to an independent adoption, Section 5-312 is applicable.41 Section 5-313 applies to a parental objection to a state or agency-arranged adoption.42 Upon meeting the statutory requirements, an adoption is permitted without a natural parent's consent if it can be shown through clear and convincing evidence that "it is in the child's best interest to terminate the natural parent's rights as to the child."43 In all adoption cases, the court must bear in mind the expressed will of the Maryland legislature that a child should not be separated unnecessarily from its natural parents.44

b. The Best Interest Standard in Maryland.—Maryland courts have long used the best interest standard to decide contested petitions for adoption as well as custody disputes.45 Under the best interest standard, the paramount consideration is the child's welfare and not the parent's interest in raising the child.46 When an adoption petition by a third party is opposed by the natural parent, it is presumed to be in the child's best interest to maintain the legal relationship with the


44. Id. § 5-303(b).

45. Adoption No. A91-71A, 334 Md. at 559, 640 A.2d at 1096; see also Washington County Dep't of Social Servs. v. Clark, 296 Md. 190, 461 A.2d 1077 (1983) (holding that when the state seeks to terminate parental rights without the consent of the natural parent in an adoption proceeding, the matter should be determined according to the best interest of the child); Melton v. Connolly, 219 Md. 184, 148 A.2d 387 (1959) (explaining that it was in the child's best interest to remain in the custody of her foster parents due to the length of time she had lived in their home); Winter v. Director of Pub. Welfare, 217 Md. 391, 143 A.2d 81 (finding that statutes that dispense with a natural parent's need to consent are not unconstitutional where the welfare and best interests of the child are the primary concerns), cert. denied, 358 U.S. 912 (1958).

natural parent. 47 "The justification for this presumption is the belief that the parent's natural affection for the child creates a greater desire and effort to properly care for and rear the child than would exist in an individual not so related." 48

To overcome the natural parent presumption, courts require evidence that either the natural parent is unfit 49 or that exceptional circumstances exist that would render a decision in favor of the natural parent detrimental to the child. 50 Courts often focus on the physical, psychological, and economic needs of the child. 51 In Alston v. Thomas, 52 the Court of Appeals granted an adoption over the natural father's objection because the father had abandoned the child shortly after birth and he was unable to provide adequate financial support to the child. 53 Likewise, in Atkins v. Gose, 54 the court granted an adoption over the objection of the natural mother. 55 The court concluded that because of the mother's crowded and unstable living quarters, return of the child from the adoptive parent's home to his mother's home would be detrimental to his welfare. 56

Due to the finality of adoption proceedings, Maryland requires that parental rights be terminated only upon a showing of clear and convincing evidence. 57 "Unlike awards of custody, . . . adoption decrees cut the child off from the natural parent who is made a legal stranger to his offspring. [A]doption shall not be granted over parental objection unless that course clearly is justified." 58 A clear and convincing standard is therefore required to protect the fundamental rights of parents. 59

47. Adoption No. A91-71A, 334 Md. at 561, 640 A.2d at 1096.
48. Id. at 560, 640 A.2d at 1096.
49. Id. Parental unfitness is a broad concept that can justify termination of parental rights in situations where parental conduct falls short of abandonment, neglect, or nonsupport. JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 4.04(1)(iv) (1993).
51. Miller, supra note 13, at 759.
52. 161 Md. 617, 158 A. 24 (1932).
53. Id. at 620, 158 A. at 25.
54. 189 Md. 542, 56 A.2d 697 (1948).
55. Id. at 551, 56 A.2d at 701.
56. Id.
57. Md. Code Ann., Fam. Law § 5-312(b) (1991). In 1982, the Supreme Court held that due process requires that parental rights not be terminated in adoption proceedings except upon clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745 (1982); see HOLLINGER ET AL., supra note 49, § 2.10 (reviewing the Santosky decision to raise the standard of proof for the termination of parental rights).
59. See Santosky, 455 U.S. at 1394-95 (explaining that the liberty interests of natural parents in the care, custody, and management of their child is a fundamental right).
3. The Court’s Reasoning.—Under Section 5-323 of the Family Law Article, the Court of Appeals held that counsel must be appointed to represent the interests of the subject in a contested independent adoption proceeding. The court rejected Ernest’s argument that Section 5-323 only applies to state or agency-arranged adoptions under Section 5-313. In interpreting Section 5-323, the court followed the plain meaning rule of statutory construction: “[a] plainly worded statute must be construed without forced interpretations designed to limit its applications.” The court reasoned that the statute contained no language which would limit its application only to Section 5-313. The court further relied on the longstanding principle that the word “shall” takes on a mandatory meaning when used in a statute. Section 5-323 consequently requires appointment of counsel whether the proceeding is arranged independently or through an agency-arranged or state adoption.

To determine whether it would be in Baby G’s best interest to terminate Ernest’s parental rights, the court stated that “in making the best interest determination . . . evidence can, and should, be considered not only with regard to [parental] fitness, but as a potential factor which may give rise to exceptional circumstances warranting the termination of parental rights.” Apart from the factors listed under Section 5-312, the court for the first time enumerated exceptional circumstance factors drawn from past adoption and custody case law. These factors include the length of time the child has been with the prospective parents and the strength of the emotional tie that has developed, the stability of life with the adoptive parents as compared with the natural parents, and the sincerity of the natu-

60. See supra note 3.
61. Adoption No. A91-71A, 334 Md. at 559, 640 A.2d at 1095.
62. Id. at 557, 640 A.2d at 1094-95.
63. Id., 640 A.2d at 1095.
64. Id. at 558, 640 A.2d at 1095.
65. Id. at 559 n.5, 640 A.2d at 1095 n.5.
66. Id. at 563, 640 A.2d at 1097.
67. See supra note 7. The court explained that while at least one of the three factors listed in § 5-312 must be satisfied apart from the best interest determination, these factors may also be considered to determine the best interests of the child. Adoption No. A91-71A, 344 Md. at 563 n.8, 640 A.2d at 1098 n.8.
68. Adoption No. A91-71A, 344 Md. at 562, 640 A.2d at 1097.
69. Id.; see King v. Shandrowski, 218 Md. 38, 42, 145 A.2d 281, 284 (1958) (remanding the case to determine whether it would be in the child’s best interest to remove her from the home of her prospective adopted parents with whom she had lived for more than three years).
70. See Atkins v. Gose, 189 Md. 542, 550-51, 56 A.2d 697, 701 (1948) (holding that the adoption could be granted over the natural mother’s objections because the child’s life
The court also placed importance on the age of the child when the third-party assumed care of the child and the emotional effect it would have on the child to remove him/her from the care of the third-party. Finally, the court listed three additional factors that could result in a finding of exceptional circumstances based on the natural parent's behavior toward the child: (1) the effect on the child's stability of having more than one of the relationships continued, (2) abandonment by the father before or after the birth, and (3) failure to support or visit the child. While these three factors normally apply to findings of a natural parent's fitness, the court also found them relevant to exceptional circumstances.

After reiterating the exceptional circumstances factors of a best interest analysis, the court examined the three alternative factors required under Section 5-312(b)(4) to grant a contested adoption. The court noted Ernest's failure to contribute monetary support for the care of Baby G and found there was insufficient evidence to support Ernest's contention that he had tendered support checks to his attorney. Even if Ernest had tendered the checks, the court rea-
asoned that the amount reflected only payment for medical bills and not for the care and support of Baby G.\textsuperscript{79}

Because it was unclear whether the trial court correctly applied evidence of Ernest's fitness to a finding of no exceptional circumstances or whether it erroneously equated the best interest standard to a finding of fitness, the court refrained from decreeing the adoption.\textsuperscript{80} Instead, the court remanded the case to the trial court in order to appoint counsel to represent Baby G's interest, and then to determine whether, under the best interest standard, exceptional circumstances warranted the termination of Ernest's parental rights.\textsuperscript{81}

4. Analysis.—The court's determination that Section 5-323 requires courts to appoint counsel to represent the interests of individuals who are the subject of an independent adoption proceeding is consistent with prior Maryland case law decided under Article 16, Section 77B, that related to agency-arranged and state proceedings.\textsuperscript{82} The court correctly and sensibly concluded that for the purposes of Section 5-323 applicability, "[t]here is no difference between a termination of parental rights prerequisite to the granting of an independent adoption and a termination of parental rights prerequisite to the granting of an agency-arranged adoption."\textsuperscript{83} This ruling will ensure more uniform treatment of independent and agency-arranged adoptions under Section 5-323. By providing separate counsel for the child, the court's ruling further enhances the principle that the sole focus in an adoption should be on the child and not on the interests of the parents or the state.

In the matter of parental nonconsent, the court clarified the proper analysis for determination of the best interest of a child in an independent adoption. With respect to the child's best interest, the court emphasized that parental fitness is not the only factor a trial court must consider.\textsuperscript{84} A court must also examine factors to determine whether exceptional circumstances may warrant the termination of parental rights.\textsuperscript{85} The court's distinction between fitness and exceptional circumstances is important, as a parent's behavior may not

\textsuperscript{79} Id. at 565, 640 A.2d at 1098. Under § 5-312(b)(4)(ii), financial support must include the cost of the child's physical care and support and not only the cost of medical bills. Id.

\textsuperscript{80} Id. at 567-68, 640 A.2d at 1099-1100.

\textsuperscript{81} Id. at 568, 640 A.2d at 1100.

\textsuperscript{82} See supra note 4.

\textsuperscript{83} Adoption No. A91-71A, 334 Md. at 558, 640 A.2d at 1095.

\textsuperscript{84} Id. at 561, 640 A.2d at 1096.

\textsuperscript{85} Id. at 567, 640 A.2d at 1099.
rise to the level of unfitness, but it may, however, give rise to an exceptional circumstance.\footnote{Id. at 563, 640 A.2d at 1097.}

Before Adoption No. A91-71A, courts had limited guidance as to which factors to weigh in a best interests adoption analysis. Generally, courts turned to past custody cases for guidance.\footnote{Id. at 561, 640 A.2d at 1097.} Consistent with this approach, the Adoption No. A91-71A court listed several factors, taken from past custody cases, for courts to apply in adoption cases.\footnote{Factors considered relevant in past custody cases included the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, [and] the stability and certainty as to the child's future in the custody of the parent. Id. at 561-62, 640 A.2d at 1097 (citing Ross v. Hoffman, 280 Md. 172, 191, 372 A.2d 582, 593 (1977)).} By its reliance on factors used in custody cases, the court's decision provides trial courts with a uniform basis to adjudicate claims based on a child's best interest, regardless of whether the dispute concerns custody or adoption.

While the Adoption No. A91-71A decision will provide courts with a set of guidelines, the court retreated from a strict formulaic approach and noted that "a determination [into exceptional circumstances] depends upon the facts and circumstances of each case."\footnote{Id. at 564, 640 A.2d at 1098.} The listed factors are "simply factors to be considered in the best interest analysis."\footnote{See supra note 72 and accompanying text.} Thus, the decision does not emphasize whether any factors should be given greater weight or if the factors should be evaluated equally. Trial judges will continue to exercise broad discretion in deciding whether exceptional circumstances exist, depending on their view of the evidence.

Although it clarified the best interest standard, the court failed to stress that before an adoption petition can be granted where a natural parent withholds consent, at least one of the three alternative factors under Section 5-312(b)(4) must exist.\footnote{Adoption A91-71A, 334 Md. at 561, 640 A.2d at 1096.} Petitioners must prove: (1) the natural parent did not maintain a meaningful relation with the child despite the opportunity to do so, or (2) the natural parent did not contribute financially to the care and support of the child, or (3)
the natural parent abused the child.\textsuperscript{92} If the petitioner cannot prove one of these factors, then the adoption decree will not be granted, regardless of the child's best interest.\textsuperscript{93} This requirement places an extra burden of proof on petitioners and disregards the possibility that, in certain circumstances, adoption may be in the child's best interest regardless of whether the natural parent has maintained a relationship or sent the child financial support. In the future, the legislature may wish to examine this issue and require judicial emphasis upon the best interest determination in cases of parental nonconsent to petitions for independent adoptions.

5. Conclusion.—The court in Adoption No. A91-71A held that under Section 5-323 of the Family Law Article, a trial judge must appoint counsel to represent the interests of a child who is the subject of an adoption proceeding, regardless of whether the proceeding is an independent or agency-arranged adoption. The court also clarified the proper application of the best interest standard in independent adoption cases when a natural parent contests the adoption. While the court failed to emphasize the importance of the three factors listed under Section 5-312(b)(4), courts must still determine whether it has been shown by clear and convincing evidence that one of these alternative factors has been met before the court can grant an adoption. Courts must then find that it is in the child's best interest to terminate the natural parents' rights either by a showing of parental unfitness or exceptional circumstances. By its clarification of the best interest standard and the enumeration of several factors that may determine exceptional circumstances, the court has provided useful guidelines for future adjudication of adoption claims.

\textsc{Danna M. Lubrani}

\textsuperscript{92} Adoption No. A91-71A, 384 Md. at 543, 640 A.2d at 1087-88 (citing Md. Code Ann., Fam. Law § 5-312(b)(4) (1991)).

\textsuperscript{93} Id. at 564, 640 A.2d at 1098.
VI. LEGAL PROFESSION

A. Compensation of a Contingency-Fee Attorney Discharged Without Cause

In Skeens v. Miller, the Maryland Court of Appeals addressed the question of at what point in time a contingent fee attorney’s cause of action for compensation of services will accrue when the attorney has been released by the client without cause before the occurrence of the contingency. In a case of first impression, the court held that an attorney discharged without cause from a contingent fee agreement may upon discharge immediately assert a claim in quantum meruit, despite the nonoccurrence of the contingency.

In so holding, the court followed the New York rule, which prevents a client who terminates a contingent fee agreement without cause from later asserting the contingency term as a defense to a fee claim of the discharged attorney. The Skeens decision reflects a well-reasoned analysis of the contractual obligations of the parties to a contingent agreement. As a result, the court’s ruling provides greater protection to attorneys, maintains adequate safeguards for clients, and preserves the contingent fee agreement as a viable instrument that provides legal services for those otherwise unable to afford them.

1. The Case.—On June 28, 1989, Helen Martha Miller retained Edward John Skeens to represent her in a personal injury claim stemming from an automobile accident that occurred a few days earlier. The written agreement consisted of a contingent fee arrangement by which Skeens would be paid one-third of any recovery, whether by lawsuit or settlement. The agreement was silent regarding any compensation due Skeens should discharge take place prior to the occurrence of the contingency.

In a letter dated October 31, 1990, Miller wrote Skeens to discharge him as her attorney and request that Skeens forward her file and a bill for costs incurred to another attorney. Responding by let-

1. 331 Md. 331, 628 A.2d 185 (1993).
2. Id. at 336-37, 628 A.2d at 188.
3. Quantum meruit is an equitable doctrine which allows the recovery of “reasonable value for services, absent a clear and understood contract or... for partial performance when an entire contract has been rescinded.” Attorney Grievance Comm’n v. McIntire, 286 Md. 87, 93, 405 A.2d 273, 277 (1979).
4. Skeens, 331 Md. at 342, 628 A.2d at 191.
5. Id. at 344, 628 A.2d at 191.
6. Id. at 333, 628 A.2d at 186.
7. Id.
8. Id.
9. Id.; see Letter of dismissal from defendant dated October 31, 1990, Record at 35-36.
ter dated November 19, 1990, Skeens wrote Miller to inform her that he expected to meet with her new counsel that day and stated that he expected payment for the reasonable value of work performed.\textsuperscript{10} Skeens enclosed an itemized statement,\textsuperscript{11} and informed Miller that he expected payment immediately, no matter the future success of her claim.\textsuperscript{12} In the letter, Skeens further stated that if Miller lacked the funds to pay him immediately, he would accept assignment of any settlement proceeds Miller might obtain.\textsuperscript{13} Upon receiving neither payment nor assignment, Skeens sued Miller in the District Court of Maryland for Prince George's County.\textsuperscript{14} Skeens alleged that he was dismissed without cause and based his claim solely in \textit{quantum meruit}.\textsuperscript{15}

At trial on June 19, 1991, the district court granted Miller's motion to dismiss the complaint without prejudice and reasoned that Skeens's claim could ripen only upon Miller's recovery on her underlying personal injury claim.\textsuperscript{16} On appeal, the Circuit Court for Prince George's County affirmed on the grounds that the trial court's ruling was not clearly erroneous.\textsuperscript{17} The circuit court held that Skeens's cause of action would accrue "only upon the successful occurrence of the contingency stated in the Attorney-Client Agreement."\textsuperscript{18} Skeens appealed the decision to the Court of Special Appeals, which transferred the case to the Court of Appeals.\textsuperscript{19} The Court of Appeals thereupon granted Skeens's petition for writ of certiorari.\textsuperscript{20}

2. \textit{Legal Background.—}

\textit{a. The Nature of the Attorney-Client Relationship.—}It is firmly established in Maryland that an attorney's authority to act for a client

\begin{itemize}
  \item \textsuperscript{10} Letter from Attorney Skeens to defendant dated November 19, 1990, Record at 37.
  \item \textsuperscript{11} \textit{Skeens}, 331 Md. at 333-34, 628 A.2d at 186. Skeens enclosed an itemized statement of services rendered and asserted that a reasonable charge for those services (at a rate of $150 per hour) was $2,740. \textit{Id.} How Skeens arrived at this figure was somewhat unclear to the court, as the 1090 minutes that Skeens spent on Miller's case when converted to hours and multiplied by an hourly rate of $150 totals $2,725. \textit{Id.} at 334 n.1, 628 A.2d at 186 n.1. The court noted that Skeens apparently spent $42 in costs in furtherance of Miller's claim. \textit{Id.}
  \item \textsuperscript{12} \textit{Id.} at 334, 628 A.2d at 186.
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} Skeens v. Miller, No. CAL 91-16575 (Md. Cir. Ct. Dec. 17, 1991).
  \item \textsuperscript{18} \textit{Id.} at 4.
  \item \textsuperscript{19} \textit{Skeens}, 331 Md. at 334, 628 A.2d at 187.
  \item \textsuperscript{20} \textit{Id.}
\end{itemize}
is freely revocable at the will of the client.\textsuperscript{21} In \textit{Western Union Telegraph Co. v. Semmes},\textsuperscript{22} the Court of Appeals reasoned that public policy demands that a litigant have the power to "compromise his suit according to his own wishes or interest."\textsuperscript{23} Commentators have noted that public policy deems this right a necessity because the nature of the attorney-client relationship is one based upon trust and confidence.\textsuperscript{24}

Once an attorney is discharged, it becomes necessary to determine whether the attorney is entitled to compensation. In \textit{Attorney Grievance Commission v. Koroti},\textsuperscript{25} the Court of Appeals noted its agreement with the prevailing rule that an attorney discharged for cause is not entitled to compensation,\textsuperscript{26} while an attorney released without cause is so entitled.\textsuperscript{27} The rule further provides that an attorney who justifiedly terminates a relationship is similarly entitled to compensation.\textsuperscript{28}

Once an attorney is deemed entitled to compensation, a determination is made regarding whether the attorney will be compensated in \textit{quantum meruit} or under the contract. A minority of jurisdictions allow full recovery of the amount stipulated in the contract, either upon the theory of constructive performance or contract damages.\textsuperscript{29}

Most jurisdictions, including Maryland, follow the modern rule which

\begin{itemize}
\item \textsuperscript{21} See Palmer v. Brown, 184 Md. 309, 316, 40 A.2d 514, 517 (1945); Boyd v. Johnson, 145 Md. 385, 389, 125 A. 697, 698-99 (1924); Western Union Tel. Co. v. Semmes, 73 Md. 17, 18, 20 A. 127, 128 (1890).
\item \textsuperscript{22} Id. at 17, 20 A. 127 (1890).
\item \textsuperscript{23} Id. at 19, 20 A. at 128.
\item \textsuperscript{24} See, e.g., F.B. MacKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964). MacKINNON notes:
\begin{quote}
One of the basic features of the lawyer-client relationship is the fact that it is terminable at will . . . with or without cause. Courts view the relationship as one peculiarly dependent upon the confidence of a client in his lawyer and believe there is no reason to force a continuance of the relationship if this confidence no longer exists.
\end{quote}
\item \textsuperscript{25} Id. at 77.
\item \textsuperscript{26} Id. at 669, 569 A.2d at 1235-36; accord Vogelhut v. Kandel, 308 Md. 183, 192, 517 A.2d 1092, 1097 (1986) (Rodowsky, J., concurring).
\item \textsuperscript{27} Id. at 670, 569 A.2d at 1236; accord Vogelhut, 308 Md. at 192, 517 A.2d at 1097 (Rodowsky, J., concurring); Palmer, 184 Md. at 316, 40 A.2d at 517; Boyd, 145 Md. at 389-90, 125 A. at 699; Semmes, 73 Md. at 20-21, 20 A. at 128.
\item \textsuperscript{28} Id. at 760, 569 A.2d at 1236.
\item \textsuperscript{29} See, e.g., Kaushiva v. Hutter, 454 A.2d 1373, 1375 (D.C.) (holding attorney who had substantially performed, was at all times ready, willing, and able to perform, and was later discharged by client without cause, was entitled to the full contingent fee set out in contract), cert. denied, 464 U.S. 820 (1983).
\end{itemize}
permits compensation for the reasonable value of services performed under the theory of quantum meruit.30

Jurisdictions that follow the modern quantum meruit rule prohibit the recovery of contract damages on the ground that a contract between an attorney and client contains an implied term that allows the client to discharge the attorney freely, with or without cause.31 Because of this implied term, a client who discharges an attorney has not breached the retainer contract, and therefore the attorney cannot collect contract damages.32 In Korotki, the Court of Appeals similarly commented that "the attorney is entitled to the reasonable value of the services—not to a higher amount produced by a contingent fee agreement."33

b. When the Attorney's Cause of Action Accrues.—While it is agreed that an attorney discharged without cause is entitled to compensation in some form, no consensus exists regarding the point in time at which such an attorney's cause of action accrues.34 Courts presented with this question follow one of two schools of thought—the California rule or the New York rule.35 In Fracasse v. Brent,36 the Supreme Court of California held that a cause of action to recover for services rendered before revocation does not accrue until the actual occurrence of the contingency stated in the contract.37 Under this

30. See, e.g., Ambrose v. Detroit Edison Co., 237 N.W.2d 520, 524 (Mich. Ct. App. 1975) (noting although no Michigan court had decided the issue, the majority view is that an attorney discharged without cause, or who rightfully withdraws, is entitled to compensation for the reasonable value of services based upon quantum meruit); Martin v. Camp, 114 N.E. 46, 47-48 (N.Y.) (holding attorney hired under contingency fee arrangement in condemnation proceedings was entitled only to reasonable value of services rendered), modified, 115 N.E. 1044 (N.Y. 1917).
31. See Martin, 114 N.E. at 48.
33. Attorney Grievance Comm'n v. Korotki, 318 Md. 646, 670, 569 A.2d 1224, 1236 (1990); see also Vogelhut v. Kandel, 308 Md. 183, 192, 517 A.2d 1092, 1097 (1986) (Rodowsky, J., concurring) ("[T]he attorney is entitled to be compensated for the reasonable value of the legal services rendered prior to termination."); Ethics Committee of the Maryland State Bar Ass'n, Informal Op. 79-19 ("It is the opinion of the Ethics Committee that [the attorney] may not claim the entire ... contingent fee but may claim the reasonable value of ... time and services to date of ... replacement.").
34. Skeens, 331 Md. at 336-37, 628 A.2d at 188.
35. Id. at 337, 628 A.2d at 188.
37. Id. at 15; see also Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982) ("We ... follow the California view that in contingency fee cases, the cause of action for quantum
rule, a discharged attorney will be denied any compensation in the event that a recovery is not obtained.\textsuperscript{38} The \textit{Fracasse} court gave two reasons for the adoption of this rule. First, any determination regarding attorney compensation before actual recovery is highly speculative.\textsuperscript{39} Second, it would be too great a burden for a client to have an absolute obligation to pay an attorney no matter the outcome of the litigation.\textsuperscript{40}

Courts adopting the California rule have expanded upon the reasons to postpone compensation until the occurrence of the contingency. In \textit{Rosenberg v. Levin},\textsuperscript{41} the Supreme Court of Florida reasoned that such a rule furthers public policy by allowing clients to discharge their attorneys at will.\textsuperscript{42} The \textit{Rosenberg} court further noted that the postponement of the cause of action does no damage to the attorney because the attorney would not have collected anything until the contingency actually occurred.\textsuperscript{43} For additional support, courts have stressed that the rule promotes greater trust and confidence in the profession\textsuperscript{44} and avoids the possible injustice that may result from a premature recovery.\textsuperscript{45}

With regard to the New York rule, the New York Court of Appeals in \textit{Martin v. Camp}\textsuperscript{46} held that an attorney's cause of action accrues upon the occurrence of the contingency.\textsuperscript{38} \textit{Fracasse}, 494 P.2d at 14; \textit{Rosenberg}, 409 So. 2d at 1022; \textit{Plaza Shoe Store}, 636 S.W.2d at 53, 60 (Mo. 1982) ("[W]e adopt[ ] the [California rule whereby the fee is] payable only upon the occurrence of the contingency."); Clerk of Super. Ct. v. Guilford Builders Supply Co., 361 S.E.2d 115, 118 (N.C. Ct. App. 1987) ("[The] right to recover under the contingent fee contract does not accrue until the occurrence of the contingency."); \textit{cert. denied}, 364 S.E.2d 918 (N.C. 1988); First Nat'l Bank & Trust Co. v. Bassett, 83 P.2d 837, 840 (Okla. 1938) ("[The] cause of action did not accrue until a final recovery was had . . . .").

\textsuperscript{38} \textit{Fracasse}, 494 P.2d at 14; \textit{Rosenberg}, 409 So. 2d at 1022; \textit{Plaza Shoe Store}, 636 S.W.2d at 53; \textit{Guilford Builders Supply Co.}, 361 S.E.2d at 115, 118; \textit{Bassett}, 83 P.2d at 840.

\textsuperscript{39} \textit{Fracasse}, 494 P.2d at 14.

\textsuperscript{40} Id.

\textsuperscript{41} 409 So. 2d 1016 (Fla. 1982).

\textsuperscript{42} Id. at 1022. "We conclude that this approach creates the best balance between the desirable right of the client to discharge his attorney and the right of an attorney for reasonable compensation for his services." \textit{Id.; see also Plaza Shoe Store}, 636 S.W.2d at 59 ("While this theory may not comport with traditional contract law . . . the broad public policy objectives to be served by this method, plus the peculiar and distinctive features of the attorney client relationship . . . more than defend and justify the position.").

\textsuperscript{43} \textit{Rosenberg}, 409 So. 2d at 1022.

\textsuperscript{44} \textit{Plaza Shoe Store}, 636 S.W.2d at 60.

\textsuperscript{45} \textit{Bassett}, 83 P.2d at 840 ("We would in such a case, [where the attorney was allowed to recover upon discharge] have the inequitable situation where the claimant had recovered . . . for services decreed by the court to be necessary and beneficial, but which in the ultimate end would have proved worthless.").

\textsuperscript{46} 114 N.E. 46 (N.Y.), \textit{modified}, 115 N.E. 1044 (N.Y. 1917).
immediately upon termination of the contingent agreement. Later, in Tillman v. Komar the New York court advanced two reasons for the adoption of this rule. First, the client cannot use the contingent fee contract as a shield once that contract has been terminated. Second, the discharged attorney cannot be made to depend upon the skill and ability of another attorney who may or may not be successful depending upon individual competence. In In re Estate of Callahan, the Supreme Court of Illinois offered three additional reasons for adhering to the New York rule. First, quantum meruit is based upon an implied promise to pay for valuable services, and the client would be unjustly enriched if those services were not paid for. Second, the eventual outcome of the litigation is not a necessary factor in deciding the value of services rendered. Lastly, if the discharged attorney's services were of little or no value to the client, injustice would be avoided by little or no award.

3. The Court's Reasoning.—In Skeens, the Court of Appeals faced the novel question of whether an attorney discharged without cause from a contingent fee agreement may immediately bring an action to recover the value of legal services rendered prior to discharge. The court held that when a client discharges an attorney without cause, “the attorney's claim in quantum meruit accrues immediately upon discharge, notwithstanding the fact that the contingency has not occurred.”

47. Id. at 48-49; see also Booker v. Midpac Lumber Co., 649 P.2d 376, 379 (Haw. 1982) ("The amount of [an attorney's] fee shall be determined . . . upon consideration of all relevant factors, at the time of, or prior to, the final disposition of [the] case . . . ."); In re Estate of Callahan, 578 N.E.2d 985, 988 (Ill. 1991) ("We have considered the rationale supporting each approach and hold that an attorney's cause of action for a quantum meruit fee accrues immediately after discharge."); Adkin Plumbing & Heating Supply Co. v. Harwell, 606 A.2d 802, 804 (N.H. 1992) ("We believe the better rule is stated in the New York cases, and hold that the cause of action accrues upon the termination of the attorney's services without cause, not upon the happening of the contingency.").

48. 181 N.E. 75 (N.Y. 1932).

49. Id. at 75. "The client is entitled to cancel his contract of retainer but such an agreement cannot be partially abrogated. Either it wholly stands or totally falls." Id.

50. Id. at 76. "A successor may be able to obtain far heavier judgments than the efforts of the original attorney could secure, or, on the other hand, inferior equipment of a different lawyer might render futile an attempt to prove damage to the client." Id.


52. Id. at 988.

53. Id.

54. See id. at 989. "[I]t is possible for someone to receive services and yet not be enriched in a tangible way at all." Id.

55. Skeens, 331 Md. at 336-37, 628 A.2d at 188.

56. Id. at 343-44, 628 A.2d at 191.
Writing for a sharply divided court, Judge Karwacki noted that an attorney discharged without cause may recover the reasonable value of legal services provided prior to the point of discharge. In support of this proposition, the opinion quoted extensively from *Western Union Telegraph Co. v. Semmes,* which firmly established that although the attorney is not entitled to collect the contingency amount once the agreement has been canceled, the attorney is nevertheless entitled to receive compensation for the value of legal services rendered prior to discharge.

After setting the attorney's right to compensation in a contractual context, the majority discussed the effect of cancellation of a contractual agreement and looked to *Rodemer v. Henry Hazlehurst & Co.* for authority. Although *Rodemer* did not involve an attorney client relationship, it "provided equally salient reasoning," when the court stated that

once [a contract is] repudiated by the defendant, it cannot bind one and not the other. . . . Where there is a special contract, and the plaintiff has performed part of it according to its terms, and has been prevented by the act or consent of the defendant from performing the residue, he may in general assumpsit recover for the work actually performed, and the defendant cannot set up the special contract to defeat him.

The court then shifted its focus to the point in time when an attorney's cause of action arises, drawing heavily upon its recent decision in *Vogelhut v. Kandel.* In *Vogelhut,* the court reasoned that an attorney discharged without cause could immediately assert the right to a retaining lien on the client's files based upon the reasonable

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57. Id. at 340-41, 628 A.2d at 190 (citing Palmer v. Brown, 184 Md. 309, 316, 40 A.2d 514, 517 (1945)); Boyd v. Johnson, 145 Md. 385, 389, 125 A. 697, 699 (1924); Western Union Tel. Co. v. Semmes, 73 Md. 17, 18, 20 A. 127, 128 (1890)).

58. 73 Md. 17, 20 A. 127 (1890).

59. Id. at 21, 20 A. at 128. "[T]he plaintiffs were entitled to reasonable compensation for the work and labor actually done by them, but that they were not entitled to the contingent compensation." Id. The *Semmes* court further noted that "[a]lthough the defendant had a right to terminate the litigation, yet the [attorneys] had rendered services to it, on the faith of a contract. It was not intended by either party that these services should be gratuitous." Id. at 20, 20 A. at 128.

60. *Skeens,* 331 Md. at 342, 628 A.2d at 190.

61. 9 Gill 288 (1850).

62. *Skeens,* 331 Md. at 342, 628 A.2d at 190.


64. 308 Md. 183, 517 A.2d 1092 (1986).
value of services rendered. The relinquishment of those files provided sufficient consideration to enforce a successor attorney's promise to share the fee ultimately earned by the successor attorney. Based on the reasoning in *Semmes, Rodemer, and Vogelhut*, the Skeens court concluded that "the unfulfilled contingency . . . had no effect upon the attorney's right to recover the reasonable value of the services performed by the attorney pursuant to the agreement."67

Once the court placed the attorney-client relationship in this contractual light, it reasoned that the New York rule was "consistent with our view of the rights and liabilities of the parties to a contingent fee agreement."69 Therefore, the attorney's claim in quantum meruit would accrue immediately upon the client's repudiation of the contract without cause.70

In a strongly worded dissent, Judge Eldridge argued that the majority mischaracterized each of the cases it relied upon to support the notion that an attorney may recover before the occurrence of the contingency.71 The dissent asserted that these cases addressed the amount an attorney is entitled to recover, rather than the point in time when recovery may be had.72 The court's decision in *Attorney Grievance Commission v. Korotki* addressed neither the amount nor the time when an attorney may recover in that *Korotki* was a disciplinary proceeding concerned with the reasonableness of attorney's fees.74 The dissent argued that *Rodemer v. Henry Hazlehurst & Co.* was inapplicable because it concerned neither a contingent fee agreement nor

65. *Id.* at 190-91, 517 A.2d at 1096.
66. *Id.* In *Vogelhut*, attorneys Vogelhut and Kandel entered into an agreement whereby successor attorney Vogelhut agreed to pay discharged attorney Kandel 25% of any fee received in return for Kandel's surrendering of the client's files. *Id.* at 186-87, 517 A.2d at 1094. The court held that such surrender was adequate consideration to support Vogelhut's promise to pay Kandel. *Id.* at 188, 517 A.2d at 1095.
67. *Skeens*, 331 Md. at 343, 628 A.2d at 191.
68. See supra notes 46-54 and accompanying text.
69. *Skeens*, 331 Md. at 343, 628 A.2d at 191.
70. *Id.* at 345-44, 628 A.2d at 191.
71. *Id.* at 345, 628 A.2d at 192 (Eldridge, J., dissenting).
72. *Id.* (citing Palmer v. Brown, 184 Md. 309, 40 A.2d 514 (1945); Boyd v. Johnson, 145 Md. 385, 125 A. 697 (1924); Western Union Tel. Co. v. Semmes, 73 Md. 17, 20 A. 127 (1890); Bull v. Schuberth, 2 Md. 38 (1852)). Judge Eldridge noted that each of these cases, unlike *Skeens*, involved a recovery that was sought after the occurrence of the contingency. *Id.*
73. 318 Md. 646, 569 A.2d 1224 (1990); see supra notes 25-28, 33 and accompanying text.
74. *Skeens*, 331 Md. at 346, 628 A.2d at 193 (Eldridge, J., dissenting) ("[Korotki] concerned the reasonableness of the contingent fee and the appropriate discipline.").
75. 9 Gill 288 (1850); see supra notes 61-63 and accompanying text.
an attorney-client relationship,\textsuperscript{76} and that the majority's discussion of Vogelhut v. Kande\textsuperscript{77} was completely inaccurate.\textsuperscript{78}

The Skeens dissent also disagreed with the majority's view of the attorney-client relationship and argued that Maryland case law supports the notion that the "attorney-client relationship is an agency relationship, governed by principles of agency law."\textsuperscript{79} The dissent maintained that case law supports the view that an agent hired under a contingency fee arrangement has no right to collect for services rendered if the contingency does not occur.\textsuperscript{80}

In arguing that the majority showed more concern for the interests of attorneys than for the interests of clients, the dissent suggested two forms of protection already afforded attorneys.\textsuperscript{81} First, an attorney released without cause from a contingency contract may be entitled to recover upon the happening of the contingency.\textsuperscript{82} Second, if there is interference by a third party, the attorney may bring action against that third party.\textsuperscript{83} Because client interests are "embedded in the policies of this state,"\textsuperscript{84} as evidenced by Maryland Rule of Professional Conduct 1.5,\textsuperscript{85} the dissent asserted that the New York rule is not

\begin{itemize}
\item \textsuperscript{76} Skeens, 331 Md. at 347, 628 A.2d at 193 (Eldridge, J., dissenting).
\item \textsuperscript{77} 308 Md. 183, 517 A.2d 1092 (1986); \textit{see supra} notes 64-66 and accompanying text.
\item \textsuperscript{78} Skeens, 331 Md. at 348, 628 A.2d at 194 (Eldridge, J., dissenting). The dissent noted that the majority relied upon the reasoning of a concurring opinion. \textit{Id.} The dissent claimed that \textit{Vogelhut} did not involve the right of the discharged attorney to immediately assert a retaining lien, and that "the majority's inaccurate statement of the Court's reasoning leads it to an inaccurate characterization of the Court's holding." \textit{Id.} at 348-49, 628 A.2d at 194.
\item \textsuperscript{79} \textit{Id.} at 349-50, 628 A.2d at 194 (citing Switkes v. John McShain, Inc., 202 Md. 340, 96 A.2d 617 (1953)). The dissent noted that the principle that requires an attorney to wait until the occurrence of the contingency in order to receive compensation may have previously been applied to an attorney in Keener v. Harrod, 2 Md. 63 (1852). \textit{Keener} was recently cited by the court in Childs v. Ragonese, 296 Md. 190, 196, 460 A.2d 1031, 1034 (1983), in which the court noted that "\textit{Keener} does not indicate whether the 'agent' was a real estate broker, auctioneer, attorney, or other type of agent." \textit{Id.} at 136 n.3, 460 A.2d at 1034 n.3.
\item \textsuperscript{80} Skeens, 331 Md. at 350, 628 A.2d at 194-95 (Eldridge, J., dissenting). The dissent expressed general doubt that the principle of \textit{quantum meruit} applies to contingent fee agreements under Maryland law. \textit{Id.} at 350 & n.2, 628 A.2d at 194-95 & n.2. "Under principles of Maryland agency law, an agent who . . . is to be compensated from funds which the agent is to assist the principal in recovering is not entitled to compensation until there is a recovery." \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 350-51, 628 A.2d at 195.
\item \textsuperscript{82} \textit{Id.} at 350, 628 A.2d at 195.
\item \textsuperscript{83} \textit{Id.} at 350-51, 628 A.2d at 195 (citing Sharrow v. State Farm Mut. Auto. Ins. Co., 306 Md. 754, 511 A.2d 492 (1986)).
\item \textsuperscript{84} \textit{Id.} at 351, 628 A.2d at 195.
\item \textsuperscript{85} The Rule states in part: "(a) A lawyer's fees shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: . . . (4) the amount involved and the results obtained." \textit{Maryland Rules of Professional Conduct}
\end{itemize}
in keeping with the public policy reflected in that comment. Finally, the dissent noted that the court’s holding is hardly in accord with the common understanding, confirmed by public advertisements, that contingency fee agreements entail no fee unless there is a recovery.

4. Analysis.—The court's holding in Skeens reflects a well-reasoned analysis of the contractual rights and liabilities of the parties to a contingent fee agreement. Presented with the issue of when a cause of action arises, the court aptly applied the rationale of the New York Court of Appeals which succinctly stated that “such an agreement cannot be partially abrogated. Either it wholly stands or totally falls.” To hold otherwise would allow the client to have her cake and eat it too. The decision of the Skeens court to follow the New York rule was only logical, as the California rule is inconsistent with basic contract principles.

a. Protections for Attorneys and Clients.—By viewing the attorney-client relationship in a contractual context and allowing an attorney’s cause of action to accrue immediately, the Skeens court eliminated the potential injustice by which a client could deny an attorney fair compensation. Under the California rule, which does not allow a discharged attorney to collect until the contingency actually occurs, a client could avoid payment of attorney compensation in a

Rule 1.5. The dissent pointed out that the comment to Rule 1.5 defines a contingent fee agreement as

an agreement for legal services (1) made before the services are completed, and (2) providing compensation of the lawyer which is contingent in whole or in part upon the successful accomplishment or disposition of the legal matter and which is either in a fixed amount or in an amount determined under a specified formula.

Id. cmt.

86. Skeens, 331 Md. at 352, 628 A.2d at 196 (Eldridge, J., dissenting).
87. Id.
89. See Morrow, supra note 32, at 686. In a strong dissent to the California rule, Justice Sullivan of that state’s supreme court noted:

Having deprived the attorney who is discharged without cause of his right to recover according to the contract and having thereby ordained a disaffirmance of all such contracts in such circumstances, the majority ... further hold[s] that the attorney’s action for reasonable compensation accrues only when the contingency stated in the original agreement (now disaffirmed) has occurred and the client has recovered ... Here again the majority opinion does violence to the basic principles of restitution ...

90. See supra notes 36-45 and accompanying text.
number of ways. First, a client could elect to allow the statute of limitations to expire on a cause of action by simply electing not to pursue the matter any further. Second, a client could hire an attorney who is unable to see the suit to successful fruition. Third, a client could choose to proceed with the suit pro se and then lose. In each instance, the discharged attorney, regardless of effort expended, would not be entitled to any compensation.

It may be argued that a contingent fee agreement imposes upon an attorney the reasonable risk that the suit may not lead to successful settlement. However, it does not follow that in a contingent fee agreement the attorney should expect a discharge without cause, much less that the case will subsequently be entrusted to a successor attorney who may be unsuccessful due to personal incompetence. These difficulties are solved under the New York rule; an attorney is entitled to immediate compensation for the fair value of services rendered, regardless of eventualities or client peculiarities.

Concerning the potential injustice done to clients, several points merit discussion. First, a client continues to have the right to discharge an attorney for cause without having to pay compensation. The client who is legitimately dissatisfied with an attorney's ability will not be forced to continue a relationship which is not in her best interest. Only upon discharge without cause by the client, or for cause on the attorney's behalf, will the client be responsible for compensation. Second, when a client is deemed liable for compensation, the client retains some protection. If the suit is ultimately successful, the client is responsible for compensation only in quantum meruit rather than full contract damages.

91. Michael L. Closen & Zachary A. Tobin, The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client, 76 ILL. B.J. 916, 917-18 (1987) (“Unfortunately, [under the California rule] the client might well take any number of steps which would result in no recovery being obtained.”).

92. Id. at 918.

93. Id.; see also Morrow, supra note 32, at 686. Morrow also posits the converse situation, in which a discharged attorney of lesser ability will have the right to a fee salvaged by the greater abilities of the successor attorney. Id.

94. Closen & Tobin, supra note 91, at 918.

95. Id.


97. See supra notes 46-54 and accompanying text.

98. Skeens, 331 Md. at 335, 628 A.2d at 187.

99. Id. at 336, 628 A.2d at 187.

100. See supra notes 29-33 and accompanying text. Other factors may also protect the client from excessive or unfair payment for attorney services. “[T]he sooner the client discharges the attorney, the less he is required to pay. If the client discharged the attorney
Finally, the New York rule protects one of the primary reasons for the contingent fee agreement—providing legal services to those of limited means. Under the California rule attorneys may be discouraged from taking cases on a contingent fee basis because there is no guarantee that they will receive reasonable value for services rendered. The New York rule provides that, at a minimum, an attorney will be immediately entitled to some form of compensation. The *Skeens* decision protects the contingent fee agreement as a tool providing legal services to those otherwise unable to afford them.

b. Compensation of Agents.—The *Skeens* dissent maintained that the attorney-client relationship is one of agency governed by agency law, and contended that "[u]nder our cases, an agent hired pursuant to a contingent fee contract is not entitled to be compensated until the contingency has been fulfilled." The dissent asserted that the court in *Childs v. Ragonese* held "that an agent could not retain a sales commission because the sale was not actually consummated." The *Childs* court actually held that under Maryland law, an auctioneer would not be afforded the same statutory protections provided real estate brokers regarding the time at which the broker is deemed to have earned their commission.

Maryland law governing broker commission is set forth in Section 14-105 of the Real Property Article of the Annotated Code of Maryland. According to Section 14-105, unless there is an agreement to before he had performed any services, the client would pay no fee." Morrow, *supra* note 32, at 686.

101. Id. at 681.
102. Hunter, *supra* note 96, at 793 ("The potential undesirable consequences [of the California rule] include . . . reluctance to enter into contingent fee contracts . . . ."); Morrow, *supra* note 32, at 686-87 ("[C]ontingent fee contracts have appealed to the economic interest of attorneys in order to provide legal services to those of limited means . . . . [S]ince he is not guaranteed that he will receive the reasonable value . . . [t]he attorney may be discouraged from taking cases on a contingent fee basis.").
103. *Skeens*, 331 Md. at 349, 628 A.2d at 194 (Eldridge, J., dissenting).
104. *Id*.
105. 296 Md. 130, 460 A.2d 1031 (1983).
106. *Skeens*, 331 Md. at 349, 628 A.2d at 194 (Eldridge, J., dissenting).
107. *Childs*, 296 Md. at 136, 460 A.2d at 1034 ("We agree with the Court of Special Appeals that § 14-105 of the Real Property Article has no application to an auctioneer.").
108. Section 14-105 of the Real Property Article provides in pertinent part:

In the absence of special agreement to the contrary, if a real estate broker employed to sell, buy, lease, or otherwise negotiate an estate, or a mortgage or loan secured by the property, procures in good faith a purchaser, . . . and the person procured is accepted by the employer and enters into a valid, binding, and enforceable written contract, in terms acceptable to the employer, . . . and the contract is accepted by the employer and signed by him, the broker is deemed to
the contrary, a real estate broker employed to sell property who produces a purchaser accepted by the employer, as evidenced by a valid contract, earns the commission upon signing of that contract, whether or not that contract is performed. Contrary to the point made by the dissent, in some circumstances Maryland law allows for compensation of agents whether a sale is ultimately consummated or not. Furthermore, it is not required that compensation come from proceeds which the agent has assisted the principal in recovering or obtaining.

With regard to public policy, the dissent raised Maryland Rule of Professional Conduct 1.5 and its comment to suggest that an attorney cannot reasonably expect compensation until the occurrence of the contingency. The comment following Rule 1.5 defines the contingency agreement as an "agreement for legal services . . . providing compensation . . . which is contingent . . . upon the successful accomplishment . . . of the legal matter." The comment to Rule 1.5 pertains to an existing agreement between an attorney and a client. If the 'agreement' has been rescinded in its entirety, any contractual statements regarding when an attorney is entitled to compensation are similarly rescinded. Rule 1.5 does, however, bear upon the determination of the amount due for reasonable value of services rendered.

have earned the customary or agreed commission. He has earned the commission regardless of whether or not the contract entered into is performed, unless the performance of the contract is prevented, hindered, or delayed by any act of the broker.


109. Id. In Childs, § 14-105 was construed narrowly, and the court refused to apply the protections afforded brokers to an auctioneer attempting to collect a fee on a contract of sale which was not performed. Childs, 296 Md. at 135-36, 460 A.2d at 1033-34; see also Nily Realty, Inc. v. Wood, 272 Md. 589, 595, 325 A.2d 730, 734 (1974) (noting that for cases outside of § 14-105, a commission is not earned until a valid contract for sale is executed by the purchaser procured by the broker).

110. Skeens, 331 Md. at 351, 628 A.2d at 195 (Eldridge, J., dissenting).


112. Id. The comment speaks only of contingency compensation for an attorney upon the "successful accomplishment or disposition of the legal matter" and makes no mention of compensation for an attorney discharged without cause. Id.

113. See Closen & Tobin, supra note 91, at 917. "[S]ince the contract is no longer in existence after the client discharges the attorney, the contract no longer dictates the attorney's compensation. The most appropriate method of calculating the discharged attorney's fee, therefore, becomes the reasonable value of the services rendered by the attorney prior to discharge." Id.

114. See infra notes 117-118 and accompanying text.
c. Application of Rule 1.5 on the Calculation of Services Provided.—Upon discharge, an attorney’s compensation will be calculated based upon the reasonable value of services rendered.115 While proponents of the California rule have argued that until the occurrence of the contingency “the amount of damages suffered by the attorney [can] not be ascertained,”116 a survey of case law reveals a number of relevant factors to the determination of compensation prior to a recovery.117 These factors closely resemble those listed in Maryland Rule of Professional Conduct 1.5(a).118

While not considered in Skeens, one factor deemed particularly important to the determination of a reasonable fee is the time and labor required.119 Although not concerned with fees for discharged attorneys, Maryland case law that has addressed the issue of attorney fees has reasoned that the use of time records and hourly rates will result in a bill which is reasonable.120 Given the importance courts place upon actual time spent, it is important for contingency attorneys to maintain detailed time records of work performed on behalf of

115. Skeens, 331 Md. at 348, 628 A.2d at 191.
117. Closen & Tobin, supra note 91, at 918. These factors include:
    (1) the skill and standing of the attorney employed; (2) the nature of the cause;
    (3) the novelty and difficulty of the question; (4) the amount and importance of
    the subject matter; (5) the degree of responsibility involved in the management
    of the cause; (6) the time and labor required; (7) the usual and customary
    charges in the community; and (8) the benefits resulting to the client.
    Id.
118. Rule 1.5(a) provides:
    (a) A lawyer’s fee shall be reasonable. The factors to be considered in determin-
    ing the reasonableness of a fee include the following:
    (1) the time and labor required, the novelty and difficulty of the question
    involved, and the skill requisite to perform the legal service properly;
    (2) the likelihood, if apparent to the client, that the acceptance of the partic-
    ular employment will preclude other employment by the lawyer;
    (3) the fee customarily charged in the locality for similar legal services;
    (4) the amount involved and the results obtained;
    (5) the time limitations imposed by the client or by the circumstances;
    (6) the nature and length of the professional relationship with the client;
    (7) the experience, reputation, and ability of the lawyer or lawyers perform-
    ing the services; and
    (8) whether the fee is fixed or contingent.

119. Closen & Tobin, supra note 91, at 919-20. The trial court dismissed Skeens’s com-
plaint for failure to state a claim upon which relief could be granted. Skeens, 331 Md. at
336, 628 A.2d at 187. The Court of Appeals did not consider the issue of whether or not
the charges put forth by Skeens were acceptable, and apparently left that issue for determi-
nation by the trial court on remand. See id. at 344, 628 A.2d at 191-92.
120. Attorney Grievance Comm’n v. Wright, 306 Md. 98, 102-03, 507 A.2d 618, 622
(1986).
their clients. Other jurisdictions addressing the issue have stated that generalized statements regarding time spent are insufficient and that detailed time records itemizing both time spent and work performed must be maintained.\textsuperscript{121} Ordinarily, a contingency fee attorney would have no reason to keep detailed time records because such records are irrelevant to the contingency amount.\textsuperscript{122} The practice should nevertheless be adopted in the event that the attorney is discharged before recovery occurs.

5. \textit{Conclusion}.—In Skeens, the Court of Appeals held that in a contingent fee agreement, an attorney's cause of action in \textit{quantum meruit} accrues immediately upon discharge without cause. In so holding, the court followed the New York rule which provides that a client cannot selectively raise a contractual provision from a contract which the client has rescinded. While the court's ruling provides important protection to attorneys, it retains the safeguards already available to contingency fee clients. The ruling additionally preserves the contingent fee agreement as an instrument for providing legal services to those of limited means. Although the court did not address the issue of computing the reasonable value of services provided, contingency attorneys will likely be required to keep detailed and accurate time records in order to receive fair compensation.

