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Recent Decisions
The Maryland Court of Appeals

I. COMMERCIAL LAW

A. A Different Outcome Under the Revised U.C.C.? 

In Citizens Bank v. Maryland Industrial Finishing Co.,1 the Court of Appeals interpreted certain provisions of Maryland's Commercial Law Code, Article 3 regarding negotiable instruments.2 The case involved the use of a corporate indorsement3 stamp by an employee who misappropriated funds by depositing checks payable to her employer into her personal account.4

The specific issues presented by Citizens Bank were narrow. In a case of first impression, the court held that a “forged indorsement” as used in the Maryland Commercial Law Code5 was synonymous with an unauthorized indorsement under section 3-419(1)(c).6 The court also held that the omission of a restrictive indorsement by an employee was sufficient to make the entire indorsement “unauthorized” for purposes of a conversion action by the employer against the depositary bank.7 Thus, a depositary bank8 will be “strictly” liable for con-

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2. Id. at 452-53, 659 A.2d at 314-15.
3. Commentators and courts vary on whether “endorsement” or “indorsement” is the proper spelling. In this Note, I defer to Judge Goldberg of the United States Court of Appeals for the Fifth Circuit who explained that the P.E.G. stamp employed by banks stands for “Prior Endorsement Guaranteed.” While the Uniform Commercial Code . . . frequently fails to provide clear answers to questions in the area of negotiable instruments, it is unequivocal in its insistence that indorsement is to be spelled with the letter “i.” Bankers, who claim to know much of such weighty matters, may insist on beginning with “e” [because of] the bankers’ understandable reluctance to stamp “Pay Any Bank PIG” on the backs of checks they handle.
7. Id. at 463-64, 659 A.2d at 320.
8. A depositary bank is the “first bank to which an item is transferred for collection even though it is also the payor bank.” Md. Code Ann., Com. Law I § 4-105(a) (1992). The name “collecting bank” is also used by some authorities for this concept, but more commonly describes any of the intermediary banks through which the instrument passes before the drawee bank, or payor bank, the one from which funds are ultimately collected, is debited. See, e.g., id. § 4-104(d) (defining “collecting bank” as “any bank handling the bank in which a bank holds funds for another bank”).
version unless it can prove one or more of the defenses allowed under section 3-419(3) that limit its liability.9

This Note compares where the burden of loss falls under the court’s analysis in Citizens Bank, and where that burden would fall under the revised version of Article 3 of the Uniform Commercial Code (U.C.C.), which has not been adopted yet by the Maryland legislature.10 The Note concludes that Citizens Bank was decided properly under existing law.

1. The Case.—Pauline Pagani, an employee of Maryland Industrial Finishing Company (MIFCO), was responsible for receiving checks; marking file copies of invoices as “paid”; and recording check numbers, dates, dates of receipt, and amounts paid on invoice file copies.11 MIFCO instructed Pagani to indorse all checks received by stamping the back with two stamps.12 The first stamp contained MIFCO’s corporate name and address; the other contained the words “for deposit only.”13 Pagani was further directed to deposit the indorsed checks into MIFCO’s account at Citizens Bank.14 Pagani was also responsible for reconciling the corporate bank statement.15

In October or November 1989, MIFCO discovered discrepancies in its accounts receivable.16 When MIFCO’s owner questioned Pagani about the discrepancies, Pagani promised to implement a more rigorous filing system.17 In February 1990, after noticing additional dis-

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9. Citizens Bank, 338 Md. at 453, 466 n.11, 659 A.2d at 315, 321 n.11. Section 3-419(3) states that “a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such [bank] dealt with an instrument . . . is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.” Md. Code Ann., Com. Law § 3-419(3) (1992).

10. The U.C.C. adopted its major revision to Articles 3 and 4 in 1990. This Note cites to the 1995 U.C.C. because it is the most recent update.

11. Id. at 454, 659 A.2d at 315; see infra notes 130-132 and accompanying text (discussing the definition of “responsibility” under the revised U.C.C.).


13. Id.

14. Id. at 455, 659 A.2d at 315-16.

15. Id. at 456, 659 A.2d at 316.

16. Id. at 455, 659 A.2d at 316.

17. Id.
crepancies, MIFCO contacted several customers and learned that payments made by the customers were not reflected on MIFCO's books.\textsuperscript{18}

MIFCO then contacted Citizens Bank.\textsuperscript{19} The bank confirmed that the missing checks were deposited into Pagani's personal account, also at Citizens Bank.\textsuperscript{20} Pagani deposited the checks using blank deposit slips that she obtained at the bank's drive-up window.\textsuperscript{21} She then filled out the deposit slips with MIFCO's name and her personal account number.\textsuperscript{22} Pagani admitted that she was not authorized to deposit checks into her personal account, and that she did not always use the "for deposit only" stamp, even on some of the checks deposited in the MIFCO account.\textsuperscript{23} Citizens Bank never questioned the absence of the stamp containing the restrictive language.\textsuperscript{24}

MIFCO sued Citizens Bank and Pagani, alleging negligence, conversion, unjust enrichment, and constructive trust.\textsuperscript{25} The trial court held that despite the absence of the "for deposit only" stamp, the indorsements were actually authorized and therefore were not forgeries.\textsuperscript{26}

On appeal, the Court of Special Appeals held that Pagani's indorsements without the "for deposit only" stamp were unauthorized because Pagani had authority to deposit only into MIFCO's account but, in fact, had deposited checks into her personal account.\textsuperscript{27} This holding linked the two separate issues of what constitutes an unauthorized signature and what acts occurring after an indorsement is made may make the indorsement invalid.\textsuperscript{28} Citizens Bank appealed, and the Court of Appeals granted certiorari.\textsuperscript{29}

\textsuperscript{18.} Id.
\textsuperscript{19.} Id.
\textsuperscript{20.} Id.
\textsuperscript{21.} Id. at 456, 659 A.2d at 317.
\textsuperscript{22.} Id., 659 A.2d at 316-17.
\textsuperscript{23.} Id. at 457-58, 659 A.2d at 317.
\textsuperscript{24.} Id. at 457, 659 A.2d at 317.
\textsuperscript{26.} Citizens Bank, 338 Md. at 457, 659 A.2d at 317. MIFCO was awarded $35,683.70 plus $10,000 in punitive damages against Pagani. Citizens Bank, 100 Md. App. at 674, 642 A.2d at 318.
\textsuperscript{27.} Citizens Bank, 100 Md. App. at 683, 642 A.2d at 317, 323; Citizens Bank, 338 Md. at 458, 659 A.2d at 317.
\textsuperscript{28.} Citizens Bank, 338 Md. at 460-61, 659 A.2d at 318-19; see infra notes 80-82 and accompanying text.
\textsuperscript{29.} Citizens Bank, 338 Md. at 458, 659 A.2d at 317. The issues on appeal were: (1) whether the trial judge properly found that there were no forged indorsements under Md. Code Ann., Com. Law I § 3-419(1)(c), where the checks were stamp-indorsed with the
2. Legal Background.—

a. Liability of a Depositary Bank.—Price v. Neal\textsuperscript{60} is recognized as first having stated the theory that a cause of action may be brought against a bank for losses sustained due to the bank's processing a check to which it was not a holder.\textsuperscript{91} The logic of Price v. Neal is embodied in sections 3-417 and 4-208 of the U.C.C., which establish warranties made upon presentment and transfer.\textsuperscript{92} These warranties allow banks in the processing chain to rely on the genuineness of signatures on the instruments they are handling,\textsuperscript{93} and to allocate losses in the event that an instrument is ultimately paid where the signatures were not genuine.\textsuperscript{94}

Under section 3-419, the depositary bank is liable without regard to the depositary bank's negligence to the true owner of the check when an instrument accepted by it for negotiation is fraudulent.\textsuperscript{95} However, the bank's liability will be limited to the amount of any proceeds remaining at the disposal of the depositary bank, if the bank acted in good faith.\textsuperscript{96}

This statutory provision is consistent with the common law before the enactment of the U.C.C. In Cooper v. Union Bank,\textsuperscript{97} the Supreme Court of California noted that

an examination of the law existing prior to the enactment of the Uniform Commercial Code reveals a nearly unanimous agreement among the jurisdictions that the true owner of an

\textsuperscript{60} 97 Eng. Rep. at 871. "Holder" means a person who is in possession of a document of title or an instrument drawn, issued or indorsed to him or to his order or to bearer or in blank." \textsuperscript{91}See \textsuperscript{95}See \textsuperscript{96}See \textsuperscript{97}507 P.2d 609 (Cal. 1973).
instrument collected on a forged indorsement could recover in a direct suit against a collecting bank even though the bank had acted in good faith and with the highest degree of care. . . . 38

Policy arguments for maintaining depositary bank liability are numerous. The depositary bank is the only bank with the opportunity to confront the thief. 39 Moreover, depositary banks are frequently solvent, convenient defendants for plaintiffs who are usually payees or indorsers such as MIFCO. 40 A direct suit against the depositary bank prevents numerous suits by and against the parties to the check and the banks involved in processing the check. 41 Additionally, banks can insure against these losses and pass costs on to consumers.

Atlantic Trust Co. v. Subscribers to Auto Insurance Exchange 42 sets out what is still the general rule in Maryland as to depositary bank liability for negotiating checks with forged or unauthorized indorsements: "[A] bank is liable to a principal for the loss of funds resulting from the honoring of checks payable to the principal and endorsed by the agent without authority." 43

b. Unauthorized and Forged Indorsements.—Both pre- and post-U.C.C. law have treated indorsements made without authority in the same way as forged indorsements. 44 Prior to the U.C.C.'s adoption, former Article 13, section 44 stated that "[w]here a signature is forged, or made without authority . . . it is wholly inoperative, and no right to retain the instrument . . . or to enforce payment thereof against any party thereto, can be acquired through . . . such signature." 45 The former section's goals are reflected in current section 3-404(1) of the U.C.C., which makes unauthorized (including forged) signatures "wholly inoperative" unless the person whose name is signed is estopped from claiming forgery. 46 Prior to Citizens Bank, the

38. Id. at 616; see also Martin Co. v. Fidelity Bank, 218 Md. 28, 32-33, 145 A.2d 267, 269-70 (1958) (discussing liability of a bank charging instruments with forged or unauthorized signatures to a depositor).
39. WHITE & SUMMERS, supra note 33, § 18-4, at 224; see also Fisher, supra note 31, at 401.
40. WHITE & SUMMERS, supra note 33, § 18-5, at 225.
41. Fisher, supra note 31, at 401-02.
42. 150 Md. 470, 133 A.2d 319 (1926).
43. Id. at 474, 133 A.2d at 320 (citations omitted).
44. See MD. ANN. CODE art. 13, § 44 (1957); MD. CODE ANN., COM. LAW I §§ 1-201(43), 3-401(1) (1992); infra notes 45-46 and accompanying text.
45. MD. ANN. CODE art. 13, § 44 (1957).
46. MD. CODE ANN., COM. LAW I §§ 1-201(43), 3-404(1) (1992). Section 3-404 also makes such a signature operable if it is ratified. Id. § 3-404(2); see also Martin Co. v. Fidelity
Court of Appeals had not held that a forged indorsement and an indorsement made without authority were synonymous.\(^4\) Courts that have considered the substance of the term "forgery" under section 3-419 of the U.C.C. have rejected a strict dictionary interpretation.\(^4\)

One court observed that "'[t]here is no substantial difference between an unauthorized endorsement and a forged endorsement, the result being the same in so far as concerns the passing of title.'"\(^4\)

Both unauthorized and forged indorsements prevent subsequent parties in the negotiation chain from enjoying the immunity to personal defenses that accompanies holder in due course status.\(^5\)

Under the U.C.C.'s transfer warranties, the drawee has a cause of action against prior check handlers who did not have "good title to the instrument" because of the forged indorsement.\(^5\)

This is called "suing upstream" with a cause of action based in old sections 3-417 and 4-207, which covered presentment and transfer warranties.\(^5\)

Under the 1990 revisions "[e]ach party . . . between the thief and the drawee bank will normally make an implied warranty, directly to the drawee bank, that is 'entitled to payment.'"\(^5\)

The transfer warranty runs to transferees who are collecting banks and warrants that

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47. See supra text accompanying note 6.
49. Id. at 725 (quoting Teas v. Third Nat'l Bank & Trust Co., 4 A.2d 64 (N.J. 1939)). The court continued, quoting Teas: "The use of the word 'forged indorsement' as constituting a conversion under N.J.S. 12A:3-419(1) does not preclude the finding of conversion where the unauthorized signature does not constitute a forgery in the strict sense." Id.; see 2 R. Anderson, Uniform Commercial Code 1034-35 (2d ed. 1971).
50. A holder in due course of an instrument is one who has taken the instrument for value, in good faith, and without notice of any claim or defense against the instrument. Md. Code Ann., Com. Law I § 3-302 (1992). A holder in due course takes the instrument free from all defenses except those enumerated, which include incapacity, duress, misrepresentation, and discharge in bankruptcy. Id. § 3-305.
51. Perini Corp. v. First Nat'l Bank, 553 F.2d 398, 404 (5th Cir. 1977); see also Md. Code Ann., Com. Law I §§ 3-417(1)(a), 4-207(1)(a) (1992). Section 3-417(1)(b) states: "[a]ny person who obtains payment or acceptance of any prior transferor warrants to a person who in good faith pays or accepts that . . . [h]e has no knowledge that the signature of this maker or drawer is unauthorized . . . ." Id. Section 4-207(1)(a) states,

Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that . . . [h]e has good title to the item or is authorized to obtain payment or acceptance on behalf of one who has good title . . . .

Id. § 4-207(1)(a).
52. Md. Code Ann., Com. Law I §§ 3-417, 4-207; see also White & Summers, supra note 33, § 18-7, at 231-32.
53. White & Summers, supra note 33, § 18-7, at 231.
“all signatures . . . are authentic and authorized.”54 After a payor bank recredits its customer’s account it will probably sue the collecting bank under 4-208(a)(2), and the collecting bank would sue further upstream under 4-207(a)(3).55

c. 1990 Revisions to U.C.C. Article 3.—In 1990, the American Law Institute and the National Conference of Commissioners on Uniform State Laws promulgated a revised version of Article 3 that governs check fraud litigation.56 By June 1995, at least thirty-one states had adopted the 1990 revisions.57 Maryland has not yet adopted the 1990 revisions, but historically has adopted major changes in uniform law.58

The 1990 revisions were adopted to “clarify the law and resolve inconsistent interpretations among various courts” and to achieve substantive changes in the law of check fraud.59 One of the most significant changes is the adoption of a “shared loss scheme” that, depending on the facts, would result in situations where (1) an employer could not sue a depositary bank for negotiating a check improperly indorsed by that employer’s employee, or (2) the employer

54. Revised § 3-416(a)(1) states “[a] person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that . . . all signatures on the instrument are authentic and authorized . . . .” U.C.C. § 3-416(a)(1) (1995).
55. Section 4-208(a)(2) of the U.C.C. states:
(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

. . .
(2) the draft has not been altered . . .
Id. § 4-208(a)(2) (1995).

Section 4-207(a)(3) provides: “(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that: . . . (3) the item has not been altered . . . .” Id. § 4-207(a)(3) (1995).
57. Johnson & Franzese-Damron, supra note 56, at 538.
58. Interview with Irving Breitowitz, Professor of Law, University of Maryland School of Law, in Baltimore, Md. (Sept. 13, 1995). A review of the General Assembly Subject Index of Proposed Legislation shows that since 1990, no bill has been introduced in the General Assembly seeking overall revision or revision of Article 3 of the U.C.C. now in effect in Maryland.
and bank would split the loss in proportion to each one's negligence.  

The introductory notes to the revised Article 3 make clear that the revisions were intended to apply more readily than prior law had to modern technologies and modern payment practices. Also noted as a catalyst to revision was the need to bring Article 3 into compliance with modern federal banking law.

Commentators have specifically criticized the revised sections 3-405 and 3-420. The main criticism is that revised section 3-405 employs for the first time a comparative negligence scheme or loss allocation regime. Under revised section 3-405, loss may be allocated between an employer whose employee has committed fraud and the depositary bank, based on the degree of negligence committed by both. A comparative negligence rule will require courts to "allocate liability mathematically if it finds a defending bank failed to exercise ordinary care. . . . Courts have rejected a comparative negligence concept under 1962 Articles 3 and 4." The required weighing of evidence put on by the employer and the bank under section 3-405 adds a dimension of uncertainty as to where liability will fall.

3. The Court's Reasoning.—The Court of Appeals defined the issue in Citizens Bank as whether an agent's indorsements on checks payable to her principal were unauthorized for purposes of determining conversion under section 3-419 "(1) when the agent indorsed . . . with an improper motive or later misappropriated the checks, or (2) when the agent omitted restrictive language required by the principal to be part of the indorsement." The court found that the agent's subjec-

60. See infra notes 129-137 and accompanying text.
62. Id. at 299.
63. See, e.g., Henry J. Bailey, New 1990 Uniform Commercial Code: Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections, 29 WILLIAMETTE L. REV. 409, 515 (1993) (discussing the clarification of the 1962 U.C.C. by the 1990 U.C.C.). Bailey argues, among other things, that the only deficiency with section 3-420 is "the absence of a provision on when a cause for conversion accrues." Id.; see also infra note 64.
64. John J.A. Burke, Loss Allocation Rules of the Check Payment System with Respect to Forged Drawer Signatures and Forged Indorsements: An Explanation of the Present and Revised UCC Articles 3 and 4, 25 UCC L.J. 318, 322-24 (1993); see also Bailey, supra note 63, at 487-91 (criticizing revised § 3-405).
65. U.C.C. § 3-405(b) (1995); Bailey, supra note 63, at 490 (discussing the inappropriateness of the tort concept of comparative negligence appearing in the U.C.C., a commercial law code).
66. Bailey, supra note 63, at 493.
67. Id.
68. Citizens Bank, 338 Md. at 452, 659 A.2d at 314. Citizens Bank was a 4-3 decision.
tive motive at the time of indorsement and her later misappropriation of the checks were irrelevant in determining whether her indorsements were authorized, and thus whether the bank could be held liable for conversion.\(^6\) Rather, the question of whether her indorsements were authorized turned on whether her employer required the use of a restrictive indorsement, a question of fact for the trial judge.\(^7\)

The majority introduced its analysis with the generally accepted underlying premise regarding the transferability of title to a check: Even though acting in good faith, a person who takes a check with a forged indorsement is exercising "dominion and control" over a check rightfully owned by another.\(^7\) Thus, the actor is liable for conversion.\(^7\) The language of section 3-419(1)(c) states only that "[a]n instrument is converted when . . . it is paid on a forged indorsement."\(^7\) In interpreting this language, the court held that a "forged" indorsement is synonymous with an "unauthorized" indorsement.\(^7\) Pagani, the employee, had not "forged" an indorsement if "forged" is interpreted by its strict dictionary definition.\(^7\) The Maryland Code defines "unauthorized signatures" as including forged signatures.\(^7\) The issue to be decided becomes whether the indorsements Pagani made were unauthorized.

Decisions from numerous other jurisdictions support the court's holding.\(^7\) In this case, if the indorsements were found to be unauthorized, the bank could be held liable for conversion.\(^7\)

\(^6\) Id. at 460-62, 659 A.2d at 318-19; see also infra text accompanying notes 79-82.

\(^7\) \textit{Citizens Bank}, 338 Md. at 462-64, 659 A.2d at 319-20; see also infra notes 83-92 and accompanying text.

\(^71\) \textit{Citizens Bank}, 338 Md. at 452-53, 659 A.2d at 314-15 (quoting MD. CODE ANN., COM. LAW I § 3-419 cmt. 3 (1992)).

\(^72\) Id. Conversion is defined as "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." BLACK'S LAW DICTIONARY 332 (6th ed. 1990).

\(^73\) MD. CODE ANN., COM. LAW I § 3-419 (1992).

\(^74\) \textit{Citizens Bank}, 338 Md. at 458-59, 659 A.2d at 317-18; see also supra text accompanying note 6.

\(^75\) "Forgery" is defined, in pertinent part, as "[t]he false making or the material altering of a document with the intent to defraud. A signature of a person that is made without the person's consent and without the person otherwise authorizing it." BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

\(^76\) See infra text accompanying note 150.


\(^78\) \textit{Citizens Bank}, 338 Md. at 463-64 & n.10, 659 A.2d at 320.
The court then addressed the Court of Special Appeals's discussion regarding the effect of the unauthorized deposits. The court agreed that Pagani was clearly unauthorized to deposit the checks into her account, but found that it was a separate question as to whether she had the authority to omit the restrictive indorsement. The court explained:

It defies reason to allow an event that occurs after the indorsement to affect the validity of the indorsement. An indorsement is either valid or invalid at the time it is made; if at that time, the agent has authority to indorse, the indorsement is authorized. The use to which the agent later puts the check does not affect the agent's authorization to indorse it.

The court stated further that a valid indorsement is not dependent on the agent's subjective motivation at the time the indorsement is made.

The next issue addressed was whether the agent's failure to use the restrictive indorsement stamp, when she was specifically directed to by her principal, made an otherwise valid indorsement invalid. The court noted three legally significant aspects to a restrictive indorsement. First, restrictive language limits the transferability of a check. Second, a bank's failure to adhere to a restrictive indorsement results in the bank being liable for conversion. Third, because of the significance of restrictive language, "courts . . . conclude that an agent who is authorized to do one is not necessarily authorized to do the other." The court continued that if a restrictive indorsement is required by the principal and is not used by the agent, because of the legal significance of a restrictive indorsement, the entire indorsement becomes unauthorized. The scope of Pagani's authority to indorse was held to be a question of fact to be decided by the trial judge.

80. Citizens Bank, 338 Md. at 460, 659 A.2d at 318.
81. Id.
82. Id. at 461, 659 A.2d at 319.
83. Id. at 462-63, 659 A.2d at 319-20 (citing Md. Code Ann., Com. Law I § 3-206(3) (1992)).
84. Id. at 461, 659 A.2d at 319.
85. Id.
86. Id. at 463, 659 A.2d at 320. In other words, an agent authorized to make restrictive indorsements is not necessarily authorized to make unrestricted indorsements or vice versa.
87. Id.
88. Id. at 465, 659 A.2d at 321.
The court further commented that "[i]f we were to hold that the omission of the restrictive language had no effect, we would essentially place the principal-drawee's ability to recover entirely in the hands of the agent under the circumstances presented in this case." The ultimate result of this reasoning is that Citizens Bank will be liable for conversion if (1) Pagani is found to have acted outside the scope of her authority in not affixing restrictive indorsements, and (2) Citizens Bank cannot meet the burden of proof of the affirmative defense allowed under section 3-419(3). The court remanded the case to the trial court for the taking of additional evidence on these questions of fact.

The dissenters' "quarrel [was] with what the majority deem[ed] to be an unauthorized indorsement." The dissent's argument turned on what is required to make an instrument negotiable. The Maryland Code defines "negotiation," in pertinent part, as "the transfer of an instrument in such form that the transferee becomes a holder. . . . if payable to bearer it is negotiated by delivery." The dissent quoted section 3-204(2), which states that "[a]n indorsement in blank... may contain a mere signature... [and] becomes payable to bearer and may be negotiated by delivery alone until specially in-

89. Id. at 464, 659 A.2d at 320. The court continued:

The agent could choose to disregard the principal's instructions and fail to include the restrictive language . . . , thus precluding the principal from recovering under a conversion theory. Or the agent could choose to indorse the checks . . . with the restrictive language but nevertheless deposit them into the agent's own account, thus permitting the principal to recover under a conversion theory because the bank violated the restrictive indorsements. This variance in outcomes based entirely on the agent's obedience or disobedience is unjustifiable.

90. Id. at 462-63, 659 A.2d at 319-20.

91. Id. at 465 n.11, 659 A.2d at 321 n.11 (discussing the elements of the affirmative defense available to Citizens); see also MD. CODE ANN., COM. LAW I § 3-419(3) (1992). The liability of a bank that can prove it has acted in good faith and in accordance with reasonable commercial standards is limited to that portion of the instrument proceeds still in the bank's possession. Id.

92. Citizens Bank, 338 Md. at 465, 659 A.2d at 321.

93. Id. at 466, 659 A.2d at 321 (Bell, J., dissenting).

94. Id. at 469, 659 A.2d at 323 (discussing that an instrument payable to order is made negotiable if it is negotiated by delivery with any necessary indorsement); see also WHITE & SUMMERS, supra note 33, §§ 18-4, 18-5, at 224-25 (discussing the policy behind Article 3's narrow conception of negotiability). Section 3-104 provides that a negotiable instrument must "(a) Be signed by the maker or drawer; and (b) Contain an unconditional promise or order to pay . . . ; and (c) Be payable on demand or at a definite time; and (d) Be payable to order or to bearer." MD. CODE ANN., COM. LAW I § 3-104 (1992). Checks are negotiated when they become bearer paper, i.e., when they are indorsed. Id. § 3-202.

95. MD. CODE ANN., COM. LAW I § 3-202(1).
dorsed."

The dissent reasoned that Citizens Bank became a holder of the checks misappropriated by Pagani because the checks were payable to the bearer, and thus in negotiable form when the bank received them. The dissent concluded that, as a matter of law, Pagani had authority to negotiate the checks, and therefore, Citizens Bank was not liable for conversion because the indorsements were authorized.

4. Analysis.—The decision in *Citizens Bank* confirms that a depositary bank will be liable under section 3-419 for proceeds paid out as a result of an employee omitting the restrictive indorsement required by the employer when depositing checks payable to the employer. The three pivotal holdings of the court were decided based on interpreting the Commercial Law Article, section 3-419. First, the court decided the meaning of "forgery" under section 3-419. Second, it held that where a principal directs an agent to use a restrictive indorsement, omission of that language makes the entire indorsement unauthorized. Finally, the court decided that if the indorsements were unauthorized, the depositary bank would be liable unless it proved the defenses allowable under section 3-419. This Note reviews the basis of the court's decisions on these points and then applies the revised 1990 U.C.C. provisions to the facts in an effort to determine whether the court's conclusions would differ under the new U.C.C. provisions.

In *Citizens Bank*, a customer deposited checks payable to her employer into her account with an indorsement that omitted certain restrictive language her employer required, the customer withdrew the funds from her account, and the drawee bank paid the checks from the drawers' accounts when the various checks were presented for payment. The *Citizens Bank* court was concerned with the ability

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96. *Citizens Bank*, 338 Md. at 468, 659 A.2d at 322 (Bell, J., dissenting).
97. *Id.* at 471, 659 A.2d at 323. "A restrictive indorsement is not, however, any part of the 'necessary indorsement' for purposes of negotiation." *Id.* at 472-73, 659 A.2d at 324.
98. *Id.* at 473, 659 A.2d at 325.
99. *Id.* at 458, 659 A.2d at 317-18.
100. See supra notes 68-74, 81-87, 91 and accompanying text.
101. *Citizens Bank*, 338 Md. at 458-59, 659 A.2d at 318. The court also held that the act by the agent of depositing the checks in a personal account did not result in conversion liability of the depositary bank, Citizens Bank. *Id.* at 460-61, 659 A.2d at 318-20.
102. *Id.* at 463-64, 659 A.2d at 320.
103. *Id.* at 452-53, 659 A.2d at 314-15. The court also held that the scope of Pagani's authority was a question of fact to be decided on remand. *Id.* at 465, 659 A.2d at 321.
104. The issue of whether the omission of the restrictive language was unauthorized was held to be a matter of fact to be decided on remand. *Id.* at 321, 659 A.2d at 464.
105. See supra text accompanying notes 20-24.
of the plaintiff to recover. After holding that the unauthorized omission of restrictive language is sufficient to make the indorsement itself unauthorized, the court stated "[i]f we were to hold that the omission of the restrictive language had no effect, we would essentially place the principal-drawee's ability to recover entirely in the hands of the agent under the circumstances presented in this case." The court confirmed that Maryland adheres to the prevailing view of U.C.C. section 3-419 that depositary banks are liable for conversion when paying in spite of an unauthorized indorsement. The court's analysis and decision were in accordance with the decisions of the various jurisdictions that have interpreted section 3-419. The question becomes one for the Maryland legislature. Does the current language of section 3-419, even when properly interpreted by the Court of Appeals, achieve a result that is equitable and practical in today's business environment?

a. Use of a Restrictive Indorsement.—The Citizens Bank court failed to address the basic concept of negotiability. A restrictive indorsement is used to dictate to subsequent holders the extent of negotiability of a check. A party may become a holder, and thus become able to negotiate the instrument, without the restrictive indorsement. This argument was raised by the dissent, and is left unanswered by the majority's opinion.

The dissent failed to acknowledge, however, that the real issue is the scope of the employee's authority. If omitting of the "for deposit only" language was within the scope of Pagani's authority, then the absence of that language would not result in liability to Citizens Bank because Pagani would be authorized to omit that language. As with any other issue involving an assignment of duties to an agent, if the

106. Citizens Bank, 338 Md. at 463, 659 A.2d at 320.
107. Id. at 464, 659 A.2d at 320. The dissent answered this statement with "[t]he argument is curious inasmuch as the method an agent chooses to breach his or her duty to the principal always impacts the principal's right to recover." Id. at 473, 659 A.2d at 325 (Bell, J., dissenting).
108. Id. at 452-53, 659 A.2d at 314-15.
109. Many provisions of U.C.C. titles 3 and 4 were revised, most of which are not relevant to the discussion in this Note. The legislature would have many considerations to address, beyond the scope of this Note, before adopting revised Titles 3 and 4.
110. Id. at 462, 659 A.2d at 319.
111. MD. CODE ANN., COM. LAW I § 3-301 (1992); see also supra note 50.
112. See supra notes 94-98 and accompanying text.
action is within the scope of the agent's authority, the principal has authorized the action and is bound by it.\textsuperscript{113}

\textit{b. A Different Outcome Under the Revised U.C.C.}—Under the 1990 U.C.C. revisions, would the court's decision be the same on the issue of the bank's liability for accepting a check on an unauthorized indorsement? Sections 3-405 and 3-420 of the revised 1990 U.C.C. Article 3 change the rule set out in \textit{Atlantic Trust Co. v. Subscribers Auto Insurance Exchange}\textsuperscript{114} by shifting the burdens borne by depositary banks and customers when an unauthorized indorsement is used.\textsuperscript{115} This results in a greater variety of outcomes as to where liability will finally lie.\textsuperscript{116}

Revised section 3-420(a) states that "[a]n instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment."\textsuperscript{117} The revision drops the specific "forged indorsement" language used in Commercial Law Article, section 3-419(1)(c).\textsuperscript{118} Comment one to revised section 3-420 states that "[t]his covers cases in which a depositary... bank takes an instrument bearing a forged indorsement."\textsuperscript{119} Holders and holders in due course are entitled to enforce instruments, as are others.\textsuperscript{120}

\textsuperscript{113. See Oaks v. Connors, 339 Md. 24, 30, 60 A.2d 423, 426 (1995) (holding that an employer is liable for his employee's conduct when the employee was acting within the scope of employment under the doctrine of respondeat superior). This means that the employer could not look to third parties, i.e., the depositary bank, for recovery because the employer would have to bear the loss created by the employee.}

\textsuperscript{114. 150 Md. 470, 133 A.2d 319 (1926).}

\textsuperscript{115. See infra notes 130-147 and accompanying text (discussing how revised § 3-405 affects the conversion liability analysis).}

\textsuperscript{116. See infra notes 130-147 and accompanying text.}

\textsuperscript{117. U.C.C. § 3-420 (1995). Section 3-201 of the revision defines "negotiation" as "transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." See infra note 120 (defining holder).}

\textsuperscript{118. Md. Code Ann., Com. Law I § 3-419(1)(c) (1992). This sections states "[a]n instrument is converted when [i]t is paid on a forged indorsement." Id.}

\textsuperscript{119. U.C.C. § 3-420 cmt. 1.}

\textsuperscript{120. U.C.C. § 3-301(1995) states:}

A "[p]erson entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.
Significantly, a payee who has not received delivery of an instrument may not maintain a conversion action against a depositary bank because the payee never became a holder. The payee may become a holder, and thereby gain standing to sue the depositary bank, if his agent takes the check on his behalf. This occurred in Citizens Bank, where Pagani was responsible for receiving all checks on MIFCO’s behalf, giving MIFCO standing to sue. Through Pagani’s receiving the checks payable to MIFCO, MIFCO became a holder in due course. Pagani was never a holder, and therefore could not be a holder in due course. Pagani also did not fulfill any other parts of the definition of one entitled to enforce an instrument. Citizens Bank made payments on instruments to a person not entitled to enforce the instrument or receive payment, i.e., someone not a holder. Thus, under the 1990 revision, Citizens Bank would still be liable for conversion.

The Citizens Bank court indicated that the bank may minimize its liability by offering evidence of the defenses allowed under section 3-419(3) “or any other defenses provided by the law.” However, under the revised U.C.C. section 3-420, the defenses of good faith and commercially reasonable practices are not available to a depositary

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121. Id. § 3-420(a); Johnson & Franzese-Damron, supra note 56, at 541 (discussing the four most significant changes to § 3-419 under the revised § 3-420); see also supra note 31 (defining holder).
122. U.C.C. § 3-420(a) states: “An action for conversion may not be brought by . . . a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent . . . .” Id.
123. Citizens Bank, 338 Md. at 454-58, 659 A.2d at 315-17.
124. See supra note 120 and accompanying text.
125. See supra note 120 and accompanying text.
126. Citizens Bank, 338 Md. at 457, 659 A.2d at 317; see supra text accompanying note 23.
127. Citizens Bank, 338 Md. at 465, 659 A.2d at 321 & n.11; see supra note 91 and accompanying text.
bank such as Citizens Bank; conversion gives rise to strict liability. 128 Despite the lack of defenses under section 3-420, a defense pertinent to Citizens Bank would arise under revised section 3-405. 129 Revised section 3-405 makes employers liable for forgeries by employees who are responsible 130 for significant accounting functions of the business, except where the bank failed to follow commercially reasonable practices. 131 Under revised section 3-405(b), if an employer gives responsibility to an employee, and that employee makes a fraudulent indorsement of the instrument, the indorsement is treated as the effective indorsement of the payee if made in the payee's name. 132 The revision requires a showing by the collecting or depositary bank that it used ordinary care in processing the check. 133 If the bank cannot prove ordinary care, the person bearing the loss may collect from the bank to the extent the bank's lack of ordinary care contributed to the loss. 134 The official comment to section 3-405 notes that where the employee is the forger, an employer is in a better position to prevent

128. U.C.C. § 3-420(c) ("[A] representative, other than a depositary bank, who has in good faith dealt with an instrument... is not liable in conversion... beyond the amount of any proceeds that it has not paid out."). Comment 3 to § 3-420 addresses the change eliminating defenses available to the depositary bank, stating that "courts... saw no reason why a depositary bank should have the defense stated in [§ 3-419(3)].... The depositary bank is ultimately liable in the case of a forged indorsement check because of its warranty to the payor bank under [§] 4-208(a)(1).... The defense provided by § 3-420(c) is limited to collecting banks other than the depositary bank." Id. cmt. 3. This defense would not be available to Citizens Bank as a depositary bank.

129. Id. § 3-405.

130. "Responsibility" is defined as "authority (i) to sign or indorse... on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit... or for other disposition...." Id. § 3-405(a)(3). Additionally, § 3-405(b) requires that the responsibility of the employee must be with respect to the instrument at issue. See also White & Summers, supra note 33 § 19-4, at 260.

131. U.C.C. § 3-405 cmt. 1; see also Johnson & Franzese-Damron, supra note 56, at 542. Section 3-405(b) states in pertinent part:

a person who, in good faith... takes [an instrument]... for collection, if an employer entrusted an employee with responsibility with respect to the instrument, and the employee... makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person... taking [the instrument] or taking it for value or for collection fails to exercise ordinary care... and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care....

U.C.C. § 3-405(b).

132. See supra note 131.

133. U.C.C. § 3-103(a)(7) (1995) (defining "ordinary care" as "observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged").

134. U.C.C. § 3-405(b). Official comment 2 to § 3-405 notes that a bank's negligence was not a factor in the old § 3-405 as the bank had to prove only good faith. Id. cmt. 2.
forgery, by carefully choosing employees, and to first catch the forgery if it is committed. Thus, section 3-405 introduces the concept of comparative negligence, splitting the loss on a percentage attributable basis between the two wrongdoers.

In determining whether section 3-405 liability applies to an employer, there are two additional factors that could be considered by a court. First, there may be an exception to liability for small businesses where it would be impractical to spread out accounting responsibilities. Second, the depositary bank’s permitting an otherwise authorized employee to deposit a corporate check into a personal account may constitute prima facie evidence of a bank’s failure to use ordinary care.

In Citizens Bank, both of these factors would weigh against Citizens Bank being relieved of liability. First, MIFCO was a small, family-owned business with only seven employees. Pagani, the employee/agent, had access to all accounting records and tools of MIFCO and fulfilled the necessary criteria to make her “responsible” under section 3-405(a)(3). Second, Pagani was able to misappropriate checks by using deposit slips with her personal account number. Admittedly, however, Pagani’s superior did not review her work, especially bank reconciliations, until suspicions were aroused after the owner incidentally reviewed the billing files.

Revised U.C.C. section 3-405 sets out scenarios to illustrate the impact of the new language. The Citizen Bank case most closely resem-

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135. Id.
136. Bailey, supra note 63, at 490. The comparative negligence provision has been criticized as a tort concept “that does not belong in a commercial law statute.” Id.
137. White & Summers, supra note 33, § 19-3, at 243.
139. Citizens Bank, 338 Md. at 453, 659 A.2d at 315.
140. Id. at 454-55, 659 A.2d at 315-16.
141. Id.; see also note 130 and accompanying text.
142. Citizens Bank, 338 Md. at 456, 659 A.2d at 316.
143. Id. at 455, 659 A.2d at 316.
bles the scenario entitled "Case #4." There, an employee's responsibilities include stamping the employer's blank unrestricted indorsement on checks received by the employer. In this hypothetical, the result is that section 3-405 does not apply because there is no forged indorsement. In the Citizens Bank case, if on remand Pagani's indorsements were found to be unauthorized, Citizens Bank could invoke a section 3-405 defense. This defense would characterize Pagani as a "responsible" employee and would result in MIFCO having to bear at least part of the loss.

c. Defining "Forgery."—There is no U.C.C. definition of "forgery." However, the definition for purposes of Article 3 usage is a well-settled U.C.C. principle. Maryland's Commercial Law Article section 1-201(43) and the 1990 U.C.C. revisions define "unauthorized signatures" as those "made without actual, implied or apparent authority and includes a forgery." Official comment two to revised section 3-406 characterizes unauthorized signatures as "broader in concept [than forged signatures] . . . includ[ing] not only forgery but also the signature of an agent which does not bind the principal under the law of agency." Thus, it may be argued that "forgery" should be construed narrowly, as the scope of the definition of "unauthorized signatures" is clearly intended to be the broader of the two categories. This clarification is sensible in light of the use courts have made of the "unauthorized equals forgery" tool they have created.

The reasoning adopted by most courts for the inclusion of "unauthorized" indorsements under the category of "forged indorsements" is found in the courts' consideration of the scope of the misappropriating agent's authority. In such cases, the agent usually has used or

144. U.C.C. § 3-405 cmt. 3 (1995).
145. Id.
146. Id.
147. Id.
148. See supra notes 48-50 and accompanying text.
150. Id.
151. U.C.C. § 3-406 (1995). The dissent made this distinction noting "[w]hile every forged signature necessarily is unauthorized . . . not every unauthorized signature is a forgery." Citizens Bank, 338 Md. at 467, 659 A.2d at 322 (Bell, J., dissenting).
affixed the principal's indorsement and then misappropriated the funds. Under a section 3-419 analysis, this reasoning makes sense. Courts needed a way to provide compensation for employers to recover from those who, through their position of trust, misappropriated funds.\textsuperscript{153} Expanding "forgery" to include "unauthorized" signatures that were not strictly forged allowed them to protect these parties.

In a revised section 3-420 analysis, however, the court in \textit{Citizens Bank} would not have to determine the meaning of "forgery." The language of revised section 3-420 that would govern the conversion cause of action refers to a person not entitled to enforce the instrument.\textsuperscript{154} The court would have to determine whether, under revised section 3-420, Pagani was entitled to enforce the instrument.\textsuperscript{155} If the 1990 revisions were operable in Maryland on remand, and if Pagani was determined to have acted outside the scope of her authority and thereby to have converted the instruments, she would not be a holder,\textsuperscript{156} and conversion liability under section 3-420 may fall on the shoulders of the employer.

5. \textit{Conclusion}.—The \textit{Citizens Bank} court properly decided the facts before it by adhering to established principles regarding the interpretation of section 3-419. While it stated its concern with the employer's recovery, its analysis was still typical of employee misappropriation cases involving bank conversion liability. Application of the revised 1990 U.C.C. provision, not yet adopted in Maryland, would produce a different analysis by the court resulting in more than one possible outcome. Under the current version of section 3-419, the court looked only to the bank's actions of accepting and paying the instruments. On remand, the court will look at facts going to the defenses of good faith and commercial reasonableness. Under section 3-420 of the revised U.C.C., however, the court would perform an extended analysis.

New section 3-405 would have an even greater impact on the court's analysis than would the new section 3-420. If the employer was found to have been negligent in its delegation to and supervision of its employee, the bank would be insulated against liability. If, how-

\textsuperscript{153} See supra note 89 and accompanying text.
\textsuperscript{154} See supra notes 117-126 and accompanying text.
\textsuperscript{155} U.C.C. § 3-420(a) (1995).
\textsuperscript{156} \textsc{White} \& \textsc{Summers}, supra note 33, § 17-3, at 158. A stolen order instrument will have a forged indorsement and therefore the thief cannot become a holder because the second criteria of holdership, "an instrument drawn, issued, or indorsed by him or to his order," is not met. \textit{Id}. 

ever, Citizens Bank was found to have failed to exercise ordinary care, the damage sustained by MIFCO would be proportionately divided between it and Citizens Bank.

The revised U.C.C. sections discussed above would not be adopted by Maryland in isolation, but as part of a larger statutory reform. Revised sections 3-405 and 3-420, used together, create more of an incentive for businesses to engage in careful hiring practices and to be diligent about their banking relations. These new sections also install another safeguard in the check-processing procedure without placing a larger burden on the banks that would in turn inconvenience and burden customers. These revisions do not drastically change existing law, but provide parties with the ability to place the burden of monitoring banking relations on the party most interested in those relations, the banking customer.

Draga L. Dubick
II. CONSTITUTIONAL LAW

A. Double Jeopardy and Drunk Driving: Imposing Civil and Criminal Sanctions for the Same Offense

In *State v. Jones*, the Court of Appeals considered whether the Double Jeopardy Clause of the Fifth Amendment or Maryland common law barred the state from obtaining a criminal conviction for driving while intoxicated against an individual whose driver's license was previously suspended as a result of the same offense. The court held that section 16-205.1 of the Maryland Transportation Article, the provision authorizing suspension of a driver's license upon a driver's failure to pass or refusal to take a blood or breath alcohol test, served the legitimate remedial purpose of removing potentially dangerous drivers from the Maryland highways. Thus, the civil sanctions imposed by the statute did not constitute a punishment within the ambit of the Double Jeopardy Clause. In so holding, the court affirmed the general rule that the state may impose both criminal and civil sanctions based on the same offense and that civil sanctions will not be viewed as punishment so long as they can be explained by remedial purposes alone.

1. The Case.—On April 25, 1994, Ernest Jones, Jr. was arrested for driving while intoxicated. A breathalyzer test, administered with Jones's consent shortly after the arrest, registered a blood alcohol content (BAC) of 0.27. The results were well above Maryland's established legal limit of 0.10 for driving while intoxicated. On August 31,
1994, an administrative law judge suspended Jones’s Maryland driver’s license for thirty days pursuant to section 16-205.1 of the Transportation Article.9

On November 15, 1994, the district court found Jones guilty of driving while intoxicated.10 Jones appealed to the circuit court, arguing that to prosecute him for driving while intoxicated after his license already had been suspended for the same incident constituted double jeopardy.11 Finding that the suspension of Jones’s license was “punishment,” the circuit court dismissed the criminal action for driving while intoxicated because such action would have placed Jones in jeopardy a second time, a violation of the Fifth Amendment.12 Subsequently, the Court of Appeals granted certiorari to consider whether the administrative suspension of a driver’s license constituted punishment within the ambit of the Double Jeopardy Clause or Maryland common law, thereby precluding the state from bringing a subsequent prosecution for the crime of driving while intoxicated.13

2. **Legal Background.**—The state’s power to suspend a driver’s license for refusing or failing a breath or blood alcohol test is granted

1. For a test result indicating an alcohol concentration of 0.10 or more at the time of testing:
   A. For the first offense, suspend the driver’s license for 45 days; or
   B. For a second or subsequent offense, suspend the driver’s license for 90 days; or
2. For a test refusal:
   A. For a first offense, suspend the driver’s license for 120 days; or
   B. For a second or subsequent offense, suspend the driver’s license for 1 year;

   **(n) Modification of suspension.**
   (1) The Administration may modify a suspension under this section or issue a restrictive license if:
   (i) The licensee did not refuse to take a test;
   (ii) The licensee has not had a license suspended under this section during the past 5 years;
   (iii) The licensee has not been convicted under § 21-902 of this article during the past five years;
   (iv) The licensee is required to drive a motor vehicle in the course of employment;
   (2) The license is required for the purpose of attending an alcoholic prevention or treatment program.

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9. *Jones*, 340 Md. at 241, 666 A.2d at 131. For the text of § 16-205.1, see *supra* note 8.
11. *Id.*
12. *Id.*
13. *Id.* at 240, 666 A.2d at 130.
by section 16-205.1 of the Transportation Article. The court in Jones held that section 16-205.1 did not implicate the Double Jeopardy Clause because it did not impose punishment, but was instead a civil sanction. Consequently, the suspension of a license had no effect on the subsequent prosecution of the same driver for driving while intoxicated. In response to several recent United States Supreme Court decisions, defense attorneys have begun to challenge this type of holding, claiming that the suspension of a license constitutes a punishment, making a subsequent prosecution for driving while intoxicated a violation of the Fifth Amendment's Double Jeopardy Clause.

The vast majority of appellate courts that have reviewed this issue have rejected the double jeopardy argument. The Court of Appeals granted review in Jones to determine this issue of first impression in Maryland.

a. The Double Jeopardy Clause. The Fifth Amendment to the Constitution provides, in relevant part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." In North Carolina v. Pearce, the Court held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. The rationale underlying these protections is that the state

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15. Jones, 340 Md. at 242, 666 A.2d at 131; see also In re John P., 311 Md. 700, 710, 537 A.2d 263, 268 (1988) (holding that double jeopardy was not implicated because loss of custody or visitation rights was not a criminal prosecution); Attorney Grievance Comm'n v. Brown, 308 Md. 219, 223, 517 A.2d 1111, 1112 (1986) (holding that lawyer's double jeopardy claim was not applicable in a disciplinary proceeding that was not criminal); Attorney Grievance Comm'n v. Anderson, 281 Md. 152, 155, 537 A.2d 159, 161 (1986) ("In order for the double jeopardy provisions of the Fifth Amendment . . . to be applicable, it would be necessary for this to be a criminal proceeding.").
16. See infra notes 25-50 and accompanying text.
19. Jones, 340 Md. at 240, 666 A.2d at 130.
20. U.S. Const. amend. V.
22. Id. at 717.
should be prevented from making repeated attempts to convict or punish someone for the same offense, thereby “subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.” The guarantee against double jeopardy is considered so fundamental to the concept of justice that the Court, via the Fourteenth Amendment, made it binding on the states.

b. Double Jeopardy and Civil Proceedings.—When considering double jeopardy and civil proceedings, the inquiry focuses on the protection against multiple punishments. In Helvering v. Mitchell, the Court recognized that the Double Jeopardy Clause did not prohibit Congress from imposing both a criminal and a civil sanction for the same activity. Traditionally, the Court has accepted a legislative labeling of a statute as “civil” as conclusory with respect to its nonpunitive intent. Thus, a civil proceeding following or preceding a criminal prosecution did not constitute punishment for double jeopardy purposes.

More recently, however, the Court has noted that the labels “criminal” and “civil” should not, by themselves, be dispositive of whether a particular sanction is remedial or punitive. Rather, “the determination whether a given civil sanction constitutes punishment ... requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.” If the underlying purpose of a civil sanction cannot be explained as also serving a remedial purpose, but instead can be explained only as retri-

27. Id. at 399.
28. See Breed v. Jones, 421 U.S. 519, 528 (1975) (stating that jeopardy does not apply in proceedings where only civil sanctions can be imposed because “the risk to which the clause refers is not present in proceedings that are not essentially criminal”).
29. Although the courts have chosen to disregard whether the civil proceeding occurs before or after the criminal proceeding in analyzing the double jeopardy issue in license suspension, there remains an important distinction: if a civil sanction imposed prior to the initiation of criminal proceedings is determined to be punishment, the criminal prosecution must be abandoned. David S. Rudstein, Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions, 46 OKLA. L. REV. 587, 600-02 (1995). However, if the civil sanction is imposed after a criminal prosecution, the civil sanction is not automatically abandoned; the court can review the civil sanction and modify its severity so that sanction remains consistent with the claimed remedial purpose. Halper, 490 U.S. at 448-49.
30. Halper, 490 U.S. at 447.
31. Id. at 448.
bution or deterrence, the statute imposes punishment for double jeopardy purposes.\textsuperscript{32}

In \textit{United States v. Halper}, the government obtained a criminal conviction against an individual for sixty-five violations of the criminal False Claims Act.\textsuperscript{33} Subsequent to the conviction, the government filed suit under the civil False Claims Act, which authorized a $2000 penalty for each violation of the Act.\textsuperscript{34} After finding that the actual damages incurred by the government as a result of the false claims were $585, the Court declared that the $130,000 fine sought bore no rational relation to the government's claimed remedial purpose, compensation for damages and the costs of litigation.\textsuperscript{35} Thus, the statute could not be fairly characterized as remedial, but could be explained only as serving the goals of retribution or deterrence.\textsuperscript{36} Realizing that this was the first time a civil statute had ever been held to impose punishment, the Court emphasized that the rule announced was "one for the rare case . . . where a fixed-penalty provision subjects [n] . . . offender to a sanction overwhelmingly disproportionate to the damages . . . caused."\textsuperscript{37}

Subsequently, in \textit{Austin v. United States},\textsuperscript{38} the Court considered whether a civil in rem forfeiture statute constituted punishment under the Eighth Amendment's Excessive Fines Clause.\textsuperscript{39} In making its determination, the Court used the \textit{Halper} definition of punishment to determine whether sanctions imposed by the statute were punitive or remedial.\textsuperscript{40} The Court conducted a particularized assessment of the forfeiture statute, focusing on the historical uses of forfeiture, the language of the statute, and evidence that Congress intended the statute to be punitive.\textsuperscript{41} Ultimately, the Court concluded that the history, language, and intent of the statute indicated that the sanctions imposed could be explained only as serving the punitive functions of retribu-

\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 437.
\textsuperscript{34} \textit{Id.} at 438-40.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 448. The Court concluded that for the purposes of a double jeopardy analysis, any statute that was enacted primarily to serve the goals of retribution or deterrence was punishment. \textit{Id.}
\textsuperscript{37} \textit{Id.} at 449.
\textsuperscript{38} 113 S. Ct. 2801 (1993).
\textsuperscript{39} \textit{Id.} at 2803.
\textsuperscript{40} \textit{Id.} at 2806.
\textsuperscript{41} \textit{Id.} at 2806-08.
tion and deterrence.\textsuperscript{42} Thus, the civil statute constituted punishment for the purposes of the Excessive Fines Clause.\textsuperscript{43}

In \textit{Department of Revenue v. Kurth Ranch},\textsuperscript{44} the issue facing the Court was whether a civil tax on illegal drugs, which taxed the drugs at more than eight times their market value and was imposed after the drugs were seized, constituted punishment for double jeopardy purposes.\textsuperscript{45} Acknowledging that a tax had never been held to violate the Double Jeopardy Clause, the Court reiterated its holding in \textit{Halper} that legislative labels do not control the analysis.\textsuperscript{46} Instead, the Court applied the same particularized assessment analysis used in \textit{Austin}, and evaluated the drug tax in light of the traditional purposes of tax statutes to determine whether the purposes served by the drug tax were characteristic of a typical civil tax.\textsuperscript{47}

After comparing Montana's drug tax with other tax statutes, the Court found that the drug tax was fundamentally different from taxes that were imposed to raise revenue.\textsuperscript{48} For example, the Montana drug tax was conditioned on the commission of a crime, and the property taxed was no longer in the possession of the person subject to the tax.\textsuperscript{49} The Court concluded that the tax was "a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape the characterization as punishment for the purposes of Double Jeopardy analysis."\textsuperscript{50}

3. \textit{The Court's Reasoning}.--In \textit{State v. Jones}, the Court of Appeals questioned whether the suspension of Jones's driver's license under section 16-205.1 could be "fairly" said to serve only a remedial purpose.\textsuperscript{51} The court adopted a three-pronged test to evaluate the sanction imposed.\textsuperscript{52} First, the court conducted a historical analysis to determine whether license suspension statutes generally have been understood as remedial or punitive.\textsuperscript{53} Second, in light of this historical understanding, the court examined the language, structure, and legislative intent of section 16-205.1 to determine whether it was con-

\begin{itemize}
\item \textsuperscript{42} \textit{Id.} at 2808.
\item \textsuperscript{43} \textit{Id.} at 2803.
\item \textsuperscript{44} 114 S. Ct. 1937 (1994).
\item \textsuperscript{45} \textit{Id.} at 1941.
\item \textsuperscript{46} \textit{Id.} at 1946.
\item \textsuperscript{47} \textit{Id.} at 1947-48.
\item \textsuperscript{48} \textit{Id.} at 1947.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 1948.
\item \textsuperscript{51} \textit{Jones}, 340 Md. at 250, 666 A.2d at 135.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\end{itemize}
sistent with similar statutes. Finally, anticipating that the statute might serve both remedial and punitive purposes, the court prepared to examine whether the statute could be justified by its remedial purpose alone.

a. The Historical Understanding of Similar Statutes.—The Jones court found that license suspension statutes generally serve remedial purposes. To support this conclusion the court noted the common use of license suspensions to regulate public safety in a variety of professional arenas. Despite the “sting of punishment” people feel when licenses are revoked or suspended, the court stated that the primary purpose of licensing is to protect the public from those people whose conduct fails to meet minimum required standards.

b. The Language, Structure, and Intent of Section 16-205.1.—Jones argued that section 16-205.1 differed from similar license suspension statutes in that it was intended to have a punitive effect. He based this argument on the fact that: (1) the suspension was conditioned upon the commission of a crime; (2) the statute provided no basis for concluding that the accused driver is unsafe or that recidivism is likely; (3) the legislature intended the statute to have only a punitive effect; and (4) that the maximum penalties are so high that the section must be punitive. The court rejected each of these arguments.

The court first noted that license suspension statutes, unlike tax statutes, are commonly predicated on activities that are also illegal.

54. Id. at 254-62, 666 A.2d at 137-41.
55. Id. at 263-66, 666 A.2d at 142-43.
56. Id. at 251, 666 A.2d at 136 (“This conclusion is drawn from the purposes served by licensing systems themselves, i.e., to protect the public from unscrupulous or unskilled operators who would otherwise engage in licensed activity.”).
57. Id. at 251-52, 666 A.2d at 136. Maryland requires licensing for a variety of professions. See, e.g., Md. Code Ann., Bus. Occ. & Prof. §§ 2-301 (certified public accountancy), 3-302 (architecture), 4-301 (barbering), 5-301 (cosmetology), 6-301 (master electricians), 7-301 (forestry), 9-301 (landscape architecture), 10-206 (practice of law), 11-401 (pilotage), 12-301 (private detectives), 14-301 (engineering), 15-301 (land surveying), 16-301 (real estate appraising), 17-301 (real estate brokering).
58. Jones, 340 Md. at 250-51, 666 A.2d at 135.
59. Id. at 252, 666 A.2d at 136. The court noted further that in determining whether a statute serves the purposes of punishment within the meaning of the Fifth Amendment, the defendant’s viewpoint on what constitutes punishment is immaterial. Id. at 250, 666 A.2d at 135; see also United States v. Halper, 490 U.S. 435, 447 n.7 (1989) (“[F]or the defendant even remedial sanctions carry the sting of punishment.”).
60. Jones, 340 Md. at 258, 666 A.2d at 139.
61. Id. at 254, 666 A.2d at 137.
62. Id. at 255, 666 A.2d at 137.
Nevertheless, this alone did not make the statute punitive. To the contrary, the court concluded that license suspensions grounded on criminal conduct were consistent with the remedial purpose of protecting the public from dangerous behavior.

The court found Jones's second argument, that section 16-205.1 was punitive because it provided no basis for finding that he was an unsafe driver, misplaced. "Nothing in the Double Jeopardy Clause requires that a statute operate with any specific degree of particularity." Thus, the question was not whether Jones was an unsafe driver, but rather whether the statute could fairly be said to serve the remedial purpose of removing drunk drivers from the road. The court stated that if the class of individuals who fail blood alcohol tests has a higher probability of driving under the influence in the future, a statute that removed these potentially dangerous drivers from Maryland highways clearly served the remedial purpose of protecting the public. Because Jones twice before had been arrested for DWI, the state was reasonable in fearing that he would do it again.

Although it found no merit to Jones's argument that the General Assembly intended section 16-205.1 to serve only punitive goals, the court conducted an exhaustive analysis of the statute's history to support this conclusion. The court found that the legislative history of the statute indicated that section 16-205.1 had a dual purpose: "the punitive goal of deterring future offenders and the remedial goal of removing suspected drunk drivers from the road."

Finally, the court dismissed Jones's contention that the sanctions imposed by section 16-205.1 were so severe as to constitute punishment. Acknowledging that both Kurth Ranch and Halper placed great emphasis on the severity of the sanction in determining its character, the court was not persuaded that a forty-five day or one-year suspension was "remarkably high." Balanced against the critical interest the state has in protecting its citizenry from dangerous drivers,

63. Id., 666 A.2d at 138; see infra note 97.
64. Jones, 340 Md. at 255, 666 A.2d at 138.
65. Id. at 256, 666 A.2d at 138.
66. Id.
67. Id.
68. Id.
69. Id. at 258-62, 666 A.2d at 139-41.
70. Id. at 262, 666 A.2d at 141.
71. Id.
72. See supra notes 44-50 and accompanying text.
73. See supra notes 30-37 and accompanying text.
74. Jones, 340 Md. at 263, 666 A.2d at 141.
the court believed that the temporary suspension of a driver's license paled in comparison.\textsuperscript{75}

c. \textit{Justifying Section 16-205.1 Solely by Its Remedial Purpose}.—After concluding that section 16-205.1 was intended to serve both a punitive and a remedial purpose, the court focused on whether the statute could be justified by its remedial purpose alone.\textsuperscript{76} The court first rejected Jones's argument that the holding in \textit{Kurth Ranch} required the court to find the sanction imposed by section 16-205.1 to be punishment if any part of the sanction was intended to be punitive.\textsuperscript{77} The court found that neither \textit{Kurth Ranch} nor \textit{Austin} dealt with a statute serving a dual purpose, like section 16-205.1, and, therefore, neither was controlling.\textsuperscript{78} The court instead looked to \textit{Halper} to determine whether a dual purpose statute could be justified exclusively by its remedial purpose.\textsuperscript{79}

According to \textit{Halper}, a dual purpose statute can be justified if the sanction may fairly be said to be remedial.\textsuperscript{80} Recognizing that this test was not exact science, the court balanced the forty-five day maximum suspension imposed upon a driver who fails a blood or breath test against the interest of the state in maintaining safe highways.\textsuperscript{81} Although this test involved an element of "rough justice," the court concluded that there was a "reasonable connection" between the remedial purpose and the length of the license suspension.\textsuperscript{82}

4. \textit{Analysis}.—In \textit{State v. Jones}, the Court of Appeals determined that the suspension of a driver's license authorized by a civil statute did not constitute punishment as applied to a driver whose blood alcohol content exceeded the legal limit.\textsuperscript{83} Consequently, the Fifth Amendment's Double Jeopardy Clause did not prevent the state from pursuing a subsequent criminal conviction for driving while intoxicated.\textsuperscript{84} The court's decision represents a carefully reasoned applica-

\begin{thebibliography}{84}
\bibitem{75} Id.
\bibitem{76} Id., 666 A.2d at 142.
\bibitem{77} Id.
\bibitem{78} Id. at 264, 666 A.2d at 142.
\bibitem{79} Id. at 265, 666 A.2d at 142.
\bibitem{81} \textit{Jones}, 340 Md. at 265, 666 A.2d at 142.
\bibitem{82} Id.
\bibitem{83} Id. at 240, 666 A.2d at 130.
\bibitem{84} Id. The court found it unnecessary to decide whether Maryland's common law contained a double-punishment analysis similar to that used in \textit{Halper}, \textit{Austin}, and \textit{Kurth Ranch} because as between common-law double jeopardy protection and a state statute, the statute would overrule the common law even if it were punishment. \textit{Id.} at 266, 666 A.2d at 143.
\end{thebibliography}
tion of the controlling legal principles governing the character of civil sanctions and the Double Jeopardy Clause.

The court began its analysis by noting that the controlling federal precedent did not provide a "tidy formulaic approach" to resolve the problem.\textsuperscript{85} \textit{Halper}, \textit{Austin}, and \textit{Kurth Ranch} reviewed civil statutes that imposed sanctions of such disparity that the reasoning used to determine the nature of one could not be used to determine the outcome of the others.\textsuperscript{86} However, in accordance with \textit{Halper}, the court rightly recognized its obligation to conduct a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.\textsuperscript{87} In response, the court formulated a three-pronged approach that effectively executed the particularized assessment of section 16-205.1.\textsuperscript{88} First, the court evaluated the general nature of the sanctions imposed by similar statutes.\textsuperscript{89} Next, the court examined the language, structure, and intent of section 16-205.1 itself to determine whether its purpose was consistent with similar statutes.\textsuperscript{90} And finally, because the statute was found to serve multiple purposes, the court considered whether the remedial purposes alone could justify the statute.\textsuperscript{91}

Both \textit{Austin} and \textit{Kurth Ranch} stressed the importance of the historical understanding of similar provisions in determining whether a certain civil sanction constituted punishment.\textsuperscript{92} Taken together, \textit{Austin} and \textit{Kurth Ranch} demonstrate that section 16-205.1 should "be presumed to serve the purposes generally served by license suspensions."\textsuperscript{93} A review of license suspension statutes strongly supports the court's conclusion that they generally serve remedial purposes.\textsuperscript{94} Licensing is a common method of regulating a variety of

\textsuperscript{85} \textit{Id.} at 249, 666 A.2d at 134.

\textsuperscript{86} See, e.g., State of New Mexico v. Kennedy, 904 P.2d 1044, 1055 (N.M. 1995) ("Just as the 'compensation for loss' test is an inappropriate standard to apply for judging the punitive nature of a tax, it likewise is inappropriate for determining whether a nonmonetary civil penalty such as administrative license revocation is punishment for double jeopardy purposes.").

\textsuperscript{87} United States v. Halper, 490 U.S. 435, 448 (1989); see supra notes 30-37 and accompanying text.

\textsuperscript{88} \textit{Jones}, 340 Md. at 250, 666 A.2d at 135.

\textsuperscript{89} \textit{Id.}; see supra note 57.

\textsuperscript{90} \textit{Id.}; see supra note 57.

\textsuperscript{91} \textit{Jones}, 340 Md. at 250, 666 A.2d at 135.

\textsuperscript{92} Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1947 (1994); \textit{Austin v. United States}, 113 S. Ct. 2801, 2810 (1993); see supra notes 44-50, 38-43 and accompanying text.

\textsuperscript{93} \textit{Jones}, 340 Md. at 251, 666 A.2d at 135.

\textsuperscript{94} See supra note 57.
activities, programs, and occupations.95 The underlying rationale is that the public would be exposed to an intolerable risk of harm if participants were permitted to perform below an acceptable standard.96 The revocation or suspension of a license for violating the terms upon which the license was granted protects the public from those who are unfit to participate in a regulated activity.97 Even though the person subject to a suspension or revocation may feel punished, the true purpose of these statutes is not punitive.98

The second step of the court's analysis involved an examination of the language, structure, and legislative intent of section 16-205.1.99 After scrutinizing these characteristics of the provision, the court accurately recognized that section 16-205.1 was consistent with the general nature of license suspension statutes.100 Despite ascertaining the existence of both a punitive and a remedial purpose, the court found that in both form and application, section 16-205.1 served the typical goal of license suspension statutes: remedying the public safety problems posed by persons engaged in hazardous activity.101

Although it rejected Jones's arguments that section 16-205.1 was different from the general nature of licensing statutes,102 the court's

95. Jones, 340 Md. at 251, 666 A.2d at 136. The court noted the numerous and diverse professions requiring licensing before practicing in Maryland. Id. at 251-52, 666 A.2d at 136; see supra note 57.

96. See State v. Zerkel, 900 P.2d 744, 753 (Alaska Ct. App. 1995) (“The rationale for this system of regulation is that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure.”).

97. Id.; see also United States v. Hudson, 14 F.2d 536, 541-42 (10th Cir. 1994) (stating that disbarment of banking officials from further banking activities for mismanagement and illegal operation of several banks was “a means of protecting the integrity of the banking system and the interests of the depositors”); United States v. Furlatt, 974 F.2d 839, 844 (7th Cir. 1992) (holding that trading bar on commodities broker accused of fraudulent commodities trading served to ensure integrity of the markets and thus was “remedial rather than punitive”); Loui v. Board of Medical Examiners, 889 P.2d 705, 711 (Haw. 1995) (holding that suspension of a doctor’s medical license for one year after criminal conviction for attempted sexual abuse and kidnapping was “designed to protect public from unfit physicians” and served “legitimate non-punitive governmental objectives”).

98. See, e.g., State v. Savard, 659 A.2d 1265, 1268 (Me. 1995) (“Although we acknowledge that any suspension may have a deterrent effect on the law-abiding public, our analysis does not focus on that perspective. In the eyes of the defendant, even remedial sanctions carry a ‘sting of punishment.’”); State v. Strong, 605 A.2d 510, 513 (Vt. 1992) (“Although there is an element of deterrence to the summary suspension of an operator’s license, this element is present in any loss of a license or privilege and is not the primary focus of this statutory scheme.”).


100. Id.

101. Id.

102. Id. at 256-57, 262, 666 A.2d at 138-39, 141.
recognition that section 16-205.1 served both a remedial and a deterrent purpose required an examination of the statute to determine whether it could be justified by its remedial purpose alone. Jones argued that the holding in Kurth Ranch required the court to view the statute as punishment if any part of its purpose was punitive. The court correctly noted that this was an incorrect interpretation of Kurth Ranch. Because the Supreme Court in Kurth Ranch found that the drug tax involved in that case served only punitive purposes, that Court did not even consider whether a dual purpose statute could be justified by its remedial purpose alone. However, the Court noted that the mere existence of a deterrent purpose would not automatically render a sanction punishment. Thus, the Court of Appeals properly looked to Halper for a framework for balancing the dual purposes of a statute to determine whether the sanctions constituted punishment.

The court examined the maximum forty-five day suspension penalty imposed for failing a blood alcohol test to determine whether it bore a "rational relation" to the remedial purpose of protecting the Maryland highways. The court determined that there was a reasonable connection between the sanction imposed and the remedial purpose to be served; this is the logical conclusion considering the larger scope of the drunk driving problem. The temporary suspension of a license to drive may impose severe hardship on a driver, but the state's obligation to protect the highways from those who imperil the lives of other drivers justifies such a sanction. Whereas the sanctions imposed in Halper, Austin, and Kurth Ranch were not even remotely related to the remedial purposes claimed by the government, the suspension of the license of a drunk driver is directly related to protecting the public from people who drive drunk.

The existence of any sanction that threatens a person's ability to function efficiently within society always will have an incidental deter-

103. Id. at 263, 666 A.2d at 142.
104. Id.
105. Id. at 263-64, 666 A.2d at 142-43.
106. Id. at 264, 666 A.2d at 142.
108. Jones, 340 Md. at 265, 666 A.2d at 142.
109. Id.
110. Id.
111. Section 16-205.1 grants some discretion to the administrative law judge (ALJ) when imposing penalties under the statute. In exercising his discretion, the ALJ must weigh "the adverse effect upon the petitioner's need to drive for employment or alcoholic prevention purposes versus the State's need to maintain safety on the public highways." Md. Code Ann., Transp. § 16-205.1(n) (Supp. 1995).
rent effect. However, where the primary purpose of the statute is to exact a nonpunitive remedy, the corresponding deterrent effect should not qualify the statute as punishment.\textsuperscript{112} Thus, despite the existence of an obvious deterrent purpose of keeping people from drinking and driving, the court correctly concluded that section 16-205.1 does not constitute punishment for the purposes of the Double Jeopardy Clause.

5. Conclusion.—Jones is significant in that it developed a coherent framework to review the sanctions imposed by a civil statute to determine whether they constitute punishment for the purposes of applying the Double Jeopardy Clause. In determining that the suspension of a driver's license for failing a blood alcohol test did not constitute punishment for double jeopardy purposes, the court properly recognized that the primary purpose of section 16-205.1 of the Transportation Article was remedial: to protect the public from dangerous drivers. The result is consistent with controlling federal precedent and state public policy.

EDWARD J. KELLEY

B. Warrantless Searches: Extending the Exigent Circumstances Exception to Evidence of Burglary

In Carroll v. State,\textsuperscript{1} the Court of Appeals for the first time considered whether a sheriff's officer who was seeking an escaped convict was justified, based upon evidence of a probable burglary, in making a warrantless entry and search of an apartment at a residence the convict was known to have recently visited.\textsuperscript{2} The court held that the entrance was lawful under the exigent circumstances exception to the warrant requirement of the Fourth Amendment\textsuperscript{3} because the officer had probable cause to believe that a burglary was either in progress or had recently been committed, and that the exigencies of the situation permitted the officer to enter to conduct a warrantless search for the

\textsuperscript{112} See supra note 97.
1. 335 Md. 723, 646 A.2d 376 (1994).
2. Id. at 725-26, 646 A.2d at 378.
3. The Fourth Amendment states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
intruder and to protect the resident's property. In reaching its decision, the court was favorably influenced by the overwhelming weight of persuasive authority that unanimously holds that evidence of a burglary at a residence justifies law enforcement officers in making a warrantless search.

The court's holding was prudently made under the facts of the case, and is consistent with the reasoning of previous Maryland exigent circumstances decisions. Carroll grants law enforcement officers greater latitude to act when they perceive an emergency; this freedom should save lives and aid in apprehending criminals. Nonetheless, Carroll recognizes the potential for abuse of citizens' constitutional rights that accompanies any expansion of police power. Therefore, the court warned law enforcement officers not to take advantage of the confidence and esteem that its holding obviously expresses in them. Both the judicial system and law enforcement community must remain vigilant to the possibility of abuse if they are to merit the public's faith at a time when distrust of law enforcement officers' methods and motives is increasingly commonplace.

1. The Case.—On July 24, 1992, Deputy First Class Mark Gonder and two other officers of the Carroll County Sheriff's Department attempted to find and arrest Joe Hudson, an escapee from a work release program at a detention center. The officers went to an apartment house in Eldersburg, Maryland, on the belief that Hudson might be hiding there. They learned from a resident, Terry Lynn Penn, that Hudson had been there the previous evening at approximately 11:00 p.m., but since had left the premises. Penn, who lived in an upstairs apartment, then gave the officers permission to search the entire residence, which contained one other apartment downstairs.

Gonder noticed that the screen door to the rear apartment door was open, that a pane of glass was missing from the door's window, and that the door was open approximately two inches; this led him to believe that someone had forcibly entered the apartment. He re-

4. Carroll, 335 Md. at 734, 646 A.2d at 382.
5. Id. at 731-34, 646 A.2d at 380-82; see infra notes 57, 60-62 and accompanying text.
7. Carroll, 335 Md. at 727, 646 A.2d at 378.
8. Id.
9. Id.
11. Carroll, 335 Md. at 727, 646 A.2d at 378.
turned to Penn's apartment and asked her if the basement apartment was secured. She responded that it was and that its occupant, Mike Carroll, was away and would not be home for another day or two. Gonder then went to the downstairs apartment, identified himself, and entered the apartment while continuing to announce his presence. No one responded to Gonder, and he determined that the apartment was unoccupied. Gonder did, however, observe several marijuana plants growing in an area of the apartment. He did not disturb this evidence, but left the apartment secured by another officer while he went to obtain a search and seizure warrant.

The Circuit Court for Carroll County issued the warrant to the deputy sheriffs, and they executed it that afternoon. The officers seized controlled dangerous substances, paraphernalia, and firearms from Carroll's apartment.

On August 27, 1992, Carroll was indicted in the Circuit Court for Carroll County on charges of manufacturing a controlled dangerous substance, possessing a controlled dangerous substance with intent to distribute, maintaining a common nuisance, and possessing a controlled dangerous substance and drug paraphernalia in violation of Maryland statutory law. Carroll filed a timely motion to suppress the evidence seized by the Carroll County sheriff's deputies. At the suppression hearing, the sole facts considered were those set forth by Gonder in the affidavit in support of the search and seizure warrant executed at Carroll's residence. Based upon these facts, the circuit

12. Id.
13. Id.
15. Id.
16. Id., 646 A.2d at 379.
17. Id.
19. Carroll, 335 Md. at 726, 646 A.2d at 378.
20. Id. In an attempt to create a conflict between the observations of the deputy sheriffs, Carroll presented the Court of Appeals with a supplemental report prepared by one of the deputies who was present during the initial warrantless entry of his residence. Id. at 726 n.1, 646 A.2d at 378 n.1. The court refused to consider this supplemental report. Id. at 727 n.1, 646 A.2d at 378 n.1. The court observed that although review of the decision to issue a search warrant is normally confined to the four corners of the affidavit and the warrant, the court here properly could have received evidence beyond the facts set out in the affidavit because the claim was that the entry before the issuance of the search warrant violated Carroll's Fourth Amendment rights. Id. at 726 n.1, 646 A.2d at 378 n.1. However, at the motions hearing the parties in this case chose to rely solely on the affidavit and the warrant. Id. Because the record at the suppression hearing is the exclusive source of facts upon review, the Court of Appeals would not take this supplemental report into consideration. Id. (citing Lee v. State, 311 Md. 642, 648, 537 A.2d 235, 237 (1988)).
court granted Carroll's motion to suppress.\textsuperscript{21} The State appealed, and the Maryland Court of Special Appeals reversed the circuit court's order and remanded the case for further proceedings. The Court of Special Appeals held that the deputies' entry into Carroll's residence was reasonable under the facts of the case.\textsuperscript{22} Carroll appealed, and the Court of Appeals granted certiorari "to consider whether, under the exigent circumstances exception to the warrant requirement of the Fourth Amendment, the Carroll County deputy sheriffs' belief that a burglary recently had been committed in Carroll's home justified their warrantless entry into his home."\textsuperscript{23}

2. Legal Background.—The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and provides that no warrants shall be issued without probable cause.\textsuperscript{24} Justice Brennan, writing for the Supreme Court, observed in \textit{Welsh v. Wisconsin}\textsuperscript{25} that "[i]t is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"\textsuperscript{26} Therefore, a warrant issued by a judicial officer is generally required before a search of a residence or seizure of property located therein may be conducted by law enforcement officers. This requirement is fundamental to the Fourth Amendment's protection against unreasonable searches and seizures.\textsuperscript{27} Nevertheless, this requirement is sometimes resented and ignored by police. Responding

\begin{footnotes}
\item[21] Id. at 728, 646 A.2d at 379.
\item[23] Carroll, 335 Md. at 725-26, 646 A.2d at 378.
\item[24] U.S. CONST. amend. IV; see supra note 3.
\item[26] Id. at 748 (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)).
\item[27] See, e.g., Horton v. California, 496 U.S. 128, 133 (1990) (observing that the general rule is that warrantless searches are presumptively unreasonable); Welsh, 466 U.S. at 748 (noting that a principal protection against unnecessary intrusions into private dwellings is the warrant requirement of the Fourth Amendment imposed on government agents who seek to enter the home to search or arrest); Payton v. New York, 445 U.S. 573, 586 (1980) (stating that a basic principle of Fourth Amendment law is that searches and seizures inside a home made without a warrant are presumptively unreasonable); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) (observing that "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'"); Johnson v. United States, 338 U.S. 10, 13-14 (1948) (noting that the Fourth Amendment's protection requires that inferences drawn from evidence be made by a neutral and detached magistrate); see also infra text accompanying note 29.
\end{footnotes}
to this disturbing trend, Justice Jackson emphasized in *Johnson v. United States*\(^2\) that

> [t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.\(^2\)

Accordingly, when law enforcement officers fail to secure a search warrant when required, the judicially created exclusionary rule operates to suppress the use of evidence seized in violation of the Fourth Amendment.\(^3\)

The exclusionary rule was held enforceable against the states in *Mapp v. Ohio*,\(^3\) thus requiring the states to provide protection against unreasonable searches and seizures.\(^4\) Therefore, the Court of Appeals follows the United States Supreme Court's general requirement that a judicial officer issue a warrant before a police officer may execute a search or seizure,\(^5\) while it continues to evaluate constitutional issues on a case-by-case basis.\(^6\)

Implied in the warrant requirement, however, are legally recognized exceptions where a search warrant is not required.\(^7\) The un-

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28. 333 U.S. at 10.
29. Id. at 13-14.
30. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments and mandating that states apply it to suppress evidence seized in violation of Fourth Amendment); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914) (holding that evidence seized by federal officials in violation of Fourth Amendment may not be admitted in federal courts).
31. 367 U.S. at 643.
32. Id. at 655.
33. See, e.g., *McMillian v. State*, 325 Md. 272, 281, 600 A.2d 430, 434 (1992) (observing that warrantless searches are per se unreasonable, subject only to a few specific exceptions); *Davis v. State*, 236 Md. 389, 395, 204 A.2d 76, 80 (1964) (noting Maryland’s recognition of the general rule that a search of private premises should be pursuant to a legally issued warrant), cert. denied, 380 U.S. 966 (1965).
34. *Riddick v. State*, 319 Md. 180, 571 A.2d 1239 (1990). The court noted that “*when the question is whether a constitutional right, such as the one here, has been violated, we make our own independent constitutional appraisal. We make the appraisal by reviewing the law and applying it to the peculiar facts of that particular case.*” Id. at 183, 571 A.2d at 1240 (citation omitted).
35. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). The Court observed that “*[t]here are exceptional circumstances in which, on balancing the need for effective law
derlying rationale for these exceptions is that the Fourth Amendment prohibits only those searches that are unreasonable.\(^3\) Thus, a search warrant may be dispensed with in situations where a suspect consents to a search,\(^3\) a search is made incident to a lawful arrest,\(^3\) contraband or evidence of a crime found in “plain view” is seized,\(^3\) a search is made of an automobile when law enforcement officers have probable cause to believe it contains evidence of criminal activity,\(^4\) or where exigent circumstances dictate that a search and seizure be executed immediately without the delay attendant to obtaining a warrant.\(^4\)

The Supreme Court has explored and defined the scope and nature of exigent circumstances in numerous cases. The Court upheld the constitutionality of a warrantless search and seizure where the potential for destruction of evidence existed,\(^4\) and extended that rationale further to justify the imposition of an involuntary blood test on a person suspected of driving under the influence of alcohol where delay would destroy evanescent evidence.\(^4\) Similarly, the Court excused the need for a search warrant where officers in “hot pursuit” of a narcotics suspect followed her into her home,\(^4\) and where officers in “hot pursuit” of an armed bank robber, who posed a danger to human life, entered a third person’s residence into which the robber had just fled.\(^4\)

In *Michigan v. Tyler*,\(^4\) the Court distinguished between permissible and impermissible warrantless searches of a burning building by

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3. U.S. Const. amend. IV; *see supra* note 3; *Florida v. Jimeno*, 500 U.S. 248 (1991). Chief Justice Rehnquist, writing for the Court in *Jimeno*, observed that “[t]he touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.” *Id.* at 250 (citations omitted).


41. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Lebedun*, 283 Md. at 277, 390 A.2d at 73; *Davis*, 236 Md. at 395, 204 A.2d at 80.


firefighters. Justice Stewart, writing for the Court, noted that a burning building constitutes exigent circumstances justifying a warrantless entry, and that firefighters may seize evidence of arson found in plain view during the course of fighting the fire.47 The Court held that fire officials may remain in a building for a reasonable time after a fire has been extinguished to investigate the cause of the blaze.48 It found warrantless entries made by fire officials in the light of morning following a late night fire reasonable, whereas warrantless entries made days later were found unreasonable, and therefore unconstitutional.49

The Court of Appeals similarly has explored the limits of the exigent circumstances exception to the Fourth Amendment's warrant requirement. The court found that exigent circumstances justified a warrantless entry where police, after finding an apparent homicide victim in the defendant's backyard, entered his home in order to determine whether he had also been victimized.50 Likewise, the court found warrantless entry of an apartment justified where police had reason to believe that armed robbers were inside and that delay might permit them to escape.51 Furthermore, the court has held that an emergency situation justified the warrantless entry of a motel room by a police officer in order to protect a rescue squad member treating a drug overdose victim; the court determined that it was reasonable to expect that illicit drug use and criminal activity had been occurring in the room, that the rescue squad member could be in danger from the occupants of the room, and that the delay inherent in obtaining a warrant could allow the destruction of contraband drug evidence.52 Most recently, the court was satisfied that exigent circumstances existed when police entered a home they had reason to believe sheltered an injured person or suspect, based upon a report of a missing

47. Id. at 509.
48. Id. at 510.
49. Id. at 511. But see id. at 516-17 (Rehnquist, J., dissenting) (arguing that warrantless entries made even days later were reasonable under the circumstances where the interior of premises suffered substantial damage, could not be used, and its owner had made no attempt to secure it).
51. Nilson v. State, 272 Md. 179, 191, 321 A.2d 301, 307 (1974). The court in Nilson observed that six factors were useful in determining the existence of exigent circumstances: (1) that a grave offense is involved, especially one involving violence; (2) that the suspect is reasonably believed to be armed; (3) that there is a clear showing of probable cause to believe that the suspect committed the crime involved; (4) that there exists strong reason to believe the suspect is on the premises being entered; (5) the possibility that the suspect might escape if not quickly apprehended; and (6) that the entry is made peaceably. Id. at 188-89, 321 A.2d at 306.
person, an open front door, and blood on the floor near the entrance to the house.\textsuperscript{53}

In contrast to these cases, the Court of Appeals refused to find sufficient exigent circumstances to justify a warrantless search where police seized a gun barrel found in the defendant’s attic after he had been arrested while hiding there. The mere suspicion that the defendant’s sister, who was present in the house, might destroy this evidence before it could be seized pursuant to a warrant did not justify the search according to the court.\textsuperscript{54} Similarly, the court held that the risk of destruction or removal of illegal drug evidence from a private social club was insufficient to justify a warrantless entry where police had earlier decided that the risk was not great enough to maintain a constant surveillance of the club.\textsuperscript{55}

The issue of whether law enforcement officers may enter a home without a warrant to investigate a probable burglary was one of first impression in Maryland, and has yet to be considered by the Supreme Court.\textsuperscript{56} However, numerous state and federal courts have weighed this issue and unanimously held that warrantless entries are justified under the exigent circumstances exception when police have probable cause to believe that a burglary is either in progress or recently has been committed.\textsuperscript{57}


\textsuperscript{54} Stackhouse v. State, 298 Md. 203, 219-20, 468 A.2d 333, 342 (1983). \textit{But see id. at 222, 468 A.2d at 343 (Smith, J., dissenting) (arguing that exigent circumstances did exist in case where defendant’s sister lied twice to police officers to prevent his arrest thereby making it reasonable to believe she would destroy evidence located on the premises that pertained to the crime he was accused of committing).}


\textsuperscript{56} Carroll, 335 Md. at 731, 646 A.2d at 380.

\textsuperscript{57} See, e.g., United States v. Johnson, 9 F.3d 506, 509-10 (6th Cir. 1993) (holding that exigent circumstances justifying warrantless entry into residence existed where police officers responded to report of burglary in progress, observed broken window and two individuals inside residence, person inside was unable to produce identification, and upon entry, officers limited search to places where persons could be hiding), cert. denied, 114 S. Ct. 2690 (1994); Reardon v. Wroan, 811 F.2d 1025, 1029-30 (7th Cir. 1987) (holding that sufficient exigent circumstances existed to justify warrantless entry of fraternity house where officers received call reporting burglary in progress at the house during time of year when students were on break and burglaries frequently occurred, and upon arrival a single car was in the driveway and the door to the house was unlocked); United States v. Valles-Valencia, 811 F.2d 1232, 1235-36 (9th Cir.) (holding that officers had probable cause to conduct warrantless entry to investigate probable ongoing burglary based on report by neighbor of suspicious activities at a house whose owner the neighbor understood to be on vacation, where officers found two trucks and a trailer in front of the house, saw two men enter the house, and observed that screen on the lower floor appeared to be pried away from the window and sliding glass door on the upper floor partially open), amended on other grounds, 823 F.2d 381 (9th Cir. 1987); United States v. Singer, 687 F.2d 1135, 1144 (8th Cir. ...
3. The Court's Reasoning.—In Carroll v. State, Judge Raker, writing for the five-to-two majority, observed that the Fourth Amendment prohibits only unreasonable searches and recognized that a warrantless search does not violate the Fourth Amendment when law enforcement officers encounter such exigent circumstances that there is a “‘compelling need for official action and no time to secure a warrant.’”\textsuperscript{58} The court reviewed its own exigent circumstances precedent and that of the Supreme Court, and noted that neither court had yet considered whether evidence of a probable burglary constituted exigent circumstances.\textsuperscript{59} The court therefore referred to persuasive authority, and noted that “all” of the numerous state and federal jurisdictions that had considered this issue had held that when police reasonably believe that a burglary is either in progress or recently has been committed, a warrantless entry is justified on the basis of exigent circumstances.\textsuperscript{60} After examining the facts and reasoning of two of such cases,\textsuperscript{61} and Professor LaFave’s treatise on search and seizure,\textsuperscript{62} the court adopted this extension of the exigent circum-

\textsuperscript{58} Id. at 731, 646 A.2d at 380.

\textsuperscript{59} Id. at 729, 646 A.2d at 380.

\textsuperscript{60} Id.; see supra note 57 and accompanying text. But see Muir, 835 P.2d at 1058, discussed supra note 57.

\textsuperscript{61} Fiore, 403 N.E.2d at 954-56, discussed supra note 57; Zander, 591 P.2d at 659, discussed supra note 57.

\textsuperscript{62} Professor LaFave notes:
stances exception into Maryland law. The court held that "when law enforcement officers have probable cause to believe that a burglary is either in progress or has recently been committed, the exigencies of the situation permit the officers to enter the premises without a warrant to search for intruders and to protect an occupant's property." The court warned, however, that law enforcement officers may not create evidence of a burglary as a pretext to make a warrantless search, and that such searches may not deviate from their original purposes.

The *Carroll* court then analyzed the facts of the case and held that in their totality, they formed the basis of a finding of requisite probable cause and exigency to justify the officer's initial warrantless entry. The court reached this conclusion by rejecting Carroll's argument that probable cause did not exist for the officers to believe that a burglary had occurred or was in progress. Rather, the court accepted the State's argument that the apparent break-in at the apartment gave the officers reasonable grounds to believe that either a common-law burglary or a statutory housebreaking had occurred or was in progress. The court reasoned that this belief, combined with the knowledge that an escaped convict recently had been at the resi-
dence and that the apartment should have been secured, amounted to "a compelling urgency to make a prompt inspection of the apartment," and justified the warrantless entry.69

Having approved of the initial entry and search of Carroll's apartment as reasonable under the Fourth Amendment, the court next determined that the search was properly confined within the scope of looking for an intruder.70 Therefore, the officer's observation of the growing marijuana was "proper grounds for a search warrant under the plain view doctrine."71 Accordingly, the court held that the search warrant subsequently issued to the officers was valid, and the evidence seized pursuant to the warrant was admissible at trial.72

Judge Bell, joined by Judge Eldridge, dissented from the court's opinion,73 not because of an objection to the majority's overall interpretation of the exigent circumstances exception, but rather because of its application to the facts in Carroll. Judge Bell acknowledged the validity of the well-established exigent circumstances exception to the warrant requirement, but observed that "[t]he exception is, however, a narrow one since 'exigency implies urgency, immediacy, and compelling need.'"74 He also emphasized that the burden of establishing the existence of exigent circumstances, which he described as "a heavy one,"75 is on the government.76 He cautioned that "'no exigency is created simply because there is probable cause to believe that a serious crime has been committed.'"77

Judge Bell conceded that in reaching a determination of probable cause, inferences may be made by police officers, but he admonished that "speculation is not, and should not, be permitted."78 He maintained that the facts in Carroll provided "no reasonable basis for inferring that the burglary of the petitioner's premises had recently occurred or was in progress,"79 and thus the sheriff's officer acted illegally as there was no exigency justifying his warrantless entry.80

69. Id. at 739, 646 A.2d at 384.
70. Id. at 739-40, 646 A.2d at 384-85.
71. Id. at 740, 646 A.2d at 385.
72. Id.
73. Id. at 741, 646 A.2d at 385 (Bell, J., dissenting).
74. Id. (quoting Stackhouse v. State, 298 Md. 203, 212, 468 A.2d 333, 338 (1983)).
75. Id. at 741-42, 646 A.2d at 385-86.
76. Id. at 741, 646 A.2d at 385.
77. Id. at 742, 646 A.2d at 386 (quoting Welsh v. Wisconsin, 466 U.S. 740, 753 (1984)).
78. Id. at 745, 646 A.2d at 387.
79. Id. at 746, 646 A.2d at 388.
80. Id. at 748, 646 A.2d at 389. Judge Bell concluded his dissent powerfully by noting:

If, as the State argues, and the majority accepts, the facts of this case constitute a sufficient basis for the establishment of exigent circumstances, then the urgency
4. Analysis.—In *Carroll v. State*, the Court of Appeals issued a three-part decision. First, the court held that when law enforcement officers have probable cause to believe that a burglary is either in progress or recently has occurred, the officers are permitted under the exigent circumstances exception to the warrant requirement of the Fourth Amendment to enter a residence without a warrant to determine if the intruder is still present and to secure the occupant’s property.\(^8\) Second, the court found that in light of the totality of the facts in the instant case, the deputy sheriffs had sufficient probable cause and exigency to enter Carroll’s apartment without a warrant.\(^2\) Finally, the court concluded that the search warrant subsequently issued to the officers was valid and that the trial court improperly granted Carroll’s motion to suppress evidence seized pursuant to that warrant.\(^3\)

a. Maryland’s Adoption of Burglary as an Exigent Circumstance.—The court’s holding that evidence of a probable burglary satisfies the exigent circumstances exception is warranted by the weight of persuasive authority reaching this conclusion, and is consistent with the court’s earlier interpretations of exigent circumstances. Notwithstanding the court’s brief treatment of the subject,\(^4\) the holding is a reasonable extension of Maryland law.

The weight and unanimity of persuasive authority that has held that evidence of probable burglary constitutes exigent circumstances is notable,\(^5\) but the better reason for adopting this approach in Maryland is the convincing rationale of these individual decisions. For example, in *Commonwealth v. Fiore*,\(^6\) officers who had received an informant’s tip that a housebreaking had occurred at a residence where there were narcotics and guns, made a warrantless entrance

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or emergency nature of exigency has been completely written out of the exception. In other words, the exception is now the rule. An exigency exists and hence, entry into a home is permissible, whenever a police officer *can surmise* that there probably has been a break-in at those premises. The officer need not show or articulate a basis for believing it to have occurred recently, not to mention for believing it to be in progress.

*Id.* at 748-49, 646 A.2d at 389.

81. *Id.* at 734, 646 A.2d at 382.

82. *Id.* at 739, 646 A.2d at 384.

83. *Id.* at 740, 646 A.2d at 385.

84. See *supra* notes 60-63 and accompanying text.

85. See *supra* note 57.

into the residence and discovered hashish in a hole in the floor.\textsuperscript{87} The Appeals Court of Massachusetts noted that:

\begin{quote}
[i]t seems clear to us that a house break without more as set out in the affidavit raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates the need to secure the premises. In such circumstances "[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers."\textsuperscript{88}
\end{quote}

This reasoning is logical and supports Deputy First Class Gonder's actions. Aware that an escaped convict had recently been at the residence, Gonder discovered evidence of a breaking. He then prudently made an immediate entry into Carroll's apartment to determine whether anyone inside had been injured. Had he merely secured the apartment and sought a search warrant, the delay attendant to this process could have exacerbated the injuries of any potential victims inside. Further, Gonder acted in objective good faith by remaining within the scope of his intended search; there was no indication in the record that Gonder entered the apartment, or executed his search, with an eye toward locating contraband.

Federal courts have applied reasoning analogous to \textit{Fiore}'s. In \textit{Reardon v. Wroan},\textsuperscript{89} the Court of Appeals for the Seventh Circuit held that exigent circumstances justified police officers' warrantless entry into a university fraternity house where evidence of a burglary existed at a time of year when most students were away from the campus, and burglaries frequently occurred.\textsuperscript{90} Similarly, the Ninth Circuit included evidence of a burglary within the scope of exigent circum-

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\begin{footnotes}
\item[87] Id. at 954.
\item[88] Id. at 954-55 (quoting United States v. Barone, 330 F.2d 543, 545 (2d Cir.), cert. denied, 377 U.S. 1004 (1964)).
\item[89] 811 F.2d 1025 (7th Cir. 1987).
\item[90] Id. at 1029-30. The court concluded that the police officers were faced with a call reporting a burglary in progress during a time of year when the students were on break and burglaries were known to occur more frequently. And when they arrived they found a single car in the driveway and the door to the residence unlocked. Therefore . . . we conclude based on these facts that the exigency requirement was satisfied as a matter of law.
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stances in *United States v. Valles-Valencia*,\(^91\) and the Sixth Circuit upheld a warrantless entry by police in *United States v. Johnson*.\(^92\) In *Johnson*, the police officers . . . had every reason to believe that a burglary was in progress. . . . The circumstances confronting the officers justified their warrantless entry into the residence because "[i]t would defy reason to suppose that [the officers] had to secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested. It is only 'unreasonable' searches and seizures that the Fourth Amendment forbids."\(^93\)

Given Gonder's observations of an unsecured apartment door where there reportedly should have been a secured one, at a residence where an escaped convict was known to have recently visited—and might still be present—his warrantless entry does not merit the label "unreasonable."

In addition to the convincing logic of persuasive case law, the rationale of previous Maryland cases finding exigent circumstances supports the inclusion of evidence of probable burglary within the scope of exigent circumstances. In *Davis v. State*,\(^94\) the Court of Appeals held a warrantless entry by police to be valid where police found a homicide victim in the backyard of a residence and were able to see the feet of another motionless person inside the home through a window.\(^95\) The court observed that:

[b]asic humanity required that the officers offer aid to the person within the house on the very distinct possibility that this person had suffered at the hands of the perpetrator of the homicide discovered in the backyard. The delay which would necessarily have resulted from an application for a search warrant might have been the difference between life

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91. 811 F.2d 1232, 1236 (9th Cir.), amended on other grounds, 823 F.2d 381 (9th Cir. 1987). Police responded to a report of strangers parked in front of a house whose occupants were known to be on vacation. *Id.* at 1235. The strangers could not adequately explain their presence, a window showed signs of being pried open, and the police smelled marijuana. *Id.* Suspecting that a burglary was underway, the police entered and seized controlled substances. *Id.* The court determined that "[t]he circumstances known to the officers supported probable cause to enter the building to learn what was happening." *Id.* at 1236.

93. *Id.* at 509-10 (quoting United States v. Singer, 687 F.2d 1135, 1144 (8th Cir. 1982)).
95. *Id.* at 395-96, 204 A.2d at 80.
and death for the person seen exhibiting no signs of life within the house.\textsuperscript{96}

This rationale also applies to evidence of a burglary. Although the danger to occupants within a burglarized home might not be as likely as the situation in \textit{Davis} where one homicide victim was already known to exist, violent crimes reasonably can be expected to accompany a burglary.\textsuperscript{97} In \textit{Oken v. State},\textsuperscript{98} the Court of Appeals upheld a warrantless entry and search of a house by police where they had reason to believe an injured person or suspects may have been inside.\textsuperscript{99} It follows that officers encountering evidence of a burglary might also reasonably expect to find a suspect or persons injured by a burglar inside a residence, and that the delay caused by obtaining a warrant could prevent apprehending a burglar or preserving the life of the victim of a violent attack.