\textit{Louis J. Franke}

\textsuperscript{121} \textit{See}, \textit{e.g.}, Estate of Healy v. Tierney, 484 N.E.2d 890, 893 (Ill. App. Ct. 1985) ("[D]etailed time records [must be] submitted . . . to support the hours claimed . . . .").

\textsuperscript{122} \textit{See} Closen & Tobin, supra note 91, at 916. "[I]n order to receive full compensation for their efforts, contingency fee attorneys should keep detailed time records even though, under normal circumstances, the time expended will be of no consequence in determining compensation." \textit{Id.}
VII. Torts

A. Recovery for Property Loss under Theories of Negligence and Strict Liability in Tort

In *A.J. Decoster Co. v. Westinghouse Electric Corp.*¹, the Maryland Court of Appeals discussed the distinction between injury to property and pure economic losses in a products liability action brought under tort and contract theories.² Although it did not ultimately address the warranty claims of plaintiff,³ the court held that purchasers of a defective product may recover under negligence or strict liability in tort for loss or harm to physical property caused by the defective product.⁴ In so holding, the court reviewed the circumstances in which recovery for harm caused by a defective product is appropriate in both tort and contract actions.⁵

1. The Case.—A.J. Decoster Co. (Decoster) is a commercial producer of chicken and eggs.⁶ Its operation relies on electrically powered ventilation fans to provide air flow through its chicken houses.⁷ On July 20, 1989, thunderstorms in the area caused Choptank Electric Utilities, the supplier of three-phase electrical power to Decoster, to lose phase “A” power.⁸ Decoster had a generator-based backup power system to supply power in the event of such an emergency.⁹ On this occasion, however, an allegedly defective transfer switch that was manufactured by the Westinghouse Electric Corporation (Westinghouse) failed to detect the power loss.¹⁰ As a result, the backup power system

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¹. 333 Md. 245, 634 A.2d 1330 (1994).
². *Id.* at 249-60, 634 A.2d at 1332-37.
³. On appeal, Decoster argued that the trial court erred in granting summary judgment to Westinghouse Electric Corp. (Westinghouse) on its warranty claims. *Id.* at 261, 634 A.2d at 1337-38. The Court of Appeals declined to consider the trial court’s grant of summary judgment on the warranty claims for two reasons. *See id.* at 263, 634 A.2d at 1339. First, Decoster failed to challenge the legal sufficiency of the affidavit that accompanied Westinghouse’s motion for summary judgment. *Id.*; see Md. R. 2-501(c) (“An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge . . . .”). Second, “Decoster failed to set forth facts controverting those proffered by Westinghouse.” *Decoster,* 333 Md. at 263, 634 A.2d at 1339; see Md. R. 2-501(b) (“The response to a motion for summary judgment shall identify with particularity the material facts that are disputed.”). Accordingly, the court held that the trial court did not err in granting summary judgment on the warranty claims. *Decoster,* 333 Md. at 263, 634 A.2d at 1339.
⁴. *Decoster,* 333 Md. at 249-51, 634 A.2d at 1332-33.
⁵. *Id.*
⁶. *Id.* at 247, 634 A.2d at 1331.
⁷. *See id.*
⁸. *Id.*
⁹. *Id.*
¹⁰. *Id.*
did not activate.\textsuperscript{11} Operating on reduced voltage, the ventilation fans overheated and shut down.\textsuperscript{12} Because of the lack of ventilation, more than 140,000 chickens, valued at over $100,000, suffocated.\textsuperscript{13}

On October 21, 1991, Decoster filed suit against Westinghouse alleging negligence, strict liability in tort, breach of express warranty, and breach of implied warranties of merchantability and fitness for purpose.\textsuperscript{14} Westinghouse responded with a motion to dismiss or, in the alternative, for summary judgment.\textsuperscript{15} Finding that Decoster's damages were solely economic losses not recoverable in tort, the trial court dismissed the negligence and strict liability counts.\textsuperscript{16} Decoster appealed to the Court of Special Appeals.\textsuperscript{17} Prior to review by the intermediate appellate court, the Court of Appeals granted certiorari on its own motion.\textsuperscript{18}

2. Legal Background.—

\textit{a. Recovery for Economic Losses in Tort and Contract.}—Economic loss has been defined as "the diminution in the value of [a] product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold."\textsuperscript{19} In general there is no cause of action in tort for purely economic losses.\textsuperscript{20} Economic losses are redressable in a contract action for breach of war-

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 247-48, 634 A.2d at 1331.
\textsuperscript{13} Id. at 248, 634 A.2d at 1331. The chickens were used primarily for egg production.
\textsuperscript{14} Id. Decoster purchased the switch from a third party who had incorporated it into the back-up system. Joint Record Extract at 31, Decoster (No. 93-46).
\textsuperscript{15} Decoster, 333 Md. at 248, 634 A.2d at 1331. In support of its motion, Westinghouse included the affidavit ofJames W. McGill, then a product line manager for Westinghouse, stating that to the best of his knowledge the transfer switch at issue was manufactured and sold to a distributor in 1979. Joint Record Extract at 15-16, Decoster (No. 93-46).
\textsuperscript{16} Joint Record Extract at 63, Decoster (No. 93-46). The trial court reasoned that because the loss of chickens constituted economic loss and because there was no risk of death or personal injury, there was no recovery under a tort theory. Id. at 60-61.
\textsuperscript{17} Decoster, 333 Md. at 249, 634 A.2d at 1331-32.
\textsuperscript{18} Id. at 249, 634 A.2d at 1332.
\textsuperscript{20} See United States Gypsum Co. v. Mayor and City Council of Baltimore, 396 Md. 145, 156, 647 A.2d 405, 410 (1994) ("Traditionally, in cases to recover damages because of defective products, the loss of value or use of the product itself, and the cost to repair or replace the product, have usually been viewed as economic losses."); \textit{see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS} § 101, at 708 (5th ed. 1984) (explaining that products which do not have defects that endanger others may not be so poor
ranty. This distinction arises out of the different theories of liability between actions brought in tort and those brought for breach of contract. An action based in tort protects personal and property interests; an action based on contract, by contrast, protects the purchaser's interest in receiving the benefit of his bargain, ensuring that the product is suited for its intended purpose. Maryland recognizes two exceptions to the general rule. Recovery for economic loss may be available for negligent misrepresentation or for cases in which the defendant's conduct creates a serious risk of personal injury or death.

b. Negligence Claims.—In Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., the Court of Appeals addressed the issue of the extent to which tort liability should be im-

in quality as to be unfit for sale and therefore the intent of the seller regarding the scope any guarantees made as to the condition is controlling).

21. United States Gypsum, 336 Md. at 156, 647 A.2d at 410.
23. Id.; see also 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 28.15, at 444-45 (2d ed. 1986) (explaining that strict liability tends to distribute the costs of manufacturing mishaps fairly while warranty law is primarily aimed at controlling the commercial aspects of business transactions).

A manufacturer has a duty to avoid creating unreasonable risks to the tangible property interests of others. Note, supra note 19, at 919-20. Breach of this duty exposes the manufacturer to liability under a negligence claim. Id. A manufacturer may be subject to strict liability in tort where it sells a product in a defective condition unreasonably dangerous to the user or consumer or to his property. RESTATEMENT (SECOND) OF TORTS § 402A (1965); see infra note 40 for the text of § 402A. Where the loss is purely economic, however, the manufacturer is liable for its defective product not meeting the expectations of its customer only when it is aware of those expectations and has agreed the product will meet them. Note, supra note 19, at 920-26.

24. See, e.g., St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 278 A.2d 12 (allowing client to recover losses incurred for reliance on mortgage broker’s advice whose interests were adverse to those of client), cert. denied, 404 U.S. 857 (1971); Brack v. Evans, 230 Md. 548, 187 A.2d 880 (1963) (allowing recovery for losses incurred as a result of negligent and incorrect advice from a stockbroker).


posed upon builders and architects for damages suffered by parties not in contractual privity with them. The plaintiff brought suit against a general contractor alleging that the contractor's negligent construction caused a threat to the safety and welfare of the residents of a condominium and to their property. The court specified a two-part test to determine whether the plaintiff had a cause of action in tort. First, a court must determine whether the plaintiff alleges physical harm to person or property or economic loss. If the claim alleges economic loss, the court must then determine whether the defendant's negligence caused a dangerous condition creating serious risk of death or personal injury to humans. Because the defendant contractor's negligence created a dangerous condition that created a serious risk of death or personal injury to humans, the court held that the plaintiffs could recover for the cost of repairing the condominium even though no physical harm or personal injury had as yet occurred. Thus, if the Whiting-Turner criteria are satisfied, tort recovery may be available, even in the absence of actual personal injury.

c. Strict Liability Claim.—Strict liability in tort developed out of a recognition that warranty-based theories were inadequate to re-

27. Id. at 22, 517 A.2d at 338.
28. Id.
29. See id.
30. Id. at 33-35, 517 A.2d at 344-45.
31. See id.
32. Id. at 35, 563 A.2d at 345 ("[T]he determination of whether a tort duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage.").
33. Id. at 35 & n.5, 517 A.2d at 345 & n.5. The court stated that the serious nature of the risk is the basis of the cause of action in the absence of actual injury. The court concluded that there was no merit in precluding recovery to one who suffers economic loss by fixing a defective condition before it results in personal injury. Id. at 32-35, 517 A.2d at 344-45.

In Boatel Industries, Inc. v. Hester, 77 Md. App. 284, 308, 550 A.2d 389, 401 (1988), the Court of Special Appeals denied recovery for the cost of repairs to the defective hull of a boat under a claim for negligent misrepresentation. The result is somewhat curious because it was decided after Whiting-Turner and because the boat was found by the jury to be unsafe, unseaworthy and to present a serious risk of death or personal injury. See id. at 308, 550 A.2d at 401. The Court of Special Appeals, however, elected not to extend Whiting-Turner to products liability cases that involve negligent misrepresentation. Id. The court said that the damages sought—the cost to rectify the dangerous condition—included the damages recovered under the warranty counts. Id. That decision left the plaintiff, Hester, in precisely the situation the Court of Appeals sought to avoid in Decoster. Hester was denied recovery for the "lemon" he purchased because Boatel had effectively limited Hester's remedies to repair or replacement of defective parts through a disclaimer. Id. at 289, 550 A.2d at 392; see infra note 59 and accompanying text.
dress injuries to person or property. It was feared that consumers' interests could be too easily frustrated by disclaimers, notice requirements, and statutes of limitation that are inherent to contract law. Strict liability in tort, moreover, is justified on a number of policy grounds. It places the burden of the loss on the party best able to absorb it, induces greater care in the manufacturing process by eliminating the requirement to prove negligence, and eliminates the chain of legal actions which might otherwise arise.

In *Phipps v. General Motors Corp.*, the Court of Appeals adopted strict liability as set forth in Section 402A of the *Restatement (Second) of Torts*. The court explained that strict liability in tort advances the policy of requiring those who make and sell defective products to bear the costs of the injuries that result therefrom. In addition, strict liability in tort augments the often inadequate remedies found in the warranty provisions of Maryland's Commercial Code. Furthermore, the court found no indication that the Maryland General Assembly


35. *See Decoster*, 333 Md. at 256, 634 A.2d at 1335.


38. Comment, *supra* note 19, at 926. Under a theory of strict liability in tort, there is no reason for the injured consumer to sue the retailer, who in turn would sue the manufacturer. Such a chain of actions could frustrate the consumer's recovery where there was a contractual disclaimer between the retailer and manufacturer, *id.*, or where the retailer has gone out of business. See, e.g., Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 310 (N.J. 1965) (permitting plaintiff, who purchased defective carpet from a retailer that later went out of business, to bring suit directly against manufacturer).


40. *Id.* at 344, 363 A.2d at 957. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Restatement (Second) of Torts* § 402A (1965).


42. *Id.* at 348-51, 363 A.2d at 961-63.
intended the warranty provisions of Maryland's Uniform Commercial Code to preempt the field of product liability law.\textsuperscript{43}

3. The Court's Reasoning.—The Decoster court began its analysis by reviewing the distinction between recovery for physical harm to person or property and recovery for economic loss in products liability actions.\textsuperscript{44} Purchasers claiming physical harm to property may recover in actions alleging negligence, strict liability in tort, and breach of warranty theories.\textsuperscript{45} Recovery for economic loss, on the other hand, is ordinarily unavailable in negligence or strict liability actions and is generally available only in breach of warranty actions.\textsuperscript{46} The court stated, however, that Whiting-Turner recognized an exception to the general rule of non-recovery in tort for purely economic loss.\textsuperscript{47} Where a defective product causes a dangerous condition creating a serious risk of death or personal injury to humans, recovery of purely economic loss under a tort theory will be permitted.\textsuperscript{48}

Using the two-pronged rule it established in Whiting-Turner, the court first considered whether Decoster's claimed loss amounted to physical loss or economic loss.\textsuperscript{49} The court looked to the negligence count contained within Decoster's complaint. In it, Decoster sought recovery only for the loss of its property that was allegedly damaged by the defective transfer switch.\textsuperscript{50} Decoster made no claim for economic

\textsuperscript{43} Id. at 350, 363 A.2d at 962.
\textsuperscript{44} Decoster, 333 Md. at 249-51, 634 A.2d at 1332-33.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 251, 634 A.2d at 1333.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 251-52, 634 A.2d at 1333.
\textsuperscript{50} Id. at 252, 634 A.2d at 1333.

Westinghouse cited three cases to support its contention that Decoster's losses were essentially economic. \textit{Id.} at 252-54, 634 A.2d at 1333-34. The court considered and rejected each in turn. \textit{Id.} The court distinguished \textit{Decoster} from Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983), because the plaintiff in that case sought recovery only for failure of the defective copiers to perform adequately. \textit{Decoster}, 333 Md. at 252, 634 A.2d at 1333. Unlike \textit{Decoster}, there was no claim for property damage. \textit{Id.} Similarly, in Wood Prods., Inc. v. CMI Corp., 651 F. Supp. 641 (D. Md. 1986), though the plaintiff made a claim for property damage, it was considered a claim for economic loss because the damage complained of was associated with the repair and replacement of a defective furnace. \textit{Decoster}, 333 Md. at 252, 634 A.2d at 1333.

The court also considered Winchester v. Lester's of Minnesota, Inc., 983 F.2d 992 (10th Cir. 1993), which involved a similar fact pattern to \textit{Decoster}. A malfunction in a ventilation system resulted in the loss of hogs. \textit{Id.} at 994. The Tenth Circuit noted that the loss of hogs was property damage of a sort but concluded that because the plaintiff sought recovery for extra labor, losses due to the sale of underweight hogs, extra veterinary bills, lost profits, and expenses to correct the ventilation system, the essence of the plaintiff's claim was the loss of the benefit of a properly ventilated hog house plus consequential
losses.51 Because the damages alleged in Decoster's negligence claim were solely property damages, the court held that the trial judge erred in dismissing the negligence count.52

The court began its consideration of Decoster's claim in strict liability by noting that the Phipps court had applied Section 402A of the Restatement to a case in which only physical harm to a person was claimed.53 Phipps did not directly consider whether Section 402A of the Restatement applies to physical harm to property alone.54 Nevertheless, because Decoster's losses were property damage and not economic losses, the court found that Section 402A of the Restatement clearly applied.55 The court stated that "[i]t is beyond question that Section 402A of the Restatement applies not only to accidental injuries to consumers or users of a product, but also to injury to the property of the user or consumer."56 The court's conclusion is supported by the case law of many jurisdictions.57 The Court of Appeals rejected
Westinghouse's contention that the Maryland Commercial Code provides the sole remedy for commercial losses. The court then reviewed the *Phipps* court's response to the same issue, and concluded that strict liability in tort, as adopted in *Phipps*, applied to injury to the property of the user or purchaser and was, therefore, an appropriate theory on which Decoster could base a cause of action.

4. Analysis.—The *Decoster* court reasoned that plaintiff's negligence action was permissible because the loss of chickens was a prop-


The seminal cases in the area are *Seely* v. White Motor Co., 403 P.2d 145 (Cal. 1965) (holding no recovery permitted under a theory of strict liability for solely economic losses) and *Santor* v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965) (holding recovery for economic losses permitted under a theory of strict liability). For a more complete description and analysis of *Seely* and *Santor*, see Comment, supra note 19, and Note, supra note 19. 58. Westinghouse claimed that the legislative enactment of the Maryland Commercial Code preempted application of product liability law as between commercial parties. See *Decoster*, 333 Md. at 255-56, 534 A.2d at 1335.

59. See id. at 255-60, 534 A.2d at 1335-37. The *Phipps* court had stated that, although the Code eliminated the privity requirement, other obstacles to an action pursued under contract law still existed. Id. at 256, 534 A.2d at 1335. These obstacles include the possibility of waiver or limitation of a warranty by the manufacturer's use of a disclaimer. See, e.g., Schrier v. Beltway Alarm Co., 73 Md. App. 281, 298, 533 A.2d 1316, 1324 (1987) (concluding that disclaimer of warranty was valid in an action to recover for injuries sustained during a hold-up where burglar alarm allegedly failed to notify police in a timely manner, and finding limitation of damages provision in contract was effective against action in negligence).

The existence of a notice requirement for breach of warranty actions by actual buyers, MD. CODE ANN., COM. LAW I § 2-607(3) (1992), and the different limitations periods for contract actions and tort actions further complicate the injured party's ability to recover. Compare id. § 2-725(1) (1992 & Supp. 1994) (allowing four years to bring breach of contract action), with MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1992 & Supp. 1994) (providing for a three-year limitation on actions unless Code provides otherwise). See also *Decoster*, 333 Md. at 256, 534 A.2d at 1335. In the interest of fairness, the court refused to allow these procedural obstacles to permit a manufacturer who sells an unreasonably dangerous product that results in injury to the property of the ultimate user or consumer to avoid liability. *Decoster*, 333 Md. at 259-60, 534 A.2d at 1337.

60. *Decoster*, 333 Md. at 260, 534 A.2d at 1337.
property loss, not a purely economic loss.\textsuperscript{61} If the essence of the plaintiff's claim was for recovery of economic loss, however, there would be no cause of action in tort.\textsuperscript{62} The court's use of the term "essence" may, however, present a pitfall to the unwary. Plaintiffs seeking recovery in tort for property loss should not risk the mischaracterization of their claim as one in contract by seeking, in addition to recovery for the lost property, such economic damages as lost profits, repair and replacement costs, or compensation for the loss of the benefit of use of the defective product. Actions to recover such economic losses should be pursued under appropriate contract theories, and are then subject to the limitations of contract actions.\textsuperscript{63}

The Decoster decision holds manufacturers liable for personal injury or property damage caused by their defective products by recognizing a plaintiff's cause of action based either in negligence or strict liability.\textsuperscript{64} These causes of action protect a purchaser's property and personal interests by placing the burden of loss on the manufacturer for breach of its duty to the buyer.\textsuperscript{65} In addition, because the recovery is based on a tort theory, there are no impediments to recovery that are inherent in actions based on warranties.\textsuperscript{66} Though contractual obstacles are removed by grounding recovery in tort, difficulties in proving negligence may prove insurmountable to plaintiffs attempting to redress injuries caused by defective products.\textsuperscript{67}

To overcome the difficulty of proving negligence, a plaintiff would be wise to bring a claim in strict liability as well, given Maryland's adoption of Section 402A of the Restatement (Second) of Torts in Phipps\textsuperscript{68} and its extension of Section 402A to property injury in Decoster.\textsuperscript{69} The court, moreover, has made it quite clear that as a mat-

\begin{itemize}
  \item \textsuperscript{61} See supra notes 46-52 and accompanying text.
  \item \textsuperscript{62} See discussion supra note 50.
  \item \textsuperscript{63} See supra note 59 and accompanying text. There is also a statutory exception to the privity requirement in the case of personal injury. See Md. Code Ann., Com. Law § 2-314 to -318 (1992).
  \item \textsuperscript{64} Decoster, 333 Md. at 249-60, 634 A.2d at 1322-37.
  \item \textsuperscript{65} A manufacturer assumes a responsibility to the purchaser merely by placing on the market a product which, if defective, might cause foreseeable harm to the purchaser or his property. Keeton et al, supra note 20, § 96, at 682-83.
  \item \textsuperscript{66} Decoster, 333 Md. at 256, 634 A.2d at 1335.
  \item \textsuperscript{67} See Phipps, 278 Md. at 343 & n.3, 368 A.2d at 962 & n.3 (explaining that the primary focus of a negligence inquiry is the manufacturer's conduct, whereas in a case of strict liability the focus is on the product itself). See generally Keeton et al., supra note 20, §§ 96, 99, 105 (discussing grounds on which to base a negligence action and the attendant difficulties of proof).
  \item \textsuperscript{68} See supra notes 40-43 and accompanying text.
  \item \textsuperscript{69} Decoster, 333 Md. at 258, 634 A.2d at 1336. The court was careful to note, however, that such recovery is not available if the loss constitutes economic loss. Id. The court
ter of public policy, it would be unfair to allow manufacturers to escape liability for injury caused to persons or property by defective products that are unreasonably dangerous or to escape such liability because of obstacles imposed by warranty law.\(^7\)

5. Conclusion.—Decoster establishes that in Maryland an action in tort does not lie where the damages claimed are purely economic in nature unless there has been a serious risk of death or personal injury. A manufacturer, however, may be held strictly liable for actual physical property damage suffered by a user or purchaser of a defective, unreasonably dangerous product.

DAVID C. ISSACSON

B. The Applicability of the Fireman's Rule and the Shopkeeper's Duty to Aid its Patrons

In Southland Corp. v. Griffith,\(^1\) the Maryland Court of Appeals held that a business employee must provide assistance to a business invitee whom the employee knows is in peril, unless rendering such aid would place the employee in the path of danger.\(^2\) Additionally, the Court of Appeals found that an off-duty, out-of-uniform police officer, who enters a place of business that is open to the public, is a business invitee and retains that status even after responding to a disturbance on the premises in an official capacity.\(^3\)

The Southland decision, however, fails to delineate the precise scope of a business's responsibility to its visitors and may increase the potential liability of businesses, although courts will probably interpret this duty narrowly. By requiring a business to help individuals on its premises who need assistance, the court impliedly recognized the central role that morality must play in our legal system.

1. The Case.—Shortly after midnight on Saturday, May 15, 1988, David Griffith, his fifteen-year-old son, and several friends arrived in a pickup truck at a 7-Eleven convenience store located in Ferndale, Maryland.\(^4\) The 7-Eleven store was owned by the Southland Corpora-

\(^7\) Id. at 259, 634 A.2d at 1337. A purchaser does not bargain for destruction to his property any more than he bargains for personal injury. Id. at 259-60, 634 A.2d at 1337.

\(^1\) 332 Md. 704, 633 A.2d 84 (1993).
\(^2\) Id. at 719, 633 A.2d at 91.
\(^3\) Id. at 719-20, 633 A.2d at 91.
\(^4\) Id. at 707, 633 A.2d at 85.
tion. After buying food in the 7-Eleven, Griffith, an off-duty and out-of-uniform member of the Anne Arundel County Police Department, went back to the pickup truck which was parked in Southland's parking lot.

As Griffith and his party ate their food in the truck, three teenagers drove into the parking lot. The teenagers, Takovich, Palmer, and Haynie, began acting in an unruly and boisterous manner and one of them threw a beer can that hit Griffith's son on the arm. Griffith proceeded from the pickup truck to speak with the teenagers. Takovich threw a beer can at Griffith that struck him in the face. Griffith then identified himself as a police officer and attempted to arrest Takovich. A scuffle ensued between Officer Griffith and Takovich, during which Griffith instructed his son, Matthew, to enter the 7-Eleven and tell the clerk to summon police assistance. The other teenagers, Palmer and Haynie, began striking Officer Griffith with a tire iron.

According to Matthew Griffith, he stuck his head through the door of the 7-Eleven and yelled to the clerk to call the police because a police officer needed assistance. Thirty seconds later, Matthew returned to the store and requested that the clerk notify police that his father needed assistance. The clerk ignored Matthew's request and "laughed at him." Two to three minutes later, Matthew again entered the 7-Eleven. This time, he jumped across the counter, called 911, shouted that there was a Code 13 and instructed the clerk to give the address of the 7-Eleven over the telephone.

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id. at 707-08, 633 A.2d at 85.
11. Id. at 708, 633 A.2d at 85.
12. Id.
13. Id. at 709-10, 633 A.2d at 86.
14. Id.
15. Id. at 710, 633 A.2d at 86.
17. A Code 13 notification signifies that an officer is in trouble and needs emergency help. Id. at 709 n.4, 633 A.2d at 86 n.4.
18. Id. at 710, 633 A.2d at 86. In an affidavit submitted by the Southland Corp., the 7-Eleven clerk stated that she called the police as soon as she became aware of the altercation in the parking lot. Id. at 709, 633 A.2d at 86. Because the trial court decided this case on summary judgment, all factual inferences were resolved by the appellate court in favor of Officer Griffith, the party who opposed the grant of summary judgment. Id. at 713, 633 A.2d at 87; see Rosenberg v. Helinski, 328 Md. 664, 674, 616 A.2d 866, 871 ("In reviewing a disposition by summary judgment, an appellate court will consider primarily whether a
Meanwhile, the altercation spilled into a gas station across the street. The attendant at the gas station called the police. He then tried to lend further assistance to Officer Griffith but was attacked by the teenagers. Police arrived approximately two minutes after Matthew Griffith's third attempt to summon assistance from the 7-Eleven and arrested the three teenage assailants.

Griffith sued the Southland Corporation for negligence in the Circuit Court for Anne Arundel County. Southland moved for summary judgment, claiming that Officer Griffith was precluded from a negligence recovery under the common-law principle, known as the fireman's rule, which prohibits firefighters and police officers from bringing negligence actions for injuries suffered during the course of their official responsibilities. Griffith countered that the fireman's rule does not apply to an off-duty police officer "whose status was that of a volunteer."

The Circuit Court for Anne Arundel County granted summary judgment in favor of Southland. Judge Wolff reasoned that Griffith lost his status as a business invitee when he announced that he was a police officer and attempted to effectuate an arrest. Consequently, the trial court found that under the fireman's rule Officer Griffith could not recover damages from Southland. Griffith appealed to the Court of Special Appeals.

The Court of Special Appeals, by a divided panel, reversed the trial court's ruling and remanded the case for further proceedings.

factual dispute exists, and in so doing resolve all inferences against the party making the motion.), cert. denied, 113 S. Ct. 3041 (1993).

20. Id.
21. Id.
22. Id.
23. Id. at 708 n.1, 633 A.2d at 86 n.1. The three teenage assailants were charged and convicted of criminal assault and battery. Id.
24. Id. at 708, 633 A.2d at 86. Griffith averred that the store clerk's failure to call 911 upon Matthew's first request had exacerbated Officer Griffith's injuries. Griffith v. Southland Corp., 94 Md. App. 242, 245, 617 A.2d 598, 600 (1992). Griffith also sought monetary damages from the three teenage assailants for assault and battery. Southland, 332 Md. at 708, 633 A.2d at 86. The trial court entered default judgments against the three teenage defendants. Id. at 708 n.2, 633 A.2d at 86 n.2.
25. Southland, 332 Md. at 709, 633 A.2d at 86; see infra notes 47-62 and accompanying text for further discussion of the fireman's rule.
26. Southland, 332 Md. at 709, 633 A.2d at 86.
27. Id. at 710, 633 A.2d at 87.
28. Id.
29. Id.
30. Id.
31. Id.
The court concluded that the clerk's failure to call the police for assistance was "an event in the nature of a hidden danger" and thus constituted an exception to the fireman's rule.\(^2\) The court also reasoned that no provisions in Maryland law allow a business to ignore requests for assistance that pose no risk of harm to the business owner or employees.\(^3\) In so ruling, the Court of Special Appeals explained that its decision "merely cultivated and improved an area of Maryland law that had previously been silent."\(^4\)

The Court of Appeals granted certiorari to determine the extent of the legal duty, if any, a business open to the public owes to a business visitor to call for emergency assistance when requested to do so by a visitor who is in distress.\(^5\)

2. Legal Background.—

a. Duty to Aid.—Historically, courts have hesitated to find liability that inures from the failure of a party to act.\(^6\) Instead, the common law firmly established that a person owes no legal duty to aid another who is injured.\(^7\) These same courts, however, have imposed

\(^{32}\) Id. at 710-11, 633 A.2d at 87; see Griffith, 94 Md. App. at 253, 617 A.2d at 603-04.

\(^{33}\) Griffith, 94 Md. App. at 257, 617 A.2d at 606. Judge Alpert wrote, "[T]here is no precedent which permits a bystander to refuse to call 911 when not exposed to imminent danger." Id.

\(^{34}\) Id. at 258, 617 A.2d at 606.

\(^{35}\) Southland, 332 Md. at 707, 633 A.2d at 85.

\(^{36}\) See Francis H. Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev. 217, 220 (1908) ("[T]he duty to take active care for others is not general in the common law... ."). Many commentators have suggested that the reluctance of the early courts was grounded in the tremendous respect accorded the individual during this period. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373 (5th ed. 1984) ("The highly individualistic philosophy of the older common law... shrank from converting the courts into an agency for forcing men to help one another."); 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.6, at 719 n.10 (2d ed. 1986) (stating that in respect for individualism in society, courts did not hold individuals liable for their omissions).

The law of torts differentiates between acts and omissions. Bohlen, supra, at 219. Courts express the distinction in terms of misfeasance and nonfeasance. Id.; see also KEETON ET AL., supra, § 56, at 373-74. Misfeasance is "the improper performance" of an act, while nonfeasance is "the nonperformance" of an act that a person is obligated to perform. BLACK'S LAW DICTIONARY 1000, 1054 (6th ed. 1990).

\(^{37}\) See generally KEETON ET AL., supra note 36, § 56, at 375 ("[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life."); HARPER ET AL., supra note 36, § 18.6, at 718-19 ("There is no legal duty to be a Good Samaritan."); RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); cf. Lamb v. Hopkins, 303 Md. 236, 242, 492 A.2d 1297, 1300 (1985) (relying on the RESTATEMENT (SECOND) OF TORTS to
liability readily and with little attention to fault when an injury results from the affirmative act of a party.\textsuperscript{38}

Over the years, courts have created certain narrowly defined exceptions to this general rule. The courts have recognized that there are special relationships between individuals who are vulnerable in some respect and other individuals, or businesses, who possess superior knowledge or the ability to render assistance.\textsuperscript{39} The most widely adopted exceptions are for a common carrier to a passenger,\textsuperscript{40} an innkeeper to a guest,\textsuperscript{41} and a shopkeeper to a business invitee.\textsuperscript{42}

In particular, the exception for the shopkeeper to business invitee requires a business open to the public to render aid to its business visitors once the shopkeeper knows or has reason to know that the visitor is ill or injured.\textsuperscript{43} Usually interpreted narrowly, the duty to aid generally requires a business to do little more than seek emergency assistance\textsuperscript{44} for its customers unless the provision of such assistance

support the proposition that an individual has no duty to act to control the conduct of a third person).

38. KEETON ET AL., supra note 36, § 56, at 383.
39. KEETON ET AL., supra note 36, § 56, at 376. Section 314A of the Restatement (Second) of Torts recognizes the following special relationships that give rise to a duty to aid or protect:

(1) A common carrier is under a duty to its passengers to take reasonable action
    (a) to protect them against unreasonable risk of physical harm, and
    (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
(2) An innkeeper is under a similar duty to his guests.
(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

RESTATEMENT (SECOND) OF TORTS § 314A (1965).

40. KEETON ET AL., supra note 36, § 56, at 376; HARPER ET AL., supra note 36, § 18.6, at 722. Maryland courts have long accepted that the special relationship between a common carrier and its passengers requires the common carrier to exercise the "highest degree of care" toward its passengers. See, e.g., Tall v. Baltimore Steam-Packet Co., 90 Md. 248, 253, 44 A. 1007, 1008 (1899) (finding that a ship's captain "is not an insurer of the absolute safety of his passengers; yet . . . a ship employment involves the safety of the lives and limbs of his passengers, the law requires the highest degree of care which is consistent with the nature of his undertaking.");

41. KEETON ET AL., supra note 36, § 56, at 376.
42. Id.
43. See id. § 61, at 426 ("The occupier must . . . act reasonably to render first aid or other care when he knows or he believes that the invitee is ill or injured."); HARPER ET AL., supra note 36, § 18.6, at 722-23 ("One who invites others on his premises has been held bound to take reasonable steps to rescue them from perils that his negligence played no part in creating.");

44. Commentators agree about the limited nature of the duty to aid. See, e.g., RESTATEMENT (SECOND) OF TORTS § 314A cmt. f (1965).
endangers the shopkeeper or his employees. Prior to Southland, Maryland courts had not recognized the shopkeeper to business invitee exception.

b. The Fireman's Rule.—The common-law doctrine, known as the fireman's rule, precludes firefighters and police officers who are injured in the course of their official duties from recovering tort damages from those whose negligence exposed them to the risk of injury.

[The defendant] is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick person over to a physician, or to those who will look after him and see that medical assistance is obtained.

Id.; see also Keeton et al., supra note 36, at 377.

Most jurisdictions have limited the duty to aid. See, e.g., Breaux v. Gino's, Inc., 200 Cal. Rptr. 260 (Cal. Ct. App. 1984) (holding, based in part on a California statute, that a restaurant fulfills its legal duty to assist a choking patron when it calls for medical assistance within a reasonable time); Williams v. Cunningham Drug Stores, 418 N.W.2d 381 (Mich. 1988) (ruling that a drugstore owner has no duty to its customers to provide armed, visible security guards to protect customers from the criminal acts of third parties).

However, some courts have taken a somewhat broader view of this duty. See, e.g., Taco Bell, Inc. v. Lannon, 744 P.2d 43 (Colo. 1987) (en banc) (holding that a restaurant had a legal duty to take reasonable measures, which might include armed security guards, to protect its customers from the consequences of criminal acts by unknown third parties); McGill v. Frasure, 790 P.2d 379, 382 (Idaho Ct. App. 1990) (explaining that tavernkeeper owes its business invitees "a duty to exercise reasonable care to protect them from reasonably foreseeable injury at the hands of other patrons."); Hovermale v. Berkeley Springs Moose Lodge, 271 S.E.2d 335 (W. Va. 1980) (concluding that the proprietor of a business has a duty to render first aid after he knows or has reason to know that a business invitee is ill or injured).

45. See, e.g., Cohen v. Southland Corp., 203 Cal. Rptr. 572 (Cal. Ct. App. 1984) (holding that a convenience store employee has no duty to act where he has a reasonable fear for his safety).

46. See Tucker v. KFC Nat'l Management Co., 689 F. Supp. 560, 562 (D. Md. 1988) ("A higher duty to protect a private person from the conduct of a third person arises under Maryland law only when a special relationship exists. ... The storekeeper and business invitee do not have that special relationship."). aff'd, 872 F.2d 419 (4th Cir. 1989); Southland, 332 Md. at 717, 633 A.2d at 90.

47. "All courts addressing the issue have taken the position that the standard of care owed to firemen applies equally to policemen." Flowers v. Rock Creek Terrace Ltd. Partnership, 308 Md. 492, 442 n.4, 520 A.2d 361, 366 n.4 (1987); Sherman v. Suburban Trust Co., 282 Md. 238, 384 A.2d 76 (1978) (same); Keeton et al., supra note 36, § 61, at 430-31.

48. See Keeton et al., supra note 36, § 61, at 430-31 ("Firemen, policemen and other such persons professionally trained to deal with dangerous situations on a regular basis must be held to assume the normal, apparent risks that are to be expected in encountering such hazards ... "). See generally Larry D. Scheafer, Annotation, Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty, 11 A.L.R.4th 597 (1982 & Supp. 1993); Richard C. Tinney, Annotation, Liability of Owner or Occupant of Premises to Police Officer Coming Thereon in Discharge of Officer's Duty, 30 A.L.R.4th 81 (1984 & Supp. 1993).
Maryland first recognized the fireman's rule in *Steinwedel v. Hilbert.* In *Steinwedel,* the Court of Appeals found that a member of the Fire Insurance Salvage Corps of Baltimore, who suffered harm when he fell down an elevator shaft in a burning building, could not recover damages from the tenant or the owner of the building even though both the tenant and owner were negligent in leaving the elevator shaft open and unguarded. The court explained its decision on the basis of premises liability, under which no duty arose on the part of the tenant or proprietor to exercise reasonable care for a salvage corps member's safety because he was a licensee when he entered the building in the performance of his duties.

In recent years, courts have grounded the fireman's rule more on public policy than on premises liability. For example, in *Flowers v. Rock Creek Terrace Ltd. Partnership,* the Court of Appeals reasoned that the very nature of firefighting and police work limits the ability of firefighters and police officers to recover tort damages for work-related injuries. Because firefighters and police officers are called upon "to confront certain hazards on behalf of the public," the court in *Flowers* concluded that firefighters and police officers are pro-

49. 149 Md. 121, 131 A. 44 (1925).
50. The Fire Insurance Salvage Corps of Baltimore was a private organization whose members saved property threatened by fire. *Id.* at 123, 131 A. at 45. Members of a salvage corps were essentially firefighters for purposes of determining liability under the fireman's rule. *Id.*
51. *Id.* at 122-23, 131 A. at 45.
52. Premises liability depends on the status of the injured visitor upon the owner or occupier's land. "[T]he liability of a property owner to an individual injured on his property is . . . contingent upon a determination of the individual's status while on the property, i.e., whether he is an invitee, licensee, or trespasser." *See Sherman v. Suburban Trust Co.,* 282 Md. 238, 241-42, 384 A.2d 76, 79 (1978). "An invitee is in general a person invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business. . . ." *Id.* at 242, 384 A.2d at 79. On the other hand, "[a] licensee is generally defined as one who enters the property with the knowledge and consent of the owner but for his own purposes or interest. . . ." *Id.* Courts have held generally that an invitee is owed a duty of reasonable care, while a licensee is only protected from willful and wanton misconduct. *See id.*
53. *Steinwedel,* 149 Md. at 123-24, 131 A. at 45.
54. [A]ccording to the great weight of authorities the general rule of common law is that a fireman entering premises to put out fire is a licensee only, and not an invitee, and that the owner or occupant of the premises is not under any duty of care to keep his premises prepared and safe for a fireman. *Id.*
57. *Flowers,* 308 Md. at 447, 520 A.2d at 368.
scribed from recovering for injuries resulting from the negligence that brought them to the scene.\textsuperscript{58} Hence, firefighters and police officers, by their choice of employment, assume the risk of injury.

While the fireman's rule limits the liability of owners and occupants of land, the fireman's rule does not provide an absolute bar to recovery.\textsuperscript{59} The rule allows firefighters and police officers to sue for injuries from perils that are not reasonably foreseeable occupational risks.\textsuperscript{60} Accordingly, actors may be liable for independent negligent occurrences that happen after the firefighter or police officer arrives on the scene.\textsuperscript{61} In addition, an owner or occupier of the land must inform the firefighter or police officer of pre-existing hidden dangers if the owner or occupier of the land knows about the dangers and possesses an opportunity to warn.\textsuperscript{62}

3. The Court's Reasoning.—In Southland, the Court of Appeals held that a business must help an injured business visitor if the business is aware of the injury and can provide assistance without danger to the owner or employees of the business.\textsuperscript{63} Chief Judge Murphy wrote that the fireman's rule did not apply in Southland\textsuperscript{64} but rejected the Court of Special Appeals's assertion that the fireman's rule did not apply because "the clerk's failure to call 911 was an event in the nature of a hidden danger or an unanticipated risk."\textsuperscript{65} Judge Murphy explained that hidden dangers normally relate to the physical condition of land, rather than to the acts or omissions of individuals.\textsuperscript{66} Furthermore, the court noted that in modern society it is not

\textsuperscript{58} Id. at 447-48, 520 A.2d at 368.

\textsuperscript{59} Courts ordinarily find that
the fireman's rule . . . appl[i]es when the firefighter or police officer is injured from the very danger, created by the defendant's act of negligence, that required his professional assistance and presence at the scene in the first place, and the rule will not shield a defendant from liability for independent acts of misconduct which otherwise cause the injury.

\textsuperscript{60} Keeton et al., supra note 36, § 61, at 430-31.

\textsuperscript{61} Flowers, 308 Md. at 448, 520 A.2d at 369; Keeton et al., supra note 36, § 61, at 431.

\textsuperscript{62} Id. at 448 & n.7, 520 A.2d at 369 & n.7.

\textsuperscript{63} Southland, 332 Md. at 719, 633 A.2d at 91.

\textsuperscript{64} Id. at 715, 633 A.2d at 89.

\textsuperscript{65} Id.

\textsuperscript{66} Id. at 715 n.6, 633 A.2d at 89 n.6 (pointing out that "property defects or the storage of hazardous chemicals" are examples of hidden dangers).
unforeseeable that individuals will refuse to seek assistance for a police officer in distress. 67

Instead, the court found it unnecessary to invoke the fireman's rule because Officer Griffith was simply a business invitee at the 7-Eleven. 68 The court explained that Griffith became a business invitee when he originally entered Southland's property to buy food. 69 He did not lose that status when he announced that he was a police officer and tried to arrest his assailants. 70

The Southland court then considered whether a business open to the public owes a duty to visitors who enter the premises of the business. 71 In accord with other authority on this matter, 72 the court expressly adopted Section 314A of the Restatement (Second) of Torts 73 and held that a shopkeeper must help business invitees who need assistance unless rendering aid endangers the shopkeeper. 74 Because Officer Griffith was a business invitee and Southland owed a legal duty to aid him when requested, the Court of Appeals refused to uphold the dismissal of Griffith's suit against Southland Corporation and remanded the case for further proceedings. 75

67. Id. at 715, 633 A.2d at 89. Contra Griffith, 94 Md. App. at 253, 617 A.2d at 603-04 (concluding that 7-Eleven's "refusal to act was an event... that no police officer in this day and age could possibly anticipate.").

68. Southland, 332 Md. at 715-16, 633 A.2d at 89.

69. Id. at 715, 633 A.2d at 89.

70. Id. at 720, 633 A.2d at 91.

71. Id. at 717-20, 633 A.2d at 90-91.

72. See Harper Et Al., supra note 36, § 18.6, at 722-23; Keeton Et Al., supra note 36, § 61, at 426. The Southland court relied heavily on two cases from other jurisdictions. In Drew v. Lejay's Sportsmen's Cafe, Inc., 806 P.2d 301 (Wyo. 1991), the Wyoming Supreme Court considered the scope of a restaurant owner's duty to aid a choking patron. Id. at 301. Rejecting the argument that the proprietor owed a duty to provide first aid, the court held that the restaurant owner satisfied his responsibility by requesting medical assistance in a timely manner. Id. at 305-06. In so deciding, the Wyoming Supreme Court took into account the small number of annual choking deaths and the burden that a first aid requirement would place upon restaurants and other businesses. Id. at 305.

In Jones v. Kwick Karol and Ginalco, Inc., 490 So. 2d 664 (La. Ct. App. 1986), the Louisiana Court of Appeals held that a convenience store attendant had a duty to take affirmative action to protect a patron from an impending attack. Id. at 666. The court suggested that the attendant could have satisfied his duty to aid if he had called police, observed the incident more carefully, threatened to call the police, or ordered the suspicious patrons to depart. Id.

73. Southland, 332 Md. at 719, 633 A.2d at 91; see Restatement (Second) of Torts § 314A(3); see also supra note 39.

74. Southland, 332 Md. at 719, 633 A.2d at 91.

75. Id. at 720, 633 A.2d at 91-92.
4. **Analysis.**—

   **a. Police Officer as Business Invitee.**—The Court of Appeals determined that Officer Griffith remained a business invitee even after he attempted to effectuate an arrest because he had entered the business as a patron. The court rejected the contention that Griffith lost his status as a business invitee once he assumed the role of a police officer. In essence, the conclusion of the court was once a business invitee always a business invitee.

   Such a seemingly simple holding, nevertheless, raises questions about the future viability of the common-law fireman's rule. Courts adopted the fireman's rule to shield individuals and businesses from liability for injuries suffered by police officers when officers encounter danger on behalf of the public. When Officer Griffith attempted to arrest the teenagers, he encountered danger on behalf of the public. By allowing Griffith to sue the Southland Corporation for negligence, the Court of Appeals has disregarded the public policy behind the fireman's rule and, thereby, increased the businesses' liability exposure.

   The *Southland* decision has also clouded the application of the fireman's rule. According to *Southland*, businesses must assist police officers who are off duty. Yet, it may be difficult for shopkeepers to distinguish between on-duty and off-duty police officers. For example, a plain clothes officer may enter a business while working on an undercover assignment, in which case the fireman's rule should shield the business from liability. In practice, the court's decision will require businesses to seek emergency assistance for any patron without regard to whether an injured person is a police officer, firefighter, or a business invitee.

   In the final analysis, the court acted appropriately in allowing Griffith to proceed with his suit against the Southland Corporation. Most Marylanders would be appalled by the failure of a clerk to call the police in the face of a vicious assault. Furthermore, the public would undoubtedly find it unfair for a shopkeeper to avoid all financial responsibility simply because the victim of an attack on the store's premises was a police officer. As a matter of public policy, off-duty officers should be encouraged to respond to threats to public safety.

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76. Id., 633 A.2d at 91.
77. Id.
78. See supra notes 56-59 and accompanying text.
79. See *Southland*, 332 Md. at 89, 633 A.2d at 716-17.
Applicability and Limitations on the Duty to Act.—The failure of the court in Southland to delineate with any specificity the proper scope of the shopkeeper’s duty to aid a business invitee may cause some uncertainty among business owners about what procedures they should adopt to protect themselves from liability. The court provided some guidance when it explained that, at a minimum, businesses have a legal duty to call 911 when it is apparent that a patron is sick or injured. Additionally, the court’s adoption of Section 314A of the Restatement (Second) of Torts suggests that a shopkeeper’s duty to aid will be limited to calling for help or, possibly, administering such basic first aid as the shopkeeper knows. The experience of other states indicates that Maryland courts will probably interpret the duty to aid narrowly. If Maryland courts so rule, businesses will only have to bear fairly limited costs.

In any case, the strong public policy concerns that underlie the Southland decision outweigh the additional costs on businesses. In a significant shift of policy on tort liability, the Court of Appeals refused to allow a business to escape liability when a store clerk failed to summon assistance for an injured patron, even though calling for help posed no risk to the employee. This ruling contravenes the common law’s reluctance to require people to take affirmative action to help each other. The court, thus, implicitly recognized the role of morality in our legal system. As Niccolo Machiavelli wrote: “[J]ust as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals.”

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80. See id. at 720, 633 A.2d at 91 (“Southland . . . owed [Griffith] a legal duty to aid (call the police) . . . .”).

81. Id. at 720 n.8, 633 A.2d at 91 n.8. The court quoted the Restatement commentary to emphasize that:

In the case of an ill or injured person, [the defendant] will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained.

Restatement (Second) of Torts § 314A cmt. f (1965). Courts in other jurisdictions have split on whether calling 911 is enough or whether a restaurant has to provide first aid. See generally Frank J. Wozniak, Annotation, Duty of Retail Establishment, or Its Employees, to Assist Patrons Choking on Food, 2 A.L.R.5th 966 (1992 & Supp. 1993).

82. See supra note 44 and accompanying text.

83. See supra notes 36-37 and accompanying text.

84. The responsibility of individuals to help one another is central to virtually all moral and religious traditions. See, e.g., Leviticus 19:18; Matthew 22:39.

85. NICCOLO MACCHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 271 (Allan Gilbert, trans. 1965).
Conclusion.—In Southland Corp. v. Griffith, the Court of Appeals imposed a new tort duty in Maryland. A business now has a legal duty to aid a business invitee if the business or its employee has knowledge that the invitee is injured and can provide assistance without risk of danger. The court also ruled that an off-duty, out-of-uniform police officer who enters a business as a business invitee is not prevented by the fireman’s rule from recovering in tort for injuries sustained while later acting in an official capacity on the premises.

The court’s decision may cause some initial uncertainty as to the scope of the duty to aid and increase the liability exposure of businesses. The public policy concerns that underlie Southland, however, outweigh such concerns. The Southland court moves Maryland tort law in a sensible direction, implicitly recognizing the interdependency of law and morality by imposing a duty on shopkeepers to help patrons in need.

WILLIAM T. MATHIAS

C. Res Ipsa Loquitur and Expert Testimony: Less is Better

In Dover Elevator Co. v. Swann, the Maryland Court of Appeals considered whether the doctrine of res ipsa loquitur may be applied in cases where direct evidence of negligence is available through expert testimony such that a plaintiff is capable of making out a prima facie case of negligence. The court held that when expert testimony has provided a complete explanation of the specific cause of an accident, a plaintiff cannot rely on the doctrine of res ipsa loquitur.

The court’s holding is the inevitable consequence of a contemporary world which takes for granted the availability of expert testimony to explain the causes of accidents. The use of expert testimony makes reliance on res ipsa loquitur increasingly problematic for both plaintiffs and courts. Because a direct inference of fault may be drawn from this testimony, the proper cause of action is one in simple negligence. As a result, the doctrine of res ipsa loquitur has become more a relic of legal history than a practical tool for contemporary litigators.

The Case.—On February 2, 1987, David Swann, the plaintiff, injured himself while attempting to board an elevator that allegedly

86. Southland, 332 Md. at 720, 633 A.2d at 91-92.
87. Id. at 715, 633 A.2d at 89.
2. Id. at 262, 638 A.2d at 777.
failed to level properly with the floor. The elevator, which was located in the office building where Swann was employed, stopped "[s]omewhere around a foot" or "[s]omewhat greater than about a foot" from the level of the floor, causing Swann to stumble and strike his back against the rear wall of the car. The building in which the elevator was located was leased from Prudential Insurance Company of America (Prudential) and managed by Carey Winston Company (Carey Winston). The Dover Elevator Company (Dover), petitioner in this appeal, manufactured, installed, and exclusively maintained the elevator.

On November 21, 1988, Swann filed a complaint against Prudential and Dover in the Circuit Court for Montgomery County. Swann pleaded causes of action based in negligence and products liability, and claimed that he suffered three million dollars in damages. Carey Winston was later included as a defendant in the action by amended complaint. The products liability claim was dismissed with respect to all three defendants and, in January 1992, a two-week jury trial heard the negligence claims.

At trial, Swann offered the testimony of an expert witness, Donald Moynihan (Moynihan), an elevator consultant and engineer. Moynihan conducted an inspection of the elevator and reviewed all of Dover Elevator’s available maintenance records. Those records indicated that numerous service calls were made to correct misleveling problems on the elevator between December 1986 and February 1987. He testified that Dover Elevator was negligent in four respects: first, in filing and cleaning the elevator’s contacts—instead of replacing them—resulting in an irregular current running between the contacts; second, in failing to spend adequate time servicing the elevator; third, in keeping deficient maintenance records; and fourth, in failing to maintain a supply of replacement parts in the elevator’s machine room. Ronald Bothell, a maintenance repairman for Dover Elevator, testified that Dover Elevator had been advised of the mis-

3. Id. at 234, 638 A.2d at 764.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id. at 234-35, 638 A.2d at 764.
9. Id. at 235, 638 A.2d at 764.
10. Id.
11. Id.
12. Id.
13. Id.
leveling problems with the elevator. A repair order dated three weeks before the accident indicated that the "14 and 15 contacts were 'burned closed,' and that Bothell cleaned the contacts." According to Bothell, cleaning rather than replacing these contacts was proper because they were not welded together.

After a trial on the merits, the jury returned a verdict in favor of all defendants. Swann appealed to the Court of Special Appeals, which affirmed the verdict as to Prudential and Carey Winston, but reversed the verdict with respect to Dover. The Court of Appeals granted certiorari to determine whether Swann was precluded from use of the doctrine of res ipsa loquitur to establish Dover's negligence.

2. Legal Background.—The doctrine of res ipsa loquitur, which means "the thing speaks for itself," originated in the famous case of Byrne v. Boadle concerning a barrel of flour that fell without explanation from a window and hit a passing pedestrian. In a res ipsa loquitur case, the jury may reasonably infer negligence from the happening of an accident, but the defendant may rebut this inference.

There are three elements that must be shown in order to invoke the doctrine of res ipsa loquitur. First, "the injury [must be] of a nature that would not ordinarily occur in the absence of negligence;" second, the injury must be caused by an instrumentality within the defendant's exclusive control; and third, it must appear from the evidence that no action on the part of the plaintiff or a third party or other intervening force might plausibly have caused the injury. To invoke the doctrine of res ipsa loquitur, the plaintiff must prove these three elements by a preponderance of the evidence.

Upon proof of these three elements of res ipsa loquitur, the burden of persuasion does not shift to the defendant. Rather "the de-

15. Id. at 374, 620 A.2d at 993.
16. Id.
17. Dover Elevator Co., 334 Md. at 235, 638 A.2d at 764.
19. Dover Elevator Co., 334 Md. at 234, 638 A.2d at 763-64.
21. See id. at 301.
23. Id.
24. Blankenship v. Wagner, 261 Md. 37, 42, 273 A.2d 412, 415 (1981). Although the precise language of the elements of res ipsa loquitur has varied over the years, the requirements have substantively remained the same. Chesapeake & Potomac Tel. Co. v. Hicks, 25 Md. App. 503, 516, 337 A.2d 744, 752 (1975).
25. Hicks, 25 Md. App. at 530, 337 A.2d at 760.
defendant has the duty of going forward with the evidence to explain or rebut, if possible, the inference that he failed to use care." 26 In Bene-dick v. Potts, 27 the Court of Appeals stated that the doctrine "is not an attempt to infer negligence from an apparent cause, but to infer the cause of the injury from the naked fact of injury, and then to super-
add the further inference that this inferred cause proceeded from negligence." 28 Res ipso loquitur permits the jury to infer negligence from the facts, but this inference is not required.29 The jury weighs the circumstantial evidence, but may not accept it as sufficient.30

Prior Maryland decisions have indicated that res ipso loquitur is precluded when the cause of an accident has been proven by the plaintiff's testimony.31 This concept was extended in Coastal Tank Lines, Inc. v. Carrol 32 to include testimony that has been introduced by the defendant.33 Maryland cases also indicate that res ipso loquitur is precluded where there is an attempt to establish specific grounds of negligence.34

In Meda v. Brown, 35 the court explained that when the doctrine is applied

27. 88 Md. 52, 40 A. 1067 (1898).
28. Id. at 58, 40 A. at 1069.
30. Id.; see also RESTATEMENT (SECOND) OF TORTS § 328D cmt. m (1965) ("In the ordinary case the great majority of courts now treat res ipso loquitur as creating nothing more than a permissible inference, which the jury may draw or refuse to draw, unless the facts are so compelling that no reasonable man could reject it.").
31. See, e.g., Nalee, Inc. v. Jacobs, 228 Md. 525, 552, 180 A.2d 677, 680-81 (1962) (stating that when a plaintiff shows how the accident happened the doctrine of res ipso loquitur may not be invoked); Hickory Transfer Co. v. Nezbed, 202 Md. 253, 263, 96 A.2d 241, 245 (1953) (finding that because the plaintiffs proved the details of the event, they could no longer rely on the doctrine of res ipso loquitur).
33. See id. at 146, 106 A.2d at 102. Since all of the facts leading to the injuries were known, there was no longer a reason for an inference of negligence. Id. at 144, 106 A.2d at 100; see also Blankenship v. Wagner, 261 Md. 37, 46, 273 A.2d 412, 417 (1971) ("If . . . everything relative to the case is known, and . . . the injury might have been caused by something other than defendant's negligence . . ., then the plaintiff will not be allowed to avail himself of the doctrine.").
34. See, e.g., Nalee, 228 Md. at 582, 180 A.2d at 681; Coastal Tank Lines, Inc., 205 Md. at 145, 106 A.2d at 101; Hickory Transfer Co., 202 Md. at 262-63, 96 A.2d at 245. There is a difference between a case involving res ipso loquitur and one where there is a direct inference of negligence to be drawn from the facts. The latter circumstance involves an additional showing of causation. Nalee, 228 Md. at 531-32, 180 A.2d at 680-81.
the jury will be permitted to infer negligence on the part of a defendant from a showing of facts surrounding the happening of the injury, unaided by expert testimony, even though those facts do not show the mechanism of the injury or the precise manner in which the defendant was negligent.\textsuperscript{36}

\textit{Meda} involved a case of medical malpractice in which two experts testified on behalf of the plaintiff.\textsuperscript{37} The court declined to apply the doctrine because the only relationship that the case had to \textit{res ipsa loquitur} was the inferential reasoning employed by the experts to conclude that the injury was unlikely to occur unless there was negligence.\textsuperscript{38}

\textit{Res ipsa loquitur} involves an inference of negligence founded on the belief that accidents do not usually happen in the absence of negligence.\textsuperscript{39} The underlying rationale for the doctrine rests upon the theory that the defendant is in a better position to explain how the accident happened because the defendant had exclusive control of the instrumentality causing the injury.\textsuperscript{40} While useful to plaintiffs, the doctrine has been a source of great confusion. According to Prosser, "the problems of \textit{[res ipsa loquitur's] application and effect have filled the courts of all our states with a multitude of decisions, baffling and perplexing alike to students, attorneys and judges.}"\textsuperscript{41} This confusion is manifest in the difficulty encountered by courts in their determination of when the plaintiff either had the ability to explain the cause of an accident or simply presented sufficient direct evidence with respect to its cause to preclude invocation of the doctrine of \textit{res ipsa loquitur}.

3. The Court's Reasoning; Analysis.—The Court of Appeals in \textit{Dover Elevator Co.} considered two issues. First, could the plaintiff, who presented direct evidence with respect to the specific cause of his injuries, also seek recovery under the doctrine of \textit{res ipsa loquitur}?\textsuperscript{42} Second, if \textit{res ipsa loquitur} was appropriate, did the trial court's failure to

\begin{itemize}
\item \textsuperscript{36} Id. at 425, 569 A.2d at 205.
\item \textsuperscript{37} Id. at 419, 569 A.2d at 202.
\item \textsuperscript{38} Id. at 424-25, 569 A.2d at 205. The court explained that if the plaintiff had offered no expert testimony but had merely shown an injury, the jury would have been able to infer negligence from the facts alone. \textit{Id. at 428, 569 A.2d at 206.}
\item \textsuperscript{39} Short v. Wells, 249 Md. 491, 496, 240 A.2d 224, 227 (1968).
\item \textsuperscript{40} Peterson v. Underwood, 258 Md. 9, 19, 264 A.2d 851, 856 (1970).
\item \textsuperscript{41} William L. Prosser, \textit{Res Ipsa Loquitur in California}, 37 \textit{CALIF. L. REV.} 183, 183 (1949). Chief Judge Bond also expressed dissatisfaction with the doctrine of \textit{res ipsa loquitur}, stating that "[i]t adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." \textit{Potomac Edison Co. v. Johnson, 160 Md. 33, 40, 152 A. 683, 636 (1930) (Bond, C.J., dissenting).}
\item \textsuperscript{42} Dover Elevator Co. v. Swann, 334 Md. 231, 234, 638 A.2d 762, 763 (1994).
\end{itemize}
so instruct the jury constitute error? The court concluded that the plaintiff was not entitled to rely on the doctrine of *res ipsa loquitur*, therefore, the trial court committed no error.

a. *Reliance on Res Ipsa Loquitur.*—The Court of Appeals confronted the question of whether Swann, by his attempt to prove the cause of his accident, was precluded from relying on the doctrine of *res ipsa loquitur*. Although the court explained that Swann did not furnish a complete explanation for how the accident happened, Swann's expert witness furnished a complete explanation of the specific causes of the elevator's misleveling, thereby precluding reliance on the doctrine of *res ipsa loquitur*. In effect, the issue before the jury became whether Dover was negligent for cleaning rather than replacing the electrical contacts that regulated the elevator's leveling.

To reach its conclusion in *Dover Elevator Co.*, the court relied in large part on the case of *Smith v. Bernfeld*, which held that *res ipsa loquitur* was inapplicable when the plaintiff attempted to establish specific grounds of negligence. The *Dover Elevator Co.* court further asserted that *res ipsa loquitur* did not apply because the jury was not allowed to draw its own inference of negligence. All of the inferences were drawn by the plaintiff's expert and then presented to the jury as expert testimony. Instead of drawing an inference from circumstantial evidence, the jury merely had to decide whether or not it believed the expert testimony. Thus, as in *Meda v. Brown*, the expert in *Dover Elevator Co.* used the inferential reasoning process to arrive at his conclusion that Dover was negligent.

The court in *Dover Elevator Co.* explained that the case where *res ipsa loquitur* is appropriate is one in which

43. *Id.*, 638 A.2d at 764.
44. *Id.* at 261-62, 638 A.2d at 777.
45. *Id.* at 238, 638 A.2d at 765-66.
46. *Id.* at 239, 638 A.2d at 766.
47. *Id.* at 245, 638 A.2d at 769. Both Swann's expert and Dover's technician agreed that the misleveling was caused by the contacts, however, Dover's witness disagreed that he acted negligently when he failed to replace the contacts. *Id.* at 248-49, 638 A.2d at 771.
49. *Id.* at 409, 174 A.2d at 57; *see also supra* note 34 and accompanying text.
50. *Dover Elevator Co.*, 334 Md. at 249, 638 A.2d at 771.
51. *Id.*
52. *Id.*
54. *See Dover Elevator Co.*, 334 Md. at 253, 638 A.2d at 773; *see also supra* note 36 and accompanying text.
"the jury will be permitted to infer negligence on the part of a defendant from a showing of facts surrounding the happening of the injury, unaided by expert testimony, even though those facts do not show the mechanism of the injury or the precise manner in which the defendant was negligent."

The Dover Elevator Co. court also relied on B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co., in which the court held that res ipsa loquitur is inapplicable where the testimony of experts provides direct evidence of negligence. The Dover Elevator Co. court reasoned that because the plaintiff's expert drew his own inference and presented testimony to the jury that the misleveling would not have occurred if Dover had exercised due care, res ipsa loquitur could not apply. The instant case was distinguished from the situation in which res ipsa loquitur would have been appropriate because this case involved a direct inference of negligence drawn from specific facts.

On appeal below, the Court of Special Appeals sought to rely upon Blankenship v. Wagner and Nalee, Inc. v. Jacobs to reach the conclusion that the plaintiff was entitled to a jury instruction on res ipsa loquitur because "an attempt to prove specific acts of negligence does not necessarily preclude reliance on the doctrine of res ipsa loquitur." The Court of Appeals in Dover Elevator Co., on the other hand, found Blankenship and Nalee distinguishable. The court explained that plaintiffs in those cases offered very little, if any, direct evidence of negligence. Blankenship followed the reasoning of the court in Potts v. Armour & Co.

The justice of the rule permitting proof of negligence by circumstantial evidence is found in the circumstance that the principal evidence of the true cause of the accident is accessi-
ble to the defendant, but inaccessible to the victim of the accident. The rule is not applied by the courts except where the facts and the demands of justice make its application essential, depending upon the facts and circumstances in each particular case.\textsuperscript{66}

\textit{Dover Elevator Co.} was not, however, a case in which the cause of the accident was available to the defendant but not the plaintiff.\textsuperscript{67} The purpose for the doctrine of \textit{res ipsa loquitur} rests upon its application to cases where the instrumentality causing the injury is within the exclusive control of the defendant and, therefore, the defendant is in a better position to explain how the accident happened.\textsuperscript{68} In the instant case, the plaintiff's expert attempted to explain precisely how the negligence caused the misleveling of the elevator.\textsuperscript{69} Because the cause of the accident could be ascertained by the plaintiff, "the facts and the demands of justice" did not require that the doctrine of \textit{res ipsa loquitur} be invoked.\textsuperscript{70} To allow an instruction on \textit{res ipsa loquitur} where evidence was available to the plaintiff would therefore contradict the reason for the doctrine.\textsuperscript{71}

The \textit{Dover Elevator Co.} court agreed with the reasoning of \textit{Nalee} that a plaintiff was precluded from relying on the doctrine of \textit{res ipsa loquitur} where the plaintiff's evidence "did not stop at the point of showing the happening of the accident under circumstances in which negligence of the defendant was a permissible inference."\textsuperscript{72} In both \textit{Blankenship} and \textit{Nalee} the court recognized the inapplicability of the doctrine of \textit{res ipsa loquitur} in cases where direct evidence of negligence was offered.\textsuperscript{73}

\textit{Res ipsa loquitur} will not apply in a case involving a complex issue that cannot be resolved without the aid of expert testimony.\textsuperscript{74} According to the court in \textit{Orkin v. Holy Cross Hospital, Inc.}, to decide whether the doctrine of \textit{res ipsa loquitur} has been properly applied, the courts must distinguish between those instances in which an inference of negligence can be drawn by an expert, but not by a lay person, and those instances in which an inference of negligence can be drawn by a

\textsuperscript{66} Id. at 488, 39 A.2d at 555.
\textsuperscript{67} Dover Elevator Co., 334 Md. at 246, 638 A.2d at 769.
\textsuperscript{68} Id. at 257, 638 A.2d at 765; see also supra note 38 and accompanying text.
\textsuperscript{69} Dover Elevator Co., 334 Md. at 246, 638 A.2d at 769-70.
\textsuperscript{70} Id. at 247, 638 A.2d at 770.
\textsuperscript{71} Id. at 253-54, 638 A.2d at 775.
\textsuperscript{72} Nalee, 228 Md. at 532, 180 A.2d at 681.
\textsuperscript{73} See Blankenship, 261 Md. at 45, 273 A.2d at 416; Nalee, 228 Md. at 532, 180 A.2d at 680.
lay person without expert testimony.\textsuperscript{75} In the first instance, “the thing speaks for itself” only from the perspective of the expert, thus \textit{res ipsa loquitur} is inapplicable.\textsuperscript{76}

In \textit{Dover Elevator Co.}, Swann’s expert admitted that elevators often experience problems even without negligence.\textsuperscript{77} The expert testimony in this case differed from traditional expert testimony because “instead of testifying that a \textit{particular act} or omission constituted a failure to exercise due care, the expert testified to the \textit{probability} that the injury was caused by the failure to exercise due care.”\textsuperscript{78} But in the instant case, it would have been difficult for the jury to make a rational inference that elevators do not normally mislevel in the absence of negligence. The way that an elevator works is not common knowledge and most jurors do not have the ability to make an inference of negligence in a case where the evidence is technically complex.

The reasoning in \textit{Hickory Transfer Co. v. Nezbed}\textsuperscript{79} resolved the issue presented to the court in \textit{Dover Elevator Co.}\textsuperscript{80} The court reasoned that Swann had proved too much to rely on \textit{res ipsa loquitur}.\textsuperscript{81} Yet at the same time that the expert testimony explained the cause of the elevator’s misleveling, it failed to persuade the jury that Dover was negligent—Swann had proved too little.\textsuperscript{82} The consequences of the court’s result is plain enough: if a plaintiff could rely on \textit{res ipsa loquitur} for any negligence case, there would be an incentive for the plaintiff to withhold evidence in order to avoid proving too much. Had the court

\textsuperscript{75} Id. at 431, 569 A.2d at 208 (holding that \textit{res ipsa loquitur} can only be applied in those cases where an inference of negligence can be drawn from the facts alone).

\textsuperscript{76} Id.

\textsuperscript{77} \textit{Dover Elevator Co.}, 334 Md. at 255, 638 A.2d at 774. Chief Judge Wilner, in his dissent from the opinion of the Court of Special Appeals, stated that “[m]echanical, electrical, and electronic devices fail or malfunction routinely—some more routinely than others.” Swann v. Prudential Ins. Co., 95 Md. App. 365, 419, 620 A.2d 989, 1015 (1993) (Wilner, C.J., dissenting); see also \textit{Harris v. Otis Elevator Co.}, 92 Md. App. 49, 54, 606 A.2d 305, 308 (1992) (involving an action against an elevator service company for failure of an elevator to level properly in which the court found that the doctrine of \textit{res ipsa loquitur} did not apply because the defendant did not have exclusive control of the elevator, and the accident could have been caused by the malfeasance of others).

\textsuperscript{78} \textit{Dover Elevator Co.}, 334 Md. at 254, 638 A.2d at 773.

\textsuperscript{79} 292 Md. 253, 263, 96 A.2d 241, 245 (1953) (holding that when a plaintiff relies on the doctrine of \textit{res ipsa loquitur}, it must not appear from the plaintiff’s own evidence that something else was the cause of the injury).

\textsuperscript{80} \textit{Dover Elevator Co.}, 334 Md. at 253, 638 A.2d at 773.

\textsuperscript{81} Id.

\textsuperscript{82} Id.; see also \textit{Hickory Transfer Co.}, 220 Md. at 263, 96 A.2d at 245 (“[T]he plaintiffs themselves proved the details of the happening, foregoing reliance on \textit{res ipsa loquitur}; and, having undertaken to prove the details, they failed to show negligence on the part of the defendants. Indeed, they explained away the possible inference of negligence. Paradoxically, the plaintiff proved too much and too little.”).
allowed the alternate instruction on *res ipsa loquitur* in this case, the instruction would open the door to secondary or back-up instructions in virtually every negligence case.\(^8^3\)

The *Dover Elevator Co.* court explained that *res ipsa loquitur* should not be applied in cases where an inference of "negligence on the part of the defendant could have properly been drawn by the jury from the evidence . . . without resort to the doctrine of *res ipsa loquitur*."\(^8^4\) To conclude that *res ipsa loquitur* did not apply, the court found that Swann purported to establish more than an inference of the defendant's negligence.\(^8^5\) Through the direct evidence presented by his own expert witness, Swann established a prima facie case of negligence; therefore, an instruction on *res ipsa loquitur* would have been improper.\(^8^6\) The *Dover Elevator Co.* court held that because expert testimony was used, Swann was precluded from reliance on *res ipsa loquitur*.\(^8^7\)

**b. Instructions to the Jury.**—The court also discussed whether it would have been reversible error to fail to instruct the jury on *res ipsa loquitur* had the instruction been applicable.\(^8^8\) Although some jurisdictions consider it reversible error to refuse to give a *res ipsa loquitur* instruction,\(^8^9\) decisions from Maryland and other jurisdictions hold that where *res ipsa loquitur* is inapplicable, it is error for the trial judge to instruct the jury on *res ipsa loquitur*.\(^9^0\) In at least one jurisdiction, the decision whether to instruct the jury on *res ipsa loquitur* in a

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\(^8^3\) *Dover Elevator Co.*, 334 Md. at 253, 638 A.2d at 773.

\(^8^4\) *Id.* at 248, 638 A.2d at 770 (quoting Nalee, Inc. v. Jacobs, 228 Md. 525, 533, 180 A.2d 677, 681 (1962)).

\(^8^5\) *Id.*

\(^8^6\) *Id.*, 638 A.2d at 770-71.

\(^8^7\) *Id.*

\(^8^8\) *Id.* at 256, 638 A.2d at 775. In light of the court's holding, this discussion was obiter dicta, but the court felt compelled to devote substantial space to the issue in view of the finding by the Court of Special Appeals that the failure to give the instruction constituted reversible error. *See id.* at 256-57, 638 A.2d at 774-75 (citing Swann v. Prudential Ins. Co., 95 Md. App. 965, 409-10, 620 A.2d 989, 1011 (1993)).

\(^8^9\) *See, e.g.*, State Farm Fire & Casualty Co. v. Municipality of Anchorage, 788 P.2d 726, 731 (Alaska 1990) (holding that "when there is sufficient evidence . . . [such] that a jury reasonably could conclude that the elements of *res ipsa loquitur* may be established, the plaintiff is entitled to [an instruction on *res ipsa loquitur*]); Davis v. Memorial Hosp., 376 P.2d 561, 563 (Cal. 1962) (holding that it is error to refuse to instruct the jury on *res ipsa loquitur* because it is a question of fact that must be left to the jury under proper instructions).

case in which its applicability is uncertain is within the discretion of the trial judge.\textsuperscript{91} According to the court in \textit{Turtenwald v. Aetna Casualty \& Surety Co.},\textsuperscript{92} there are two conditions that will make it an error for a trial judge to give an instruction on \textit{res ipsa loquitur}: first, when the plaintiff has proved too little such that there is not enough evidence to make the question of causation a permissible inference; second, when the plaintiff's evidence is too substantial in that a complete explanation of the event has been offered.\textsuperscript{93}

The \textit{Dover Elevator Co.} court, however, found no Maryland cases that held a trial judge must instruct the jury on \textit{res ipsa loquitur} or that reversed a judge for failing to do so.\textsuperscript{94} Accordingly, the court concluded that \textit{res ipsa loquitur} was not applicable in this case and the trial judge committed no error in refusing to give the requested instruction.\textsuperscript{95}

4. \textit{Conclusion}.—Legal scholars have argued that the doctrine of \textit{res ipsa loquitur} is nothing more than the application of an inference and circumstantial evidence.\textsuperscript{96} But as the Court of Appeals stated in \textit{Orkin v. Holy Cross Hospital, Inc.},\textsuperscript{97} "not every inference of negligence involves \textit{res ipsa loquitur."}\textsuperscript{98} The Court of Appeals in \textit{Dover Elevator Co.} correctly determined that it would be error to extend the doctrine of \textit{res ipsa loquitur} to those instances where direct evidence of negligence is available to the plaintiff.

\textbf{TACEY J. NUSBAUM}

\textsuperscript{91} \textit{See} \textit{Turtenwald v. Aetna Casualty \& Surety Co.}, 201 N.W.2d 1, 5-6 (Wis. 1972) ("In some cases the adequacy of the proof is a close question and in those instances giving the instruction rests within the sound discretion of the trial court."); Fehrman v. Smirl, 131 N.W. 2d 314, 317 (Wis. 1964) ("Sometimes the question as to the adequacy of the proof of negligence will be a close one; it will be within the sound discretion of the trial judge to determine whether the giving of the instruction will be redundant.").

\textsuperscript{92} 201 N.W.2d 1 (Wis. 1972).

\textsuperscript{93} \textit{Id.} at 6.

\textsuperscript{94} \textit{Dover Elevator Co.}, 334 Md. at 258, 638 A.2d at 775. Under the Maryland Rules, a court "need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. R. 6-520(c).

\textsuperscript{95} \textit{Dover Elevator Co.}, 334 Md. at 262, 638 A.2d at 777.


\textsuperscript{97} 318 Md. 429, 569 A.2d 207 (1990).

\textsuperscript{98} \textit{Id.} at 431, 569 A.2d at 208.
Recent Developments
The Maryland General Assembly

VIII. FAMILY LAW

A. A New Exception to Noncompellability of Spousal Testimony in Criminal Proceedings: The Domestic Violence Act of 1994

In 1994, the General Assembly passed an omnibus bill entitled "Domestic Violence Act of 1994." Among its many components, the Act provides an additional exception to the noncompellability of spousal testimony in criminal proceedings, commonly known as spousal privilege. Following a brief overview of the Domestic Violence Act (Act), this Note will review the history of and justification for the spousal privilege and outline some of the practical difficulties that the new exception will likely present for prosecution, defense attorneys, and domestic violence victims. The Act supports a broad application of the "abuse of a child" exception when construed in light of the development of the statutory privilege and its common-law predecessor. Finally, the language and purpose of Maryland's spousal privilege permit the state to use a missing witness inference, in certain cases, where defendants fail to call their spouses as witnesses.

1. Background.

   a. The Domestic Violence Act of 1994.—House Bill 630 was introduced at the urging of the Maryland Network Against Domestic Violence with the aim of increasing legal protections for domestic vio-

2. Effective October 1, 1994, the new exception to noncompellability of spousal testimony is codified at § 9-106 of the Courts and Judicial Proceedings Article. Section 9-106 provides:
   The spouse of a person on trial for a crime may not be compelled to testify as an adverse witness unless the charge involves:
   (1) The abuse of a child under 18; or
   (2) Assault and battery in which the spouse is a victim if:
       (i) The person on trial was charged with assault and battery of the spouse within 1 year of the current charge;
       (ii) The spouse was sworn to testify at the previous trial; and
       (iii) The spouse refused to testify on the basis of the provisions of this section.

In addition to modifying the spousal privilege, the Act extends protections against domestic violence—previously available only to married victims—to individuals living with or sharing a child with their aggressor. The Act also modifies the circumstances under which an individual may be prosecuted for marital rape by changing the period of spousal separation necessary for such a prosecution from six months to three months in cases where there is no written separation agreement.

The Domestic Violence Act significantly impacts law enforcement by expanding arrest powers and increasing police duties to victims of domestic violence. Previously, officers could make warrantless arrests on probable cause that individuals had battered their spouses or cohabitants only if there was evidence of physical injury, or a danger that a suspect would flee or cause further injury or property damage, and if police made a report within two hours of the incident. The Act increases this time period to twelve hours. The Act also allows a police officer to arrest an individual if there is probable cause to believe the person is in violation of an ex parte order or a protective order.

The Act requires that law enforcement officers responding to requests for assistance from domestic violence victims—for example, to remove clothing and personal effects from the family home—give victims written notice that they may request that the district court commissioner or state’s attorney’s office file criminal charges. The officer must also inform victims that they may file for civil relief under the

3. DEPARTMENT OF LEGISLATIVE REFERENCE, 1994 SESSION REVIEW 212 (reviewing legislative developments of the Maryland General Assembly).


The Domestic Violence Act amended §§ 4-513 to -515 of the Family Law Article by changing the heading from "Battered Spouses" to "Victims of Domestic Violence." The Act also extends the Department of Human Resources’ program of shelters, counseling, and rehabilitative services to current or former cohabitants as defined in § 4-501 of the Family Law Article. Domestic Violence Act of 1994, ch. 728, 1994 Md. Laws 3240-42.

5. Id. at 3236.


8. Id. at 3240. This provision modifies § 4-509 of the Family Law Article. Previously, an officer could arrest an individual for violation of an ex parte order or a protective order only when that officer actually observed a violation. MD. CODE ANN., FAM. LAW § 4-509 (1991 & Supp. 1993).
Family Law Article. An officer must provide victims with the telephone number of any available local domestic violence program. When an incident report is filed subsequent to a request for assistance, a copy of the report must be given to the Maryland State Police and, if requested, to the victim without the victim first obtaining a subpoena.

The Act also modifies the definitions of "abuse" and "neglect" of a child in four ways. First, mental injury is explicitly included in the definition of child abuse. Second, the qualifier "significantly" modifying the word "harmed" has been deleted from the definition of child abuse. Third, the Act deletes the exemption from child abuse of nonmedical religious remedial care and treatment. Finally, the Domestic Violence Act expands the category of individuals who can be "neglectors" to include those who have permanent or temporary care, custody, or responsibility to supervise a child.

b. History of the Spousal Privilege.—Maryland's statutory noncompellability of spousal testimony is rooted in the common-law rule of incompetence of one spouse to testify for or against the other in a civil or criminal proceeding. This incompetency rule evolved

9. Domestic Violence Act of 1994, ch. 728, 1994 Md. Laws 3236-37. Although law enforcement officers are required to provide victims with this written notice, they may not be held civilly liable for failure to do so. Id. at 3237.

10. Id.

11. Id.

12. Id. at 3242. This provision modifies § 5-701 of the Family Law Article. The Act defines mental injury as "observable, identifiable and substantial impairment of a child's mental or psychological ability to function." Id. at 3244.

13. Id. The revised language of § 5-701(b) now reads:

(b) Abuse.—"Abuse" means:

(1) The physical or mental injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed; or


14. Id. at 3243. Prior law provided that "(2) 'Abuse' does not include, for that reason alone, providing a child with nonmedical religious remedial care and treatment recognized by State law." Md. Code Ann., Fam. Law § 5-701 (1988).


16. See M. Peter Moser, Compellability of One Spouse to Testify Against the Other in Criminal Cases, 15 Md. L. Rev. 16, 18 (1955) (detailing the common-law antecedent of Maryland's statutory spousal privilege).
from the proposition that husband and wife were legally one entity. This exception, based in the doctrine of necessity, has been applied in jurisdictions where the common law controls as well as in those where incompetence of spousal testimony is statutory. Judicial interpretations of the exception, both at statutory and common law, are expansive and include injuries to the spouse’s child and to third parties where the witness spouse is in the zone of danger. The weight of authority holds that where spouses are competent by virtue of the common-law exception, they are also compellable.

In 1888, the Maryland Legislature eliminated the common-law incompetence of spousal testimony in criminal proceedings. Despite the absence of a statutory prohibition from 1888 until 1965, Maryland

17. See 8 WIGMORE, EVIDENCE § 2228, at 214 (McNaughton rev., 1961). “Husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage.” Id. (quoting J. BULLER, INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 270 (1767), 286a (7th ed., Bridgman 1817)).


19. Id.; see, e.g., Hanon v. State, 63 Md. 123, 127 (1885) (holding that where the wife is the victim of the crime, the injustice of barring her complaint of the crime outweighs the policy reasons for the rule of incompetency).

20. See, e.g., Bassett v. United States, 137 U.S. 496, 506 (1890) (recognizing the exception but holding it inapplicable to a wife’s charge of polygamy); Merritt v. State, 339 So. 2d 1366, 1370 (Miss. 1976) (holding that the rule allowing one spouse to testify against the other for crimes of personal violence includes the murder of their child); State v. Woodrow, 52 S.E. 545, 546 (W. Va. 1905) (holding that a husband’s alleged murder of his infant child, although not a crime against the wife, triggered the exception).

21. See, e.g., Commonwealth v. Sapp, 14 S.W. 834, 836 (Ky. 1890) (holding that a victim-spouse is competent to testify despite the absence of statutory exception).

22. See Seyle v. State, 584 P.2d 1081, 1086 (Wyo. 1978) (interpreting statutory exception for a “crime committed by one against the other” as applicable to wrong against the child of the witness spouse); State v. Kollenborn, 304 S.W.2d 855, 864 (Mo. 1957) (interpreting the common-law exception for crimes committed by one spouse against the other as including violent crimes against the child of the witness spouse). But see State v. Woodrow, 52 S.E. 545, 546 (W. Va. 1905) (interpreting the statutory exception strictly and holding that crimes against the child of the witness spouse are not crimes against “the person” of such spouse).

23. See, e.g., Loesche v. State, 620 P.2d 646, 650 (Alaska 1980) (“The assault for which the defendant was convicted was a crime against his wife in the sense that he forcibly entered her residence without permission, and surely put her in fear by shooting her guest five times at close range. Because she was physically present, she was within the zone of danger, and she could have apprehended violent injury to herself from the attack.”).


courts were reluctant to compel such testimony,26 even in cases where the crime involved the injury of one spouse by the other.27 The historic aversion to compulsory spousal testimony may be explained either by a fear of the "danger of causing dissension and of disturbing the peace of families,"28 or a "natural repugnance in every fair-minded person to compel a wife or husband to be the means of the other's condemnation, and to compel the culprit to the humiliation of being condemned by the words of his intimate life partner."29

Maryland codified the noncompellability of adverse spousal testimony in 196530 and later created one exception—"when such proceedings involves [sic] the abuse of a child under sixteen years pursuant to Section 11A of Article 27 of this Code . . . ."31 In Mulligan v. State,32 the defendant unsuccessfully argued that because he was charged with murder of a child—rather than a Section 11A charge of mistreating a child under sixteen—his spouse was not compellable as an adverse witness.33 The legislature subsequently removed the reference to Article 27 and enacted Section 9-106 of the Courts and Judicial Proceedings Article, which provides that a spouse may be

26. See, e.g., Raymond v. State ex rel. Younkins, 195 Md. 126, 130, 72 A.2d 711, 713 (1950) (holding that spousal privilege, if it existed, was vested in the witness spouse and that defendant spouse could not raise this evidentiary issue for the first time in a habeas corpus proceeding); Richardson v. State, 103 Md. 112, 117, 63 A. 317, 319-20 (1906) (stating in dictum that wife was a competent witness against her husband "although she could not have been compelled to testify.").

27. Raymond, 195 Md. at 127, 72 A.2d at 712. Most jurisdictions, however, have interpreted statutory removal of spousal incompetence as rendering the witness spouse compellable. See, e.g., State v. Antill, 197 N.E.2d 548 (Ohio 1964). The Antill court held that where the wife was competent by statute, she was compellable in an action against her husband for assault upon her:

It is an overgenerous assumption that the wife who has been beaten, poisoned or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony. And if there were, conceivably, any such peace, would it be a peace such as the law could desire to protect? Could it be any other peace than that which the tyrant secures for himself by oppression?

Id. at 551 (quoting 8 Wigmore, Evidence § 2239, at 242, 243 (McNaughton rev., 1961)).

28. 8 Wigmore, supra note 17, at 216. Wigmore continues: "[T]he peace of families does not essentially depend on . . . immunity from compulsory testimony, and . . . so far as it might be affected, that result is not to be allowed to stand in the way of doing justice to others." Id.

29. Id. at 217.


33. Id. at 615, 252 A.2d at 485. The Mulligan court held that defendant's spouse was a compellable witness. Id.
compelled to testify when the "charge involves the abuse of a child under 18."  

2. The 1994 Limited Exception for Assault and Battery of the Witness Spouse.—As of October 1, 1994, section 9-106 of the Courts and Judicial Proceedings Article allows a prosecutor to compel a defendant's spouse to testify as an adverse witness when the charge involves "[a]ssault and battery in which the spouse is a victim." The defendant spouse, however, must also have been charged with an additional assault and battery of the witness spouse within one year of the current charge. The witness spouse must have been "sworn to testify at the previous trial" and have asserted the spousal privilege.  

As originally presented, House Bill 630 would have created an exception to both the spousal privilege of noncompellability and the marital communications privilege for crimes committed by one spouse against the other. The legislature's hesitation to create an exception for marital communications appears to be an affirmation that the marital relationship is private and that it is in society's interest to foster open communication between spouses without fear of public disclosure.

34. MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1989 & Supp. 1994). The Maryland spousal privilege statute differs from those in most jurisdictions in at least two ways. First, at common law and in many jurisdictions, the spouse is compellable as an adverse witness in a proceeding for abuse of the witness spouse's child on the theory that abuse of the child is a vicarious injury to the spouse. 2 WIGMORE, EVIDENCE § 488 (J. Chadbourn rev., 1979). Second, the common law and most statutory exceptions to the spousal privilege require that the charge involve abuse of a child of either of the spouses. Id. The Maryland statute denies the privilege in cases involving the abuse of any child. MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1989 & Supp. 1994) (emphasis added).  


36. Id.  

37. Id.  

38. Domestic Violence Act of 1994, ch. 728, 1994 Md. Laws 3239. The proposed exception to the spousal privilege against compulsory testimony was for "any criminal defense in which the spouse is a victim." Id.  

39. See MD. CODE ANN., CTS. & JUD. PROC. § 9-105 (1980). The marital communications privilege renders spouses incompetent to testify as to any confidential communication that occurred between them during their marriage. Id.  

40. Domestic Violence Act of 1994, ch. 728, 1994 Md. Laws 3239. The proposed exception to the marital communications privilege was that where "the confidential communication occurs during the commission of a crime committed by one spouse against the other or pertains to a crime committed by one spouse against the other," the testimony is competent. Id. This proposal did not survive the bill's passage, and the marital communications privilege remains a privilege without exception. See generally State v. Enriquez, 327 Md. 365, 372, 609 A.2d 343, 346 (1992) (holding that until the legislature acts to the contrary, there is no exception to the marital communications privilege).
The new statutory authority to compel spousal testimony represents a compromise between differing views of the privilege. Prosecutors have found that, in practice, the spousal privilege often inhibits otherwise willing and truthful testimony from a victim spouse. Typically, the defendant, when informed by counsel of the spousal privilege, pressures the victim spouse not to testify. This pressure may be in the form of threats, or by promises to seek counseling and refrain from abusive behavior. Even in the absence of pressure from the defendant spouse, the prospect of an affirmative decision to testify, coupled with the sense of powerlessness that an abused spouse often feels, may influence the victim spouse to invoke the privilege.

Proponents of the spousal privilege assert that the principal justification for the privilege—preservation of marital harmony—applies to the domestic violence context. They further argue that the abrogation of the privilege is paternalistic because it takes the choice to testify away from the victim spouse and may expose the spouse to further victimization. When the General Assembly created a limited exception for cases involving assault and battery of the witness spouse, it recognized that, at least where the relationship is one of cyclical or repeated violence, the value of prosecuting violent defendants outweighs any benefit of the privilege.

41. Telephone Interview with Steve Bailey, Unit Chief, Family Violence Unit, Baltimore County State's Attorney's Office (Sept. 19, 1994).
42. Id.
43. Telephone Interview with Dorothy Leonnig, Legal Director, House of Ruth, Baltimore, Maryland (Sept. 20, 1994).
44. In many counties, the court will advise the victim spouse of the privilege not to testify in the presence of the defendant and then ask the victim spouse if they wish to testify. Id.
46. See supra notes 28-29 and accompanying text. The decision to testify voluntarily, however, is likely to damage a relationship more than compelled testimony. Section 9-106 confronts victim spouses with a difficult, and perhaps unfair, choice between preserving their marriage and taking what may be the only available steps to stop domestic violence. For example, a promise to seek counseling would more likely be kept when it is a condition of probation. Moreover, the negative impact of voluntary testimony by a victim spouse could be softened by the offer of mitigating evidence; for example, that the incident was the first abusive act or that the defendant has apologized or sought counseling.
47. This argument is weakened by the fact that the legislature has not sought to extend this choice to unmarried domestic violence victims.
48. Telephone Interview with Dorothy Leonnig, supra note 43. Many critics of compulsory spousal testimony view it as an endangerment of the victim spouse where the defendant spouse has used threats and may retaliate for adverse testimony. Others fear that unwilling and fearful victims will be held in contempt for failure to appear or for refusal to testify. Id.
49. Telephone Interview with Steve Bailey, supra note 41.
3. Implications for Practitioners.—

a. Retroactive Versus Prospective Application.—The language of the newly created exception to the spousal privilege clearly indicates that the General Assembly sought to prevent the privilege from shielding chronically abusive spouses from prosecution. There is, however, some confusion with respect to the significance of the October 1, 1994, effective date. The statute could be read to allow prosecutors to compel testimony, as of October 1, 1994, when the conditions of the statute are met. Alternatively, the statute could be interpreted to allow compulsion of spousal testimony when, after October 1, 1994, there are two cases of spousal assault and battery within a year of each other and the witness invokes the privilege in the trial of the first charge. Similarly, the exception could be construed to mean that if a defendant is charged with assault and battery after October 1, 1994, and, within one year prior to that charge was charged with assault and battery, and in the first case the witness spouse invoked the privilege, the prosecutor may compel the spousal testimony in the second proceeding.

The first interpretation seems most consistent with the purposes of the legislature because it allows compulsory testimony in trials of repeat offenders after October 1, 1994. The application of the effective date of the amendment to the trial, rather than the charge, is also consistent with the Court of Special Appeals ruling in Mulligan v. State. This "retroactive" application of the exception, however, may be largely moot as prosecutors only recently have begun noting and tracking the assertion of the privilege.

b. Technical Difficulties in the Enforcement of the Exception.—Prosecutors and defense attorneys, in many cases, may be unable to ascertain whether the victim spouse is a compellable witness. Because it often takes six to nine weeks to obtain a transcript of a district court proceeding, the use of such transcripts is an impractical means of es-

51. Telephone Interview with Donna Smith, Domestic Violence Advocate, Victim/Witness Assistance Unit, Carroll County Office of the State's Attorney (Oct. 1, 1994).
52. Telephone Interview with Steve Bailey, supra note 41.
54. Id. at 615, 252 A.2d at 485.
55. Telephone Interview with Steve Bailey, supra note 41.
tablishing that a spouse has previously asserted the privilege. It may prove helpful for the state's attorney's office in each county to maintain its own records regarding the privilege. Unfortunately, there is no guarantee that any two charges of assault and battery that involve a couple will be brought in the same county. Because defense attorneys also need access to the information, a statewide tracking method is necessary. Perhaps the most efficient means of ensuring that attorneys have access to the information is to require that the clerks of the various courts note the assertion of the privilege on the docket. The necessity of obtaining certified copies of docket entries would, however, undoubtedly increase the time requirements and economic cost of both the prosecution and the defense of domestic violence cases.

5. **Probable Increase in the Number of Trials for Domestic Violence Cases.**—The statutory requirement that witnesses must invoke the privilege after being sworn to testify in assault and battery cases against their spouses in order to compel spousal testimony in future proceedings probably will lead to far more domestic violence trials. Prosecutors will be less likely to offer a "stet" for a first-time offender on a relatively minor charge when it forecloses the opportunity to compel spousal testimony on a future, perhaps more serious charge. Similarly, the value of the agreed to statement of facts as a plea bargaining tool and trial expedient may be outweighed, in some cases, by the necessity of preserving the future compellability of the witness spouse. This increased case load may pose little or no problem in those counties with relatively few domestic violence cases. In Baltimore City and counties with a high volume of domestic violence cases, however, the increased burden on the courts and prosecutors may inhibit prosecutors in the use of the exception.

56. Id.
57. Telephone Interview with Donna Smith, supra note 51.
58. Id.
59. Telephone Interview with Steve Bailey, supra note 41.
60. When parties proceed on an agreed to statement of facts, defendants waive their right to a trial in exchange for prosecutors' recommendation of more lenient sentences. Prosecutors then read the statement of charges into evidence and judges decide the cases on the basis of that evidence alone. There are, therefore, no witnesses.
61. Telephone Interview with Steve Bailey, supra note 41.
62. Telephone Interview with Donna Smith, supra note 51. Carroll County courts, for example, handle approximately 300 domestic violence cases per year. Id.
63. Baltimore City courts handle more than 3000 domestic violence cases per year. Id.
64. While the newly created exception to the spousal privilege may profoundly change prosecution in some counties, many counties now have "no drop" policies for domestic violence cases. As Judge Cathell noted in Clark v. State, 97 Md. App. 381, 629 A.2d 1322 (1993):
d. Broadening of the Abuse of a Child Exception.—With the deletion of the language referring to Article 27, Section 11A of the Code, the 1980 amendment of the spousal privilege arguably broadens the definition of "child abuse" under the spousal privilege statute.\(^5\) Depending on the facts of the particular case, two arguments can be advanced for compelling spousal testimony when the defendant spouse is charged with a crime of violence against the witness spouse and the crime occurs in the presence of either of their children.

First, an analogy can be made to the extension of the crimes against the other spouse exception to cases where third parties are injured and the witness spouse was within the zone of danger.\(^6\) For example, if the defendant spouse fires a weapon at the witness spouse in the presence of a child, it would endanger the child.\(^6\) The General Assembly enacted the exception for abuse of a child to protect children.\(^6\) Therefore, it is consistent with that purpose to compel testimony in such a case, especially where the defendant spouse, if unpunished, may present a future danger.\(^6\)

Second, the General Assembly extended the definition of child abuse to include mental abuse.\(^7\) A recent American Bar Association

We . . . acknowledge the significant improvements we feel have occurred in the Maryland courts as prosecutors, defense attorneys, judges, and their staffs have become more sensitized to the problems of the battered cohabitant. As we understand it, in some Maryland jurisdictions prosecutors have formed intra-office victim assistance programs, provided special training for prosecution and staff on the subject, and have adopted more stringent and vigorous prosecution policies. . . . Some prosecutors attempt to prosecute without the victim's assistance by using 911 generated evidence, police reports, and other documentary matter, other witnesses testimony, etc.

\(^5\) Id. at 392 n.6, 629 A.2d at 1328 n.6.
\(^6\) See Loesche v. State, 620 P.2d 646, 649-50 (Alaska 1980) (noting that where witness spouse was present when defendant spouse fired five shots at a third party, the crime was within the exception for "crimes against the other" spouse).
\(^6\) See e.g., State v. Whitaker, 544 P.2d 219, 224 (Ariz. 1975) (holding that the trial court had not abused its discretion by allowing a spouse to testify against her estranged husband after he fired into the residence she, her child, and a male roommate occupied).
\(^7\) In the Senate Judiciary Committee hearings on the nomination of Janet Reno as Attorney General, Chairman Biden noted:

Children [in] cases where there is domestic violence in the home . . . [in which] the child[ren] witness . . . a spouse or a live-in boyfriend beating the wife or girlfriend . . . [are] 1,500 times as likely to be the victim[s] of abuse within that household as they are in a household where domestic violence between the adults does not take place—1,500 times.

report on the impact of domestic violence on children "concludes 'children can suffer grievous harm by merely observing or hearing the domestic terrorism of brutality against a parent at home.'" The report states that "children who live in homes where there is domestic violence are more likely than others to become batterers of their partners when they become adults. They also view violence among intimate companions as an acceptable or inevitable norm." Recent studies suggest that children who witness violence suffer adverse effects in many areas, "including their ability to function in school, emotional stability, and orientation toward the future." It is arguable that the term "abuse of a child" in the spousal privilege exception means "injury to a child" rather than statutory child abuse. Had the legislature intended to limit the exception to statutory child abuse, it could have explicitly provided that limitation.

**e. Prosecutorial Comment on and Inference from Defendant's Failure to Call Spouse as Witness.**—Under Maryland law, "[t]he failure to call a material witness raises a presumption or inference that the testimony of such person would be unfavorable to the party failing to call him." This inference will not apply "where the witness is not available, or where his testimony is unimportant or cumulative, or where he is equally available to both sides." The "missing witness inference" may arise either through a request that the judge instruct the jury on the operation and availability of the inference or by calling it to the attention of the finder of fact during closing arguments. For example, in *Bruce v. State*, the prosecutor argued in closing:

> The defense has no obligation, ladies and gentlemen, to put on a defense, but when they do start to put on a defense and

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72. Id.


74. In 1980, the General Assembly removed the reference to Article 27, § 11A of the Code, which supports the conclusion that it intended an exception broader than statutory child abuse. See supra notes 12-15, 34 and accompanying text.


76. Id. at 134, 333 A.2d at 46.

77. Although the missing witness inference is most often used in jury trials, prosecutors also may argue the applicability of the inference in bench trials.

78. See, e.g., Davis v. State, 333 Md. 27, 52, 633 A.2d 867, 877 (1993) (upholding the trial court's grant of permission to the prosecutor to argue a missing witness inference in closing).

leave somebody out, somebody who is important, somebody who can be crucial to supporting what the defendant said, then you may draw inferences from that.\textsuperscript{80}

In other jurisdictions, there is a split of authority on the availability of the missing witness inference where the witness in question is a spouse and the spousal privilege is available.\textsuperscript{81} Jurisdictions in which an adverse inference from defendant's failure to call a spouse as a witness have been held improper generally bar spousal testimony \textit{for or against} the defendant spouse.\textsuperscript{82} The witness is simply unavailable to both the defendant spouse and the prosecution.

Maryland's spousal privilege statute states that only "adverse" testimony is privileged.\textsuperscript{83} Witness spouses are unavailable to the prosecutor by their assertion of the privilege,\textsuperscript{84} but remain available to the defendant spouse.\textsuperscript{85} Where the defendant did not call the witness spouse, a missing witness inference would be appropriate if the witness spouse's testimony was material and noncumulative.\textsuperscript{86} In cases

\begin{itemize}
\item \textsuperscript{80} Id. at 729, 565 A.2d at 1266. The Court of Appeals held that this argument was proper because of the close relationship between the missing witness and the defendant and the relative importance of her testimony. \textit{Id.} at 730, 569 A.2d at 1267.
\item \textsuperscript{81} \textit{See generally} 79 A.L.R.4TH 694, 697-99 (collecting and analyzing how the courts in various jurisdictions have interpreted and applied the missing witness inference).
\item \textsuperscript{82} \textit{See, e.g.,} Simpson v. State, 497 So. 2d 424, 428 (Miss. 1986) (holding that prosecutor's comments on defendant's failure to call his wife as a witness were improper as the spouse was not a competent witness for the defendant). Mississippi law provides that a spouse is not a competent witness against the other spouse. Miss. CODE ANN. § 13-1-5 (1993); \textit{see also} Casey v. State, 306 S.E.2d 683, 684 (Ga. 1983) (holding that the failure of defendant's wife to testify is not a legitimate subject matter of argument for counsel where statute provides that "husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other"); Gossett v. Commonwealth, 402 S.W.2d 857, 858 (Ky. 1966) (stating that a husband or wife cannot be compelled to testify for or against the other). \textit{But see} Wynn v. State, 308 S.E.2d 392, 394 (Ga. App. 1983) (holding that it is not harmful error for state to comment upon fact that it has no power to call defendant's spouse by virtue of the spousal privilege where defendant relies upon words and actions of nontestifying spouse).
\item \textsuperscript{83} MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1989 & SUPP. 1994).
\item \textsuperscript{84} The assertion of the privilege is not, however, necessary for the state to prove that the spouse is unavailable to the prosecution. Bruce v. State, 318 Md. 706, 731, 569 A.2d 1254, 1267 (1990). The \textit{Bruce} court held that the witness's status as girlfriend of the defendant was sufficiently close that she was more available to the defendant than the prosecution. \textit{Id.}
\item \textsuperscript{85} The witness spouse is available to the defendant spouse because there is no statutory prohibition against compelling exculpatory testimony from one's spouse. In order for the prosecution to use the inference, however, the defendant must put on an affirmative defense and raise the issue that the witness spouse's testimony would be exculpatory, for example, that the incident did not occur or that the defendant acted in self defense. \textit{See} 79 A.L.R.4TH 694, 708-11.
\item \textsuperscript{86} \textit{Bruce}, 318 Md. at 731, 569 A.2d at 1267. The Supreme Court of Wyoming, in Fortner v. State, 835 P.2d 1155 (Wyo. 1992), interpreted a statute where the witness spouse was
that involve marital domestic violence, it is difficult to imagine an instance where the witness spouse's testimony would not be material.

f. Defendant's Right to Have Spousal Privilege Invoked Outside Presence of the Jury.—Although the prosecutor may comment on the failure of a defendant to call a spouse as a witness, once the defendant has raised the issue that the spouse would be an exculpatory witness, it is improper for the prosecutor to comment upon the spouse's exercise of the privilege.87 Many courts have held that calling the spouse to the stand for the sole purpose of having her invoke the privilege before the jury is prejudicial.88 As the Court of Appeals of Georgia stated:

Being required to make an election in the presence of the jury was tantamount to having her testify that she knew certain things against her husband, she yet refused, under her rights as a wife, to testify against him. All of this was most harmful to defendant, and should have been conducted only in the absence of the jury.89

The newly amended spousal privilege, however, mandates that the prosecutor call the spouse to the stand for the sole purpose of invoking the privilege.90 Where the trial is before a jury, case law in other jurisdictions suggests that the election to invoke the spousal privilege should be made outside the presence of the jury.91

4. Conclusion.—The newly created exception to the spousal privilege under the Domestic Violence Act of 1994 is a much needed step in the direction toward abrogation of the privilege in the context of

available to the defendant but not to the prosecutor and where the prosecutor was allowed to comment on the defendant's failure to call his spouse as a witness. The court stated: "We recognize that where a witness is equally available to both parties, the failure to call the witness is not the proper subject of comment. We have recognized an exception where the witness is the defendant's spouse and can assert the marital privilege because she is then available to the defendant but not to the government." Id. at 1157.