\textbf{b. The Court's Conclusion that Officers Had Probable Cause and Exigency. —}The legality of Deputy First Class Gonder's warrantless entry into Carroll's apartment depended on what he reasonably believed at the time of entry,\textsuperscript{100} and whether he had probable cause to believe that there had been a recent, forcible entry into the apartment or to believe an intruder was still inside the residence.\textsuperscript{101} The court repeated its previous definition of probable cause as a "'non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion.'"\textsuperscript{102} Under this

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\footnote{96. \textit{Id.} at 396, 204 A.2d at 80. The court also pointed to \textit{Wayne v. United States}, 318 F.2d 205 (D.C. Cir.), \textit{cert. denied}, 375 U.S. 860 (1968), in which Judge Burger emphasized that "the business of policeman and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process." \textit{Id.} at 212.}

\footnote{97. \textit{See supra} note 88 and accompanying text; \textit{cf.} \textit{Reed v. State}, 316 Md. 521, 527, 560 A.2d 1104, 1107 (1989) (stating that intent element for burglary conviction can be inferred from the circumstances of the case and opining that a "surreptitious or forceful" breaking would more strongly suggest criminal intent than would a constructive breaking).}


\footnote{99. \textit{Id.} at 646-47, 612 A.2d at 266-67.}


\footnote{101. \textit{Carroll}, 335 Md. at 735, 646 A.2d at 382.}

\footnote{102. \textit{Id.}, 646 A.2d at 388 (quoting \textit{Doering v. State}, 313 Md. 384, 403, 545 A.2d 1281, 1290 (1988)). For a further treatment of the basis for probable cause, see \textit{Brinegar v. United States}, 338 U.S. 160 (1949). Justice Rutledge, writing for the Court in \textit{Brinegar}, observed that "'[i]n dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" \textit{Id.} at 175. Justice Rutledge observed that Chief Justice Marshall wrote that "'[i]t may be
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definition, and based on the totality of facts in the record, Gonder reasonably determined that he had probable cause to believe that a burglary was either in progress or had recently occurred in Carroll’s apartment.

First, assume that Deputy First Class Gonder believed Penn’s account of events at the residence: that Hudson had been there but had left, that Carroll was away for a few days, and that Carroll secured his door when he went away. Armed with this knowledge, Gonder encountered an open apartment door with a missing pane of glass. At this point, he could have reasonably believed that Hudson had broken into Carroll’s apartment unbeknownst to Penn, or that someone else had broken into the apartment. Gonder also could have reasonably believed that an intruder was still inside the apartment. Furthermore, Carroll could have come home early without announcing his return to Penn. Thus, Carroll might have been the victim of an attack inside his apartment without Penn being aware of this occurrence. Therefore, under this rationale, Gonder was justified in perceiving “more evidence than that which would arouse a mere suspicion” and in concluding that he had probable cause to believe a burglary had been committed in Carroll’s apartment.

Had Gonder believed that Penn was lying to him, a conclusion he would have been justified in reaching because she was a known acquaintance of his targeted fugitive, his actions appear even more reasonable. Gonder might have reasonably doubted the truthfulness of any or all of Penn’s account of events, and thus could have believed that Hudson was still at the residence and that Carroll had never left. In this case, Gonder also would have had sufficient probable cause to believe that a burglary had taken place, and that the exigencies of the
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Id. at 175 n.14 (quoting Locke v. United States, 7 Cranch 339, 348, 3 L. Ed. 364 (1813)). Justice Rutledge concluded that

[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.

Id. at 176.

103. See supra notes 8-12 and accompanying text.

104. Doering, 313 Md. at 403, 545 A.2d at 1290 (citing Sterling v. State, 248 Md. 240, 244, 235 A.2d 711, 714 (1967)).
situation demanded that he enter and search for an intruder immediately, rather than merely securing the building and taking the time necessary to obtain a search warrant.

In his dissent, Judge Bell criticized Gonder's determination that he had probable cause to enter the apartment by noting that "[i]n the case sub judice, there is no reasonable basis for inferring that the burglary of the petitioner's premises had recently occurred or was in progress." Judge Bell based this assertion largely upon the information that Penn imparted to the officers. He observed that:

[t]he petitioner's neighbor [Penn] told the police that the petitioner was not present and was not expected back for at least a day. From this, we know that the only basis upon which the police could legitimately have entered the premises was to investigate an ongoing burglary, i.e., to determine whether the burglar was still on the premises. Nobody being at home, there was no reason to believe that anyone was in need of assistance.

This rationale credits Penn with omniscience concerning the movements of Carroll, and ignores Penn's motive to lie to protect her friend Hudson. Judge Bell would require law enforcement officers to put complete faith in a witness's statement. Such a restriction would deny experienced officers the opportunity to reach their own reasonable conclusions based upon the totality of the circumstances surrounding an event, and would lead to an unworkable standard of probable cause.

c. Impact of the Court's Decision.—The court's extension of the exigent circumstances exception to include evidence of an ongoing or recently committed burglary will contribute to more efficient law enforcement by enabling police to catch criminals who otherwise might escape, and will save lives that could be lost without immediate medical aid during the time it takes to obtain a warrant. The exigent circumstances exception does not dispense with the prerequisite of probable cause before a search may be conducted. Instead, it trusts that a law enforcement officer, rather than a judicial officer, will properly determine that probable cause exists in circumstances where immediate action is necessary to apprehend a criminal, protect property, or save lives. By extending the exigent circumstances exception to

105. Carroll, 335 Md. at 746, 646 A.2d at 388 (Bell, J., dissenting).
106. Id. at 747, 646 A.2d at 388 (emphasis added).
include evidence of burglary, the court opens the possibility that evidence of other crimes also may become per se examples of exigent circumstances.

Unfortunately, the court's holding in *Carroll* also could encourage police abuse of the exigent circumstances exception. Sadly, it is far too believable that police might manufacture evidence of a recent or contemporaneous burglary as a pretext to making a warrantless entry and search of a premises when they doubt that a neutral and detached magistrate would find sufficient probable cause to justify a search. The court foresaw that such unjustified searches could occur and warned against them, but the courts themselves must be the final watchdog of police misconduct in cases of this nature. The *Carroll* court performed this duty by analyzing Gonder's actions prior to and during the entry and search of Carroll's apartment. The court noted that he returned to ask Penn questions to clarify the status of the apartment door, that he announced his entrance into the apartment, and that he did not disturb the contraband evidence upon finding it, but instead obtained a search warrant authorizing him to seize it. All of these actions are consistent with a police officer performing his duties in good faith, without malice, and within the limited scope of a search executed to find a burglar and secure property, rather than an abusive search for contraband.

The specter of police misconduct raises an interesting paradox. There is a sentiment shared by many in the American public, and fueled by news reports and portrayals in popular culture, that law enforcement officers cannot be trusted. Yet others fear that crime is

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107. Effective October 1, 1994, all unauthorized entries into dwellings in Maryland are termed "burglary." *Id.* at 737 n.3, 646 A.2d at 883 n.3; *see also* Md. ANN. CODE art. 27, §§ 29, 30 (Supp. 1994).

108. *But see* Welsh v. Wisconsin, 466 U.S. 740 (1984). In *Welsh*, the Court held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made . . . [A]pplication of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." *Id.* at 753.

109. *Carroll*, 335 Md. at 734-35, 646 A.2d at 882. The court noted that "[w]e are mindful that the responsibility of the police to investigate burglaries must be balanced against the serious invasions of privacy such entries and searches entail. We further recognize that courts must 'be vigilant to ensure that the rationale of protecting private property is not employed as a subterfuge to seek out evidence of criminal conduct.'" *Id.* at 734, 646 A.2d at 882 (citations omitted) (quoting People v. Gardner, 459 N.E.2d 676, 681 (Ill. App. Ct. 1984)).

out of control in America, and that stronger police measures are necessary to combat this epidemic.\textsuperscript{111} Allowing law enforcement officers greater latitude in reaching their own determinations of probable cause under exigent circumstances allays the latter concern but offends the former. Nevertheless, officers need a workable and understandable standard to follow in circumstances such as those encountered by Deputy First Class Gonder in \textit{Carroll}. In situations where even learned judges can differ on whether evidence of a burglary justifies a warrantless entry and search, such a bright line standard would contribute to more efficient, and constitutional, law enforcement. The standard established by the court in \textit{Carroll}, which recognizes evidence of burglary as exigent circumstances while admonishing law enforcement officers not to abuse this privilege, satisfies that need and was providently adopted into Maryland law.

5. \textit{Conclusion}.—In \textit{Carroll v. State}, the Court of Appeals extended Maryland’s Fourth Amendment jurisprudence by holding that when law enforcement officers have probable cause to believe that a burglary is either in progress or recently has been committed, the exigencies of the situation permit the officers to enter a premises without a warrant to search for an intruder and to protect the occupants’ property.\textsuperscript{112} This extension is consistent with pre-existing Maryland Fourth Amendment law, and was wisely adopted considering the overwhelming weight of persuasive authority that had previously reached this conclusion. The court’s decision should enable law enforcement officers to perform their duties more efficiently and confidently, which obviously contributes to public welfare. However, the courts must remain vigilant to ensure that the police do not abuse this discretion, further eroding public confidence in law enforcement.

\textbf{Eric M. Veit}

\begin{footnotesize}
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  \item 335 Md. at 734, 646 A.2d at 382.
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III. Contracts

A. The Continuing Erosion of Maryland Choice of Law

In American Motorists Insurance Co. v. ARTRA Group, Inc.,¹ the Court of Appeals held that where an insurance policy excludes pollution coverage unless the damage is “sudden or accidental,” a plaintiff, alleging numerous discharges as a result of normal business operations over a period of years, may not recover on that theory.² ARTRA also presented a complex choice-of-law issue because, although the pollution occurred in Maryland, the parties entered into the insurance contract in Illinois.³ The circumstances presented the Court of Appeals with an opportunity to reconsider its adherence to the traditional doctrine of lex loci contractus.⁴

In a majority opinion written by Judge Chasanow, the court adopted a limited renvoi⁵ exception to the doctrine of lex loci contractus “to avoid the irony of applying the law of a foreign jurisdiction when that jurisdiction’s conflict of law rules would apply Maryland law.”⁶ The court held that Maryland courts should apply Maryland substantive law instead of the foreign state’s law when (1) Maryland has the most significant, or at least a substantial relationship to the contract issue, and (2) the state where the contract was formed would apply Maryland law.⁷ Under the facts in ARTRA, Maryland’s existing choice-of-law rules called for the application of the doctrine of lex loci contractus, which would have required the court to apply Illinois substantive law. However, if Maryland were also to apply Illinois choice of law rules,⁸ those rules might have required application of Maryland law,⁹ resulting in an endless choice-of-law cycle.¹⁰ In order to break this

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². Id. at 593, 659 A.2d at 1311.
³. Id. at 563-64, 659 A.2d at 1296-97.
⁴. Id. at 573, 659 A.2d at 1301. The term is “[u]sed sometimes to denote the law of the place where the contract was made, and at other times to denote the law by which the contract is to be governed (i.e., place of its performance), which may or may not be the same as that of the place where it was made.” Black’s Law Dictionary 820 (5th ed. 1979); see also infra text accompanying notes 40-41.
⁵. “The ‘doctrine of renvoi’ is a doctrine under which court in resorting to foreign law adopts rules of foreign law as to conflict of laws, which rules may in turn refer court back to law of forum.” Black’s Law Dictionary 1167; see also infra text accompanying notes 46-52.
⁶. ARTRA, 338 Md. at 579, 659 A.2d at 1304.
⁷. Id. at 577, 659 A.2d at 1303; see infra text accompanying note 79.
⁸. ARTRA, 338 Md. at 574, 659 A.2d at 1302.
⁹. Because ARTRA failed to preserve the issue on appeal, the court assumed for the purposes of its opinion that Illinois choice-of-law rules would require application of Maryland law to the substantive issues in the case. Id. at 568-69, 659 A.2d at 1298-99.
¹⁰. Id. at 574, 659 A.2d at 1302.
cycle, the court adopted a limited application of the doctrine of *renvoi*, which it found preferable to "a total jettisoning of *lex loci contractus*."\(^{11}\) The court's adoption of *renvoi* represents a significant change in Maryland jurisprudence.\(^{12}\) In a similar situation ten years earlier, the court created an exception to *lex loci contractus* without finding it necessary to adopt the controversial doctrine of *renvoi*.\(^{13}\)

1. The Case.—In 1980 the Sherwin-Williams Company (Sherwin-Williams) purchased a paint manufacturing factory located in Baltimore, Maryland, from ARTRA Group, Inc. (ARTRA).\(^{14}\) After Sherwin-Williams took over the factory, the Maryland Department of the Environment discovered that hazardous waste from the factory's operations had contaminated both the soil and groundwater at the factory site.\(^{15}\) When the Department of the Environment ordered Sherwin-Williams to investigate and remedy the hazardous conditions, Sherwin-Williams filed suit in the United States District Court for the District of Maryland against ARTRA and other prior owners\(^{16}\) seeking to recover the cost of its investigation and clean-up.\(^{17}\) Sherwin-Williams alleged that "numerous spills of hazardous substances and hazardous wastes were released at the [s]ite during and as a result of regular operations of the plant."\(^{18}\)

ARTRA asked its insurer, American Motorists Insurance Company (American Motorists) to defend and indemnify ARTRA in the suit.\(^{19}\) ARTRA, its predecessors, and American Motorists all maintained their headquarters in Illinois, and the parties entered into the

11. *Id.* at 579-81, 659 A.2d at 1304-05. *But see id.* at 596-97, 659 A.2d at 1313 (Raker, J., dissenting) ("[I]t makes no 'sense' in the instant case to curtail Maryland's well-established rule," by adopting the "often criticized and rejected doctrine of *renvoi*.").


15. *Id.* at 564, 659 A.2d at 1296-97.

16. The court identified Baltimore Paint and Color Works and Baltimore Paint and Chemical Corporation as prior owners. Baltimore Paint and Chemical Corporation later merged with the ELT Corporation, which then changed its name to Dutch Boy, Inc. Dutch Boy changed its name to ARTRA in 1981. *Id.* at 564 n.1, 659 A.2d at 1296 n.1.

17. *Id.* at 564, 659 A.2d at 1297.

18. *Id.*

19. *Id.* American Motorists issued a series of comprehensive liability policies to ARTRA and its predecessors from April 1, 1976 through April 1, 1985, and also issued a Comprehensive Catastrophe Umbrella Policy to ARTRA, effective from 1976 to 1978, that contained similar pollution exclusion language. *Id.* at 564-65, 659 A.2d at 1297.
relevant insurance policies there. Each policy contained a pollution exclusion limiting the scope of coverage, but the exclusion permitted coverage for damage resulting from sudden and accidental discharge.

American Motorists refused to defend and indemnify ARTRA and, in turn, filed a complaint for declaratory judgment in the Circuit Court for Baltimore City, seeking a determination by that court that it owed no duty to defend or indemnify ARTRA under the relevant policies. ARTRA argued that "at a minimum, American Motorists owed a duty to defend ARTRA in the Sherwin-Williams suit because the allegations of the Sherwin-Williams complaint gave rise to a potentiality of coverage under the applicable policies." ARTRA also filed a motion to dismiss the declaratory judgment action, "arguing that key factual issues determinative of the duty to indemnify were intertwined with facts to be determined at trial." American Motorists then moved for summary judgment.

The trial judge held that, notwithstanding that the parties had entered into the relevant contract in Illinois, the court would apply Maryland substantive law because Illinois choice-of-law rules required the application of Maryland law and because Maryland recognized a strong public policy regarding environmental issues. Relying on Bentz v. Mutual Fire, Marine & Inland Insurance Co., the trial court

20. Id. at 564, 659 A.2d at 1297.
21. Id. at 564-65, 659 A.2d at 1297. The exclusion precluded coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water." Id. The Comprehensive Catastrophe Umbrella Policy contained similar exclusion language. Id.
22. Id. at 565, 659 A.2d at 1297. American Motorists had raised additional defenses that were not preserved on appeal. Id. at 564 n.2, 659 A.2d at 1297 n.2. The declaratory judgment action considered only the legal duties of American Motorists as to its policy holder, ARTRA. Id. at 565, 659 A.2d at 1297. The merits of the Sherwin-Williams claim against ARTRA were, therefore, not before the court. Id. at 565-66, 659 A.2d at 1297-98.
23. Id. at 565, 659 A.2d at 1297.
24. Id.
25. Id. at 566, 659 A.2d at 1297. American Motorists argued that the court should apply the principle of renvoi and that the court should look to the entire body of Illinois law, including Illinois choice-of-law rules, and decide if Illinois rules would require application of Maryland law to the underlying dispute because "Illinois conflict of law rules apply the 'most significant contacts' test of Restatement (Second) Conflict of Laws §§ 188 and 193." Id., 659 A.2d at 1297-98.
26. Id., 659 A.2d at 1298.
27. 83 Md. App. 524, 589-40, 575 A.2d 795, 802-03 (1990) (holding that the terms "sudden" and "accidental" were not unclear within the context of a pesticide pollution exclusion in the relevant insurance policy).
found the terms "sudden" and "accidental" in the language of the pollution exclusions unambiguous. The trial court found no potentiality for coverage under the applicable policies and granted American Motorists' motion for summary judgment.

On appeal, the Court of Special Appeals reversed. In so doing, the court held that the trial court incorrectly decided both the issue of choice-of-law and potentiality of coverage. The Court of Appeals granted American Motorists' petition for a writ of certiorari.

2. Legal Background.—

a. Lex Loci Contractus and the Most Significant Relationship Test.—In 1971, the Restatement (Second) of Conflict of Laws adopted the "most significant relationship test for resolving choice-of-law issues in contract actions." This modern approach to choice-of-law issues requires the application of the law of the state having the "most significant relationship" to the disputed contract issue. Section 188 of the Restatement states that "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant rela-

28. ARTRA, 338 Md. at 566, 659 A.2d at 1298.
29. Id. at 566-67, 659 A.2d at 1298.
31. Id. at 736-37, 642 A.2d at 900. The court found that the doctrine of renvoi was not accepted in Maryland, nor had Maryland accepted the Restatement (Second) of Conflict of Laws § 193's significant relationship analysis. Id. Rather, the court held that Maryland followed the doctrine of lex loci contractus and that the court therefore should look to the substantive law of Illinois, but not to Illinois choice-of-law rules. Id. In so ruling, the court reasoned that "[t]he party who seeks to overturn the general rule of lex loci contractus bears a 'heavy burden' to establish that Maryland public policy is sufficiently strong to warrant overriding the otherwise controlling law of another jurisdiction." In addition, the court held that although the Maryland legislature had "expressed a strong public policy regarding the protection of the land and citizens of Maryland from pollution ... Maryland has no strong public policy regarding who pays for the clean-up." Id. at 738-39, 642 A.2d at 901. That issue, the court held, "is controlled by the contract between insured and insurer." Id. at 739, 642 A.2d at 901.
32. Id. at 740, 642 A.2d at 902 (holding that under either Maryland or Illinois law, "there are allegations [in the Sherwin-Williams complaint] that at least some of the pollution at the site occurred under circumstances that might well be deemed to be 'sudden and accidental'.")
34. ARTRA, 338 Md. at 569, 659 A.2d at 1299; see also 16 AM. JUR. 2D Conflict of Laws § 83, at 140 n.89 (1979) (noting that preliminary drafts of the "most significant relationship" approach appeared as early as 1953).
35. ARTRA, 338 Md. at 570, 659 A.2d at 1299.
tionship to the transaction and the parties."  

In making this determination, courts should consider "the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicil [sic] and place of business of the parties."  

The Restatement further narrows this test in section 193 in the context of fire, surety, and casualty insurance contracts, finding that the state the parties understood to be the principal location of the insured risk will typically be the state with the most significant relationship.  

ARTRA and American Motorists agreed that Illinois employs the "most significant relationship" approach.

This modern test contrasts with the rule of lex loci contractus, which requires the application of the law of the state in which the parties entered into the contract. To understand lex loci contractus, one must understand that a basic tension exists in choice-of-law disputes. Various commentators have discussed this tension:

[W]e are constantly confronted by a conflict between the lex fori, that is, the law of the forum or place where relief is sought, and what may in general terms be called the lex loci, that is, the law of the place where the right was acquired or the liability was incurred which constitutes the claim or the cause of action. Under the traditional "territorial" approach to choice of law problems, the lex loci controls the substantive rights of the parties, that is, all matters going to the basis of the right itself, while the lex fori controls procedural and remedial matters.

According to the Court of Appeals, the "most significant relationship" test of the Second Restatement "sacrifices some of the certainty, simplicity, and predictability of the lex loci contractus rule in favor of a rule which gives the jurisdiction with the strongest interest in the litigation the most control over the outcome of the litigation." Notwithstanding the increasing popularity of the "most significant re-

37. ARTRA, 338 Md. at 570, 659 A.2d at 1300.
39. ARTRA, 338 Md. at 571, 659 A.2d at 1300.
40. Id. at 570, 659 A.2d at 1300; see also supra note 4.
41. 16 AM. JUR. 2D CONFLICT OF LAWS § 5 (1979).
42. ARTRA, 338 Md. at 570, 659 A.2d at 1300.
relationship" test, Maryland courts prior to ARTRA instead adhered to the doctrine of lex loci contractus, albeit not without exceptions.

b. Renvoi.—Where a court chooses to apply the law of the foreign jurisdiction, the question arises whether the court should apply only the applicable substantive law, also known as the "internal law," or the "whole law" of the foreign jurisdiction, including foreign choice-of-law.

The general view is that where a question comes before a court which, according to the law of the forum as to conflict of laws, is to be determined by the law of another jurisdiction, the question is determined by the law of such other jurisdiction applicable to the precise question; the law of such other jurisdiction as to conflict of laws is not taken into consideration.

The French word "renvoi" means to "send back" or "remit." The Court of Appeals noted that courts may have created the renvoi doctrine in response to the "harshness" of traditional choice-of-law principles. According to the doctrine, where a forum court's choice-of-law rules calls for the application of the substantive law of a foreign jurisdiction, the forum court may apply the whole law of the foreign jurisdiction, including the foreign jurisdiction's choice-of-law rules.

Applying renvoi, when a forum state determines that the foreign jurisdiction's choice-of-law rules would require the application of the forum's law, a reference back by the forum to its own laws is called a remission. A transmission occurs when the choice-of-law rules of the foreign jurisdiction would instead refer the forum court to a third jurisdiction. The Court of Appeals noted that "renvoi could have the

43. Id. at 572, 659 A.2d at 1301.
45. ARTRA, 338 Md. at 581, 659 A.2d at 1305 (explaining that Maryland has "refused to apply the law of the place of contracting where to do so would violate some strong public policy of Maryland" or where the parties include a choice-of-law provision within the contract); see National Glass Inc. v. J.C. Penney Properties, Inc., 336 Md. 606, 615, 650 A.2d 246, 250 (1994).
47. ARTRA, 338 Md. at 574, 659 A.2d at 1301.
48. Id. (citing Rhoda S. Barish, Comment, Renvoi and the Modern Approaches to Choice-of-Law, 90 Am. U. L. Rev. 1049, 1061-62 (1981)).
49. Barish, supra note 48, at 1062.
50. Id.
51. Id.
danger of creating an endless cycle." Prior to ARTRA, Maryland courts refused to adopt the doctrine of renvoi.

3. The Court's Reasoning.—

a. Illinois Law or Maryland Law?—ARTRA failed to preserve on appeal the issue of whether an Illinois court would apply Maryland law given the facts of the case. Consequently, the ARTRA court proceeded under the assumption that Illinois choice-of-law rules would dictate the application of Maryland law to the substantive issues of the case. Before the Court of Special Appeals, ARTRA had "acknowledged that the trial judge 'ruled that Illinois would apply Maryland law for purposes of conflict of law analysis in interpreting issues of coverage' and American Motorists agreed with the trial judge's finding, contending that 'Illinois would apply the law of Maryland in resolving the declaratory judgment case.'" The Court of Special Appeals also assumed that Illinois's choice-of-law rules would require the application of Maryland law. In its petition for certiorari, American Motorists acknowledged that the trial court had found that "Illinois choice-of-law rules would lead to the application of Maryland law." ARTRA failed to challenge this holding.

b. Sudden and Accidental.—After deciding that Maryland law would apply, the Court of Appeals turned its attention to American Motorists' claim that the Court of Special Appeals had incorrectly held that (1) American Motorists had a duty to defend ARTRA, and (2) such duty could not be determined in a declaratory judgment action. The Court of Appeals reversed the decision of the Court of

52. ARTRA, 338 Md. at 574, 659 A.2d at 1302.
54. ARTRA, 338 Md. at 568-69, 659 A.2d at 1299.
55. Id., 659 A.2d at 1298. But see id. at 597, 659 A.2d at 1313 (Raker, J., dissenting) (arguing that Illinois would not have applied Maryland law in this case).
56. Id. at 568, 659 A.2d at 1299.
57. ARTRA, 100 Md. App. at 738, 642 A.2d at 901; see Diamond State Ins. Co. v. Chester-Jensen Co., 611 N.E.2d 1083, 1095 (Ill. App. Ct. 1993) ("While ... section [193] does not preclude considerations of other factors in a choice of law analysis, the 'location of the insured risk will be given greater weight than any other single contact in determining the state of applicable law provided that the risk can be located, at least principally in a single state.'") (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 195 cmt. b (1971)); see also KNS Cos. v. Federal Ins. Co., 866 F. Supp. 1121, 1125 (N.D. Ill. 1994) ("Although KNS is an Illinois-based corporation ... the assertedly insured risk has its situs in Indiana, and Diamond State calls for the application of Indiana law.").
58. ARTRA, 338 Md. at 568, 659 A.2d at 1299.
59. Id.
60. Id. at 581-82, 659 A.2d at 1305.
Special Appeals, finding that the trial court had ruled correctly on both issues.61

Pursuant to *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*,62 the Court of Appeals in *ARTRA* interpreted the terms of the contract according to their "customary, ordinary, and accepted meaning."63 The court reviewed *Bentz v. Mutual Fire, Marine & Inland Insurance Co.*,64 in which the Court of Special Appeals discussed the meaning of the terms "sudden" and "accidental" in the context of a pollution exclusion contained in an insurance contract.65 That court found that the terms were clear within the context of the applicable policy.66 The *Bentz* court explained that a "sudden and accidental" exception to a pollution exclusion precludes coverage unless the discharge, rather than the resultant injury, is both sudden and accidental.67 The *Bentz* court held that the policy must be read as a whole to determine the meanings of its terms.68 Relying on *Bentz* and "numerous other cases,"69 the Court of Appeals in *ARTRA* held that long-standing business activities that result in pollution are not "sudden and accidental" events for which such policies would provide coverage.70 In addition, after considering *ARTRA*’s allegations in the underlying complaint, the court found that Sherwin-Williams had clearly based its claim on damage alleged to have resulted from "the cumulative effects of nu-

61. *Id.* at 582, 659 A.2d at 1305-06.
63. *ARTRA*, 338 Md. at 582, 659 A.2d at 1306 (quoting *Mitchell*, 324 Md. at 56, 595 A.2d at 475).
67. *Id.* at 538, 575 A.2d at 802.
69. *ARTRA*, 338 Md. at 586, 659 A.2d at 1308; see *American Motorists*, 667 F. Supp. at 1428; see also U.S. Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437, 446 (D. Kan. 1990) ("To divorce ‘sudden’ of its temporal component would eviscerate it of any independent meaning or force."); 999 F.2d 489 (10th Cir. 1993); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 841 (Ct. App. 1992) ("We cannot reasonably call ‘sudden’ a process that occurs slowly and incrementally over a relatively long time . . . ."); Lumbermens Mut. Casualty Co. v. Belleville Indus., 555 N.E.2d 568, 572 (Mass. 1990) ("For the word ‘sudden’ to have any significant purpose, and not to be surplusage when used generally in conjunction with the word ‘accidental,’ it must have a temporal aspect to its meaning, and not just the sense of something unexpected."); cert. denied, 502 U.S. 1073 (1992).
70. *ARTRA*, 338 Md. at 590, 659 A.2d at 1310.
merous releases" occurring in the regular course of business over a period of years.\textsuperscript{71}

The Court of Appeals also disagreed with the holding of the Court of Special Appeals that American Motorists' duty to indemnify ARTRA could not be determined in a declaratory judgment action.\textsuperscript{72} The Court of Appeals found that, because the "allegations of the underlying complaint cannot be read to assert that the polluting activities alleged were . . . 'sudden and accidental,'" no potentiality of coverage existed.\textsuperscript{73} The court found that no issues remained to be determined at trial relating to American Motorists' duty to indemnify ARTRA.\textsuperscript{74}

c. \textit{Choice of Law}.—The court did not, however, rely on Maryland precedent regarding the choice-of-law issue. Absent a choice-of-law provision in an agreement, Maryland courts previously applied the rule of \textit{lex loci contractus}\textsuperscript{75} in contract disputes, recognizing only a public policy exception.\textsuperscript{76} Because American Motorists and ARTRA entered into their contract in Illinois, a Maryland court, under its existing choice-of-law rules, normally would apply Illinois law under \textit{lex loci contractus}.\textsuperscript{77} Instead, the court, using the \textit{renvoi} theory, chose to adopt all of Illinois law, including Illinois choice of law, which would apply the "most significant relationship" test, resulting in the application of Maryland law.\textsuperscript{78} Pursuant to this exception,

Maryland courts should apply Maryland substantive law to contracts entered into in foreign states' jurisdictions in spite of the doctrine of \textit{lex loci contractus} when:

\begin{itemize}
\item \textsuperscript{71} Id. at 590-92, 659 A.2d at 1310-11.
\item \textsuperscript{72} Id. at 593, 659 A.2d at 1311.
\item \textsuperscript{73} Id. at 593-94, 659 A.2d at 1311.
\item \textsuperscript{74} Id. at 594, 659 A.2d at 1311; see also Aetna Casualty & Ins. Co. v. Cochran, 337 Md. 98, 112, 651 A.2d 859, 866 (1995) (explaining that an insured may establish a potentiality of coverage if the "insured demonstrates that there is a reasonable potential that the issue triggering coverage will be generated at trial"); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 407, 347 A.2d 842, 850 (1975) (explaining that an insurer's obligation to defend its insured under a contract provision is determined by the allegations in the complaint; where the plaintiff alleges "a claim covered by the policy, the insurer has a duty to defend").
\item \textsuperscript{75} ARTRA, 338 Md. at 573, 659 A.2d at 1301.
\item \textsuperscript{76} See supra note 45.
\item \textsuperscript{77} ARTRA, 338 Md. at 574, 659 A.2d at 1302.
\item \textsuperscript{78} Id. at 576, 659 A.2d at 1303. The court justified its holding in part on the ground that Maryland should seek to prevent forum shopping when the place of contracting would have applied Maryland law had suit been filed in that jurisdiction. Id. at 577, 659 A.2d at 1303.
\end{itemize}
1) Maryland has the most significant relationship, or, at least, a substantial relationship with respect to the contract issue presented; and

2) The state where the contract was entered into would not apply its own substantive law, but instead would apply Maryland substantive law to the issue before the court.\(^7\)

By creating another exception to *lex loci contractus*, the court sidestepped "the intriguing question of whether Maryland's traditional *lex loci contractus* test should be abandoned in favor of one of the 'modern' most significant relationship tests."\(^8\) The court noted "growing support" for substituting the "most significant relationship" test for *lex loci contractus* "in light of modern technology,"\(^9\) but instead simply opted not to apply *lex loci contractus* where Maryland has a substantial relationship to the issues presented, if the foreign jurisdiction would itself apply Maryland law.\(^2\)

In reaching its decision, the court reasoned that Maryland courts prefer to apply Maryland law.\(^8\) When Maryland courts decline to apply Maryland law to a contract entered into in a different state, they do so not because they "deem the law of the other state preferable, but because their preference for Maryland law is outweighed by considerations of simplicity, predictability and uniformity."\(^2\) The court reasoned that if the state where the contract was made would apply Maryland law, however "simplicity, predictability, and uniformity

\(^{7}\) Id.

\(^{8}\) Id. at 569, 659 A.2d at 1299.

\(^{9}\) Id. at 579-80, 659 A.2d at 1304-05. The court stated that "[w]ith modern technology and modern business practices, the place of contracting becomes less certain and more arbitrary . . . . 'In these days of multistate insurers, multistate insureds, and instantaneous interstate transmission of voice and document, it is not easy to identify a state of contracting.'" Id. at 580, 659 A.2d at 1305 (quoting Johnson Matthey, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co., 593 A.2d 367, 372 (N.J. Super. Ct. App. Div. 1991). See generally 16 Am. Jur. 2d Conflict of Laws § 83 (1979).

\(^{2}\) ARTRA, 338 Md. at 579, 659 A.2d at 1304.

\(^{8}\) Id. at 578, 659 A.2d at 1303-04. The court stated:

It is axiomatic that Maryland law is Maryland law because our courts and legislature believe the rules of substantive law we apply are the best of the available alternatives. From this fundamental principle, it is safe to assume our courts would prefer to follow Maryland law unless there is some good reason why Maryland law should yield to the law of a foreign jurisdiction. Our own substantive law is not only more familiar to and easier for Maryland judges to apply, but there has been a legislative or judicial determination that it is preferable to the available alternatives.

\(^{8}\) Id.
would be better achieved if Maryland courts followed the conflict of law rule of the place of contracting and apply Maryland law.”85

The court explained that its holding that *lex loci contractus* “must yield” to a modern approach when the state where the contract was entered into would apply Maryland law was not a total abandonment of *lex loci contractus*.86 The court found that its objectives would best be accomplished by a limited application of *renvoi*.87 Where the forum and the foreign jurisdiction would each apply the law of the other, “it would seem that the balance should tip in favor of the jurisdiction with the most significant contacts or . . . for ease of application and to prevent forum shopping, the law of the forum should be applied.”88

The court added that Maryland courts ordinarily apply Maryland substantive law and that there is no good reason to apply the substantive law of a foreign jurisdiction if that jurisdiction would also have applied Maryland substantive law to the contract.89 The Court of Appeals employed this same reasoning ten years earlier in *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*90 In that case, the court adopted the public policy exception without discussing *renvoi*.

In her dissent, Judge Raker criticized the majority for adopting *renvoi*,91 argued that the decision “will lead to uncertainty, confusion, and unpredictability,”92 and expressed her preference for a “solid, predictable rule.”93 Judge Raker also suggested that Illinois would have applied its own law in this dispute.94

85. *Id.* at 578-79, 659 A.2d at 1304. The court rejected ARTRA’s argument that “failure to apply a strict *lex loci contractus* test in the instant case would be unfair because ARTRA allegedly had some expectation that Illinois law would govern these insurance contracts.” *Id.* at 577, 659 A.2d at 1303.

86. *Id.* at 579, 659 A.2d at 1304. The court observed that “[m]any states using the traditional rules simply have not switched over to a more modern approach . . . . Even if a state has recently reaffirmed its commitment to a traditional approach, giving some deference to how the case would have been decided in another concerned court improves interstate relations by demonstrating respect for the foreign jurisdiction’s whole law.” *Id.* at 579 n.5, 659 A.2d at 1304 n.5 (quoting Barish, *supra* note 48, at 1075-76).

87. *Id.* at 579, 659 A.2d at 1304.

88. *Id.* at 575-76, 659 A.2d at 1302.

89. *Id.* at 576, 659 A.2d at 1303.


91. *ARTRA*, 338 Md. at 596, 659 A.2d at 1313 (Raker, J., dissenting).

92. *Id.* at 597, 659 A.2d at 1313.

93. *Id.* at 596, 659 A.2d at 1313.

94. *Id.* at 597, 659 A.2d at 1313; see *supra* notes 54-59 and accompanying text.
4. Analysis.—

a. Sudden and Accidental.—The Court of Appeals agreed with the trial court's reliance on Bentz for a definition of the terms "sudden" and "accidental" in the policy's pollution exclusion.95 The trial court determined that the word "sudden" meant quick or instantaneous, as defined in Bentz.96 In contrast, the plaintiff in ARTRA alleged that "the pollution occurred over the course of many years, i.e., not instantaneously or quickly."97 For this reason, the trial court correctly concluded that "American Motorists had no duty to defend or indemnify ARTRA in the Sherwin-Williams action."98 This holding clearly was consistent with Maryland precedent99 as well as that of numerous other jurisdictions.100 The question remains, however, whether a Maryland court instead should have interpreted the pollution clause pursuant to Illinois precedent,101 in adherence to lex loci contractus.

b. Lex Loci Contractus or the Most Significant Relationship Test?—Maryland consistently has applied the traditional "territorial" approach102 of the First Restatement of Conflict of Laws, which is based


95. ARTRA, 338 Md. at 584, 593, 659 A.2d at 1307, 1311.
96. Id. at 566-67, 659 A.2d at 1298.
97. Id. at 585, 659 A.2d at 1307.
98. Id.
100. See, e.g., Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 768 (6th Cir. 1992) (holding that allegations of continuing pollution on a regular basis could not be considered sudden); A. Johnson & Co. v. Aetna Casualty & Sur. Co., 935 F.2d 66, 75 (1st Cir. 1991) ("Mere speculation . . . that any individual instance of disposal, including leaks, occurred 'suddenly' cannot contradict a reasonable reading of the allegations that the entire pattern of conduct was not a 'sudden and accidental' occurrence."); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) ("We do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected."); Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793, 797 (Minn. Ct. App.) (holding that when pollution is alleged to have occurred over a long period of time, individual instances of pollution may not be isolated to provide occurrences that are "sudden"), review denied (Minn. Ct. App. 1993).
101. ARTRA, 338 Md. at 565, 659 A.2d at 1297 ("Illinois law holds the pollution exclusion at issue to be ambiguous.").
102. See Hauch v. Connor, 295 Md. 120, 128-24, 453 A.2d 1207, 1209 (1983) (rejecting the position of the Restatement and adhering to the rule that the substantive tort law of the state where the wrong occurs governs"); White v. King, 244 Md. 348, 352, 228 A.2d 763, 765 (1966) (explaining that when lex loci contractus has been challenged, "this Court has consistently followed the rule").
on the vested rights theory.\textsuperscript{103} Although sometimes characterized as antiquated,\textsuperscript{104} the "territorial" approach has some support in recent commentary.\textsuperscript{105} Its traditional justification is that it affords the parties certainty and probability as to what law will govern, yet it has been criticized as being illogical,\textsuperscript{106} rigid,\textsuperscript{107} and filled with uncertainty.\textsuperscript{108} The First Restatement approach also has been labeled "jurisdiction-selecting,"\textsuperscript{109} although courts do recognize exceptions to the rule in certain circumstances.\textsuperscript{110} Nevertheless, Maryland's loyalty to \textit{lex loci contractus} keeps it among the shrinking majority of jurisdictions that continues to follow that rule.\textsuperscript{111}

A number of states, however, have abandoned \textit{lex loci contractus} in favor of the "most significant relationship" test of the Second Restate-
Section 188 suggests factors to consider when determining which state has the "most significant relationship." These factors include: (1) the place where the contract was made; (2) the place where the contract was negotiated; (3) the place where the contract was performed; (4) the location of the subject matter of the contract; and (5) the domicile and place of business of the parties. Like all choice-of-law rules in the Second Restatement, section 188 rules must be applied in light of the principles articulated in section 6, namely

(1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability and uniformity of result, and (7) ease in the determination and application of the law to be applied.

Whereas the First Restatement based choice-of-law rules on the theory of vested rights, the Second Restatement is “more thematic or doctrinal than its predecessor”; however, the Second Restatement retains a presumption of territoriality. The “validity and effect” of certain types of contracts are determined by the law of the state where that contract is “located,” “unless the values stated in [s]ection 6 point to a different solution.” Although the Second Restatement approach might ultimately produce “the more equitable result” in a particular case by considering factors in addition to territoriality, “it has the de-

112. Id. at 572, 659 A.2d at 1301; see, e.g., St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 78 F.3d 202, 205 (5th Cir. 1996) (explaining that Texas applies the “most significant relationship” test); Reliance Ins. Co. v. Mast Construction Co., 1996 WL 139572 (10th Cir. 1996) (explaining that Utah applies the “most significant relationship” test); Security Ins. Co. v. Kevin Tucker & Assocs., Inc., 64 F.3d 1001, 1005 (6th Cir. 1995) (stating that Kentucky follows the “most significant relationship” test).


114. Id.


117. Reese, supra note 115, at 514 (“People naturally think in terms of territoriality, and so have the courts. To ignore its significance is to turn one’s back on the past and to ignore a vital factor that underlies the field.”); VERNON ET AL., supra note 108, at 359 (“Restatement (Second)’s typical reference to the ‘place of most significant relationship’ is generally accompanied by a presumption that a traditionally-selected jurisdiction will govern.”).

118. Reese, supra note 115, at 513-14.
cided disadvantage of producing limited precedential guidelines for cases that will follow later."\textsuperscript{119}

It may be the case that "[b]oth the First and Second Restatements of Conflicts failed to provide generally acceptable approaches to analyzing and resolving cases involving choice-of-law questions."\textsuperscript{120} The \textit{First Restatement} relied on arbitrarily selected "contacts as determinative," while the \textit{Second Restatement} provided "a long list of presumptions" that the courts have largely ignored.\textsuperscript{121} It is fair to say that, at a minimum, the \textit{Second Restatement} serves as more of a statement of values than a restatement of current law.\textsuperscript{122}

This would suggest that a clearer and more honest approach might be that of "interest analysis." This approach to choice of law bases the power of a state to legislate more on its "sphere of legitimate governmental interest" than "on its territory."\textsuperscript{123} Endorsed by the United States Supreme Court,\textsuperscript{124} "interest analysis" does not require the forum to balance its interests with those of the foreign jurisdiction.\textsuperscript{125} Rather, the Supreme Court has held, with "fair consistency," that "a state with a legitimate interest in applying its own law [may] do so," even though a foreign state may have an equal or superior interest.\textsuperscript{126} Some have criticized the approach as being defectively biased in favor of state residents.\textsuperscript{127} Despite the fact that the Court of Appeals discussed at length the "modern" approach of the \textit{Second Restatement},\textsuperscript{128} the \textit{ARTRA} court adopted instead a form of "interest analysis."\textsuperscript{129}

The Court of Appeals held that Maryland courts should apply substantive Maryland law in contract disputes when the foreign jurisdiction would apply Maryland law, and when "Maryland has the most significant relationship, or, at least, a substantial relationship with respect to the contract issue presented."\textsuperscript{130} Thus, if Maryland has a sub-

\textsuperscript{121} \textit{Id.} at 735-36.
\textsuperscript{122} See Reese, \textit{supra} note 115, at 516.
\textsuperscript{123} \textit{Vernon et al.}, \textit{supra} note 103, at 299.
\textsuperscript{124} Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).
\textsuperscript{125} \textit{Vernon et al.}, \textit{supra} note 103, at 299.
\textsuperscript{126} \textit{Id.} at 299-300.
\textsuperscript{127} \textit{Id.} at 354.
\textsuperscript{128} \textit{ARTRA}, 338 Md. at 569-71, 659 A.2d at 1299-1300.
\textsuperscript{129} See \textit{Vernon et al.}, \textit{supra} note 103, at 299 ("Interest analysis is probably the methodology of most pervasive influence on courts today.").
\textsuperscript{130} \textit{ARTRA}, 338 Md. at 579, 659 A.2d at 1304.
stantial interest, Maryland law will be applied even in a case when a foreign jurisdiction has a more substantial interest. This approach is pure interest analysis.\textsuperscript{131}

Although the court did mention the factors suggested by the Restatement to determine the "most significant relationship,"\textsuperscript{132} it did not discuss the principles listed in section 6 that are the "central theme or theory" around which the Restatement provisions "revolve."\textsuperscript{133} Moreover, the court stated that, under the circumstances of ARTRA, "Maryland's adherence to lex loci contractus must yield to a test such as Restatement (Second) Conflict of Laws Section 188,"\textsuperscript{134} rather than unequivocally identifying the court's approach as that of the Restatement.

At least one writer has suggested that Maryland began to adopt the doctrine of "interest analysis" years ago.\textsuperscript{135} The Court of Appeals declined the opportunity presented by ARTRA, however, to provide guidelines to the lower courts as to when interest analysis should be applied. Finally, the court remained silent as to whether Maryland courts should apply the same exception, under similar choice-of-law circumstances, to the doctrine of lex loci delicti\textsuperscript{136} in torts cases.

c. Renvoi.—The theory of renvoi provides that the court of the forum state must take into account the whole law of the other jurisdiction, including its rules as to choice-of-law, even if that law is the law of the forum.\textsuperscript{137} Brainerd Currie, a sponsor of "interest analysis," argued that forum law should always apply in a true conflict situation\textsuperscript{138} because "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order . . . that should not be committed to courts in a democracy."\textsuperscript{139} In justifying its

\textsuperscript{131} See supra text accompanying notes 123-126.
\textsuperscript{132} ARTRA, 338 Md. at 570, 659 A.2d at 1300 (emphasis added).
\textsuperscript{133} Reese, supra note 115, at 516.
\textsuperscript{134} ARTRA, 338 Md. at 579, 659 A.2d at 1304.
\textsuperscript{136} The term means "[t]he law of the place where the crime or wrong took place."
\textsuperscript{137} Black's Law Dictionary 820 (5th ed. 1979).
\textsuperscript{138} See Eugene F. Scoles & Peter Hay, Conflict of Laws § 2.6, at 17 (1st ed. 1982) ("A 'false conflict' exists when the potentially applicable laws do not differ or when, upon examination, one law—by its own terms or underlying policies—is not intended to apply to a situation such as the one in issue.").
\textsuperscript{139} Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171, 176 (1959).
use of the *renvoi* doctrine, the Court of Appeals explained that Maryland's courts and legislature “prefer” Maryland law.\(^{140}\) However, in order to apply its own “preferred” internal law in cases such as *ARTRA*, it necessarily must “prefer” the choice-of-law rules of the foreign jurisdiction to its own.\(^{141}\) The court held that because “simplicity, predictability, and uniformity would be better achieved,” the preference was justified.\(^{142}\) Alternatively, “[j]udges [take] an equivocal stance, generally rejecting the *renvoi* while employing it in a variety of particular situations.”\(^{143}\) *Renvoi* is therefore often discussed as an “escape device” that “courts use to avoid the traditional rules.”\(^{144}\)

The *First Restatement* did not approve of *renvoi* in contract cases.\(^{145}\) In spite of this, “traditionalist courts occasionally resorted to the concept to escape the place of making rule.”\(^{146}\) In contrast, according to the *Second Restatement*, a court appropriately uses *renvoi* “[w]hen the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state.”\(^{147}\) This clearly is not the case in *ARTRA*. Maryland law would reach the exact opposite result of the interpretation of pollution clauses that both parties attribute to Illinois.\(^{148}\) Another circumstance in which the *Second Restatement* recommends *renvoi* is when the forum state “has no substantial relationship to the particular issue or the parties and the courts of all interested states would concur in selecting the local law rule applicable to this issue.”\(^{149}\) This too is clearly not the case in *ARTRA*. The court applied *renvoi* precisely because Maryland had “the most significant relationship, or, at least, a substantial relationship with respect to the contract issue presented.”\(^{150}\) In other words, the court adopted a limited form of *renvoi*\(^{151}\) in stark

\(^{140}\) *ARTRA*, 338 Md. at 578, 659 A.2d at 1303-04.


\(^{142}\) *ARTRA*, 338 Md. at 179, 659 A.2d at 1304.


\(^{144}\) Id.

\(^{145}\) *Renvoi Revisited*.

\(^{146}\) *RESTATEMENT OF CONFLICT OF LAWS* § 7 (1934).

\(^{147}\) Id.

\(^{148}\) *VERNON ET AL.*, supra note 103, § 4.13(4).

\(^{149}\) *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 8 (1971).

\(^{150}\) *ARTRA*, 338 Md. at 579, 659 A.2d at 1304.

\(^{151}\) Id. at 574, 659 A.2d at 1302.
opposition to the *First Restatement* and applied the doctrine in a situation not endorsed by the *Second Restatement*.

Inherent problems arise when courts apply *renvoi* to cases such as *ARTRA*. First, it is illogical, because if "we refer to all the law, including conflicts rules, we are apparently on a merry-go-round" of circularity. Second, Maryland courts must now determine which choice-of-law approach the foreign jurisdiction would have used; a difficult task because many states are currently in transition from the traditional to the modern approach. If a Maryland court determines that the foreign jurisdiction uses the "most significant relationship" approach, it must then determine the degree of consideration the foreign jurisdiction would extend to each factor, including the place of contracting. Also, if the court determines that the foreign jurisdiction employs *lex loci contractus*, it must then determine how the foreign jurisdiction would itself determine *lex loci*.

Finally, the issue presents a problem of a more theoretical nature. It takes two jurisdictions to dance the *renvoi* tango, a reference and a remission. What is the result when the foreign jurisdiction does not recognize *renvoi*? If Maryland has truly chosen in *ARTRA* to recognize all of Illinois law, including Illinois choice-of-law, is it not also necessary for Maryland to determine whether Illinois recognizes the doctrine of *renvoi*, or whether Illinois abandoned *renvoi* just as it abandoned *lex loci contractus*? The fact that Illinois might have applied Maryland law if the action had been brought in Illinois does not necessarily mean that Illinois would remit a reference from Maryland.