87. See, e.g., George v. State, 644 P.2d 510, 511 (Nev. 1982) (holding that a prosecutor cannot comment on the husband's failure to call his wife to testify). Because the privilege is vested in the witness spouse and, therefore, its exercise is beyond the control of the defendant spouse, any comment relating to the privilege would be improper.

88. See, e.g., Terry v. State, 540 So. 2d 782, 783 (Ala. Crim. App. 1988), overruled on other grounds by J.D.S. v. State, 587 So. 2d 1257 (Ala. Crim. App. 1991) ("It is improper for the prosecution to call as a witness one it knows will certainly invoke the privilege against testifying as a witness, with the sole purpose of having the jury observe that invocation."); Hylton v. State, 688 P.2d 304, 305 (Nev. 1984) ("It is improper for a prosecutor to force the invocation of the spousal privilege in the presence of the jury.").


90. See supra text accompanying notes 35-37.

91. See supra note 88.
domestic violence. The General Assembly appears to have reluctantly conceded that the purposes of the spousal privilege—to preserve marital harmony and protect the marital relationship from the perceived dangers of securing a conviction based on spousal testimony—do not always outweigh the public need to prevent and punish violent crimes in the domestic setting. As amended, the spousal privilege will likely increase the cost to the court system and the legal community in terms of time and money. In the future, the General Assembly may find that whatever marital harmony is preserved between domestic violence victims and their aggressors through the noncompellability of spousal testimony is not worth this price.

M. Kay Scanlan

B. Strengthening the System: Omnibus Child Support Act of 1994

Acting under federal mandate, the 1994 session of the Maryland General Assembly passed an omnibus measure designed to increase child support collection and ensure adequate medical coverage for children in single parent homes. Collectively known as the Omnibus Child Support Act (Act), the new law makes several modifications that relate to establishment of paternity, including a requirement that courts issue default judgments when alleged fathers fail to appear for paternity hearings after being summoned or giving bond. The Act also compels courts to view laboratory reports that establish at least a ninety-nine percent statistical probability of a defendant's paternity as a rebuttable presumption of paternity. Maryland courts also must give full faith and credit to determinations of paternity made by other states or by administrative processes that include a right to appeal to a court.

The Act seeks to improve children's access to health care by authorizing courts to include in a support order a provision that requires either parent to provide health insurance for the child if the parent can obtain coverage through an employer or group health in-

92. Telephone Interview with Dorothy Leonnig, supra note 43.
2. Id. at 1253.
3. Id. at 1254-55.
4. Id. at 1255. Presumably, this enactment is a recognition of the trend toward administrative procedures in dealing with child support enforcement and paternity establishment. See Child Support Enforcement Admin., Supporting Children; Raising Hopes, Addendum (1993) (noting that 19 states and the Virgin Islands employ administrative processes for at least part of their child support enforcement).
urance at a reasonable cost. Provisions that outline the responsibilities of employers and insurance companies have been added to the Act to simplify this process and ensure that children will not be denied coverage. In addition, the Act authorizes interception of a child support obligor's state income tax refund to recover medical assistance payments made by the Department of Health and Mental Hygiene (DHMH) if the obligor receives payments from an insurer for the cost of health services provided to the child but fails to reimburse the Department.

In view of the Child Support Act's social context, its impact on prior law, and its legislative and political history, the legislation has not radically transformed the law. Yet, the Act makes incremental changes that, in the aggregate, should provide greater economic security for single parents and their children.

1. Sources and Background of the Law.—
   a. Social Context.—A growing proportion of children under eighteen live in single-parent homes. In 1990, 24% of Maryland households were headed by a single parent, up from 14% in 1970. Of the estimated 61.3 million children in America in 1988, 25% lived with only one parent even though all but one million had two living parents.

   The correlation between single-parent homes and poverty is well-established: Seventy-six percent of Maryland families living in poverty in 1990 were headed by single parents, and 71% of those parents were women. Moreover, a congressional report released in 1990 found that 90% of all individuals eligible for Aid to Families with Dependent Children (AFDC) became eligible because of nonpayment of child support. The cost to support those families totaled more than $53 billion, or $24,187 for each family. Consequently, enhanced child support measures have become a politically popular cornerstone of welfare reform plans.

6. Id. at 1273-75.
7. Id. at 1276-79.
8. Id. at 1275.
12. Id.
14. Id. at 15-16.
Streamlined provisions for the determination of paternity are closely linked to the elimination of the child support debt in Maryland, which in 1993 amounted to an unprecedented $500 million. Moreover, approximately 30% of all births reported in the 1990 Maryland census were to unmarried women. That figure rose to 36% in Prince George's and Caroline Counties, 49% in Somerset County, and 59% in Baltimore City. Nationally, paternity is established in less than one-third of nonmarital births, which is considered the primary reason why fewer than 20% of never married women have child support awards, as opposed to more than 80% of divorced women. Until paternity is conclusively established, the fathers of children from nonmarital unions generally do not pay child support.

The Child Support Act is structured to improve health care coverage for children by demanding greater financial accountability from noncustodial parents. Of the 17,097 support orders established in Maryland in 1993, approximately 78% had provisions for obligor-provided health insurance for the child. Obligors, however, often fail to comply with these provisions, contributing to the eight million children nationally who are without adequate health care. Although the Family Support Act of 1988 requires state child support enforcement agencies to enforce court ordered health insurance coverage for dependent children, many parents still fail to provide the coverage even when it can be acquired at a reasonable cost through an employer. Moreover, some insurance carriers refuse to accept claims filed by the custodial parent on behalf of the employee's dependents or refuse to provide dependency coverage unless the child

16. Id. at 3.
17. Id. at 4.
18. Id.
19. Id. at 14 (quoting data from the American Public Welfare Association).
20. Id. at 6.
23. President Clinton's Budget Proposals in the Human Resource Area: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means, 103d Cong., 1st Sess. 25 (1993) [hereinafter Hearings] (testimony of Margaret Campbell Haynes) (quoting Children's Defense Fund, Special Report: Children and Health Insurance (1992)). The Children's Defense Fund estimates that 25 million children from two-parent or single-parent homes lack employer-provided insurance. Eighteen million children do not have any form of private insurance, while eight million children have neither private nor public insurance such as Medicaid. Id.
27. Id.
lives with the employee. States were rendered powerless to respond to these problems by the Employee Retirement Income Security Act of 1974 (ERISA), which preempts state regulation of health insurance plans where the employer bears the risk of loss. Approximately two-thirds of employer-provided insurance plans were exempted from regulation under this provision.

b. Federal Mandate: The 1993 Omnibus Budget Reconciliation Act.—Most of the child support legislation passed in the 1994 session of the General Assembly was required under President Clinton’s 1993 Omnibus Budget Reconciliation Act (OBRA) and substantially mirrors its stipulations. In addition to the legislative provisions previously discussed, OBRA included health plans formerly excluded under ERISA among those bound by the new law.

The child support measures in OBRA received little attention from either Congress or the public. At the hearing before the House Ways and Means Committee’s Subcommittee on Human Resources, testimony did not focus on areas that affected the Family Support Act of 1988 nor on improvements to child support collection. The few references to the paternity and health insurance measures, however, were favorable.

c. Legislative and Political History.—The General Assembly received Senate Bill 312 from Governor Schaefer under a threat of losing $30 million in federal child support enforcement funds if it failed to comply with OBRA mandates. Despite external pressures, legislators struggled with the bill’s paternity by default judgment provision because they were hesitant to restrict judicial discretion and feared some men would be declared fathers without sufficient evidence. At the Schaefer Administration’s request, the Senate Judicial Proceed-

28. Id. at 25.
32. See supra text accompanying notes 1-8.
33. 42 U.S.C. § 1396g-1.
34. See Hearings, supra note 23, at 22 (stating the need for both the paternity and health insurance provisions).
35. John Roll, Md. Child Support Enforcement Bill Called Controversial But Inevitable, DAILY RECORD (Baltimore), Feb. 4, 1994, at 11. The $30 million represents 60% of the total budget for Maryland’s Child Support Enforcement Administration. Id.
37. Roll, supra note 35, at 11 (quoting Senator Walter Baker as saying “I have a real problem with telling a court they’ve got to issue a judgment when the defendant doesn’t show up. Suppose there is no evidence [of paternity?]”).
ings Committee amended Senate Bill 312 so that a court is only required to issue a default judgment that adjudicates paternity "if the court is satisfied by the evidence presented by the petitioner." Despite this mitigating language, and contrary to OBRA, the House Judiciary Committee amended the section to make default judgments once again optional. The Senate refused to concur with this and other House amendments, and a conference committee restored the original mandatory language of the provision.

Notwithstanding Senate Judicial Proceedings Committee Chairman Walter Baker's fears that the bill would "blow [insurance costs] out of the water," insurance companies supported the legislation, but did suggest several "clarifying amendments" that ultimately were rejected. Anticipating objections from employers, however, the legislation included provisions that forbid the use of an order that requires health insurance coverage as grounds for retaliatory action against employee-parents or as the basis for failure to hire or promote them.

The initial version of Senate Bill 312 included several independent gubernatorial initiatives that would have placed Maryland among the more progressive states for child support enforcement. Legislators, however, opted for a more cautious approach, and eliminated virtually every proposal except the federal requirements and a few technical changes. The scant opposition to the bill dissipated upon

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40. Letter from Fran Tracy, Vice President, Government Affairs, Blue Cross and Blue Shield of Maryland, to Senator Walter M. Baker, Chairman, Senate Judicial Proceedings Committee (Feb. 28, 1994) (on file with author). Blue Cross and Blue Shield of Maryland offered a provision that would allow the child to be disenrolled upon "non-payment of premium or loss of child status under the terms of the insurance policy." Id. OBRA requires that when a parent obtains family health coverage pursuant to a court or administrative order, coverage for the child will be eliminated only when either the order is no longer in effect or the child will be enrolled in comparable health insurance. 42 U.S.C. § 1396g-1 (1993).
42. The original version of Senate Bill 312 allowed the Motor Vehicle Administration to suspend the driver's license of a child support obligor who was more than 60 days in arrears and issue a work restricted license. S. 312, 1994 Sess. Although Maryland has the authority to attach a delinquent parent's wages, 66% of noncustodial parents in 1993 failed to pay court ordered child-support. Child Support, 1994: Hearings on S.B. 312 Before the Senate Jud. Proc. Comm., Maryland Gen. Assembly 5 (1994) (statement of Meg Sollenberger, CSEA). The license provision would have reached those parents who earned income through means other than attachable earnings. Id. Similar statutes have been enacted in Illinois, Florida, Maine, South Dakota, but current Maryland law does not authorize driver's license suspension for behavior unrelated to driver safety. See id. at 5-6.
elimination of the Governor's proposals, and on final passage, received unanimous approval.43

2. Impact of the Act on Prior Law.—

a. Paternity Establishment.—Under the Act, "unless there is good cause to the contrary," courts are required to proceed with a hearing on a paternity complaint and to issue a default judgment adjudicating paternity if the defendant fails to appear after being summoned or giving bond.44 The court, however, must be satisfied by petitioner's evidence before it can issue a judgment against the defendant. The court retains the discretion to issue any other order that is "just and proper."45 Previously, courts were allowed, but not required, to proceed with the hearing and issue any order that was just and proper.

The Act also establishes that a laboratory report received into evidence with a 99% statistical probability of the alleged father's paternity constitutes a rebuttable presumption of his paternity.46 Before the Act, no particular evidentiary weight was assigned to a laboratory report.47 The Act does not alter the requirement that a laboratory report of an alleged father's blood test must be received into evidence if "definite exclusion is established" or if "the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of an alleged father's paternity is at least 97.3%."48

b. Health Insurance.—Prior to the Act, Maryland courts were authorized to order a parent to obtain health insurance for a child only if the parent was insured by a plan that offered family coverage.49 The Act amends this provision so that courts may include health insurance in the support order, either through a wage withholding order

The legislation also would have permitted a court to issue a child support award for an unmarried child over the age of 18 who was enrolled for at least 4 credits of secondary school education. S. 312, 1994 Sess. The award would continue until the first to occur of the child's marriage, graduation, disenrollment in secondary school, or upon reaching the age of 19. Id. Courts presently lack authority to award child support for persons over 18 years old. The House Judiciary Committee killed both of these provisions.

43. VOTING RECORD, S. 312, Maryland Gen. Assembly (Apr. 10, 1994).
45. Id.
46. Id. at 1254-55. Under OBRA, states have the option of regarding such genetic testing as conclusive determination of paternity if they so choose. 42 U.S.C. § 666.
47. SENATE JUD. PROC. COMM., FLOOR REP., S. 312, Maryland Gen. Assembly 1 (1994).
49. See supra notes 26-30 and accompanying text.
or as a separate order, if the parent can obtain employer-provided insurance or any form of group health coverage at a reasonable cost.50

A parent or child enforcement agency must send a certified copy of the court order to the child support obligor's employer, who upon receipt must permit either the parent, a child support enforcement agency, or DHMH to enroll the child in the parent's health insurance coverage regardless of enrollment season restrictions.51 The employer is then required to deduct premiums from the parent's earnings.52 If it is involved in collection, employers must notify the child support agency and both parents of the date of enrollment or of any reason for failure to comply with the order.53 All parties also must be given notice within fifteen days if the health coverage is terminated.54 Either a parent or the support enforcement agency may bring civil suit against an employer who willfully violates the health insurance provisions of the Act.55 These provisions are binding on a parent's present and future employers if they have received a copy of the order.56

The law imposes duties on insurers who are prohibited from denying the child's enrollment on the grounds that the child was born out of wedlock, was not claimed as a dependent on the insuring parents tax returns, or does not reside in the service area of the insurer or with the insuring parent.57 The insurer may not disenroll the child without written evidence that: the court order is no longer in effect, the child will receive comparable health insurance elsewhere, the employer no longer employs the parent, or the employer has eliminated coverage for all employees.58 Both employers and insurers must honor administrative orders for coverage "to the same extent" as judicial orders issued in Maryland.59 Previously, the law imposed no specific obligation on employers or insurance companies other than compliance with the terms of court orders.60 Now, however, ERISA

51. Id. at 1273. Health insurance companies typically have designated enrollment periods during which employees must make all desired changes in their coverage for the next year.
52. Id. at 1274.
53. Id.
54. Id.
55. Id. This civil suit provision is not federally mandated.
56. Id. at 1275.
57. Id. at 1277.
58. Id. at 1278.
59. Id. at 1275.
60. See supra note 4 and accompanying text.
group health plans are included among the insurers bound by the Act.\textsuperscript{61}

The Act allows the interception of the child support obligor's state income tax refund to recover medical assistance payments made by DHMH when the obligor receives payment from an insurer for the child's health services and fails to reimburse the Department.\textsuperscript{62} Formerly, a state income tax refund could be intercepted only if the obligor was more than $150 in arrears of support payments.\textsuperscript{63}

c. Child Support.—Among the nonfederally mandated initiatives in the Act is a provision that establishes a presumption in favor of retroactive award of child support to the date the request was filed.\textsuperscript{64} The law targets noncustodial parents who delay court proceedings to avoid paying support in the interim. Prior law applied the presumption only to pendente lite awards, so that other awards only became effective on the date of the actual order.\textsuperscript{65} The Act also expands the definition of child support to include medical and hospital costs associated with "pregnancy, confinement, and recovery," and neonatal expenses.\textsuperscript{66}

3. Analysis.—The new legislation is likely to succeed in closing off some of the gaps in the current child support system that have contributed to economic hardship for many children of single-parent homes. It also validates the national push toward child support enforcement as an element of welfare reform. According to the Maryland Department of Human Resources, the paternity default provision will eliminate the three-month delay caused by reissuing summonses for individuals who fail to appear in court and thus is likely to increase AFDC related child support payments by $100,794 in 1995.\textsuperscript{67} Establishing a blood test probability of 99% or more as rebuttable presumption of paternity eliminates another two-month delay caused by trial

\textsuperscript{61} Child Support Act, ch. 113, 1994 Md. Laws 1249, 1277.
\textsuperscript{62} Id. at 1275-76.
\textsuperscript{64} Child Support Act, ch. 113, 1994 Md. Laws 1249, 1281.
\textsuperscript{66} Child Support Act, ch. 113, 1994 Md. Laws 1249, 1281.
\textsuperscript{67} Department of Fiscal Services, Fiscal Note on S. 312, Report to Maryland Gen. Assembly, at 1 (1994). The Department, however, does not indicate to what extent, if any, the increase from the paternity provisions overlaps that from the retroactive support orders. Id.
requests, and could increase AFDC support payments in 1995 by $20,410.68.

Making court orders for child support retroactive to the date of filing should generate a $546,825 increase in AFDC child support payments. DHMH also projects a $706,320 savings in Medicaid expenditures in 1995 because of the health insurance provisions. After outlays of about $334,265 for administrative costs, the Act will produce a net savings that should approach nearly $1.7 million by 1999.

Despite this positive financial impact, the health insurance provisions of the Act will not universally benefit all single parents who need assistance. The new law fails to help those Marylanders who are among the nation's five million female-headed households without child support orders. While the paternity establishment provisions will reduce this figure somewhat, the Act should not be seen as a panacea for the inadequate level of health care available to children. Moreover, although the law requires employers and insurers to recognize administrative orders for health insurance coverage from other jurisdictions "to the same extent" as judicial orders issued in Maryland, the law does not regulate out-of-state insurance companies, but only "commercial insurer[s], nonprofit health service or health maintenance organization[s] operating in this state under a certificate of authority issued by the Maryland Insurance Commissioner." Because of this provision, a potentially significant loophole remains in the insurance portion of the Act.

68. Id. In 1994, 192 AFDC cases were delayed by trial requests, of which only approximately 65 fathers would pay their average $157 monthly support obligations. Id.

69. Id. As discussed supra in note 67, it is unclear to what extent, if at all, the projected increase from retroactive support orders overlaps that from paternity provisions.

70. Id. at 2. Because Medicaid cost savings are divided evenly between the state and federal government, Maryland's general fund expenditures would be reduced by $354,731 in 1995. Id.

71. Id. at 3.

72. Id. This figure includes $690,800 in revenues and a $1,006,000 reduction in expenditures. Id.

73. FROMM ET AL., supra note 13, at 14. This figure represents half of America's female-headed households. Id.

74. For example, Washington County Department of Social Services estimated that, as of January 1994, it had 800 cases pending establishment of paternity or an initial court order that would be affected by paternity provisions. This represented 17% of potential paying cases and yearly collections of $900,000. Letter from Edward J. Maloy, Assistant Director, Washington County Department of Social Services, to Senator Walter Baker, Chairman, Judicial Proceedings Committee 2 (Jan. 28, 1994) (on file with author).


76. Id. at 1277.
4. *Conclusion.*—Unquestionably, the Child Support Act provides additional economic security for Maryland’s single-parent families. Yet, as the Act is a combination of federal mandates and state legislative initiatives, it has created a patchwork of changes. Although these changes are largely incremental and do not address the root of the current child support crisis, they will fulfill their limited intent and purpose of eliminating deficiencies in prior law.

DIANA M. SCHOBEL
IX. Torts

A. The Application of the Cap on Noneconomic Damages to Wrongful Death Actions

After strenuous lobbying by the medical insurance industry and victims’ rights advocates, the Maryland General Assembly reversed the Court of Appeals’ 1993 ruling in United States v. Streidel1 and passed legislation that declared noneconomic damages in wrongful death suits subject to the statutory cap applicable to personal injury awards since 1986.2 The cap now applies collectively to all plaintiffs who claim injury through the tort victim,3 rather than to each person individually as recently maintained by the United States District Court for the District of Maryland in Bartucco v. Wright.4 The legislation provides, however, for the statutory cap to rise to 150% of the mandatory limit when there are two or more claimants; the cap applies prospectively to cases arising after October 1, 1994.5 The new law raises the existing cap for personal injury cases from $350,000 to $500,000 and provides an annual adjustment for inflation to this limit for both personal injury and wrongful death suits.6 While extending the cap to wrongful death cases may be sound public policy, the law as written presents serious problems for families irreparably harmed by tortious conduct.

1. Sources and Background of the Law.—

   a. Legal Context.—In reaction to a perceived insurance “crisis” in 1986,7 the General Assembly established a $350,000 cap as the maximum amount recoverable for noneconomic damages in personal injury cases.8 The legislature hoped that the cap would add “predictability” to damage awards and make the Maryland market “more at-

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1. 329 Md. 533, 537, 620 A.2d 905, 907 (1993) (holding that the legislature intended the cap on noneconomic damages to apply only to awards for personal injury and not to awards for wrongful death).  
3. Id. at 2293.  
6. Id.  
tractive to underwriters” by controlling the category of damages most subject to emotion and resistant to objective valuation.9

While not specifically articulated prior to United States v. Streidel, courts followed a general interpretation of the General Assembly’s broad use of personal injury in the statute to include wrongful death.10 Less well-settled, however, was the question of whether to enforce the cap against each individual claimant or all parties collectively. In Simms v. Holiday Inns, Inc.,11 the federal district court decided to apply the limit to each tortious occurrence, but the same court later held in Bartucco v. Wright12 that the cap applied to each plaintiff individually in a wrongful death action.13

Although damage limits have been struck down in other states,14 the cap statute survived a constitutional challenge in Maryland in Murphy v. Edmonds.15 In reaching its decision, the Court of Appeals used a rational basis test to determine that the statute did not violate equal protection of the laws under Article 24 of the Maryland Declaration of Rights.16

13. Id. at 612.
14. State constitutions in Pennsylvania, Arizona, and Montana restrict the legislature’s ability to limit damages recoverable in tort actions. See Health Program Office of Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs, 105th Cong., 1st Sess. 100-01 (1993). Other states without specific constitutional provisions have reviewed damage caps under an equal protection analysis and have applied an intermediate or strict level of scrutiny to overturn caps on damages. See, e.g., White v. State, 661 P.2d 1272, 1275 (Mont. 1983) (holding that statutes limiting recovery warrant strict scrutiny under equal protection analysis because all individuals have a “fundamental right” under the Montana Constitution to have a remedy for every injury). But see Morris v. Savoy, 576 N.E.2d 765, 772 (Ohio 1991) (holding that a damage cap statute did not violate equal protection under a rational basis test, when it could be supported by “any conceivable set of facts”).
16. Id. at 370, 601 A.2d at 116. But see id. at 378-79, 601 A.2d at 120 (Chasanow, J., dissenting) (“[T]he right to recover full and fair compensation from a tortfeasor is an important personal right” that merits review under intermediate scrutiny and only in medical malpractice cases would a cap survive such analysis.). See generally Lynn A. Dymond, The Constitutionality of Maryland’s Non-economic Damage Cap, Developments in Maryland Law 1991-92, 52 Md. L. Rev. 545 (1993) (reviewing the court’s decision in Murphy).
One year after Murphy came the Streidel decision, which disturbed the settled statutory interpretation that the General Assembly intended the cap to apply to wrongful death cases. The Streidel court examined the statute’s requirement that juries itemize awards for “personal injury” actions in order to indicate how much they have allocated for past and future lost earnings, medical expenses, noneconomic damages, and other damages, and pointed out that such categories of damages do not apply to recoveries in wrongful death actions. The court found, moreover, nothing in the available legislative history that indicated the cap on noneconomic damages would apply to wrongful death cases. Given this finding, the court saw no need to reach the question certified before it: whether the damage cap would apply individually or in the aggregate to plaintiffs in the wrongful death action.

b. Legislative and Political History.—The legislative proposal to reverse Streidel was assigned to the Senate Judicial Proceedings Committee, chaired by the Bill’s sponsor, Senator Walter Baker (D-Cecil). A member of the conference committee that formulated the 1986 cap, Senator Baker believed that, contrary to Streidel’s analysis, the legislature always intended the damage ceiling to cover wrongful death actions. This belief reflected the fear of many legislators and insurers that medical malpractice rates, presumably stabilized by the 1986 cap, would soar in the face of wrongful death damage awards no longer restrained by law.

Insurance industry representatives joined forces with the state’s medical community to support the legislation. One insurance company cited a Baltimore County case, in which a plaintiff received nearly $6,000,000 in noneconomic damages, in order to show the danger of leaving the jury to its own devices. Moreover, malpractice

18. Streidel, 329 Md. at 544, 620 A.2d at 911.
19. Id. at 546, 620 A.2d at 912.
20. Id. at 537, 620 A.2d at 907.
22. Id.
23. Id. at 13.
24. Id.
rates that had doubled in Maryland between 1984 and 1987 remained essentially constant from 1988 to 1993, at least in part, because of the cap.\textsuperscript{26}

Despite a proposed raise in the statutory ceiling from $350,000 to $450,000 and an allowance for yearly increases for inflation,\textsuperscript{27} victims' rights groups and the plaintiffs bar objected.\textsuperscript{28} They denied any correlation between caps on noneconomic damages and medical malpractice premiums while insisting insurers were simply trying to protect their substantial profit margins.\textsuperscript{29}

The proposed legislation emerged from the Senate Committee by the slimmest of margins.\textsuperscript{30} In addition to the primary issue of whether to extend the cap to cover wrongful death, the Judicial Proceedings Committee wrestled with the Bill's retroactive application to wrongful death suits still pending.\textsuperscript{31} Proponents of retroactivity argued that until \textit{Streidel}, insurance rates were set with the assumption that wrongful death was already included by law.\textsuperscript{32} Premiums had been collected to reflect the presence of the cap, and would have to be increased immediately to cover possible noneconomic awards exceeding the old

\textsuperscript{26} \textit{Id.} at 1-2 (supporting legislation to apply the cap on noneconomic damages in wrongful death actions).

\textsuperscript{27} \textit{SENATE JUD. PROC. COMM., FLOOR REP., S. 283, Maryland Gen. Assembly} (1994).

\textsuperscript{28} \textit{See, e.g., CITIZEN ACTION, DEBUNKING THE MYTHS OF MEDICAL MALPRACTICE: THE CONSUMER PERSPECTIVE} (1993) (submitted to Delegate Joseph F. Vallario, Chairman, \textit{HOUSE JUD. COMM.}, Mar. 1, 1994, by Leigh Hauter); \textit{NATIONAL INSURANCE CONSUMER ORGANIZATION, MEDICAL MALPRACTICE INSURANCE 1985-1991 CALENDAR YEAR EXPERIENCE} (submitted to Senator Walter Baker, Chairman, \textit{SENATE JUD. PROC. COMM.}, Mar. 16, 1994, by Leigh Hauter) (copy on file with author); \textit{see also Hearings, supra note 25 (statement of Maryland Trial Lawyers Ass'n) (agreeing that the original law was intended to cover both injury and death, but objecting primarily to the application of a single cap to all plaintiffs) (copy on file with author).}

\textsuperscript{29} \textit{See, e.g., Hearings, supra note 25} (testimony of Izzy Firth, Association of Trial Lawyers of America) ("There is no correlation between the Maryland cap on noneconomic damages, and cost and availability of medmal insurance in the state.") (copy on file with author). According to the Association of Trial Lawyers of America, Maryland medical malpractice insurers paid out 32 cents for every dollar of premium earned in 1992, as opposed to the national average of 54 cents. \textit{Id.} at 2. In 1991, Maryland insurers earned profits of 42.5\% of premiums, compared to 29\% nationally. \textit{Id.}

\textsuperscript{30} The Committee vote was six to five in favor of passage. \textit{S. 283, SENATE JUD. PROC. COMM., COMMITTEE VOTING RECORD} (copy on file with author).

\textsuperscript{31} Medical Mutual estimated that it had 141 wrongful death claims that would be potentially uncapped. Letter from David L. Murray, President of Medical Mutual Liability Insurance Society of Maryland, to Delegate Joseph F. Vallario, Chairman, \textit{HOUSE JUD. COMM.} 1 (Feb. 28, 1994) (on file with author).

\textsuperscript{32} \textit{Hearings, supra note 25, exhibit 4, at 3} (statement of Medical Mut. Liability Ins. Soc'y of Md.) ("Because \textit{Streidel} 'uncapped' seven years of death cases that insurers had thought were capped—with rates set accordingly, the legislation should apply to pending cases to the extent constitutionally permissible.").
Although the Attorney General advised that there was no constitutional bar to the retroactivity provision, the Committee ultimately opted to amend the legislation to apply only to causes of action arising after October 1, 1994.

The Bill required application of the cap amount to the tort victim and "all persons who claim injury by or through that victim," thus answering the question that was never addressed by the Streidel court. The Senate Committee agreed to increase the limit in wrongful death actions to 150% of the proposed limit when two or more

33. David Funk, a lobbyist for Medical Mutual Liability Insurance Society of Maryland, predicted doctors would see an additional 15 to 20% rise in malpractice insurance rates, in addition to the 20% increase from the higher cap. Reinert, supra note 21, at 13.

34. Judgments—Limitation on Noneconomic Damages Act, ch. 477, 1994 Md. Laws 2292, 2293. The Attorney General's office advised legislators that while the State's Due Process Clause, found in Article 24 of the Maryland Declaration of Rights, is interpreted in pari materia with the federal provision, the Court of Appeals has not adopted the federal rule regarding retroactive legislation, but has followed an older rule that asks whether the proposed retroactivity encroaches upon "vested rights." Tort actions, however, even when filed, are not considered "vested rights" until they are reduced to final, unreviewable judgments. Since the legislation did not affect such judgments, vested rights were not adversely impacted and the retroactivity provision would be upheld unless deemed "irrational and arbitrary." See Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Kenneth H. Masters, Member, House Jud. Comm. 2 (Mar. 17, 1994) (copy on file with author). A finding of arbitrariness or irrationality would be unlikely given the legislation's role in reducing uncertainty in damage awards, which is the purpose of the cap.

Despite this advice, the Attorney General disagreed with an application of the cap retroactively as a matter of policy.

If this bill is being made retroactive simply to show the Court of Appeals that it was wrong when it decided the Streidel case the way it did, I submit little is to be gained by sending the Court such a message. In fact, more will be lost in terms of needless litigation and the resulting lack of certainty in this area of the law.


36. See supra notes 17-20 and accompanying text. Opponents of this measure cited Bartucco v. Wright, 746 F. Supp. 604, 609-10 (D. Md. 1990), to point out that while Maryland's Wrongful Death Statute requires all claims to be brought in one action, those with a cause of action for wrongful death still retain their right to recover damages. See, e.g., Hearings, supra note 25 (statement of the Maryland Trial Lawyers Ass'n) ("[T]he Wrongful Death Statute is procedural and only . . . protect[s] a wrongdoer from having to defend multiple suits; Juries are not required to bring in a single verdict but should determine the injuries suffered on an individual basis."); see also Bartucco, 746 F. Supp. at 609-10 ("This procedural choice, made over a century ago, was meant to protect a defendant from several suits, not from several judgments or awards to several prevailing plaintiffs.").

This argument ignores the legislature's need to address different policy concerns in subsequent enactments. Whether the original caps were intended to apply on a per occurrence or on a per claimant basis, as argued under Bartucco, has become irrelevant in view of changing demands in public policy.
claimants existed, but retained a single cap for all plaintiffs in a personal injury claim.37

This proposed legislation was referred to a conference committee after the House re-inserted a retroactivity provision in its version of the Bill that applied to wrongful death actions still pending after October 1, 1994.38 The House also increased the limit for multiple claimants to 200% of the statutory ceiling and raised the damage ceiling itself to $500,000.39 For personal injury cases, it sought to apply the cap to each plaintiff, whereas the Senate’s version imposed the limit on all claimants.40 In conference, the Senate conceded the $500,000 ceiling, but prevailed on all other points.41 The revised Bill passed in both chambers by wide margins.42

2. Impact of the Statute on Current Law.—The new statute notably raises the cap for noneconomic damages in personal injury cases arising after October 1, 1994 from $350,000 to $500,000 with subsequent annual increases of $15,000.43 Because the original statute capping noneconomic damages did not provide for inflation, this is the first increase in the cap since its imposition in 1986.44 More importantly, in reversing Streidel the law applies the same limit to suits for wrongful death as for personal injury, but does not cover suits arising before the October 1, 1994, implementation date.45

Because courts prior to Streidel uniformly treated the cap as applicable to wrongful death cases, this legislation largely codifies what, until last year, had been judicial precedent. The prospectivity provision of October 1, 1994, however, allows Streidel’s brief span as Maryland law to provide a window of opportunity for plaintiffs in pending wrongful death cases to collect damages exceeding the cap. While

37. SENATE JUD. PROC. COMM., FLOOR REP. ON S. 283, Maryland Gen. Assembly (1994).
38. The retroactivity provision stated that the Act would “not apply to any wrongful death action in which a final judgment [was] entered in favor of one or more beneficiaries by a circuit court or other court of original jurisdiction before October 1, 1994.” HOUSE JUD. COMM., AMENDMENTS TO S. 283, at 7 (1994).
39. Id. at 4.
40. Id.
41. The Bill also retained the Senate’s flat $15,000 annual increase for inflation, as opposed to the three percent raise favored by the House. Judgments—Limitation on Noneconomic Damages Act, ch. 477, 1994 Md. Laws 2292, 2293.
42. See S. 283, SENATE AND HOUSE VOTING RECORDS (copy on file with author).
44. This inflation provision brings Maryland in line with most other states that cap damage awards. Hearings, supra note 25 (statement of the Maryland Trial Lawyer’s Ass’n).
insurance companies are expected to raise premiums in anticipation of this situation, the number of wrongful death cases that historically have collected more than the limit is very small.\textsuperscript{46}

The law also eliminates ambiguity over the number of caps permitted in a suit by its declaration that the limit applies to all plaintiffs in the aggregate rather than to each claimant individually.\textsuperscript{47} In wrongful death actions where there are two or more claimants, the court may award up to 150\% of the $500,000 cap, for a maximum allotment of $750,000.\textsuperscript{48} Awards to multiple claimants that exceed the cap are reduced proportionally.\textsuperscript{49} In the same language as the law for personal injury cases, jurors in a wrongful death suit may not be informed of the statutory limit.\textsuperscript{50} The trier of fact, however, must itemize the award to show the allocation between various economic damages and noneconomic damages.\textsuperscript{51} Formerly, only personal injury cases required this form of itemization. The statute, moreover, defines "noneconomic damages" for wrongful death to mirror the Wrongful Death Act\textsuperscript{52} in order to distinguish them from noneconomic damages in personal injury actions.\textsuperscript{53}

3. Analysis.—As a matter of public policy, the issue of caps on noneconomic damages in Maryland has been addressed both legislatively and through the judiciary.\textsuperscript{54} Questions remain, however,

\begin{itemize}
\item \textsuperscript{46} See Hearings, supra note 25 (statement of the Maryland Trial Lawyers Ass'n) (noting that "the previously mandated Closed Claim Summary to the Maryland Insurance Commissioner from 1987-91 . . . shows an average of eight cases per year with possible noneconomic damages exceeding Three Hundred Fifty Thousand Dollars . . .").
\item \textsuperscript{47} Judgments—Limitation on Noneconomic Damages Act, ch. 477, 1994 Md. Laws 2292, 2293.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. at 2294.
\item \textsuperscript{50} Id. at 2299.
\item \textsuperscript{51} Id. at 2294.
\item \textsuperscript{53} This clarification eliminates the contrast between the description of damages found in the Wrongful Death Act and the former cap statute which had convinced the Bartucco court to apply the limit to each plaintiff individually. See Bartucco v. Wright, 746 F. Supp. 604, 607-08 (D. Md. 1990).
\item \textsuperscript{54} This is not to conclude that such caps are necessarily desirable. The jury's discretion to compensate tort victims fully should not be infringed except in extreme circumstances, as such restraints may harm the most severely injured plaintiffs. Of the available tort reforms, however, the damage cap is the only one found to reduce malpractice cost indicators consistently. See Health Program Office of Technology Assessment, supra note 14, at 64-65 (outlining studies that suggest damage caps reduce payments per paid claim and, thus, reduce malpractice insurance rates, but have no effect on the frequency of claims). While maintaining access to affordable malpractice insurance is a valid legislative goal, Maryland law exceeds this purpose when it applies the cap to all sources of injury.
\end{itemize}
whether wrongful death claims should be included in this policy and whether the recently adopted statute embodies its most sensible form.

As a matter of equity, a cap for noneconomic damages for wrongful death actions eliminates a potential disparity in award allocation.\textsuperscript{55} As Judge Chasanow noted in his \textit{Streidel} concurrence, a victim left alive but rendered a brain-damaged, quadriplegic could recover only up to the statutory ceiling for her anguish, but the plaintiff who makes a claim through a dead victim could be allowed an unlimited award.\textsuperscript{55} Similarly, the prohibition against informing jurors of the cap\textsuperscript{56} prevents the jury from viewing the cap as the "price" for only the most lamentable circumstances and setting all other awards below the statutory limit.\textsuperscript{56}

Given that the extension of the cap to wrongful death actions merely codifies what both courts and malpractice insurers already interpreted as the General Assembly's original intent, the failure to make the law retroactive seems odd. Both Maryland courts and the legislature, nevertheless, have become wary of the retroactive application of law in recent years and follow the notion that "'[a] construction which produces that kind of interference with substantive rights, whether or not the interference is of a constitutional magnitude, is to be avoided.'"\textsuperscript{59} But the retroactive application of the new statute would not have upset "settled expectations" since, until \textit{Streidel}, wrongful death was assumed to have been included under the cap.\textsuperscript{60}

More troubling is the application of a single cap to all plaintiffs in the aggregate rather than to each claimant individually. Although the statutory limit rises to $750,000 when there are at least two claimants, that same amount must apply no matter how many plaintiffs are involved.\textsuperscript{61} As a result, plaintiffs who belong to large families will not be compensated as fully as those from smaller families, although the degree of anguish is arguably the same or greater. Adequacy of compen-

\textsuperscript{55} \textit{Streidel}, 329 Md. at 553-54, 620 A.2d at 916 (Chasanow, J., concurring).

\textsuperscript{56} Id.

\textsuperscript{57} See supra text accompanying note 50.

\textsuperscript{58} Judgments—Limitation of Noneconomic Damages Act, ch. 477, 1994 Md. Laws 2292, 2293.

\textsuperscript{59} Letter from J. Joseph Curran, Attorney General, to Senator Walter M. Baker, supra note 34, at 2 (quoting WSSC v. Riverdale Fire Co., 308 Md. 556, 559, 520 A.2d 1319, 1326 (1987)).

\textsuperscript{60} Letter from Kathryn M. Rowe, Asst. Attorney General, to Delegate Kenneth H. Masters, supra note 34, at 4.

\textsuperscript{61} See supra text accompanying note 48.
sation may be further reduced when attorneys' fees are subtracted from the award.

It is doubtful, moreover, whether applying the cap to individual plaintiffs would create a genuine need to raise malpractice rates. While Medical Mutual Liability Insurance Society of Maryland estimated that applying caps to two claimants would increase rates by 30% and three caps by more than 40%, its calculations assumed that all potential wrongful death plaintiffs would receive the maximum award and that each case would have two or three plaintiffs.

According to a Johns Hopkins University closed claim study through 1992, only 15% of medical malpractice claims involved more than two claimants. A summary of closed claims from the Maryland Insurance Commissioner showed an average of only eight cases per year with noneconomic damages potentially exceeding $350,000 between 1987 and 1991. Because these cases all arose before the implementation of the cap statute, each wrongful death beneficiary would have been eligible for an unlimited award. Assuming, as Medical Mutual does, that between 25% and 40% of its claims are for wrongful death, this would mean that only two to four cases per year would have exceeded the cap, even if awards were calculated per beneficiary.

63. Medical Mutual analyzed cases where the cause of action arose after July 1, 1986, the date the cap for wrongful death suits became effective, and those cases where it paid out awards between January 1, 1990 and December 31, 1993. It provided all of the data to the House Judiciary Committee. Out of some 1130 cases, Medical Mutual selected 50 cases for which the highest payments were made, an average of $647,149 for 14 death and 36 nondeath cases. Letter from David L. Murray to Delegate Joseph F. Vallario, supra note 31, at 3. In a two-cap scenario, the company estimated it would have paid out $650,000 more for each of the wrongful death cases, $150,000 from raising the statutory limit from $350,000 to $500,000 and $500,000 from application of the second cap. Id. Medical Mutual claimed the cost of raising the cap for the wrongful death cases would have totalled an additional $14,500,000 for these cases plus an additional $2,405,498 in defense costs. Id. In addition to the assumption that each case would have automatically received a higher award, these figures suppose that Medical Mutual would have paid the extra amount in one year rather than over the four year period it analyzed. See id. Medical Mutual failed to explain why it would cost more to defend the same cases.
64. Telephone Interview with Faye Malitz, Research Associate, School of Hygiene and Public Health, Johns Hopkins University (Mar. 24, 1995).
67. Id. at 2; see also id. (statement of Maryland Trial Lawyers Ass'n).
While insurers could justifiably increase rates to anticipate unlimited wrongful death awards in pending cases, there is no such reliance argument as applied to multiple caps. Unlike the statute's extension of the cap to wrongful death, it was by no means settled law that the cap would apply to multiple claims in each cause of action. Either insurers already have set rates that assume a per plaintiff award or have seriously miscalculated their former business costs.

The boost in the statutory cap from $350,000 to $500,000 and the allowance for annual increases makes the new statute more palatable to plaintiffs, but inflation inevitably will erode the impact of the $15,000 annual raise. While this effect may not be felt for some time, the problem could be avoided by applying the percentage-based raise that the House Judiciary Committee suggested.

4. Conclusion.—The legislative reversal of *Streidel* is a laudable compromise that balances the demands of two powerful interest groups, trial lawyers and the insurance industry. While insurers expressed dissatisfaction that the law would not apply to pending cases, trial lawyers objected to the single claim limit and, in principle, the extension of the cap to wrongful death altogether. Not surprisingly, each side made political concessions: retention of the single cap for insurers and inflationary increases in the cap with prospectivity for the plaintiffs bar. The rejection of *Streidel* is also significant because it will preserve the stabilizing effect that the damage cap has had on malpractice rates, despite a one-time insurance rate increase to offset the prospectivity provision of the cap and its increased limit.

On the negative side, the law will mean inadequate compensation for those who have suffered the greatest of losses: the needless death of a loved one from another's tortious conduct. The application of the cap to the entire claim penalizes larger families who have suffered the same loss as a smaller family.

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69. *See supra* note 41.

70. *See supra* notes 32-34 and accompanying text.

71. *See supra* notes 28-29 and accompanying text.

72. *See supra* note 29 and accompanying text.
In 1994, the General Assembly of Maryland enacted House Bill 760, the Lead Paint Poisoning Prevention Act (the Act),\(^1\) a controversial statute expressly designed to bypass the sometimes problematic tort liability system\(^2\) and institute a remedial program aimed at lessening children's exposure to lead in rental properties.\(^3\) The Act's stated purpose is the reduction of "the incidence of childhood lead poisoning, [and the maintenance of] the stock of available affordable rental housing."\(^4\) While under consideration, the legislation gave rise to acrimonious debate between property owners and child welfare advocates, a debate that continues even as the regulations are drafted to implement the statute.\(^5\) Although it is impossible to predict with cer-

\(^2\) Experts have found that negligence suits against property owners for lead-caused injuries may not automatically lead to a plaintiff's recovery of money damages because landlords' insurance policies typically contain "lead exclusions" which avoid coverage for damages caused by lead. REPORT OF THE LEAD PAINT POISONING COMMISSION, PREPARED FOR: GOV. WILLIAM DONALD SCHAEFER AND THE MARYLAND GEN. ASSEMBLY OF 1994, at 5 (1994) [hereinafter LEAD PAINT POISONING COMMISSION]. The Commission noted that: [M]ost standard lines insurers in Maryland since the mid- to late-1980s have excluded coverage of lead hazards from policies insuring older housing. The unavailability of liability insurance covering lead risks in turn has decreased the marketability of these properties and prevents owners from obtaining loans (using the property as collateral) which may be needed to finance abatements or other improvements. \(Id.\) The Commission's research demonstrated that only one insurer subject to regulation in Maryland writes coverage without a lead exclusion. \(Id.\) at 5 n.8. Furthermore, most owners of affected properties "currently do not have insurance coverage applicable to lead risks." \(Id.\) n.8 (citing LEAD PAINT POISONING COMMISSION, supra, at E-6, E-10, E-18, E-21, E-29).


\(^4\) \(Id.\)

\(^5\) Telephone Interview with Robert Smith, Counsel for the House Environmental Matters Committee of the Maryland General Assembly (Sept. 14, 1994); see Timothy B. Wheeler, Veto Threatens Bill Requiring Lead Screening, THE SUN (Baltimore), Apr. 18, 1994, at B1; Timothy B. Wheeler, Lead Paint "Compromise" Draws Fire, THE SUN (Baltimore), Mar. 16, 1994, at B3 (discussing child advocates' strong dissatisfaction with the legislative process); see also Letter from Anne Blumenberg, Executive Director, Community Law Center, to Hon. Virginia M. Thomas, Maryland House of Delegates (Feb. 9, 1994) (outlining in detail concerns of advocates with respect to the "compromise" proposal that eventually passed); Letter from Donald G. Gifford, Chair, Lead Paint Poisoning Commission to Hon. Ronald A. Guns, Chair, House Environmental Matters Committee (Mar. 14, 1994) (same); Letter from Lisa A. Kershner, Executive Director, Lead Paint Poisoning Commission, to Hon. Ronald A. Guns, Chair, House Environmental Matters Committee (Mar. 28, 1994) (same) (all letters on file with the House Environmental Matters Committee, Lowe House Office Building, Annapolis, Md.).
tainty the long-term ramifications and enforcement potential of this complex piece of legislation, it is nevertheless clear that the Act signifies a fundamental change in the tort law of Maryland.

Part 1 of this Note will provide an overview of the societal concerns that led to the Act's passage. Part 2 will discuss briefly the existing state and federal laws that address lead-based paint in residential housing. In Part 3, the Note will examine the treatment of lead poisoning in Maryland common law, with particular attention given to recent case law. Part 4 reviews the provisions of the Act that will impact most significantly on providers of rental housing and their tenants. Finally, in Part 5, the Note will examine the Act's effect on landlord liability.

1. The Social Context.—Child advocates consider lead poisoning "the number one preventable environmental disease affecting children in the United States." Lead-poisoned children frequently suffer permanent injuries, including brain damage, that threaten their intellectual, psychological, and economic well-being. These injuries may include cognitive impairment, learning disabilities, and loss of I.Q.

The federal Centers for Disease Control (CDC) have reported that lead poisoning is a serious environmental health threat to young
children. CDC statistics for 1992 indicate that "four million children are affected [by lead poisoning] nationwide, and as many as 500,000 Maryland dwellings are potential lead poisoning risks."10

The public health system has been criticized widely for not responding effectively to the problem of lead poisoning. In Maryland, for example, the vast majority of lead poisoning cases are diagnosed in Baltimore City, where the system is so overwhelmed that case management services generally are not provided until a child's blood lead level has reached at least 25-30 micrograms per deciliter (ug/dL).11 By way of comparison, the CDC has recommended that blood lead levels as low as 10-14 ug/dL should trigger "community-wide childhood lead poisoning prevention activities," and that nutritional and educational intervention should take place if a child's blood lead level is between 15 and 19 ug/dL.12

Most victims of lead poisoning are poor, inner-city children, many of whom are exposed to lead via dust from deteriorating lead-based paint in older housing stock.14 Perhaps due to the lack of political muscle of the affected persons, current public health services related to childhood lead poisoning are largely reactive.15 Few resources are devoted to prevention; thus, a family generally will receive no instruction regarding the identification of lead hazards, methods to minimize exposure, and information on nutrition, screening, or medical follow-up until a child has been poisoned.16

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10. Id.
11. LEAD PAINT POISONING COMMISSION, supra note 2, at 2. Guidelines adopted by the CDC in 1991 call for case management to be provided by a public health nurse or other health professional starting at blood levels of 20 ug/dL. Id. at 2 n.4. The Commission noted, however, that nursing case management currently is not provided in Baltimore City until a child's blood lead level reaches approximately 45 ug/dL. Id.
12. Id. at 18.
13. Mahoney, supra note 7, at 52 (citation omitted).
14. LEAD PAINT POISONING COMMISSION, supra note 2, at 3.
15. Id. at 2.
16. Id. The Commission noted that "[m]ore than 1,338 cases of children with blood lead levels between 20 and 24 ug/dL receive no outreach, confirmation, or environmental investigation until the child's blood lead level rises to at least 25 or 30 ug/dL . . . . A lead-poisoned child in Baltimore City may not receive any services following diagnosis unless the blood lead level is 30 ug/dL or above." Id. at 16-17; see also Catherine A. Potthast, Lead Paint Regulation and Your Clients, Md. Bar J., Jan./Feb. 1994, at 17-18. Ms. Potthast, an attorney practicing in Baltimore City, notes that lead poisoning is a reportable disease under state health regulations. Id. (citing Md. REGS. CODE tit. 26, § 02.06.02 (1994). Upon finding a child with an elevated blood lead level, a physician must notify the local health department, which, in turn, assigns a specialist to monitor the child's medical status. Id. In addition, the health department will assign an investigator to conduct an
For some families, the system's lack of preventative mechanisms has produced tragic results. Personal injury suits against individual landlords are one potential avenue of relief. These suits may result in large awards for plaintiffs, but as with all litigation, they bring no guarantee of success.

2. **Existing Legislation.**—The Act takes effect against a backdrop of existing state and federal laws that currently address lead-based paint in residential housing. Maryland banned the use of lead-based environmental investigation to ascertain the source of the child's lead exposure. While the Maryland program has been lauded as a step toward increasing public awareness of the importance of lead poisoning prevention, it has been criticized because action is not "triggered" and no medical or environmental intervention occurs unless a child is identified as having an elevated lead level.


18. See generally Sonja Larsen, Annotation, Landlord's Liability for Injury or Death of Tenant's Child from Lead Paint Poisoning, 19 A.L.R.5TH 405 (1994) (summarizing lead paint cases against landlords founded on negligence and other theories). Tenants also have turned to consumer protection statutes in order to hold their landlords liable for lead poisoning. In Maryland, however, the Court of Appeals has held that Maryland's consumer protection law is limited to "material misstatements and omissions at the inception of the lease rather than during the full term of the lease." Richwind, 335 Md. at 685, 645 A.2d at 1159.