152. *See supra* text accompanying note 146.
153. *See supra* text accompanying note 147.
154. Griswold, *supra* note 141, at 1167. Griswold states, in answer to the question whether a court should stop after the first or second reference,

> It may promptly be conceded that there is no logical basis for choosing between the first and second [approaches] . . . [Where we face] an endless series of references, there is no logical reason for stopping after the second reference (or "accepting the *renvoi*"); it would be just as "logical" to stop after the third reference or the seventeenth. But by the same token, it is no more "logical" to stop after the first reference. It may or may not be expedient to stop there for one reason or another, but a solution reached on this ground cannot be accorded the accolade of logic.

*Id.* at 1177.
155. *See supra* note 112.
156. *See supra* text accompanying notes 114-116.
The most recent Illinois case discussing renvoi seems to indicate that Illinois now rejects that doctrine.\(^{158}\)

5. Conclusion.—In addition to placing the burden of making difficult inquiries on Maryland courts, ARTRA will impact Maryland law in other ways. Maryland courts that would have approved of the abandonment of lex loci contractus in favor of a modern approach will now have an incentive to determine that the foreign jurisdiction would not apply its own substantive law, in order to "accept" the reference back to Maryland under the doctrine of renvoi. By creating another exception to lex loci contractus in ARTRA rather than abandoning the doctrine, the current status of Maryland choice of law is that Maryland rejects the "most significant relationship" test unless a Maryland court determines that Maryland itself has the "most significant relationship."\(^{159}\)

In ARTRA, the Court of Appeals bypassed the opportunity to modernize and clarify its choice-of-law approach. Although neither of the Restatements provides a paradigm of certainty or predictability of outcome, contract parties at least should be certain which approach a Maryland court would likely employ when faced with such a dispute. If the Court of Appeals prefers interest analysis it should openly express that preference. The court then should prefer Maryland choice-of-law rules to those of foreign jurisdictions and reference only the internal, or substantive law of the foreign jurisdiction. Because of the problems inherent in renvoi, the court should apply this controversial doctrine only in the limited situations recommended by the Second Restatement,\(^{160}\) if at all. "In this way, it is said, we do not have to worry about how to get off the merry-go-round, for we never get on it."\(^{161}\)

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159. See supra text accompanying note 79.

160. See supra text accompanying note 147.

161. Griswold, supra note 141, at 1167.
IV. CRIMINAL LAW

A. Mandatory Sentencing: Moving Toward Judicial Discretion

In Jones v. State, the Court of Appeals considered whether a defendant who is convicted of more than one violent crime resulting from a single incident is entitled as a matter of law to have Article 27, section 643B(c) mandatory sentencing imposed upon a conviction carrying the greatest statutory penalty, thereby resulting in the shortest term possible under the statute. The court held that a defendant was not entitled to the shortest penalty because a sentencing judge has the discretion to choose any one of the qualifying convictions upon which to impose the statutory penalty required under section 643B(c). In reaching its conclusion, the court looked to statutory construction to ascertain the intent of the legislature as well as the principle of broad judicial discretion in sentencing.

This Note will review the legal background of the Jones decision with attention to the development of the mandatory provision, the application of its sentencing provisions, and the history of judicial discretion in sentencing. This Note concludes that the court's construction provides a compromise between mandatory sentencing and the judicial discretion that historically has been afforded the trial judge. The Jones holding implies that, although mandatory sentencing will remain in place, Maryland courts may broadly construe such statutes to allow for more judicial discretion.

1. The Case.—Duane Thomas Jones was convicted of three crimes arising out of a single incident that occurred on March 15, 1991. The victim, the part owner of a small company that sells perfumes door-to-door, testified that at his request she went to the de-

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2. Md. Ann. Code art. 27, § 643B(c) (1992). Section 643B(c) mandates that [a]ny person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years. Neither the sentence nor any part of it may be suspended, and the person shall not be eligible for parole except in accordance with the provisions of Article 31B, § 11. A separate occasion shall be considered one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding occasion.

Id.
3. Jones, 336 Md. at 257, 647 A.2d at 1205.
4. Id.
5. Id. at 258, 647 A.2d at 1205.
fendant’s home to sell perfume, at which time the crimes of second
degree rape, six second degree sexual offense, seven and robbery eight occurred. nine Jones was subsequently convicted by a jury in the Circuit Court for
Baltimore County. ten Because Jones previously had been convicted in
two separate criminal cases in nineteen eighty-nine, eleven the State served him with notice of its intention to seek a mandatory minimum penalty under section
six forty-three b c. twelve
Jones admitted that the statutory prerequisites for the imposition of a mandatory minimum penalty were met; however, he argued that section six forty-three b c was ambiguous regarding the crime upon which the mandatory twenty-five year penalty should be imposed. thirteen Jones argued that because the statute did not specify upon which crime the mandatory penalty should be imposed, the statute was subject to the rule of lenity. fourteen Jones argued that the rule of lenity required that the section six forty-three b c mandatory penalty of twenty-five years without the possibility of parole be applied to the conviction that would result in the minimum term possible under the statute. fifteen Because both the convictions of second degree rape and second degree sexual offense carried a possible term of twenty years, and the robbery conviction only carried a possible term of ten years, sixteen Jones sought to have the mandatory penalty imposed upon either the second degree rape or second degree sexual offense conviction, thereby shortening the maximum term to which he could be sentenced from sixty-five years to fifty-five years. seventeen
The trial judge rejected Jones’s argument and sentenced him to twenty years on the second degree rape conviction and twenty years on the second degree sexual offense, to run concurrently with the rape sentence. eighteen The judge imposed the sixty-four b c mandatory twenty-five year sentence upon the robbery conviction, increasing the term

7. Id. § 464A.
8. Id. § 486.
10. Jones, 336 Md. at 258, 647 A.2d at 1205.
11. Id. Jones previously had been convicted of robbery and burglary and served a term of confinement in a correctional facility. Id.
12. Id.
13. Id. at 258-59, 647 A.2d at 1205-06.
14. Id. See infra note 31 and accompanying text for discussion of the rule of lenity.
15. Jones, 336 Md. at 259, 647 A.2d at 1205-06.
17. Jones, 336 Md. at 259, 647 A.2d at 1206.
18. Id.
for the conviction from ten to twenty-five years, to run consecutively with the rape sentence.\textsuperscript{19}

Jones appealed, arguing that section 643B(c) was ambiguous and therefore should be construed to impose the shortest sentence possible.\textsuperscript{20} In an unreported opinion, the Court of Special Appeals affirmed the trial court's decision.\textsuperscript{21} The Court of Special Appeals held "that when more than one conviction arising from a single episode qualifies as the third conviction of a crime of violence, the determination of the crime to which the mandatory sentence will be imposed rests within the discretion of the trial court."\textsuperscript{22} The Court of Appeals granted certiorari to resolve the issue of whether a sentencing judge may select any one of the qualifying convictions to serve as the third conviction for the purposes of the imposition of the section 643B(c) penalty.\textsuperscript{23}

2. Legal Background.—

a. Development of the Mandatory Sentencing Provision.—The General Assembly enacted mandatory sentencing laws under Article 27, section 643B, "[for] the purpose of providing new and different alternatives for dealing with aggressive and violent offenders."\textsuperscript{24} Section 643B(c) specifically provides that an individual who has previously been convicted on two separate occasions of a crime of violence and has previously served at least one term of confinement shall be sentenced, upon conviction of a third violent crime, to a mandatory sentence not less than twenty-five years without the possibility of suspension or parole.\textsuperscript{25} Since its enactment, Maryland courts repeatedly

\begin{itemize}
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. at 260, 647 A.2d at 1206.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. (citing Jones v. State, No. 197, slip op. at 21 (Md. Ct. Spec. App. Nov. 12, 1993) (per curiam)).
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Act of May 26, 1977, ch. 678, 1977 Md. Laws 2723.
  \item \textsuperscript{25} See supra note 2 for the statutory language in pertinent part.
\end{itemize}
have found section 643B(c) to withstand constitutional scrutiny, but have found it difficult to apply.

The Maryland courts consistently have relied on established rules of statutory construction in order to determine legislative intent and have ruled to effectuate such intent. The courts have used the plain meaning rule, which dictates that the words of the statute should be given their common and everyday meaning. When such a reading does not give a complete insight into legislative intent, the court should examine other sources. If, after this analysis, ambiguity still remains, criminal statutes are subject to the rule of lenity, which requires such statutes to be read to favor the defendant.


27. See Garrett v. State, 59 Md. App. 97, 115, 474 A.2d 931, 940 (discussing the statute's need for legislative clarification), cert. denied, 300 Md. 483, 479 A.2d 372 (1984); Calhoun v. State, 46 Md. App. 478, 489, 418 A.2d 1241, 1249 (1980) (holding that § 643B(c) permits the imposition of only one mandatory sentence), aff'd, 290 Md. 1, 425 A.2d 1361 (1981). The court in Calhoun noted that "[t]he draftsmanship of the statute is patently inartful. Any change, however, must be left to the legislature." Id. at 489-90, 418 A.2d at 1249.


29. Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 513, 525 A.2d 628, 632 (1987) (discussing the plain meaning rule); see also State v. Thompson, 332 Md. 1, 6-7, 629 A.2d 731, 734 (1993) (stating that if the words of the statute are clear and unambiguous, the court need not go further).

30. Kaczorowski, 309 Md. at 515, 525 A.2d at 632-33. The court stated:
[courts] may and often must consider other "external manifestations" or "persuasive evidence," including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of the legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case.

Id.

31. See Harris v. State, 331 Md. 137, 145, 626 A.2d 946, 950 (1993) (stating that penal statutes must be construed in favor of the defendant); see also Jones, 336 Md. at 275, 647 A.2d at 1214 ("Where a statute is ambiguous and the legislative intent is in doubt, the courts are inclined toward the construction most favorable to the accused.") (quoting Belman v. State, 332 Md. 207, 213, 586 A.2d 1281, 1284 (1991)); Monoker v. State, 321 Md.
b. Application of the Mandatory Sentencing Provision.—Over the last fifteen years, Maryland courts have used statutory construction to determine the proper application of section 643B(c). In *Hawkins v. State*, the Court of Appeals stated that the purpose of the statute is "to protect the public from assaults upon people and injury to property and to deter repeat offenders from perpetrating other criminal acts of violence under the threat of an extended period of confinement." With this purpose in mind, Maryland courts have construed the statute to determine guidelines for applying the mandatory penalty, and the legislature has amended the statute to clarify its requirements.

In *Calhoun v. State*, one of the first cases to apply section 643B(c), the Court of Special Appeals, using the plain meaning rule, held that the statute permits only one mandatory sentence without the possibility of parole. Two years later, the legislature amended the language of the statute to clarify the meaning of the requirement that the defendant must have been previously convicted on two separate occasions. In *Loveday v. State*, the Court of Appeals stated that once the statutory requirements were met, there was "no discretion in the trial court" and the mandatory penalty of twenty-five years without parole or suspension must be imposed. The court then decided a series of cases that clarified the statutory requirements. In *Garret v. State*, the Court of Special Appeals held that the prerequisite two

214, 222, 582 A.2d 525, 529 (1990) (stating that the rule of lenity prohibits a court from an interpretation that increases a defendant's penalty "'when such an interpretation can be based on no more than a guess as to what [the legislature] intended'") (quoting Landner v. United States, 358 U.S. 169, 178 (1958)).


33. Id. at 148, 486 A.2d at 182; see also Minor v. State, 313 Md. 573, 576, 546 A.2d 1028, 1029 (1988) (discussing the penological objectives behind section 643B(c) "to protect our citizens from violent crime and to expose these criminals to a prolonged rehabilitative process").


35. Id. at 488-89, 418 A.2d at 1248-49.

36. In 1992, the legislature amended § 643B(c) by adding the phrase a "separate occasion shall be considered one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding occasion." Md. ANN. CODE art. 27, § 643B(c) (1992); see also infra note 100 and accompanying text (noting possible motivations for the enactment of the amendment).


38. Id. at 236-37, 462 A.2d at 63; see also State v. Taylor, 329 Md. 671, 676-77, 621 A.2d 424, 426-27 (1993) (holding that where a defendant is convicted of two violent crimes for which there is a finding of merger, sentences imposed on both crimes should be vacated and the mandatory sentence must be imposed).

convictions must precede the commission of the third crime.\textsuperscript{40} In \textit{Muir v. State},\textsuperscript{41} the Court of Appeals expanded the mandatory sentencing provision by holding that a previous conviction for a crime of violence in a general court-martial tribunal of the United States Army was satisfactory under the statute and that the defendant's juvenile status at the time of the previous offenses did not preclude the use of such offenses for the purpose of mandatory sentencing.\textsuperscript{42} In \textit{Teeter v. State},\textsuperscript{43} the Court of Special Appeals determined that where the predicate crimes were committed outside the state, the State must prove that each crime would have constituted a crime of violence under section 643B.\textsuperscript{44} However, where any crime listed under the statute is shown, no additional proof of violence is necessary.\textsuperscript{45}

c. Judicial Discretion.—Mandatory sentencing statutes have been a topic of debate in the legal community.\textsuperscript{46} Maryland is just one of many jurisdictions to enact mandatory sentencing provisions\textsuperscript{47} and has, in fact, enacted more than one.\textsuperscript{48} Mandatory sentencing, by its nature, provides no discretion at the trial level once the statutory requirements have been satisfied. In Maryland, however, the Court of Appeals has recognized that "the awesome responsibility of imposing

\begin{itemize}
\item 40. Id. at 118, 474 A.2d at 941.
\item 41. 308 Md. 208, 517 A.2d 1105 (1986).
\item 42. Id. at 216-17, 517 A.2d at 1110. The court recognized the jurisdictional and other similarities and differences between military and civil justice and determined that the legislature intended general court-martial convictions, for offenses enumerated in § 643B(a), to satisfy the statutory requirements for the imposition of mandatory sentencing. \textit{Id.} at 214-16, 517 A.2d at 1108-10. The court also determined that to discount predicate violent offenses committed as a juvenile would "thwart the legislative purpose of protecting the public and deterring the commission of violent offenses." \textit{Id.} at 218, 517 A.2d at 1110.
\item 44. \textit{Id.} at 115-16, 499 A.2d at 508.
\item 45. \textit{Id.} at 117, 499 A.2d at 509. The court determined that although daytime housebreaking with the intent to steal does not necessarily require violent means, it is still considered a violent crime because it is enumerated under the statute as a predicate offense for mandatory sentencing. \textit{Id.} at 116-17, 499 A.2d at 508-09.
\item 46. \textit{See infra} notes 95-96 and accompanying text.
\end{itemize}
[a] sentence is within the exclusive domain of the trial judge.”49 The judge is "vested with virtually boundless discretion"50 in order to best carry out the objectives of sentencing.51 Such discretion is evidenced by the limited access to appellate review in Maryland for sentencing challenges.52

The Court of Appeals recognized judicial discretion within the mandatory sentencing context in Taylor v. State.53 The Court of Appeals, in reviewing an earlier Court of Special Appeals decision,54 determined that where a defendant was convicted of a third violent offense that would be subject to life imprisonment notwithstanding the mandatory sentencing provision, the judge has the discretion to impose a sentence of life imprisonment and suspend all but twenty-five years or more thereof, if he so chooses.55 The Court of Appeals, after applying maxims of statutory construction, found the language of the statute to be ambiguous and therefore ruled in favor of leniency.56

51. The objectives of sentencing are punishment, deterrence, and rehabilitation. Id.
52. Id. at 680, 602 A.2d at 1189. Appellate review is only recognized in three cases: "(1) the sentence may not constitute cruel and unusual punishment or otherwise violate constitutional requirements; (2) the sentencing judge may not be motivated by ill-will, prejudice or other impermissible considerations; and (3) the sentence must be within the statutory limitations [if any there be]." Id. (quoting Teasley v. State, 298 Md. 364, 370, 470 A.2d 337, 340 (1984)).
54. Id. at 236, 634 A.2d at 1325 (discussing Leggett v. State, 79 Md. App. 170, 556 A.2d 289, cert. denied, 317 Md. 70, 562 A.2d 718 (1989)). In Leggett, the Court of Special Appeals addressed a factually similar case to Taylor in which the defendant was convicted of first degree murder and sentenced to life imprisonment without parole under the statute. Leggett, 79 Md. App. at 171-72, 556 A.2d at 289. The issue involved interpretation of the phrase in the statute mandating the imposition of a sentence of imprisonment for "the term allowed by law, but not less than 25 years." See id. at 176, 556 A.2d at 292. The defendant argued that the court failed to exercise its discretion to impose another sentence, but the Court of Special Appeals declared that trial court had no discretion. Id. at 174-77, 556 A.2d at 291-92. The Court of Appeals, interpreting the same portion of the statute in Taylor, disagreed and stated a "more lenient reading of the statute is preferable to that put forth by the Court of Special Appeals in Leggett." Taylor, 333 Md. at 236, 634 A.2d at 1325.
55. Taylor, 333 Md. at 237, 634 A.2d at 1326.
56. Id. at 236-37, 634 A.2d at 1325-26. The court held that it was within the discretion of the trial judge to impose the maximum sentence or to impose a life sentence and suspend all but 25 years or more of the sentence. Id. at 237, 634 A.2d at 1326. Because the sentencing judge in this case believed that he had no choice but to impose the maximum sentence, life imprisonment without the possibility of parole, the court vacated the sentence and remanded the matter for resentencing. Id.
3. The Court’s Reasoning.—The Court of Appeals in Jones held that where a defendant is convicted, from a single incident, of multiple violent crimes, any one of which would satisfy the statutory prerequisites for the imposition of a mandatory minimum sentence under section 643B(c), the trial judge has the discretion to decide upon which crime of violence to impose the penalty. In so ruling, the court relied heavily upon statutory construction and legislative intent to determine that the statute was not ambiguous. The court noted that judges have always been given broad discretion with respect to sentencing decisions and similarly should be given the same discretion within the prescribed boundaries of section 643B(c).

Writing for the majority, Judge Raker explained that “the goal of statutory construction is to ascertain and effectuate legislative intent.” She further explained that to achieve this goal, the first step is to examine the language of the statute. If the common and everyday meaning of the words of the statute are clear and unambiguous, the court will give effect to the statute as it is written. The court then addressed the rule of lenity, which states that “the Court will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what [the Legislature] intended.” Judge Raker then qualified the use of the rule of lenity as a “maxim of statutory construction which serves only as an aid for resolving an ambiguity . . . [that] may not be used to create an ambiguity where none exists.” She further explained that the rule of lenity is the last step in statutory construction and “is reserved for cases where, [after

57. Jones, 336 Md. at 257, 647 A.2d at 1205.
58. Id. at 260-65, 647 A.2d at 1206-09.
59. Id. at 264-65, 647 A.2d at 1208-09.
60. Id. at 260, 647 A.2d at 1206 (citing Mustafa v. State, 323 Md. 65, 73, 591 A.2d 481, 485 (1991); Jones v. State, 311 Md. 398, 405, 535 A.2d 471, 474 (1988)).
61. Id. at 261, 647 A.2d at 1206.
63. Id., 647 A.2d at 1207 (alteration in original) (quoting Ladner v. United States, 358 U.S. 169, 178 (1958)); see also Rewis v. United States, 401 U.S. 808, 812 (1971) (stating that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”)
65. Id. “[T]he rule of lenity ‘comes into operation at the end of the process of construing what [the Legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.’” Id. (second alteration in original) (quoting Callanan v. United States, 364 U.S. 587, 589 (1961)).
"siez[ing] everything from which aid can be derived," the Court is "left with an ambiguous statute," containing a 'grievous ambiguity or uncertainty.'

Turning to the case at bar, the court began construction of the mandatory sentencing provision under section 643B(c) by examining the plain language of the statute. After reviewing the statutory prerequisites for the imposition of the twenty-five year sentence, the court relied on past precedent to conclude that "[o]nce the predicate requirements for imposition of the § 643B(c) penalty have been established, a sentencing judge has no choice but to impose the mandatory minimum penalty upon the third crime of violence conviction."

The Jones court found section 643B(c) to be unambiguous and found no merit to Jones's argument for the application of the rule of lenity. The court noted that the statute clearly states that a third conviction of a violent crime mandates imposition of the section 643B(c) penalty. The court explained that any of Jones's crimes, committed in isolation, would have satisfied the prerequisites under the statute, thereby mandating the imposition of the twenty-five year penalty. Therefore, had Jones committed only robbery, it would have been clear that the sentencing judge would have had no choice but to impose the section 643B(c) penalty on that crime. The court determined that the conviction of additional crimes of violence did not change the fact that the robbery conviction still qualified as a third violent crime under the statute.

The court also rejected Jones's argument that the conviction of additional crimes should entitle him to a proportionately more lenient sentence. The court examined the purpose of section 643B(c),

66. Id. at 262, 647 A.2d at 1207 (alterations in original) (citations omitted) (quoting Staples v. United States, 114 S. Ct. 1793, 1804 n.17 (1994)).
67. Id.
68. Id. The court summarized the statute stating that section 643B(c) provides that a defendant who has twice before been convicted of crimes of violence and served at least one term of confinement in a correctional institution as a result thereof is subject, upon a conviction a third time of a crime of violence, to the imposition of the mandatory twenty-five year minimum sentence upon that third crime of violence conviction.
69. Id. (citing State v. Taylor, 239 Md. 671, 675, 621 A.2d 424, 426 (1993); Loveday v. State, 296 Md. 226, 236-37, 462 A.2d 58, 63 (1983)).
70. Id., 647 A.2d at 1207-08.
71. Id. at 263, 647 A.2d at 1208.
72. Id.
73. Id.
74. Id.
75. Id.
stating that "'[i]t would be illogical to permit a criminal to reduce proportionally the enhancement of his or her punishment by committing additional and more serious crimes of violence during the incident in which the victim is robbed.'" 76

The court further examined the purpose and legislative intent of the mandatory sentencing provision. The court concluded that the statute was intended to provide "'new and different alternatives for dealing with aggressive and violent offenders,'" 77 as well as "to provide warning to those persons who have previously been convicted of criminal offenses that the commission of future offenses will be more harshly punished." 78 The statute also was intended to deter repeat offenders by imposing the mandatory penalty upon those who disregard the warning, and to protect society from such violent repeat offenders. 79

The court relied on the historical discretion granted to sentencing judges to conclude that the legislature never intended to prevent judges from selecting the conviction upon which to impose the mandatory penalty. 80 The court noted that Maryland trial court judges, in order to effectuate the objectives of sentencing—punishment, deterrence, and rehabilitation—must be given the discretion to evaluate the facts and circumstances of each case before them. 81 The majority then concluded that because the sentencing judge has the discretion to impose the mandatory penalty upon any of the qualifying convictions, it was proper for the judge to impose the section 643B(c) penalty upon Jones's robbery conviction. 82

Judge Bell's dissent, in which Judge Eldridge joined, argued that the rule of lenity should apply because the plain language of section 643B(c) is ambiguous and the legislative intent is unclear. 83 He con-

76. Id. at 264, 647 A.2d at 1208 (quoting Jones v. State, No. 197, slip op. at 18 (Md. Ct. Spec. App. Nov. 12, 1993) (per curiam)).
78. Id. 
80. Id. at 265, 647 A.2d at 1209. The court stated that "trial court judges are vested with broad discretion in the exercise of the 'awesome responsibility of imposing sentence' on criminal defendants." Id. (quoting Johnson v. State, 274 Md. 536, 538, 336 A.2d 113, 114 (1975)).
81. Id.
82. Id. (citing Johnson, 274 Md. at 540-42, 336 A.2d at 115-16).
83. Id. at 265-66, 647 A.2d at 1209.
84. Id. at 266, 647 A.2d at 1209 (Bell, J., dissenting).
tended that because section 643B(c) is silent on the issue, it is not clear upon which of the qualifying convictions the mandatory penalty should be imposed. He argued that while statutory construction should begin with the plain words of the statute, a court may not "add or delete words in order to give the statute a meaning not evident by the words actually used." Judge Bell also argued that legislative intent was not helpful because while the legislature intended to deal more harshly with recidivist criminals, their intentions did not reflect a judgment as to which conviction the penalty should be applied when there are multiple qualifying convictions. He disagreed with the majority's holding that the legislature intended to leave the decision to the discretion of the trial judge because, he argued, if that had been the case, the legislature would have so provided in the statute. Judge Bell argued that the legislature enacted section 643B(c) with the intention that "a three time loser" be punished more harshly, in the form of a mandatory minimum twenty-five year sentence, without the possibility of suspension or parole. Examining past precedent, he noted that the court has recognized that when an offense carries a sentence greater than the mandatory penalty, a judge may have discretion to give the sentence proscribed, leaving the portion of the sentence that is not enhanced subject to suspension and parole. Judge Bell distinguished the case at bar as "not an exercise of discretion . . . but a manipulation of the mandatory portion of the sentence itself" that resulted in a sentence that might have been more harsh or lenient than the legislature intended. In a case of multiple convictions, application of the statute to any of the convictions would have served the purpose of treating the defendant more harshly; however, which conviction was chosen might have affected the severity of the overall sentence. He concluded that because the statute is itself ambiguous and the legislative intent is unclear, the statute should have been construed in favor of the defendant.

4. Analysis.—The Jones court held that it is within the discretion of the trial judge to select any of the available crimes upon which to

85. Id. at 267, 647 A.2d at 1210.
86. Id. (citing State v. Thompson, 332 Md. 1, 629 A.2d 731, 734-35 (1993)).
87. Id. at 270-71, 647 A.2d at 1211-12.
88. Id. at 271, 647 A.2d at 1212.
89. Id. at 272, 647 A.2d at 1212-13.
90. Id. at 272-73, 647 A.2d at 1213.
91. Id. at 273, 647 A.2d at 1213.
92. Id. at 274-75, 647 A.2d at 1214.
93. Id. at 275, 647 A.2d at 1214.
impose the section 643B(c) mandatory sentence. In its decision, the court recognized the judicial discretion that has always been afforded to judges in sentencing, and at the same time used maxims of statutory construction to support its decision and to conform with legislative intent. The court provided a compromise between the constraints enforced by mandatory sentencing provisions and the judicial discretion historically given the sentencing judge. As precedent, Jones will stand as a decision not for mandatory sentencing, but rather for recognizing and reinforcing judicial discretion for trial judges in sentencing decisions.

a. Past Frustration with Section 643B(c).—The Jones decision marks a trend favoring reliance upon statutory construction and allowing greater discretion for sentencing judges within the mandatory sentencing framework. Such construction may be the result of a conflict between the legal community’s objection to mandatory sentencing, and support of enhancement penalties, which have both gained public support and passed constitutional scrutiny. From the outset, however, courts have been frustrated with the language of section 643B(c) and have consequently struggled with the language of the statute to define what is actually required and how it is to be applied. Such frustration was openly noted by the Court of Special Appeals in Calhoun v. State, in which the court concluded its opinion by stating, “The draftsmanship of the statute is patently inartful. Any change, however, must be left to the legislature.” The Calhoun opinion is peppered with footnotes questioning the statute’s application to future scenarios not addressed by the language of the statute. The

94. Id. at 257, 647 A.2d at 1205.
97. See supra note 26 and accompanying text for discussion of constitutional scrutiny of mandatory sentencing provisions.
98. 46 Md. App. 478, 418 A.2d 1241 (1980), aff’d, 290 Md. 1, 425 A.2d 1361 (1981); see also supra text accompanying notes 34-35.
100. The Calhoun court questioned two scenarios, both of which became the subject of later cases. At the time of Calhoun, the statutory language only provided that the defendant have two prior convictions. The court questioned the interpretation of the terms “sep-
Calhoun court concluded that "[t]hese discrepancies and variations are indicative of the need for legislative clarification of this statutory enactment." For the next ten years, as different scenarios arose, the courts struggled to determine the proper guidelines for the trial court. More recently, however, the Court of Appeals has shifted away from a construction of the statute that provides a definite answer for the trial courts, and instead has interpreted the statute to leave room for judicial discretion within mandatory sentencing.

b. The New Trend Toward Judicial Discretion.—The Jones decision continues a trend that began one year earlier in Taylor v. State. The Taylor court considered the statutory language of section 643B(c), which mandates that a judge must impose a sentence of "imprisonment for the term allowed by law, but in any event, not less than 25 years. Neither the sentence or any part of it may be suspended, and the person shall not be eligible for parole . . . ." The court could not determine from the plain language of the statute whether the phrase "the sentence" referred to the "term allowed by law," or whether it referred only to the twenty-five year minimum sentence immediately preceding the phrase. The court tried to discern the leg-

arate occasions," and invited the General Assembly to clarify the statute. Id. at 490 n.5, 418 A.2d at 1249 n.5. The legislature did in fact do so, but not before the Court of Special Appeals considered the issue in Lett v. State, where the court determined that two separate convictions that were consolidated at trial and entered the same day did not constitute separate occasions for the purpose of the statute. 51 Md. App. 668, 679-80, 445 A.2d 1050, 1057, cert. denied, 294 Md. 442 (1982). The Lett case was decided on June 2, 1982, and the clarifying amendment was signed by the governor on May 25, 1982 and became effective on July 1, 1993. See Garrett v. State, 59 Md. App. 97, 116-17, 474 A.2d 931, 940, cert. denied, 300 Md. 483, 479 A.2d 372 (1984) (discussing the need for legislative clarification and review of the Lett decision).

The Calhoun court, while discussing the illogical effect of allowing more than one mandatory sentence, noted that under § 643B(c), a life sentence without the possibility of parole could be imposed when such a sentence is the "term allowed by law." Calhoun, 46 Md. App. at 489 n.4, 418 A.2d at 1248 n.4. The Court of Appeals was faced with this scenario in Taylor v. State and addressed what is mandatory for the sentencing judge when the sentence allowed by law is greater than the mandated 25-year penalty. 333 Md. 229, 235-36, 634 A.2d 1322, 1325 (1993).

101. Calhoun, 46 Md. App. at 490 n.5, 418 A.2d at 1249 n.5.
102. See supra notes 26-56 and accompanying text for discussion of past decisions.
103. 333 Md. 229, 634 A.2d 1322 (1993); see also supra notes 53-56 and accompanying text.
105. Taylor, 333 Md. at 235-36, 634 A.2d at 1325. The court debated whether the language in § 643B(c) meant that only the 25-year mandatory sentence was not subject to suspension and parole, or if the term allowed by law for the specific crime committed (which in this case was first degree murder carrying a sentence of life imprisonment) was not subject to suspension or parole. Id.
islative intent and determined that the statute was ambiguous with respect to the limitation on parole eligibility and the judge's ability to suspend the sentence, and therefore applied the rule of lenity. Accordingly, the court construed the statute to require only that twenty-five years must be served without parole or suspension, and to provide the sentencing judge the discretion to impose any additional sentence beyond the mandatory penalty.

The Jones decision is similar to the decision in Taylor in that both allowed judicial discretion; however, Jones can be distinguished from Taylor in the way the court reached its conclusion. The Jones court looked at the plain meaning of the statute to determine that, if the defendant had been convicted of robbery alone, there would be no question that the mandatory sentence applied. Therefore, the court concluded that the legislature intended to give the trial judge discretion when there is more than one qualifying conviction. However, as noted by Judge Bell in his dissent, the statute is silent on what to do when there is more than one qualifying conviction, and there is nothing to indicate that the legislature even considered this scenario. While the Taylor court determined the actual language of the statute to be ambiguous, it is significant that, in contrast, the Jones court determined the statute to be unambiguous on an issue that was not addressed by the statute. The Jones court engaged in the exercise of statutory construction with deference to the legislature, but, in fact, used the legislature's silence as an affirmation of judicial discretion. Still, Jones and Taylor are consistent in that, by relying on judicial discretion, they both allow for a great range in the maximum possible sentence under the mandatory sentencing provision.

106. Id. The court noted that "[t]he dual purposes of public protection and deterrence do not require conversion of every life imprisonment sentence into a sentence of life imprisonment without parole; both purposes are sufficiently served by 25 years' mandatory imprisonment without parole." Id. at 256, 634 A.2d at 1325. The court further noted such a lenient reading of the statute is preferable because "an enhanced punishment statute is 'highly penal, [it] must be strictly construed.'" Id. at 237, 634 A.2d at 1325-26 (alteration in original) (quoting Jones v. State, 324 Md. 32, 38, 595 A.2d 463, 466 (1991)).

107. Id. at 256-57, 634 A.2d at 1325-26. Judge Bell dissented, arguing that the majority created ambiguity where none existed and that "[w]hen the sentence 'allowed by law' is a specific sentence that necessarily is greater than 25 years imprisonment, it is that greater sentence that must be imposed and which cannot be suspended, in whole or part." Id. at 240, 634 A.2d at 1327 (Bell, J., dissenting).

108. Jones, 336 Md. at 269, 647 A.2d at 1208.

109. Id. at 264-65, 647 A.2d at 1208-09.

110. Id. at 270-71, 647 A.2d at 1211-12.

111. The court in both cases was careful to rule in a way that did not provide trial courts with a specific answer as to how to rule when these situations arise in the future. In Taylor, the court stated it was construing the statute in favor of leniency, which in effect provided
c. Policy Impact on Mandatory Sentencing.—The discretion now afforded to a sentencing judge who must impose a section 643B(c) mandatory sentence may significantly affect the sentence a defendant receives.\(^\text{112}\) The Court of Appeals has stated that the purpose of the mandatory provision "is to protect the public from assaults upon people and injury to property and to deter repeat offenders from perpetrating other criminal acts of violence under the threat of an extended period of confinement."\(^\text{113}\) The aforementioned discretion, however, likely will allow for variations in the imposition of mandatory sentences, thereby undermining the deterrent effect of the statute. There will no longer be an element of predictability concerning the criminal sanction to which a repeat offender will be subject under a mandatory provision. In addition, there may be a lack of uniformity in sentencing among the courts because judges are given discretion rather than guidance as to how to apply the statute.

The Court of Appeals has recognized that "[f]undamental fairness dictates that the defendant understand clearly what debt he must pay to society . . . . If the punishment is clear, the defendant can begin to conform."\(^\text{114}\) If a potential repeat offender infers that there

that judges could use their discretion to provide either a harsher or more lenient sentence depending on the case. 333 Md. at 237, 604 A.2d at 1326. Similarly, in Jones, the court did not determine that the statute required interpretation of either the harshest or most lenient sentence, but instead left it for judicial discretion. 336 Md. at 265, 647 A.2d at 1209.

112. Section 643B(a) enumerates the crimes to which the statute applies and provides in pertinent part:

"[C]rime of violence" means abduction; arson; burglary; daytime housebreaking under § 30(b) of this article; kidnapping; manslaughter, except involuntary manslaughter; mayhem and maiming under §§ 384, 385, and 386 of this article; murder; rape; robbery; robbery with a deadly weapon; sexual offense in the first degree; sexual offense in the second degree; use of a handgun in the commission of a felony or other crime of violence; an attempt to commit any of the aforesaid offenses; assault with intent to murder; assault with intent to rape; assault with intent to rob; assault with intent to commit a sexual offense in the first degree; and assault with intent to commit a sexual offense in the second degree.


114. Robinson v. Lee, 317 Md. 371, 379-80, 564 A.2d 395, 399 (1988); see also Gargliano v. State, 334 Md. 428, 444, 639 A.2d 675, 682-83 (1994) ("[T]he means for achieving such deterrence is the provision of fair warning to previous offenders that if they continue to commit criminal acts after having had the opportunity to reform after one or more prior contacts with the criminal justice system, they will be imprisoned for a considerably longer period of time than they were subject to as first offenders.").
is latitude in the maximum mandatory sentence under section 643B(c), the deterrent effect may be negated. Nonetheless, this argument does not account for sentencing judges' historic discretion to effectuate the objectives of punishment, deterrence, and rehabilitation.\(^\text{115}\) While the statute takes into account past convictions and time served, judicial discretion similarly always has required that "[a] sentence should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime."\(^\text{116}\) Allowing judicial discretion, while still retaining the mandatory provision, will allow the judge not only to account for the statutory requirements of the mandatory sentence, but also to consider other factors that may play a role in determining whether a more lenient or more harsh sentence is required.\(^\text{117}\)

The *Jones* decision represents a compromise, but stands for the proposition of judicial discretion.\(^\text{118}\) The Maryland courts have continually tried to interpret the statute to determine what is mandatory, and in *Jones* the Court of Appeals interpreted section 643B(c) to allow for judicial discretion in a situation where the statute is otherwise silent.\(^\text{119}\) The court found that the intent of the legislature was to provide the sentencing judge with discretion, and the court will most likely interpret the statute in a similar manner in the future.\(^\text{120}\)

\(^{115}\) Johnson v. State, 274 Md. 536, 540, 336 A.2d 113, 115 (1975) (stating that a judge is given broad latitude in order to impose what is necessary in order to accomplish the goals of sentencing).

\(^{116}\) Id.

\(^{117}\) For example, the sentencing judge in *Jones* explained why the mandatory sentence should be applied to the robbery conviction, thereby giving the defendant the greater maximum sentence:

> There is no question that this was a very evil thing that you did. And it was not spontaneous. It was something you had thought about. And you actually executed a plan to get this victim who is out trying to make a living into your "clutches," so-to-speak. You're a very dangerous person, and that's the way I'm going to treat this case.

Appellant's Brief at 39, Jones v. State, 336 Md. 255, 647 A.2d 1204 (1994) (No. 2) (citing excerpt from the sentencing proceeding of Oct. 16, 1992). After reading the sentence imposed, the judge reiterated the objectives that motivated the sentence: "You will be a very old man when you get out of jail, if you change yourself when you get out of jail at all, but at least you have the chance to do that in your later years. You've earned that disposition by your conduct." Id. at 40.

\(^{118}\) *Jones* has since been cited as precedent for allowing judicial discretion by the Court of Special Appeals in Keirsey v. State, No. 1515, slip op. at 13 (Md. Ct. Spec. App. Sept. 1, 1995) (citing *Jones*, 336 Md. at 265, 647 A.2d at 1209).

\(^{119}\) See supra notes 110-111 and accompanying text for a discussion of the interpretation of this statutory silence.

\(^{120}\) The *Jones* decision may be another invitation to the legislature to intervene if the true legislative intent has not been carried out. The court repeatedly has noted the statute's inadequacy and invited the legislature to clarify the language. See supra notes 98-101
5. Conclusion.—Jones holds that trial judges are to be given discretion to choose upon which crime of violence to impose a section 643B(c) mandatory penalty, when there are multiple qualifying convictions.121 This is consistent with the court’s recent trend toward judicial discretion and its deference to legislative intent. Jones is unique, however, in its assumption of legislative intent in a situation in which the statute is silent. The decision reflects a compromise that provides deference to the legislature in requiring the judge, at a minimum, to stay within the confines of the established requirements of the statute, while also allowing for judicial discretion in a situation upon which the statute is silent. In the future, mandatory sentences will remain a topic of debate. Unless the legislature responds to the court’s construction of section 643B(c), situations unaccounted for by the statute, like the one in Jones, will continue to arise and the court again will be required to attempt to construe the legislative intent behind the statute.

TASHINA GAUHAR

B. The Necessity of Inquiry into Racial Bias in Voir Dire

In the wake of the Rodney King and O.J. Simpson trials, jury racial bias has become a fast-growing topic of social and legal debate. In Hill v. State,1 the Court of Appeals rendered a decision aimed at combating racially biased juries. The court reversed the conviction of an African-American Baltimore resident convicted of drug possession on the ground that the trial court failed to question prospective jurors on issues of racial prejudice. This decision extends the rights of criminal defendants far beyond federal constitutional and nonconstitutional protections and sends a resounding message that racism will not be tolerated by Maryland courts. The decision constitutes a positive step forward in the protection of the criminal defendant’s right to an impartial jury and thereby enhances the integrity and fairness of Maryland’s criminal justice system.

1. The Case.—One late November evening in 1991, Baltimore City police officer Barron Burch approached Andrew Hill in connec-
Hill fit the description of the suspect: an African-American male in the 2100 block of Booth Street dressed in blue jeans and a black jacket. Officer Burch also had been informed that the suspect carried a gun. Burch placed Hill against his cruiser and conducted a pat-down search, but recovered no weapon. He then questioned Hill about the contents of a box labeled “Dominoes” that Hill held in his possession. Hill explained that the box did in fact contain a set of dominoes. Unconvinced, Burch seized the box, opened it, and found fourteen vials of cocaine inside. The State subsequently charged Hill with possession of cocaine and possession with the intent to distribute. Officer Burch, who is white, served as the State’s only witness at Hill’s trial in the Circuit Court for Baltimore City. During jury selection, Hill requested that the court propound the following question to the venire:

You have taken note, the defendant is African-American. Both sides to this case, and certainly the court want to make it abundantly clear to you that the racial background of the defendant is not to be considered against him in any way. It is imperative that the defendant be judged only upon the evidence or lack of evidence, without any regard whatever to whether he is African-American or white. If there is in your background any experience, or attitude, or predisposition, or bias, or prejudice, or thought that will make it more difficult for you to render a verdict in favor of this defendant because of his race, then I ask that you raise your hand.

The trial court refused Hill’s request, but did allow prospective jurors to answer whether they knew of “anything that would keep [them] from giving a fair and impartial verdict [and] whether any member knew of any reason why he or she should not serve on the jury.” When the trial concluded, the jury returned a guilty verdict on both charges. Hill appealed.
In the Court of Special Appeals, Hill argued that the trial court erred by refusing to question the venire about possible racial bias.\(^{15}\) The State countered that Hill failed to preserve his argument at trial.\(^{16}\) According to the State, Hill not only failed to raise an objection to the court's decision on the voir dire issue, but he also subsequently "expressed satisfaction with the impaneled" jury.\(^{17}\) The Court of Special Appeals held that even if Hill had properly preserved the argument, the lower court was not required to grant Hill's request to question jurors on potential racial bias.\(^{18}\) The court reasoned that state court precedent\(^{19}\) required Maryland courts to grant such requests only when "the complainant and the witnesses for the State are of different race than the defendant" and when "the crime involves victimization of another person and the use of violence."\(^{20}\) The court concluded that Hill's crime, possession with the intent to distribute, did not qualify as a crime of violence and, therefore, did not "fairly" generate the issue of racial bias.\(^{21}\) Thus, the Court of Special Appeals held that the trial court had not erred by refusing Hill's request.\(^{22}\) Hill appealed, and the Court of Appeals granted certiorari.\(^{23}\)

2. Legal Background.—The development of Maryland law with respect to voir dire examination of racial bias began in 1959 with *Brown v. State*.\(^{24}\) In *Brown*, the Court of Appeals held that a trial court's failure to elicit information as to possible racial bias among prospective jurors constituted reversible error where the defendant was charged with the shooting death of a white police officer.\(^{25}\) Following *Brown*, Maryland courts issued a number of decisions that broadened the scope of *Brown*.\(^{26}\) The decision of the Court of Ap-

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16. Id. at 8.
17. Id.
18. Id.
20. Id.
21. Id.
22. Id.
25. Id. at 32-36, 150 A.2d at 896-97.
26. See Bowie v. State, 324 Md. 1, 11, 595 A.2d 448, 453 (1991) (holding that in a capital case trial court erred by refusing to propound voir dire question relating to possible bias); Humphreys v. State, 227 Md. 115, 118, 175 A.2d 777, 778 (1961) (finding that voir dire questions pertaining to racial bias were appropriate where an African-American man was charged with raping a white woman); Contee v. State, 223 Md. 575, 581, 165 A.2d 889, 893 (1960) (holding that refusal to question jurors about racial bias in trial of an African-American man charged with raping a white woman constituted reversible error).
peals in *Hill* continued this trend. In formulating this body of law, Maryland courts, including the Court of Appeals in *Hill*, have often looked to federal law as a point of reference or for guidance. Consequently, this Note will first briefly examine the development of federal law on this issue.

a. Federal Constitutional and Nonconstitutional Requirements.— Presently, when a heightened risk of racial bias exists, two standards govern voir dire in federal criminal trials. The first standard stems directly from the Due Process Clause of the Fourteenth Amendment. The second standard derives from the Supreme Court’s supervisory authority over the lower federal courts. The United States Supreme Court first addressed the issue of questioning prospective jurors about racial bias in the landmark case of *Aldridge v. United States*. In *Aldridge*, an African-American defendant, charged with the murder of a white police officer, asked the court to pose a question to prospective jurors designed to uncover possible racial biases against African-Americans. The trial court refused the defendant’s request, finding the question “improper.” The jury subsequently convicted the defendant and sentenced him to death.

The Supreme Court, persuaded by “widespread sentiment” among the states that “such inquiries be allowed,” reversed. The Court held that the discretion a court exercises in questioning prospective jurors is “subject to the essential demands of fairness.” In so ruling, the Court rejected the lower court’s finding that the mere fact that African-Americans enjoyed equal “privileges and rights under the law” eliminated the need for voir dire inquiry into racial bias.

27. Ham v. South Carolina, 409 U.S. 524 (1973). The Fourteenth Amendment states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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. 283 U.S. 308 (1931).

30. Id. at 309.

31. Id. The Court’s opinion in *Aldridge* does not indicate the precise question or questions requested by the defendant or if the defendant merely asked the trial court to propound its own question with respect to racial bias. See id. at 310-11.

32. Id. at 310.

33. Id. at 309.

34. Id. at 313.

35. Id. at 310.

36. Id. at 314.
Court found the “civil privileges of the [N]egro,” or even the existence of a predominantly unbiased community, irrelevant to the issue at hand.97 What matters, the Court held, is the “bias of the particular jurors who are to try the accused.”98 The Court reasoned:

If in fact, sharing the general sentiment, [prospective jurors] were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the [N]egro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life and death.99

Furthermore, the Court rejected arguments that racial bias questions would act as a detriment to “the administration of the law” in federal courts.40 To the contrary, the Court reasoned that prohibiting questions designed to elicit “disqualifying prejudice” would serve only to “bring the processes of justice into disrepute.”41 The Court did hold, however, that trial courts possessed “broad discretion as to the questions to be asked” and were not required to grant specific requests as to the form questions should take or the number of questions that should be asked.42 Significantly, the Aldridge Court did not ground its holding in either constitutional or statutory language.43

(i) Federal Constitutional Requirements.—The Supreme Court established the federal constitutional standard for voir dire examination on racial bias in two cases, Ham v. South Carolina44 and Ristaino v. Ross.45 In Ham, an African-American defendant alleged that law enforcement officers framed him with charges of marijuana possession in retaliation for his participation in civil rights activities.46 Recognizing that its decision in Aldridge did not expressly rest on constitutional grounds,47 the Court held that where a state creates a “statutory

37. Id.
38. Id.
39. Id. (footnote omitted).
40. Id. at 314-15.
41. Id. at 315.
42. Id. at 310.
44. Id. at 524.
46. Ham, 409 U.S. at 525.
47. Id. at 526.
framework for the selection of juries,” the Fourteenth Amendment requires trial courts to “interrogate the jurors upon the subject of racial prejudice” in circumstances such as those in the Ham case.48 In support of this ruling, the Court reasoned that the Fourteenth Amendment’s Due Process Clause helps preserve the “essential demands of fairness,” that the Aldridge Court suggested served as the basis for its holding.49 The Court further explained that the Fourteenth Amendment was adopted primarily to prevent states from “invidiously discriminating on the basis of race.”50

Three years later, in Ristaino v. Ross,51 the Court limited the reach of Ham.52 A jury convicted Ross and two other African-American defendants of armed robbery, assault, battery, and attempted murder53 after the trial court refused to question prospective jurors on whether they believed that “a white person is more likely to tell the truth than an African-American person.”54 Ross had based his request solely on the ground that he and the alleged victim, a white security guard, were of different races.55 The Supreme Court granted certiorari for the purpose of answering two questions.56 First, the Court considered whether Ham constitutionally entitled Ross to have racial bias questions propounded to prospective jurors.57 Second, the Court decided whether Ham required that the trial court propound such questions whenever a confrontation exists between persons of different races or ethnic origins in a criminal trial.58

The Court answered in the negative to both of these questions.59 The Court found that while Ham recognized that “some cases may present circumstances” that require courts to question prospective jurors about racial prejudice, it did not “announce a requirement of universal applicability.”60 Rather, the Court held that the Ham decision “reflected an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not

48. Id. at 527.
49. Id. at 526.
50. Id. at 526-27.
52. Id. at 597-98.
53. Id. at 590.
54. Id. at 590 n.1.
55. Id. at 591.
56. Id. at 590.
57. Id.
58. Id.
59. Id.
60. Id. at 595-96.
be as 'indifferent as [they stand] unsworn.'" Thus, the *Ristaino* Court made clear that only when "special circumstances" exist is racial bias questioning constitutionally required. The Court held that the facts of *Ham* presented just such circumstances. The nature of the defendant's allegations and his reputation as a civil rights activist, the Court reasoned, was "likely to intensify . . . prejudice." Thus, racial issues were "inextricably bound up with the conduct of the trial." To the contrary, the Court found that no "special circumstances" existed in *Ristaino*. The mere fact that the victim of an alleged crime and the defendant are of different races, the Court held, did not automatically generate a constitutionally protected right to voir dire examination for racial bias. Significantly, however, the Court stated in dicta that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." Under its supervisory power, the Court stated that it "would have required as much of a federal court faced with the circumstances here."