20. Mahoney, supra note 7, at 58. Mahoney acknowledges that "[s]uccess of landlord-tenant suits in gaining damages depends in part on what statutory duties are imposed by state laws, local health codes, and housing ordinances." Id. "[L]itigating individual suits shifts the burden of enforcing lead paint poisoning prevention onto the victims, whose resources are limited." Id. at 59. While contingency fee arrangements may alleviate the financial burden faced by most plaintiffs, a personal injury action cannot result in any relief for the plaintiff unless an injury already has occurred. Hence, personal injury litigation does little to foster prevention of injury. Because plaintiffs in personal injury suits do not uniformly prevail, it is questionable whether the threat of tort liability is a useful deterrent to landlords whose properties may contain lead-based paint. See, e.g., Hayes v. Hambrough, 841 F. Supp. 706 (D. Md. 1994) (denying relief for lead poisoning injuries because plaintiff failed to produce evidence that the landlord had "reason to suspect" that the leased premises contained lead paint); Scroggins v. Dahme, 335 Md. 688, 645 A.2d 1160 (1994) (finding landlord not negligent as a matter of law because "there was no notice of flaking lead-based paint and no reasonable opportunity to correct the condition"); see also infra note 62 and accompanying text.

paint in residential dwellings in 1971. In the same year, Congress enacted the Lead-Based Paint Poisoning Prevention Act, which prohibited the application of lead-based paint in federally-assisted residential housing. In 1978, the Consumer Product Safety Commission banned the sale of lead-based paint for residential use. In 1992, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act, popularly known as Title X, which set renovation standards and requires, in part, that purchasers and tenants of housing built prior to 1978 be warned about the hazards associated with lead paint. In Maryland, the Act is intended to operate independently of Title X.

In addition, a number of state and local laws govern the existence of hazards, including lead-based paint, in residential rental properties. These laws provide tenants with possible remedies for unsafe conditions. From the tenant's perspective, perhaps the most significant of these are the state and local "rent escrow" provisions. On the state level, the rent escrow statute enables a tenant, irrespective of any oral or written agreements with the landlord, to deposit rent into a judicially administered escrow account if the landlord fails to remove lead-based paint from any interior or exterior surface that is easily accessible to a child. Local laws governing the maintenance of rental property include specific provisions addressing lead-based paint. Baltimore City landlords, for example, are required to keep their

30. MD. CODE ANN., REAL PROP. § 8-211.1 (1988); see Fishkind Realty v. Sampson, 306 Md. 269, 285-86, 508 A.2d 478, 487 (1986) (holding that § 8-211.1 is intended to supplement and coexist with § 9.9 of the Code of Local Laws of Baltimore City, that permits tenants to pay rent into escrow if a landlord fails to correct the existence of paint containing lead pigment on surfaces within the dwelling, provided that the landlord has notice of the painted surfaces, and if such condition would be in violation of the Baltimore City Housing Code).
property in good repair and to correct hazardous conditions.31 With respect to these laws, the Act expressly states that it will not affect "[t]he duties and obligations of an owner of an affected property to repair or maintain the affected property as required under any applicable state or local law or regulation."32

3. The State of the Common Law With Respect to Lead Poisoning.—Because the Act limits tort liability in exchange for compliance,33 it must be considered in the context of the existing Maryland tort law governing landlord liability. Nationally, the majority of lead paint cases founded on negligence, and not involving injuries sustained in common areas, require that a landlord have notice or knowledge of a hazard before liability can attach.34 This principle was recently articulated by the Maryland Court of Appeals in Richwind Joint Venture 4 v. Brunson.35 The Richwind court considered the liability of a property owner for lead paint hazards in a rental unit.36 The court's discussion of the common law and statutory provisions relating to lead-based paint hazards emphasized the common law requirement that, before liability will be imposed on a landlord, the landlord must have notice and a reasonable opportunity to repair the defective condition of the property.37

31. Baltimore, Md., Housing Code §§ 702, 703, 706 (1983). Section 702 provides that every building in Baltimore City that is occupied as a dwelling must be "kept in good repair, in safe condition, and fit for human habitation." Section 703(2)(c) defines one of the standards for good repair as maintaining "[a]ll walls, ceilings, woodwork, doors and windows . . . clean and free of any flaking, loose or peeling paint and paper." Section 706 specifically states that "[n]o paint shall be used for interior painting of any dwelling . . . unless the paint is free from any lead pigment." See also Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 672, 645 A.2d 1147, 1152 (1994) (discussing the Baltimore City Code provisions in relation to a tenant's suit for negligence).

32. Act of May 2, 1994, ch. 114, § 6-822(A)(1), 1994 Md. Laws 1282. The Act states further that it will not change "[t]he authority of a state or local agency to enforce applicable housing or livability codes or to order lead abatements in accordance with any applicable state or local law or regulation." Id. § 6-822(A)(2).

33. See infra notes 91-93 and accompanying text.

34. Larsen, supra note 18, at 418-24. But see Hardy v. Griffin, 569 A.2d 49, 50-51 (Conn. Super. Ct. 1989) (holding a landlord strictly liable for permanent damages suffered by a six-year-old as a result of the landlord's violation of state and local ordinances pertaining to the use of lead-based paint); Bencosme v. Kokoras, 507 N.E.2d 748, 749 (Mass. 1987) (holding that an owner of residential property is strictly liable for lead poisoning injuries where the owner failed to remove lead-based paint from the premises as required by state law).

35. 335 Md. 661, 674, 645 A.2d 1147, 1153 (1994).

36. Id. at 670-82, 645 A.2d at 1151-57.

37. Id. at 673, 645 A.2d at 1152. The court did not discuss the integration of H.B. 760 into the existing legal framework, because the Act, by virtue of its October 1, 1994 effective date, was inapplicable. Id. at 680 n.7, 645 A.2d at 1156 n.7.
Richwind involved a suit filed against a property owner by a tenant, whose two children allegedly suffered injuries as a result of their exposure to lead-based paint. The president of the corporation that managed the rental property testified that although he knew that the property was of a vintage that made it likely to contain lead-based paint, he had no specific knowledge that the premises in fact did contain lead-based paint at the time his company assumed management. The tenant alleged negligence, nuisance, and violation of the Maryland's Consumer Protection Act (CPA).

In addressing the allegations of negligence, the Court of Appeals first examined the statutory requirements imposed on landlords by the Baltimore City Code and concluded that violations thereof "may be the basis for a negligence action." Turning to the issue of notice, the court observed that the Code explicitly requires that a landlord be given notice of any code violations. Thus, the court stated, the city code sections providing that a landlord must be served with notice and subsequently provided with a "reasonable opportunity to correct"

38. Id. at 669, 645 A.2d at 1150.
39. Id. at 667, 645 A.2d at 1150. The property manager, a former Baltimore City housing inspector, managed the facility for 16 years. Id.
40. Id. at 669, 645 A.2d at 1150. The Court of Appeals, reversing the Maryland Court of Special Appeals, held that the plaintiff did not have a remedy under the CPA, as set forth in Md. Code Ann., Com. Law II §§ 13-101 to -501 (1990). Richwind, 335 Md. at 667, 645 A.2d at 1149. The court noted that it has "only applied the CPA in landlord/tenant cases where the unfair or deceptive practice occurred during the establishment of the landlord/tenant relationship between the parties." Id. at 683, 645 A.2d at 1157. The court concluded that the landlord's "[r]enting a premises with intact, lead-based paint is not in itself a violation of the CPA." Id. at 668, 645 A.2d at 1159.
41. See supra note 31.
42. Richwind, 335 Md. at 671, 645 A.2d at 1152. The Restatement (Second) of Property states:

A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:

(1) an implied warranty of habitability; or
(2) a duty created by statute or administrative regulation.

Restatement (Second) of Property, Landlord and Tenant § 17.6 (1977). The Richwind court thus concluded "that a private cause of action in a landlord/tenant context can arise from a violation of any statutory duty or implied warranty created by the Baltimore City Code." Richwind, 335 Md. at 671-72, 645 A.2d at 1152.
43. Richwind, 335 Md. at 673, 645 A.2d at 1152 (citing Baltimore, Md., Housing Code § 301 (1983)).
defective conditions are consistent with the common law of the state.44

The court's analysis of Maryland common and statutory law with regard to liability of property owners emphasized the past efforts to distinguish between the terms "reason to know"45 and "should know."46 The court noted that the latter implies a "duty to inspect."47 The court refused to impose such a duty on property owners, stating that "[k]nowledge of a condition which involves unreasonable risk of physical harm to persons on the land may not be imputed to a landlord merely from general knowledge that other properties of like age, construction, or design might possibly contain such hazardous conditions."48 The court concluded that a landlord is under no duty to inspect the premises in order to determine whether hazardous conditions exist.49

Turning to the merits of the case, the court held that the provisions of the Baltimore City Code dealing with lead-based paint do not "alter or supersede the common law concerning a landlord's knowledge of a defective condition on the premises."50 Thus, under

44. Id. at 673-74, 645 A.2d at 1153; see also Scott v. Watson, 278 Md. 160, 169, 359 A.2d 548, 554 (1976); Katz v. Holsinger, 264 Md. 307, 311-12, 286 A.2d 115, 118 (1972); State v. Feldstein, 207 Md. 20, 29-34, 113 A.2d 100, 104-06 (1955).
45. See Restatement (Second) of Torts § 358 (1965). Section 358 states that a lessor must have "reason to know" of a hazardous condition to be subject to liability for "physical harm caused by the condition after the lessee has taken possession." Id.; see also Hayes v. Hambruch, 841 F. Supp. 706, 710 (D. Md. 1994) (noting that Restatement (Second) of Torts § 358 has been adopted in Maryland).
46. Richwind, 335 Md. at 676-77, 645 A.2d at 1154. In Feldstein, the Court of Appeals held that: "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.
47. Richwind, 335 Md. at 676-77, 645 A.2d at 1154.
48. Id. at 677, 645 A.2d at 1154-55. 49. Id. (citing Restatement (Second) of Torts § 358 cmt. b (1965)); see also Kleiman v. Mono of Maryland, Inc., 254 Md. 548, 553-55, 255 A.2d 393, 396-97 (1969) (stating that a landlord is under no duty to inspect property unless contractually obligated to do so).
50. Richwind, 335 Md. at 676, 645 A.2d at 1154. Specifically, the court expressed its agreement with the amicus curiae brief of the Apartment Builders and Owners Council of the Home Builders Association of Maryland, which stated that "the landlord's common law right to notice and an opportunity to correct a particular defect is reinforced, not super-
Richwind, unless the plaintiff is able to prove that a landlord knew or had reason to know of the existence or danger of lead-based paint in a particular home, the landlord may not be held liable for related injuries.\textsuperscript{51} While the Richwind rule has yet to be applied, the court's carefully-chosen language indicates that, in cases falling outside the framework of the Act, owners of lead-contaminated rental housing may resist liability by arguing that they had no independent knowledge of the existence of a hazard.\textsuperscript{52} The court expressly left this possibility open, by stating that "knowledge of the fact that older homes often contain lead-based paint, without the knowledge that the paint in a particular older home is actually peeling or flaking, may be insufficient by itself to hold a landlord liable."\textsuperscript{53}

The Richwind court did not articulate a standard for determining when a landlord has notice of a hazardous condition. Such a determination is likely to focus on the facts of each case. For example, in determining whether the property owner in Richwind had reason to know of the potential hazards, the court paid particular attention to the fact that during the period at issue (the mid-1980s), the potential for lead poisoning from peeling paint in older buildings was "commonly known."\textsuperscript{54} The court further noted that the property manager had sixteen years of experience in the housing market and had testified that he knew: (1) that older houses contained lead-based paint, (2) that the building in question was old, and (3) that peeling lead-based paint presented dangers to children.\textsuperscript{55}

Prior to the Court of Appeals' decision in Richwind, the United States District Court for the District of Maryland held in Hayes v. Hambruch\textsuperscript{56} that, "[a]bsent notice to a landlord of the existence of lead-based paint in leased premises, the landlord cannot be expected to reasonably foresee the lead poisoning of a child living in those premises."\textsuperscript{57} The district court's application of Maryland tort principles paralleled that of the Richwind court.\textsuperscript{58} It should be noted, however, seded, by the provisions of the Baltimore City Code and the Balt. Pub. Local Laws." Id. at 675, 645 A.2d at 1154.

\textsuperscript{51} Id. at 678, 645 A.2d at 1155.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 679, 645 A.2d at 1155-56.
\textsuperscript{54} Id. at 678, 645 A.2d at 1155.
\textsuperscript{55} Id. at 678-79, 645 A.2d at 1155.
\textsuperscript{56} 841 F. Supp. 706 (D. Md. 1994).
\textsuperscript{57} Id. at 711.
\textsuperscript{58} Id. at 710-12. The Hayes court declined to impose, under the Housing Code of Baltimore City, "strict liability upon a landlord for all damages resulting from a known housing code violation, whether or not such damages are reasonably foreseeable by the landlord." Id. at 712.
that the factual situation in *Hayes* differed in one significant respect from that in *Richwind*: in *Hayes*, the lead poisoning occurred in the mid-1970s. According to the *Hayes* Court, "lead poisoning was not a well known problem at that time. Thus, there is no evidence that defendant was unreasonable in not being aware of the potential danger resulting from paint in the leased premises."^60

Cases decided concurrently with *Richwind* confirm that unless a property owner (or an agent of the owner) either personally observes chipping or peeling lead-based paint on the rented premises, or receives written or oral notice of those conditions from a tenant, it is unlikely that the tenant will prevail on a negligence claim. This position is bolstered by the *Richwind* court's statement that "general knowledge" of potential defects in properties of similar age, construction or design may not be the basis for imputing to the landlord specific "[k]nowledge of a condition which involves unreasonable risk of physical harm."^63 In effect, *Richwind* imposes an obligation on the tenant to inform the landlord of the presence of deteriorating paint. The importance of *Richwind* rests upon these standards of liability which will govern cases that are not subject to the Act’s immunity provisions.

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59. *Id.* at 711 n.2; see also *Richwind*, 335 Md. at 678, 645 A.2d at 1155 (differentiating the facts of each case).

60. *Hayes*, 841 F. Supp. at 711 n.2. The court noted that "[a] different case might be presented if plaintiffs had shown that the potential for lead poisoning was a danger that landlords in general should have been aware of at the time of the alleged lead poisoning." *Id.*

61. See Scroggins v. Dahne, 335 Md. 688, 693, 645 A.2d 1160, 1162-63 (1994). In Scroggins, the plaintiff argued unsuccessfully that notice should be imputed to the property owner because the owner had notice of a hole in the wall of the premises, and if he had come to the apartment to repair the hole, he would have seen the flaking paint. *Id.* at 692, 645 A.2d at 1162. The Court of Appeals held that the landlord had not been given notice and a reasonable opportunity to correct the lead hazard. *Id.* at 693, 645 A.2d at 1162-63. In a case decided the same day as Scroggins, the court rejected the plaintiffs' claims because they never informed the landlords of the existence of chipping paint and "never requested the premises be painted." Davis v. Stollof, 335 Md. at 695, 645 A.2d at 1164.

62. See, e.g., White v. R & S Constr. Co., No. 93-140 (Md. filed Aug. 23, 1994) (affirming summary judgment for the landlords because they had no knowledge of any paint problems until after child had been hospitalized and treated for severe lead poisoning); Taylor v. Estate of Klotzman, No. 93-135 (Md. filed Aug. 23, 1994) (reversing summary judgment on the issue of notice because the landlord’s agents actually saw peeling paint while on the premises).

63. *Richwind*, 335 Md. at 677, 645 A.2d at 1154.
4. Analysis of Key Provisions of the Act.\(^{64}\)

a. Covered and Exempted Properties and Persons.—The General Assembly articulated the Act's three primary goals: the compensation of persons at risk of lead poisoning, the improvement of rental housing containing lead-based paint, and the limitation on the liability of property owners who comply with the Bill's requirements.\(^{65}\)

The Act's scope is broad, addressing all pre-1950 rental dwelling units in the state,\(^{66}\) and those post-1949 units for which an owner elects to "opt-in."\(^{67}\) The Act exempts property that is not expressly covered.\(^{68}\) Affected property is also exempt if it is owned by a federal, state, or local governmental unit and is subject to lead standards that are at least equivalent to those contained in the new statute.\(^{69}\) The Act further excludes affected property that has been certified "lead-free" under Section 6-804.\(^{70}\) Finally, the Act defines a "person at risk" to be "a child or a pregnant woman who resides or regularly spends at least 24 hours per week in an affected property."\(^{71}\)

b. Registration of Affected Property, Risk Reduction Standards, and Notice to Tenants.—The Act contains three sets of requirements for property owners. First, as of December 31, 1994, the owner of an af-

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64. Because of the detailed nature of the legislation, this Note will not attempt to comprehensively summarize all of its provisions. For comprehensive summaries of the entire Act, see House Bill 760, supra note 65 (on file with the House Environmental Matters Committee, Lowe House Office Building, Annapolis, Md.); The Property Owners Association of Greater Baltimore, Inc., Rental Property Owners and Managers Manual: Lead Poisoning Prevention Program (1994); University of Maryland Law Clinic, Summary of the Lead Poisoning Prevention Program Act (Sept. 7, 1994) (copies available from the Law Clinic).
66. It is estimated that approximately 160,000 apartments and rental homes in the state were built before 1950, and thus are subject to the Act, regardless of the "opt-in" provision. Wheeler, Lead Law Begins Tomorrow, supra note 5, at B1.
67. Act of May 2, 1994, ch. 114, § 6-801(B)(1), 1994 Md. Laws 1282. Excluded from the definition of "owner" is "a trustee or beneficiary under a deed of trust or a mortgagee." Id. § 6-801(O)(3).
68. Id. § 6-803(B)(1). Property not expressly covered is non-rental property, property built after 1949, or property for which an owner has not elected to "opt-in" to the provisions of the new law. Id. § 6-801(B).
69. Id. § 6-803(B)(2).
70. Id. § 6-803(B)(3). To obtain a "lead-free" certification, a property owner must submit to the Maryland Department of the Environment (MDE) an inspection report that: (1) indicates that the affected property has been tested for lead-based paint in accordance with MDE standards and procedures; (2) states that all exterior and interior surfaces of the property are lead-free; and (3) is verified by an MDE-accredited inspector. Id. § 6-804.
71. Id. § 6-801(P).
fected property must have registered that property with the MDE.\textsuperscript{72} The registration of an affected property must be renewed annually and updated periodically.\textsuperscript{73} An owner who first acquires an affected property after December 1, 1994, must register the property under Section 6-811 within thirty days of the acquisition.\textsuperscript{74} The registration provisions are equipped with a built-in enforcement incentive: owners who fail to register or renew their registration under Section 6-812 will lose the protection from tort liability provided in Section 6-836.\textsuperscript{75}

The second requirement, set forth in Section 6-815, provides that, no later than the first change in occupancy in an affected property on or after October 1, 1994, and before the next tenant moves in, the owner of the affected property must either pass a test for lead-contaminated dust, or perform specified "lead hazard reduction treatments."\textsuperscript{76} At each change in occupancy thereafter, and before the next tenant occupies the property, a landlord must satisfy a partial risk reduction standard by passing a test for lead-contaminated dust set

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\textsuperscript{72} Act of May 2, 1994, ch. 114, § 6-811(A)(1), 1994 Md. Laws 1282. Registration consists of providing the MDE with the following: (1) the name and address of the owner; (2) the address of the affected property; (3) the name and address of each property manager employed by the owner to manage the affected property; (4) insurance information; (5) the name and address of a resident agent, or contact person with respect to the affected property; (6) the date of construction; (7) the date of the last change in occupancy; (8) the dates and nature of treatments performed to attain a risk reduction standard under §§ 6-815 or 6-819 of the statute; and (9) the latest date, if applicable, on which the property has been certified to be in compliance with the provisions of § 6-815 of the statute. \textit{Id.} § 6-811(B); see infra notes 76-79 and accompanying text.

While under consideration, H.B. 760 was amended to add a confidentiality provision by which MDE may disclose whether the owner has met the percentage of inventory requirements as specified in § 6-817, but may not disclose "an inventory or list of properties owned by an owner." \textit{Id.} § 6-811(C)(2).

\textsuperscript{73} \textit{Id.} § 6-812(A)(1).

\textsuperscript{74} \textit{Id.} § 6-812(B).

\textsuperscript{75} \textit{Id.} § 6-815(A). "A person who willfully and knowingly falsifies information filed in a registration or renewal under [§ 6-812] is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1000." \textit{Id.} § 6-813(B).

\textsuperscript{76} \textit{Id.} § 6-815(A). Section 6-815(A)(2) delineates what is known as the "full risk reduction standard" that must be met by all properties, beginning on October 1, 1994, when the first change in occupancy occurs and before the next tenant moves in. The lead hazard reduction treatments consist of the following: (1) visual review of all exterior and interior painted surfaces; (2) removal and repainting of chipping, peeling, or flaking paint on exterior and interior surfaces; (3) repair of structural defects that cause paint to chip, peel, or flake, of which the owner knows or should know; (4) stripping and repainting, replacing, or encapsulating all interior windowsills; (5) ensuring that caps are installed in all window wells to make the wells "smooth and cleanable"; (6) fixing in place the top sash of non-treated and non-replacement windows to eliminate friction caused by movement of the top sash; (7) rehanging doors to prevent friction with other lead-painted surfaces; (8) making bare floors "smooth and cleanable"; (9) covering kitchen and bathroom floors with a smooth, water-resistant covering; and (10) washing and vacuuming the interior of the dwelling with a high-efficiency particle air (HEPA) vacuum. \textit{Id.} § 6-815(A)(2).
forth in Section 6-816,77 or by repeating certain lead hazard reduction treatments specified in Section 6-815(A)(2), and ensuring that other lead hazard reduction treatments remain in effect.78

The Act sets up an elaborate timetable for the number of properties that must satisfy either the "full" or "modified"79 risk reduction standard.80 The most significant provision mandates that at least half of an owner's affected properties must satisfy the full risk reduction standard specified in Section 6-815 by October 1, 1999, regardless of the number of properties that have had a change in occupancy.81 By October 1, 2004, an owner who has been notified in writing of the presence of a "person at risk" on the premises must ensure that the property satisfies the full risk reduction measures.82 By October 1, 2004, an owner must also ensure that the modified risk reduction standards are met at all affected properties.83 An owner who fails to meet the compliance deadlines risks losing immunity from tort liability.84

After September 30, 1994, owners must meet the modified risk reduction standards within thirty days of receiving written notice stating that (1) a person at risk who resides in the property has an elevated blood lead level (EBL) of 15 ug/dL or above; or (2) a "defect" exists at the property and a person at risk exists at the property.85 Prior to December 1, 1995, owners of more than 300 affected properties are given extensions to the thirty-day period.86

The Act's final requirement states that owners of affected property must furnish tenants with notification of the tenant's rights under Sections 6-817 and 6-819.87 Section 6-820(A) sets up a timetable by which notification must be provided according to a specified percent-

77. "The [MDE] shall establish procedures and standards for the optional lead-contaminated dust testing by regulation." Id. § 6-816. At this writing, the final regulations have not been promulgated. See supra note 5.
78. Id. § 6-815(B)(2); see supra note 76.
79. Id. § 6-819(A). The "modified" standard is similar to the "full" standard, but it does not require that all bare floors be made smooth and cleanable, and it limits HEPA-vacuuming and phosphate washing to only treated areas. Id.
80. Id. § 6-817.
81. Id. § 6-817(A)(1).
82. Id. § 6-817(B)(1).
83. Id. § 6-819(E).
84. Id. §§ 6-817(A)(2)(I), (B)(2)(I).
85. Id. § 6-819(C)(1).
86. Id. § 6-819(C)(2)(II). Specifically, if the owner received notice of the existence of a person at risk on the premises, the owner has 60 days to clean up the property. If the notice states only that there is a defect, the owner has 90 days to comply. Id.
87. Id. § 6-820. Owners must also disclose to prospective purchasers an obligation to fulfill either a modified or full risk reduction. Id. § 6-824.
age of an owner’s tenants. For example, at least twenty-five percent of an owner’s tenants must receive notification by January 1, 1995. All of an owner’s tenants must receive notification by October 1, 1995.

c. Limitations on Tort Liability.—The most hotly debated provision of the Act is a quid pro quo mechanism that provides owners of dwelling units built prior to 1950 with immunity for lead poisoning injuries discovered after October 1, 1994, if they comply with the Act’s registration, cleanup, and notification provisions. Specifically, a person may not sue a landlord who is in compliance with the Act for damages arising from injury to a person at risk caused by his or her ingestion of lead that is first documented by a test performed after September 30, 1994, showing an elevated blood level (EBL) of 25 ug/dL or more, unless two conditions are met: (1) the owner must have been given written notice of the EBL of the person at risk and (2) the owner must have been given the opportunity to make a “qualified offer” as provided in Section 6-831. This limitation on tort liability is broad, but applies only prospectively to “all potential bases of liability for alleged injury or loss to a person caused by the ingestion of lead by a person at risk in an affected property.”

Another controversial aspect of the statute is the mechanism by which owners may extinguish their tort liability—the “qualified offer.” The offer is the landlord’s agreement to pay for relocation and medically necessary treatment for a person at risk (usually a child)

88. Id. § 6-824.
89. Id. § 6-820(A).
90. Id.
91. Id. § 6-836. Section 6-836 states that:
An owner of an affected property is not liable, for alleged injury or loss caused by ingestion of lead by a person at risk in the affected property, to a person at risk or a parent, legal guardian, or other person authorized under § 6-833 of this subtitle to respond on behalf of a person at risk who rejects a qualified offer made by the owner or the owner’s insurer or agent if, during the period of the alleged ingestion of lead by the person at risk, and with respect to the affected property in which the exposure allegedly occurred, the owner [has met the registration, risk reduction, and notification requirements of the statute].

Id. For a discussion of the qualified offer, see infra notes 94-98 and accompanying text.
92. Id. § 6-828.
93. Id. § 6-827. The Act’s prospective application, by virtue of the specification of the cutoff date of October 1, 1994, for test results, means that claims arising out of the ingestion of lead before the statute’s effective date are preserved unless the ingestion of lead occurred before the effective date but the testing was not performed until October 1, 1994, or later. See University of Maryland Law Clinic, supra note 64, at 16.
who has sustained lead-related damages. An offer that has not been accepted within thirty days of its receipt by the parent or guardian of the person at risk is considered rejected. Acceptance of a qualified offer "discharges and releases all potential liability" of the offeror. Likewise, an owner is not liable if the person at risk rejects a qualified offer and the owner of the property was in compliance with the statutory requirements of registration, risk reduction, and notice.

5. Effect of the New Statute on Landlord Liability. — While the Act explicitly extinguishes landlords' tort liability for lead paint injuries under specific circumstances, an owner remains subject to existing tort law if he or she does not comply with the Act. In addition, the Act does not apply to cases arising from test results that showed elevated blood lead levels before the Act became effective. The Act thus codifies the common-law notion that a landlord must have notice and a reasonable opportunity to correct a hazardous condition, and envisions the tenant triggering the obligations of the landlord through provision of such notice. First, the tenant in an affected property may notify an owner of a defect and thereby trigger the landlord's obligation to comply with the modified risk reduction standards. Second, the tenant's provision of written notice to the landlord is required before the landlord will initiate the "qualified offer."

In cases to which the Act applies, a tenant's potential damages are greatly reduced, but in return, the legal consequences of a tenant's notice to the landlord may force compliance with the Act. Upon receipt of notice, landlords who wish to avail themselves of the Act's immunity must make a qualified offer within thirty days. As a result, tenants have the ability to force the landlord to address the

95. Id. § 6-839. The aggregate maximum cap for relocation expenses is set at $9500. Id. § 6-840(A)(2). Medical expenses are capped at $7500. Id. § 6-840(A)(1). Thus, the total amount of the landlord's liability under a qualified offer is $17,000.
96. Id. § 6-834(C).
97. Id. § 6-836.
98. Id. § 6-836. For the text of § 6-836, see supra note 91.
99. Id. § 6-828; see supra notes 45-56 and accompanying text (discussing the Court of Appeals' articulation of the landlord's standard of care in Richwind).
100. Act of May 2, 1994, ch. 114, § 6-828(B), 1994 Md. Laws 1329; see supra notes 91-93 and accompanying text.
101. Richwind, 335 Md. at 673, 645 A.2d at 1152-53; see also RESTATEMENT (SECOND) OF TORTS § 558 (1965).
103. Id. § 6-828(B)(1).
104. See supra notes 60-62 and accompanying text.
presence of deteriorating lead-based paint or forego statutory immu-
nity. Significantly, one action the landlord must take in connection
with the qualified offer is the provision of relocation expenses to the
tenant.106 This provision represents an important opportunity for ten-
ants to prevent repeated or prolonged lead exposures that may, in
fact, provide a far more effective remedy than could be obtained
through an action in tort.107

The Act also alters the traditional cause of action in negligence
against landlords who do not comply with its provisions.108 Specifi-
cally, a landlord, who has not met the risk reduction standard for an
affected property during the period in which a person at risk resided
on the property, is presumed to have failed to exercise reasonable
care with respect to lead hazards in a subsequent negligence action.109
The property owner, rather than the plaintiff, then has the burden of
rebutting the presumption by a preponderance of the evidence.110

The Office of the Attorney General of Maryland, in response to a
challenge to the Act's constitutionality,111 summarized the qualified
offer provisions of the Act as follows:

If accepted, a qualified offer bars all further action unless the
owner subsequently fails to meet its terms. If the offer is re-
jected, all further action is also barred unless the owner has
failed to comply with the requirements of the law at any time
during the residence of the child or pregnant woman on
whose behalf the claim is made.112

The Attorney General's office recognized that the Act results in a con-
siderably altered cause of action for claimants whose injuries are diag-
nosed after the Act’s effective date.113 While the Act limits damages

106. Id. § 6-839(A)(1).
107. See LEAD PAINT POISONING COMMISSION, supra note 2, at 3 (“[T]he primary means of
both preventing and treating lead poisoning is placement in (or relocation to) lead-safe
housing.”).
109. Id. § 6-838.
111. A question arose during consideration of H.B. 760 as to whether the provisions of
the legislation extinguishing the tort rights of some plaintiffs presented a violation of equal
protection principles. See Letter from Kathryn M. Rowe, Assistant Attorney General, to
Hon. Ronald A. Guns, Chair, House Environmental Matters Committee (Mar. 17, 1994)
(on file with the House Environmental Matters Committee, Lowe House Office Building,
Annapolis, Md.). Rowe stated that the Constitution "does not forbid the creation of new
rights or the abolition of old ones recognized by the common law to obtain a permissible
legislative object." Id. at 2 (quoting Silver v. Silver, 280 U.S. 117, 122 (1929)).
112. Id. at 2.
113. Id.
under qualified offers, it creates strict liability. Where the property owner is not in compliance, the tenant is under no obligation to accept a qualified offer; in this situation, the bill "creates a presumption of failure to exercise reasonable care and places no limit on damages."

The Act incorporates another powerful inducement to property owners to remediate lead hazards. Under Section 6-830, the ingestion of lead will be presumed to have occurred at some other property if test results of 25 ug/dL occur within thirty days after the person at risk begins residing or regularly spending at least twenty-four hours per week at an affected property, provided the property has been cleaned up in accordance with Section 6-815. By cleaning up a rental property in compliance with the Act, the landlord, in effect, has purchased a form of insurance against the potential liability for lead poisoning in a tenant's child.

6. Conclusion.—Given the questionable efficacy of the current system of tort liability and the companion goals of preventing cases of lead poisoning and maintaining the stock of affordable housing, the Maryland General Assembly has gambled on a revolutionary measure to further these two goals. If the Act functions as intended, increasing numbers of property owners will undertake to clean up lead hazards in their rental properties. The Act is structured, moreover, so that tenants may use the provision of notice to their landlords as a sword to force action before injuries occur. The Act's requirement that tenants be provided with notice of their rights under the new statute is particularly critical in this regard.

The Lead Paint Poisoning Prevention Act contains powerful incentives for property owners to comply with its provisions. Noncompliance destroys the opportunity for statutory immunity. Although lead paint plaintiffs in tort actions do not uniformly prevail, property owners should realize that a single substantial recovery may jeopardize their businesses, or, at a minimum, result in significant financial distress. Property owners may gamble with noncompliance, but those who face tort liability as a result will carry the additional burden of

114. Id.
115. Id.
117. Large recoveries in lead paint suits are not unprecedented. See, e.g., Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 687, 645 A.2d 1147, 1160 (1994) (affirming jury's award of compensatory damages of $518,444 to plaintiffs); see also supra note 19.
rebutting the presumption that they failed to exercise reasonable care.

Susan A. Winchurch
XI. Employment Law

A. Exploring the Boundaries of Section 1983 and Title VII

In *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, the United States Court of Appeals for the Fourth Circuit held that a case-specific finding of fact was required to determine whether a private volunteer fire company qualified as either a state actor or an employer subject to liability under 42 U.S.C. § 1983 or under Title VII. In so ruling, the court upheld the broad remedial purposes of civil rights statutes and opened new possibilities to volunteers in organizations who seek recovery for workplace discrimination. Courts should not, however, misinterpret *Haavistola* as reserving all such definitional questions for the fact finder. Particularly in Section 1983 cases, judges must analyze difficult issues to promote clarity and uniformity in the law.

1. The Case.—Paula Haavistola and Kenneth Truitt were both volunteer members of the Community Fire Company of Rising Sun (Fire Company), a private corporation that receives twenty to forty percent of its annual budget from the State of Maryland. Although the fire fighters receive no salary for their work, they do receive a number of statutory benefits in return for their services.

Haavistola claimed that Truitt sexually assaulted her on March 24, 1990, while both of them were on duty. At the next Fire Company board of directors meeting, Haavistola reported the alleged as-

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1. 6 F.3d 211 (4th Cir. 1993).
2. See id. at 221-22.
3. Id. at 213.
4. Id. at 218.
5. Id. at 221. Haavistola received the following benefits pursuant to membership: A state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon disability or death, group life insurance, tuition reimbursement for courses in emergency medical and fire service techniques, coverage under Maryland's Workers Compensation Act, tax-exemptions for unreimbursed travel expenses, ability to purchase (without paying extra fees) a special commemorative registration plate for private vehicles, and access to a method to obtain certification as a paramedic. Id.
6. Id. at 213. Haavistola initially communicated the charge to the Assistant Fire Chief, who told her to present her claim to the Fire Company's board of directors. Id.
FouRTH CIRCUIT COURT OF APPEALS

The board asked her to leave the room and questioned Truitt separately. Haavistola then returned to the meeting and repeated the charge to Truitt, who denied all of the allegations. After considering the matter, the board voted to suspend Haavistola and Truitt from membership indefinitely.

Dissatisfied with the board's response, Haavistola filed a criminal complaint against Truitt in state court. Truitt was cleared of the criminal charges, and reinstated with "good standing." The Fire Company refused to reinstate Haavistola, but did not terminate her. On April 25, 1990, Haavistola filed a discrimination charge with the Equal Employment Opportunity Commission.

Later, Haavistola filed suit against the Fire Company in the United States District Court for the District of Maryland and alleged discrimination under Section 1983 and under Title VII. The Fire Company moved for summary judgment on both counts. The district court dismissed the Title VII claim and held that Haavistola was not an employee within the meaning of Title VII because she "volunteered" at the fire department. The court then granted summary

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7. Id.
8. Id.
9. Id. at 213-14.
10. Id. at 214.
11. Id.
12. Id.
13. Id.
14. Id.
16. Id. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
17. Haavistola, 812 F. Supp. at 1381. Title VII of the Civil Rights Act of 1964 provides in pertinent part:
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....
19. Id. at 1389-90. The court noted that "[o]ne who volunteers, and therefore donates her time, is widely understood to be the opposite of one who is employed, and is compensated for her time." Id. at 1389. Title VII governs employers with 15 or more employees.
judgment on Haavistola's Section 1983 claim against the Fire Company because it was not a "state actor." Haavistola thereupon appealed the district court's decision.

2. Legal Background.—

a. Motions for Summary Judgment.—Because summary judgment standards require that the court view all evidence "in the light most favorable to the party opposing the motion," courts rarely disposed of employment discrimination cases on summary judgment. Recently, in a trio of landmark cases, the Supreme Court has attempted to liberalize standards that govern the grant of summary judgment and to encourage its usage to dispose of appropriate cases. Despite the Supreme Court's encouragement to dispose of cases on summary judgment, courts remain constrained to try genuine issues of material fact.

42 U.S.C. § 2000e(b). Because the district court found that volunteer fire fighters were not employees, the Fire Company did not possess the requisite number of employees to fall within Title VII. Haavistola, 812 F. Supp. at 1389.

20. Haavistola, 813 F. Supp. at 1390-400. To be liable under § 1983, an organization must qualify as a "state actor." Id. at 1390. Haavistola alleged that the Fire Company was a state actor for any one of four reasons:

1. The Fire Company is subject to extensive regulation by the State,
2. the Fire Company receives extensive public funding,
3. the Fire Company performs a public function traditionally exclusively reserved to the State,
4. attributes of sovereignty are attached to the Company's firefighting function.

Id. at 1391. The district court found that because the "public function [doctrine] has been given a 'narrow scope' in past decisions in [the Fourth] circuit," Maryland volunteer fire departments operate in a "gray area" and are not state actors. Id. at 1398. See infra notes 27-35 and accompanying text for a discussion of the elements of a § 1983 claim.

21. Haavistola, 6 F.3d at 213.


23. See Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 206 (1993) ("Before the summary judgment trilogy, courts had been reluctant to grant summary judgment to a defendant in a civil rights case where questions of motive, intent and credibility existed.").

24. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (holding that the moving party succeeds on summary judgment merely by pointing to an absence of evidence to support an essential element of the nonmoving party's case); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (concluding that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."); Matsushita, 475 U.S. at 586-87 (holding that once a moving party has demonstrated an absence of a genuine issue of material fact, the burden reverts back to the nonmoving party to demonstrate "specific facts" showing a genuine issue for trial).


b. Liability under Section 1983.—

(i) Elements of Section 1983.—Proof of a Section 1983 claim involves two elements: (1) the defendant deprived the plaintiff of a right secured by the "Constitution and laws" of the United States and (2) the defendant acted "under color of law." 27 Rights secured by the Constitution encompass privileges afforded through the Fourteenth Amendment. 28 The Supreme Court has interpreted the second element, "under color of law," as equivalent to the "state action" requirement under the Fourteenth Amendment. 29 Accordingly, under Section 1983, a private entity is only liable for those actions that are "fairly attributable to the State." 30

The Supreme Court has developed three separate analyses to determine when a private party's actions constitute state action. The Court enunciated the "symbiotic relationship" test in Burton v. Wilmington Parking Authority. 31 This test examines whether "[t]he state had so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant. . . ." 32 Under the current interpretation of this test, courts only find state action if the private entity is a lessee of state-owned property. 33 In a second line of cases, the Court has found state action where the state has encouraged or coerced the behavior of the private defendant to such an extent that the actions are considered those of


28. See Rendell-Baker v. Kohn, 457 U.S. 830, 837-38 (1982) (explaining that Congress enacted § 1983 to enforce "the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process. . . ."). The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

29. Rendell-Baker, 457 U.S. at 838 ("In cases under § 1983, "under color of law" has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment."); Lugar, 457 U.S. at 928.

30. Lugar, 457 U.S. at 937; Rendell-Baker, 457 U.S. at 830; see also Flagg Bros., 436 U.S. at 156 ("[A plaintiff] must establish not only that [defendant] acted under color of the challenged statute, but also that its actions are properly attributable to the State."); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("[A § 1983] inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.").


32. Id. at 725.

33. Jackson, 419 U.S. at 358 (refusing to find state action where the defendant did not rent its facilities from the state); Burton, 365 U.S. at 726 (concluding that a restaurant that leased state property was a state actor).
Lastly, the Court has found state action by employing the "public function doctrine."  

(ii) The Public Function Doctrine.—In order to become a "state actor," the public function doctrine requires that private actors must both serve a public function and perform a traditionally exclusive responsibility of the state. Because courts have found it difficult to determine when the public function doctrine applies, the public function doctrine has created liability only in a small category of cases.

At the heart of the difficulty with the public function doctrine is the Supreme Court's inability to state clear standards under which the doctrine may be applied. In Flagg Bros., Inc. v. Brooks, the Court cre-

34. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("Our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 171 (1970) (explaining that the plaintiff could establish a claim by proving that the police supported and encouraged a policy of segregation in the local restaurants).


Under this restrictive [public function] test, the provision of public or governmental 'services' by a private entity is never found to constitute a 'public function' except when the particular act is closely tied to the police powers of the state. If history shows that the service had been provided by a private entity independently of governmental authority, the service fails to satisfy the test.

Id.

36. The question is "not simply whether a private group is serving a 'public function'. . . . [T]he question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" Rendell-Baker, 457 U.S. at 842 (quoting Jackson, 419 U.S. at 353).

37. To date, the Supreme Court has invoked the public function doctrine only in cases involving elections and "company towns." In Terry v. Adams, 345 U.S. 461, 484 (1953), the Court held that a political party running the county elections exercised state power. In Marsh v. Alabama, 326 U.S. 501, 507-08 (1946), the Court held that a private company town performed the same functions as other towns.

More frequently, the Court has rejected application of the public function doctrine. See Rendell-Baker, 457 U.S. at 842 (declining to apply the public function doctrine to a school for maladjusted students); Flagg Bros., 436 U.S. at 157-64 (refusing to use the doctrine in a case involving a warehouseman's proposed sale of goods that state statute entrusted to him for storage); Jackson, 419 U.S. at 553-57 (refusing to find that a public utility performed a public function).

38. 436 U.S. 149 (1978). Pursuant to New York's commercial law, a warehouseman threatened to sell the plaintiff's goods because storage costs had not been paid. See id. at 151-52. The Court held that the public function doctrine did not make a warehouseman's proposed sale of goods "state action." Id. at 163.
ated confusion about the definition of an exclusive state activity. Initially, the Court indicated a narrow reading of the term "exclusive" when it noted that "while many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the state.'" In subsequent language in the opinion, the Court "note[d] that there are a number of state and municipal functions... which have been administered with a greater degree of exclusivity by States and municipalities..." The court recognized the possibility that private entities who, for example, teach children or fight fires may be state actors even though such functions have never been solely reserved to the states.

(iii) Fire Fighting as a Public Function.—The Supreme Court and the Fourth Circuit have never determined whether a private fire company serves an exclusive state function. In Jackson v. Metropolitan Edison Co., the Supreme Court held that a private utility company was not a state actor because the utility did not exercise a traditional municipal power that was "required" of the state. Similarly, the Flagg Bros. Court did not determine fire fighting was a required public function, although it raised this possibility in dicta.

In Adams v. Bain, the Fourth Circuit concluded that whether a private fire company should be treated as a state actor requires an in-depth factual analysis and cannot be determined solely from the

39. Id. at 158 (quoting Jackson, 419 U.S. at 352).
40. Id. at 163 (emphasis added).
41. See id. at 163-64 (pointing out that "education, fire and police protection, and tax collection" are government functions but declined to determine whether private parties who perform these activities are state actors under the Fourteenth Amendment).
42. See Brown v. Board of Educ., 347 U.S. 438, 489-90 (1954) (reviewing the history of education in the United States and noting that education was only a function of the state in our recent history); Ronny J. Coleman, Opportunities in Fire Protection 5 (1990) (explaining that fire fighting has a long tradition of private volunteers dating back to the colonial days).

Justice Stevens points out the inconsistency of the Court's two positions in his dissent in Flagg Bros. "[The Court's] notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions..." Flagg Bros., 436 U.S. at 173 n.10 (Stevens, J., dissenting). Simply put, if the test involves identifying state functions "traditionally and exclusively reserved to the state," education and fire protection would not be covered under the doctrine.

44. Id. at 352-53.
45. Flagg Bros., 436 U.S. at 163-64.
46. 697 F.2d 1213 (4th Cir. 1982). The court ruled on a motion to dismiss pursuant to Federal Rule Civil Procedure 12(b)(6) and did not reach the merits of the case: "We need not decide whether the VFD is a private organization and, if so, whether fire fighting per se is an activity 'traditionally the exclusive prerogative of the State.'" Id. at 1218 (quoting Rendell-Baker, 457 U.S. at 842).
pleadings in a case. Two years later, in Kreiger v. Bethesda-Chevy Chase Rescue Squad, the court considered whether privately organized rescue support and back-up services for on-duty fire fighters could be called fire fighting services. While explaining that emergency assistance did not constitute fire fighting, the court added in dicta that, "[u]nquestionably firefighting is traditionally an exclusively public function." The court, however, provided no authoritative support for this assumption. Few other circuits have addressed the question of whether private volunteer fire companies are state actors, but those courts that have considered the matter have found no state action on the part of these private entities.

c. Liability under Title VII.—Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of "race, color, religion or national origin." As a threshold matter, to state a viable cause of action under Title VII, plaintiffs must demonstrate they are "employees" within the meaning of the Act. Courts have addressed this question in two contexts. One line of case law addresses whether plaintiffs qualify as employees or independent contractors. In this context, the Fourth Circuit follows a combination of the "economic realities" test and the common law "right-of-control"

47. Id. at 1218-19.
49. Id. at 773.
50. Id.
51. Id.
52. See, e.g., Yeager v. City of McGregor, 980 F.2d 337, 341 (5th Cir.) (taking "judicial notice of the fact that there are a variety of private sector fire fighting alternatives; and fire fighting is not generally an exclusive government function" and holding that volunteer fire department did not qualify as a state actor under the public function doctrine), cert. denied, 114 S. Ct. 79 (1993); Mark v. Borough of Hatboro, 856 F. Supp. 966, 974-75 (E.D. Pa. 1994) (declining to label a private fire company a state actor because "[a]lthough [companies] perform a valuable public function, they generally do so independently of the governmental unit under whose authority they are organized."); cf Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 21-25 (2d Cir. 1979) (holding that a volunteer fire department was a state actor under provisions of a statute that declared the volunteers state employees and relying on the "symbiotic relationship" test as well as the public function doctrine to find state action).
54. The Act defines employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day . . . ." Id. § 2000e (emphasis added).
55. First employed in Bartels v. Birmingham, 332 U.S. 126 (1947), the "economic realities" test defines employees as "those who as a matter of economic reality are dependent upon the business to which they render service." Id. at 130.
In Garrett v. Phillips Mills, Inc., the court enumerated eleven factors to be considered when determining whether a plaintiff is an independent contractor or an employee for purposes of liability under the Act.

The second line of case law considers whether volunteers who receive nonmonetary benefits are employees for the purposes of Title VII. The Fourth Circuit has never addressed this question, but other circuits that have spoken on this issue have not found liability in cases where the volunteers received no salary or minimal fringe benefits in exchange for their services. In Graves v. Women's Professional Rodeo Ass'n, Inc., the Eighth Circuit held that because members of a female rodeo association were volunteers, receiving no cognizable compensation, a man excluded from the Women's Professional Rodeo Association (WPRA) could not sue under Title VII. The court explained that "[c]entral to the meaning of [employer and employee relationship] . . . is the idea of compensation in exchange for services . . . . [This compensation may be paid] directly or indirectly, [as] wages or a salary or other compensation."

56. The common-law "right-to-control" test is derived from principles of agency and "emphasizes the importance of the employer's control over the individual." Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981 (4th Cir. 1983). In Garrett, the Fourth Circuit elected to use "a combination of both the 'economic realities test' and the common law right-of-control test" to determine whether a plaintiff is an employee under Title VII. Id. at 981.
57. 721 F.2d 979 (4th Cir. 1983).
58. The court explained:
Under this test, control is still the most important factor to be considered, but it is not dispositive. Other important considerations include:

(1) the kind of occupation with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id. at 982 (quoting Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979).
59. See infra notes 60-64.
60. 907 F.2d 71 (8th Cir. 1990).
61. Id. at 72-73. The court noted, "[T]he relationship between WPRA and its members categorically resists classification as 'employment' according to the ordinary usage of that term. . . . Members of WPRA receive no compensation from WPRA or from any other source by reason of being members of WPRA." Id.
62. Id. at 73.
Similarly, in *Hall v. Delaware Council on Crime and Justice*, the Third Circuit found that members of the Delaware Council on Crime and Justice were not employees under Title VII because “reimbursement for some work-related expenses and free admittance to an annual luncheon [did not] constitute compensation significant enough to raise a volunteer to the status of employee.” In these circumstances, courts that have decided cases involving uncompensated volunteers, or volunteers who receive minimal fringe benefits, have not allowed plaintiffs to proceed under Title VII.

3. Court’s Reasoning.—The Fourth Circuit reviewed the *Haavistola* record de novo and determined that summary judgment was inappropriate in the instant action. In view of the elements to be proved in a § 1983 claim, the court first examined whether the Fire Company was a state actor. The court identified the three “situations” in which the Supreme Court has determined a private entity to be a state actor: when the private entity (1) enjoys a “symbiotic relationship” with the state; (2) operates under expansive state regulation; or (3) performs activities traditionally carried out by the government. The court dismissed the first two situations as completely inapplicable to the case at bar. The court then focused on the “public function doctrine” and whether fire protection is a “traditionally exclusive prerogative of the State.”

The court reviewed Fourth Circuit jurisprudence for guidance to determine whether fire protection constitutes state action under the public function analysis. Because prior case law raised the possibility that fire fighting is a public function, the court rejected the district court’s cursory disposal of this issue on summary judgment. The court further recognized that the Supreme Court had raised questions

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64. Id.
65. *Haavistola*, 6 F.3d at 214.
66. Id. at 214-15.
67. Id. at 215.
68. Id. at 215-16. The court first explained that because the Fire Company owned all of its own “buildings, vehicles, and equipment . . . it is not engaged in any type of leasing arrangement with a governmental unit that would give rise to a symbiotic relationship.” Id. at 215. The court found that “state regulation will convert private actions into state actions . . . [only when] the regulatory scheme [impacts] directly the alleged constitutional violation.” Id. Because the State of Maryland did not in any way regulate the Fire Company’s employment or volunteer relationships, there was no state action. Id. at 216.
69. Id.
71. *Haavistola*, 6 F.3d at 218.
as to whether fire fighting was a public function in its Flagg Bros. decision. Ultimately, the court concluded that a public function analysis is a "factual intense analysis" and "its outcome hinges on how a given state itself views the conduct of the function by the private entity." Accordingly, the Haavistola court decided that further fact finding was necessary and that the plaintiff's claim could not be resolved on summary judgment.