(ii) *Federal Nonconstitutional Requirements.*—Following *Ham*, considerable dissension arose among the lower federal courts as to an appropriate nonconstitutional standard. Several circuit courts of appeal established a per se rule of reversible error whenever a trial judge failed to grant a defendant's request for a voir dire racial bias inquiry, while others required reversal only in cases likely to "have ra-

61. *Id.* at 596 (quoting *Coke on Littleton* 1556 (19th ed. 1892)).
62. *Id.* at 594.
63. *Id.* at 596.
64. *Id.* at 597.
65. *Id.*
66. *Id.*
67. *Id.* Nine years later, the Court modified its position for cases involving capital offenses. *Turner v. Murray*, 476 U.S. 28 (1986). The Court held that a "capital defendant accused of an interracial crime" does have a constitutional right "to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. The *Turner* Court reasoned that capital cases may be set apart from others because "the range of discretion entrusted to a jury in a capital sentencing hearing [provides] a unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35. The Court stated that given the finality of the death sentence and the "minimally intrusive" manner in which the risk of racial prejudice may be eliminated, a capital defendant is entitled to voir dire questioning on the issue of racial bias. *Id.* at 37. Where voir dire is inadequate, however, the Court held that the sentence of death need only be vacated. *Id.* It is not necessary, the Court held, that the defendant be granted a retrial "on the issue of guilt." *Id.*
69. *Id.*
71. *Id.*
cial overtones or involve racial prejudice.” The Supreme Court addressed the controversy in 1981 in *Rosales-Lopez v. United States,* a case involving a defendant of Mexican descent convicted of helping Mexican aliens gain unlawful entry into the United States. The trial court had refused the defendant’s request that the court ask prospective jurors if they would be affected by or take into consideration the defendant’s race or ancestry when evaluating the case. In a plurality opinion, the Court affirmed. The facts of *Rosales-Lopez,* the Court held, did not give rise to a federal nonconstitutional right to voir dire examination on racial bias.

Justice White’s opinion in *Rosales-Lopez* explained that the failure to honor a defendant’s request for voir dire inquiry into racial bias constitutes “reversible error” under a nonconstitutional standard “only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.” Examination as to racial bias, he reasoned, is not automatic. Adding substance to the “reasonable possibility standard,” Justice White held that *Aldridge* and *Ristaino* taken together “fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.” Justice White recognized that other circumstances also could give rise to the need for a racial bias inquiry, but that these decisions rest “primarily with the trial court, subject to case-by-case review by the appellate courts.”

b. The Development of Maryland Law.—Three years after the Supreme Court’s decision in *Aldridge,* the issue of voir dire examination of prospective jurors on issues of racial bias arose in Maryland in *Lee v. State.* In *Lee,* an African-American defendant sentenced to death for first degree murder appealed his conviction in part on the

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72. *Id.* at 187-88.
73. *Id.* at 182.
74. *Id.* at 184.
75. *Id.* at 185.
76. *Id.* at 194.
77. *Id.*
78. *Id.* at 191. The Court found that both of its prior decisions in *Aldridge* and *Ristaino* involved circumstances that suggested that “there was a ‘reasonable possibility’ that racial prejudice would influence the jury.” *Id.* at 192.
79. *Id.* at 191.
80. *Id.* at 192.
81. *Id.*
82. 164 Md. 550, 165 A. 614 (1933).
ground that the trial court refused to ask prospective jurors if they regarded African-Americans as their "social equal" and whether they would "believe a colored man's story just as quickly as a white man's?" The Court of Appeals affirmed, finding the questions themselves improper. The court looked to persuasive state court authority that upheld the qualification of white jurors serving in cases involving African-American defendants, even when those jurors harbored feelings of racial superiority or did not believe in the "social equality" of the two races. As to whether prospective jurors would just as readily believe an African-American as a white, the court found the question "too general." Significantly, though, the Lee court recognized the question posed in Aldridge as "proper," thus suggesting by implication that a criminal defendant had some right to voir dire examination of racial bias.

The Court of Appeals addressed the issue head-on twenty-six years later in Brown v. State. In Brown, a Dorchester County jury convicted an African-American defendant of the shooting death of a white police officer. At trial, the court refused Brown's request that the venire answer questions about possible "prejudice against a Negro." This time, however, the Court of Appeals reversed. In so ruling, the court adopted the same position taken by a Connecticut state court. In State v. Higgs, the Supreme Court of Connecticut held that where "any likelihood [exists] that some prejudice is in the juror's mind which will even subconsciously affect his decision of the case, [the defendant] should be permitted questions designed to uncover that prejudice." To this same end, the Brown court also em-

83. Id. at 556, 165 A. at 617. The trial court did, however, permit the question "Do you have feeling against colored people?" Id. The Court of Appeals held that the fact that jurors had answered this question in the negative should have provided sufficient assurance to the defendant that jurors would weigh witness credibility with impartiality. Id. at 557, 165 A. at 617.
84. Id. at 556, 165 A. at 617.
85. Id.
86. Id.
87. Id.
89. Id. at 32-33, 150 A.2d at 896-97.
90. Id. at 33, 150 A.2d at 897. One of the questions Brown requested that the court ask the venire was: "Can you, without bias or prejudice, pass your verdict in this case solely on the evidence produced from the witness stand without regard to the race, creed or color of the Defendant?" Id. at 34, 150 A.2d at 897.
91. Id. at 39, 150 A.2d at 900.
93. Id.
94. Id. at 154.
braced the reasoning of Aldridge, and emphasized the Supreme Court's position that the relevant issue was "not . . . the dominant sentiment of the community and the general absence of disqualifying prejudice, but . . . the bias of the particular jurors who were to try the accused."95 The court reasoned that "unless bias is inquired into beforehand, its existence ordinarily will not become known since the verdict cannot be impeached."96 Consequently, the court held that "the failure to elicit from the jurors the essence of the information sought by the appellant was reversible error."97

One year later, in Contee v. State,98 the Court of Appeals expanded Maryland law by holding that where racial issues were present, the trial judge had a duty to frame a proper question, if the ones proposed by counsel were not in proper form.99 In Contee, an African-American defendant charged with raping a white woman asked the court to question prospective jurors on several issues relating to racial bias.100 The court refused, finding the substance and form of the proposed questions "improper."101 Furthermore, the court did not afford the defendant the opportunity to rephrase the questions and declined to rephrase them on its own initiative.102 While agreeing on the impropriety of the questions,103 the Court of Appeals held that the trial court should have given the defendant "an opportunity either to frame additional voir dire questions which might have been proper or

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95. Brown, 220 Md. at 35-36, 150 A.2d at 898.
96. Id. at 96, 150 A.2d at 898.
97. Id.
98. 223 Md. 575, 165 A.2d 889 (1960).
99. Id. at 581, 165 A.2d at 893.
100. Id. at 579, 165 A.2d at 892.
101. Id. at 579-80, 165 A.2d at 892-93. The Contee court described these questions as follows:

3. Whether any juror had ever "belonged to or been affiliated with any organization that had to do with segregation of the races?"
4. Whether any juror believed "in segregation?"
5. Whether any juror had "an opinion as to" the impropriety of "people of the white race" having "sexual intercourse with people of the colored race?" and if so "whether the opinion was adverse to the race" of the defendant, who was a Negro?
6. Whether any juror would "believe a woman of the white race over the statement of a man of the colored race?"
8. Whether any juror had "ever been involved personally or through close family association in any criminal matter" concerning "the prosecution of a colored man" for an act of violence?

102. Id. at 580, 165 A.2d at 892.
103. Id.
to request a general one concerning racial prejudices or feelings.\textsuperscript{104} Because the judge, "fully apprised of the essence of what the defendant was seeking . . . failed to ask on its own motion, as it should have done, a proper question," the denial constituted reversible error.\textsuperscript{105} That same year, in \textit{Glaros v. State},\textsuperscript{106} the Court of Appeals held that a "general question as to bias against any race, creed or nationality" asked by the trial court "eliminated the need to ask the specific question as to possible prejudice against" a defendant of Greek heritage.\textsuperscript{107}

Between 1961 and 1971, the Court of Appeals and the Court of Special Appeals decided several more cases on the issue. In 1961, in \textit{Humphreys v. State},\textsuperscript{108} the Court of Appeals affirmed the conviction of an African-American defendant for the rape of a white woman.\textsuperscript{109} During voir dire examination, the trial court asked a Wicomico County jury four general questions designed to uncover possible racial prejudice among the prospective jurors,\textsuperscript{110} but refused to ask questions that specifically addressed situations where "a colored man is charged with that offense against a white woman."\textsuperscript{111} The Court of Appeals held that because prospective jurors had been informed prior to voir dire that the trial involved the crime of rape, prospective "jurors could not [have] fail[ed] to understand . . . that the case involved

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\textsuperscript{104} Id., 165 A.2d at 893.

\textsuperscript{105} Id. The court concluded:

\[\text{[F]rom the demeanor of the court disclosed by the colloquy between it and counsel at the bench, we are impelled to conclude . . . that the court had no intention of making any inquiry as to whether the jurors could or would set aside the feelings he or she might have as to racial differences and fairly and impartially decide the case solely on the evidence and the applicable law.}\]

\textit{Id.} at 580-81, 165 A.2d at 893.

\textsuperscript{106} 225 Md. 272, 164 A.2d 461 (1960).

\textsuperscript{107} Id. at 276, 164 A.2d at 463.

\textsuperscript{108} 227 Md. 115, 175 A.2d 777 (1961).

\textsuperscript{109} Id. at 124, 175 A.2d at 781.

\textsuperscript{110} Id. at 118-19, 175 A.2d at 778-79. For example, the court questioned prospective jurors about (1) their ability to decide the case without regard to the race of the defendant; (2) whether they would decide a case differently if the defendant and the prosecuting witnesses were of different races; (3) if they harbored racial prejudices against blacks that might cause them to render a guilty verdict when they would not do so if the defendant were white; and (4) whether they thought they could give a black defendant as impartial a trial as they would a white defendant. \textit{Id.}

\textsuperscript{111} Id. at 119, 175 A.2d at 779. The defendant argued:

\[\text{[I]t is not enough for a trial court to recognize and explore the possibility of racial prejudice on the part of jurors, but that in a case involving the rape of a white woman, charged to one of the Negro race, it should be further recognized that such bias or prejudice is likely to be greater . . . .}\]

\textit{Id.}
the rape of a white woman by a Negro defendant" when answering the court's more general racial bias questions.112

Ten years later, in Smith v. State,113 the Court of Special Appeals applied the principles set forth in Brown and Contee to reverse the armed robbery conviction of an African-American defendant.114 The trial court refused to ask prospective jurors whether they harbored any racial prejudice toward African-Americans that might affect their "ability to pass fairly on the innocence of the accused."115 A few months later, in Tunstall v. State,116 the court reversed two more armed robbery convictions involving African-American defendants because the trial court refused to ask the venire if they would be "more likely to believe a white witness rather than a Negro witness?"117 Relying on Smith, the court held that the defendants were "entitled to have excluded from the jury those persons who would believe the testimony of one witness as true, in preference to another because of the pigmentation of the skin of the witness."118

Three years after the Supreme Court's decision in Ham, the Court of Special Appeals began to limit the holdings of Brown and Tunstall. In Thornton v. State,119 the court held that, just as the Ham Court required voir dire examination into racial bias "only when there is an element in the case which raises the possibility that racial considerations could play a role in the jury's deliberations," the language of Maryland case law similarly suggests that such questioning is required only when "racial prejudice may be a factor because of the facts of the case."120 In so ruling, the court pointed to language in Humphreys that

112. Id. at 120, 175 A.2d at 779.
114. Id. at 134, 277 A.2d at 624.
115. Id. at 131, 277 A.2d at 623.
117. Id. at 726-27, 280 A.2d at 277.
118. Id. at 727, 280 A.2d at 277. Curiously, however, the court's opinion offered no specific factual reasons as to why the circumstances warranted such questioning, other than the fact that the defendants had requested it. Id. Moreover, unlike earlier cases, the opinion failed to identify the race of the victim and other state witnesses. Id.
119. 31 Md. App. 205, 355 A.2d 767 (1976). In Thornton, a Prince George's County jury convicted an African-American defendant of receiving stolen goods. Id. at 206, 355 A.2d 767. Thornton appealed the verdict on two grounds: (1) the trial court failed to ask potential jurors if they would "not believe a witness because that witness was black"; and (2) the State presented insufficient evidence to show that the defendant had received stolen goods while in the state of Maryland. Id., 355 A.2d at 768. The court reversed the defendant's conviction on the second ground, but went on to address the issue of voir dire inquiry as to racial bias. Id. at 207, 355 A.2d at 768.
recognized a right to racial bias examination when "prejudice . . . may be a factor in determining a prospective juror's attitude toward a particular defendant" and in Contee when the case "is likely to have aroused some racial feelings in the community where it is to be tried," respectively.

The Thornton court also explained that its holding in Tunstull, which failed to articulate specific reasons for requiring racial bias examination, did not create an absolute right to such questioning. The court held that "to the extent that Tunstall 'announce[d] a requirement of universal applicability' . . . we limit it as the Supreme Court limited Ham." The court stated further that, "[i]n doing so, we qualify that holding for precedential purposes to conform to limitations implicit in the holdings of the Court of Appeals in Humphreys and in Contee." While Thornton limited the right to voir dire racial bias examination to cases involving special circumstances where "prejudice may be a factor," the court did not articulate what specific factual situations would appropriately constitute a "special circumstances" case. This question remained unanswered until 1985 when the Court of Special Appeals decided Holmes v. State, a case involving an African-American defendant convicted of the attempted murder of his former white employer. Six years later in Bowie v. State, the Court of Appeals accepted the criteria set forth in Holmes. In Bowie, the trial court refused the request of an African-American murder defendant that the venire be

121. Thornton, 51 Md. App. at 213, 355 A.2d at 772.
122. Id. at 214-15, 355 A.2d at 772.
123. Id. at 219, 355 A.2d at 775.
124. Id. (citations omitted).
125. Id. at 219-20, 355 A.2d at 775.
126. Id. at 220, 355 A.2d at 775.
127. Id.
129. Id. at 431, 501 A.2d at 77.
130. Id. at 438-39, 501 A.2d at 81.
132. Id. at 15, 595 A.2d at 455.
questioned on issues of racial bias. Applying Holmes, the court held that the trial court patently "erred in refusing to inquire concerning possible racial prejudice" because most of the State's witnesses and all but one of the victims in Bowie were white and the crime involved the "violent victimization" of another person. Significantly, however, the Bowie court refused to follow the Supreme Court's holding in Turner that the failure to propound racial questions during voir dire in capital cases merely required that a death sentence be vacated. Rather, the Bowie court held that a new trial must be granted.

3. The Court's Reasoning.—In Hill v. State, the Court of Appeals held that "under the circumstances" of the case, the trial court's refusal to question the venire on racial or ethnic bias constituted reversible error. In so ruling, the court first reviewed the purposes underlying Maryland's voir dire procedures, the nature and extent of which "lie initially within the discretion of the trial judge." Of paramount importance, the court held, is identifying "the existence of cause for disqualification." The objective of voir dire is to select a jury capable of deciding a case based solely on the facts, "uninfluenced by any extraneous considerations." One method of ensuring that prospective jurors do not harbor disqualifying prejudices is to question them directly on such subjects. These questions are both proper and required in Maryland, when directed toward "matter[s] reasonably liable to unduly influence" a juror. The right of a defendant to have jurors questioned on specific causes for disqualification, the court held, also is guaranteed by the Maryland Declaration of

133. Id. at 4-5, 595 A.2d at 449-50. Specifically, the defendant asked that the following questions be read:
   1. Most of the victims in this case are white and Mr. Bowie and his alleged accomplices are black. Do you feel uncomfortable sitting on a jury where a black man is accused of shooting and robbing several white individuals?
   2. Have you or any of your family been a member of any organization with a stated philosophy on race?

134. Id. at 11, 595 A.2d at 453.
135. Id. at 15, 595 A.2d at 455.
136. Id. at 16 n.8, 595 A.2d at 455 n.8.
137. 339 Md. at 275, 661 A.2d at 1169.
138. Id. at 285, 661 A.2d at 1169.
139. Id. at 278-80, 661 A.2d at 1166-67.
140. Id. at 279, 661 A.2d at 1166 (quoting McGee v. State, 219 Md. 53, 58, 196 A.2d 194, 196 (1959)).
141. Id. (citing Davis v. State, 383 Md. 27, 35, 633 A.2d 867, 871 (1993); Langley v. State, 281 Md. 337, 340, 378 A.2d 1358, 1359 (1977); Waters v. State, 51 Md. 480, 496 (1879)).
142. Id.
143. Id. (quoting Corens v. State, 185 Md. 561, 564, 45 A.2d 840, 348 (1946)).
Rights. Racial bias, the court found, ranks among those areas of inquiry that have been identified in Maryland as mandatory subjects of voir dire examination.

The *Hill* court observed clear parallels between federal and Maryland law in the development of a voir dire racial bias inquiry based on a nonconstitutional standard. The court adopted the Supreme Court's position that the determination of a "nonconstitutional standard involves resolution of a conflict concerning the appearance of justice" and how that conflict should be resolved "ordinarily should be determined by the defendant." Maryland "strike[s] a different balance," the court held, however, "when the trial court does not defer to the defendant's preferred resolution." In so ruling, the court embraced the reasoning of the Supreme Court in *Aldridge*. The court stated that while it had not earlier adopted the *Aldridge* analysis in full, it would do so now. To the extent that Maryland cases held otherwise, the court held that those cases were overruled.

4. Analysis.—*Hill* clearly expands Maryland law on the examination of racial bias during voir dire. Where such questioning once was limited to cases involving both racial confrontation and crimes of violence or victimization, the *Hill* court extended the right to criminal defendants involved in victimless or nonviolent crimes. The decision also expands the rights of Maryland criminal defendants beyond those conferred by the federal Constitution and also surpassed federal nonconstitutional standards. As a result of *Hill*, Maryland criminal defendants no longer must meet the burdensome "special circumstances" test as enunciated in *Thornton* and *Rosales-Lopez*.

a. Restoring *Aldridge*.—Justice Stevens argued vigorously in favor of a standard such as that announced in *Hill* in his dissenting

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144. MD. CODE ANN., CONST., art. 21 (1981). The Maryland Declaration of Rights states: 
[I]n all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Id.

145. *Hill*, 339 Md. at 280, 661 A.2d at 1167.

146. *Id.* at 283, 661 A.2d at 1168.

147. *Id.* at 283-84, 661 A.2d at 1168.

148. *Id.* at 284, 661 A.2d at 1168.

149. *Id.* at 285, 661 A.2d at 1169; see supra notes 29-43 and accompanying text.

150. *Hill*, 339 Md. at 285, 661 A.2d at 1169.

151. *Id.*
opinion in *Rosales-Lopez*, 152 and he too looked to *Aldridge* for precedential support. 153 Although *Aldridge* and the state cases upon which it relied all involved crimes that would have satisfied the contemporary "special circumstances" test, 154 the *Aldridge* Court did not expressly rely on this test to justify its holding. 155 Quite to the contrary, the *Aldridge* Court reasoned that "the propriety of such an inquiry has been generally recognized." 156 As Justice Stevens observed, given the Court's choice of language, it is not "surprising that the overwhelming majority of Federal Circuit Judges who have confronted the question ... have interpreted *Aldridge* as establishing a firm rule entitling a minority defendant to some inquiry of prospective jurors on voir dire about possible racial or ethnic prejudice unrelated to the specific facts of the case." 157

b. *Restoring Fairness.*—As Justice Stevens observed in *Rosales-Lopez*, 158 the narrowly defined "special circumstances" test provides only a limited solution to a complex problem. Racial bias, Justice Stevens argued,

can arise from two principal sources: a special relation to the facts of the particular case, or a special prejudice against the individual defendant that is unrelated to the particular case. Much as we wish it were otherwise, we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against all members of certain racial, religious, or ethnic groups for no reason other than hostility to the group as a whole. Even when there are no "special circumstances" connected with an alleged criminal transaction indicating an unusual risk of racial or other group bias, a member of the Nazi Party should not be allowed to sit in judgment on a Jewish defendant. 159

The Court of Appeals's recognition that racial bias may infect criminal trials not only because "special circumstances" exist in a particular

153. *Id.*
155. *Aldridge*, 283 U.S. at 314 ("[The] question is not as to the civil privileges of the negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused.").
156. *Id.* at 311.
158. *Id.*
159. *Id.* at 196-97.
case, but also because individual jurors often harbor racial and ethnic biases regardless of the case, is a more realistic approach to resolving the problem of racially biased juries. Clearly, the risk of individual bias will not always be apparent to judges merely because of the nature of the crime involved.

Furthermore, Hill allows courts to address the more complex forms of racism that pervade our society today. Specifically, contemporary racial and ethnic stereotypes are not always tied to issues involving violence and victimization. As Hill noted in his brief to the court, "[t]he reality of race relations and the focus on black males as the cause of the rampant drug problem in the 90's establishes, at the very least, a 'reasonable possibility' that racial prejudice may infect a black defendant's trial."160 The Hill decision allows Maryland courts the flexibility to address racial and ethnic stereotypes in all their complexities and even as they develop over time.

c. Limited Drawbacks.—In Rosales-Lopez, the Supreme Court viewed the most "significant conflict" raised by the issue of voir dire questioning on racial bias to be "the appearance of justice" in federal courts.161 The Court reasoned that "requiring an inquiry in every case is likely to create the impression that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth."162 Thus trial judges, the Court reasoned, are "understandably hesitant to introduce such a suggestion into their courtrooms." This concern seems somewhat exaggerated given that the clear message voir dire racial bias questioning sends to both jurors and to the public is that racial bias will not be tolerated in court proceedings. The extent to which such questions draw race or ethnicity to the attention of jurors is harmless. The racial or ethnic background of the defendant and witnesses inevitably will come to the attention of jurors during the course of the trial. It is difficult to image how the mere questioning of jurors on racial issues will, as the Thornton court feared, "rekindle a dormant spark of prejudice."163

Concern more appropriately should be directed toward the consequences of not allowing racial bias examination on voir dire. Even the Rosales-Lopez Court conceded that although it appreciated concerns that racial bias inquiry in every case might "create the impression 'that justice in a court of law may turn upon the pigmentation of 160. Brief for Petitioner at 15, Hill v. State, 339 Md. 275, 661 A.2d 1164 (1995) (No. 92).
162. Id. (quoting Ristaino v. Ross, 424 U.S. 589, 596 (1976)).
skin [or] the accident of birth,"\(^{164}\) also at stake is the "criminal defendant's perception that avoiding the inquiry does not eliminate the problem, and that his trial is not the place in which to elevate appearance over reality."\(^{165}\) Refusing to permit racial bias questions on voir dire could send the message to defendants, prospective jurors, and the public that racial bias will be tolerated, thus undermining the credibility of Maryland's criminal justice system. More disturbing, though, is the fact that the failure to propound racial bias questions to jurors could lead to unfair verdicts. Given the possible cost to a defendant's liberty involved in criminal trials, unjust verdicts cannot be tolerated.

\[\textit{d. Minimal Administrative Costs.} - \text{The new Hill standard should impose only minimal administrative burdens on Maryland courts. The Thornton court expressed concern that "considering the amalgam of minorities which constitute" Maryland juries, if courts were not "subject to a Ristaino limitation, a voir dire racial prejudice inquiry would be mandated in every case."}^{166}\] At first glance, the Hill decision suggests a potential for increased administrative costs, most likely due to increased delays at trial. Realistically, however, delay will be tempered by the fact that the nature and extent of voir dire still lie within the discretion of the trial judge.\(^{167}\) This includes broad discretion as to the form questions may take or the number of questions that may be asked.\(^{168}\) This much was acknowledged by the Supreme Court in Rosales-Lopez when it stated that "concrete costs" of racial bias examination on voir dire, which amounted to "some delay in the trial," probably would be "slight."\(^{169}\)

5. \textit{Conclusion.} - Clearly, the Hill decision will not produce such a dramatic result as eliminating all racial and ethnic prejudice from Maryland juries. After all, only jurors who are fully cognizant of their own prejudices and who answer such questions truthfully will be excused from service. As the Court of Special Appeals stated in Thornton, "[t]o require a prospective juror under oath to say he is without prejudice would indeed leave us with a dearth of honest venire persons or, possibly, only with jurors who are too insensitive to recognize

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\(^{164}\) Rosales-Lopez, 451 U.S. at 190 (quoting Ristaino, 424 U.S. at 596 n.8).
\(^{165}\) Id. at 191.
\(^{166}\) Thornton, 31 Md. App. at 216, 355 A.2d at 773.
\(^{167}\) Hill, 339 Md. at 278, 661 A.2d at 1166.
\(^{168}\) Aldridge v. United States, 283 U.S. 308 (1931).
\(^{169}\) Rosales-Lopez, 451 U.S. at 190.
their own biases." Given the complexities of race relations in today's society, many individuals harbor biases too subtle to consciously detect. Even if one prospective juror is eliminated for admitted racial or ethnic bias, however, the question will have been well worth the asking.

C. Granting Trial Judges Broad Discretion to Remove an Impaneled Juror

In State v. Cook, the Court of Appeals held that a trial judge has broad discretion to remove a seated juror from a criminal trial when the cause for removal is for reasons particular to the individual juror, and not for characteristics the juror shares in common with a particular class of people. Absent exclusion of a class of persons, deference will be given to a trial judge's determination to dismiss a seated juror and replace that juror with an alternate. Deference to the trial judge is proper due to the judge's presence at the trial, which provides the judge with an opportunity to discern matters outside of the limited record available to appellate courts. The Court of Appeals held that an appellate court should not substitute its judgment for that of the trial judge and that reversible error will be found only upon a clear showing of abuse of discretion or prejudice to the defendant.

1. The Case.—In July 1993, Harold Thomas Cook was convicted in the Circuit Court for Harford County on charges of sexually abusing his stepdaughter from 1974 through 1977. During the trial, the victim testified as to the frequency of the abuse: "I know to me it was just every night. It was for sure every time that my Mom was away, my Mom was at work, he was in my room. And it went on—there were times that my Mom would be in bed and he would come in." After the State rested its case and shortly after the defense commenced its case, the judge called a meeting in chambers to advise counsel of the following note, which was sent to him by juror number six:

2. Id. at 615, 659 A.2d at 1322.
3. See infra notes 40-51 and accompanying text.
4. Cook, 338 Md. at 620, 659 A.2d at 1324.
5. See infra notes 78-82 and accompanying text.
6. Cook, 338 Md. at 620, 659 A.2d at 1324.
7. Id. at 600, 659 A.2d at 1315. Additional charges of sexual abuse of the victim's younger sister were nolle prossed. Id. at 600 n.1, 659 A.2d at 1315 n.1.
8. Id. at 601, 659 A.2d at 1315.
9. Id.
Your Honor [sic],

[The victim] stated her stepfather came into her bedroom every night. The mother & stepfather's bedroom right next door. The mother was home in bed some times before he got home from work. If he left there [sic] bedroom and went into the stepdaughter’s bedroom did the mother know it? Why not right next door? ‘If so!’ What for? If the daughter was raped every night, was the mother having sex with him? How often? Working a full time job and 2 nights on a part time job. ‘Had to be a good man!’ Strike that!

The State moved for the juror to be removed on the grounds that he had reached a conclusion and was “not considering the remainder of the evidence.” The defense countered that the note, while unusual, was not improper and that the note’s language, particularly the statement “had to be a good man,” did not imply a conclusion of innocence or guilt. The trial judge took the matter under consideration but did not remove the juror at that time.

The court addressed the issue again at the close of all evidence. The trial judge questioned the juror and also allowed counsel to question the juror regarding the contents of his note. The juror told the

10. Id. (alterations in original).
11. Id.
12. Id. at 602, 659 A.2d at 1315.
13. Id., 659 A.2d at 1316.
14. Id. An excerpt of the juror’s examination as reported in the Court of Appeals’s opinion is as follows:

COURT: You sent me a note this morning. I was wondering why you did that?
JUROR: I feel we have gotten part of the evidence from the daughter, her statement and it was not followed up to the mother right there in the household.
COURT: Why did you send me a note?
JUROR: That’s right.
COURT: The witnesses were gone. This note came to me this morning. That witness finished testifying yesterday.
JUROR: I didn’t understand that they were dismissed of the hearing either.
COURT: Well, they finished testifying and other people testified, didn’t they, after they finished? I don’t understand your remark. What was the purpose of that remark in the second paragraph? They aren’t questions; they are comments aren’t they?
JUROR: It’s not meant as a comment . . . . I didn’t mean it to be but it is, but what was really on my mind, I could not see, I mean, I’m a parent also, what went
court that he had sent the note because he believed that there were certain questions related to the victim's testimony that should have been asked of the victim's mother. The State asked the juror what he had meant by the statement "had to be a good man." He answered that he was referring to the defendant's physical health, and proceeded to describe his own past experience and the ill effects on his health from the constant demand to perform sexual acts.

The State again moved for the juror to be dismissed. The defense argued that the juror was merely expressing a desire to hear from a witness again and that the "had to be a good man" comment simply related his own experience to the facts of the case. The judge dismissed the juror, stating his concern that the note's comment was a "gratuitous evaluation of certain portions of the evidence" and that "[t]here's a serious question in my mind whether this particular juror has followed the instructions he was given . . . specifically to keep an open mind throughout the entire case." The juror was replaced with an alternate before jury instructions and closing arguments were given. Cook was found guilty on all counts.

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15. Id. at 602-04, 659 A.2d at 1316.
16. Id. at 603-04, 659 A.2d at 1316; see also supra note 14.
17. Cook, 338 Md. at 604, 659 A.2d at 1316.
18. Id.
19. Id., 659 A.2d at 1316-17.
20. Id., 659 A.2d at 1317.
Cook made a motion for a new trial alleging error in the dismissal of the juror.\textsuperscript{22} The trial judge denied the motion, finding that the juror's explanation of the note was "dubious."\textsuperscript{28} The judge cited a lack of credibility on the basis of both the juror's explanation and on his demeanor.\textsuperscript{24} The Court of Special Appeals reversed, holding the removal of the juror to be prejudicial error.\textsuperscript{25} Relying on its earlier holding in \textit{Stokes v. State},\textsuperscript{26} the Court of Special Appeals stated that "once a jury has been selected and sworn, the accused maintains a substantial right to have his case decided by the particular jurors selected to try him."\textsuperscript{27} The Court of Appeals granted certiorari to consider a trial judge's discretion in a criminal trial to dismiss a seated juror and replace him with an alternate.\textsuperscript{28}

2. \textit{Legal Background}.—Jury selection for criminal trials is covered under Rule 4-312 of the Maryland Rules of Procedure.\textsuperscript{29} The rule provides for removal of a juror for inability to continue\textsuperscript{30} and removal for cause upon the motion of a party.\textsuperscript{31} Rule 4-312(b)(3) states that "[a]ny juror... found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection."\textsuperscript{32} Rule 4-312(e) provides that "[a] party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown."\textsuperscript{33} The rule further provides that "[a]n alternate juror shall be
drawn in the same manner, have the same qualifications, be subject to
the same examination, take the same oath, and have the same func-
tions, powers, facilities, and privileges as a juror.”

4. Juror Removal: Court of Appeals Decisions.—The removal
and replacement of a juror before the jury had been sworn was ad-
dressed by the Court of Appeals over eighty years ago in Bluthenthal &
Bickart v. May Co. In Bluthenthal, the trial judge allowed plaintiff's
counsel to withdraw a peremptory challenge against one juror and use
it to strike another juror who, after taking his seat in the jury box, was
seen giving a nod of recognition to defendant's counsel. The court
allowed the removal and replacement of the juror after the jury panel
had been selected but before the jury had been sworn. The court
held that the defendant suffered no injury by the juror
substitution, noting “it is not reversible error to exclude a juror, even
for insufficient cause, if an unobjectionable jury is afterwards
obtained.” The court reasoned that unless it is shown that the jury
ultimately seated was not fair and impartial, the determination to re-
move and replace a juror is left to the discretion of the trial judge.

In King v. State, the court held that the dismissal of a potential
juror because of characteristics that the juror holds in common with a
class of persons is reversible error. The defendant in King was
charged with simple possession and possession with intent to dis-
tribute marijuana. The trial court dismissed two prospective jurors
who, during voir dire, expressed a belief disfavoring the law that pro-
hibited the use and possession of marijuana. The Court of Appeals
noted that a significant number of people believe that current crimi-
nal laws regarding marijuana should be changed. The court rea-
soned that “[s]uch a belief concerning a matter of debatable public
policy raises no presumption that those persons could not properly
apply the existing laws to the evidence.” The court believed that
automatically excluding a large segment of the population from jury

34. Mn. R. 4-312(b)(1).
35. 127 Md. 277, 96 A. 434 (1915).
36. Id. at 285, 96 A. at 438.
37. Id.
38. Id. at 285-86, 96 A. at 438.
39. Id. at 286, 96 A. at 438.
40. 287 Md. 530, 414 A.2d 909 (1980).
41. Id. at 539, 414 A.2d at 913.
42. Id. at 531-32, 414 A.2d at 910.
43. Id.
44. Id. at 536, 414 A.2d at 912.
45. Id.
service merely because of their beliefs is inconsistent with the objective that a jury should be drawn from a fair cross-section of the community.  

In *Hunt v. State* the court followed its reasoning in *King*, noting that "[a] trial judge should not excuse prospective jurors for cause simply because of the juror's abstract beliefs." However, the *Hunt* court found no error in the trial court's exclusion of a prospective juror who was a cousin of the attorney who had represented the defendant on his first appeal. The juror was not dismissed for his abstract beliefs, but rather for his personal relationship with an interested party in the case. The *Hunt* court noted the holding in *Bluthenthal* that an ultimately unobjectionable jury does not constitute reversible error, but added that "[t]his principle is applicable where, as here, the reason for excusing the juror is related to the particular juror and not to a general class of people."

b. Juror Removal: Court of Special Appeals Decisions.—The line of Court of Special Appeals cases dealing with juror dismissal evolved from a standard of broad deference to a trial judge's determination to dismiss a juror into a standard of more limited discretion when a juror is removed for cause. In *James v. State*, the court stated that the decision to remove and replace a juror with an alternate is committed to the sound discretion of the trial judge and will not be reversed unless it is "arbitrary and abusive." In *McCree v. State*, the court found that "[a] juror may be struck for cause only where he or she displays a predisposition against innocence or guilt because of some bias extrinsic to the evidence." In perhaps revisionist dicta, the

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46. *Id.* at 536-37, 414 A.2d at 912.
48. *Id.* at 419, 583 A.2d at 233 (citing *King*, 287 Md. at 539, 414 A.2d at 913).
49. *Id.*, 583 A.2d at 233-34.
50. *Id.*
51. *Id.* at 420, 583 A.2d at 234 (citing *King*, 287 Md. at 538, 414 A.2d at 913).
52. *See infra* notes 83-90 and accompanying text.
54. *Id.* at 699, 288 A.2d at 650 (finding no abuse of discretion in trial judge's dismissal of a seated juror who allegedly failed to report her previous participation as a juror in a criminal trial when questioned during voir dire).
55. 33 Md. App. 82, 363 A.2d 647 (1976). The *McCree* court found that the defendant did not meet his burden of proving prejudice in the trial judge's failure to remove a prospective juror for cause because of her acquaintance with one of the witnesses. *Id.* at 98, 363 A.2d at 657. The court noted that the defendant used a peremptory challenge to remove the juror. *Id.* Because the defendant did not use all the peremptory challenges allotted to him, the trial judge's failure to remove the juror for cause would have been harmless even if proven erroneous. *Id.*
56. *Id.*
court in *Tisdale v. State*\(^5^7\) wrote: "[u]nsaid in *James*—unnecessary to be said in *James*—is that, where the issue is disqualification of a juror for cause, the court's discretion is necessarily more limited than where the issue is the juror's ability to continue."\(^5^8\) Building upon both *McCree* and *Tisdale*, the court in *Stokes v. State*\(^8^9\) noted that once a jury has been impaneled, "a defendant has a 'valued right to have his trial completed by a particular tribunal'"\(^6^0\) and removal of a juror is prejudicial to a defendant absent a showing of good cause.\(^6^1\)

3. **The Court's Reasoning.**—In *Cook*, the Court of Appeals considered the degree of deference to give to a trial judge who has removed a seated juror.\(^6^2\) The court held that when a seated juror is dismissed for reasons particular to that juror rather than for characteristics that the juror shares with a particular class of people, an appellate court must give deference to the trial judge's determination and not substitute its judgment for that of the trial court, absent an abuse of discretion or prejudice to the defendant.\(^6^3\)

The court first addressed the characterizations of juror dismissal under the Maryland Rules as argued by *Cook* and by the State.\(^6^4\) *Cook* argued that the State's request to remove the juror was a challenge for cause under Rule 4-312(e), requiring a showing of "good cause."\(^6^5\) On the other hand, the State argued that the juror's removal was purely discretionary and therefore Rule 4-312(b)(3) pro-

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57. 41 Md. App. 149, 157, 396 A.2d 289, 294 (1979) (finding that there was no error in the trial judge making a telephone call to an absent juror outside of the presence of the defendant to determine whether the juror would be able to return to the trial).

58. Id. at 156, 396 A.2d at 293 (citing *James v. State*, 14 Md. App. 689, 288 A.2d 644 (1972)). The *Tisdale* court noted that the broader discretion allowed to a trial judge in removing a juror for inability to continue exists because such removal is an administrative matter and "the issue is not so much one of fairness but of efficiency." Id. at 156-57, 396 A.2d at 293-94.

59. 72 Md. App. 673, 532 A.2d 189 (1987). In *Stokes*, a juror was dismissed sua sponte by the trial judge because the judge had witnessed the juror smiling at the defendant at times and also because he saw the juror sleeping at other times. Id. at 675, 532 A.2d at 190. The court found error in the trial judge's failure to make an inquiry of the juror regarding her ability to continue. Id. at 680, 532 A.2d at 192. In reasoning that a trial judge necessarily has less discretion to remove a juror once the jury panel has been selected and sworn, the *Stokes* court stated, "[a]lthough it is true that appellant cannot complain that the jury which decided his fate was not a fair and impartial one, it was still not the same jury that had been selected, with his approval, to decide his fate." Id. at 682, 532 A.2d at 193.

60. Id. at 676, 532 A.2d at 190 (quoting *Tabbs v. State*, 43 Md. App. 20, 22, 403 A.2d 796, 798 (1979)).

61. Id. at 683-84, 532 A.2d at 194.

62. *Cook*, 338 Md. at 606, 659 A.2d at 1317.

63. Id. at 615, 659 A.2d at 1322; see also supra notes 40-51 and accompanying text.

64. *Cook*, 338 Md. at 606-07, 659 A.2d at 1318.

65. Id.; see also supra note 33 and accompanying text.
vided the appropriate analysis. The Court of Appeals found that the juror's removal did not warrant a new trial under either rule, but did note that "good cause shown" under Rule 4-312(e) refers to the justification of the party challenging for cause and not to the standard of review to be applied by an appellate court in considering a trial judge's determination to remove a juror.

In holding that a trial judge's decision to remove a juror is discretionary and "will not be reversed on appeal absent a clear abuse of discretion or a showing of prejudice to the defendant," the court first concluded that dismissal and replacement of a juror is not reversible error where the reason for the juror's dismissal is related to that particular juror and not to a class of persons. The court reasoned that the remedy sought by the defendant, a new trial, would result in a new jury that is no fairer than the jury in the original trial. When removal occurs for reasons particular to the excluded juror, that juror would not be on the jury in the new trial "nor would [the new jury] contain any juror with characteristics similar to that which caused the exclusion of the original juror." However, when a juror is removed because of characteristics shared with a class of persons, "upon retrial the jury will represent a fair cross-section of the community and the new jury may contain members of the originally excluded class."

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66. Cook, 338 Md. at 606-07, 659 A.2d at 1318; see also supra note 32 and accompanying text. Cook adopted the Court of Special Appeals's position that a trial court's discretion is necessarily more limited when removing a juror for cause under Rule 4-312(e) than when a juror is removed for inability to continue under Rule 4-312(b)(3). Cook, 338 Md. at 606, 659 A.2d at 1318; see also Cook v. State, 100 Md. App. 616, 626, 642 A.2d 290, 295 (1994), rev'd, 338 Md. 598, 659 A.2d 1313 (1995).

67. Cook, 338 Md. at 607, 659 A.2d at 1318. This reasoning is contrary to the standard employed by the Court of Special Appeals in reviewing a juror's dismissal, where the court required good cause to be shown by the trial court itself. Cook, 100 Md. App. at 628-29, 642 A.2d at 296. The intermediate appellate court found prejudicial error based on its holding in Stokes v. State, 72 Md. App. 673, 532 A.2d 189 (1987). Cook, 100 Md. App. at 629, 642 A.2d at 296. See supra notes 59-61 and accompanying text for a discussion of the Stokes holding.

68. Cook, 338 Md. at 607, 659 A.2d at 1318.

69. Id. at 609, 659 A.2d at 1319; see also supra notes 40-51 and accompanying text.

70. Cook, 338 Md. at 609, 659 A.2d at 1319.

71. Id. The court stated:

A litigant who argues on appeal that he or she did not receive a fair trial without the excused juror and seeks a new trial will have exactly what he or she got in the first trial—a jury which will not contain the juror excused from the original trial and is unlikely to contain any jurors similar to the juror excused from the original jury.

Id.

72. Id.
The court noted that in *Hunt v. State*, 73 "[w]e held that, even had there been insufficient cause to excuse the potential juror, this would not constitute reversible error if the jurors actually seated were unobjectionable." However, if there is insufficient cause in removing a juror because of characteristics the juror holds in common with a class of persons, a resulting and otherwise unobjectionable jury constitutes reversible error. 74 The Court of Appeals found no evidence that Cook suffered any prejudice from the jury after the juror's dismissal and replacement. 76 It also found that the dismissal was for reasons particular to the specific juror. 77

The court focused on the opportunity a trial judge has to directly question a juror and to witness a juror's demeanor. 78 The court noted a previous decision regarding a judge's discretion to declare a mistrial, stating, "We find that the rationale for providing such deference in a trial judge's determination to exclude a potential juror or in deferring to a trial judge's decision regarding a motion for mistrial is equally present in evaluating a trial judge's decision to excuse a seated juror." 79

Thus, the court found that the record adequately supported the trial judge's determination to remove the juror, 80 deferring to the trial judge's finding that, based on his observation of the juror's demeanor in answering the questions posed to him, the juror's explanation for his note was dubious. 81 The court stated it would not substitute its own judgment for that of the trial judge based on a cold record. 82

74. *Cook*, 338 Md. at 608, 659 A.2d at 1319 (citing *Hunt*, 321 Md. at 420, 583 A.2d at 234); see also *supra* notes 47-51 and accompanying text.
75. *Cook*, 338 Md. at 615, 659 A.2d at 1325; see also *King v. State*, 287 Md. 530, 538, 414 A.2d 909, 913 (1980) (finding that the dismissal of jurors solely because of their disagreement with criminal marijuana laws erroneously excluded a significant segment of the population from jury service); see *supra* notes 40-46 and accompanying text.
76. *Cook*, 338 Md. at 610-11, 659 A.2d at 1320.
77. *Id.* at 620, 659 A.2d at 1324.
78. *Id.* at 615, 659 A.2d at 1322. The court stated, "'The judge is physically on the scene, able to observe matters not usually reflected in a cold record . . . . [T]he judge has his finger on the pulse of the trial.' *Id.* (quoting *State v. Hawkins*, 326 Md. 270, 278, 604 A.2d 489, 493 (1992) (upholding trial judge's denial of defendant's motion for mistrial alleging prejudice in the testimony of two police officers who made indirect references to the defendant taking a polygraph test)).
79. *Id.* (footnote omitted).
80. *Id.* at 617, 659 A.2d at 1323.
81. *Id.* at 616, 659 A.2d at 1322.
82. *Id.* at 617, 659 A.2d at 1323.
In reversing the decision of the Court of Special Appeals, the Cook court was critical of the intermediate court's apparent analogy to double jeopardy principles in finding error in the removal of a seated juror. The Court of Special Appeals had held that the "court's discretion is necessarily more limited" when dismissing a juror for cause. Citing its earlier decision in Stokes v. State, the intermediate appellate court reasoned that once a jury is sworn "a criminal defendant is entitled to have his case heard to completion by the chosen jury the defendant believes may decide in his favor." The Stokes court recognized a defendant's "valued right to have his trial completed by a particular tribunal." The Court of Appeals noted that this idea was borrowed from Wade v. Hunter, a Supreme Court opinion applying a double jeopardy analysis to the dismissal of an entire jury during a court-martial proceeding. The court found that the reasoning the Court of Special Appeals drew from Wade incorrectly applied a double jeopardy analysis to the removal of individual jurors because double jeopardy principles should be limited to the dismissal of an entire jury.

4. Analysis.—In Cook, the Court of Appeals held that a trial judge has broad discretion to remove a seated juror. The court's sound reasoning dispensed with the intermediate court's "apparent comparison of double jeopardy principles" to the removal and replacement of an impaneled juror. The court found that deference to the trial judge's decision provides the appropriate analysis of a

83. Id. at 614, 659 A.2d at 1321.
85. 72 Md. App. 673, 532 A.2d 189 (1987); see also supra notes 59-61 and accompanying text.
86. Cook, 100 Md. App. at 626, 642 A.2d at 295.
87. Stokes, 72 Md. App. at 676, 532 A.2d at 190 (quoting Tabbs v. State, 43 Md. App. 20, 22, 403 A.2d 796, 798 (1979)).
89. Cook, 338 Md. at 612, 659 A.2d at 1321 (citing Wade, 336 U.S. at 688). Wade involved the court-martial of an American soldier in Europe during World War II. The Supreme Court found that military tactical considerations justified abandoning the first court-martial proceeding and removing to another location for a second court-martial. Wade, 336 U.S. at 692. Rejecting the petitioner's claim of double jeopardy, the Court stated that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Id. at 689.
90. Cook, 338 Md. at 614, 659 A.2d at 1321-22.
91. Id. at 615, 659 A.2d at 1322.
92. Id. at 614, 659 A.2d at 1321.
seated juror's removal. The court rejected distinctions between prospective jurors and seated jurors, and between removal "for cause" and removal for "inability to continue." The court gave clear guidance as to what constitutes abuse of discretion in the removal of a seated juror. Furthermore, the court reasoned that it is unnecessary to question specifically whether a juror has the ability to render a fair and impartial verdict when removal is for reasons specific to the individual juror. The Cook opinion also suggests that while the record on appeal should reflect some rationale for a juror's dismissal, the deference given to determinations of trial judges suggests that the reason for a juror's removal need not be stated unequivocally.