With regard to Haavistola's Title VII claims, the court also found the district court's grant of summary judgment premature. The court characterized the essential issue as whether a fire company member, who receives certain benefits pursuant to membership, is an employee. The court first surveyed the applicable law for finding employer liability under Title VII. The court found that existing case law dealt with two circumstances: (1) whether a salaried individual was an employee or an independent contractor, and (2) instances in which an individual received no salary or benefits from the alleged employer. Because Haavistola received benefits but no salary from the Fire Company, the court held that Haavistola's situation did not clearly fall within either category as a matter of law. The court rejected the district court's characterization of Haavistola as a volunteer who donates her time and held that a determination of whether "benefits received by Fire Company members are insufficient to make them employees under Title VII involves the resolution of a disputed material fact." Before the judge can determine the appropriate precedent to apply, the fact finder must decide whether the benefits received by this volunteer member of the Fire Company constituted "compensation."

72. The court explained that "[a]t best, the language in Flagg Bros. shows the Supreme Court acknowledgment that the fire protection may be an exclusive state function, but not that it must be an exclusive state function." Haavistola, 6 F.3d at 216 n.1 (emphasis added); see supra notes 38-42 and accompanying text.
73. Haavistola, 6 F.3d at 218.
74. Id. at 219.
75. Id. at 222.
76. Id.
77. Id. at 219-20.
78. This situation has been decided under the principles outlined in Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983); see supra notes 53-58 and accompanying text.
79. See supra notes 60-64 and accompanying text.
80. Haavistola, 6 F.3d at 221; see supra note 5.
81. Haavistola, 6 F.3d at 221.
82. Id. at 221-22.
83. Id. at 221. The court noted that "[b]ecause compensation is not defined by statute or case law, . . . it cannot be found as a matter of law." Id. at 221-22.
84. Id. at 222.
4. Analysis.—

a. Extending the Reach of Title VII and Section 1983.—In Haavistola, the Fourth Circuit provided a new opportunity for volunteer organizations to fight discrimination. By its recognition that private fire companies could be state actors, the court extended the potential reach of Section 1983 to volunteer fire fighters. Because Flagg Bros. recognized that education could be a public function, volunteers in private educational institutions might be able to rely on Haavistola as well.

With respect to Title VII, Haavistola could extend to volunteers outside of the limited area of fire fighting and education. Because the issue of compensation cannot be determined as a matter of law, the court has opened the door for individuals who do not receive traditional salaries to argue that Title VII applies to them. Of course, Haavistola does not guarantee success on the merits, but it makes it more likely that litigants will advance beyond the summary judgment stage. At a minimum, an organization may be more willing to settle a claim, rather than risk facing a jury trial. The Haavistola decision also contravenes a trend, evidenced in some circuits, of frequent summary judgment awards in civil rights claims to free up overburdened dockets. Additionally, some courts grant summary judgment because they fear that a broad reading of civil rights statutes may bankrupt private companies who lack the resources to pay substantial judgments.

85. Id. at 218.
87. Because the public doctrine only applies if the private entity performs an activity that has traditionally been an exclusive state responsibility, few organizations qualify as state actors under § 1983. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). The Flagg Bros. opinion also mentions police protection and tax collection as candidates for consideration under the public function doctrine. 436 U.S. at 163-64.
88. Haavistola, 6 F.3d at 211-12.
89. See McGinley, supra note 23, at 203. Professor McGinley points out that “[c]ivil rights are under siege” by certain federal judges who have interpreted the liberalized summary judgment standards as a license to award summary judgment “in cases where plaintiffs’ claims appear weak or unpersuasive.” Id. at 207. These judges may use summary judgment in borderline cases to reduce the large volume of discrimination lawsuits in federal courts. See generally Jonsonius, supra note 25, at 747. In fact, “[c]ivil rights actions constitute one of the most significant components of the federal courts’ dockets . . . . During the twelve-month period ending June 30, 1987, for example, plaintiffs filed 43,959 civil rights complaints . . . constituting more than 18% of the total cases commenced.” Douglas A. Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 WM. & MARY L. REV. 935, 935 (1990).
90. The district court in Haavistola wrote that, if faced with Title VII liability, private fire companies may not be able to survive. Haavistola v. Community Fire Co., 812 F. Supp. 1379, 1400 (D. Md. 1993). The district court declared:
These proponents of judicial efficiency fail to appreciate the serious and important scope of civil rights statutes. Civil rights statutes are remedial in nature and intended to be liberally construed. When a judge narrowly construes statutes in order to reduce the number of cases on the federal docket, the overall scope of the statutes is narrowed. As a consequence—contrary to the intention of the legislature—the remedial promise of the statutes goes unfulfilled. The Haavistola court's decision attempts to fulfill the promises of civil rights statutes, not narrow them.

b. Allocation of Decision-making Between the Judge and the Jury.—Although the Fourth Circuit refused to decide the appellant's claims as a matter of law, the court did not direct trial courts to place the definitional issues raised in Haavistola unilaterally in the hands of the jury. Such issues of fact may be decided by the judge or the jury. More particularly, submission of state action questions to the jury is problematic. First, the application of the public function test involves a complicated analysis that may be difficult for a jury to comprehend. Additionally, jury instructions fail to convey the full meaning and intricacy of legal doctrine. Because different juries may decide...
differently on similar facts, similarly situated fire companies will be subjected to differing liability. 95 Without uniform standards governing their behavior, fire companies will be uncertain how to proceed. Consequently, to ensure equal application of this complex doctrine and to further public understanding of the doctrine’s application, it would be desirable to allocate state action determinations to judges who must support their findings in full judicial opinions.

5. Conclusion.—By enabling Haavistola to move beyond summary judgment to a jury question, the Fourth Circuit has provided an important opening for volunteers who face discrimination in the workplace. By the same token, judges are better positioned to determine Section 1983 state action issues than juries. The determination of state action questions by judges, moreover, would help clarify the public function doctrine and better ensure its fair application to all similarly situated litigants.

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values which the Supreme Court had in mind. In practice, however, something will be lost in the translation.

95. In Goldstein, Judge Wilkinson elaborated on this problem:

I fear, however, that the upshot of turning state action into a jury question will be that volunteer fire companies whose circumstances are indistinguishable will find themselves irreconcilably labelled. . . .

This concern for uniformity that underlies the state action doctrine has been well-served by treating state action questions as questions of law to be determined by judges, rather than as questions of fact to be decided by juries. Goldstein, 1994 WL 233356 at *2-3 (Wilkinson, J., concurring).
XII. ENVIRONMENTAL LAW

A. RCRA Consent Order Preempts State-Law Injunction

In *Feikema v. Texaco, Inc.*, the United States Court of Appeals for the Fourth Circuit considered whether the Resource Conservation and Recovery Act (RCRA), or an administrative consent order entered pursuant to it, preempted state common-law causes of action for nuisance and trespass. In the matter of common-law compensatory damage claims, the court held that neither RCRA nor the consent order, which made no provision for the payment of damages, preempted such state law claims. However, because the consent order of the Environmental Protection Agency (EPA) had not yet been fulfilled or terminated, the request for injunctive relief was preempted. In so holding, the court fashioned a narrow holding limited to those cases involving a prior consent order.

The *Feikema* holding conforms with the legislative intent of RCRA and other federal environmental laws. *Feikema* leaves some room, however, for claims of injunctive relief under RCRA where, for example, the EPA or the “state authority” has yet to take any action, or where the injunctive relief requested will not conflict with any prior official action.

1. The Case.—By 1990, it became apparent to Mr. and Mrs. Feikema, and several other residents of their Fairfax, Virginia neighborhood (collectively, the Homeowners), that a leak of petroleum products from a nearby petroleum “tank farm” had moved under-

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1. 16 F.3d 1408 (4th Cir. 1994).
3. RCRA § 7003, provides that “[t]he Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.” 42 U.S.C. § 6973(a).
4. *Feikema*, 16 F.3d at 1410.
5. *Id.* at 1418. The defendants conceded that “if the complaint were construed as one for damages... the RCRA does not preempt the damages claims.” *Id.* at 1417.
6. *Id.* at 1416.
7. States may seek authorization from the EPA to administer and enforce a hazardous waste program pursuant to 42 U.S.C. § 6926. Such programs must be consistent with the federal program and must be either equivalent to or more stringent than the federal program. See 42 U.S.C. § 6926(b).
8. The types of petroleum products were described in detail in another action arising from the same leak. *See* Adams v. Star Enter., 851 F. Supp. 770 (E.D. Va. 1994). The court
ground and within close proximity to their homes. The source of the leak was a petroleum distribution terminal owned by Texaco, Inc. The leak formed a plume of oil which was flowing underground through a "'recharge' area of an aquifer." Although the Virginia State Water Control Board had taken action to control the leak, the situation worsened. Thereafter, the EPA was brought in to implement a more rigorous program to eliminate and recover the released petroleum.

On September 23, 1991, pursuant to Section 7003 of RCRA, the EPA and Texaco entered an administrative consent order (consent order). The consent order required, inter alia, that Texaco contain and clean the oil which had contaminated the creek, and that Texaco excavate and remove contaminated soils. Additionally, the consent order required Texaco to develop and submit a corrective action plan to be implemented under an EPA-approved schedule.

In March 1993, the Homeowners filed a diversity action against Texaco in federal district court alleging nuisance and trespass under Virginia common law. The Homeowners prayed for injunctive relief in the form of greater remedial measures to contain and clean up the leak. In addition, they sought compensatory damages for the actual contamination of their property. Texaco moved to dismiss on grounds of improper pleading of diversity and federal preemption of state law. The district court dismissed the complaint on preemption grounds, and the Homeowners appealed.

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9. Feikema, 16 F.3d at 1410. The Homeowners alleged to have noticed a visible sheen of oil upon a nearby creek. Id. at 771.

10. Id. Texaco, Inc., Texaco Refining and Marketing (East), Inc., Saudi Refining, Inc., and Star Enterprises (collectively, Texaco) had all been named defendants in the Homeowners' action. Id. at 1408.

11. Id. at 1410. An "aquifer" is an underground layer of porous rock which usually contains water. Webster's New World Dictionary 29 (1990).

12. See Feikema, 16 F.3d at 1410-11.

13. Id. at 1411.


15. Feikema, 16 F.3d at 1411. The EPA determined that the leak "might present an imminent and substantial endangerment . . . within the meaning of section 7003(a) of the RCRA." Id.

16. Id.

17. Id.

18. Id.

19. Id.

20. Id.

21. Id. at 1410, 1412.

22. Id. at 1411.
2. Legal Background.—

a. Diversity and the “Amount in Controversy” Requirement.—A party properly invokes federal diversity jurisdiction by establishing diversity of citizenship and by alleging the necessary amount in controversy.²⁸ Where the case involves more than one plaintiff, the amount in controversy may be pleaded either by attributing damages of over $50,000 to each plaintiff or by aggregating the plaintiffs’ claims to meet the required amount.²⁴ Aggregation of claims among plaintiffs, however, is generally limited to those cases where the plaintiffs share “a common and undivided interest.”²⁵ Thus, in Eagle v. American Telephone & Telegraph Co.,²⁶ aggregation was allowed among the minority shareholders of Pacific Telephone and Telegraph (PT&T) who brought suit against AT&T in its capacity as the majority shareholder of PT&T.²⁷ The minority shareholders alleged that AT&T had breached its fiduciary duty, resulting in considerable depreciation in the value of PT&T stock.²⁸ The Eagle court concluded that the minority shareholders had suffered an indirect injury and that the source of the shareholders’ claim was the common and undivided interest each shareholder had in the corporation’s assets.²⁹

The test set forth in Eagle was derived from the Supreme Court’s ruling in Snyder v. Harris.³⁰ In Eagle, the court maintained that the status of claims as “common and undivided” is determined by inquiry into the “character of the interest asserted.”³¹ In addition, “the character of the interest asserted depends on the source of plaintiffs’ claims.”³² Claims are deemed common and undivided when their source and derivation is from rights which the plaintiffs’ hold in “group status.”³³

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25. Id.
26. 769 F.2d 541 (9th Cir. 1985), cert. denied, 475 U.S. 1084 (1986).
27. Id. at 546-57.
28. Id. at 542-43.
29. Id. at 546-47 (maintaining that wrongful depletion of corporate assets is an injury to the corporation which only results in an indirect injury to shareholders).
30. Id. at 546; see Snyder v. Harris, 394 U.S. 332, 335 (1969).
31. Eagle, 769 F.2d at 546.
32. Id.
33. Id. (quoting Potrero Hill Community Action Comm. v. Housing Auth., 410 F.2d 974, 978 (9th Cir. 1969)).
b. Preemption of State Common-Law Causes of Action.—Generally, preemption of state law is disfavored. Nevertheless, Congress has the power to preempt state law under the Supremacy Clause. Various reasons have been suggested to explain the necessity for federal preemption, such as the need for uniformity, the elimination of dual systems of regulation, and the realization of benefits to be derived from a centralized federal agency which can boast specialized knowledge and experience. These reasons are generally set forth in response to the central concern in preemption cases—the fulfillment of congressional purpose. Concomitant with the threshold inquiry in regard to congressional purpose is an additional inquiry into the scope or “domain expressly preempted” by the legislation at issue.

Historically, the scope of preemption has been sufficiently broad to allow preemption of state legislative enactments. The Supreme Court has further established that regulations promulgated by a federal agency may have preemptive effect on state laws to the extent that the agency has acted within its statutory authority but has not acted

34. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

35. U.S. CONST. art. VI, cl. 2 (providing that “the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

36. See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959) (“We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes.”).

37. See Rice, 331 U.S. at 234 (holding that the United States Warehouse Act preempted state law as an exclusive system of federal regulation of warehouses licensed under the Act except where the Act expressly provides for state regulation in particular phases of the warehouse business). But cf. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 218-19, 233 (1983) (finding that dual regulation in nuclear industry was permissible since the state nuclear waste disposal statute focused on the economic impact of further growth in the nuclear power industry rather than safety, which was the focus of the federal regulation).

38. See Garmon, 359 U.S. at 246 (holding that state court lacked authority to award damages for economic injury resulting from the peaceful picketing at plaintiff’s lumber business where the National Labor Relations Board had specifically declined to act on the matter pursuant to the authority of the National Labor Relations Act).

39. See, e.g., Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone.”); Garmon, 359 U.S. at 240 (stating that courts must “carry[ ] out with fidelity the purposes of Congress”).


41. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06, 436 (1819) (holding that the Supremacy Clause rendered unconstitutional a Maryland law designed to impose a tax on the Bank of the United States).
arbitrarily in so doing. As a final matter, the Court has determined that the preemption doctrine may extend to common-law damage actions because such actions can be "regulatory" in effect.

Once the threshold inquiries into congressional purpose and the scope of preemption are satisfied, the courts must next establish the mechanism through which preemption occurred. Preemption of state laws and regulations may occur in a number of ways. First, Congress may expressly preempt state laws. Second, preemption may arise by implication: where the inference can be made that Congress intended to "occupy the field" through comprehensive legislation. Lastly, state law may be preempted "to the extent it actually conflicts with federal law." Conflict preemption occurs where "it is [either] impossible to comply with both state and federal law," or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."
3. *The Court's Reasoning.*—Feikema presented the Fourth Circuit with a question of first impression: whether RCRA, or a consent order entered pursuant to it, preempted state common-law causes of action for nuisance and trespass where the plaintiffs sought both compensatory and injunctive relief.\(^5\) As a threshold matter, the court considered whether the Homeowners properly pleaded diversity jurisdiction.\(^5\) Although the court concluded that diversity jurisdiction was improperly pleaded,\(^5\) the court granted permission to amend the complaint on remand in accordance with the liberal amendment provisions of the Federal Rules.\(^5\)

With regard to preemption, the court first noted that there was no express provision in RCRA which "mandate[d] comprehensive preemption of all state laws."\(^5\) The court then focused on whether RCRA was comprehensive and pervasive enough to be considered an implicitly preemptive regulation through occupation of the field or whether RCRA was in conflict with the state causes of action.\(^5\) The court concluded that RCRA did not negate the state's authority to regulate in the field of hazardous waste.\(^5\) The court similarly found nothing in the plain language of the Act\(^5\) nor in the legislative history

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51. Id. at 1412.
52. Id. The court found that, although the plaintiffs had claims arising from a single cause, they were divisible "with respect to the several properties." Id. The court thus distinguished the Homeowners' position from that of the plaintiffs in *Eagle v. American Tel. & Tel.* Id. See supra notes 26-33 and accompanying text.
53. Feikema, 16 F.3d at 1412 (suggesting that the Homeowners' claims would meet the jurisdictional amount in controversy and accepting as true the Homeowners' assertions that each suffered damages amounting to approximately $156,250); see FED. R. CIV. P. 15(a).
54. Feikema, 16 F.3d at 1413. The preemption provision of RCRA is limited and provides that "no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter . . . Nothing in this chapter shall be construed to prohibit any State . . . from imposing any requirements . . . which are more stringent than those imposed by such regulations." 42 U.S.C. § 6929 (1988).
55. Feikema, 16 F.3d at 1413.
56. Id. Although "RCRA is national in scope and universal in coverage," it calls for "a cooperative effort" among the federal and state governments and provides that states may run their own waste management programs with federal approval. Id. (citing 42 U.S.C. §§ 6902(a)(11), 6943).
57. Feikema, 16 F.3d at 1413.
58. Id. Although "RCRA is national in scope and universal in coverage," it calls for "a cooperative effort" among the federal and state governments and provides that states may run their own waste management programs with federal approval. Id. (citing 42 U.S.C. §§ 6902(a)(11), 6943).
59. The Homeowners argued that RCRA's savings clause, found at 42 U.S.C. § 6972(f), negated the inference that Congress had meant RCRA to occupy the field. Id. at 1413-14. However, the court correctly found that the "natural reading of the phrase, "nothing in this section shall restrict" which appears in RCRA's savings clause applies only to the "citizen-suit" provisions, in which § 6972(f) appears. Id. at 1414 (quoting 42 U.S.C. § 6972 (f)). Therefore, the court did not find the general savings clause determinative of whether Congress intended RCRA to occupy the field of hazardous waste laws. Id.
60. Id. (citing 42 U.S.C. § 6973). Section 6973(a), titled "Authority of Administrator," provides in pertinent part:
that suggested Congress intended 42 U.S.C. § 6973 "to be the sole remedy against violators of the RCRA."

The court reasoned that the consent order, like the Act itself, derived preemptive authority from the Supremacy Clause. Therefore, the consent order could also preempt state law actions which conflicted with the Order. The court then applied the conflict preemption test and determined that it would be impossible for Texaco to comply with both the Homeowners' requested injunctive relief and the EPA's consent order. Injunctive relief was necessarily preempted by the consent order.

Finally, as to the damages claims, the court relied upon past precedent, legislative history, and application of the conflict preemption test to hold that the Homeowners' damages claims were not preempted by RCRA. Because the district court had dismissed the complaint without consideration of whether the Homeowners had ad-
equately pleaded actions for nuisance and trespass, the court remanded to allow the Homeowners to pursue those actions.\textsuperscript{67}

In a concurring opinion, Judge Murnaghan wrote to emphasize that a consistent preemption analysis was applied to both the damages claims and the injunctive relief.\textsuperscript{68} In recognition that damages actions may be preempted to the same extent as injunctive suits,\textsuperscript{69} Judge Murnaghan reasoned that the Homeowners' damages claims could be preempted to the extent that they arose from conduct already regulated by the consent order.\textsuperscript{70}

4. Analysis.—

\textit{a. Damages and Injunctions Not Generally Preempted.}—In \textit{Feikema}, the Fourth Circuit faced federal legislation that was not silent as to preemption. RCRA has an express preemption provision which preempts state requirements that are less stringent than those authorized under RCRA.\textsuperscript{71} Nor does 42 U.S.C. \textsection 6929—the general savings clause of RCRA—preempt state common-law actions, whether for compensatory damages or for injunctive relief.\textsuperscript{72} Therefore, as to the general preemptive effect of RCRA on state common-law claims, it was unnecessary to look beyond the express language of the statute.\textsuperscript{73} If the initial inquiry in \textit{Feikema} had been whether the compensatory damages and the injunctive relief sought would "impose any requirements less stringent than those authorized under [the Act],"\textsuperscript{74} the court could have plainly concluded that, because RCRA only authorizes injunctive relief,\textsuperscript{75} a request for damages under state law would not be preempted because damages are plainly a more stringent requirement than those imposed by the Act.

\textsuperscript{67} Id.

\textsuperscript{68} Id. (Murnaghan, J., concurring).

\textsuperscript{69} Id. at 1418; see, e.g., International Paper Co. v. Ouellette, 479 U.S. 481, 498 n.19 (1987).

\textsuperscript{70} \textit{Feikema}, 16 F.3d at 1419. Judge Murnaghan declared: "[W]e would not allow the plaintiffs to gain indirectly, through the threat of monetary damages, what we have expressly prevented them from gaining directly through an injunction . . . ." Id.

\textsuperscript{71} 42 U.S.C. \textsection 6929; see also supra note 54 and accompanying text.

\textsuperscript{72} See supra note 54; see also \textit{Feikema}, 16 F.3d at 1419 (Murnaghan, J., concurring) ("As with injunctive relief, the plaintiffs' claim for damages is preempted \textit{only} to the extent that those damages arise from conduct regulated by the EPA's Consent Order.").

\textsuperscript{73} The court chose instead to focus on implicit field preemption and actual conflict preemption at the initial stages of its preemption analysis. See id. at 1412-13.

\textsuperscript{74} 42 U.S.C. \textsection 6929; see supra note 54.

\textsuperscript{75} See 42 U.S.C. \textsection 6973(a). There are no provisions in RCRA that authorize the EPA to seek or declare compensatory relief.
On the other hand, application of express preemption analysis to claims for injunctive relief necessarily requires a detailed case-by-case analysis to establish whether the relief requested imposes requirements less stringent than those authorized under RCRA. Because it gave the express preemption analysis only a cursory review, the Feikema court overlooked the possibility that, under certain circumstances, neither compensatory damages nor injunctive relief will be preempted by RCRA. However, because the provisions of RCRA call for cooperation among federal, state, and local governments, it is necessary to analyze whether state laws, which purport to regulate in conjunction with an EPA consent order, are preempted under RCRA.

b. Preemption Due to Terms of Consent Order.—Under RCRA, there is no express preemption of state common-law damage claims or claims for injunctive relief. As the concurring opinion correctly points out, both forms of relief are preempted "only to the extent that [they] arise from conduct regulated by the EPA's Consent Order." The court in Feikema held that a non-arbitrary consent order negotiated under the statutory authority of RCRA has the same supremacy power and preemptive effect as a federal regulation or law. Thus, under a preliminary preemption analysis, it is clear that the consent order is controlling.

76. Cf. United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1454 (6th Cir. 1991) ("CERCLA sets only a floor, not a ceiling for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA.").

77. Section 6902(a) provides in pertinent part:
   The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy sources by—
   (1) providing technical and financial assistance to State and local governments . . . for the development of solid waste management plans . . . ;
   . . .
   (7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will . . . give a high priority to assisting and cooperating with States . . . ;
   . . .
   (11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials . . .

78. It is precisely the cooperation explicitly called for in § 6902 that negates any inference of implicit field preemption. See supra note 77.

79. Feikema, 16 F.3d at 1419 (Murnaghan, J., concurring).

80. See id. at 1416.

81. Preliminary preemption analysis under RCRA should take the form of an express preemption inquiry, namely: whether the plaintiff's injunctive relief is less stringent than that imposed under the consent order. See 42 U.S.C. § 6929.
Since every consent order is different, courts must necessarily analyze the requested relief on a case-by-case and claim-by-claim basis. Therefore, the Feikema court should have gone through a full preemption analysis to establish whether the consent order preempted the particular state regulations—here, damage claims and injunctive claims.

Although the consent order is the vehicle of preemption, the Feikema court did not establish whether it contained any express preemptive language. The court simply stated that the consent order required Texaco, inter alia: (a) to take immediate remedial action, and (b) to develop and implement an EPA-approved emergency measures plan. After establishing that the consent order "derive[d] rights of supremacy" from the Supremacy Clause, the court proceeded directly to a conflict preemption analysis.

There was insufficient evidence available at the appellate level to establish whether the consent order expressly preempted either form of relief requested. It is clear, though, that the EPA had contemplated the need for future action to address areas not covered by the consent order. Such open-ended regulation—the contemplation of future measures—negates the inference that the Homeowners' request was expressly preempted. Arguably, the express possibility of

82. Feikema, 16 F.3d at 1416 (stating that the record on review was silent as to the status of the plan). In the absence of an express preemption provision or its equivalent, a consent order entered pursuant to the authority of RCRA would import the express provision of § 6929 which provides for preemption of less stringent regulations. The court explained that Texaco had implemented immediate remedial measures in accordance with the consent order and that such requirements had been satisfied. Feikema, 16 F.3d at 1416. Therefore, the only remaining action under the consent order was for Texaco to submit an emergency measures plan and to implement the plan upon EPA approval. Id. However, the status of the emergency measures plan was unknown. Id. It is difficult to comprehend how the court could pass upon the preemption issues, particularly the conflict issues related to the Homeowners' request for injunctive relief, without knowing the scope of the conduct actually regulated by the emergency measures plan.

Since the requirements of the immediate remedial response plan had been satisfied, it is possible that a conflict could arise if the requirements of that immediate remedial plan were somehow undone by the requests for compensatory damages or injunctive relief. Yet the Feikema court held that the Homeowners' claims for injunctive relief were preempted without any evidence that such a conflict would occur. Conversely, if the request for damages sought recovery for something in actual conflict with a plan previously implemented by the EPA, then an actual conflict would exist. See id. at 1419 (Murnaghan, J., concurring).

83. Feikema, 16 F.3d at 1415.
84. Id. at 1416.
85. See supra text accompanying notes 14-22.
86. Feikema, 16 F.3d at 1411 ("[The consent order] recognized that the response action might not address all contamination and that additional long-term measures might be required.").
"additional long-term measures" indicates that the EPA contemplated soliciting the cooperation of the state in its efforts "to neutralize the effects of the oil plume."87

The open-ended nature of the consent order also negates the inference that the EPA intended implicitly to preempt further state action through occupation of the field. Although Texaco may have raised a colorable argument that the consent order had occupied the particular "micro-field" related to this specific petroleum hazard through comprehensive regulation, this argument fails to acknowledge RCRA's goal of cooperative state and federal action.88 This position also denies a strong presumption in favor of state law where the state acts to protect the health and welfare of its citizens.89 The savings clauses of RCRA90 combine with the open-ended language of the consent order to negate the inference that the EPA implicitly preempted state action through comprehensive occupation of the field.

Because the EPA had selected and supervised the remedial measures, the Feikema court reasoned that the Homeowners' request for injunctive relief was preempted by actual conflict.91 The court failed, however, to analyze whether the damages claims were also in conflict with the consent order.92 Moreover, the opinion provided only brief analysis of the preemptive effect of the consent order on the particu-

87. Id. The savings clause which appears in the "citizen suit" provision of RCRA provides that:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief . . . .

42 U.S.C. § 6972(f). In Feikema, the court concluded that the language "nothing in this section" limited the scope of the savings clause to the citizen-suit provisions alone, and "'d[id not purport to preclude pre-emption of state law by other provisions of the Act.'" Feikema, 16 F.3d at 1414 (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987)).

However, other courts construing this RCRA section have concluded that it applies with force only when raised by a state that has adopted state standards, pursuant to 42 U.S.C. § 6926, that have been approved by the EPA for the regulation of hazardous waste. See, e.g., Hermes Consol., Inc. v. Wyoming, 849 P.2d 1302, 1312 (Wyo. 1993) (reasoning that Wyoming could not argue for compliance with a stricter state standard where they had not taken action to become an "authorized state" under RCRA). Because Virginia is an authorized state under RCRA, citizens of that state, like the Feikemas, should be able to demand compliance with stricter state standards. Id. at 1312.

88. See supra note 54 and accompanying text.
89. See United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1455 (6th Cir. 1991).
90. 42 U.S.C. §§ 6929, 6972(f).
91. Feikema, 16 F.3d at 1416.
92. See supra note 82 and accompanying text.
lars of the injunctive relief requested, and did not clearly demonstrate that an actual conflict existed. The consent order in *Feikema* "addressed measures to eliminate the causes of the leaking and to neutralize the adverse effects of the oil plume." The requested injunctive relief did not on its face violate these objectives.

Finally, had a detailed comparison been made between each claim and the language of the consent order, the court could have upheld portions of the injunctive relief and fashioned a remedy which furthered RCRA's express objective of establishing a co-operative effort among the federal and state governments. From a public policy standpoint, the court missed an opportunity to extol the virtues and benefits of state regulation and private injunctive relief in complex areas such as pollution control—an area in which the states have regulated for centuries. These benefits include: (a) the heightened public perception of the legitimacy and potent power of the federal government when it regulates in full cooperation with the states in the important area of pollution control; and (b) the promotion of increased citizen participation in the regulation of an area of deeply rooted public concern.

93. The Homeowners' claim asked for further "excavation, treatment and replacement of contaminated soil to a specified depth and over a specified area . . . [as well as] 'enhanced ground water extraction and bio-remediation to reduce the off-site contamination' and . . . construction of a 'free phase hydrocarbon trench removal system across the water table.'" *Feikema*, 16 F.3d at 1416.

94. Rather than demonstrating the extent of the conflict, if any, the court concluded that the consent order "addresses the same site and conditions covered by the homeowners' suit." *Id.* This conclusion, without more, does not compel preemption.

Unlike similar requests in other jurisdictions for excavation that clashed directly with EPA directives to cap and contain, the injunctive relief requested in *Feikema* may harmoniously augment the federal action. See Hermes Consol., Inc. v. Wyoming, 849 P.2d 1302, 1310 (Wyo. 1993); Illinois v. Teledyne, Inc., 599 N.E.2d 472, 475-77 (Ill. App. Ct. 1992). It is unclear from the court's opinion where a conflict would, in fact, arise. *Feikema*, 16 F.3d at 1411, 1416; *see also supra* note 82.

95. *Feikema*, 16 F.3d at 1411.

96. Both the EPA and the Homeowners sought excavation, although the Homeowners presumably desired to cover a larger area. *Id.* at 1411, 1416. The additional remedial measures requested by the Homeowners, *see supra* note 95, were surely congruent with the EPA's desire to "neutralize the adverse effects of the oil plume." *Feikema*, 16 F.3d at 1411.

Additionally, since one of the Homeowners' requests specifically focuses on "off-site contamination," *id.* at 1416, the court's assertion that the EPA and the Homeowners addressed the same site is not entirely accurate. *See id.* This is another factor counseling against a finding that the requested injunctive relief was preempted by RCRA.

97. See 42 U.S.C. § 6902; *see also supra* note 77 and accompanying text.


In sum, *Feikema* goes a long way towards establishing that common-law damage actions are not preempted by RCRA. It is unclear, however, whether the decision established a per se rule or whether damage claims may, in some instances, be preempted by an EPA consent order. It is similarly difficult to draw conclusions regarding RCRA's preemptive effect on injunctive claims because this case may readily be distinguished from others which do not involve a prior consent order. Therefore, *Feikema* will likely have limited precedential value. The *Feikema* court has not taken RCRA preemption jurisprudence very far.

5. *Conclusion.*—In *Feikema*, the Court of Appeals for the Fourth Circuit established that a consent order entered pursuant to RCRA Section 7003\(^{102}\) has the same preemptive effect as other federal laws and regulations. The court concluded that state common-law actions for damages are not preempted by RCRA due, in part, to the fact that RCRA makes no provision for damages, and because the Act contemplates extensive state and federal cooperation in the field of hazardous waste management. Despite RCRA's express objective of intergovernmental cooperation, the court held that injunctive relief was preempted because of an actual conflict with a previously entered EPA-negotiated consent order.

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100. See *supra* notes 68-70 and accompanying text.
101. The court's holding with respect to preemption of injunctive relief was based on actual conflict with a then-existing consent order, not general preemption based on the EPA's authority to issue injunctive relief. *Feikema*, 16 F.3d at 1416.
XIII. CONSTITUTIONAL LAW

A. A Blanket Rule for the Burford Abstention Doctrine in Land Use Cases?

In Pomponio v. Fauquier County Board of Supervisors, the United States Court of Appeals for the Fourth Circuit considered whether the federal district court properly applied the abstention doctrine of Burford v. Sun Oil Co. when it dismissed the case. The court upheld the district court's ruling, concluding that when a plaintiff's federal claim stems solely from interpretation of a state or local zoning law, the district court should stay its hand under the Burford abstention doctrine. The court determined that when the claim does not involve constitutional questions or exceptional circumstances, federal courts should abstain in order not to interfere with a state or locality's zoning policy. In so holding, the Pomponio court, in effect, espoused a per se approach to the application of the Burford abstention doctrine in land use cases, and thereby extended the doctrine well beyond the narrow scope established in Colorado River Water Conservation District v. United States.

1. The Case.—In March 1989, Arthur Pomponio, a real estate developer, contracted to purchase approximately 1250 acres of property located in the agricultural and conservation zoning districts of Fauquier County, Virginia. A local zoning ordinance permitted the development of minor residential subdivisions if certain maximum density and open space requirements were met. In June 1989, shortly after Pomponio submitted a preliminary subdivision plan for review and approval by the Fauquier County Planning Commission, a member of the Board of Supervisors negatively commented about Pomponio’s plan during an interview with a local newspaper. Pomponio alleged that the board member had not even reviewed the

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1. 21 F.3d 1319 (4th Cir.) (en banc), cert. denied, 115 S. Ct. 192 (1994).
2. 319 U.S. 315 (1943).
3. Pomponio, 21 F.3d at 1328.
4. Id.
7. Pomponio, 21 F.3d at 1320-21.
8. Id. at 1321.
9. Id.
After Pomponio had an opportunity to argue that his plan fully complied with the ordinance, the Planning Commission concluded that a majority of the lots could not be subdivided under the zoning ordinance. Pomponio appealed the Commission's decision to the Board of Supervisors for interpretation of the local ordinance, which subsequently voted to deny Pomponio's appeal. Pomponio then appealed the Board of Supervisors' decision to the local circuit court and simultaneously pursued an administrative appeal before the Zoning Board of Appeals. Upon the Board's denial of his appeal, Pomponio appealed their decision to the county circuit court.

In the meantime, Pomponio's right to purchase the land under the contract expired, and he nonsuited his two state court cases. With no further remedy available under state law, Pomponio pursued a damages claim under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia. Pomponio alleged that the Board intentionally misconstrued the zoning ordinance and violated his due process and equal protection rights under the Constitution. Instead of ruling on the defendant's motion for summary judgment, the district court, acting sua sponte, abstained and dismissed the case without prejudice. On appeal, a three-judge panel of the Fourth Circuit held that abstention was inappropriate, as involved neither difficult questions of state law nor a risk that federal jurisdiction would interfere with the state's efforts to establish a uniform land use policy. Sitting en banc, the Fourth Cir-

10. Id.
11. Id. at 1322.
12. Id. at 1323.
13. Id. The Board of Supervisors was chaired by James Green, the same individual who had previously made negative comments to the press about Pomponio's plan. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 1323-24.
18. Id. at 1322.
19. Id. at 1324. To support his claim, Pomponio asserted that Fauquier County's Planning Director erroneously instructed the Commission staff to reduce the allowable density of Pomponio's property and then falsely informed the Commission that the proposed density of Pomponio's plan exceeded the maximum density permitted by law. See Pomponio v. Fauquier County Bd. of Supervisors, No. 91-1107, 1992 U.S. App. LEXIS 17636, at *4 (4th Cir. Aug. 3, 1992).
20. Pomponio, 21 F.3d at 1324.
cuit reviewed the district court’s decision to abstain under the *Burford* doctrine for abuse of discretion.  

2. **Legal Background.**—

2a. **Supreme Court Cases.**—Congress has vested in the federal courts the jurisdiction to enforce Section 1983 of the Civil Rights Act of 1871. Although the federal courts are generally required to hear all cases in which jurisdiction is conferred to them by Congress, some abstention exceptions exist.

The Supreme Court first articulated the abstention doctrine in *Railroad Commission of Texas v. Pullman Co.* The *Pullman* Court held that abstention is preferable when a state court can resolve an unclear state-law issue, and thus spare a federal court the need to decide a constitutional question. The Court reasoned that an erroneous decision by a federal court on an unclear issue of state law may lead to the disruption of state authority. However, if a court abstained, the plaintiff may reserve the right to return to federal court after a state court has resolved the questions before it.

Two years later, in *Burford v. Sun Oil Co.*, the Supreme Court considered the harmful effects of federal court intervention on a uniform system of state regulation. The Court held that a federal district court may, as a matter of equitable discretion, abstain when necessary to avoid interfering with a state government’s domestic pol-

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22. *Pomponio*, 21 F.3d at 1324.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

*Id.*

26. 312 U.S. 496 (1941).
27. *Id.* at 501.
28. *Id.* at 500-01.
31. *Id.* at 317-18.
Unlike abstention under *Pullman*, *Burford* does not permit the federal court to retain any jurisdiction on federal issues. In *Burford*, Sun Oil Company sued the Railroad Commission of Texas to enjoin the execution of an order of the Commission that permitted the drilling and operation of certain oil wells in the East Texas Oil Field. Texas statutes, however, already provided a well-organized system of regulation and review. The *Burford* Court reasoned that an exercise of federal equity jurisdiction in this case could result in delay, misunderstanding of local law, and needless federal conflict with state policy.

The Court reiterated these principles in *Alabama Public Service Commission v. Southern Railroad Co.*, where a railroad company challenged an order of the Alabama Public Service Commission. Under Alabama law, a party who disagreed with a final order of the Public Service Commission was entitled to appeal to the Circuit Court of Montgomery County. Because of the uniformity of the state regulatory process, the adequacy of state court review, and the local nature of the case, the Supreme Court held that the federal district court should have abstained from exercising its jurisdiction. From the Court's decisions in *Burford* and in *Alabama Public Service Commission*, the principle commonly called the *Burford* doctrine has emerged.

The *Burford* doctrine, however, was not explicitly cited in the Court's next abstention case, *Louisiana Power & Light Co. v. City of Thibodaux*. In *Thibodaux*, the Court suggested that abstention was necessary because of the unclear nature of the state law and the importance of the issue to the state. *Thibodaux* is distinguishable from *Burford* in that *Thibodaux* did not anticipate interference with a state's administrative processes. Both doctrines, however, focus on the
threat of federal intervention in important state matters and thus could be viewed as one in the same.\textsuperscript{45}

In \textit{Colorado River Water Conservation District v. United States},\textsuperscript{46} the Court clarified the scope of the \textit{Burford} abstention doctrine by stressing the limited circumstances where abstention is permissible and noting that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule."\textsuperscript{47} More recently, the Court further examined the scope of the \textit{Burford} abstention doctrine in \textit{New Orleans Public Service, Inc. v. Council of New Orleans}.\textsuperscript{48} The Court held that a federal court must refuse equitable relief:

(1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or
(2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."\textsuperscript{49}

The Court in \textit{New Orleans} explained that the presence of a complex state administrative process alone does not necessarily require abstention, even where the potential for conflict between federal and state law may exist.\textsuperscript{50} If federal adjudication would undermine the state's desire for uniformity, then abstention may be warranted.\textsuperscript{51}

\paragraph{b. Fourth Circuit Cases.}—By itself, the \textit{Burford} abstention doctrine provides only a vague idea of when a state administrative action would justify a federal court decision to abstain from exercising its jurisdiction.\textsuperscript{52} As a result, the federal courts have had to shape their own application of the \textit{Burford} doctrine.\textsuperscript{53} Not surprisingly, application has ranged from the rigorous to the lax.\textsuperscript{54}

\textsuperscript{45} Id.
\textsuperscript{46} 424 U.S. 800 (1976).
\textsuperscript{47} Id. at 813.
\textsuperscript{48} 491 U.S. 350 (1989).
\textsuperscript{49} Id. at 361 (quoting \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 814 (1976)).
\textsuperscript{50} Id. at 362.
\textsuperscript{51} Id.
\textsuperscript{52} Young, \textit{supra} note 25, at 863-64.
\textsuperscript{53} Id. at 899.
\textsuperscript{54} See Blaesser, \textit{supra} note 5, at 100 (analyzing the differences among the circuits in their application of the abstention doctrine).
The Fourth Circuit has demonstrated a strong judicial preference to abstain in land use cases.\(^5\) It first addressed the issue of abstention in zoning or land use laws in *Fralin & Waldron, Inc. v. City of Martinsville.*\(^5\) The plaintiff contended that a section of the city code was unconstitutionally vague and that the code section had been arbitrarily and discriminatorily applied to it.\(^5\) The court concluded that abstention was warranted on the basis of the *Thibodaux* doctrine because of the state court's familiarity and experience in construing local land use law.\(^5\) In *Caleb Stowe Associates, Ltd. v. County of Albemarle,*\(^5\) the court applied the *Thibodaux* doctrine in a suit brought under Section 1983.\(^5\) The court found that abstention applied because the essence of the action was the County Board of Supervisors' construction of a purely state land use law.\(^5\)

The first zoning case to use the *Burford* abstention doctrine was *Browning-Ferris, Inc. v. Baltimore County.*\(^5\) In *Browning-Ferris,* the court upheld abstention and stressed that state land use issues belong in state courts and that federal courts should hesitate to intervene in the ordinary land use case.\(^5\) *Browning-Ferris* departed from the court's previous holding in *Education-Services, Inc. v. Maryland State Board for Higher Education,*\(^5\) where the court required that a state regulatory scheme include a specialized court before *Burford* would apply.\(^5\) Instead, the *Browning-Ferris* court found that the existence of a specialized court is not an absolute prerequisite.\(^5\) Since *Browning-Ferris,* the Fourth Circuit has consistently applied *Burford* instead of *Thibodaux* when analyzing abstention in zoning cases.\(^5\)

3. *The Court's Reasoning.*—The *Pomponio* court held that under the *Burford* doctrine trial courts should abstain in claims that stem solely from the construction of state or local land use or zoning law.\(^5\) Where claims do not involve constitutional issues or exceptional cir-

\(^{55}\) *Id.* Between 1972 and 1988, the courts in the Fourth Circuit ordered abstention in 60% of all land use cases, and in 40% of land use cases brought under § 1983. *Id.* at 101.
\(^{56}\) 493 F.2d 481 (4th Cir. 1974).
\(^{57}\) *Id.* at 482-83.
\(^{58}\) *Id.* at 483.
\(^{59}\) 724 F.2d 1079 (4th Cir. 1984).
\(^{60}\) *Id.* at 1080.
\(^{61}\) *Id.*
\(^{62}\) 774 F.2d 77 (4th Cir. 1985).
\(^{63}\) *Id.* at 79-80.
\(^{64}\) 710 F.2d 170 (4th Cir. 1983).
\(^{65}\) *Id.* at 173.
\(^{66}\) *Browning-Ferris,* 774 F.2d at 80.
\(^{67}\) *Pomponio,* 21 F.3d at 1328.
\(^{68}\) *Id.* at 1328.
circumstances, courts should avoid interfering with a state or locality's land use policy. Writing for the majority, Judge Widener relied on the Supreme Court's guidance in *New Orleans* to determine when a federal court sitting in equity must decline to hear a case under the *Burford* abstention doctrine. The Court in *New Orleans* had declared that under the *Burford* doctrine, a federal court should refrain from exercising its jurisdiction where the "exercise of federal review of the question in a case . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Judge Widener reasoned that questions of state or local land use or zoning law are classic examples of situations in which federal review would be disruptive. Citing Justice Marshall in *Village of Belle Terre v. Boraas*, the court stated that "in the usual case federal courts should not leave their indelible print on local and state land use and zoning law . . . in effect, sitting as a zoning board of appeals."

The court reaffirmed previous case law which held that, absent unusual circumstances, a district court should abstain under the *Burford* doctrine in cases that arise solely out of state or local zoning or land use law. The court stated that an unusual circumstance reflects the presence of a "genuine and independent federal claim." A true federal claim would include a valid claim of religious prejudice, a claim of federal statutory preemption, or claims that involve First Amendment rights.

The court found that Pomponio's claims failed to present any unusual circumstances that would convert an ordinary zoning dispute into a federal case. It concluded that Pomponio's argument "boil[ed] down to an assertion that his plan complied with the zoning laws, and the local authorities wrongfully disapproved his plan by misapplying the laws and by abusing their authority in the decision-making process." The court distinguished *Pomponio* from *New Orleans*.

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69. *Id.*
70. *Id.* at 1327.
72. *Pomponio*, 21 F.3d at 1327.
74. *Pomponio*, 21 F.3d at 1327; see *Boraas*, 416 U.S. at 13 (Marshall, J., dissenting) (agreeing with the majority that zoning issues are inherently state issues).
75. *Pomponio*, 21 F.3d at 1327.
76. *Id.* at 1327-28.
77. *Id.* at 1328.
78. *Id.*
79. *Id.*
In *New Orleans*, the Court declined to abstain under *Burford*, in part, because the plaintiffs had not alleged that a state agency misused its authority or improperly weighed relevant state-law factors. By contrast, the *Pomponio* court reasoned that abstention under *Burford* was appropriate in the instant case precisely because the claim at issue involved a state agency’s misapplication of its lawful authority. After finding that abstention in this case was proper, the court affirmed the district court’s dismissal of the case as the usual result under *Burford* abstention.

In dissent, Judge Murnaghan disagreed with the majority’s assertion that *Pomponio* merely appealed an unfavorable agency decision. Judge Murnaghan pointed out that *Pomponio* did not file an appeal of the unfavorable decision. Instead, *Pomponio* had sued in federal court under Section 1983 for an abuse of process in order to recover damages after the loss of a land purchase contract. Judge Murnaghan reasoned that *Pomponio*’s claims did not involve difficult state law questions, nor would the exercise of federal jurisdiction disrupt the state’s efforts to establish a uniform land use policy. He stated, moreover, that *Pomponio* never had the opportunity to prove that he met the “unusual circumstance” exception because the district court dismissed his claim.

4. Analysis.—The *Pomponio* court held that when a plaintiff’s federal claim stems solely from the interpretation of state or local zoning law, a federal court should stay its hand under the *Burford* abstention doctrine. In effect, the court determined that the potentially disruptive effect of federal court intervention on state zoning policy is sufficient to remove congressionally mandated jurisdiction from the federal courts. While such an application of the *Burford* abstention doctrine comports with Supreme Court and Fourth Circuit precedent, *Pomponio* is not such a case.

Although the court started with the “fundamental proposition that abstention is the exception, not the rule,” by the end of its opin-

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81. *Pomponio*, 21 F.3d at 1328.
82. *Id.*
83. *Id.* at 1329.
84. *Id.*
85. *Id.*; see supra text accompanying notes 16-19.
86. *Pomponio*, 21 F.3d at 1329.
87. *Id.*
88. *Id.* at 1328.
89. *Id.* at 1324.
ion, the court seemed to have forgotten this proposition. The majority seemed all too eager to abstain under *Burford*. First, the court did not carefully distinguish the decisions it cited for support. In *Browning-Ferris, Inc. v. Baltimore County*, the plaintiff (BFI) claimed that the county had arbitrarily and capriciously denied a renewal of its disposal permit. Like the plaintiff in *Pomponio*, BFI alleged that the county had acted under improper political or personal motives and sought relief under 42 U.S.C. § 1983. The court held that the district court correctly invoked the *Burford* abstention doctrine when it declined to hear the case. In light of the pending state administrative proceedings, the *Browning-Ferris* court reasoned that if a federal court heard the case, it would eventually be required to decide if BFI was eligible for a permit; and, if BFI was eligible, the court would have to order the state to issue the permit. In such a situation, the federal court would become involved in the complexities of state land use control.

In *Pomponio*, however, the plaintiff did not seek to influence state administrative proceedings. Pomponio had nonsuited his state claims and sought damages for the loss of his land purchase contract. As Judge Murnaghan pointed out in his dissent, specific instances of arbitrary behavior, false statements, abuse of authority, and misconduct by local zoning officials do not involve difficult questions of state law.

*Caleb Stowe Associates v. County of Albemarle*, another Section 1983 land use case relied upon by the majority, is also distinguishable from *Pomponio*. In *Caleb Stowe*, the plaintiffs conceded that they were afforded sufficient procedural due process; however, they argued that the zoning officials failed to correctly construe a state land use statute. Construction of a state statute is precisely the type of question the federal courts seek to avoid. In contrast, Pomponio claimed that he did not receive adequate procedural due process, and pointed to specific instances of misconduct by officials. To decide

90. 774 F.2d 77 (4th Cir. 1985).
91. Id. at 77.
92. Id. at 77-78.
93. Id.
94. Id. at 79-80.
95. Id. at 80.
96. *Pomponio*, 21 F.3d at 1323.
97. Id. at 1329 (Murnaghan, J., dissenting).
98. 724 F.2d 1079 (4th Cir. 1984).
99. See *Pomponio*, 21 F.3d at 1326.
100. *Caleb Stowe*, 724 F.2d at 1080.
101. Id.
102. See supra note 19 and accompanying text.
Pomponio's due process claim, the court was not required to interpret Fauquier County's land use and zoning ordinances.

The court, nevertheless, construed Pomponio as a zoning case and repeatedly stressed that local and state land use and zoning laws fall within the province of the state. The court "[could] conceive of few matters of public concern more substantial than zoning and land use laws." The court voiced concern that federal claims often "cannot be untangled from the state or local zoning or land use law." While the court is correct that land use and zoning law should be left to the states, it did not pause to consider whether the zoning question was the primary issue in the case. In fact, Pomponio's federal claim under Section 1983 for abuse of process was the crux of his complaint.

After assuming that Pomponio was solely a zoning case, the court examined whether the case contained an "unusual circumstance" that would allow a federal court to hear the case. The court did not provide any insight as to how it came to its determination that no unusual circumstances existed. To define an unusual circumstance as one "which reflected the presence of a genuine and independent federal claim," the court gave three examples that simply do not apply to the abuse of process issue raised in Pomponio. The court did not attempt to enumerate other possibilities where federal jurisdiction would come into play; nor did it explain why Pomponio's Section 1983 claim was not "a genuine and independent claim."

If the court had applied its reasoning from a like case, Richmond, Fredericksburg & Potomac Railroad Co. v. Forst, it could have found the existence of an unusual circumstance in Pomponio. In Forst, the court held that Burford did not apply because Congress expressly provided railroads with the opportunity to litigate state tax discrimination claims in federal court. Similarly, Congress has expressly determined that plaintiffs may bring claims in federal court under Section 1983 to redress alleged abuses of authority by state officials. It

103. Pomponio, 21 F.3d at 1327.
104. Id.
105. Id.
106. Id. at 1320.
107. Id. at 1328.
108. Id. The court referred to claims of religious prejudice, federal preemption, and violations of First Amendment rights as unusual circumstances. Id.
109. Id.
110. 4 F.3d 244 (4th Cir. 1993).
111. Id. at 253.
112. See Blaesser, supra note 5, at 73-74.
would appear that Pomponio and Forst both fall within express grants of federal jurisdiction that qualify as genuine and independent claims. By its failure to find that a Section 1983 claim qualifies as an independent claim, the court has seemingly taken a step back from Forst and narrowed the meaning of a genuine and independent claim.