The Court of Appeals properly rejected the intermediate court's reliance on Stokes v. State. A defendant's right to have his case heard by a particular tribunal does not exclude alternate jurors as part of that tribunal. The Cook court correctly refused to recognize that the right to have a trial completed by a particular tribunal extends to the replacement of a juror "with an alternate who has undergone the same selection process as the seated jurors and has been present for the entire trial." The Court of Appeals reasoned that expanding this concept to the discretionary removal and replacement of a juror would constitute an erroneous application of double jeopardy principles. While jeopardy attaches once a jury has been impaneled,

93. Id. at 609, 659 A.2d at 1319; see also supra text accompanying note 79.
94. Cook, 338 Md. at 607, 659 A.2d at 1318; see also supra notes 64-67 and accompanying text.
95. See infra notes 114-116 and accompanying text.
96. See infra notes 118-124 and accompanying text.
97. 72 Md. App. 673, 532 A.2d 189 (1987); see also supra notes 59-61 and accompanying text.
98. See supra notes 87-90 and accompanying text.
99. Cook, 338 Md. at 614, 659 A.2d at 1321-22 (citation omitted). The Maryland Rules provide that "[a]n alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror." Md. R. 4-312(b)(1).
100. Cook, 338 Md. at 612-13, 659 A.2d at 1321; see also supra note 90 and accompanying text. One commentator noted:

[U]nder such circumstances it could not be said that the defendant had been more than once in jeopardy, since the same proceedings were had in the selection of the alternate jurors as in the case of the first 12, and all of them must be regarded as members of the same jury. . . . The court pointed out that the essential attributes of jury trial were number, impartiality, and unanimity, concluding that if the code provision for alternate jurors did not affect any of these three essential qualities it should be held that the section in question did not affect the inviolability of the right of trial by jury. . . . "To hold, under these circumstances, that a defendant is deprived of the right to a trial by a jury of 12 simply because one of the 12 by whom the verdict is rendered may, throughout a part of the trial,
the mere replacement of a juror does not place a defendant in double jeopardy "because the unity of the original jury [is] not destroyed."\textsuperscript{102} The court further noted that "while Cook has a right to a fair and impartial jury, Cook does not have a right to a jury composed of particular individuals."\textsuperscript{103} A double jeopardy analysis is only appropriate when an entire jury has been discharged.\textsuperscript{104}

Not only did the court decline to analyze the Cook juror's dismissal as a removal for cause versus a removal for inability to continue,\textsuperscript{105} it made the distinction moot as part of the trial judge's broad discretion.\textsuperscript{106} The rationale for deferring to a trial judge's determination should not diminish simply because a party has made a motion for a juror's removal as opposed to the court removing a juror sua sponte.\textsuperscript{107} Furthermore, the Cook court analogized the use of the deference rationale in juror removal scenarios to that of a trial judge's discretion to grant a mistrial,\textsuperscript{108} which "is a discretion that will rarely, if ever, be disturbed on appeal."\textsuperscript{109} Thus, the Cook holding gives great discretion to a trial judge to dismiss a juror.

\begin{quote}
W.J. Dunn, Annotation, \textit{Constitutionality and Construction of Statute or Court Rule Relating to Alternate or Additional Jurors or Substitution of Jurors During Trial}, 84 A.L.R.2d 1288, 1293 (1962) (quoting People v. Peete, 202 P. 51, 66 (Cal. Dist. Ct. App. 1921) (upholding the constitutionality of a statute providing for the replacement of a seated juror with an alternate juror)).
\end{quote}

103. \textit{Id.} In the context of peremptory challenges during jury selection, the Court of Appeals wrote that "[i]t enables the [defendant] to say who shall not try him; but not to say who shall be the particular jurors to try him." Turpin v. State, 55 Md. 462, 469 (1881).
104. \textit{Cook}, 338 Md. at 614, 659 A.2d at 1321-22; \textit{see also supra} note 90 and accompanying text.
105. Removal of jurors for cause is covered by Rule 4-312(e); removal of a juror for inability to continue, i.e., when a juror is found unable or disqualified to perform his duty, is covered by Rule 4-312(b)(3). \textit{See supra} notes 32-34 and accompanying text.
106. \textit{Cook}, 338 Md. at 607, 659 A.2d at 1318. The court held that when a judge determines to remove a juror and substitute an alternate juror for a reason particular to that juror, whether the juror is removed based on the trial judge's determination of the juror's unavailability or disqualification or based on the judge's determination of some other cause for the removal of the juror, the trial judge's decision is a discretionary one and will not be reversed on appeal absent a clear abuse of discretion or a showing of prejudice to the defendant.
107. \textit{Id.} (emphasis added).
108. \textit{Cook}, 338 Md. at 615, 659 A.2d at 1322.
However, an appellate court will overturn a trial judge's decision upon a showing of abuse of discretion. The Cook court noted two specific areas of discretionary abuse. The exclusion of a juror because of beliefs or characteristics the juror shares with a class of persons constitutes one area of abuse. Another potential abuse of discretion is the dismissal of a juror for bias that the juror may have formed based upon evidence presented at trial. Even under this category a trial judge is still likely to exercise broad discretion in determining the nature and degree of bias. In the context of removing a potential juror, the court has stated "[t]he trial judge's factual determinations about the extent of a juror's bias must be given deference."

Consistent with a trial judge's broad discretion in removing a seated juror is the court's finding that no specific inquiry is required of the juror before dismissal. The Court of Appeals correctly rejected the intermediate appellate court's finding that the failure to inquire into the ability of a juror to render a fair and impartial verdict constitutes reversible error. The determination should be made from the overall impression the judge gains through his presence at the trial, not because of an answer or lack of an answer to a specific question. A juror's answer as represented in a printed record may belie the finding of the trial judge who, witnessing the juror's de-

110. Cook, 338 Md. at 620, 659 A.2d at 1324.
111. Id. at 609, 659 A.2d at 1319.
112. Id. at 616, 659 A.2d at 1323. The court noted that the record in Cook supported a finding that the juror was not dismissed for bias he formed based on the evidence presented at trial, but rather for his inability to follow the instructions of the court. Id.
114. Cook, 338 Md. at 617 n.5, 659 A.2d at 1323 n.5. However, if dismissal were for reasons that the juror shared with a class of persons, a specific inquiry into the juror's ability to reach a fair and impartial verdict would almost certainly be required. See King v. State, 287 Md. 530, 539, 414 A.2d 909, 913 (1980); see also infra notes 116-117 and accompanying text.
115. Cook, 338 Md. at 617 n.5, 659 A.2d at 1323 n.5. The court stated:

Having already found the juror's answers to the court's inquiries "dubious," we do not feel that it was necessary for the judge to pose such a question only to be given another "dubious" answer. In dismissing the juror, the trial judge clearly found that the juror could not reach a fair and impartial verdict. We will give deference to such a finding.

Id.
meanor, is in a better position to determine the credibility of the juror’s answers.\textsuperscript{116}

The court’s opinion does suggest that a more thorough inquiry would be necessary if the removal of a juror could be construed as striking a class of persons. Other grounds would be required to establish that the dismissal was for reasons particular to the juror. Questions about a juror’s ability to render a fair and impartial verdict may clarify what would otherwise appear to be removal based on class distinctions.\textsuperscript{117} It is in this area that the court has limited the discretion of the trial judge, providing a more workable and concrete standard of review than merely asserting that a trial judge’s discretion is more limited when a juror is removed “for cause.”

In citing several jurisdictions that follow the rule adopted by \textit{Cook}, the court quoted a definition of prejudice in the removal of a juror as one “without factual support, or for a legally relevant reason.”\textsuperscript{118} The factual support required under the abuse of discretion standard of review was labeled variously as “a reasonable cause,”\textsuperscript{119} “a proper reason,”\textsuperscript{120} “an adequate basis,”\textsuperscript{121} and “some legitimate reason for discharge in order to avoid the appearance of being arbitrary in the face of objection.”\textsuperscript{122} These tests suggest that when a seated juror is dismissed for reasons particular to that juror, minimal factual support in the record for the trial judge’s determination will be enough to with-

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 615, 659 A.2d 1322 (quoting State v. Hawkins, 326 Md. 270, 278, 604 A.2d 489, 493 (1992)). In \textit{Cook}, the State argued:

No particular litany is a necessary antecedent to this discretionary decision . . . . [E]ven had the trial court inquired explicitly about the juror’s ability to render a fair and impartial verdict and even had the juror told the court that he could act impartially, the court would not have been bound to leave the juror on the jury. Brief of Petitioner at 17 n.4, State v. \textit{Cook}, 338 Md. 598, 659 A.2d 1313 (1995) (No. 94-110).

\item \textsuperscript{117} See \textit{King}, 287 Md. at 539, 414 A.2d at 913 (excluding jurors merely for their abstract beliefs regarding marijuana laws without further inquiry into their ability to render a fair and impartial verdict was reversible error). The \textit{King} court noted that had an inquiry been made and had the jurors answered that they were unable to render a fair and impartial verdict because of their beliefs, removal would be justified. \textit{Id.} at 537, 414 A.2d at 912; see also supra notes 52-61, 83-90 and accompanying text.

\item \textsuperscript{118} \textit{Cook}, 338 Md. at 618, 659 A.2d at 1323 (quoting United States v. Fajardo, 787 F.2d 1523, 1525 (11th Cir. 1986) (citations omitted)).

\item \textsuperscript{119} \textit{Id.}, 659 A.2d at 1324 (quoting \textit{Fajardo}, 787 F.2d at 1526).

\item \textsuperscript{120} \textit{Id.} at 620, 659 A.2d at 1324.

\item \textsuperscript{121} \textit{Id.} at 621, 659 A.2d at 1325.

\item \textsuperscript{122} \textit{Id.} at 619, 659 A.2d at 1324 (quoting Flath v. Madison Metal Servs., Inc., 570 N.E.2d 1218, 1226 (Ill. App. Ct. 1991)).
\end{itemize}
stand appellate court scrutiny.\textsuperscript{123} Assuming that \textit{Cook} has left little distinction between the removal of prospective jurors and the removal of seated jurors, an appellate court likely would resolve an ambiguous record in deference to the decision of the trial court.\textsuperscript{124}

5. \textit{Conclusion}.—In \textit{Cook}, the Court of Appeals held that a trial judge has broad discretion to dismiss a seated juror when the dismissal is for reasons particular to that juror rather than for reasons that the juror may hold in common with a class of people. The court effectively eliminated previous distinctions between prospective jurors and impaneled jurors in reviewing a judge’s discretionary decision to remove jurors. In deferring to the decision of the trial judge, the court focused less on formal categorizations but instead emphasized a defendant’s right to an impartial jury drawn from a fair cross-section of the community. The court correctly stressed that the right to an impartial jury does not afford a defendant the right to any particular juror.\textsuperscript{125}

TIMOTHY P. MARTIN

D. \textit{Rejecting Double Jeopardy as a Bar to Retrials of Greater Offenses}

In \textit{State v. Woodson},\textsuperscript{1} the Court of Appeals unanimously held that following a mistrial, double jeopardy did not bar retrial of a greater offense when it barred retrial of a lesser-included offense for lack of manifest necessity in the mistrial declaration.\textsuperscript{2} In reaching this conclusion, the court likened a declaration of mistrial without manifest necessity to a nolle prosequi,\textsuperscript{3} and concluded that both acted as acquittals only for double jeopardy purposes and only as to those specific counts.\textsuperscript{4} This decision further reduces the applicability of double jeopardy protection to cases in which the original trial involved an adjudication on the merits.

1. \textit{The Case}.—The State tried Thomas Woodson in the Circuit Court for Prince George’s County on charges of distribution of a con-

\textsuperscript{123} Early in its opinion, the \textit{Cook} court dismissed “good cause” as the standard for reviewing a trial court’s determination to remove a seated juror. \textit{Id.} at 607, 659 A.2d at 1318; \textit{see also supra} note 67 and accompanying text.
\textsuperscript{124} \textit{See supra} note 103 and accompanying text.
3. \textit{See infra} note 43.
trolled dangerous substance, possession of a controlled dangerous substance with intent to distribute, possession of a controlled dangerous substance, and conspiracy to distribute a controlled dangerous substance. At the close of the trial, the judge granted Woodson’s motion for judgment of acquittal on the conspiracy charge and sent the three remaining charges to the jury.

After deliberating, the jury informed the judge that it had reached verdicts on two of the three counts. The court asked the jury whether it had reached a verdict on the distribution charge, and the jury informed the court that it found the defendant not guilty. The court then asked if the jury had reached a verdict on the possession with intent to distribute charge, and the jury stated that it had not. The court stated that it would not inquire into the jury’s verdict on the possession charge until the jury was ready to return a verdict on the possession with intent to distribute charge, and sent the jury out for further deliberations. The jurors returned four hours later and stated that they were deadlocked on the possession with intent to distribute charge. The court then declared a mistrial on both the possession with intent to distribute charge and the possession charge, without having inquired into the jury’s verdict on the possession charge.

After a new trial date was set for the remaining possession counts, Woodson filed a motion to dismiss both counts on double jeopardy grounds. He argued that the judge’s failure to take a verdict on the possession charge amounted to an acquittal of that charge and barred retrial for that offense. Thus, because of his “acquittal” of the lesser offense of possession, the defendant argued that double jeopardy barred retrial for the greater offense of possession with intent to distribute. The court denied this motion, and in his second trial the defendant was found guilty on both counts.

Following his convictions, Woodson renewed his motion to dismiss on double jeopardy and collateral estoppel grounds. This time

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5. Id. at 325, 658 A.2d at 274.
6. Id.
7. Id. at 325-26, 658 A.2d at 274.
8. Id. at 326, 658 A.2d at 274.
9. Id.
10. Id.
11. Id.
12. Id., 658 A.2d at 274-75.
13. Id., 658 A.2d at 275.
14. Id.
15. Id. at 326-27, 658 A.2d at 275.
16. Id. at 327, 658 A.2d at 275.
the judge granted the motion and dismissed the charges.\textsuperscript{17} The judge agreed with the defendant that the declaration of a mistrial without manifest necessity as to the possession charge barred retrial on that count as well as on the possession with intent to distribute count because it was the “same offense.”\textsuperscript{18} The State appealed this dismissal to the Court of Special Appeals.\textsuperscript{19} The State did not dispute that the court below lacked manifest necessity to declare a mistrial on the possession count, but argued that manifest necessity existed on the possession with intent to distribute count because the jury had deadlocked.\textsuperscript{20} The Court of Special Appeals disagreed with the State’s contention that double jeopardy could bar retrial on a lesser-included offense while still allowing retrial on a greater offense.\textsuperscript{21} Thus, the court affirmed the dismissal, claiming that “to do otherwise would be fundamentally unfair.”\textsuperscript{22} Thereafter, the Court of Appeals granted certiorari to determine whether double jeopardy barred retrial of a greater offense, on which the jury was deadlocked, after a court declared a mistrial on both the greater offense and the lesser-included offense, on which the jury reached a verdict that the court refused to hear.\textsuperscript{23}

2. \textit{Legal Background.}—

\textit{a. The Applicability of the Double Jeopardy Clause.}—The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”\textsuperscript{24} The Supreme Court has held that the “twice put in jeopardy” phrase actually encompasses three distinct protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; (3) and it protects against multiple punishments for the same offense.\textsuperscript{25} In \textit{Benton v. Maryland},\textsuperscript{26} the Supreme Court held that these three protections,
guaranteed by the Double Jeopardy Clause, applied to the States through the Due Process Clause of the Fourteenth Amendment.\(^2\)

Logically, in order for any subsequent prosecution or punishment of a defendant to be constitutionally barred on double jeopardy grounds, a defendant first must be placed in original jeopardy. This original jeopardy occurs when a defendant is put to trial or when the trial commences.\(^2\) The Supreme Court has held that a jury trial commences when the jury is selected and sworn.\(^2\) Thus, jeopardy attaches when a jury is impaneled.\(^3\)

\textit{b. The “Required Evidence” Test.}—Distinct statutory or common-law offenses may be deemed the “same offense” for double jeopardy purposes. In \textit{Gavieres v. United States},\(^1\) the Supreme Court adopted the “required evidence” test to determine whether distinct statutory offenses fell within the “same offense” definition of the Double Jeopardy Clause.\(^2\) Under this test, two distinct statutory offenses are deemed the “same offense” when both require proof of the same facts or only one requires proof of an additional fact.\(^3\)

After \textit{Gavieres}, the Supreme Court applied the required evidence test in \textit{Blockburger v. United States}\(^4\) and held that double jeopardy did not bar the prosecution of two distinct statutory offenses based on one illegal narcotics sale.\(^5\) The Court found that each of the two offenses, though based on one transaction, required proof of an additional element and, therefore, that the two offenses were not the “same offense” for double jeopardy purposes.\(^6\) However, the \textit{Blockburger} test is

\begin{itemize}
\item \textit{27.} Id. at 787.
\item \textit{28.} United States v. Jorn, 400 U.S. 470, 479-80 (1971); see also Blondes v. State, 273 Md. 435, 444, 330 A.2d 169, 173 (1975) ("The problem in particular cases is in determining when a defendant is 'put to trial' or when 'the trial commences.'").
\item \textit{30.} Blondes, 273 Md. at 444, 330 A.2d at 173.
\item \textit{31.} 220 U.S. 338 (1911) (holding that double jeopardy did not bar prosecution for both statutory offenses of insulting a public officer and behaving in an indecent manner in a public place even though the offenses were based on a single transaction).
\item \textit{32.} Id. at 342.
\item \textit{33.} Id. However, if each statute required proof of an additional fact, a single transaction could be considered to be two distinct statutory offenses. \textit{Id.}
\item \textit{34.} 284 U.S. 299 (1932).
\item \textit{35.} Id. at 304.
\item \textit{36.} Id. Since \textit{Blockburger}, the required evidence test has been referred to as the \textit{Blockburger} test. The Supreme Court expanded this test in Grady v. Corbin, 495 U.S. 508 (1990), by adopting an additional “same conduct” test. \textit{Id.} at 510. This test barred “a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” \textit{Id.} However, this “same conduct” test was subsequently over-
not completely determinative of whether a violation of the Double Jeopardy Clause has occurred.\(^7\)

c. The Manifest Necessity of a Mistrial.—In United States v. Perez,\(^8\) the Supreme Court first declared that double jeopardy did not necessarily bar retrial of the same offense following a mistrial.\(^9\) The Court reasoned that without an acquittal or conviction, the defendant’s original jeopardy never terminated such that double jeopardy protection would attach.\(^40\) The Court stated that “the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.”\(^41\)

Thus, a fundamental double jeopardy doctrine developed whereby defendants could be retried following a mistrial without their consent only if that mistrial was of manifest necessity. Subsequent cases have declared a hung jury the “prototypical example” of manifest necessity for a mistrial declaration.\(^42\)


Maryland consistently has used the \textit{Blockburger} test in determining whether offenses are the same for double jeopardy analysis. \textit{See, e.g.}, Snowden v. State, 321 Md. 612, 583 A.2d 1056 (1991) (holding that defendant’s separate sentences for assault and battery and robbery with a dangerous and deadly weapon were barred because they were the same offense for double jeopardy purposes); Thomas v. State, 277 Md. 257, 353 A.2d 240 (1976) (holding that defendant’s conviction for misdemeanor charge of driving a vehicle without the owner’s consent and with the intent to temporarily deprive the owner of possession barred defendant’s subsequent prosecution under the unauthorized use statute because the two charges were the same offense for double jeopardy purposes).

37. Eli J. Richardson, \textit{Eliminating Double-Talk from the Law of Double Jeopardy}, 22 FJA. ST. U. L. Rev. 119, 127 (1994) (“By itself, \textit{Blockburger} does not inform a court whether a double jeopardy violation exists. . . . Even if the case involves ‘same offenses’ according to \textit{Blockburger}, a double jeopardy violation might not exist because other considerations might turn what otherwise would be a double jeopardy violation into a nonviolation.”).

38. 22 U.S. 579 (1824).

39. \textit{Id.} at 580.

40. \textit{Id.}

41. \textit{Id.}

42. \textit{See, e.g.}, Richardson v. United States, 468 U.S. 317, 324 (1984) (“\textit{I}f we have constantly adhered to the rule that a retrial following a ‘hung jury’ does not violate the Double Jeopardy Clause.”); Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (“While other situations have been recognized by our cases as meeting the ‘manifest necessity’ standard, the hung jury remains the prototypical example.”); Wooten-Bey v. State, 308 Md. 534, 545-46, 520 A.2d 1090, 1095-96 (1987) (holding that a defendant may be retried on felony murder charges following a mistrial due to a hung jury even after the defendant was acquitted of premeditated murder, second degree murder, and manslaughter).
d. Continuing Jeopardy.—As with manifestly necessary mistrials, nolle prosequis and convictions reversed on appeal have not barred subsequent prosecutions on double jeopardy grounds. In United States v. Ball, the Supreme Court held that double jeopardy did not bar reprosecution of a defendant whose conviction was reversed on appeal. Maryland similarly has held that nolle prosequis entered without a defendant’s consent, after jeopardy has attached, do not bar subsequent prosecutions of “same offenses” under separate charging documents.

This was not always so. Initially, in Blondes v. State, the Court of Appeals held that the entry of a nolle prosequi without the defendant’s consent, after jeopardy had attached, barred subsequent prosecution of the defendant for the same offense because a nolle prosequi operates as an acquittal. However, just one year later in Bynum v. State, the Court of Appeals noted the Blondes decision, agreed with its proposition, yet distinguished it as applying to cases involving more than one prosecution. In Bynum, the defendant argued that a nolle prosequi on a simple robbery count precluded the State from trying him on an armed robbery count in the same indictment. The Court of Appeals disagreed because the two charges were brought against the defendant in a single trial and “[d]ouble jeopardy is not suffered unless a man is twice put to trial.” This differential treatment, between single and subsequent trials, was soon abolished by the Maryland courts.

In Hunter v. State, the Court of Special Appeals held that the nolle prosequis of several counts of an indictment, after jeopardy had attached, did not bar subsequent prosecution of the defendant in a second trial on the remaining counts after a manifestly necessary mistrial was declared as to those counts in the original trial. The Court

43. A nolle prosequi is a “‘declaration of record from the legal representative of the government, that he will no further prosecute the particular indictment or some designated part thereof.’” Ward v. State, 290 Md. 76, 83, 427 A.2d 1008, 1012 (1981) (quoting 2 Bishop, New Criminal Procedure § 1387, at 1194 (2d ed. 1913)).
44. 163 U.S. 662 (1896).
45. Id. at 671-72.
48. Id. at 443, 330 A.2d at 173.
50. Id. at 705-08, 357 A.2d at 340-42.
51. Id. at 705, 357 A.2d at 340.
52. Id. at 707, 357 A.2d at 341.
53. See infra notes 54-61 and accompanying text.
55. See id. at 117-18, 379 A.2d at 435.
of Special Appeals first noted that the *Bynum* rationale should apply to the facts at hand despite the departure from the single trial logic because “the single difference between *Bynum* and the subject case is this: in *Bynum* the jury resolved the submitted issue; in the subject case the jury was unable to agree and a mistrial followed.”56 The Court of Special Appeals also relied on *United States v. Perez*57 and its resolution that double jeopardy is not offended by the retrial of the same offense following a manifestly necessary mistrial.58

The Court of Appeals affirmed the *Hunter* extension of *Bynum* in *Ward v. State*.59 In *Ward*, the defendant objected, on double jeopardy grounds, to a retrial following a postconviction reversal because the offenses charged were the “same offenses” as those that the State had earlier nolle prossed. Because the defendant was already “acquitted” of those counts under the nolle prosequi, he argued, he could not be retried.60 The Court of Appeals rejected this argument on the theory that a nolle prosequi only discharges the defendant on the charging document and “is not an acquittal or pardon of the underlying offense and does not preclude a prosecution for the same offense under a different charging document or different count.”61

The Court of Appeals in *Ward* dismissed the possibility of any limitations resulting from the *Bynum* and *Blondes* holdings.62 As to *Bynum*, the court reasoned that the language relating to a “single trial” was not a limitation placed on the *Bynum* holding expressly, but a limitation unintentionally stated because of the facts of that case.63

The Court of Appeals also limited the precedential value of *Blondes* by stating that the real issue in that case was the attachment of jeopardy in a jury trial. Any dicta as to the effect of a nolle prosequi on double jeopardy, the court stated, “represented an inaccurate or

56. *Id.* at 114, 379 A.2d at 434.
57. 22 U.S. 579 (1824).
59. 290 Md. 76, 427 A.2d 1008 (1981). In *Ward*, the State nolle prossed two counts in defendant’s trial, after jeopardy had attached, and tried him on the remaining three. *Id.* at 79, 427 A.2d at 1010. The jury convicted the defendant on those three counts but this conviction was overturned in a postconviction proceeding for lack of effective counsel. *Id.* Thereafter, the State attempted to retry the defendant. *Id.*
60. *Id.* at 80, 427 A.2d 1010.
61. *Id.* at 84, 427 A.2d at 1012-13.
62. *Id.* at 96-100, 427 A.2d at 1019-21.
63. See *id.* at 97-98, 427 A.2d at 1019-20. In other words, the *Bynum* court had only stated its holding so narrowly because it was not faced with a postconviction proceeding by the defendant. *Id.*
overbroad view of nolle prosequi and double jeopardy principles.\textsuperscript{64} By dismissing any problems created by dicta in \textit{Bynum} and \textit{Blondes}, the Court of Appeals nullified the effect of a nolle prosequi, for double jeopardy purposes, on other offenses.

e. \textit{Collateral Estoppel}.—In \textit{Ashe v. Swenson},\textsuperscript{65} the Supreme Court added another dimension to double jeopardy analysis by holding that the federal rule of collateral estoppel is embodied in the Fifth Amendment's double jeopardy protection.\textsuperscript{66} This rule bars relitigation of an issue of ultimate fact between the same parties when that issue has been determined by a valid and final judgment.\textsuperscript{67} Thus, double jeopardy may bar both the relitigation of the "same offense" as well as the relitigation of the same factual issue.

3. \textit{The Court's Reasoning}.—In \textit{State v. Woodson},\textsuperscript{68} the Court of Appeals, in a unanimous decision, held that double jeopardy did not bar retrial of the greater offense of possession with intent to distribute even though the erroneous declaration of a mistrial as to the lesser-included offense of possession barred that count from being retried.\textsuperscript{69} In determining whether the two separate offenses of possession and possession with intent to distribute were the "same offense" for double jeopardy purposes, the court applied the \textit{Blockburger} "required evidence" test.\textsuperscript{70} Because the elements of possession were completely subsumed within the elements of possession with intent to distribute, and thus only one offense required proof of an additional fact, the court declared the two offenses the "same offense" for double jeopardy purposes.\textsuperscript{71}

After finding that the two charged offenses were the "same offense," the court looked to the necessity of the mistrial declaration to determine whether double jeopardy would bar the defendant's second prosecution. Using the \textit{Perez} "manifest necessity" doctrine, the court found that double jeopardy barred reprosecution on the possess-
The jury had actually reached a verdict on that count and, thus, the judge had no necessity to declare a mistrial as to that count. However, the court found that manifest necessity existed for the mistrial on the possession with intent to distribute count because the jury was deadlocked, and deadlock is the prototypical example of a manifestly necessary mistrial. Thus, using the logic advanced by Perez, double jeopardy did not bar retrial on the greater offense because the defendant’s original jeopardy never terminated as to that charge.

Woodson argued that because the State was barred from retrying him on the lesser offense of possession, the State also should be barred from retrying him on the greater offense of possession with intent to distribute, given that it was the “same offense” for double jeopardy purposes. The Court of Appeals rejected this argument, reasoning that the double jeopardy bar to reprosecution on the lesser offense only operated as an acquittal for that charge but was not an actual acquittal that would bar reprosecution of a separate offense.

The court also rejected Woodson’s argument that the bar to retrial of the possession charge collaterally estopped retrial of the greater offense, because a verdict was not delivered on the possession count from which a factual finding in Woodson’s favor could be inferred. The “critical consideration” in the application of collateral estoppel is whether a fact has been previously determined in a defendant’s favor. Because no verdict was delivered on the lesser offense, no judgment existed from which the court could infer a finding of fact in favor of Woodson. The court stated that neither procedural adjudication represented an adjudication of not guilty or factual findings in the defendant’s favor.

The court’s decision, however, was largely based on its analogy of Woodson’s situation to one involving a nolle prosequi. Because

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72. Id. at 329-30, 658 A.2d at 276.
73. Id.
74. Id. at 330, 658 A.2d at 277.
75. Id. at 337, 658 A.2d at 280.
76. Id. at 326-27, 658 A.2d at 275.
77. Id. at 336, 658 A.2d at 279.
78. “‘Collateral estoppel’... means simply that 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.” Ashe v. Swenson, 397 U.S. 436, 443 (1970).
80. Id. at 331, 658 A.2d at 277.
81. Id. at 331-32, 658 A.2d at 277.
82. Id.
83. Id. at 332-33, 658 A.2d at 278.
Maryland case law clearly supports the proposition that a nolle prosequi does not operate as an acquittal except as to the specific count nolle prosessed, the court found that the procedural bar to reprosecution of the lesser offense in **Woodson** did not bar continuing prosecution on other counts.

4. Analysis.—

   a. The “Same Offense.”—The Court of Appeals correctly found that the two offenses for which the defendant was convicted in his second trial were the “same offense” for double jeopardy purposes based on a proper application of the **Blockburger** “required evidence” test. The offense of possession with intent to distribute requires proof of an additional fact (intent to distribute) not required to prove possession, while the possession offense does not require proof of additional facts. Therefore, under the **Blockburger** test, both charges are the “same offense” for double jeopardy purposes.

   b. The Manifest Necessity of a Mistrial.—In **Woodson**, there was no question that jeopardy attached at Woodson's first trial, as the jury was not only selected and sworn, but heard the case and deliberated on the charges. Yet, even if jeopardy attached and the two offenses charged to Woodson in his first trial were the “same offense” for double jeopardy purposes, reprosecution of those offenses would not be barred if the mistrial declared in his first trial was of manifest necessity. This manifestly necessary mistrial exception to the **Double Jeopardy Clause** has been recognized for over one hundred and fifty years, and was properly applied by the Court of Appeals in **Woodson**.

There is little dispute that the mistrial declaration as to the possession with intent to distribute charge was manifestly necessary. Hung juries have long been recognized as the “prototypical example”

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84. See *supra* notes 47-64 and accompanying text.
86. *Id.* at 328-29, 658 A.2d at 275-76. For an explanation of the **Blockburger** test, see *supra* notes 31-37 and accompanying text.
87. **Woodson**, 338 Md. at 329, 658 A.2d at 276 (“[E]very element of possession is also an element of possession with intent to distribute.”). Greater and lesser offenses are necessarily the “same offense” for double jeopardy purposes. See **Brown** v. Ohio, 432 U.S. 161, 169 (1977) (“Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”). However, as the **Brown** Court acknowledged, exceptions may exist for retrial following a mistrial or following the reversal of a conviction. *Id.* at 165 n.5.
88. **Woodson**, 338 Md. at 325-26, 658 A.2d at 274.
89. See *supra* notes 38-42 and accompanying text.
of manifestly necessary mistrials.90 Furthermore, the judge did not simply accept the jury's initial declaration of deadlock.91 When the jury first announced its inability to reach a verdict on the possession with intent to distribute charge, the judge sent the jurors back into the jury room to attempt to reach a conclusion.92 However, after deliberating for four more hours, the jury was still at an impasse.93 At that point, the judge had no choice but to declare a mistrial.

There is also little dispute that the judge lacked manifest necessity to declare the mistrial as to the possession charge. In Arizona v. Washington,94 the Supreme Court stated that there must be a high degree of necessity before a mistrial is declared.95 In Woodson, the judge declared the mistrial on the possession charge without ever asking the jury for its verdict on that count.96 The requisite high degree of necessity was clearly not present here because the judge was aware that the jury had reached a verdict. He simply refused to take that verdict because the jury had not reached a verdict on the greater offense.97 This hasty mistrial declaration did not meet the stringent necessity test stated in Washington and was indisputably without manifest necessity.98 Therefore, the mistrial declaration as to the possession count was not

90. See supra note 42 and accompanying text. One commentator discussed the common sense of retrying a defendant following a hung jury as follows:

Intuitively the decision seems correct. Justice demands resolution of criminal charges brought to trial; if a particular jury cannot agree to acquit or convict, it is manifestly necessary that another jury must have the opportunity. Double jeopardy is not violated: first, because no prior conviction or acquittal exists; and second, because the defendant was deprived of the "valued right to have his trial completed by a particular tribunal" only because of that tribunal's inability to complete the trial.


91. Woodson, 338 Md. at 926, 658 A.2d at 274.

92. Id. The judge also gave the jury an Allen charge before they went back in the jury room for further deliberations. Id. An Allen charge is given to deadlocked juries to prod them toward unanimity. Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 948 (4th ed. 1992). It admonishes jurors to decide for themselves but it also states that "[y]ou should listen, with a disposition to be convinced, to each other's arguments" and that the minority should question the reasonableness of their opinion in the face of the opinion of the majority. Allen v. United States, 164 U.S. 492 (1896).

93. Woodson, 338 Md. at 926, 658 A.2d at 274.


95. Id. at 506.

96. Woodson, 338 Md. at 926, 658 A.2d at 274-75.

97. Id. The Court expressly did not decide whether a judge has a duty to inquire into the jury's verdicts on all counts of a multi-count indictment when the jury deadlocks. Id. at 330 n.2, 658 A.2d at 276 n.2.

98. Id. at 329-30, 658 A.2d at 276. "[T]he State concedes that there was no manifest necessity to declare a mistrial as to Count 3, the possession count, because the jury had reached a verdict on that count . . . ." Id.
manifestly necessary, and double jeopardy barred reprosecution of the defendant for the same offense in his second trial.

c. The Meaning of Acquittal.—In Woodson, the fundamental dispute between the defendant and the State was the meaning of the term "acquittal." Woodson hoped to invoke the double jeopardy protection against a second prosecution for the same offense after acquittal. Because there was no dispute that the lesser and greater offenses charged against Woodson were the same offense, the only dispute was whether an original "acquittal" existed as to the lesser offense that would bar a second prosecution for the greater offense.

When deciding this issue of first impression, the Court of Appeals analogized the mistrial to a nolle prosequi. Maryland case law has recognized that nolle prosequis have little effect on prosecution of other offenses under separate charging documents. This limited effect of a nolle prosequi is proper under the terms of the Double Jeopardy Clause of the Fifth Amendment because a second prosecution is only barred for the same offense following a conviction or acquittal. A nolle prosequi, by its own terms, is not a conviction or acquittal on the merits of the charge, but merely a strategic decision made by the prosecutor not to proceed on that charge. As noted in Jackson v. State, “[i]t is not uncommon before submitting a case to the jury to ‘tidy up’ the issues to be submitted so as to simplify its deliberations. Such housecleaning exercises in no way represent acquittals.”

Similarly, the double jeopardy bar on the lesser offense in Woodson, due to the lack of necessity for the mistrial declaration, is not an acquittal on the merits of the case. Instead, like a nolle prosequi, it is a procedural bar placed on the judicial system so that defendants will not be subject to numerous prosecutions for the same offense when a decision can be reached in one original trial. Therefore, double jeop-

99. See id. at 332, 658 A.2d at 277-78 (discussing the defendant’s double jeopardy argument).
100. See id. at 333, 658 A.2d at 278 (noting that neither the parties nor the court could find any cases addressing the specific issue before the court).
101. See supra note 43. Interestingly, though it was never mentioned in Woodson, one case suggests that the comparison of a mistrial to a nolle prosequi has historical roots. See Ward v. State, 290 Md. 76, 86, 427 A.2d 1008, 1014 (1981) (discussing early American case law on the double jeopardy effects of nolle prosequis). “The earlier opinions discussed both circumstances together, viewing mistrial cases as authority in cases involving a nolle prosequi, and vice versa.” Id.
104. Id. at 447, 572 A.2d at 571-72.
ardy should not hinder the State’s ability to reprosecute counts, which can be defined as the “same offense,” that legitimately should be reprosecuted.

In the instant case, the original jeopardy never terminated as to the possession with intent to distribute charge because it ended in a properly declared mistrial. The Double Jeopardy Clause requires that either an acquittal or a conviction occur to terminate original jeopardy, and “a trial court’s declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy.” Therefore, the erroneous mistrial declaration as to the possession charge should not affect the State’s ability to retry the defendant on the possession with intent to distribute charge, tried in the same trial, because the original jeopardy as to the latter charge never terminated.

d. Collateral Estoppel.—Collateral estoppel bars relitigation of an issue between the same parties once that issue has been determined by a valid and final judgment. Woodson argued that this doctrine barred his retrial on the possession with intent to distribute charge following the bar to reprosecution of the possession charge. This argument was flatly rejected by the Court of Appeals. Because collateral estoppel requires a factual finding in the defendant’s favor based on a valid and final judgment, collateral estoppel cannot be applied following a mistrial because mistrials do not establish any findings of fact. Thus, the defendant’s mistrial as to the possession charge cannot collaterally estop reprosecution on possession with intent to distribute.

105. Woodson, 338 Md. at 329-31, 658 A.2d at 276-77.
107. See Ashe v. Swenson, 397 U.S. 436, 443 (1970); supra notes 65-67 and accompanying text. It is possible that even if the defendant had been outright acquitted of the possession charge, double jeopardy would still not bar the reprosecution of the possession with intent charge, following a mistrial, but that the doctrine of collateral estoppel would. See Mauk v. State, 91 Md. App. 456, 478 n.11, 605 A.2d 157, 168 n.11 (1992). The Court of Special Appeals noted that even a properly granted acquittal of a lesser offense would not require an acquittal of the greater offense on double jeopardy grounds but rather on collateral estoppel grounds. Id. ("[F]or the very reason that a properly granted judgment of acquittal on the lesser charge would establish, by definition, that the evidence was insufficient to permit going forward on the greater charge.").
108. Woodson, 338 Md. at 327, 658 A.2d at 275.
109. Id. at 331-32, 658 A.2d at 277.
In addition, the Supreme Court has held that the doctrine of collateral estoppel must be applied with "realism and rationality."\textsuperscript{111} It is certainly not realistic or rational to believe that the jury found in the defendant's favor as to the possession charge. The jury's verdict on the possession charge was probably one of guilt, or the jury would not have hung on the possession with intent to distribute charge.\textsuperscript{112} Thus, Woodson did not prove that the factual issue of his possession of a dangerous controlled substance was actually and validly decided in his favor such that the issue could not be relitigated in a subsequent prosecution for the offense of possession with intent to distribute.\textsuperscript{113}

e. Manifest Necessity as to Multi-Count Indictments Unresolved by Woodson.—One question left open by the Court of Appeals is the double jeopardy effect of a mistrial declaration following a trial on a multi-count indictment, when the jury deadlocks but does not specifically state that the deadlock is to all counts.\textsuperscript{114} Following Woodson, it is unclear whether a judge has a duty to inquire individually into each count before declaring a mistrial. Indeed, the court expressly did not reach this issue.\textsuperscript{115} In Woodson, the judge knew that a verdict existed as to one count but refused to accept it, causing the subsequent mistrial to be without manifest necessity. The dicta in Woodson suggests, however, that no such duty of inquiry exists for a Maryland judge.\textsuperscript{116} This issue likely will require further clarification from the court in the future.

5. Conclusion.—In State v. Woodson,\textsuperscript{117} the Court of Appeals properly followed the trend in Maryland case law of applying the double jeopardy bar to second prosecutions of separate offenses that meet the "same offense" test only in cases in which the first offense was tried and disposed of on the merits. By analogizing the double

\textsuperscript{111} See Ashe, 397 U.S. at 444 (noting that collateral estoppel should not be applied rigidly).

\textsuperscript{112} "It is unlikely that the jury would have hung on the charge of possession with intent to distribute if it had already concluded that Woodson was not guilty of possession." Woodson, 338 Md. at 332, 658 A.2d at 277.

\textsuperscript{113} The burden is on a defendant to prove that an issue has previously been decided in another proceeding. See Dowling v. United States, 493 U.S. 342, 350 (1990) (discussing the burden of proof on a party attempting to use the doctrine of collateral estoppel).

\textsuperscript{114} Woodson, 338 Md. at 330 n.2, 658 A.2d at 277 n.2.

\textsuperscript{115} Id. ("We are, however, not holding in this case that the trial judge has a duty to inquire as to whether the jury has reached or may be able to reach a verdict on each individual count in a multi-count indictment when the jury announces that it is deadlocked.").

\textsuperscript{116} Id.

\textsuperscript{117} 338 Md. at 322, 658 A.2d at 272.
jeopardy effect of a mistrial without manifest necessity to a nolle prosequi, the Court of Appeals held that reprosecution of a greater offense following a necessary mistrial declaration was not barred when double jeopardy precluded reprosecution of a lesser offense due to a lack of manifest necessity for the mistrial declaration.\textsuperscript{118} The court did not reach the question of how this decision will impact multi-count indictments, but instead properly limited itself to the facts of the case at bar.

STACY A. MAYER

\textbf{E. Allowing Sentence Enhancement While a Prior Conviction Is on Appeal}

In \textit{Whack v. State}\textsuperscript{1} the Court of Appeals held that a criminal conviction that is on appeal may be considered in imposing sentences under two sections of the Maryland Code\textsuperscript{2} that provide for enhanced penalties for individuals who previously have been convicted of crimes involving dangerous substances.\textsuperscript{3} In so doing, the court defined the words "convicted" and "conviction" as referring to the "final judgment and sentence rendered by a court pursuant to a verdict or plea of guilty."\textsuperscript{4} Despite a sparse record of legislative intent\textsuperscript{5} and ambiguity in the language of the statutes,\textsuperscript{6} the court decided that application of the rule of lenity\textsuperscript{7} was not appropriate because the legislature's intent was ascertainable.\textsuperscript{8} The court also held that the two sentence-enhancing

\begin{itemize}
\item \textsuperscript{118} Id. at 338, 658 A.2d at 281.
\item \textsuperscript{1} 338 Md. 665, 659 A.2d 1347 (1995).
\item \textsuperscript{3} \textit{Whack}, 338 Md. at 668, 659 A.2d at 1348. Article 27, § 286(c) specifies that a defendant who "previously has been convicted" of defined drug-related crimes be given a 10-year minimum sentence without the possibility of parole. Md. Ann. Code. art. 27, § 286(c). Article 27, §§ 286(c) and 293 allow a judge to impose a sentence that is twice the otherwise authorized sentence if the offense is a "second or subsequent offense." \textit{Id.} §§ 286(c), 293.
\item \textsuperscript{4} \textit{Whack}, 338 Md. at 674, 659 A.2d at 1351 (quoting Myers v. State, 303 Md. 639, 645, 496 A.2d 312, 315 (1985)).
\item \textsuperscript{5} Id. at 680, 659 A.2d at 1354; \textit{see also id.} at 685, 659 A.2d at 1356 (Bell, J., dissenting); Gargliano v. State, 334 Md. 428, 441-42, 639 A.2d 675, 681 (1994) (noting that legislative intent with regard to § 286 is not clear from legislative history).
\item \textsuperscript{6} \textit{Whack}, 338 Md. at 675, 659 A.2d at 1351.
\item \textsuperscript{7} The rule of lenity provides that where there is ambiguity in the language of a statute concerning possible punishments, the ambiguity should be resolved in favor of the defendant. \textsc{Black’s} \textsc{Law Dictionary} 902 (6th ed. 1990).
\item \textsuperscript{8} \textit{Whack}, 338 Md. at 683, 659 A.2d at 1355. The rule of lenity is reserved for cases where it is impossible to discern the legislative intent and the court is "left with an ambiguous statute" containing a "grievous ambiguity or uncertainty." \textit{Id.} at 674, 659 A.2d at 1351 (quoting Jones v. State, 336 Md. 255, 262, 647 A.2d 1204, 1207 (1994)).
\end{itemize}
sections could be used to increase sentences imposed on different counts in the same criminal proceeding.9

1. The Case.—Whack called on the Court of Appeals to consider two statutory provisions that provide for increased sentences for repeat offenders involved in drug-related crimes. Article 27, section 286(c)10 provides for a minimum ten-year sentence, without parole, for an individual convicted of distributing or conspiring to distribute specified controlled dangerous substances11 if that person “previously has been convicted” of the same or a similar crime.12 Article 27, section 293 allows a judge to double the sentence and fine of an individual convicted of drug-related offenses if the “offense is a second or subsequent offense.”13

9. Id. at 683, 659 A.2d at 1355.
11. Id. Article 27, § 286(b)(1) specifies that anyone manufacturing, distributing, dispensing, possessing or conspiring to do any of these things in regard to Schedule I or II narcotic drugs is guilty of a felony and is subject to imprisonment for not more than 20 years or a fine of not more than $25,000, or both. Id. § 286(b)(1). Article 27, § 286(b)(2) provides a similar sentence and fine for individuals involved with specified non-narcotic substances. Id. § 286(b)(2).
12. Id. § 286(c)(1). Section 286(c) provides in relevant part:
   (1) A person who is convicted under subsection (b)(1) or subsection (b)(2) of this section, or of conspiracy to violate subsection (b)(1) or (b)(2) of this section shall be sentenced to imprisonment for not less than 10 years if the person previously has been convicted:
   (i) Under subsection (b)(1) or subsection (b)(2) of this section;
   (ii) Of conspiracy to violate subsection (b)(1) or subsection (b)(2) of this section;
   (iii) Of an offense under the laws of another state, the District of Columbia, or the United States that would be a violation of subsection (b)(1) or subsection (b)(2) of this section if committed in this State.
   (2) The prison sentence of a person sentenced under subsection (b)(1) or subsection (b)(2) of this section, or of conspiracy to violate subsection (b)(1) or subsection (b)(2) of this section or any combination of these offenses, as a second offender may not be suspended to less than 10 years, and the person may be paroled during that period only in accordance with Article 31B, § 11 of the Code [providing for the parole of persons confined for treatment at the Patuxent Institution].
13. Id. § 293(a) (1992). Section 293 provides in relevant part:
   (a) Any person convicted of any offense under this subheading is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both.
   (b) For purposes of this section, an offense shall be considered a second or subsequent offense, if, prior to the conviction of the offense, the offender has at any time been convicted of any offense or offenses under this subheading or under any prior law of this State or any law of the United States or of any other
On March 11, 1993, Larry Whack was convicted by a jury in the Circuit Court for Prince George's County of four drug-related offenses. The issue before the Court of Appeals concerned the sentences imposed on counts two and fifteen of Whack's indictment. On count two, conspiracy to distribute cocaine, the maximum sentence of twenty years was doubled to forty years pursuant to section 293, and a ten-year minimum sentence without parole was imposed, as provided for in section 286(c). On count fifteen, importation of twenty-eight grams or more of cocaine, the maximum penalty of twenty-five years was doubled to fifty years in accordance with to section 293.

A sentencing review panel later reduced these sentences. The sentence on count two was reduced from forty years to twenty years, the maximum allowed without enhancement. The ten-year minimum sentence without parole, imposed pursuant to section 286(c), remained. The sentence on count fifteen was reduced from fifty years to forty years. This left it enhanced by section 293.

In imposing the enhanced sentences, the circuit court relied on Whack's prior conviction on October 24, 1991, in the Circuit Court for Cecil County, for possession with intent to distribute controlled dangerous substances. Whack was sentenced in that case on February 20, 1992. The Court of Special Appeals affirmed the prior Cecil County conviction on November 27, 1992. The Court of Appeals

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state relating to the other controlled dangerous substances as defined in this subheading.

Id.


15. Whack, 338 Md. at 669, 659 A.2d at 1348.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id., 659 A.2d at 1349. After the sentencing review panel's reductions, Whack's total sentence was reduced from 85 years to 65 years, with 25 years to be served without parole. Id. at 669 n.2, 659 A.2d at 1349 n.2.
24. Id. at 670, 659 A.2d at 1349.
denied certiorari on April 21, 1993, twenty days after Whack was sentenced on the charges in Prince George's County.

At sentencing in Prince George's County, the trial judge rejected the argument that because Whack's earlier conviction was on appeal, it was not final and could not be used as a basis for imposing enhanced sentences. The Court of Special Appeals, in an unreported opinion, sided with the trial court. The court also held that the trial court could apply both sentence-enhancing sections to Whack's sentence. The Court of Appeals granted certiorari to decide whether a prior conviction that is on appeal can serve as a predicate for the imposition of enhanced punishment under sections 286(c) and 293 and whether both provisions may be used to enhance a sentence in the same case.

2. Legal Background.—

a. The Meaning of "Conviction."—Whack is not the first time the Court of Appeals had to resolve a statutory ambiguity concerning the word "conviction." In Myers v. State, the court determined that "the meaning of 'convicted' and 'conviction' turns upon the context and purpose with which those terms are used." Faced with the question of whether a person found guilty of perjury who had been given a sentence of probation before judgment was competent to testify in the face of a statute providing that "'[a] person convicted of perjury may not testify,'" the Myers court identified two possible meanings of conviction. First, conviction may refer to "the establishment of guilt prior to, and independent of, the judgment of the court." Second, conviction may refer to "the final judgment and sentence rendered by a court pursuant to a verdict or plea of guilty." The court stated that

27. Whack, 338 Md. at 669-70, 659 A.2d at 1348-49.
28. Id. at 670, 659 A.2d at 1349.
30. Id. at 11.
31. Whack, 338 Md. at 668, 659 A.2d at 1349.
32. 303 Md. 639, 496 A.2d 312 (1985).
33. Id. at 639, 642, 496 A.2d at 313.
34. Id. at 640, 496 A.2d at 312 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-104 (1984)) (emphasis in Myers). The court stated that because the General Assembly had not defined the meaning of "conviction," it was the court's duty "to ascertain its meaning in the context of [the statute]." Id. at 642, 496 A.2d at 313.
35. Id.
36. Id. at 642-43, 496 A.2d at 313-14. This was the common-law meaning of the term "convicted." Id. at 642, 496 A.2d at 313 (citing 2 J. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 521, at 731 (J. Chadbourn ed., 1979)); see also Francis v. Weaver, 76 Md. 457,
"unless the context in which the word is used indicates otherwise, a 'conviction' is the final judgment and sentence rendered by a court pursuant to a verdict or plea of guilty." 37 Pointing to the wording of the probation before judgment statute, 38 the court concluded that a sentence of probation imposed prior to judgment was not a conviction in the legal sense of the word, 39 and thus did not bar the witness in Myers from testifying. 40

The court found a different meaning for conviction in State v. Broadwater. 41 In Broadwater, the court considered a statute denying voter registration to an individual "convicted of theft or other infamous crime, unless he has been pardoned, or, in connection with his first such conviction only, he has completed any sentence imposed pursuant to that conviction." 42 At issue was the question whether multiple counts arising in the same criminal proceeding were to be treated as a single conviction or as multiple convictions in construing the words "first such conviction." 43 Repeating its position that the meaning of the words "convicted" and "conviction" depends upon the con-

467, 25 A. 413, 415 (1892) (explaining that in legal sense, conviction is used to denote the judgment of the court); Hunter v. State, 193 Md. 596, 606-07, 69 A.2d 505, 509-10 (1949) (citing numerous cases that support the majority view that a conviction includes not only the verdict of a jury but the imposition of a sentence or judgment).

37. Myers, 303 Md. at 645, 496 A.2d at 315.

38. Md. Ann. Code art. 27, § 641 (1982 & Supp. 1984). Section 641(c) provides in relevant part that at the satisfactory conclusion of the probationary period, "a person under this section shall be without judgment of conviction" and that the completed probationary sentence "is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of a crime." Id. § 641(c). Also, § 641(a) provides that if there was a determination of guilt or acceptance of a nolo contendere plea, a trial judge could "stay the entering of judgment, defer further proceedings, and place the person on probation." Id. § 641(a).

39. Myers, 303 Md. at 647, 496 A.2d at 316. "[A] person who receives probation before judgment is not convicted of the crime for which he has been found guilty, unless the person violates the probation order and a court enters a judgment on the finding of guilt." Id.

40. Id. at 648, 496 A.2d at 316. "The General Assembly, as evidenced by its careful use of the dispositive terms associated with this case, obviously was aware that a situation such as this might arise. Had the General Assembly intended to disqualify those found guilty, but not convicted, of perjury, it surely had the ability and knowledge to do so." Id. at 648-49, 496 A.2d at 317.


42. Id. at 343-44, 563 A.2d at 421 (quoting Md. Ann. Code art. 33, §§ 3-4(c) (1986)) (emphasis added).

43. Id. at 344, 563 A.2d at 421. The State, which sought to deny Tommy Broadwater, Jr., a former state senator, the right to re-register to vote, argued that each count for which a separate sentence could be imposed should be considered a conviction. Id. Broadwater contended that "first conviction" should apply to the criminal proceeding as a whole and not to each individual count. Id.
text and purpose for which the words are used, the court agreed with Broadwater that, because the purpose of the statute was to allow individuals convicted of a crime an opportunity to be rehabilitated and restored to their right to vote as a citizen, it would be contrary to the intent of the legislature to interpret conviction to apply to each individual count in a single criminal proceeding. Hence, the court concluded that "first such conviction" should be interpreted "in the broader, layperson's sense of the occasion of conviction of a person who is a first time offender, as opposed to a repeat offender."

The court's interpretation of legislative purpose also played a key role in its definition of the meaning of conviction in Shilling v. State. At issue was whether the State was required to give a person notice under Rule 4-245(c) that it intended to use a prior conviction for drunk driving, where the judge had imposed probation prior to judgment, in order to seek additional punishment under a subsequent offender provision. The State argued, consistent with Myers, that the prior violation, while sufficient to meet the repeat violation requirements of the drunk driving statute, was not a "prior conviction" within the meaning of Rule 4-245(c). Finding that the purpose of Rule 4-245(c) was to provide notice so that a defendant would have the opportunity to "intelligently conduct his defense," the court held that the State was required to provide the defendant with notice of its intent to use his prior conviction.

The two-pronged effort to ascertain the meaning of the word "conviction" in a statute through both precedent and the inference of legislative intent led to differing conclusions in Jones v. Baltimore City

44. Id. at 347, 563 A.2d at 423.
45. Id. at 348, 563 A.2d at 423.
46. Id. at 351-52, 563 A.2d at 425.
47. Id. at 351, 563 A.2d at 425.
49. Md. R. 4-245(c). This rule provides that "[w]hen the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court." Id.
50. Shilling, 320 Md. at 291-92, 577 A.2d at 84-85. Prior to amendment in 1991, Maryland law provided that "a court may not stay the entering of judgment and place a person on probation for a second or subsequent violation" of the state's driving while intoxicated statutes. Md. Ann. Code art. 27, § 641(a) (2) (1987).
51. The statute provides that if a person has received probation under the section, he is deemed to have been in violation of the statute. Md. Ann. Code art. 27, § 641(a)(2).
52. Shilling, 320 Md. at 296, 577 A.2d at 87.
53. Id. at 297, 577 A.2d at 87-88.
Police Department. At issue was a provision of the Law Enforcement Officer's Bill of Rights (LEOBR) that provides that a police officer must be given an administrative hearing prior to termination unless he has been "convicted" of a felony. A Baltimore City police officer was found guilty of two felony counts of distribution and possession of child pornography and was terminated without a hearing. The trial judge sentenced him to probation before entering judgment. The officer challenged the termination, arguing that he should have been given a hearing because he had not been legally "convicted" of a felony. Relying on the Myers precedent that a conviction means judgment and imposition of sentence unless the context indicates otherwise, a majority of the court held that the officer should have been granted a hearing prior to his firing. The majority found nothing in the legislative history or the purpose of the statute to "suggest a contrary result."

In a forceful dissent, however, Judge Chasanow challenged the majority's analysis of legislative intent and its reliance on Myers. He argued that the purpose of an administrative hearing is to determine whether an officer was guilty of the offense or violation charged. However, the officer's guilt was not in question because he had been tried and found guilty. Moreover, Judge Chasanow argued that there was clear legislative history indicating that the admin-

54. 326 Md. 480, 606 A.2d 214 (1992); see also id. at 490, 606 A.2d at 219 (Chasanow, J., dissenting).
55. Id. at 481, 606 A.2d at 214. LEOBR provides that "[a] law enforcement officer is not entitled to a hearing under this section if the law enforcement officer has been charged and convicted of a felony." Id. (quoting Md. Ann. Code art. 27, § 730(c) (1992)).
56. Id. at 481-82, 606 A.2d at 214-15.
57. Id. at 482, 606 A.2d at 215.
58. Id. at 483, 606 A.2d at 215.
59. Id. at 489, 606 A.2d at 218.
60. Id. “Whether we agree that such a rule would be beneficial is immaterial—we are not a legislative body and we are not permitted to engraft a strained or artificial interpretation upon a statute to achieve a result that comports with our idea of societal needs.” Id.
61. Id. at 490, 606 A.2d at 219 (Chasanow, J., dissenting). "The General Assembly could not have intended such a result.” Id.
62. Id. at 494-95, 606 A.2d at 221. Judge Chasanow argued that Myers does not dictate the result because the court had interpreted the words in different ways in the past. Id.
63. Id. at 493, 606 A.2d at 220. Judge Chasanow explained that a hearing under LE- OBR is a two-stage process, the objective in the first stage being to determine guilt. In the second stage, the hearing board makes a recommendation to the chief of police regarding the appropriate sanction. In this case, the city was willing to give Jones a stage-two hearing and allow him to make his case for reinstatement. However, the city objected to having to call witnesses, present evidence, and hold a full evidentiary hearing as required in a stage-one proceeding. Jones's position, on the other hand, was that he was entitled to reinstatement, back pay, and a new hearing to determine guilt. Id. at 493-94, 606 A.2d at 220-21.
64. Id. at 490, 606 A.2d at 219.
istrative hearing exception was passed to relieve local governments of the trouble and expense involved with conducting an additional hearing. In that context, he concluded, "conviction" should be "given its everyday meaning" as a determination of guilt "regardless of the sentence imposed."

Prior to Whack, the Court of Appeals had an opportunity to interpret the legislative intent of section 286(c). In Gargliano v. State, the court held that the mandatory minimum sentence prescribed by section 286(c) could be imposed only where the conviction for a prior offense preceded the commission of the principal offense. Because the statute was silent as to the sequence of the commission of the crime and the timing of convictions, the court said it had to "look beyond the words of the statute and to other evidence of legislative intent to determine which interpretation of the two [possible meanings of prior conviction] . . . best furthers the legislative object or goals." The legislative history of section 286(c) was of no help. Drawing on prior decisions and the general structure of the stat-

65. Id. at 496, 606 A.2d at 222.
66. Id. at 499, 606 A.2d at 223.
68. Id. at 431, 639 A.2d at 676. Gargliano sold drugs to a Maryland State police officer on three occasions in 1989 and 1990. He was tried and convicted on the first two sales in April 1991. Shortly after that trial, the State notified him that it intended to seek enhanced punishment in his trial on the third sale on the basis of his conviction. Id. at 431-32, 639 A.2d at 676. While there was no evidence that the State deliberately delayed charging Gargliano on the third sale in order to be able to get an enhanced sentence, the timing of the two trials and the possibility that trial dates could be manipulated was mentioned by the court as a factor in its decision that enhanced sentences could come into play only if the crime on trial had occurred after the prior conviction. See id. at 448, 639 A.2d at 684-85.
69. Id. at 438, 639 A.2d at 679.
70. Id. at 439, 639 A.2d at 680. The question for the court was whether the statute was "intended to apply only to defendants who fail to reform their behavior after a prior conviction," as Gargliano contended, or "to all defendants who amass multiple convictions," as the State contended. Id. at 438, 639 A.2d at 680. At no point in Gargliano did the court define the meaning of conviction. The implicit assumption appears to be that it referred to the judgment of the court and the imposition of sentence.
71. Id. at 441-42, 639 A.2d at 681.
72. Id. at 442-45, 639 A.2d at 682-83; see, e.g., Jones v. State, 324 Md. 32, 38, 595 A.2d 463, 466 (1991) (holding that the legislature intended to give convicted individuals a chance to rehabilitate themselves in adopting language of § 286(d) (1)); Montone v. State, 308 Md. 599, 606, 521 A.2d 720, 723 (1987) (finding that the sentence-enhancing statute was intended to identify individuals incapable of rehabilitation and this required that there be some opportunity for them to rehabilitate themselves); Garrett v. State, 59 Md. App. 97, 118, 474 A.2d 931, 941 (finding that deterrence rather than retribution was the intent of the legislature in enacting the statute), cert. denied, 500 Md. 483, 479 A.2d 372 (1984).
ute, the court concluded that the intent of the legislature in enacting section 286(c) was to "protect the public ... and to deter repeat offenders from perpetrating other criminal acts ... under the threat of an extended period of confinement."  

b. The Finality of Convictions.—In Butler v. State the Court of Special Appeals addressed essentially the same question raised in Whack: whether a predicate conviction had to be final before a sentence-enhancing statute could be applied. In Butler, an enhanced sentence was imposed in a robbery case pursuant to a sentencing statute when one of the predicate convictions was still on appeal. Butler argued that his earlier conviction could not be used to enhance his sentence because it was not final. The Court of Special Appeals agreed. The court did not elaborate on the reasons for its holding, noting only that, "[w]e believe that before the drastic effect of a [section] sentencing can be allowed to stand, the supporting conviction must be a final conviction." There was no appeal.

The federal code includes analogous statutory provisions similar to those at issue in Whack. Title 21, section 841 of the United States Code includes several sections that provide that a person who commits defined drug violations after one or more prior convictions have "become final" shall be given an enhanced sentence. Prior to 1970, the federal statute used the language "previously been convicted" instead of "have become final" to indicate the triggering event for imposition of an enhanced sentence. Federal courts of appeals considering this language prior to its amendment interpreted it to re-

73. Gargiano, 334 Md. at 440-41, 639 A.2d at 680-81. The court noted the various sections of the statute "form a comprehensive scheme of graduated mandatory penalties for repeat offenders." Id. at 440, 639 A.2d at 680.

74. Id. at 444-45, 639 A.2d at 683 (quoting Hawkins v. State, 302 Md. 143, 148, 486 A.2d 179, 182 (1985)). Given this purpose, there had to be some "provision of fair warning to previous offenders that if they continue to commit criminal acts after having had the opportunity to reform ... they will be imprisoned for a considerably longer period of time than they were subject to as first offenders." Id. at 444, 639 A.2d at 682-63.

76. See supra text accompanying note 31.
80. Id. (emphasis added); see also Whack, 338 Md. at 676 & n.5, 659 A.2d at 1352 & n.5 (discussing these provisions).
81. Whack, 338 Md. at 675, 659 A.2d at 1352.
fer to the judgment of a trial court after a determination of guilt. After the 1970 amendments, however, federal courts generally have interpreted this and similar provisions as requiring the exhaustion of all appeals.

Courts in other jurisdictions are split on the issue of whether a predicate conviction must be final. In the past, allowing convictions that were not final to be used to enhance sentences was the minority rule. This may be changing, however, as more jurisdictions appear to be adopting this position.

3. The Court's Reasoning.—Writing for the majority in Whack, Judge Raker began by noting that the statute does not define "convic-
tion,” “prior conviction,” and “previously has been convicted.” According to the court, the word “conviction” can be interpreted in three different ways:

in its general and popular sense, to mean establishment of guilt pursuant to a verdict or plea of guilty; in its legal and technical sense, to mean following judgment or sentence; or in its “final” sense, to mean establishment of guilt, judgment, or sentence, and absence or resolution of any appeal.

In resolving which of these interpretations to employ, the court looked first to precedent and authority. Applying Myers v. State, the court held that “prior convictions pending on appeal may be used to impose enhanced sentences under § 286(c) and § 293.” The court also considered legislative intent and concluded that a finality requirement would be counter to the intent and purpose of the two statutes.

The court rejected Whack’s reliance on recent federal cases and his argument that judicial economy, as well as the need to avoid resentencing in cases where the appeal of a prior conviction was successful, required a decision for finality. Judicial economy, the court admitted, “prompted Congress to require that a prior conviction be final before it can be used as a predicate for an enhanced penalty.” The General Assembly has not imposed a similar requirement, however.

87. Whack, 338 Md. at 672, 659 A.2d at 1350. “[W]hether the statutes require the absence of a pending appeal on the prior conviction is unclear on the face of the statutes.”

88. Id. at 675, 659 A.2d at 1351.

89. 303 Md. 639, 645, 496 A.2d 312, 315 (1985); see supra notes 32-40 and accompanying text. “[U]nless the context in which the word is used indicates otherwise, a 'conviction' is the final judgment and sentence rendered by a court pursuant to a verdict or plea of guilty.” Myers, 303 Md. at 645, 496 A.2d at 315.

90. Whack, 338 Md. at 674, 659 A.2d at 1351.

91. Id. at 678, 680, 659 A.2d at 1353, 1354. The court defined the intent of the legislature in several ways: “first, deter the future commission of criminal offenses by persons who have previously been convicted and subject to the threat of punishment,” id. (quoting Gargliano v. State, 334 Md. 428, 442-43, 639 A.2d 675, 682 (1994)); second, to identify defendants “who have not reformed their behavior after prior convictions and incarcerating such defendants for a longer period than would otherwise be applicable in order to protect the community and deter others from similar behavior,” id. (quoting Gargliano, 338 Md. at 444, 639 A.2d at 682); third, “to protect society against repeat drug offenders and to deter recidivism,” id., 659 A.2d at 1354; and fourth, “to punish repeat drug offenders more severely,” id. at 683, 659 A.2d at 1355.

92. Id. at 676, 659 A.2d at 1352.

93. Id. at 677, 659 A.2d at 1352. The court agreed with the Court of Special Appeals that the appropriate analogy was to federal law before it was amended in 1970, noting that the earlier version “was interpreted by several courts to mean convicted in the trial court.”
The *Whack* court also rejected a contrary decision by the Court of Special Appeals in *Butler v. State,* stating:

The appellant thus appeals, let it be noted, not to the binding authority of *Butler* but to the force of its logic. We must confess, however, that the force of its logic eludes us. *Butler* established its finality requirement without defining finality, in a single unilluminating paragraph. It announced its holding as an *ipse dixit* but engaged in no analysis whatsoever of the issue before it. Neither did it cite authority where such analysis might be found.

The court also rejected the argument that because *Butler* was decided two years before section 286 was enacted, the court should assume the legislature agreed with the decision and, through its silence, ratified *Butler*’s interpretation of the law. The court explained that because *Butler* was not a decision by the Court of Appeals, the legislature was not bound by its outcome. Moreover, there was no evidence that the General Assembly’s attention was ever called to *Butler.* The court also rejected the argument that because convictions on appeal cannot be used for purposes of impeachment, they should not be allowed for sentence-enhancement purposes.

As to whether the two sections could be applied simultaneously to different counts in the same criminal proceeding, the court noted that the two provisions enhance the sentence in different ways. The

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*Id.*, 659 A.2d at 1353. The court stated that a finality requirement would give the criminal defendant an “undeserved windfall.” *Id.*


96. *Id.*

97. *Id.* at 681, 659 A.2d at 1354. “[J]udicial construction of a statute has little or no application when the construction is not by the highest court of the jurisdiction involved.” *Id.; see also* United States v. Streidel, 329 Md. 533, 551 & n.12, 620 A.2d 905, 914 & n.12 (1993) (stating the General Assembly may well wait for authoritative interpretation from the Court of Appeals before reacting to interpretation of the Court of Special Appeals).


99. *Id.; see MD. CODE ANN., CTS. & JUD. PROC. § 10-905(a) (1995) (barring convictions subject to or pending appeal for purposes of impeachment).

100. *Whack*, 338 Md. at 681, 659 A.2d at 1354. The difference, the court said, is that the damage cannot be undone if a successful appeal is taken when used to impeach, whereas a sentence improperly imposed can be reversed under the Uniform Post Conviction Procedure Act, Md. Ann. Code art. 27, § 645A (1992). *Whack*, 338 Md. at 681, 659 A.2d at 1354.
The court agreed with the Court of Special Appeals that there was no ambiguity or inconsistency in their meaning and application.101

Writing in dissent, Judge Bell, joined by Judge Eldridge, argued that “[w]here a statute is silent as to a prerequisite to its application and the legislative intent is unclear on the matter, the rule of lenity applies.”102 Given that the key statutory terms were not defined103 and the legislative history provided no guidance,104 Judge Bell concluded that the statute was ambiguous.105 Consequently, Judge Bell argued that the rule of lenity was applicable because “ambiguous penal statute[s] must be ‘strictly construed so that only punishment contemplated by the language of the statute is meted out.’”106

While agreeing that the meaning of conviction must “be defined in light of the statutes’ purpose,”107 Judge Bell concluded that the rule of lenity should apply and the court should rule in the way most favorable to the defendant.108

101. Whack, 338 Md. at 682-83, 659 A.2d at 1355. Section 286(c) enhances the minimum sentence by mandating 10 years without parole, while § 293 allows for the doubling of the maximum sentence. Md. Ann. Code art. 27, §§ 286(c), 293 (1992 & Supp. 1994). The court limited its holding to the question of whether the two provisions could be applied to different counts in the same proceeding. Whack, 338 Md. at 682, 659 A.2d at 1355. The court did not determine whether both statutes may be used to enhance a sentence on the same count. Id.

102. Whack, 338 Md. at 683, 659 A.2d at 1355 (Bell, J., dissenting); see supra notes 7-8 and accompanying text (discussing the rule of lenity).

103. Whack, 338 Md. at 685, 659 A.2d at 1356 (Bell, J., dissenting). "No where . . . are the terms ‘conviction,’ ‘prior conviction,’ or ‘previously has been convicted’ defined." Id. "The statutes, therefore, do not expressly provide guidance as to the Legislature’s intent." Id.

104. Id. “The legislative intent is not apparent from the legislative history of the statutes either.” Id. Judge Bell quoted the finding in Gargliano that nowhere in the legislative history of § 286 were the words “previously has been convicted” defined. Id. (citing Gargliano v. State, 334 Md. 428, 441-42, 639 A.2d 675, 681 (1994)).

105. Id.

106. Id. at 685-86, 659 A.2d at 1356-57 (quoting Gargliano, 334 Md. at 437, 639 A.2d at 679). “The rule [of lenity] expressly prohibits a court from interpreting a criminal statute so as to increase the penalty it places on a defendant ‘when such an interpretation can be based on no more than a guess as to what [the legislature] intended.’” Id. at 686, 659 A.2d at 1357 (quoting Monoker v. State, 321 Md. 214, 222, 582 A.2d 525, 529 (1990)).

107. Id. at 687, 659 A.2d at 1357. Judge Bell agreed with the majority’s determination that the purpose of the two statutes is to identify "defendants who have not reformed their behavior after prior convictions." Id. at 687-88, 659 A.2d at 1357-58 (quoting Gargliano, 334 Md. at 444, 639 A.2d at 682-83).

108. Id. at 689, 659 A.2d at 1359. The dissent also argued by analogy between §§ 286(c) and 293 and § 643B, which it argued imposes a requirement of finality “by its express terms.” Id. Presumably this is a reference to § 643B(b), which imposes a mandatory life sentence on “any person who has served three separate terms of confinement in a correctional institution as a result of three separate convictions of any crime of violence,” and § 643B(d), which provides for an enhanced sentence for a second conviction of a crime of violence after serving a term of confinement. Md. Code Ann. art. 27, § 643B(b), (d) (1992
4. Analysis.—Confronted with two ambiguous statutes, the Court of Appeals had three choices: (1) it could admit that it was impossible to unambiguously interpret the statutes, in which case application of the rule of lenity would be appropriate;\(^9\) (2) it could interpret the statutes in light of the way the same or similar statutes had been interpreted in the past;\(^10\) or (3) it could look for meaning in the context and purpose of the statutes.\(^11\)

The dissent argued for the first option.\(^12\) However, adopting the rule of lenity would, in effect, impose a finality requirement in Maryland. This was clearly something the court was reluctant to do on its own.\(^13\) Nor were there compelling circumstances in the facts or context in which the question arose that gave the court reason to apply the rule of lenity in this case.\(^14\) Significantly, no legal harm would come to a defendant by refusing to invoke the rule. If a predicate conviction that is used to enhance a sentence is later overturned, the defendant is entitled to have his enhanced sentence reduced under the Uniform Post Conviction Procedure Act.\(^15\) In contrast, if the

\(^9\) & Supp. 1994). Arguably, if a person has served out his term of confinement, his sentence might be considered final. But nowhere does § 643B explicitly specify that convictions be final. Indeed, subsection (c), providing for sentence on a third conviction provides that there be two prior convictions but only one term of confinement. Id. § 643B(c). Without an explicit requirement for finality, the second conviction in that case presumably could be on appeal without violating the explicit terms of 643B(c). See id.

\(^10\) See Gargliano, 334 Md. at 437, 639 A.2d at 679 (noting highly penal statutes like § 286(c) must be strictly construed and that rule of lenity requires court to construe any ambiguity in favor of lenity so as to not increase penalty based on no more than a guess as to legislative intent).

\(^11\) Id. at 436, 639 A.2d at 679. In Gargliano, the court noted that:

"Section 286(c) must be construed in light of the construction we have previously given to similarly worded enhanced penalty statutes, as "statutes that deal with the same subject matter, share a common purpose, and form part of the same system are in pari materia and must be construed harmoniously in order to give full effect to each enactment.""

\(^12\) See id. at 436, 639 A.2d at 679. In Gargliano, the court noted that:

"Section 286(c) must be construed in light of the construction we have previously given to similarly worded enhanced penalty statutes, as "statutes that deal with the same subject matter, share a common purpose, and form part of the same system are in pari materia and must be construed harmoniously in order to give full effect to each enactment.""

\(^13\) See, e.g., Gargliano, 334 Md. at 448, 639 A.2d at 684-85. Gargliano's second conviction was on a drug sale that occurred before he was charged in the first case, giving rise to the suspicion—or at least the possibility in future cases—that prosecutors deliberately could delay a prosecution in order to get an enhanced sentence. Id. The rule of lenity was a convenient tool to support the court's decision to ensure that this could not happen.

\(^14\) MD. ANN. CODE art. 27, § 645A (1992). The Uniform Post Conviction Procedure Act gives a criminal defendant sentenced to more than the allowable sentence a way to have his sentence reduced. Subsection (a) provides that:
any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation . . . who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law . . . may institute a proceeding under this subtitle in the circuit court for the county to set aside or correct the sentence. . . .

*Id.* Although mentioned only obliquely in the opinion, *Whack*, 338 Md. at 681, 659 A.2d at 1354, it is reasonable to assume that the presence of a well-established mechanism to correct sentences imposed in violation of sentencing guidelines made it much easier for the court to agree to allow convictions on appeal to be used to enhance sentences.

116. Md. R. 4-345. Rule 4-345(b)(2) specifies that “[t]he court may not increase a sentence after the sentence has been imposed.” Md. R. 4-345(b)(2). Rule 4-345(a) does provide, however, that “[t]he court may correct an illegal sentence at any time.” Md. R. 4-345(a). This raises the possibility that the State could petition for review of a sentence under § 286(c), which mandates a 10-year minimum sentence. Md. Ann. Code art. 27, § 286(c) (1992 & Supp. 1994). This would not be true of a sentence enhanced by § 293, which only gives a judge the option of imposing an increased sentence, however. *Id.* § 293.

117. *Whack*, 338 Md. at 677, 659 A.2d at 1353. There may be an argument based in judicial economy for a rule that would avoid the need for resentencing hearings, but this is an issue for the court to decide and it obviously was not one with which they were concerned.

118. *Id.* at 673-74, 659 A.2d at 1351-52; see *supra* notes 7-8 and accompanying text.

119. *Whack*, 338 Md. at 672, 659 A.2d at 1350.

120. 326 Md. 480, 606 A.2d 214 (1992); see *supra* notes 54-66 and accompanying text.

121. *Jones*, 326 Md. at 489, 606 A.2d at 218. In holding that probation before judgment was not a conviction sufficient to excuse the police department from holding a hearing prior to termination under LEOBR, the *Jones* majority relied primarily on precedent. *Id.* The dissent, however, emphasized the purpose and intent behind LEOBR in arguing that the legislature would never have intended such a result. *Id.* at 490-91, 606 A.2d at 219-22 (Chasanow, J., dissenting); see *supra* notes 61-66 and accompanying text.

122. *Whack*, 338 Md. at 675, 659 A.2d at 1351.
In terms of precedent, *Myers v. State* defined a rule that the court easily could cite as controlling. The *Myers* rule also reflected the common law, and there were supporting cases in other jurisdictions.

With respect to the court's analysis of context and purpose, *Gargliano v. State* already had defined the purpose of section 286(c) and similar sentence-enhancing statutes as being "to deter the future commission of criminal offenses by persons who have previously been convicted." There was no problem of notice in this case because an individual who was tried and sentenced in court once would be on notice that a subsequent conviction on a later crime would make him subject to enhanced penalties even if his first conviction was on appeal. While appearing to challenge the majority on its analysis of legislative purpose, in the end, the dissent relied on the argument that it is impossible to know what the legislature intended. The dissent made no substantive argument for adoption of a finality requirement.

The question of whether the two sentence-enhancing provisions could be applied simultaneously was essentially a non-issue given that the two provisions were applied to different counts. There was nothing contradictory or ambiguous about their application outside of the question of the finality of the conviction.

5. Conclusion.—In *Whack v. State*, the Court of Appeals decided that mandatory or enhanced sentencing provisions are triggered by a

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123. 303 Md. 639, 496 A.2d 312 (1985); see supra notes 32-40 and accompanying text.
124. *Whack*, 338 Md. at 674, 659 A.2d at 1351; see supra notes 32-40 and accompanying text (discussing the court's decision that conviction refers to the final judgment and sentence rendered by a court after a verdict or plea of guilty).
125. See supra notes 36-37 and accompanying text.
126. See *Whack*, 338 Md. at 679, 659 A.2d at 1353. Although the court appears to have paid only minimal analytical attention to the treatment afforded the question in other jurisdictions, it cited an extensive list of cases from other jurisdictions on both sides of the question. *Id.*
127. 334 Md. 428, 639 A.2d 675 (1994); see supra notes 67-74 and accompanying text.
128. *Whack*, 338 Md. at 678, 659 A.2d at 1353 (quoting *Gargliano*, 334 Md. at 442-43, 444, 639 A.2d at 682); see supra notes 67-74 and accompanying text.
129. The court did not address the question of notice or fair warning directly, although it did discuss the deterrent effect of the statutes at several points. *See Whack*, 338 Md. at 678, 680, 659 A.2d at 1353, 1354. The argument in *Gargliano* was that fair warning was essential if defendants were to be permitted to reform themselves. *Gargliano*, 334 Md. at 445, 639 A.2d at 683. The absence of any discussion of fair warning would appear to indicate the court did not see this as a problem in *Whack*.
130. *Whack*, 338 Md. at 682, 659 A.2d at 1355. Any argument that *Whack* had on this point disappeared when the sentence review panel reduced his sentence so each count was only enhanced by one statutory provision. *See supra* note 23 and accompanying text.
judgment and sentence on a prior crime and are not stayed by the fact that the judgment is on appeal. The decision is an extension of prior holdings that forced the court to distinguish between conviction as a determination of guilt and conviction as the entry of judgment after a finding of guilt. The court applied the reasoning of these cases to the new issue of whether there is a requirement for "finality" before a conviction can be used to enhance a sentence. The court's decision reflects its willingness to interpret ambiguous statutes in light of a judicial analysis of their purpose, and a rejection of rules of statutory construction that would limit arbitrarily the ability of the court to consider statutory purpose when there is only limited legislative history. The decision was made easier by the fact that provisions exist to correct inappropriate sentences should the appeal of a prior conviction be upheld.

DOYLE L. NIEMANN

F. Restricting Expert Testimony on Post Traumatic Stress Disorder

In Hutton v. State, the Court of Appeals held that expert testimony that an alleged victim of child sexual abuse suffered from Post Traumatic Stress Disorder (PTSD) was inadmissible for the purpose of proving that the abuse occurred. In reaching this conclusion, the court determined that expert testimony regarding PTSD implicates the credibility of the alleged victim and, hence, invades the province of the jury. Relying on Bohnert v. State, the court found that PTSD testimony exceeds the scope of proper expert opinion, and therefore, is inadmissible as a matter of law.

In so holding, Hutton limits the court's seemingly broad authorization, announced in State v. Allewalt, to use expert psychological testimony in cases involving sexual abuse. The court achieved this result by shifting its analytical framework from the balancing approach employed in Allewalt to the exclusionary approach employed in

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2. Id. at 504, 663 A.2d at 1301.
3. Id. at 504-05, 663 A.2d at 1301.
5. Hutton, 339 Md. at 504-05, 663 A.2d at 1301.
7. Id. at 109-10, 517 A.2d at 751-52.
8. See infra note 108 and accompanying text.
9. Allewalt, 308 Md. at 110, 517 A.2d at 752.
10. See infra note 106 and accompanying text.
As a result of the court's liberal application of the Bohnert approach, Hutton appears to erect a significant obstacle to the admission of expert psychological testimony in child sexual abuse cases.

1. The Case.—Steven Clarence Hutton was charged with sexually abusing his stepdaughter. According to the victim, Hutton forced her to perform sexual intercourse and fellatio on him. The abuse allegedly began when she was seven years old. Although the victim reported the abuse to her mother on several occasions, and once reported it to a classmate, Hutton continued the abuse until the time of his arrest, when the victim had reached the seventh grade.

At trial, the State presented the testimony of two child behavior experts. Gail Jackson, a clinical social worker who examined the victim on approximately thirty occasions, related the behavioral characteristics that she observed in the victim and testified that they were consistent with the behavioral characteristics of children who are confirmed victims of sexual abuse. When asked on redirect examination how she assessed the credibility of a patient claiming sexual abuse, Jackson responded that the "consistency" of the victim's story is indicative of whether the individual is "telling me the truth."

Dr. Nancy Davis, a psychologist with a specialty in child sexual abuse, opined that the victim suffered from PTSD triggered by child sexual abuse. She based this opinion on her review of a medical report issued from the Prince George's County Sexual Assault Center, a review of Ms. Jackson's interview notes, discussion of the case with Ms. Jackson, and her conversations with the alleged victim. When asked during the State's case in chief how she determined the credibility of the victim's story, Dr. Davis stated that the victim's symptoms of PTSD were "not in any way faked."

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12. Hutton, 339 Md. at 484, 663 A.2d at 1290.  
13. Id. at 484-85, 663 A.2d at 1291.  
14. Id. at 484, 663 A.2d at 1291.  
15. Id. at 484-85, 663 A.2d at 1291.  
16. Id. at 485, 663 A.2d at 1291. Additionally, the State presented the testimony of the victim's pediatrician, the victim's mother, and a social worker from Virginia, where the family had previously lived, in order to corroborate certain aspects of the victim's story. Id. at 485 n.4, 663 A.2d at 1291 n.4.  
17. Id. at 486-87, 663 A.2d at 1291-92.  
18. Id. at 487-88, 663 A.2d at 1292.  
19. Id. at 488, 663 A.2d at 1292-93.  
20. Id., 663 A.2d at 1292.  
21. Id. at 489-90, 663 A.2d at 1293.
Hutton was found guilty of two counts of second degree rape, two
counts of second degree sexual offense, and two counts of child
abuse. The Court of Special Appeals affirmed the conviction in an
unreported opinion. The Court of Appeals granted a writ of certio-
rari to consider two issues: first, whether an expert witness may testify
that an alleged victim of child sexual abuse is suffering from PTSD
triggered by child sexual abuse in order to prove that the defendant
committed the abuse; and second, whether an expert's testimony that
the victim's PTSD is "not in any way faked" was an impermissible com-
ment on the credibility of the victim.

2. Legal Background.—Child sexual abuse became a national
concern during the mid-1980s as a result of widespread media cover-
age of the problem. The increased public attention created a flood
of allegations of sexual abuse and an intense desire to punish offend-
ers of this heinous crime. However, the dynamics of child sexual
abuse create significant evidentiary obstacles to the effective prosecu-
tion of persons accused of the crime.

Many cases of alleged child sexual abuse are completely void of
any objective evidence of the offense. The abuse is often committed
by a family member in a private atmosphere. Because of numerous
factors, including fear of reprisal and fear of being blamed for the
incident, a child often delays in reporting an incident of sexual
abuse. Hence, physical evidence of the abuse is often not detecta-
ble. Therefore, the child's uncorroborated testimony is often the only
evidence available to a prosecutor in a child sexual abuse case. Conse-
quently, the jury's evaluation of the credibility of the alleged victim is
often the determinative issue in many child sexual abuse cases.

In order to support the victim's allegations of abuse, prosecutors
often attempt to introduce expert psychological testimony. The pur-
pose of the expert's testimony is to create an inference that a child has
been abused based upon the presence of certain behavioral character-

22. Id. at 484, 663 A.2d at 1290.
23. Id.
24. Id. at 483-84, 663 A.2d at 1290.
26. Id. at 2029 (citing David Hechler, The Battle and the Backlash: The Child
Sexual Abuse War 3 (1988)).
27. Id. at 2033-34.
28. Id. at 2033.
29. Id. at 2033-34.
30. Id. at 2034.
istics or syndromes in the child. 31 However, expert psychological testimony has met with varying degrees of acceptance depending on the purpose for which the testimony is offered. 32

Many courts reject the use of expert psychological testimony when it is presented as substantive evidence of child sexual abuse. 33 However, many courts do permit the use of expert psychological testimony when it is employed on rebuttal to bolster the victim’s testimony after the defense has impugned the child’s credibility. 34 Courts that do admit expert psychological testimony on rebuttal are careful to ensure that such testimony does not extend beyond the scope of rehabilitation and invade the province of the jury. 35

The Court of Appeals has confronted the issue of the admissibility of expert testimony regarding PTSD on several occasions. 36 In the leading case of State v. Allewalt, 37 the prosecution, seeking to rebut the defendant’s claim of consensual sex, elicited the opinion of a psychiatrist that the alleged victim of a rape suffered from PTSD. 38 The psychiatrist described PTSD as a “condition recognized in psychiatry as the emotional reaction to a traumatic event.” 39 Moreover, the psycho-

31. Id. at 2028 (noting that expert psychological testimony is often the determinative factor in measuring the credibility of the alleged victim and the defendant).
32. See infra notes 33-35 and accompanying text.
33. See, e.g., People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984) (indicating that rape trauma syndrome is not relied upon in the scientific community to prove that a rape occurred); Hutton, 339 Md. at 494-95, 663 A.2d at 1296; State v. Cressey, 628 A.2d 696, 699-702 (N.H. 1993) (indicating that an expert’s testimony regarding the effect of sexual abuse on children is not sufficiently reliable to be admitted in order to prove that the abuse occurred); State v. Hall, 412 S.E.2d 883, 890 (N.C. 1992) (noting that PTSD “does not alone prove that sexual abuse has in fact occurred”). But see Townsend v. State, 734 P.2d 705, 708 (Nev. 1987) (admitting expert testimony regarding PTSD in order to prove that the abuse actually occurred).
34. See, e.g., State v. Spigarolo, 556 A.2d 112, 123 (Conn.) (admitting expert testimony describing the general behavior characteristics of child sexual abuse victims in order to explain the inconsistent and incomplete disclosures of the alleged victim), cert. denied, 493 U.S. 953 (1989), and habeas corpus denied, 934 P.2d 19 (2d Cir. 1991); Hutton, 339 Md. at 496, 663 A.2d at 1296-97 (citations omitted); People v. Beckley, 456 N.W.2d 391, 404 (Mich. 1990) (admitting expert psychological testimony only when the alleged victim’s behavior becomes an issue in the case).
35. See, e.g., State v. Moran, 728 P.2d 248, 255 (Ariz. 1986) (permitting an expert to explain the behavior patterns of child sexual abuse victims to a jury, but refusing to allow the expert to go further and offer an opinion regarding the behavior of the alleged victim); Hutton, 339 Md. at 496-97, 663 A.2d at 1297.
36. See infra notes 37-67 and accompanying text.
37. 308 Md. 89, 517 A.2d 741 (1986).
38. Id. at 95, 517 A.2d at 744.
39. Id. at 94, 517 A.2d at 743. The basic diagnostic criteria of PTSD are as follows: (1) the person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone; (2) the traumatic event is persistently re-experienced; (3) persistent avoidance of stimuli associated with the trauma or
The psychiatrist stated that, based upon the information provided to him by the alleged victim, the traumatic event that caused the PTSD was rape. 40

Relying on *Beahm v. Shortall*, 41 the court held that the expert’s opinion regarding causation, based upon history provided by the alleged victim, was admissible as substantive evidence. 42 In reaching this conclusion, the court found that expert testimony regarding PTSD was relevant to the issue of consent. 43 Furthermore, the court determined that the probative value of expert testimony regarding PTSD outweighed any potential prejudice. 44

The *Allewalt* court articulated several reasons why the expert testimony regarding PTSD was not unduly prejudicial. First, the expert clearly informed the jury that his opinion was based upon history provided by the alleged victim. 45 Second, the expert stressed that rape was only one of many types of severe traumas that could trigger PTSD. 46 Third, the expert’s testimony was given on rebuttal in regard to the issue of consent. 47 The court concluded that “[b]y requiring a

numbing of general responsiveness (not present before the trauma); (4) persistent symptoms of increased arousal, not present before the trauma; (5) duration of the disturbance for at least one month. See generally *American Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders* (DSM-III-R) 250-51 (4th ed. rev. 1994).

40. *Allewalt*, 308 Md. at 95, 517 A.2d at 744.

41. 279 Md. 321, 368 A.2d 1005 (1977). “[A] physician . . . may present his medical conclusions and the information, including the history and subjective symptoms, received from the patient which provide the basis for the conclusions.” *Id.* at 327, 368 A.2d at 1009.

42. *Allewalt*, 308 Md. at 98-99, 517 A.2d at 745-46. In drawing an analogy to *Beahm*, the court stated that

[the psychiatrist’s] opinion that the PTSD which he diagnosed . . . was caused by the rape which [the alleged victim] described is as evidentiarily reliable as an opinion by an orthopedist who has been engaged only to testify ascribing a plaintiff’s subjective complaints of low back pain to soft tissue injury resulting from an automobile accident described in the history given by the plaintiff.

*Id.*, 517 A.2d at 746.

43. *Id.* at 99-100, 517 A.2d at 746. The court stated that, because PTSD is a diagnostic category in DSM III, “[t]here is no issue in this case over the fact that the psychiatrists and psychologists recognized PTSD as an anxiety disorder.” *Id.* at 99, 517 A.2d at 746.

44. *Id.* at 102-03, 517 A.2d at 747-48.

45. *Id.* at 108-09, 517 A.2d at 751. “[The psychiatrist] was asked by the State ‘[B]ased on what she told you, what would be the trauma that forms the basis for your opinion?’ He replied that ‘[t]he only trauma that she claims that she went through at that time was being raped.’” *Id.* at 95, 517 A.2d at 744.

46. *Id.* at 108, 517 A.2d at 751.

47. *Id.* at 109, 517 A.2d at 751. The court stated that,

[j]ust as the jury can understand that evidence of the complainant’s hysteria shortly following an alleged sexual assault tends to negate consent, so a jury, with the assistance of a competent expert, can understand that a diagnosis of PTSD tends to negate consent where the history as reviewed by the expert, reflects no other trauma which in the expert’s opinion could produce that medically recognized disorder.
full explanation on direct, by allowing liberal cross-examination, and by proper jury instructions, . . . the trial court can prevent any impression that the psychiatric opinion is like a chemical reaction." 48

Writing in dissent, Judge Eldridge rejected the notion that PTSD testimony was relevant to the issue of consent. 49 Judge Eldridge concluded that scientific literature indicated that PTSD was developed as a therapeutic tool to treat emotional injuries that resulted from traumatic events; 50 it was not designed to prove that a particular triggering event actually occurred. 51 Furthermore, like the Court of Special Appeals, Judge Eldridge determined that, even if PTSD was relevant to the issue of consent, the limited probative value of such testimony was clearly outweighed by its danger of prejudice. 52 Significantly, Judge Eldridge found that expert testimony regarding PTSD has a high degree of prejudicial effect because an expert "implicitly express[es] an opinion about the credibility of the witness's testimony." 53

Allewalt was subsequently applied in the context of a child sexual abuse case in Acuna v. State. 54 In Acuna, a psychologist testified in the State's case in chief that the alleged victim of child sexual abuse exhibited symptoms consistent with PTSD. 55 However, the expert did not testify that the child had been sexually abused. 56 Furthermore, the expert was not permitted to testify that the child displayed behavior consistent with other victims of child sexual abuse. 57 On cross examination, the psychologist linked the commencement of the victim's PTSD symptoms to the time frame when the sexual abuse allegedly occurred. 58 Relying on Allewalt, the court held that the testimony was not "evidentiarily meaningless" because the expert was able to link the traumatic event at issue to the victim's PTSD based on a review of the victim's history. 59

In both Allewalt and Acuna, the expert witnesses based their testimony on both objective and subjective evidence of sexual abuse that

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48. Id.
49. Id. at 116-17, 517 A.2d at 755 (Eldridge, J., dissenting).
50. Id. (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982)).
51. Id. (quoting People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984)).
52. Id. at 119, 517 A.2d at 756.
53. Id. at 120, 517 A.2d at 757.
55. Id. at 69, 629 A.2d at 1235.
56. Id.
57. Id.
58. Id. at 70-71, 629 A.2d at 1235-36.
59. Id. at 71, 629 A.2d at 1236.
was discerned from a review of the alleged victim's history. However in *Bohnert v. State*, the court was presented with a child sexual abuse case that rested completely on the subjective allegations of the alleged victim. In order to support the child's testimony, the State introduced the testimony of a social worker who had interviewed the alleged victim. Relying exclusively on the child's story, the expert concluded that the alleged victim had been sexually abused.

The court held that the expert's opinion testimony was inadmissible because it improperly interfered with the jury's responsibility to weigh the credibility of witnesses. Specifically, the court found that "[t]estimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." As a result, the court rejected the social worker's testimony because it was "tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying."

3. **The Court's Reasoning.**—In *Hutton*, the Court of Appeals held that expert testimony regarding PTSD was inadmissible when offered to prove that sexual abuse had occurred. In so holding, the court applied the reasoning of *Bohnert* and determined that PTSD testimony goes beyond the scope of proper expert opinion testimony because it

60. At issue in *Allewalt* was whether the alleged victim had consented to the sexual intercourse. State v. Allewalt, 308 Md. 89, 90, 517 A.2d 741, 741 (1986). Consequently, the expert witness did not speculate about whether a possible triggering event of PTSD had in fact occurred. *Id.* at 95-96, 517 A.2d at 744-45. In *Acuna*, the victim's mother witnessed the incident that led to the defendant's arrest for child sexual abuse, and undoubtedly related this knowledge to the expert when detailing the child's "developmental history." *Acuna*, 332 Md. at 67, 629 A.2d at 1234.


62. *Id.* at 268, 539 A.2d at 658.

63. *Id.* at 270-79, 539 A.2d at 559-60.

64. *Id.* at 276, 539 A.2d at 662. The social worker's source of all the evidence concerning the incident was the child—what she told [her], what the mother said the child told her, what the mother's friend said the child told her. [The social worker] proffered no evidence as to objective tests or medically recognized syndromes with respect to the child. . . . The opinion was reached on the child's unsubstantiated averments and "a certain sense about children" which [the social worker] believed she possessed.

65. *Id.* at 279, 539 A.2d at 663.

66. *Id.* at 278, 539 A.2d at 663. Additionally, the court stated that "[i]n ruling on a question of law a judge is either right or wrong, and discretion plays no part." *Id.* at 279, 539 A.2d at 663.

67. *Id.* at 278-79, 539 A.2d at 663.

68. *Hutton*, 339 Md. at 504, 663 A.2d at 1801.
amounts to a comment on the alleged victim's credibility. The court based its decision on several grounds.

First, the unique diagnostic criteria of PTSD require an expert to rely upon the alleged victim's story in order to make a diagnosis of PTSD. Second, expert testimony regarding PTSD may usurp the jury's function of determining the credibility of witnesses. The court found that this danger exists with PTSD testimony because a jury likely will give excessive weight to the expert's opinion without realizing that its validity depends upon the veracity of the alleged victim. Third, the responsibility of assessing the credibility of witnesses is traditionally entrusted to the jury and is a matter outside the realm of the expert's unique knowledge.

Based on this reasoning, the Hutton majority concluded that the trial court erred in admitting Dr. Davis's testimony regarding the existence of PTSD in the alleged victim as proof that the sexual abuse had occurred. The court found that "[i]n expressing an opinion as to PTSD, Dr. Davis . . . necessarily stated her opinion on the victim's credibility." As a result, the Hutton majority applied Bohnert and excluded Dr. Davis's testimony as a matter of law.

Nonetheless, the court authorized the use of expert testimony regarding PTSD when offered for a purpose other than to prove that the abuse occurred. The court stated that PTSD testimony might be admissible to refute a defense claim of consent to sexual intercourse or to explain inconsistent behavior on the part of the alleged victim.

After concluding its analysis of PTSD testimony, the court examined Dr. Davis's statement that the victim's symptoms were "not in

69. Id. at 505, 663 A.2d at 1301.
70. Id. at 503, 663 A.2d at 1300. The diagnostic criteria require the victim to re-experience the traumatic event. See supra note 39 and accompanying text. Because a mental health care professional objectively cannot determine this element of PTSD, an expert "is required to believe that the PTSD sufferer has experienced the traumatic experience related." Id.
71. Id.
72. Id.
73. Id.
74. Id. at 504, 663 A.2d at 1301.
75. Id. at 505, 663 A.2d at 1301.
76. Id.
77. Id. at 504, 668 A.2d at 1301.
78. Id. (citing People v. Taylor, 552 N.E.2d 131, 136-38 (N.Y. 1990)). The Taylor court stated that "we believe that patterns of response among rape victims are not within the ordinary understanding of the lay juror. For that reason, we conclude that introduction of expert testimony describing rape trauma syndrome may under certain circumstances assist a lay jury in deciding issues in a rape trial." Taylor, 552 N.E.2d at 136 (emphasis added).
any way faked." The *Hutton* majority, supported by the concurring opinion by Judge Rodowsky, found that Dr. Davis's statement amounted to a comment on the credibility of the alleged victim. As a result, the court held that the statement was a clear violation of *Bohnert*, and therefore was inadmissible as a matter of law.

At this point, the court had disposed of all the issues presented on appeal. However, in articulating its holding regarding the testimony of Dr. Davis, the court focused attention on the admissibility of the opinion of Ms. Jackson. Specifically, the *Hutton* majority questioned whether the trial court had erred in permitting Ms. Jackson to comment on the "consistency" of the alleged victim's story. Also, the *Hutton* majority expressed concern about whether Ms. Jackson's testimony, which compared the behavioral characteristics that she observed in the alleged victim with the behavioral characteristics commonly found in the class of victims of child sexual abuse (hereinafter "comparative behavioral testimony"), also implicated the credibility of the alleged victim.