The Pomponio court purported to apply the benchmark test set forth in New Orleans Public Service, Inc. v. Council of New Orleans\(^{113}\) that Burford abstention was inappropriate because the claim asserted by Pomponio was not "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors."\(^{114}\) Without further explanation, the court rested its conclusion on the observation that Pomponio's action was "just such a claim."\(^{115}\) However, the court left out of its analysis an important clarification that the Supreme Court noted in New Orleans: "[w]hile Burford is concerned with protecting complex state administrative processes, it does not require abstention whenever there exists a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy."\(^{116}\) Although the potential for conflict may exist between Fauquier County's zoning law and federal law, the Pomponio court failed to realize that the case involved zoning issues only peripherally.

Two years before Pomponio, the court recognized this very distinction in Neufeld v. City of Baltimore.\(^{117}\) In Neufeld, the Fourth Circuit held that the district court erred when it declined to hear Neufeld's First Amendment and preemption claims.\(^{118}\) The court reasoned that under New Orleans' principles the case "involved land use issues only in a peripheral sense."\(^{119}\) In light of Supreme Court and Fourth Circuit precedent, the Pomponio court should have recognized that Pomponio's claim involved land use issues only peripherally and that his Section 1983 claim was the central issue to be decided.

Finally, to determine whether the district court properly dismissed the suit, the court offered only a sparse analysis and accepted dismissal of the suit as the "appropriate course of action."\(^{120}\) The

\(^{113}\) 491 U.S. 350 (1989).
\(^{114}\) Pomponio, 21 F.3d at 1328.
\(^{115}\) Id.
\(^{116}\) New Orleans, 491 U.S. at 362 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 801, 815-16 (1976)).
\(^{117}\) 964 F.2d 347 (4th Cir. 1992).
\(^{118}\) Id. at 348.
\(^{119}\) Id. at 351.
\(^{120}\) Pomponio, 21 F.3d at 1328.
court cited Meredith v. Talbot County\textsuperscript{121} to support its dismissal of Pomponio. But Meredith is clearly distinguishable from Pomponio. First, the Meredith plaintiffs sought an injunction that required Talbot County to take a zoning action.\textsuperscript{122} Second, the plaintiffs did not initially file suit in the local state courts.\textsuperscript{123} Third, and most significantly, although the Fourth Circuit affirmed the district court’s dismissal, the court stated in dicta that “[r]etention of jurisdiction may have been a more cautious route for the district court to have followed.”\textsuperscript{124}

While the Pomponio court acknowledged the recent Supreme Court decision in Ankenbrandt v. Richards,\textsuperscript{125} the court ignored Ankenbrandt’s proposition that when a federal court declines to hear a state issue under Burford, it should retain jurisdiction over any federal issues while a state court resolves the state issues.\textsuperscript{126} If it had followed Ankenbrandt, the Pomponio court could have retained jurisdiction over the Section 1983 claim while it waited for the state court to resolve the peripheral zoning issue.

In Ankenbrandt, the Supreme Court acknowledged that a domestic relations exception to Burford exists in cases that involve the issuance of a divorce, alimony, or child custody decree.\textsuperscript{127} The Court reasoned that the exception is necessary because “[s]tate courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling [these] issues . . . .”\textsuperscript{128} The exception, however, did not apply to Ankenbrandt because the allegations in the complaint did not request the district court to issue a divorce, alimony, or child custody decree.\textsuperscript{129} These issues had already been decided; all that was left to do was decide the federal issue.\textsuperscript{130} Of course, in certain circumstances, a Burford abstention may be invoked in domestic relations cases where the parties do not seek divorce, alimony, or child custody. An example would be where a case presents “difficult questions of state law bearing on policy problems of substantial

\textsuperscript{121} 828 F.2d 228 (4th Cir. 1987).
\textsuperscript{122}  Id. at 230.
\textsuperscript{123}  Id. at 232.
\textsuperscript{124}  Id.
\textsuperscript{125}  Pomponio, 21 F.3d at 1328; Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992).
\textsuperscript{126}  Ankenbrandt, 112 S. Ct. at 2216 & n.8.
\textsuperscript{127}  Id. at 2216.
\textsuperscript{128}  Id. at 2215.
\textsuperscript{129}  Id. The claim involved a diversity action in tort.  Id.
\textsuperscript{130}  Id.
public import . . . ."\textsuperscript{131} In \textit{Ankenbrandt}, however, no "difficult questions of state law" remained, and abstention was inappropriate.\textsuperscript{132}

The exception to federal jurisdiction regarding zoning and land use cases is analogous to the exception for domestic cases as both exceptions target traditional state law issues. In \textit{Pomponio} and \textit{Ankenbrandt}, the federal courts sought to avoid interference with the state's efforts to establish a coherent policy on an important matter. However, the \textit{Pomponio} and \textit{Ankenbrandt} plaintiffs both sought damages for abuse of process, an issue over which the federal courts do have jurisdiction. While the \textit{Ankenbrandt} court acknowledged that there is no blanket rule of exception,\textsuperscript{133} the \textit{Pomponio} court seems to advocate a blanket rule of abstention in land use cases.

5. Conclusion.—In \textit{Pomponio}, the Fourth Circuit determined that when a claim does not involve constitutional questions or exceptional circumstances, federal courts should abstain in order to avoid interfering with a state or locality's zoning policy. The \textit{Pomponio} court, however, was not sufficiently detailed in its analysis and provided the lower courts or practitioners with little guidance on how to apply its decision to future cases. In effect, the court espoused a per se rule of abstention in land use cases.

The court's blanket approach extends the \textit{Burford} doctrine far beyond the narrow scope established in \textit{Colorado River Water Conservation District v. United States}, in which the Supreme Court stressed that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."\textsuperscript{134} In so holding, the court has denied plaintiffs in zoning and land use cases the right to pursue Section 1983 claims, a remedy expressly created by Congress in the Civil Rights Act of 1871.

VIVIAN LEE

B. Equal Protection for Church Groups' Use of Public Schools After Hours

In \textit{Fairfax Covenant Church v. Fairfax County School Board},\textsuperscript{1} the United States Court of Appeals for the Fourth Circuit held that a school board's practice of charging a church group a higher rental

\textsuperscript{131}. \textit{Id.} at 2216 (quoting \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 814 (1976)).

\textsuperscript{132}. \textit{Id.}

\textsuperscript{133}. \textit{See id.} (stating that the domestic relations exception to federal jurisdiction "has no place in a suit such as this one.").

\textsuperscript{134}. 424 U.S. 800, 813 (1976).

\textsuperscript{1}. 17 F.3d 703 (4th Cir.), \textit{cert. denied}, 114 S. Ct. 2166 (1994).
rate than that charged other nonprofit organizations for the use of its facilities violated the church's freedom of speech and freedom of religion. The court held that the district court erred, however, in not applying its decision retroactively.

1. The Case.—In 1980, Fairfax Covenant Church (the Church) began renting space from the Fairfax County School Board (School Board) to hold its weekly Sunday services. The School Board permitted various groups to use school facilities under rules established in its Regulation 8420. Under Regulation 8420, local government agencies, student organizations, and the Girl Scouts and Boy Scouts of America pay no rent for using school facilities; cultural, educational, civic groups, and state and federal governmental groups pay a non-commercial rate designed to reimburse the county for the actual costs of using the facilities. Regulation 8420 provides a special rate for churches which allows the church to pay the noncommercial rate for the first five years. Thereafter, the rate escalates to a commercial rate over the next four years.

In 1992, the Church filed a complaint under 42 U.S.C. § 1983 against the School Board in the United States District Court for the Eastern District of Virginia and sought a permanent injunction, a declaratory judgment, and compensatory damages. The Church alleged that the rental structure of Regulation 8420 violated its First Amendment rights.

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2. Id. at 707.
3. Id. at 711.
4. Id. at 705.
5. Id. at 704. During 1991, about 8500 groups applied for use of the public school facilities in Fairfax County; in 1992, 51 churches were utilizing the facilities. Id. at 705.
6. Id. at 704.
7. Id. at 705.
8. Id. The commercial rate is five times the noncommercial rate. Id. at 704-05.
9. Section 1983 provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.
11. Fairfax Covenant, 17 F.3d at 705-06. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. The Establishment Clause, Free Exercise Clause, and Free Speech Clause all apply to the states.
churches below-market rates and allowing them long-term or permanent use of school facilities would violate the Establishment Clause by advancing or subsidizing the practice of religion, and therefore the Establishment Clause is in conflict with the Free Speech Clause and Free Exercise Clause.  

Ruling on cross-motions for summary judgment, the district court held that Regulation 8420 was unconstitutional because it abridged the Church's freedom of speech and infringed upon its free exercise of religion. The district court refused to apply its decision retroactively and allow the Church to collect the excess amounts already paid under the discriminatory rate structure. Both parties appealed to the United States Court of Appeals for the Fourth Circuit. 

2. Legal Background.—

a. First Amendment Issues.—In Lemon v. Kurtzman, the Supreme Court set forth a test to determine whether a statute that affects a religious group offends the Establishment Clause. To pass constitutional muster, "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" The Lemon Court invalidated Pennsylvania and Rhode Island statutes providing state aid to church-related schools because they provided state funds for parochial school teachers, who the Court found were under significant religious control, and because the statutes required extensive government monitoring of the schools' "secular" expenditures. Moreover, the Pennsylvania statute had "the further defect of providing state financial aid directly to the church-related school." The


12. Fairfax Covenant, 17 F.3d at 706. The School Board conceded that it was required to provide the Church access to its facilities because it had opened its facilities to the public. Id.


14. Fairfax Covenant, 17 F.3d at 706.

15. Id.


17. Id. at 612-13 (quoting Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970)).

18. Id. at 617-22.

19. Id. at 621.
Court concluded that each statute "involve[d] excessive entanglement between government and religion." 20

Subsequent to the Lemon decision, the Court considered a series of cases involving government infringement upon freedom of speech and freedom of religion. In Widmar v. Vincent, 21 a state university regulation barred student groups and speakers from using a generally open forum 22 to engage in religious worship and discussion. 23 The Widmar Court struck down the regulation because the university failed to provide a "sufficiently 'compelling' interest to justify content-based discrimination against respondent's religious speech." 24 The Court rejected the university's argument that to allow religious groups to use its facilities would violate the Establishment Clause under the Lemon test. The Court determined that the open-forum policy would not have the "primary effect" of advancing religion under Lemon because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" and because the forum would be open to nonreligious as well as religious speakers. 25

In Lamb's Chapel v. Center Moriches Union Free School District, 26 the Supreme Court examined the application of a school board rule that prohibited the use of school premises for religious purposes. 27 The

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20. Id. at 614. The Court previously had upheld state aid to church-related schools for secular or neutral services such as bus transportation or textbooks. Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (transportation).
22. Open or public forums are places which "by long tradition or by government fiat have been devoted to assembly and debate." They include public streets and parks. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Public forums also may be created when the state designates a particular place for public use, for meetings, speech, use by certain speakers, or for discussion of certain subjects. Id. at 45, 46 n.7. "Th[e] Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." Widmar, 545 U.S. at 267 n.5 (citations omitted).
23. Widmar, 454 U.S. at 269.
24. Id. at 276. To justify content-based exclusions, a state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Id. at 270.
25. Id. at 274. The Court suggested that an open forum might have the "primary effect" of advancing religion if it were shown that religious groups "dominate" that forum. Id. at 275.
27. Id. at 2141. The Court declined to rule whether the school was a limited public forum or a nonpublic forum. Id. at 2147. The district court had stated that the school was a limited nonpublic forum, open only for designated purposes and able to "remain non-public except as to specified uses." Id. at 2145. The church argued that the school was open for a wide variety of uses and therefore was "subject to the same constitutional limitations" as public forums. Id. at 2146. Without resolving the argument, the Court reiterated
Center Moriches School District (the District) adopted rules governing the use of school facilities by outside groups in which Rule 10 permitted groups to use school facilities for social, civic, and recreational purposes. Rule 7, however, prohibited the use of school facilities for religious purposes. Based on Rule 7, the District denied petitioner’s request to use school facilities to show a film about child rearing because petitioner was an evangelical church and its film had a religious slant.

The Supreme Court stated the test for access to a non-public forum: “The government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.” The Court held that Rule 7 was “unconstitutionally applied in this case” because the proposed film dealt with child rearing, an otherwise includible subject, but its showing was denied solely because of its religious slant.

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the Court considered whether certain ordinances passed by the City of Hialeah violated the Free Exercise Clause of the First Amendment. Out of concern for public health and safety, the ordinances restricted its rule that “control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”

28. Id. at 2144.
29. Id.
30. Id. at 2144-45.
31. Id. at 2147 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
32. Id. The Court did not consider whether Rule 7 is facially invalid because the resolution of that issue was not necessary to its decision. Id. at 2147 n.6.
33. Id. at 2147. Justice Scalia, joined by Justice Thomas, concurred in the judgment, but took issue with the majority’s observation that its holding was consistent with Lemon. Id. at 2148, 2149 (Scalia, J., concurring). Justice Scalia argued that the Court should abandon Lemon. Id. at 2149-50. He asserted that in the past the Court has invoked or ignored the Lemon analysis depending on the desired result in the case. Id. at 2150. This inconsistent application, he noted, has produced an “Establishment Clause geometry of crooked lines and wavering shapes.” Id.

Justice O’Connor later echoed Justice Scalia’s call for the abandonment of Lemon in Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994). She observed that “the slide away from Lemon’s unitary approach is well under way.” Id. at 2500 (O’Connor, J., concurring). In her estimation, Lemon’s three-pronged analysis is too rigid to cover the variety of Establishment Clause issues confronted by the Court. Id. To replace Lemon, Justice O’Connor suggested that the Court adopt several tests which cover “narrower and more homogeneous area[s]” of the law. Id. Having multiple tests, she argued, would allow the Court to “pay attention to the specific nuances of each area” of law and might result in “more consensus on each of the narrow tests than there has been on a broad test.” Id.
34. 113 S. Ct. 2217 (1993).
35. See supra note 11.
the slaughter or ritual sacrifice of animals—a devotional practice of the Santeria religion. The Court invalidated the ordinances because it concluded that "suppression of the central element of the Santeria worship service was the object of the ordinances," and the City failed to demonstrate that there was a compelling state interest involved and that the ordinances were narrowly drawn to protect that interest.

The Court concluded that although the government had a legitimate interest in protecting public health and preventing cruelty to animals, the City could have drawn the ordinances far more narrowly and avoided a complete prohibition of all Santeria sacrificial practices.

b. Retroactivity Analysis.—Over the past twenty-five years, the Court's approach to retroactivity of decisions has changed significantly.

36. Church of the Lukumi, 113 S. Ct. at 2222-23.
37. Id. at 2227. The Court's Free Exercise Clause cases indicate that "a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Id. at 2226 (citation omitted). However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id.
38. Id. at 2229.
39. There are three ways in which a court may apply its holding.

First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed . . . . This practice is overwhelmingly the norm and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law . . . .

Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision . . . .

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement.

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535-37 (1991) (plurality opinion) (citations omitted). The third method is called modified, or selective, prospectivity. Id. at 537.

Critics of prospective decision-making have attacked its validity on various grounds. Justice Blackmun, concurring in Beam, stated:

The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and to apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a Government of limited powers.

Id. at 547 (Blackmun, J., concurring). He also noted that applying new rules selectively would result in treating similarly situated litigants differently. Id. Similarly, Justice Scalia has charged that prospective rule-making is inconsistent with common-law traditions: "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (1993) (Scalia, J., concurring) (citation omitted).
In *Chevron Oil Co. v. Huson*, the Court recognized that in certain situations a court may apply its ruling on a purely prospective basis.

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that “we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” Finally, we have weighed the inequity imposed by retroactive application, for “[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.”

In *American Trucking Ass’ns v. Smith*, a plurality reaffirmed the validity of *Chevron Oil* in civil cases. However, a four-Justice dissent vigorously argued against prospective rule-making, stating that the Court lacks constitutional authority “to disregard current law or to treat similarly situated litigants differently.”

One year later in *James B. Beam Distilling Co. v. Georgia*, the Court signalled a change in retroactivity analysis. In *Beam*, the petitioners challenged the constitutionality of a Georgia liquor tax based on the Court’s decision in *Bacchus Imports, Ltd. v. Dias*. The Supreme Court of Georgia invalidated the tax statute but applied its ruling on a prospective basis under the *Chevron Oil* analysis. Justice Souter’s opin-

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In contrast, supporters of prospective rule-making have defended it based on fairness and respect for stare decisis. Justice O’Connor noted in *American Trucking Ass’ns v. Smith*, 496 U.S. 167, 191 (1990) (plurality opinion), that the Court usually decides that a decision should be applied prospectively when it has determined that retroactive application “would have a harsh and disruptive effect on those who relied on prior law.” *Id.* at 191.

41. *Id.* at 105-06.
42. *Id.* at 106-07 (citations omitted).
43. 496 U.S. 167 (1990) (plurality opinion).
44. *Id.* at 178.
45. *Id.* at 214 (Stevens, J., dissenting).
47. 468 U.S. 263 (1984). *Bacchus* held that a Hawaii statute which distinguished between imported and local alcoholic beverages violated the Commerce Clause. *Id.* at 273.
ion, which reversed the judgment of the Supreme Court of Georgia, did not command a majority. However, he and five other Justices agreed that the holding in Bacchus should control the decision in Beam.

In Harper v. Virginia Department of Taxation, the Court adopted the position of the six Justices in Beam with respect to selective prospectivity. Petitioners sought Virginia state tax refunds based on the Court’s decision in Davis v. Michigan Department of Treasury. The Supreme Court of Virginia denied the refunds because it determined that Davis should apply prospectively under the three-pronged Chevron Oil test. The Court reversed, holding that

[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper explicitly banned selective prospectivity; moreover, dicta in the majority opinion suggested that pure prospectivity may be improper

49. Id. at 544-49. Justice Souter determined that the Bacchus Court had followed the general rule of applying its decision retroactively to the parties before it. Id. at 539. Therefore, he reasoned, the decision of the Supreme Court of Georgia should apply to the similarly situated petitioners in Beam: “[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.” Id. at 544. Justice White agreed with Justice Souter’s analysis, but concurred separately to dispel any doubt as to the propriety of selective prospectivity. Id. at 545-46 (White, J., concurring). Justice Blackmun, joined by Justices Marshall and Scalia, concurred in the judgment, arguing that “prospectivity, whether ‘selective’ or ‘pure,’ breaches our obligation to discharge our constitutional function.” Id. at 548 (Blackmun, J., concurring). In a separate concurrence, Justice Scalia asserted that both “selective prospectivity” and “pure prospectivity” are beyond the power of the Court because they “alter in a fundamental way the assigned balance of responsibility and power among the three branches [of government].” Id. at 549 (Scalia, J., concurring). Thus three Justices concluded that only selective prospectivity should be eliminated, while three other Justices determined that all prospective rule-making should be abolished.

50. 113 S. Ct. 2510 (1993).

51. Id. at 2517.

52. 489 U.S. 803 (1989). Under Davis, “a State violates the constitutional doctrine of inter-governmental tax immunity when it taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions.” Harper, 113 S. Ct. at 2513.


54. Id. at 2517. The Court in Davis had also applied its decision retroactively to the parties before it. Id. at 2518.
The Court stated that "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions for near a thousand years.'"56

3. The Court's Reasoning.—In Fairfax Covenant, the Fourth Circuit retroactively applied its decision that the school board's regulation violated the Church's freedom of speech and freedom of religion.57 The opinion first addressed the freedom of speech question. The court noted that the School Board had created a public forum by allowing diverse groups access to school facilities.58 In finding the circumstances indistinguishable from those of the Widmar decision, the Fairfax Covenant court held that Regulation 8420 violated the Church's freedom of speech.59 The court rejected the School Board's argument that charging churches below-market rental rates would violate the Establishment Clause, noting the lack of evidence that the Church would dominate the school forum.60 The court also found that the cost-recovering rent served to offset ongoing expenses for school facilities rather than to subsidize the Church.61 Further, the court determined that there was no evidence that the public forum was interpreted by the community as a religious endorsement by the School Board.62 Using the Lemon analysis,63 the School Board failed to show an Establishment Clause violation.64 Similarly, under Widmar there was no compelling state interest shown to justify Regulation 8420's discrimination against churches.65 The court also determined that Regulation 8420 interfered with the Church's first amendment right to free exercise of religion.66

Finally, the court determined that the district court should have applied its decision retroactively.67 While unsure of the vitality of

55. In her dissenting opinion, Justice O'Connor noted that "[r]ather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well." Id. at 2527 (O'Connor, J., dissenting).
56. Id. at 2516 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).
57. Fairfax Covenant, 17 F.3d at 707, 711.
58. Id. at 706.
59. Id. at 707; see supra notes 23-25 and accompanying text.
60. Fairfax Covenant, 17 F.3d at 708.
61. Id.
62. Id. at 709.
63. See supra note 17 and accompanying text.
64. Fairfax Covenant, 17 F.3d at 708.
65. Id. at 707.
66. Id.; see supra note 11.
67. Fairfax Covenant, 17 F.3d at 711.
Chevron Oil in light of Beam and Harper, the court concluded that its decision should apply retroactively to the parties before it even under the more demanding Chevron Oil analysis because the record did not satisfy Chevron Oil's three-pronged test for prospectivity. The court stated that Widmar did not establish new law and found that in light of the School Board's $850 million annual operating budget, the potential award to the Church was not "so substantial as to fall under the inequitable-result exception in Chevron." The School Board's "good faith" attempt to comply with the Establishment Clause was, moreover, irrelevant to a Chevron Oil equity analysis. The court noted that defenses such as laches and limitations would limit the damage award and "offset any inequity arising from the fact that Fairfax Covenant Church waited 11 years to file suit."

4. Analysis.—

a. Extending the Scope of Widmar.—In Fairfax Covenant, the Fourth Circuit invalidated a school board regulation that charged churches a higher rent than other nonprofit organizations because the regulation violated the Church's freedom of speech and freedom of religion. The court's decision represents a logical application of First Amendment law governing open forums. In Widmar, the Court struck down a state university regulation that barred speakers and student groups from using an open forum based on the religious content of their speech because the state failed to show a compelling interest to justify the exclusion. Several federal courts have applied Widmar to invalidate school district rules that prohibit groups from using school facilities based on the religious content of their speech. Until Fairfax Covenant, no federal court had

68. See supra notes 40-56 and accompanying text.
69. Fairfax Covenant, 17 F.3d at 710; see supra note 42 and accompanying text.
70. Fairfax Covenant, 17 F.3d at 710.
71. Id. The Church claimed approximately $280,000 in damages.
72. Id. The court explained that good faith is only "relevant when the elements of a cause of action, or where a defense to it, depend on the defendant's state of mind . . . . But in the circumstances here, whether the defendant acted in good faith is irrelevant and barely contributes to any possibility of an inequity." Id.
73. Id. at 711. Laches is defined as "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as a bar in a court of equity." Black's Law Dictionary 875 (6th ed. 1990) (citation omitted).
74. Fairfax Covenant, 17 F.3d at 707.
yet considered whether the requirement of churches to pay a higher rent than other nonprofit organizations violates the principles of **Widmar**.

The Supreme Court's decision in **Widmar** supports the Fourth Circuit's determination that a state must show a compelling interest to justify charging churches a higher rent than other nonprofit organizations. Although **Widmar** directly addressed whether a state university could exclude religious speakers from an open forum, the Court generally referred to the university's policy as discriminatory: "Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[^77] Thus, the Court did not limit its reasoning to the total exclusion of religious groups from an open forum. Instead, the Court required the state to show a compelling interest to justify its discrimination against religious speakers in an open forum.[^78]

In **Fairfax Covenant**, the School Board did not prohibit the Church from using its facilities, but Regulation 8420 required churches to pay a higher rent than other nonprofit organizations.[^79] Because the **Widmar** Court indicated that a state may not discriminate against religious speakers in an open forum absent a compelling interest, the Fourth Circuit properly required the School Board to show a compelling state interest to justify charging the Church higher rent.[^80] The court then correctly determined that the School Board failed to show such a compelling state interest to justify its policy of discrimination against churches.[^81]

Pursuant to **Widmar**, a state actor claiming that discrimination against a religious group in an open forum is necessary to avoid offending the Establishment Clause must show an actual Establishment Clause violation under the **Lemon** analysis.[^82] In essence, the state actor must show that the open forum will advance the practice of religion because the religious group will dominate the forum.[^83]

The record in **Fairfax Covenant** indicates that there was no danger that the Church's use of the School Board's facilities at a reduced rent would advance the practice of religion. As in **Widmar**, "the forum [was] available to a broad class of nonreligious as well as religious

[^77]: Widmar, 454 U.S. at 269 (emphasis added).
[^78]: Id. at 269-70.
[^79]: Fairfax Covenant, 17 F.3d at 705.
[^80]: Id. at 706.
[^81]: Id. at 707.
[^82]: See supra note 17 and accompanying text.
[^83]: See supra note 25 and accompanying text.
speakers." Therefore, the Church did not "dominate" the open forum. In addition, there was no evidence that the community interpreted the Church's use of the School Board's facilities as "a religious endorsement by the School Board." Finally, the below-market rent did not constitute a subsidy because churches were charged the same amount as other nonprofit organizations, and the amounts were used by the School Board to maintain school facilities.

b. A Request for Guidance.—Although the Fairfax Covenant court applied its decision retroactively based on Chevron Oil, much of the opinion focused on whether a federal court still may decide cases on a purely prospective basis. Judge Niemeyer acknowledged that the "precise issue" in Harper v. Virginia Department of Taxation was the propriety of selective prospectivity. He observed that strong dicta in Harper appears to disapprove of pure prospectivity as well and reasoned that "[i]t might not be reading too much into Harper and Beam if we were to conclude that Chevron, adopting the test for determining when cases may be enforced prospectively, has lost all vitality." Yet the court felt constrained to decide Fairfax Covenant under the established three-pronged nonretroactivity analysis because Harper did not expressly overrule Chevron Oil.

The Fourth Circuit's discussion of pure prospectivity in Fairfax Covenant essentially represents a plea to the Supreme Court for a definitive ruling on the issue. Although the court questioned Chevron

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84. Widmar v. Vincent, 454 U.S. 263, 274 (1981); see supra note 5.
85. See supra note 25 and accompanying text.
86. Fairfax Covenant, 17 F.3d at 709.
87. Id. at 708.
88. Chevron Oil Co. v. Huson, 409 U.S. 97 (1971); see supra notes 40-42 and accompanying text.
89. Fairfax Covenant, 17 F.3d at 710.
90. 119 S. Ct. 2510 (1993); see supra notes 50-56 and accompanying text.
91. Fairfax Covenant, 17 F.3d at 710; see supra note 54 and accompanying text.
92. Fairfax Covenant, 17 F.3d at 710.
93. Id.; see supra notes 55-56 and accompanying text.
94. Id. The Eleventh Circuit reached the same conclusion in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). To determine whether to apply its holding prospectively, the court stated that

Beam and Harper stand only for the proposition that, once a rule of federal law is applied to the parties in the case in which it was announced, it must be applied retroactively. Neither decision directly addresses whether a newly announced decision need be applied to the parties in the instant case. Thus, the Beam and Harper Courts did not overrule Chevron Oil's three-factor test. . . . [W]e therefore look to Chevron Oil itself for our standard concerning retroactivity.

Id. at 1566 (citations omitted).
Oil’s continued “vitality,” the Fourth Circuit will continue to apply the Chevron Oil analysis in situations where purely prospective rule-making may be appropriate.

5. Conclusion.—In Fairfax Covenant, the Fourth Circuit affirmed the district court’s determination that the School District’s Regulation 8420 violated the Church’s freedom of speech and freedom of religion. However, the court concluded that the district court erred in not applying its decision retroactively.

The reasoning used by the Fairfax Covenant court, however, may not remain valid for long. If the Court abandons the Lemon test as suggested by Justice Scalia and Justice O’Connor, Widmar’s analysis for content-based discrimination in public forums will have to be reconsidered. Similarly, if the Court follows the dicta in Harper concerning retroactivity of decisions, Chevron Oil’s test for purely prospective rule-making may be eliminated. Thus, litigants soon may be faced with new analyses for Establishment Clause violations, open forums, and retroactivity of decisions.

KEVIN M. ROBERTSON

G. Stricter Procedural Safeguards Required for Adult Bookstore Zoning Ordinances

In 11126 Baltimore Boulevard, Inc. v. Prince George’s County, the United States Court of Appeals for the Fourth Circuit struck down a Prince George’s County zoning ordinance that regulated adult bookstores on the grounds that it lacked the constitutional safeguards required by Freedman v. Maryland and FW/PBS, Inc. v. City of Dallas. Under the ordinance, an adult bookstore seeking a special exception to the zoning law would “face at least an eight-month delay from the date the application is filed to a judicial resolution of the application.”

95. Fairfax Covenant, 17 F.3d at 710.
1. 32 F.3d 109 (4th Cir. 1994), vacated and reh’g granted (4th Cir. Nov. 2, 1994).
2. 380 U.S. 51, 58 (1965) (articulating a three-prong test to determine whether procedural safeguards exist to protect movie theaters against impermissible censorship by state authorities); see infra notes 32-38 and accompanying text.
3. 493 U.S. 215 (1990) (plurality opinion). 11126 Baltimore Boulevard is the first case in which the Fourth Circuit has addressed the mandate of FW/PBS. In FW/PBS, the Supreme Court stated that the procedural safeguards in Freedman apply to adult bookstore regulations. See infra notes 57-64 and accompanying text.
4. See 11126 Baltimore Boulevard, 32 F.3d at 112 & nn.1-3.
5. Id. at 117.
Unable to judge whether the ordinance on its face provided the necessary constitutional safeguards, the court examined comparable ordinances in other jurisdictions and found that the delay was not a brief specified period. As such, the ordinance operated as an unconstitutional prior restraint on protected speech. The court also concluded that because Maryland procedures provide for a three and one-half month time period to reach a judicial decision, the appellant was denied prompt judicial review. Although the court determined that the ordinance lacked valid procedures to safeguard protected speech, the court's opinion failed to specify standards that would generally determine whether a given time limit is unconstitutional.

1. The Case.—In 1986, 11126 Baltimore Boulevard, Inc. (Warwick Books) filed an action (Warwick I) in the United States District Court for the District of Maryland that sought to declare a Prince George's County's adult bookstore zoning ordinance violative of the First and Fourteenth Amendments to the United States Constitution. The trial court struck down the ordinance on two grounds. First, the county's adult bookstore zoning provisions, which would effectively ban the operations of adult bookstores, lacked sufficient evidence to support the interests advanced by the county. Second, the special exception provisions in the ordinance, which required a lengthy and difficult process before an operating permit would be issued, were invalid because they granted zoning officials too much discretion. The Fourth Circuit disagreed on both grounds and reversed. Warwick Books appealed, and the Supreme Court vacated and remanded for further consideration in light of its recent holding.

6. Id. at 115-16.
7. Id. at 116-17.
8. Id. at 117.
9. The court observed that “hardship” may be a factor for consideration. Id. at 116. The opinion, however, gave no further guidance on how such hardship relates to constitutionality of the time limits at issue.
10. The parties to the instant action have battled each other in the courts for more than a decade. Warwick Books was first issued a use and occupancy permit for the adult bookstore in June 1975. In the 1980s, the Prince George's County zoning laws became increasingly restrictive with respect to adult bookstores. Warwick Books commenced action to invalidate the new regulations and to secure its right to operate in the county. See 11126 Baltimore Boulevard, Inc. v. Prince George's County, 886 F.2d 1415, 1417-18 (4th Cir. 1989), vacated and remanded, 496 U.S. 901 (1990), dismissed, 924 F.2d 557 (4th Cir.), cert. denied, 112 S. Ct. 76 (1991).
13. Id.
14. 11126 Baltimore Boulevard, 886 F.2d at 1429.
in *FW/PBS, Inc. v. City of Dallas.* Before the case was heard on remand, however, the Prince George's County Council amended the zoning ordinance to conform with the district court's earlier decision. Concluding that the county was asking for an advisory opinion, the Fourth Circuit dismissed the appeal and remanded to the district court with instructions to dismiss.

Following that dismissal, Prince George's County further amended its ordinance, to prohibit any adult bookstore from operation within the county unless it obtained a special exception, in addition to any other applicable requirements in the County Code.

Section 27-904.01 of the Prince George's County Code specifies the time schedule for a special exception application. Although the ordinance itself does not provide for judicial review, the administrative judge of the Circuit Court for Prince George's County issued an administrative order which stated that when a case is filed it shall be assigned to a specific judge who will hear oral argument no later than five days after the date for filing a reply memorandum under Maryland Rules, and render a decision within five days after the conclusion of the hearing.

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16. 11126 Baltimore Boulevard, Inc. v. Prince George's County, 924 F.2d 557 (4th Cir.) (per curiam) (noting that during oral argument counsel for Prince George's County advised the court that the county council had amended the zoning regulations to comply with the district court's ruling), *cert denied,* 112 S. Ct. 76 (1991).

17. *Id.* at 558.

18. *11126 Baltimore Boulevard,* 92 F.3d at 112.

19. See [PRINCE GEORGE'S COUNTY, Md., CODE § 27-904.01 (Supp. 1992).] Subsection (b) provides that "[t]he Technical Staff . . . shall render a decision on whether to accept an application within three (3) working days of receipt" of a completely and properly filled out application. *Id.* Subsection (d) requires that "[w]ithin forty-five (45) days from the date an application is accepted, the Technical Staff shall issue a written report . . . for review and consideration by the Zoning Hearing Examiner." *Id.* Subsection (e) dictates that a hearing on the Special Exception application "shall be scheduled before the Zoning Hearing Examiner and publication of the hearing . . . [and] shall take place within forty-five (45) days from the date the application is accepted." *Id.* Subsection (f) states that "[t]he Zoning Hearing Examiner shall issue its written decision within ninety (90) days from the date the application is accepted." *Id.* Subsection (g) allows a Notice of Appeal of the Zoning Hearing Examiner's written decision to the District Council to be filed within "one hundred five (105) days from the date the application is accepted." *Id.* According to subsection (h), upon receiving timely notice of appeal, "the District Council shall conduct an oral argument within one hundred thirty-five (185) days from the date the application is accepted." *Id.* Subsection (i) provides that "a decision on appeal shall be rendered by the District Council no later than one hundred fifty (150) days from the date the application for a Special Exception is accepted." *Id.*
of oral argument. These time limitations may be extended only with the consent of the parties.

Warwick Books contended that the new provisions of the County Code violated the First and Fourteenth Amendments and brought a second suit (Warwick II) in federal district court pursuant to 42 U.S.C. § 1983. The district court entered summary judgment for the county. On appeal, the Fourth Circuit found that the 150-day minimum time period between the filing of the application and judicial resolution was not a brief specified period as required under FW/PBS to "guard against the abridgment of protected speech." In this context, the court held that "the Prince George's County adult bookstore ordinance is an unconstitutional prior restraint on protected speech." The court later vacated its judgment and granted a petition for a rehearing en banc.

2. Legal Background.—

a. Developing Procedural Safeguards for Protected Expression.—In Near v. Minnesota, the Supreme Court sought to balance freedom of individual expression with protections for the general welfare. After it examined a state statute, which regulated the content of a newspaper, the Court noted that "[i]t is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action." This liberty, however, is offset by "the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people."

As a procedural matter, the Due Process Clause "require[s] that the government not restrict a specific individual's freedom to exercise a fundamental constitutional right without a process to determine the

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21. Id.
23. Id. at 376.
24. 11126 Baltimore Boulevard, 32 F.3d at 117.
25. Id.
27. 283 U.S. 697 (1931).
28. See id. at 707-23.
29. Id. at 707.
30. Id.
basis for the restriction.” Procedural safeguards against unconstitutional censorship were established in *Freedman v. Maryland*, in which a theater owner had been convicted of showing a film without prior approval of the Maryland State Board of Censors. In *Freedman*, the Supreme Court articulated a three-prong test to determine whether a law contains sufficient safeguards to “obviate the dangers of a censorship system.” The first prong of the test requires that “the burden of proving that the film is unprotected expression must rest on the censor.” Second, the censor must, “within a specified brief period, either issue a license or go to court to restrain showing the film.” Any restraint prior to a final judicial determination on the merits “must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.” Third, the procedure must assure a “prompt final judicial decision.”

**b. Evolution of the Supreme Court’s Jurisprudence After Freedman.**—In *Teitel Film Corp. v. Cusack*, the Supreme Court elaborated its meaning of “specified brief time period” as articulated in *Freedman*. The Court ruled that a fifty to fifty-seven day period necessary to complete an administrative review before the initiation of judicial proceedings was not a “specified brief period.” The Court also found the disputed ordinance unconstitutional because it lacked any provision for a prompt judicial decision by the trial court.

33. Id. at 52. The Maryland Court of Appeals upheld the conviction despite the state’s concession that the film “would have received a license if properly submitted.” Id. at 52-53.
34. Id. at 58.
35. Id.
36. Id. at 59. The Court required a judicial review “because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, . . . [and] suffices to impose a valid final restraint.” Id. at 58; see also Blount v. Rizzi, 400 U.S. 410, 419 (1971) (noting only the judiciary possesses the necessary independence to review constitutionally protected expression fairly).
38. Id.
40. Id. at 141 (quoting *Freedman*, 380 U.S. at 58-59). In *Teitel Film*, an ordinance prohibited the exhibition, in any public place, of any motion picture without first securing a permit from the police superintendent. Id. at 140. The administrative process of appealing a permit denial took 50 to 57 days before the initiation of judicial review. Id. at 141.
41. Id. at 141-42.
42. Id. at 142.
In *Blount v. Rizzi*, the lack of adequate procedural safeguards rendered invalid a federal statute designed to deny use of the mail for commercial distribution of obscene literature. Under the statute, the General Counsel of the Post Office could begin administrative proceedings to withhold mail and refuse to honor money orders from any person upon evidence satisfactory to the Postmaster General that the person used the mails to distribute obscene matter. The Postmaster General could then obtain a court order to detain an individual's incoming mail pending the conclusion of proceedings. Those persons or businesses whose mail was withheld could "'only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by [their] own initiative.'" The fatal flaw of this procedure was that it failed "'to require that the Postmaster General obtain a prompt judicial determination of the obscenity of the material.'"

The Supreme Court took yet a closer look at the time requirements of anti-obscenity statutes in *United States v. Thirty-Seven Photographs*. Pursuant to federal customs law, customs agents seized thirty-seven photographs belonging to the claimant when he returned to the United States from Europe. As enacted, the statute did not contain explicit time limits necessary to comport with *Freedman*, *Teitel*, and *Blount*. To avoid a constitutional question, the Court looked to the legislative history of the statute to determine what time limits, if any, might apply. The Court found that "'fidelity to Congress' purpose" dictated an interpretation of explicit time limits in the statute. For purposes of examining goods imported into the United States, the Court determined that the forfeiture proceedings must be commenced within fourteen days of seizure and completed within sixty

43. 400 U.S. 410 (1971).
44. Id. at 417.
45. Id. at 412.
46. Id. at 419-14.
48. *Blount*, 400 U.S. at 418. The statute failed the *Freedman* requirements in two respects: there was no requirement that judicial determination be prompt, and the burden of seeking judicial review fell on the individual, not the government.
52. Id. at 368.
53. Id. at 369-72.
54. Id. at 372.
days of commencement.\textsuperscript{55} The Court noted, finally, that "constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements."\textsuperscript{56}

In \textit{FW/PBS, Inc. v. City of Dallas},\textsuperscript{57} the Supreme Court considered whether a Dallas licensing scheme to regulate sexually oriented businesses was a prior restraint that lacked the procedural safeguards required by \textit{Freedman}.\textsuperscript{58} The scheme incorporated a combination of zoning restrictions, licensing regulations, and inspections.\textsuperscript{59} In a plurality opinion, three Justices found that the scheme failed to satisfy the "specified brief period" of restraint prior to judicial review, nor did it offer the applicant an "expeditious judicial review" of an adverse decision.\textsuperscript{60} The plurality concluded, however, that the first prong of the \textit{Freedman} test—the censor must bear the burden of going to court and bear the burden of proof once in court—is not required where the license is the key to the maintenance of the applicant's business.\textsuperscript{61} The plurality reasoned that such an applicant would have "every incentive" to pursue a license denial through court.\textsuperscript{62} In a separate opinion concurring in the judgment, three other Justices stated that all three of the \textit{Freedman} safeguards applied to invalidate the scheme.\textsuperscript{63} In dissent, Justice White and Chief Justice Rehnquist interpreted the licensing scheme as a content-neutral time, place and manner restriction, and would have held that none of the \textit{Freedman} procedural safeguards were needed.\textsuperscript{64}

3. \textit{The Court's Reasoning}.—

\textbf{a. Time Period Requirements.}—In \textit{11125 Baltimore Boulevard}, the court observed that, "no clear guideposts mark [its] way in determining whether the 150-day time period for decision established in the Prince George's County adult bookstore ordinance constitutes a
specified brief period.' In regard to the reasonableness of the time period, the court mentioned that the prohibition against operating during the application process imposes a hardship on Warwick Books, but declined to explain the degree to which constitutionally required time limits might differ if no such hardship were imposed. The court rejected Warwick Books' assertion that Teitel Film Corp. v. Cusack should be read as establishing a bright-line rule that a 50-day period for an administrative decision fails the Freedman requirement. Instead, the court noted that the "core policy underlying Freedman is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." The court further explained that the "reasonableness of the time period during which a restraint on speech may operate prior to judicial review 'may vary in different contexts.'"70

Because Prince George's County did not "provide any evidence to support a conclusion that 150 days is the most reasonably prompt time frame within which a decision can be made" the court looked at "schemes devised and time limitations imposed by other jurisdictions to remedy the perceived evils occasioned by adult bookstores." The court found that several jurisdictions have held that appropriate inquiries may reasonably be performed in less than the 150-day period imposed by Prince George's County. On this basis, the court concluded that the 150-day time period for was not the shortest time period in which an administrative decision reasonably could be completed.

65. 11126 Baltimore Boulevard, 32 F.3d at 115 (quoting Freedman v. Maryland, 380 U.S. 51, 59 (1965)).
66. Id. at 116.
67. 390 U.S. 139 (1968); see supra notes 39-42 and accompanying text.
68. 11126 Baltimore Boulevard, 32 F.3d at 115.
69. Id. (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228 (1990)).
70. Id. (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971)).
71. Id. The court noted that "[u]nder Maryland case law a county's decision pertaining to a special exception application is to be supported by competent material and substantial evidence in the record." 11126 Baltimore Boulevard, Inc. v. Prince George's County, 886 F.2d 1415, 1427 (4th Cir. 1989).
72. 11126 Baltimore Boulevard, 32 F.3d at 115-16; see, e.g., TK's Video, Inc. v. Denton County, 24 F.3d 705, 708 (5th Cir. 1994) (holding sixty days to act on license applications imposes no undue burden); Chesapeake B & M, Inc. v. Harford County, 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (holding that a 44-day administrative time schedule is reasonable); Wolff v. City of Monticello, 803 F. Supp. 1568, 1574 (D. Minn. 1992) (finding that a 90-day time period for decision on adult bookstore license application was not per se unreasonable).
73. 11126 Baltimore Boulevard, 32 F.3d at 115.
74. Id. at 116.
b. Judicial Review.—With respect to Warwick Books' assertion that the ordinance failed to assure prompt judicial review of an administrative denial, the court noted that 110 days typically would be required in Maryland to obtain a judicial ruling after a denial. The court declared that, "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to . . . the shortest fixed period compatible with sound judicial resolution." After a comparison of the Prince George's County provisions with those in other jurisdictions, the court concluded that the ordinance did not ensure sufficiently prompt judicial review.

4. Analysis.—When Warwick I reached the Fourth Circuit, the standards set forth in Freedman had not yet been applied to the licensing of adult bookstores. In the instant case (Warwick II), the Fourth Circuit faced for the first time the issue of defining the nebulous phrases "specified brief period" and "prompt judicial review" with respect to the licensing of adult bookstores.

   a. Delineating a "Specified Brief Period."—In FW/PBS, Inc. v. City of Dallas, the Supreme Court affirmed the notion that at least two prongs of the Freedman test apply to the licensing of sex-oriented businesses, but failed to provide any standards for what constitutes a

75. Id. at 116-17.
76. Id. at 117.
77. Id. at 116 (quoting Freedman v. Maryland, 380 U.S. 51, 59 (1965)) (emphasis added).
78. Id. at 117.
79. Id. at 117. Under the current Maryland Rules of Procedure, there is a three and one-half month time frame for judicial decision. Id.; see Md. R. B4 & B7 (1993). The court pointed out that although the county has no control over the time limitations imposed by the Maryland Rules, it may impose upon itself more limited time restraints for filing the administrative record, responsive pleadings and memoranda than is required by the Maryland Rules. 11126 Baltimore Boulevard, 32 F.3d at 117 n.12.
80. Neither the district court nor the Fourth Circuit mentioned Freedman in their opinions in Warwick I, see supra notes 10-17 and accompanying text, although several Supreme Court decisions had, by that time, extended Freedman beyond the context of movie pictures. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (reaffirming Freedman's procedural safeguards as applied to regulations of use of a public theater); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (upholding a statute permitting customs agents to seize allegedly obscene material because statute could be construed as complying with Freedman time limits); Blount v. Rizzi, 400 U.S. 410 (1971) (requiring regulations regarding postal inspectors' seizing mail to satisfy the procedural safeguards set forth in Freedman).
81. 11126 Baltimore Boulevard, 32 F.3d at 115-16.
83. See supra notes 60-63 and accompanying text.
"specified brief period." The only guidance given was the vague directive that "[t]he core policy underlying Freedman is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech."

As such, a determination of the reasonableness of the time period would sensibly "require[ ] an examination of the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." Yet, the Fourth Circuit's decision in Warwick II identified no objective criteria by which legislatures might measure the constitutionality of a proposed statute. The court simply compared the time limits in the ordinance to those of other jurisdictions as a measure of its constitutionality. Such a comparative approach would seem to offer a dubious yardstick. Indeed, the court stated, "zoning decisions necessarily involve a detailed examination of numerous factors." With no specified basis to determine the reasonableness of review the time period, the court evasively concluded that "[c]omparison of schemes devised and time limitations imposed by other jurisdictions to remedy the perceived evils occasioned by adult bookstores discloses that the necessary inquiries may be performed in a shorter time frame than that imposed by Prince George's County."

As Justice Black stated in his dissent to Thirty-Seven Photographs, it is "peculiar and disturbing" to derive rules for the determination of the constitutionality of a statute by "surveying previously litigated cases and then guessing what limits would not pose an undue hardship."

84. FW/PBS, 493 U.S. at 228. The difficulty with the statute in FW/PBS was that an applicant had to obtain the approval of the health department, fire department, and the building official before a license could be issued, and there were no time limits in the statute that set forth when those approvals or denials had to be made. Id. at 227.

85. Id. at 228.

86. 11126 Baltimore Boulevard, 32 F.3d at 115.

87. Appellee's brief, for example, included no discussion of what procedural steps it takes and how much time each step requires in the issuance of a license. To show that the 150-day limit was reasonable, the brief relied on the Warwick I decision which found that six months was a reasonable time period, and therefore the five-month (150-day) limit must also be reasonable. Brief for Appellee at 7-8, 11126 Baltimore Boulevard (No. 93-2151).

88. 11126 Baltimore Boulevard, 32 F.3d at 115-16.

89. Id. at 115.

90. Id.

91. United States v. Thirty-Seven Photographs, 402 U.S. 363, 387 (1971) (Black, J., dissenting) (citations omitted). Justice Black's point is particularly applicable to zoning ordinances in view of the Supreme Court's recognition that, with regard to regulation of potentially First Amendment-protected speech, "constitutionally permissible limits may vary in different contexts." Id. at 374.
The determination of the reasonableness of the time period by comparison with other jurisdictions should not be the only barometer of constitutionality. It is an affront to state sovereignty for the constitutionality of a state's laws to be judged solely by what other jurisdictions found reasonable in their opinion. One possible method to ascertain whether a time limit on zoning applications is reasonable would be to place the burden on the government to introduce evidence as to the reasonableness of the time limits. As the regulating entity, the government is certainly in a better position to provide such evidence than licensing applicants. The applicant would then have the burden of proving that the government's data is inaccurate or that the method of application review is unnecessarily inefficient. Time limits imposed in other jurisdictions could then be used to assess the factual accuracy of the government's assertions, but not as an independent barometer of the constitutionality of the statute.

b. Prompt Judicial Review of Administrative Denial.—The Freedman test, as extended to adult bookstore regulations by FW/PBS, requires that there be “an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial.” This requirement followed the decision in Southeastern Promotions, Ltd. v. Conrad, in which the Supreme Court held that a public theater's standard to determine which shows may be performed “must be implemented under a system that assures prompt judicial review.” In Warwick II, the Fourth Circuit interpreted this prong of the Freedman test to require not only prompt judicial review, but also prompt judicial decision. The court concluded that the “three and one-half

92. This process could be administered in either of two ways. Evidence could be introduced regarding how long other types of zoning applications in that jurisdiction reasonably take to process. Presumably, a county or state would not slow down all zoning decisions as a means of restricting adult bookstores. Alternatively, the government could itemize the required administrative tasks and then approximate the time necessary to expedite each task. Either of these methods would give courts a sound factual basis on which to make a decision as to the reasonableness of the time limit imposed by the statute in question.

93. This process would not create an additional burden in Maryland because “[u]nder Maryland case law a county's decision pertaining to a special exception application is to be supported by competent material and substantial evidence in the record.” See 11126 Baltimore Boulevard, Inc. v. Prince George's County, 886 F.2d 1415, 1427 (4th Cir. 1989).


96. Id. at 562.

97. 11126 Baltimore Boulevard, Inc., 32 F.3d at 117. The Eleventh Circuit has also determined that the administrative procedures must specifically provide for prompt judicial review. See Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994).
month time frame for judicial decision under the present Maryland procedures" is not sufficiently prompt. To reach this result, the court compared the provisions of the county ordinance to similar regulations that the Supreme Court has considered. Again, the deficiencies of such a comparative method beg the question of finding a more reasoned standard.

At least two circuits have interpreted the prompt judicial review standard differently. The Fifth Circuit has understood FW/PBS to require only that the state "offer a fair opportunity to complete the administrative process and access the courts within a brief period." Taking a different approach, the Seventh Circuit observed that "it is not clear why the Court in Freedman set out the apparent requirement that an ordinance . . . explicitly provide for prompt judicial review. A person always has a judicial forum when his speech is allegedly infringed." The Seventh Circuit found that although the ordinance at issue contained no provisions for "expeditious judicial review," the state's common-law writ of certiorari would suffice. Because the Supreme Court has yet to clarify this issue, the true intent of the Court's requirement of prompt judicial review remains shrouded in uncertainty.

5. Conclusion.—In 11126 Baltimore Boulevard, the Fourth Circuit invalidated a county ordinance that regulated adult bookstores on grounds of excessive delay in administrative and judicial review of the licensing application. Although the court stated in its conclusion that "there is little authority to guide [its] decision," it failed to establish a standard that would guide future decision-makers as to what constitutes a "brief specified period" for an administrative review. The court likewise failed to specify what constitutes "prompt judicial review"

98. 11126 Baltimore Boulevard, 32 F.3d at 117.
99. Id. at 116. This comparison differs from the court’s treatment of a specified time period, where it compared the present facts to other federal district and circuit court decisions. See supra note 72.
100. TK's Video, Inc. v. Denton County, 24 F.3d 705, 709 (5th Cir. 1994). The Fifth Circuit noted that "a 'brief period' within which all judicial avenues are exhausted would be an oxymoron." Id. However, the regulation at issue in TK's Video did provide that the filing of a notice of appeal stays any administrative decision revoking or suspending a license. Id.
101. Graff v. City of Chicago, 9 F.3d 1309, 1324 (7th Cir. 1993) (reviewing an ordinance that required newsstand operators to acquire a permit or face eviction).
102. Id. at 1324-25.
103. 11126 Baltimore Boulevard, 32 F.3d at 117.
under *FW/PBS*,\textsuperscript{104} in terms that will inform legislatures of the parameters necessary to pass constitutional muster.

\textbf{ERICA M. STEINACKER}

\footnote{104. The only standard given in *FW/PBS* is that the license must be issued, or there must be a final judicial determination denying issuance, in a reasonable time period. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990).}
A. Confidential Maintenance of Unsubstantiated Child Abuse Investigation Reports and the Scope of Familial Privacy

In Hodge v. Jones, the United States Court of Appeals for the Fourth Circuit held that Maryland's confidential maintenance of a child abuse investigation report, after the parents had been cleared of the charges by the Department of Social Services (DSS), did not violate the parents' substantive due process right of familial privacy. The court stated that a mere allegation of reputational injury and the possibility of public disclosure of the confidential records did not implicate a constitutional privacy right. The court further concluded that Maryland's statutory scheme for the investigation of child abuse and neglect evidenced a proper concern with, and protection of, the parents' interest in privacy. Although the court's decision is consistent with Supreme Court jurisprudence confining familial privacy to governmental attempts to proscribe individual conduct or otherwise affect the parent-child relationship, the reasoning suggests that unwarranted disclosure of personal information could violate a constitutionally imposed duty of confidentiality.

1. The Case.—On January 20, 1989, David and Marsha Hodge took their three-month-old son, Joseph, to the Carroll County General Hospital for examination and treatment of his swollen right arm. After diagnosing the child's condition as a fractured ulna "without adequate historical explanation," the examining physician contacted the Carroll County Department of Social Services (CCDSS) to report suspected child abuse. An investigation by a Child Protective Services (CPS) caseworker and a Maryland state police officer ultimately yielded no evidence of abuse. The CPS caseworker filed a report with the CCDSS classifying the case as "ruled out" and "unsubstantiated."
Shortly thereafter, two specialists diagnosed the child’s condition as osteomyelitis, a bacterial bone infection, and performed the necessary corrective surgery. The Hodges informed the CCDSS of the corrected diagnosis. The CCDSS, however, denied the Hodges’ request for the full report of the incident, as well as their repeated requests for the destruction or expunction of any CCDSS file or document on the investigation. Each request was denied under Maryland’s statutory bar against disclosure of confidential materials and the CCDSS’s purported inability to expunge the file until 1994.

The CCDSS entered the Hodge investigation report into the Automated Master File (AMF), a computerized data base containing a record of every Maryland citizen who has received any services from a local Department of Social Services office. The AMF information is alpha-numerically coded. It is shielded by state law from disclosure to the general public.

The CCDSS’s continued refusal to disclose and expunge the investigation report prompted the Hodges to file a civil rights action in the United States District Court for the District of Maryland against

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9. Id. at 161.
10. Id.
11. Id.
13. Hodge, 31 F.3d at 161. At the time in question, the CCDSS was statutorily required to expunge "unsubstantiated" reports after five years if no further incidents involving the same alleged perpetrator were reported during that time. Id. at 161 n.3. The Hodge report, filed in January 1989, would have been expunged in January 1994. As of 1991, "ruled out" reports must be expunged within 120 days of the report’s filing. Md. Code Ann., Fam. Law § 5-707(b) (1991).
15. Id.
16. Id. Section 6 of Article 88A provides:

[It shall be unlawful for any person or persons to divulge or make known in any manner any information concerning any applicant for or recipient of social services, child welfare services, cash assistance, food stamps, or medical assistance, directly or indirectly derived from the records, papers, files, investigations or communications of the State, county or city, or subdivisions or agencies thereof, or acquired in the course of the performance of official duties.]

the CCDSS and various state officials. The complaint alleged a violation of the Hodges' liberty interest in familial privacy. The district court ruled that Maryland's maintenance of child abuse investigation reports after the parents have been cleared of the charges by the DSS violated the parents' substantive due process right to familial privacy and their procedural due process rights. The trial court rejected the defendant state officials' qualified immunity defense and granted interlocutory summary judgment to the Hodges on the issue of liability. The defendant state officials appealed the denial of their qualified immunity defense to the United States Court of Appeals for the Fourth Circuit.

2. Legal Background.—

a. The "Pre-Privacy" Cases.—The concept of familial privacy has evolved from a host of Supreme Court cases tracing their lineage from *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In *Meyer*, the


18. *Hodge*, 31 F.3d at 162.

19. Id. at 160. By comparing it to the protected liberty interest in personal privacy acknowledged by the Supreme Court, the district court reasoned that "the protected liberty interest in familial privacy encompassed an interest in avoiding disclosure of personal matters." *Hodge v. Carroll County Dep't of Social Servs.*, 812 F. Supp. 593, 600 (D. Md. 1992) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). That interest is implicated "when government shares private information or when government collects private information in the absence of any legitimate state interest for such collection." *Id.*

20. *Hodge*, 31 F.3d at 162.

21. Id. The defendants invoked the "collateral order" doctrine in appealing the denial of their qualified immunity defense. *Id.* Under this doctrine, a district court's denial of a claim of qualified immunity is an appealable final decision. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Qualified immunity entitles a defendant who did not violate clearly established law not to stand trial or face the other burdens of litigation. *See id.* at 526. This entitlement is effectively lost if the case is erroneously permitted to go to trial. *Id.* at 526-27. The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations because there are no further steps that can be taken in the district court to avoid the trial the defendant maintains is barred. *Id.* at 527. Moreover, the issue of immunity is separate from the merits of the underlying action because the reviewing court need only determine a question of law—whether the conduct of which the plaintiff complains violated clearly established law. *Id.* at 527-28.

22. *Hodge*, 31 F.3d at 168. The court reversed the district court's order rejecting the defendant state officials' qualified immunity and vacated the partial judgment for the Hodges on the issue of liability. *Id.*

23. 262 U.S. 390 (1923).

Court held that a state statute prohibiting the teaching of modern foreign languages to elementary school children violated substantive due process.25 The Court stated that the instructor's right to teach and the parents' right to engage him to instruct their children for this purpose were within the liberty interests protected by the Fourteenth Amendment.26 More was at stake than the economic liberties of teacher and parent.27 The legislature had attempted to interfere with "the power of parents to control the education of their [children]."28

In Pierce, the Court struck down as a violation of the Fourteenth Amendment a law that required all children between the ages of eight and sixteen to attend public school.29 The Court held that the law unreasonably interfered with the liberty of parents to direct the upbringing and education of their children.30 Although neither case articulated the right of privacy, both Meyer and Pierce have been viewed as the true progenitors of the doctrine of familial privacy.31

In Prince v. Massachusetts,32 the Supreme Court characterized Meyer and Pierce as decisions that "have respected the private realm of family life which the state cannot enter."33 The Court cautioned that the family itself was not beyond regulation in the public interest and that the state had a legitimate interest in limiting parental freedom and authority in areas that affect a child's welfare.34 As a result, the Court in Prince held a statute that made it unlawful for a parent or guardian to furnish a minor any newspapers, magazines, periodicals, or other articles of merchandise to sell on the streets or in other public places was within the state's police power.35

b. The Privacy Cases.—The Supreme Court announced the right of privacy in Griswold v. Connecticut.36 In Griswold, the Court invalidated a Connecticut statute that banned contraceptives, stating that a right of privacy was contained within "zones of privacy" or

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25. 262 U.S. at 402-03.
26. Id. at 400.
27. See id. at 401.
28. Id.
29. 268 U.S. at 534-35.
30. Id.
33. Id. at 166.
34. Id. at 166-67.
35. Id. at 170. The Court balanced the state's police power against the parents' claim of control over the child. Id. at 169.
36. 381 U.S. 479 (1965).
"penumbras" of specific constitutional guarantees.\textsuperscript{37} The right of privacy included the freedom of married persons to decide what to do in the privacy of the marital bedroom.\textsuperscript{38}

The Court further modified the privacy concept in \textit{Roe v. Wade}.\textsuperscript{39} The \textit{Roe} Court created a species of privacy unattached to specific guarantees in the Bill of Rights.\textsuperscript{40} In \textit{Roe}, the right of privacy arose from the Fourteenth Amendment's concept of personal liberty, and was broad enough to encompass a woman's decision whether to terminate her pregnancy.\textsuperscript{41}

In \textit{Cleveland Board of Education v. LaFleur},\textsuperscript{42} the Court held that mandatory maternity leave provisions for school teachers in the fourth or fifth month of pregnancy were unconstitutional.\textsuperscript{43} The Court concluded that "freedom of personal choice in matters of . . . family life [was] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."\textsuperscript{44}

In \textit{Moore v. City of East Cleveland},\textsuperscript{45} the city filed criminal charges against a grandmother for residing with her grandson in violation of a zoning ordinance that limited the occupancy of a dwelling unit to members of a single family.\textsuperscript{46} The \textit{Moore} Court invalidated the ordinance.\textsuperscript{47} After a recitation of the \textit{Griswold} line of case law as well as the "pre-privacy" cases, the Court concluded that "the Constitution

\begin{itemize}
  \item \textsuperscript{37} Id. at 484-85.
  \item \textsuperscript{38} See id. at 485-86.
  \item \textsuperscript{39} 410 U.S. 113 (1973).
  \item \textsuperscript{40} Id. at 153.
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} 414 U.S. 632 (1974).
  \item \textsuperscript{43} Id. at 651.
  \item \textsuperscript{44} Id. at 639-40. The Supreme Court also has acknowledged a fundamental liberty interest of natural parents in the care, custody, and management of their children. In \textit{Stanley v. Illinois}, 405 U.S. 645 (1972), the Court considered an Illinois statute that presumed unwed fathers unfit to raise their children. \textit{Id.} at 650. On the death of the mother, the statute declared children of unwed fathers wards of the state and placed them with court-appointed guardians. \textit{Id.} at 646. The Court held that all Illinois parents were constitutionally entitled to a hearing on their fitness before their children could be removed from their custody. \textit{Id.} at 658. The Court emphasized that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'far more precious . . . than property rights.'" \textit{Id.} at 651 (citations omitted); see also \textit{Santosky v. Kramer}, 455 U.S. 745 (1982) (holding that termination of parental rights requires at least a clear and convincing evidence standard).
  \item \textsuperscript{45} 431 U.S. 494 (1977) (plurality opinion).
  \item \textsuperscript{46} Id. at 496-97.
  \item \textsuperscript{47} Id. at 506.
\end{itemize}
protect[ed] the sanctity of the family” and acknowledged a “private realm of family life which the state cannot enter.”

In *Whalen v. Roe*, a case involving individual privacy, the Supreme Court interpreted the constitutional right of privacy as protecting two distinct interests: (1) the interest to make certain decisions autonomously, and (2) the interest to avoid disclosure of personal matters. In response to a concern that prescription drugs were being diverted into unlawful channels, New York enacted a statute requiring the maintenance of records in a centralized computer with the names and addresses of persons who obtain by prescription certain drugs for which there exists both a lawful and an unlawful market. The *Whalen* Court held that the New York statute did not so threaten either confidentiality or autonomy that it violated the constitutionally protected right of privacy.

The *Whalen* Court concluded that the remote possibility of unwarranted disclosure was not a sufficient reason for invalidating the entire patient-identification program. Patients and physicians challenging the statute pointed out that even without public disclosure, private information had to be disclosed to the authorized state employees. Because disclosure to state employees under a duty of confidentiality differed from disclosure to the public, the Court concluded that “[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.” The Court acknowledged that in some circumstances the state’s duty to avoid unwarranted disclosure of personal information “arguably ha[d] its roots in the Constitution.”

c. The Registry of Child Abuse Reports and Recent Federal and State Jurisprudence.—In *Glasford v. New York State Department of Social Services*, the plaintiff was the subject of a report of child abuse which

48. Id. at 503.
49. Id. at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
51. Id. at 599-600.
52. Id. at 591.
53. Id. at 605-06.
54. Id. at 601-02.
55. Id. at 602.
56. Id.
57. Id. at 605-06. The strict statutory safeguards against public disclosure in *Whalen* permitted the Court to avoid consideration of the constitutionality of an unwarranted disclosure. Id.
had been entered into New York's central register of suspected child abusers.59 He claimed that the report interfered with his protected liberty interest in his reputation and in his relationship with his family.60 The federal district court found that the complaint stated no violation of a protected interest and granted the defendant's motion to dismiss.61 The court held that the effect on reputation, without more, was not a constitutionally protected liberty or property interest.62

New York's child abuse registry laws were attacked again in Valmonte v. Bane.63 The laws required employers in the child care field to make inquiries to the central register to determine whether potential employees were among those listed.64 If a potential employee was on the list, then the employer could only hire the individual if the employer maintained a written record of the specific reasons for the decision to hire.65

Unlike Glasford, the plaintiff in Valmonte had applied for child care positions and alleged that the state's communication of the names of individuals in the central register to potential employers in the child care field implicated a protectable liberty interest under the Fourteenth Amendment.66 The Second Circuit held that there was a deprivation of a liberty interest where plaintiff's inclusion in the register caused defamation to her character and created a statutory impediment to employment in the child care industry.67

The Supreme Court of Iowa upheld that state's child abuse registry laws in Roth v. Reagen.68 A person accused of sexually abusing his stepdaughter, whose name was placed in the child abuse information registry with the statement that the accusation was unfounded, filed a mandamus and declaratory judgment action to request that his record

59. Id. at 385.
60. Id. at 387.
61. Id. at 388-89.
62. Id. at 388. The court noted that the complaint did not allege that the plaintiff's employment prospects suffered as a result of the report in the central register. Id. Plaintiff's relationship with his family also was not altered as a result of the report in the central register. Id.
63. 18 F.3d 992 (2d Cir. 1994).
64. Id. at 995.
65. Id. at 996.
66. Id. at 994, 1000.
67. Id. at 1002. But see Bohn v. County of Dakota, 772 F.2d 1433 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986). In Bohn, the Eighth Circuit noted that the identification of the Bohns as child abusers and the maintenance of data on them exposed the Bohns to "public opprobrium" and, thereby, stigmatized them. Id. at 1436 n.4. The court found that Mr. Bohn's reputation was a protectable interest. Id.
68. 422 N.W.2d 464 (Iowa 1988).
be expunged and to declare Iowa’s child abuse registry laws unconstitutional. The court rejected plaintiff’s argument that reputation was a property interest sufficient to invoke the procedural protections of the Due Process Clause. It also rejected his assertion that the placement and maintenance of his name in the registry on the basis of an unfounded report was an invasion of his constitutional right of privacy. To reach its decision, the court noted that the records were highly confidential and that criminal penalties covered the unauthorized public disclosure of the identity of persons in the registry.

3. The Court’s Reasoning.—In upholding Maryland’s confidential maintenance of unsubstantiated child abuse investigation reports, the circuit court first noted that the sanctity of the family unit was a fundamental precept “firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment.” The court stated that “[t]he concept of familial privacy ha[d] been restricted by the Supreme Court to (1) thwarting governmental attempts to interfere with particularly intimate family decisions, and (2) voiding government actions that sever, alter, or otherwise affect the parent-child relationship.” The court further established that the maxim of familial privacy was neither absolute nor unqualified and could be outweighed by a legitimate governmental interest.

The court concluded that whatever the precise confines of the familial privacy right, the defendants’ actions could not be classified within the Supreme Court’s jurisprudence in the privacy cases, and thus did not establish a violation of an identified liberty interest. The Hodges failed to demonstrate that the defendants’ actions had a significant impact on the parent-child relationship or on their family’s ability to function. The complaint “reveal[ed] no more than a conclusory allegation of reputational injury.” Neither a conclusory allegation of reputational injury nor the remote possibility of public disclosure of confidential records constituted a violation of a substan-

69. Id. at 465.
70. Id. at 467.
71. Id. at 468.
72. Id. at 468-69.
73. Hodge, 31 F.3d at 163 (citations omitted).
74. Id. (footnotes omitted).
75. Id. at 163-64 (citations omitted).
76. Id. at 164.
77. Id.
78. Id. at 165; see also supra note 62 and accompanying text.
tive due process right. In so holding, the court also noted its disagreement with the Hodges' contention that the state lacked a legitimate governmental interest once an abuse report had been deemed "unsubstantiated" or "ruled out."

Given its holding that no substantive federal constitutional right was violated, the court determined that it was technically unnecessary for it to discuss the district court's denial of qualified immunity. Nevertheless, troubled by the district court's "generalized formulation of a constitutional right which prevents reasonable government officials from knowing just what conduct is actually prohibited by the broad concept of family inviolability," the court felt compelled to address the denial. The court concluded that it would have applied qualified immunity because the confines of the familial privacy right were not so clearly established that the defendant state officials could objectively or reasonably have known that their conduct violated the Due Process Clause.

Retired Supreme Court Justice Powell, sitting by designation, concurred in the judgment of the court. He agreed with the court that the defendants were entitled to qualified immunity from civil monetary damages. Justice Powell, however, preferred not to reach the merits of the underlying constitutional question.

79. Hodges, 31 F.3d at 165-66; see also Paul v. Davis, 424 U.S. 693 (1976) (holding damage to reputation alone did not implicate any "liberty" or "property" rights secured by the Fourteenth Amendment).

80. See infra notes 96-98 and accompanying text.

81. Hodges, 31 F.3d at 167 (quoting Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988) ("If there is no violation of a federal right, there is no basis for a section 1983 action and no answer to a plea by the public officer of qualified immunity.").

82. Id.

83. See, e.g., Doe v. Louisiana, 2 F.3d 1412, 1416 (5th Cir. 1993) (noting that the constitutional right of family integrity was not clearly established), cert. denied, 114 S. Ct. 1189 (1994); Frazier v. Bailey, 957 F.2d 920, 921 (1st Cir. 1992) ("[T]he dimensions of [the] right [of familial privacy] have yet to be clearly established."); Hodorowski v. Ray, 844 F.2d 1210, 1217 (5th Cir. 1988) (stating that the right of family integrity was nebulous).

84. Hodges, 31 F.3d at 167-68; see Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). The Hodges court of appeals also determined that its holding obviated any federal constitutional requirement of procedural due process. Hodges, 31 F.3d at 168.

85. Hodges, 31 F.3d at 168-69 (Powell, J., concurring).

86. Id. at 169. Justice Powell reasoned: "[E]ven assuming that [d]efendants' actions infringed a constitutionally protected liberty interest, such interest was not clearly established at the time of [d]efendants' conduct." Id.

87. Id.
4. *Analysis.*—In *Hodge*, the Court of Appeals for the Fourth Circuit properly limited the scope of familial privacy in accordance with the Supreme Court's privacy jurisprudence. That jurisprudence makes clear that the right of familial privacy is neither absolute nor unqualified. As the concept evolved from the liberty interest of the early cases of *Meyer* and *Pierce* to a substantive right of privacy under the Fourteenth Amendment, the Court confined the concept to cases that involve an individual's freedom of action in the intimate realm of family life. So confined, the right of privacy attached to the right-holder's own actions. It is a substantive right that immunizes certain conduct—such as the use of contraceptives, the abortion of a pregnancy, or residence with members of an extended family—from state proscription or penalty.

In *Whalen v. Roe*, the Court suggested that the individual's interest in the continued confidentiality of personal information stored by the government was protected by constitutional privacy. The *Whalen* Court, however, did not extend the right of privacy to the governmental collection and retention of personal information. When applied to the concept of familial privacy, *Whalen* suggests there is a constitutional right of confidentiality once private data is accumulated. In *Hodge*, this right of confidentiality was not violated by the mere maintenance of unsubstantiated child abuse investigation reports.

Even assuming the familial privacy rights were broad enough to include an interest in access to personal information, the family is not beyond regulation in the public interest. The state has a legitimate

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88. See *Hodge*, 31 F.3d at 163; see also *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (recognizing that the Constitution protected the parent-child relationship in appropriate cases).

89. See Rubenfeld, *supra* note 31, at 740.

90. See id. See generally Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. REV. 1335, 1396 (arguing that *Griswold* and *Roe* combined well-respected constitutional privacy notions—primarily drawn from Fourth and First Amendment case law—with turn-of-the-century "liberty" jurisprudence created under the Fourteenth Amendment to produce a new form of privacy dealing with "liberty of choice.").

91. 429 U.S. 589, 605-06 (1977); see *supra* notes 50-57 and accompanying text.

92. *Whalen*, 429 U.S. at 602 (1977). The Court has interpreted *Whalen* as holding that the Constitution does not prohibit the compilation of personal information in centralized computer files. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989); see also *Arkansas Dep't of Human Servs. v. Heath*, 848 S.W.2d 927, 951 (Ark. 1993) (recognizing that the essence of the decision in *Whalen* is that the right of privacy does not extend to matters relating to the government's collecting and retaining data concerning private citizens).

interest in the health and safety of its minor citizens. The right of familial privacy does not include the right to be free from child abuse investigations. Indeed, the maintenance of reports contemplates no further interference with the family structure than the investigation itself.

The state, moreover, has a legitimate interest in the maintenance of unsubstantiated reports of child abuse. Abuse investigations are not always accurate, and a series of "unsubstantiated" entries for a given child can indicate a pattern of emotional or physical harm to the child that warrants further investigation by the state. Retained reports also protect the individual whose records are kept by the prevention of repeated investigations when more than one person makes the same accusation. Such reports allow the state to defend itself in the event of a suit alleging inadequate investigation of a reported instance of abuse.

Nevertheless, parents suspected of child abuse have a genuine concern that the information about the abuse investigation will become publicly known and adversely affect their reputation. Although reputational injury coupled with the deprivation of another recognized liberty or property interest, or the infringement of some other legal status or right conferred by state law, is constitutionally protected, reputational injury alone is not a due process interest. Likewise, the remote possibility of an unwarranted disclosure does not by itself implicate a constitutional right.

Given Maryland's extensive confidentiality provisions protecting child abuse investigation reports, there appears to be no realistic avenue by which such a stigma could attach. The unauthorized disclosure of confidential information about reports of abuse or neglect is a misdemeanor subject to imprisonment of up to ninety days, a fine of not more than $500, or both. The disclosing person may also be liable for damages in a civil suit. A statement that the accusation is not substantiated is permitted under Maryland law.

94. Santosky v. Kramer, 455 U.S. 745, 766 (1982) (noting that the state has a "parens patriae interest in preserving and promoting the welfare of the child"); Prince 321 U.S. at 167 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.").
95. Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993).
96. Hodge, 31 F.3d at 166.
97. Id.
98. Id. at 166-67.
100. See supra note 54 and accompanying text.
“unsubstantiated” must be placed in the report.\textsuperscript{108} Child abuse investigation information, moreover, is entered into the AMF in alphanumeric code and is not accessible to the general public.\textsuperscript{104}

There are strong policy arguments not to expand the concept of familial privacy to include an interest in access to confidential information. Unlike individual privacy, familial privacy involves the interest of the child as well as the interests of the parents and the state.\textsuperscript{105} One commentator has suggested that attempts to accommodate family autonomy and privacy significantly compromise the protection of children.\textsuperscript{106} Others persuasively argue that familial privacy should be seen as an obstacle to independent representation for allegedly abused children in private custody cases.\textsuperscript{107} Presumably, a more expansive notion of familial privacy would limit the ability of the state to intervene on behalf of the child.

In practice, the court’s decision in \textit{Hodge} requires that parents who claim a violation of their familial privacy liberty interest must allege more than a reputational injury or the possibility of public disclosure of confidential records. A constitutional remedy will arise only if an unauthorized disclosure of accumulated information results in the infringement of another constitutionally recognized liberty or property interest, or some other legal status or right conferred by state law.\textsuperscript{108} Absent a significant impact on the parent-child relationship,

\textsuperscript{103} See \textit{Md. Regs. Code tit. 07, § 02.07.08a.}

\textsuperscript{104} See \textit{Md. Code Ann., Fam. Law § 5-714} (availability of information). Information contained in the reports can be disclosed only to a limited number of persons specified by statute, including social services and law enforcement personnel who investigate abuse or provide services to persons named in the reports, licensed practitioners who render medical care, the parent or custodian, and the alleged child abuser. \textit{Md. Ann. Code art. 88A, § 6(b).} A person suspected of abuse must be given notice before the name of that person is entered in the central register. \textit{Md. Code Ann., Fam. Law § 5-715(b).} The person may request a hearing to appeal the entry of his name in the central register. \textit{Id. § 5-715(c).}

\textsuperscript{105} \textit{But see} David A. Richards, \textit{The Individual, the Family, and the Constitution: A Jurisprudential Perspective}, 55 N.Y.U. L. Rev. 1, 3-6 (1980) (arguing that some Supreme Court decisions respect a child’s right to autonomy but others ignore it).

\textsuperscript{106} \textit{See} Judith G. McMullen, \textit{Privacy, Family Autonomy, and the Maltreated Child}, 75 Marq. L. Rev. 569, 569 (1992). McMullen argues that the law’s reverence for family privacy and family autonomy is based on two often false assumptions: “(1) that privacy strengthens families, and (2) that parents will act in the best interests of their children.” \textit{Id.}


\textsuperscript{108} \textit{See} Paul v. Davis, 424 U.S. 693, 708-09 (1976). The Supreme Court has indicated, for example, that not all employment interests are constitutionally recognized. In \textit{Board of Regents v. Roth}, 408 U.S. 564, 566-69 (1972), the Court held that a nontenured state college professor employed on a year-to-year basis had no protected property interest in his
the mere maintenance of investigation reports is constitutionally permissible.

A more problematic scenario involves an unauthorized disclosure that does not result in the infringement of some other legal status or right. The Supreme Court in *Whalen* concluded that there was no privacy violation in the disclosure of personal information to appropriate government officials. Nevertheless, aware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks, the Court indicated that a constitutional right of confidentiality of personal information accumulated by the government exists as part of the right of privacy.

*Whalen* implies that statutes with inadequate safeguards against public disclosure will be invalidated for failure to show a proper concern with, and protection of, the individual's interest in privacy. It indicates that a right of confidentiality exists to protect a residual interest in the prevention of a further erosion of the right to privacy. In this context, the unauthorized disclosure of a child abuse investigation report that does not infringe on some other legal right or status may still violate the right of confidentiality.

5. Conclusion.—By declining to extend the concept of familial privacy to the confidential maintenance of unsubstantiated child abuse investigation reports, the Court of Appeals for the Fourth Circuit properly concluded that Fourteenth Amendment privacy jurisprudence permits the accumulation of personal information by state officials. Maryland's child abuse and registry laws strike an appropriate balance between the state's interest in the protection of children against abuse and the individual's interest in privacy and reputation. The court's decision does not, however, signify that there are no constitutional remedies for improper disclosure of sensitive information. The Constitution still requires strict confidentiality provisions to protect individuals from unwarranted disclosure.

Nicholas G. Stavlas

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employment. To reach this conclusion, the Court conditioned constitutional recognition of a property interest on the possession of "a legitimate claim of entitlement" rather than a mere expectation of benefit. *Id.* at 577.

109. See supra note 56 and accompanying text.

110. See supra note 57 and accompanying text.
XV. HEALTH CARE LAW

A. EMTALA and the Maryland Malpractice Act: Competing Causes of Action?

In Brooks v. Maryland General Hospital, Inc., the United States Court of Appeals for the Fourth Circuit addressed whether a claim brought under the Emergency Medical Treatment and Active Labor Act (EMTALA) must first undergo arbitration as mandated by the Maryland Health Care Malpractice Claims Act (Maryland Malpractice Act). The court held that EMTALA plaintiffs may proceed directly to litigation because the Maryland Malpractice Act’s arbitration requirement does not govern EMTALA claims. In reaching this conclusion, the court declined to decide whether EMTALA incorporates state law mandates, but, in dicta, presented reasons both for and against the incorporation of state arbitration requirements into EMTALA.

1. The Case.—On October 5, 1989, Robert Brooks suffered from a sudden inability to walk and went to the emergency room of Maryland General Hospital at 2:00 p.m. He did not carry medical insurance. After he waited for more than six hours, hospital personnel examined him, but did not treat him. Instead, they transferred him to the University of Maryland Medical System’s emergency room three and one-half hours later. Once there, Brooks waited three additional hours before receiving a pan-myelogram and CAT scan. Because of technical difficulties, hospital employees did not review the results of these tests for three days. Brooks later suffered injury to his spine.

1. 996 F.2d 708 (4th Cir. 1993).
2. 42 U.S.C. § 1395dd (1988 & Supp. V 1993). This statute imposes a duty upon hospitals to screen individuals presenting themselves to the emergency department for treatment, regardless of whether the individual is covered by insurance. Id. § 1395dd(a). If the individual has an emergency medical condition, the hospital must treat the individual to stabilize that condition, or transfer the individual to another facility. Id. § 1395dd(b). If the hospital chooses to transfer the individual, it must first stabilize the medical condition unless the situation falls under an exception to this requirement. Id. § 1395dd(c).
3. Brooks, 996 F.2d at 710; see Md. CODE ANN., CTS. & JUD. PROC. § 3-2A-01 to -09 (1989 & Supp. 1994). Under this Act, all claims against a health care provider for damages resulting from medical injury must undergo arbitration before a judicial remedy is sought. Id.
4. Brooks, 996 F.2d at 710.
5. Id. at 714-15.
6. Id. at 709.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
Brooks sued both hospitals and their medical personnel in the United States District Court for the District of Maryland for violation of EMTALA. He alleged that the delay in screening and treatment by both hospitals and their responsible medical personnel had caused him irreparable spinal cord injury, which required him to undergo surgery and extended rehabilitation. In response, the defendants moved for dismissal on the grounds that Brooks had failed to comply with the Maryland Malpractice Act because he had not attempted to arbitrate his EMTALA claim before he filed it in district court.

The district court dismissed Brooks' complaint and held that the arbitration requirement applied to his EMTALA claim because the Maryland Malpractice Act governs all allegations that involve the rendering or failure to render health care. Brooks appealed to the Court of Appeals for the Fourth Circuit and requested the court to consider whether an EMTALA claimant may seek a judicial remedy without first complying with the state malpractice law's arbitration requirements.

2. Legal Background.—
   a. Statutory Scope.—
      (i) Maryland Malpractice Act.—To allay a medical malpractice insurance crisis in 1976, the Maryland General Assembly passed the Maryland Malpractice Act, which mandates arbitration for all medical malpractice claims prior to litigation. The legislature sought to reduce the cost of defending malpractice claims by encouraging negotiated agreements and "screening out frivolous claims at the arbitration level." In turn, the legislature hoped that lower litigation expenses would decrease the cost of malpractice insurance and stabilize the insurance market.

13. Id.
14. Id.
15. Id.
17. Brooks, 996 F.2d at 710.
20. Newell, 323 Md. at 732, 594 A.2d at 1159. Earlier, the Johnson court had viewed these goals as adequate justification for the creation of a different mechanism to resolve malpractice claims in comparison with other tort actions. Johnson, 282 Md. at 308, 385 A.2d at 76-77.
21. Johnson, 282 Md. at 308, 385 A.2d at 76.
The Maryland Malpractice Act encompasses only traditional malpractice claims.\(^2\) Such claims allege that medical professionals have breached a duty in the exercise of their "professional expertise or skill."\(^3\) Maryland law requires medical personnel and hospitals to perform their duties with the degree of care that similarly situated doctors and hospitals nationwide must use.\(^2\) This national standard of care includes a consideration of the latest medical advances and the health care resources available under the circumstances.\(^5\)

If plaintiffs allege malpractice, they must comply with arbitration procedures delineated by the Medical Malpractice Act.\(^2\) First, individuals must obtain a certificate from a qualified expert attesting to a departure from the applicable standard of care and file that document along with a claim to the Director of Health Claims Arbitration Office.\(^7\) The Director ensures service of the claim upon the defendants\(^2\) and organizes the arbitration panel.\(^2\) The panel determines liability and damages, and delivers its award to the Director within one year from the service of the claim on all defendants.\(^3\) The Director subsequently arranges for service of the award upon the parties.\(^3\) Finally, any party dissatisfied with the panel's determination may file an action in court to nullify the award.\(^3\)

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23. Id. at 36, 459 A.2d at 201.
24. Davis v. Johns Hopkins Hosp., 86 Md. App. 134, 146-47, 585 A.2d 841, 847 (1991). In 1975, the Maryland Court of Appeals adopted a national standard of care, as opposed to a strict locality or similar locality standard. Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 194-201, 349 A.2d 245, 249-53 (1975). However, the recently amended version of the Maryland Malpractice Act suggests that Maryland may be reverting to a similar locality rule, stating that courts should judge health care professionals by "standards of practice... in the same or similar communities." See Md. Code Ann., Cts. & Jud. Proc. § 3-2A-02(c) (Supp. 1994). A minority of jurisdictions continue to use the strict locality rule, which compares the physicians' conduct to that of others in their own community. 2 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability & Litigation § 25.20 (rev. ed. 1989). Many jurisdictions have expanded the strict locality rule by also considering the standard of practice in similarly situated communities. Id.
26. See Tranen v. Aziz, 304 Md. 605, 612, 500 A.2d 636, 639 (1985) (holding that the Act establishes specific procedures that must be followed, including arbitration, prior to court proceedings regarding a malpractice claim).
28. Id. § 3-2A-04(a)(1).
29. Id. §§ 3-2A-03(c), 3-2A-04(c).
30. Id. § 3-2A-05(e)-(g).
31. Id. § 3-2A-05(g).
32. Id. § 3-2A-06(a)-(d).
EMTALA. Courts have recognized that EMTALA imposes a duty on hospital emergency rooms to screen and stabilize all persons seeking medical attention. Because most states do not require hospitals to treat people presenting themselves at emergency rooms, EMTALA fills a gap in tort law by providing a cause of action for the failure of hospitals to treat. Under EMTALA, individuals may allege denial or delay of screening and stabilization regardless of their financial status. Consequently, because plaintiffs need not establish their inability to pay for medical services to bring their claims, EMTALA is not restricted to indigent plaintiffs.

33. EMTALA provides:
   (a) Medical screening requirement
      In the case of a hospital that has a hospital emergency department, if any individual comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department to determine whether or not an emergency medical condition exists.
   (b) Necessary stabilizing treatment for emergency medical conditions and labor
      (1) In General
      If any individual comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—
         (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or . . .
         (B) for transfer of the individual to another medical facility . . . .
      (c) (1) If an individual at a hospital has an emergency medical condition which has not been stabilized . . . ., the hospital may not transfer the individual unless—
      (A)(ii) a physician . . . has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual . . . .

35. Gatewood, 933 F.2d at 1041 (explaining that although "most questions related to the adequacy of a hospital's standard screening and diagnostic procedures must remain the exclusive province of local negligence law[,]" the failure of a hospital to treat generally does not exist under state law).
37. Id. at 272. However, while many courts apply EMTALA regardless of the economic status of the plaintiff, other courts only allow EMTALA claims for economically disadvantaged patients. See Thomas L. Stricker, Jr., The Emergency Medical Treatment & Active Labor Act: Denial of Emergency Medical Care Because of Improper Economic Motives, 67 NOTRE DAME L. REV. 1121, 1121-45 (1992).
EMTALA claims differ from traditional malpractice actions in two significant ways. First, plaintiffs may only file EMTALA suits against hospitals. The Fourth Circuit analyzed the legislative history of EMTALA in *Baber v. Hospital Corp. of America* and found that Congress exclusively sought to provide a sole cause of action against hospitals and thus excluded physicians and emergency personnel. Second, EMTALA does not define a specific method of screening that hospitals must employ. Indeed, the *Baber* court held “that EMTALA does not impose on hospitals a national standard of care for screening patients.” According to the court, Congress intended to prevent disparate treatment among patients by forcing hospitals to screen individuals uniformly and cease “patient dumping.” EMTALA only holds hospitals to their facilities’ internal standards, rather than to national or local standards of care. Thus, in *Baber* the Fourth Circuit determined that “EMTALA is no substitute for state law medical malpractice actions.” Instead, the statute simply ensures that all patients will receive the level of care that the hospital is capable of rendering.

b. Preemption by EMTALA.—With respect to a federal cause of action, state law must yield to federal law in the identification of state law elements and defenses. The Supreme Court generally assumes that federal statutes are intended to operate unimpeded by state law unless an express provision gives effect to state law. The Court has held, moreover, that the Supremacy Clause requires federal law to preempt state law that interferes with the purposes and

38. In *Cleland*, the Sixth Circuit specifically rejected the proposition that the language of the statute indicates that Congress did not provide “a guarantee of the result of emergency room treatment and discharge.” *Cleland*, 917 F.2d at 271.

39. While EMTALA allows the Department of Health and Human Services to levy as much as $50,000 against physicians violating the Act, the statute limits the private individual to a “civil action against the participating hospital . . . .” *42 U.S.C. §§ 1395dd(d)(1)(B), (2)(A).*

40. *977 F.2d 872 (4th Cir. 1992).*

41. *Id. at 877.*

42. *Id. at 879.*

43. *Id.*

44. *Id.* Patient dumping “refers to a hospital’s refusal to treat an emergency patient, even though the hospital is physically capable of doing so, simply because the patient may be unable to pay.” *Deberry v. Sherman Hosp. Ass’n*, 741 F. Supp. 1302, 1304 (N.D. Ill. 1990).

45. *Baber*, *977 F.2d at 879-80.*

46. *Id. at 880.*

47. *Id. at 879.*


50. *U.S. CONST. art. VI, cl. 2.*
objectives of federal statutes. However, the Fourth Circuit has noted that courts must honor the substantive aspects of state statutes when no conflict with federal objectives exists. In essence, federal law incorporates state law requirements where any gaps exist in federal statutes.

The EMTALA statute explicitly incorporates these general preemption principles. EMTALA provides that it "[does] not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." In Deberry v. Sherman Hospital Ass'n, a federal court in Illinois determined that Congress did not intend for EMTALA to preempt all state regulation regarding the same duties of a hospital to screen and stabilize. The court ruled that preemption occurs only when compliance with both federal and state law is impossible.

Because of EMTALA's language and decisions such as Deberry, courts will evaluate whether a conflict exists between EMTALA and state law that might preclude compliance with aspects of state law. For example, in HCA Health Services of Ind., Inc. v. Gregory, an Indiana court recognized a conflict between EMTALA's statute of limitations and the requirement that all state malpractice claimants first bring their cases before the Department of Insurance and a medical review panel. The court noted that EMTALA has a two-year statute of limitations, but contains no provision for its tolling pending the satisfaction of state procedural requirements. The court pointed out the difficulty that the issuance of a medical review board opinion could take longer than two years and, thus, effectively eliminate the plaintiff's access to a federal cause of action. In conclusion, the court found that EMTALA plaintiffs need not follow state law prior to litigation because this is an area of direct conflict in which EMTALA preempted state requirements.

52. Rowland v. Patterson, 882 F.2d 97, 99 (4th Cir. 1989). Here, the plaintiff sought federal jurisdiction on the basis of diversity over a state malpractice claim, which is not a federal question. Id. at 98.
55. Id. at 1307.
56. Id.
58. Id. at 977.
59. Id.
60. Id.
61. Id.; see also Smith v. Richmond Memorial Hosp., 416 S.E.2d 689, 695 (Va.) (ruling a claimant need not comply with state notice requirements because a state provision that
3. The Court's Reasoning.—In Brooks v. Maryland General Hospital, the Court of Appeals for the Fourth Circuit considered whether the Maryland Malpractice Act imposes an arbitration requirement upon EMTALA claims. In reversing the decision of the federal trial court, the court found that an EMTALA claim falls outside the scope of the Maryland Malpractice Act, and therefore is not subject to arbitration requirements.

Judge Niemeyer began his opinion for the court with an analysis of the purpose of EMTALA and the duties imposed under the statute. He noted that Congress passed the Act in order to create a new cause of action but not "to provide a federal remedy for misdiagnosis or general malpractice." Congress mandated that hospitals screen and stabilize all patients as they would any paying patient, in order to prevent the hospital practice of patient dumping when patients cannot afford medical care. The court noted that EMTALA does not address the quality of the diagnosis or the general level of care as a malpractice statute does; rather, the federal law stipulates that hospitals must adhere to their own standards and screen all patients uniformly.

The court then addressed the scope of the Maryland Malpractice Act to decide whether it applied to Brooks's EMTALA claim. The court found that, while the Act's language seems broad, Maryland courts have limited its application to traditional malpractice claims, involving the failure of professionals to meet the requisite standard of care.

Since a pure EMTALA claim does not constitute a traditional malpractice claim, the court reasoned that the Maryland Malpractice Act did not apply to Brooks's claim.

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allowed the tolling of a malpractice statute of limitations directly conflicted with EMTALA's statute of limitations), cert. denied, 113 S. Ct. 442 (1992); Reid v. Indianapolis Osteopathic Med. Hosp., 709 F. Supp. 853 (S.D. Ind. 1989) (holding that EMTALA preempts state-mandated review by a medical panel, but that the Act incorporates state caps on medical malpractice damages).

62. Brooks, 996 F.2d at 710.
63. Id.
64. Id. at 715.
65. Id. at 710.
66. Id.
67. Id. at 710-11. The court explained, "Congress expressed concern that hospitals were abandoning the longstanding practice of providing emergency care to all due to increased pressures to lower costs and maximize efficiency. Under traditional state tort law, hospitals are under no legal duty to provide this care." Id.
68. Id. at 710-11.
69. Id. at 712-13. The Act technically "covers all claims against health care providers for injury 'arising or resulting from the rendering or failure to render health care' . . . ." Id. at 712 (quoting Cannon v. McKen, 296 Md. 27, 36, 459 A.2d 196, 199 (1983)).
Act did not apply in the instant case because Brooks did not allege that the professionals were negligent in their screening or treatment of him. Rather, he alleged that the hospital’s failure to use uniform screening and stabilization procedures delayed his treatment and caused his condition to worsen. The court concluded that Brooks did not need to arbitrate his claim before proceeding to court.

In dicta, the circuit court discussed, but declined to determine, the impact of state law on EMTALA claims. The court explained that preemption was not relevant in the instant action because Brooks did not file a claim under a state statute providing the same cause of action; thus, no conflict between state and federal law existed. More significantly, the court reiterated that no overlap existed between EMTALA and the Maryland Malpractice Act because EMTALA does not encompass traditional medical malpractice claims.

After reviewing Supreme Court preemption doctrine, the court discussed issues relevant to determine whether an EMTALA cause of action implicitly adopts state arbitration requirements. Courts must make this determination when faced with a case in which EMTALA and state malpractice claims coexist in the same lawsuit. To support a claim that EMTALA might incorporate the state arbitration requirement, the court pointed out: (1) that Congress only intended EMTALA to fill a gap in state law; (2) that EMTALA calls for “limited preemption;” and (3) that EMTALA already assumes state damages limitations. On the other hand, the court recognized potential problems from incorporation. The court pointed to the likelihood that conflicting standards of care and differing burdens of proof under the state malpractice law and EMTALA would raise difficult issues without clear resolutions. The court was particularly concerned that EMTALA’s two-year statute of limitations is inconsistent with state arbitration procedures that could easily delay a claim for over two years. Indeed, the court could not reconcile the differences be-

70. Id. at 713.
71. Id. at 709. The court held that the Maryland statute does not cover a claim regarding disparate screening that does not allege a breach in the standard of care of the professional community. Id. at 713.
72. Id.
73. Id. at 714.
74. Id. at 714-15.
75. Id.
76. Id.
77. Id. at 715.
78. Id. In particular, whether the presumption of correctness of the state arbitration award is in conflict with the Federal Rules of Evidence. Id.
79. Id.
tween the federal and state laws because "[n]o language in EMTALA indicates that compliance with state arbitration requirements tolls the federal statute of limitations."\textsuperscript{80}

4. Analysis.—In Brooks, the Fourth Circuit correctly ruled that a pure EMTALA claim does not fall within the scope of the Maryland Malpractice Act's arbitration requirements. Despite similarities, EMTALA claims and traditional malpractice claims are distinct causes of action. First, case law and the Maryland Malpractice Act both limit the Act's application to claims that involve the alleged breach of a recognized standard of care in the medical community. Yet, neither Maryland courts nor the General Assembly has concluded that hospitals with emergency rooms possess a duty to treat all parties.\textsuperscript{81} Consequently, because EMTALA expressly creates a duty to treat where none exists in Maryland,\textsuperscript{82} EMTALA claims should be considered separately from the provisions of the Act.\textsuperscript{83}

Second, the standards of care imposed by the two statutes differ greatly. While traditional malpractice claims in Maryland follow a national standard of care,\textsuperscript{84} EMTALA judges hospitals by their own individual standards.\textsuperscript{85} Theoretically, a hospital could delay a patient's screening and stabilization for many hours as long as it followed this same practice for every patient; the practices of other hospitals are irrelevant. Third, as the Brooks court noted, EMTALA claimants must sue hospitals, unlike traditional malpractice plaintiffs who may also bring actions against medical personnel.\textsuperscript{86}

Finally, Congress declined to recognize EMTALA as a medical malpractice statute, even though in practice it may function as one because plaintiffs have brought EMTALA claims without regard to their economic status.\textsuperscript{87} Congress viewed the statute only as an effort to stop "patient dumping."\textsuperscript{88} In light of these differences and the con-
gressive view that EMTALA is not a malpractice statute, a court should not independently declare a region of overlap between the state and federal statutes.89

The *Brooks* court did not need to decide how state and federal law interact because the Medical Malpractice Act does not include EMTALA claims.90 But the court did explore considerations it might have applied if Brooks had filed both an EMTALA and a traditional malpractice claim in the same action.91 Under the circumstances, Brooks might well have made both an EMTALA and a malpractice claim. The *Brooks* court warned that the standards of care invoked under arbitration procedures and EMTALA claims may be irreconcilable.92 Yet, obtaining the certificate of the professionals' breach of the standard of care does not conflict with EMTALA's provisions, which apply solely to a cause of action against the hospital.93 Inasmuch as the certificate evidences a hospital's breach of its duty of care, it would not address the EMTALA duty to screen and stabilize all patients uniformly.

EMTALA's statute of limitations presents an even greater obstacle to incorporation of the arbitration procedures of the Maryland Malpractice Act. EMTALA does not provide for the tolling of its two-year statute of limitations under any circumstances. Thus, defense attorneys could easily eliminate an EMTALA cause of action by delaying the plaintiff's case in arbitration until the statute of limitations has passed.94 Such a situation certainly conflicts with the Congressional goal to prevent patient dumping.95 Although an initial review indicates that EMTALA should preempt the state statutory requirements when claimants file both EMTALA and traditional malpractice claims, blanket preemption would enable any plaintiff to bypass the state arbi-


89. The Maryland General Assembly could create overlap by enacting a law that imposes on hospitals the duty to treat, since both federal and state legislatures may regulate within the same field. See Deberry v. Sherman Hosp. Ass'n, 741 F. Supp. 1302, 1307 (N.D. Ill. 1990) (holding that double regulation is permissible unless compliance with both laws is impossible). The court would then need to determine the extent of preemption if compliance with both statutes were impossible. *Id.*


91. *Id.*

92. *Id.* at 715. The court was concerned that the standard of care used to prepare the certificate of breach conflicted with EMTALA's standard of care. *Id.*

93. See *supra* notes 39-41 and accompanying text.

94. See HCA Health Servs. of Ind., Inc. v. Gregory, 596 N.E.2d 974, 977 (Ind. Ct. App. 1992) (recognizing the possibility that the statute of limitations may expire before a medical review panel delivers its opinion).

95. See *supra* note 44 and accompanying text.
tration procedures altogether by alleging an EMTALA claim. Such preemption would ignore the state's interest in arbitration as a means to lower the cost of malpractice insurance.

It is not inconceivable, moreover, that an EMTALA claim could coexist with a state malpractice claim without the need for preemption.\(^{96}\) If malpractice arbitration proceedings finish before the expiration of the federal two-year statute of limitations, plaintiffs can still file federal causes of action. However, courts must protect the EMTALA claim from extinguishment with the running of the statute of limitations. Allowing courts to toll the EMTALA statute of limitations pending arbitration of the traditional malpractice claim could protect EMTALA claims in other cases as well. But in *Vogel v. Linde*,\(^{97}\) a case following the *Brooks* decision, the Fourth Circuit refused to toll the statute of limitations because EMTALA lacked an express provision that allowed such tolling.\(^{98}\) The court explained that the Supreme Court requires the "statute of limitations [to run] against all persons, even those under a disability, unless the statute expressly provides otherwise."\(^{99}\)

Decisions such as *Vogel* may encourage Congress to provide guidance in this matter. For instance, Congress could amend EMTALA and label it a federal malpractice statute or could provide for the tolling of the statute of limitations pending state-mandated arbitration.

Even if Congress does not act to remedy this situation, a plaintiff may still be able to delay an EMTALA claim while the malpractice claim goes through arbitration. At the time the plaintiff files with the Health Claims Arbitration Office, an EMTALA claim could be filed in federal court. If the EMTALA suit was filed in a timely manner, defense counsel would move for dismissal on the theory that the claim must undergo arbitration before a federal court could hear the case. A claimant could then request the court to stay the EMTALA proceeding pending arbitration of the malpractice claim. A court could fairly grant such a delay if the EMTALA claim did not appear a pretext to bypass the state provisions. Under principles of equity, the court can

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96. *See* Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266, 270 (6th Cir. 1990) (rejecting the notion of preemption).
97. 23 F.3d 78 (4th Cir. 1994).
98. *Id.* at 80. In *Vogel*, the plaintiff filed suit nearly three years after the alleged EMTALA violation. *Id.* at 78-79. The plaintiff requested that the period be tolled from the time of the violation until the time at which a committee for the plaintiff was appointed due to plaintiff's incompetency. *Id.* at 80.
99. *Id.*
both ensure access to a federal cause of action and simultaneously respect the state's interests in arbitration proceedings.¹⁰⁰

5. Conclusion.—In Brooks, the Fourth Circuit addressed the scope of EMTALA with respect to the Maryland Health Care Malpractice Claims Act. The court held that a plaintiff may seek judicial resolution of an EMTALA claim without first undergoing arbitration under the state act. While the court formulated its holding on this ground alone, it also addressed the issue of preemption. Given the many differences between EMTALA and the state act, the lack of congressional guidance on the matter, and the separate possibility of an equitable remedy, it is unlikely that the court will find that EMTALA incorporates many, if any, requirements of state medical malpractice law.

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¹⁰⁰ See Jewell v. Malamet, 322 Md. 262, 276, 587 A.2d 474, 481 (1991) ("In all fairness, the tort case [for assault and battery] must be kept alive pending the outcome of the arbitration proceedings to prevent the running of limitations.").
# The Maryland Survey: 1993-1994

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