Again relying on *Bohnert*, the court, in dicta, found that "both experts commented, impermissibly . . . on the victim's credibility." The court was somewhat ambiguous, however, as to what aspect of Ms. Jackson's testimony constituted improper expert opinion. In a relatively clear announcement, the court indicated that Ms. Jackson's comment regarding the "consistency" of the alleged victim's story amounted to an indirect statement of her belief in the "truthfulness" of the victim's story. Yet, in rather opaque language, the court appeared to imply that Mrs. Jackson's comparative behavioral testimony also implicated the credibility of the alleged victim and, therefore, was inadmissible under *Bohnert*. In an apparent reference to Ms. Jackson's comparative behavioral testimony, the court stated that "[i]n expressing an opinion as to PTSD, Dr. Davis, to an even greater extent than Ms. Jackson, necessarily stated her opinion on the victim's credibility."

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79. *Hutton*, 339 Md. at 489-90, 663 A.2d at 1293.
80. *Id.* at 505, 663 A.2d at 1301.
81. *Id.*
82. *Id.* at 504-05, 663 A.2d at 1301.
83. *Id.*
84. *Id.*
85. *Id.* at 505, 663 A.2d at 1301.
86. *Id.; see infra* note 92 and accompanying text (discussing how the ambiguity in *Hutton* regarding comparative behavioral testimony subsequently was handled in *Hall v. State*, 107 Md. App. 684, 670 A.2d 962 (1996)).
Having completed its analysis of the instant case, the *Hutton* majority revisited *Allewalt* in order to clarify its holding. The court stated that *Allewalt* was consistent with the line of cases that admit PTSD testimony in rape cases when the defense asserts the claim of consensual intercourse. In reaching this conclusion, the *Hutton* majority noted that the *Allewalt* court found that the expert testimony regarding PTSD did not implicate the credibility of the alleged victim because the defendant previously had acknowledged the intercourse but asserted that it was consensual.

Furthermore, the court stated that *Allewalt* also was aligned with those cases that admit expert psychological testimony on rebuttal in order to refute evidence challenging the consistency of the child's behavior. In this context, the court found that expert testimony regarding PTSD would assist the jury in understanding the "unique trauma experienced by minor victims of sexual abuse." However the *Hutton* majority was unclear as to whether an expert may employ comparative behavioral testimony or is limited to offering a clinical description of PTSD for this purpose. At one point, the court stated that "[t]he cases make clear . . . that the agent's role is that of an educator, 'supplying the jury with necessary information about child sexual abuse in general, without offering an opinion as to whether a certain child has been abused.'" Nonetheless, immediately thereafter, the court stated that "testimony admissible for that purpose is 'limited to whether the behavior of this particular victim is common to the class of reported child abuse victims.'"

87. *Hutton*, 339 Md. at 505-07, 663 A.2d at 1301-02.
88. *Id.* at 505, 663 A.2d at 1301.
89. *Id.* at 506, 663 A.2d at 1301.
91. *Hutton*, 339 Md. at 507, 663 A.2d at 1302 (quoting *Spigarolo*, 556 A.2d at 123).
92. See supra notes 85-86 and accompanying text (indicating that the language employed by the *Hutton* majority regarding the admissibility of Ms. Jackson's comparative behavioral testimony is unclear).

In *Hall v. State*, 107 Md. App. 684, 670 A.2d 962 (1996), a child sexual abuse case remanded by the Court of Appeals with the direction to reconsider its decision in the context of *Hutton*, the Maryland Court of Special Appeals found that "[n]othing in *Hutton* . . . prohibits an expert from opining that the child's behavior problems are consistent with abuse." *Id.* at 691-92, 670 A.2d at 965-66.
93. *Hutton*, 339 Md. at 507, 663 A.2d at 1302 (quoting *Cressey*, 628 A.2d at 702).
94. *Id.* (quoting *Beckley*, 456 N.W.2d at 406-07).
Judge Rodowsky, joined by Chief Judge Murphy, wrote a concurring opinion agreeing with the majority’s judgment that Dr. Davis’s testimony that the alleged victim’s symptoms were “not in any way faked” violated Bohnert. However, Judge Rodowsky rejected the majority’s conclusion that an expert’s diagnosis of PTSD was inadmissible to prove that child sexual abuse had occurred. In making this assertion, Judge Rodowsky argued that a diagnosis of PTSD precipitated by child sexual abuse, which was based on history provided by an alleged victim, does not implicate the credibility of the complainant. Judge Rodowsky based this argument on several grounds.

First, the foundation of an expert’s opinion has bearing on the weight that a jury assigns to the testimony and not on the question of its admissibility. Second, the court permits physicians to testify as to causation based on unconfirmable history provided by a patient, and hence, mental health providers should not be treated differently. Third, it would be irrational to admit a patient’s statements made for purposes of medical diagnosis or treatment as substantive evidence.

95. Id. at 507-08, 663 A.2d at 1302 (Rodowsky, J., concurring).
96. Id. at 508, 663 A.2d at 1302.
97. Id. at 508-14, 663 A.2d at 1302-05. In addition, Judge Rodowsky rejected the majority’s contention that a diagnosis of PTSD caused by child sexual abuse runs a danger of usurping the jury’s function by virtue of the notion that a jury would assign excessive weight to the testimony of the expert. Id. at 512-13, 663 A.2d at 1304-05; see supra notes 71-72 and accompanying text. Judge Rodowsky noted that a jury would be fully aware of the fact that the expert’s opinion depended upon the veracity of the alleged victim because at some point the expert would be required to state the basis of his opinion. Hutton, 339 Md. at 513, 663 A.2d at 1305. Consequently, the jury would be capable of performing its function of weighing the evidence.

Finally, Judge Rodowsky rejected the majority’s view that credibility assessment is outside the realm of an expert’s area of expertise. Id. at 513-14, 663 A.2d at 1305. Judge Rodowsky asserted that clinical guidelines require mental health professionals to assess the child’s credibility.

98. Id. at 509, 663 A.2d at 1303.
99. See Baltimore Transit Co. v. Truitt, 223 Md. 440, 445, 164 A.2d 882, 885 (1960) (admitting the opinion of an attending physician, based upon information furnished by the patient, that a herniated disk was caused by an automobile accident); Yellow Cab Co. v. Henderson, 183 Md. 546, 552-53, 39 A.2d 546, 550 (1944) (admitting a treating physician’s opinion, based on history provided by the victim’s mother, that a child’s drooping eyelid was caused by a motor vehicle collision).
100. Hutton, 339 Md. at 511, 663 A.2d at 1304 (Rodowsky, J., concurring).
101. Maryland Rule of Evidence 5-803(b)(4) provides that:

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis . . . [are] not excluded by the hearsay rule, even though the declarant is unavailable as a witness.

Md. R. 5-803(b)(4).
evidence but to exclude a mental health care provider’s diagnosis that was made in reliance on this information.  

Later in his concurrence, Judge Rodowsky articulated his belief that a diagnosis of PTSD precipitated by child sexual abuse is relevant to the determination of whether the abuse actually occurred. Furthermore, Judge Rodowsky asserted that the probative value of a diagnosis of PTSD outweighed any danger of prejudice that may be associated with the testimony.

Judge Eldridge, in a separate concurrence, rejected the analysis of Hutton based on the reasoning contained in his dissenting opinion in Allewalt. He therefore concurred in the result only.

4. Analysis—Hutton elevates the standard for admitting expert psychological testimony in child sexual abuse cases in Maryland. In a significant shift in the court’s jurisprudence, the Court of Appeals decided the question of the admissibility of expert testimony regarding PTSD by adopting the exclusionary approach applied in Bohnert.

102. Hutton, 339 Md. at 510-11, 663 A.2d at 1304 (Rodowsky, J., concurring).
103. Id. at 514, 663 A.2d at 1305.
104. Id. at 516, 663 A.2d at 1306. Judge Rodowsky noted that a significant number of courts have admitted expert testimony that related to similarities in the behavioral characteristics of children who have been sexually abused with the behavioral characteristics of the alleged victim. See id. at 517, 663 A.2d at 1307 (citations omitted). However, a number of courts have refused to admit such testimony on the grounds that no “universal symptomology of sexual abuse” is generally accepted by the psychiatric community because “[t]he American Psychiatric Association does not include the sexually abused child syndrome in its diagnostic manual.” See id. at 518, 663 A.2d at 1307-08 (quoting Mary Ann Mason, A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Cases, J. PSYCHIATRY & LAW, Fall-Winter 1991, at 185, 203).

However, Judge Rodowsky noted that PTSD is a generally accepted psychological disorder, as evidenced by its recognition by the American Psychiatric Association. See id. at 518, 663 A.2d at 1308 (citing AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (DSM-IV) 424 (4th ed. 1994)). Moreover, DSM-IV recognizes child sexual abuse as being a traumatic event that could precipitate PTSD. Id. at 518-19, 663 A.2d at 1308.

Consequently, Judge Rodowsky concluded that “when so many courts are prepared to accept ‘characteristics or behavior’ evidence in [child sexual abuse] cases, I submit that this [c]ourt should accept a diagnosis of PTSD . . . because the latter is much more reliable that the former.” Id. at 518, 663 A.2d at 1307.

105. Id. at 520, 663 A.2d at 1309 (Eldridge, J., concurring); see supra notes 49-53 and accompanying text.

106. Under the exclusionary approach, expert testimony is inadmissible if it invades the province of the jury by impermissibly implicating the alleged victim’s credibility. Maryland Rule of Evidence 5-702 states:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge,
instead of the balancing approach\textsuperscript{108} applied in \textit{Allewalt}.\textsuperscript{109} Consequently, the court excluded Dr. Davis's testimony regarding PTSD as a matter of law on the ground that such testimony implicated the credibility of the alleged victim.\textsuperscript{110} Curiously, the court could have reached the same conclusion, without rejecting the balancing approach of \textit{Allewalt}, by simply correcting \textit{Allewalt}'s erroneous determination that the probative value of PTSD testimony was not substantially outweighed by its prejudicial effect.

The immediate effect of \textit{Hutton} is the exclusion of expert psychological testimony regarding PTSD to prove that child sexual abuse occurred.\textsuperscript{111} More important, however, the court's decision to exclude Dr. Davis's testimony as violative of \textit{Bohnert} indicates that expert testimony that marginally implicates credibility is inadmissible as a matter of law.\textsuperscript{112} As a result, \textit{Hutton} may have profound ramifications upon the admissibility of expert psychological testimony in child sexual abuse cases in Maryland.

\textbf{a. Allewalt's Influence on Hutton.—}The court's reasoning in \textit{Allewalt} played a significant role in the \textit{Hutton} majority's decision to examine the admissibility of PTSD testimony through the \textit{Bohnert} framework of analysis. In \textit{Allewalt}, the court determined that testimony regarding PTSD was not unduly prejudicial as long as the expert did not present his opinion with an air of "mystical infallibility."\textsuperscript{113} In reaching this conclusion, the court stated that "[w]e emphasize that admissibility is a matter of trial court discretion based on the facts."\textsuperscript{114} Consequently, \textit{Allewalt} left open the possibility that the State could use

\begin{quote}
\textit{skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.}\textsuperscript{107} See \textit{supra} notes 61-67 and accompanying text.
\textit{The balancing approach refers to Maryland Rule of Evidence 5-403, which states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." \textit{Md. R.} 5-403.}\textsuperscript{108} See \textit{supra} notes 44-48 and accompanying text.
\textit{See \textit{supra} notes 74-76 and accompanying text.}\textsuperscript{110} \textit{Hutton}, 339 Md. at 504, 663 A.2d at 1301.
\textit{See infra} notes 127-140 and accompanying text.
\textit{Id.} at 109, 517 A.2d at 751.
\end{quote}
PTSD testimony in order to prove that child sexual abuse occurred. Moreover, the court's decision in *Acuna* appeared to give this possibility further support. In *Acuna*, the court held that there was no error under *Allewalt* in permitting an expert to testify regarding PTSD in the State's case in chief.

However, as stated by Judge Eldridge in his *Allewalt* dissent, scientific literature indicates that PTSD was not designed to prove that child sexual abuse actually occurred. Rather, PTSD was developed as a therapeutic tool to help treat emotional injuries that result from traumatic events. Therefore, the probative value associated with PTSD in the context of child sexual abuse cases is extremely low. When this fact is considered in relation to the danger of prejudice associated with expert testimony regarding PTSD, it is clear that the *Allewalt* court erred in determining that the probative value of PTSD testimony outweighed its prejudicial effect.

The *Hutton* majority, apparently recognizing the flawed reasoning of *Allewalt*, responded by applying *Bohnert* in order to exclude Dr. Davis's PTSD testimony. Drawing from Judge Eldridge's dissenting opinion in *Allewalt*, the court determined that a diagnosis of PTSD impermissibly implicates the credibility of an alleged victim. Therefore, expert testimony regarding PTSD, when offered to prove that the abuse occurred, is inadmissible as a matter of law under *Bohnert*.

However the court's decision to apply *Bohnert*, instead of correcting the erroneous balancing test performed in *Allewalt*, produces

115. "We hold only that in this case the trial court did not abuse its discretion in admitting the testimony of [the expert]." *Id.* (emphasis added).

116. See supra notes 54-59 and accompanying text.

117. *Allewalt*, 308 Md. at 116-17, 517 A.2d at 754-55 (Eldridge, J., dissenting).

118. *Id.* at 116, 517 A.2d at 754 (citing Kilpatrick, *Rape Victims: Detection, Assessment and Treatment*, CLINICAL PSYCHOLOGIST, Summer 1983, at 92, 94).

119. *Id.*; see also *People v. Bledsoe*, 681 P.2d 291, 301 (Cal. 1984) (observing that the relevant scientific "literature does not even purport to claim" that the disorder is a "scientifically reliable means of proving that a rape occurred"); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (stating "Rape Trauma Syndrome is not a fact finding tool, but a therapeutic tool useful in counseling").

120. In perhaps the most probative clinical study regarding the relationship of PTSD and victims of child sexual abuse, 31 children, all of whom were confirmed victims of sexual abuse, were interviewed to determine the frequency of PTSD and related symptoms. Susan V. Mc Leer et al., *Post Traumatic Stress Disorder in Sexually Abused Children*, 27 J. ACAD. CHILD ADOLESCENT PSYCHIATRY 650 (1988). Only 48.4% of the sample groups satisfied the diagnostic criteria of PTSD. *Id.* at 652. Moreover, the study did not employ a control group that would indicate the frequency of PTSD in the population of children who were not victims of sexual abuse. *See id.* at 651.

121. See supra text accompanying note 53.

122. See supra note 66 and accompanying text.
illogical results.\textsuperscript{123} As previously discussed, \textit{Hutton} authorizes the use of expert testimony regarding PTSD in order to counter a defense claim of consent or to explain inconsistent behavior on the part of the alleged victim.\textsuperscript{124} Consequently, \textit{Hutton} creates the highly anomalous situation whereby expert testimony regarding PTSD is inadmissible as a matter of law when offered to prove that the abuse occurred, but is admissible when offered to explain the alleged victim’s inconsistent behavior.

Moreover, \textit{Hutton} appears to contradict the court’s intent in reversing the Court of Special Appeals’s decision in \textit{Allewalt}. In \textit{Allewalt}, the court stated that the Court of Special Appeals “erects an unreasonably high standard” for the admission of expert psychological testimony by excluding it on the grounds of undue prejudice.\textsuperscript{125} Furthermore, the \textit{Allewalt} court believed that such “[a] slavish application of so rigid a requirement would eliminate most of the evidence at trials of all kinds.”\textsuperscript{126} In reality, however, \textit{Hutton}’s exclusion of expert testimony as a matter of law under \textit{Bohnert} actually creates a much higher obstacle to the admission of expert psychological testimony than that which the court rejected in \textit{Allewalt}.

\textbf{b. The Extension of Bohnert.}—\textit{Bohnert} stands for the proposition that “testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law.”\textsuperscript{127} In reaching this conclusion, however, \textit{Bohnert} did not specify what degree of credibility implication was sufficient to constitute testimony “relating to” the credibility of another witness. This determination is critical because “expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness.”\textsuperscript{128}

\textit{Hutton} substantially clarifies the ambiguity of \textit{Bohnert}. In rejecting Dr. Davis’s expert testimony regarding PTSD, the court indicated that expert testimony that has only a slight tendency to implicate credibility is inadmissible under \textit{Bohnert}. In so holding, the \textit{Hutton} majority extended the scope of \textit{Bohnert} and severely restricted the application of PTSD testimony in child sexual abuse cases in Maryland.

\begin{itemize}
\item \textsuperscript{123} In Part I of his concurring opinion, Judge Rodowsky, joined by Chief Judge Murphy, persuasively rejected the majority’s contention that expert testimony regarding PTSD implicates credibility and therefore, is inadmissible as a matter of law. See supra notes 97-102 and accompanying text.
\item \textsuperscript{124} See supra notes 77-78 and accompanying text.
\item \textsuperscript{125} State v. Allewalt, 308 Md. 89, 97-98, 517 A.2d 741, 745 (1986).
\item \textsuperscript{126} Id. at 101, 517 A.2d at 747.
\item \textsuperscript{127} Bohnert v. State, 312 Md. 266, 278, 539 A.2d 657, 663 (1988) (emphasis added).
\item \textsuperscript{128} Townsend v. State, 734 P.2d 705, 709 (Nev. 1987).
\end{itemize}
The *Hutton* majority believed that PTSD testimony implicated credibility because it "requires the expert to believe that the PTSD sufferer has experienced the traumatic experience related." However, the degree to which PTSD testimony implicates the credibility of an alleged victim is relatively insignificant when compared to the highly prejudicial nature of other examples of expert testimony that the court deemed to be violative of *Bohnert*. For example, the *Hutton* majority, supported by the concurring opinion of Judge Rodowsky, found Dr. Davis's comment that the victim's symptoms were "not in any way faked" amounted to a direct statement to the jury regarding the expert's assessment of the credibility of the alleged victim. Similarly, the testimony of the expert witness in *Bohnert* unanimously was declared to exceed the scope of proper expert opinion because it was based solely on the expert's personal intuition about the alleged victim's unsubstantiated story.

In contrast to these violations of *Bohnert*, Dr. Davis's testimony regarding PTSD had a much lower tendency to implicate the credibility of the alleged victim. Unlike the statement that the victim's symptoms were "not in any way faked," Dr. Davis's PTSD testimony did not amount to a direct comment on the victim's credibility because it did not attempt to tell a jury that the victim was being truthful. Rather, her testimony simply indicated that the diagnostic criteria of PTSD has been satisfied. Furthermore, unlike the PTSD testimony of the expert witness in *Bohnert*, Dr. Davis's PTSD testimony was based upon a thorough investigation of the clinical data surrounding the victim's story. Therefore her opinion regarding PTSD was narrowly confined to her trained evaluation of the alleged victim and the application of her unique skills as a psychological expert in child sexual abuse.

Undeniably, expert testimony regarding PTSD carries with it some danger of unfair prejudice. Expert testimony has an inherent tendency to support the allegations of either the alleged victim or the defendant. But as Judge Rodowsky persuasively argued in his con-

129. *Hutton*, 339 Md. 503, 663 A.2d at 1300.
130. See *supra* notes 79-81 and accompanying text.
131. See *supra* notes 64-67 and accompanying text.
132. See *Hutton*, 339 Md. at 509, 663 A.2d at 1303 (Rodowsky, J., concurring). Judge Rodowsky stated that "if the expert believes that the diagnostic criteria are met, including the stressor, the diagnosis would be PTSD. If the criteria actually exist, the diagnosis would be objectively correct." *Id.*
133. See *supra* text accompanying note 20.
134. See *supra* note 128 and accompanying text.
currying opinion,\textsuperscript{135} expert testimony that implicates credibility is not automatically inadmissible unless the opinion is de facto prejudicial.\textsuperscript{136} PTSD, because of its relatively marginal tendency to implicate credibility, does not appear to rise to a level that would require automatic exclusion under \textit{Bohnert}. By utilizing the balancing approach of Maryland Rule 5-403,\textsuperscript{137} as advocated in the concurring opinions of Judge Rodowsky\textsuperscript{138} and Judge Eldridge\textsuperscript{139} and employed by the Court of Special Appeals,\textsuperscript{140} trial judges would have discretion to determine the prejudicial effect of PTSD testimony based on the unique circumstances surrounding each case.

c. \textit{Ramifications of Hutton}.—\textit{Hutton} has important ramifications regarding the admissibility of expert psychological testimony in Maryland. By employing \textit{Bohnert} instead of the balancing test of Rule 5-403, \textit{Hutton} adopts an inflexible standard for determining the admissibility of expert psychological testimony in child sexual abuse cases. Under \textit{Hutton}, Maryland courts must automatically exclude expert opinion testimony if such testimony implicates the credibility of the alleged victim.\textsuperscript{141} Furthermore, the court apparently will invoke \textit{Bohnert} in regard to testimony that has only a slight tendency to implicate credibility.\textsuperscript{142} In so doing, \textit{Hutton} appears to blur the line separating expert testimony that is de facto prejudicial and subject to exclusion under Maryland Rule 5-702 from testimony that is only marginally prejudicial and is subject to the balancing test of Maryland Rule 5-403.

In the aftermath of \textit{Hutton}, prosecutors are faced with the difficult challenge of offering expert testimony that is probative of child sexual abuse without implicating the credibility of the alleged victim.

\textsuperscript{135} See supra notes 97-102 and accompanying text.
\textsuperscript{136} \textit{Hutton}, 339 Md. at 511, 663 A.2d at 1304.

It is true that this Court does not permit experts directly to tell a jury that they believe histories given by their patients. But the majority opinion in the instant matter goes far beyond \textit{Bohnert}. Attending physicians who testify that they prescribed medication, . . . exclusively based on the patient's description of physical pain, impliedly give credence to those subjective complaints. Nevertheless, their medical opinions as to the cause of the objectively unconfirmable complaints have been admissible. The opinions of mental health care providers, based on the diagnosis of a mental disorder, should not be treated differently.

\textit{Id.} (citations omitted).

\textsuperscript{137} See supra note 108 and accompanying text.
\textsuperscript{138} See supra note 104 and accompanying text.
\textsuperscript{139} See supra text accompanying note 52.
\textsuperscript{140} See supra text accompanying note 125.
\textsuperscript{141} See supra text accompanying notes 75-76.
\textsuperscript{142} See supra text accompanying notes 8-11.
Because *Hutton* only authorizes the use of expert testimony regarding PTSD in order to rebut a defense claim of consent or to explain the inconsistent behavior of the alleged victim, prosecuters will have little to gain by using PTSD testimony in a child sexual abuse case. For example, consent is never an issue in child sexual abuse cases. Furthermore, the diagnostic criteria of PTSD does not explain to a jury why a victim of child sexual abuse might recant her story or delay in reporting the abuse.

In light of the limited application of PTSD testimony, prosecutors, undoubtedly, will attempt to employ other forms of expert psychological testimony. Recent psychological research indicates that Child Sexual Abuse Accommodation Syndrome (CSAAS) and the observation of age-inappropriate sexual behavior have a high degree of probative value in the context of child sexual abuse cases. Keeping in mind the *Hutton* majority's concerns with credibility implication, it is likely that a description of CSAAS would be admissible to explain the inconsistent behavior of the alleged victim, but would be inadmissible to prove that the abuse occurred. However the observation of age-inappropriate sexual behavior, considered highly probative of child sexual abuse, would not be admissible for any purpose because of its tendency to implicate the credibility of the alleged victim.

143. See supra note 78 and accompanying text.
145. See supra note 39 and accompanying text (describing the diagnostic criteria of PTSD).
146. See Myers, supra note 144, at 37 (noting that CSAAS describes five characteristics commonly observed in sexually abused children: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; (5) retraction).
147. Id. at 42 (indicating that age-inappropriate sexual behavior displayed by a child includes sexualized play, preoccupation with genitals, excessive masturbation, and age-inappropriate sexual knowledge).
148. See id. at 68 (noting that “[CSSAS] has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred.”); see also id. at 62 (indicating that age-inappropriate knowledge of sexual acts or anatomy, sexualized play, the appearance of genitalia in a child’s drawings, and sexualized play with anatomical dolls is considered by psychologists as probative of sexual abuse).
5. Conclusion.—"Society must tread a measured path that avoids ignoring the reality of child sexual abuse and avoids as well the possibility of unjust conviction of this most shameful of crimes."

In attempting to achieve this delicate balance, the Court of Appeals appears to have adopted a restrictive framework for analyzing the admissibility of expert psychological testimony in child sexual abuse cases. By employing Bohnert to exclude expert testimony regarding PTSD, the Hutton majority rejected its previous jurisprudence that emphasized that the admissibility of expert psychological testimony was a matter of trial court discretion. Moreover, in doing so, the court indicated that expert testimony that has a relatively minor tendency to implicate the credibility of an alleged victim was sufficient to invoke the strict rule of Bohnert. As a result, Hutton will significantly impair the ability of prosecutors to effectively employ expert psychological testimony in child sexual abuse cases.

ALFRED F. PETERSON

G. Defining the Standard for Abrogating the Psychotherapist-Patient Privilege

In Goldsmith v. State, the Court of Appeals held that a criminal defendant has no pretrial right to discovery of privileged psychotherapy records. To gain access at trial, a defendant must establish a reasonable likelihood that the records contain exculpatory information necessary for a proper defense. This standard is significantly more rigid for defendants than the balancing test used for educational records and therefore imports a higher degree of privilege to the psychotherapist-patient relationship.

The court’s decision is largely consistent with decisions from other jurisdictions. However, the court’s reasoning creates potential

3. Exculpatory evidence has been defined as "evidence which extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorable, is merely collateral or impeaching." Black's Law Dictionary 566 (6th ed. 1990).
4. See Zaal v. State, 326 Md. 54, 81-82, 602 A.2d 1247, 1261 (1992) (stating that defendant must demonstrate a likelihood that relevant information will be obtained in order to gain access to educational records); see also infra text accompanying note 60.
5. Goldsmith, 337 Md. at 132-34, 651 A.2d at 876-77.
6. See infra notes 64-65 and accompanying text.
problems in practice. Specifically, the majority made a disturbing distinction between private psychotherapists and psychotherapists paid by the government, implying that records in the hands of private psychotherapists warrant greater protection. In addition, the vagueness of the new standard makes it subject to widely differing interpretations and leaves this area of law in a state of uncertainty.

1. The Case.—Eugene Franklin Goldsmith was charged with committing various sexual offenses on his adopted stepdaughter. The criminal charges were not brought until more than ten years after the time that the acts were alleged to have occurred. Knowing that his stepdaughter regularly visited a psychologist, Goldsmith attempted to gain access to her psychotherapy records by filing a motion requesting a subpoena “for production of tangible evidence prior to trial” pursuant to Rule 4-264. Goldsmith also requested, and was granted, a subpoena calling for the stepdaughter’s psychologist to appear and produce his records at trial pursuant to Rule 4-265. At a hearing on the motion, Goldsmith’s defense counsel identified credibility as the crucial issue necessitating production. He argued that the records should be opened because the alleged incidents occurred over ten years earlier, therefore raising questions about his stepdaughter’s

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7. Goldsmith, 337 Md. at 125-26, 651 A.2d at 872-73.
8. Id. at 115, 651 A.2d at 868. Goldsmith was charged with committing sexual child abuse, second degree rape, second and third degree sexual offense, and unnatural and perverted sexual practices. Id.
9. Id. at 115-16, 651 A.2d at 868.
10. Id. at 116, 651 A.2d at 868. Rule 4-264 authorizes the trial court to issue subpoenas "commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action." Md. R. 4-264 (emphasis added).
11. Goldsmith, 337 Md. at 119, 651 A.2d at 869. Rule 4-265 details the procedures for the court clerk and the parties for issuing a subpoena for trial of tangible evidence that is not privileged. See Md. R. 4-265.
12. The trial court’s record was not clear as to what motion was being considered at the hearing. The majority of the Court of Appeals thought that the hearing addressed Rule 4-264 and evidence before trial, but conceded that a trial subpoena under Rule 4-265 could be reviewed pretrial, as here, on a motion to quash or a motion for a protective order. Goldsmith, 337 Md. at 117-18, 132, 651 A.2d at 869, 876. In his dissent, Judge Bell argued that the trial court was in fact ruling on a motion by the prosecution to keep the witness's privileged psychotherapy records from being discovered by the defense at trial despite the existence of a Rule 4-265 subpoena. Id. at 140 n.4, 651 A.2d at 880 n.4 (Bell, J., dissenting).
13. Id. at 117-18, 651 A.2d at 869.
emotional state in bringing the charges at this time. The trial judge denied the motion and the records were not produced.

The defense never called the psychologist to testify, and at trial Goldsmith denied sexually abusing his stepdaughter. Goldsmith was found guilty of several sexual offenses, and sentenced to prison. On appeal, the Court of Special Appeals affirmed all but one part of the judgment in an unreported opinion. The Court of Appeals granted certiorari, framing the issue as "whether Maryland Rule 4-264 or the federal and/or state constitution entitles a defendant charged with child abuse and related sexual offenses to obtain pre-trial discovery review of the victim's psychotherapy records maintained by the victim's private psychotherapist."

2. Legal Background.—In Goldsmith, the court balanced a witness's privileged communication with her psychotherapist against a defendant's constitutional Confrontation Clause and due process rights. To make this determination, the court had to consider the

14. Id. at 118, 651 A.2d at 869. The Court of Appeals observed that the defendant's proffer was not sufficient to show "any likelihood that relevant information would be obtained by reviewing the records." Id. at 117, 651 A.2d at 869. The defense did not persuade the court that there was any reason to expect the psychologist's records to contain relevant information. Id. at 128, 651 A.2d at 874.
15. Id. at 118, 651 A.2d at 869.
16. Id. at 119, 120-21, 651 A.2d at 870.
17. Id. at 121, 651 A.2d at 870. Goldsmith was acquitted of second degree rape and found guilty of sexual child abuse, second and third degree sexual offense, and unnatural and perverted sexual practices. Id. Goldsmith's prison sentence was for 12 years, with 6 years being suspended. Id. Upon his release, Goldsmith would be placed on probation for 5 years, "conditioned upon payment of restitution, performing community service, and undergoing psychiatric counseling." Id.
18. Id.
19. Id.
20. Id. at 115, 651 A.2d at 868. In his dissent, Judge Bell noted that the issue as presented in the petition for certiorari was different. Id. at 135-39, 651 A.2d at 877-79 (Bell, J., dissenting). The court granted certiorari to consider the question: "Did the trial court err in refusing either to permit defense counsel to inspect the records of the complainant's treating psychologist or to conduct an in camera review of the record itself?" Id. at 139 n.2, 651 A.2d at 879 n.2 (quoting the petition for certiorari).
21. Criminal defendants have asserted a right to confidential information for use in their defense on the basis of constitutional protections guaranteed by the Sixth and Fourteenth Amendments. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.3 (2d ed. 1992).

Specifically, defendants have tried to invoke the Sixth Amendment's protection of the right of confrontation and the right of compulsory process. Id. The Sixth Amendment states in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

Criminal defendants have contended that the restriction of access to potentially relevant information is a violation of the Fourteenth Amendment's Due Process Clause, which
nature of the psychotherapist-patient privilege, the defendant’s right
to pretrial discovery in light of the victim’s right to privacy, and the
defendant’s right to fairly present a defense.

a. The Psychotherapist-Patient Privilege.—Given broad discretion
to determine the extent of the psychotherapist-patient privilege, federal
courts have split over its existence. At the state level, psychotherapist-
patient communication is governed by different statutes, allowing various
degrees of privacy protection. Maryland’s law is set out in the Courts and
Judicial Proceedings Article, section 9-109: “Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient’s mental or emotional disorder.”

Prior to Goldsmith, the Court of Appeals had not addressed whether the psychotherapist-patient relationship is protected so as to

forbids any state from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1; see also LAFAVE & ISRAEL, supra, at 1016-19. Defendants have also argued that the Due Process Clause of the Fifth Amendment protects their right to discovery of information for use in preparing a defense. See, e.g., Goldsmith, 337 Md. at 124-25, 651 A.2d at 872; Pennsylvania v. Ritchie, 480 U.S. 39, 42-43 (1987).

22. FED. R. EVID. 501. The rule provides in pertinent part: “Except as otherwise required . . . the privilege of a . . . person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Id.

23. See Anne D. Lamkin, Should Psychotherapist-Patient Privilege Be Recognized?, 18 AM. J. TRIAL ADVOC. 721, 721-23 (1995). Lamkin discusses the status afforded the privilege in each of the 11 regional federal circuits. Id. at 721-23. Currently, three circuits—the Second, Sixth, and Seventh—have recognized the psychotherapist-patient privilege on public policy grounds. See id. at 721-22. Five circuits—the Fourth, Fifth, Eighth, Ninth, and Eleventh—have declined to adopt the privilege, finding no federal common-law basis for it. Id. at 722. Finally, three circuits—the First, Third, and Tenth—have not ruled definitively as to the existence of the privilege. See id. at 722-23. Recently, the Supreme Court agreed to hear a case out of the Seventh Circuit that could potentially resolve the conflicts among the circuits. Jaffee v. Redmond, 116 S. Ct. 334 (1995) (granting writ of certiorari); see Linda Greenhouse, Supreme Court to Rule on Establishing Therapist-Client Privilege, N.Y. TIMES, Oct. 17, 1995, at A23. This case involved a police officer who sought counseling from a licensed clinical social worker after mortally shooting a man while acting in the line of duty. Jaffee v. Redmond, 51 F.3d 1946, 1348-50 (7th Cir.), cert. granted, 116 S. Ct. 334 (1995). The Seventh Circuit became the third federal circuit to recognize the psychotherapist-patient privilege. Id. at 1355, 1357. The Supreme Court is likely to confine its ruling to apply only to the federal courts. See id. at 1354.

24. See Lamkin supra note 23, at 723-25. Texas is the only state that does not have at least a limited privilege for the psychiatrist-patient relationship. Id.

25. MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995). The statute also provides for six exceptions to when a patient may claim the privilege, none of which are applicable in this case. Id.
bar completely discovery of records within its boundaries. In contrast, the Court of Special Appeals has considered the extent of this privilege on several occasions.

In *Avery v. State*, the Court of Special Appeals characterized the privilege as virtually absolute when claimed by a patient, finding no constitutional basis for disclosure. With time, the court's view moderated, and in *Reynolds v. State* the court established a procedure for balancing the competing interests at stake. The *Reynolds* court allowed limited access to records for defendants who could prove that there was a "substantial possibility" that the records contained information that would affect the verdict.

**b. Pretrial Discovery Under Rule 4-264.**—In Maryland, subpoenas ordering the production of documents and other information are issued in accordance with Rule 4-264 at the discretion of the trial court. The rule grants to the circuit court the power to command a person by subpoena to produce information that is "not privileged."

**c. Constitutional Right to Pretrial Discovery.**—In *Brady v. Maryland*, the Supreme Court held that in a criminal trial the prosecution is required to disclose to the defense evidence that is exculpatory in nature. Lower courts have expressed broad agreement that the prosecution is said to be in control of evidence that is in the posses-

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26. *Goldsmith*, 337 Md. at 145, 651 A.2d at 883 (Bell, J., dissenting).
28. *Id.* at 536-38, 292 A.2d at 741. The court refuted the Sixth, Eighth, and Fourteenth Amendment theories offered by the appellant, although it considered no other constitutional arguments. *Id.*
31. *Id.* This procedure has been nullified, at least in part, by the *Goldsmith* court. *Id.* at 369, 633 A.2d at 464-65; *Goldsmith*, 337 Md. at 133-34, 651 A.2d at 877.
33. *Id.*; see *supra* note 10.
34. *Id.* 4-264.
36. *Id.* at 87. In *Brady*, the defense counsel had asked to examine the extrajudicial statements of the codefendant. *Id.* at 84. The prosecution turned over some of the statements, but withheld a statement in which the codefendant admitted to the actual homicide. *Id.* The defendant, having confessed to his participation in the robbery and been sentenced to death, was awarded a new trial limited to the question of punishment. *Id.* at 84, 90-91.
sion of any agency that has contributed to the investigation. Maryland has codified this understanding of discovery. However, the prosecution is not deemed to have “control” over all government documents. The Court of Special Appeals has noted that because “[h]ealth and social service agencies do not ordinarily report their findings or suspicions to the State’s Attorney . . . material in the files of those agencies, especially material protected by privilege, would not [normally] be subject to disclosure.” Furthermore, the Reynolds court declared that allowing the prosecution pretrial access to protected communications constitutes only a limited waiver of the patient’s privilege, and thus does not guarantee access to defendants. The Brady doctrine can become a factor in cases involving records kept by a government-employed psychotherapist.

The majority in Goldsmith distinguished between the limited pretrial rights of the accused, and the more expansive constitutional protections available at trial. In Weatherford v. Bursey, the Supreme Court announced that “[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one.” Maryland courts have consistently followed this principle.

37. See LAFAVE & ISRAEL, supra note 21, § 20.7, at 893-94.
38. Md. R. 4-263(g). The rule provides that:
   The obligations of the State’s Attorney under this Rule extend to material and
   information in the possession or control of the State’s Attorney and staff mem-
   bers and any others who have participated in the investigation or evaluation of
   the action and who either regularly report, or with reference to the particular
   action have reported, to the office of the State’s Attorney.

   Id.
   The court stated that disclosure was not available on the basis of due process, or under
   Rule 4-263(a)(1). Id. Section (g) of the rule refers to its entirety, including section (a)(1).
   Md. R. 4-263(g); see also supra note 38.
   material that was examined by the prosecution, and not “shielded from all eyes” was still
   considered privileged by the court. Id.
42. Goldsmith, 337 Md. at 121, 651 A.2d at 870-71.
44. Id. at 559. Lower courts agree that Brady and its progeny do not require pretrial
disclosure of evidence. Rather, due process demands only that evidence be disclosed in
   time for the defense to use it properly. See LAFAVE & ISRAEL, supra note 21, § 20.7, at 894-
   95.
45. See Evans v. State, 304 Md. 487, 509, 499 A.2d 1261, 1272 (1985) (stating that the
   defendant had no right to demand a pretrial deposition or pretrial interrogation of the
   witness); Kardy v. Shook, 237 Md. 524, 542, 207 A.2d 83, 93 (1965) (holding that persons
   under indictment have no constitutional right to take pretrial depositions of a state wit-
   ness); State v. Haas, 188 Md. 63, 69, 51 A.2d 647, 650 (1947) (noting that no right to
The Supreme Court has concluded that in some instances a defendant's constitutional right of confrontation outweighs a state's interest in safeguarding confidential communications. Cases involving privileged psychotherapy records are often analyzed as part of a larger group of decisions encompassing many different privacy interests. The Goldsmith court considered two such decisions, one by the Supreme Court, and the other from the Court of Appeals itself.

In Pennsylvania v. Ritchie, the Supreme Court examined a Pennsylvania statute that provided confidentiality for the records of a state child protective service agency. The statute contained an exception stating that reports could be disclosed pursuant to a court order. In holding that the defendant was entitled to an in camera review of the information by the trial court, the Court first cited the qualified nature of the privilege. The Court also indicated that although the prosecution had not viewed the evidence, the records were in the hands of a state investigative agency, and therefore the government was obligated to produce them if the records satisfied the Brady criteria. The Court tempered its holding by requiring that the defendant establish a basis for the claim of materiality before the trial court would be compelled to review the file. Finally, the Court held that direct access to the records by defense counsel was an unnecessary infringement on state policy, and opted instead for in camera review by the trial court alone.

In Zaal v. State, the Court of Appeals addressed the degree of protection afforded by a Maryland regulation to confidential children's records held by a county board of education. As in Ritchie, the records could be disclosed pursuant to a court order. The court first noted that these files were not discoverable under Rule 4-263.
because they were not in the possession or under the control of the prosecution. The \textit{Zaal} court announced that "[t]o overcome a privacy interest in . . . records, some relationship must be shown between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records." The court allowed discovery on the basis that the defendant met this standard. The court distinguished \textit{Zaal} from \textit{Ritchie}, declaring that educational records were entitled to a lesser degree of protection than child abuse information. This distinction paved the way for the \textit{Zaal} court to rule that the defendant was entitled to an expanded in camera review, with controlled access available to defense counsel.

d. \textit{Disclosure of Privileged Records at Trial}.—While some state courts have ruled that the statutory psychotherapist–patient privilege is absolutely immune from being abrogated by the rights of the accused, the majority of courts have held that the privilege is not absolute. The \textit{Goldsmith} court cited \textit{Commonwealth v. Bishop}, a case holding that psychotherapy records are not protected by an absolute privilege. The test announced in \textit{Bishop} attempts to strike a balance between the rights of the accused and society's interest in protecting

59. \textit{Zaal}, 326 Md. at 62 n.2, 602 A.2d at 1251 n.2. Records held by the county board of education were not considered to be in the possession or under the control of the prosecution. \textit{Id.}

60. \textit{Id.} at 81-82, 602 A.2d at 1261.

61. \textit{Id.} at 76, 602 A.2d at 1258.

62. \textit{Id.} at 86-88, 602 A.2d at 1263-64.


64. \textit{See Goldsmith}, 337 Md. at 151-54, 651 A.2d at 885-87 (Bell, J., dissenting).

65. 617 N.E.2d 990 (Mass. 1993). The \textit{Bishop} court stated that "in certain circumstances a defendant must have access to privileged records so as not to undermine confidence in the outcome of trial." \textit{Id.} at 994-95. The court set forth a five-stage test for determining access to privileged materials: (1) a judge makes written determination of whether records are privileged; (2) the judge rules on defense counsel's proffer of relevance, and reviews records in camera if the defense has met its burden of persuasion; (3) after individual review, the judge allows confidential access to records by both the defense and the prosecution for the purpose of determining which information must be disclosed to ensure a fair trial for the defendant; (4) the burden is on the defense to demonstrate that disclosure to the trier of fact is necessary, with any doubts the judge may have being resolved in favor of the defendant; (5) at trial the judge determines the admissibility of records that counsel may wish to introduce in a voir dire examination, keeping in mind that the duty to disclose is ongoing. \textit{Id.} at 997-98.

66. \textit{Goldsmith}, 337 Md. at 134-35 n.9, 651 A.2d at 877 n.9 (citing \textit{Bishop}, 617 N.E.2d at 998-99).
privacy by requiring the defendant to show that the request for disclosure is based on more than the desire to embark on a “fishing expedition” in search of unknown information that might assist an attack on the credibility of the patient-witness.67

3. The Court’s Reasoning.—In Goldsmith v. State, the court served notice that the psychotherapist-patient privilege is to be afforded strong protection in judicial proceedings.68 The Court of Appeals developed this protection by holding that criminal defendants have no pretrial right to discover privileged communications, and by designing a stringent trial standard that is difficult to overcome.69

Relying on the events that transpired at the trial level, Judge Chasanow, writing for the majority, framed the primary issue as a question of pretrial discovery rights for the accused.70 The majority ruled out the possibility of a common-law right to pretrial discovery in this case, observing that “the right to pre-trial discovery is strictly limited to that which is permitted by statute or court rule or mandated by constitutional guarantees.”71 The majority next ruled out a statutory right to pretrial discovery, stating that Rule 4-264 applies only to non-privileged information.72

Performing a constitutional analysis of a defendant’s pretrial right to discovery, the majority distinguished Pennsylvania v. Ritchie73 from the instant case.74 While Ritchie dealt with a statute setting out only a qualified protection for records held by a state agency,75 the Goldsmith law contained no qualifying provision allowing for judicial review, and pertained to the records of a private psychologist in this case.76 Based on these distinctions, the majority concluded that Ritchie did not constitutionally mandate a right to pretrial discovery77 because the majority viewed both of the Goldsmith variations as worthy of greater protection from abrogation.78

68. Goldsmith, 337 Md. at 133-35, 651 A.2d at 877.
69. Id.
70. Id. at 115, 651 A.2d at 868.
71. Id. at 121-22, 651 A.2d at 871.
72. Id. at 122-23, 651 A.2d at 871. Under Rule 4-264 discovery is only provided for things “not privileged.” Md. R. 4-264; see supra notes 10, 34 and accompanying text.
73. 480 U.S. 39 (1987); see supra notes 47-54 and accompanying text.
74. Goldsmith, 337 Md. at 124-26, 651 A.2d at 872-73.
75. Id. at 124-25, 651 A.2d at 872.
76. Id.
77. Id. at 126, 651 A.2d at 873.
78. Id. at 124-26, 651 A.2d at 872-73.
In distinguishing *Zaal v. State,*79 the majority again emphasized that the records at issue were controlled by a nongovernmental entity.80 Thus, the court's first holding found "no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party."81

The majority opinion then considered whether the defendant could even satisfy the standard necessary for pretrial discovery of non-privileged records.82 Applying the test announced in *Zaal,*83 the court determined that the showing made by the defendant could not even satisfy the standard required for disclosure of nonprivileged records because Goldsmith had failed to establish that the records were likely to contain relevant information.84

Although not compelled to do so, the majority chose to address the rights of the accused at trial.85 The majority explicitly acknowledged that "the defendant's constitutional rights at trial may outweigh the victim's right to assert a privilege."86 The court also made an appeal to the practical advantages of an in camera review of psychotherapy records at trial pursuant to Rule 4-265 as opposed to a pretrial procedure.87 The majority opined that a judge is in a better position to evaluate the relevancy and importance of privileged documents at trial, rather than at the premature pretrial stage.88

Even if the trial subpoena was reviewed pretrial on a motion to quash or a protective order, the *Goldsmith* court reasoned that the burden of proof for a defendant attempting to abrogate the psychotherapist-patient privilege should be higher than under the *Zaal* standard because the records in *Zaal* were entitled to a lesser degree of protection.89 The majority believed that to allow access to protected materials upon a simple assertion that the files may contain information relevant to credibility would effectively serve to eliminate the privilege because of the ease with which this standard could be met.90 The ma-

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80. *Goldsmith,* 337 Md. at 125-26, 651 A.2d at 872-73. The majority cited *Avery,* declaring that because the privileged files were not in the control of a state agency, "no disclosure is required under *Brady.*" *Id.*
81. *Id.* at 127, 651 A.2d at 873.
82. *Id.* at 127-29, 651 A.2d at 873-74.
83. *See supra* text accompanying note 60.
84. *Goldsmith,* 337 Md. at 127-29, 651 A.2d at 873-74.
85. *Id.* at 129, 651 A.2d at 874.
86. *Id.*
87. *Id.* at 130-32, 651 A.2d at 875-76.
88. *Id.*
89. *Id.* at 132, 651 A.2d at 876; *see also supra* note 80 and accompanying text.
90. *Goldsmith,* 337 Md. at 133, 651 A.2d at 876.
The majority determined that the social importance of maintaining privileged relationships warranted stronger protection of privacy. Therefore, the court held that "in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense." The majority found that Goldsmith did not meet this burden.

In his dissent, Judge Bell disputed the propriety of the majority's framing of the issue, observing that no distinction had been drawn between a Rule 4-264 subpoena and a Rule 4-265 subpoena by either the courts below or the grant of certiorari. Judge Bell asserted that state agency control of the records in Zaal had not been a factor in the decision. In advancing a different organizational approach to the case, he reviewed state court decisions that confront the question of whether the psychotherapist-patient privilege is absolute. Concluding that the majority's requirement for allowing a defendant access to privileged records is virtually impossible to satisfy, Judge Bell supported application of the standard and procedure announced in Zaal to cases involving a privilege.

4. Analysis.—In Goldsmith v. State, the Court of Appeals demonstrated a great reluctance to infringe upon the psychotherapist-patient privilege as codified at the Courts and Judicial Proceedings Article, section 9-109. By completely closing off pretrial access to protected communications, and instituting a rigorous trial standard, the court runs the risk of subordinating the constitutionally guaranteed rights of the accused. In addition, the distinction drawn by the court between private and governmental control of privileged records is troublesome as a matter of policy.

a. Eliminating Pretrial Discovery for Criminal Defendants Seeking Privileged Material from a Third Party.—The court's holding on pretrial discovery was well-grounded in legal precedent, and advanced a pol-

91. Id., 651 A.2d at 876-77.
92. Id. at 133-34, 651 A.2d at 877.
93. Id.
94. Id. at 135-39, 651 A.2d at 877-79 (Bell, J., dissenting). Judge Bell's dissent mistakenly refers to Rules 2-264 and 2-265, rather than Rules 4-264 and 4-265. Id. at 136, 651 A.2d at 878.
95. Id. at 142-43, 651 A.2d at 881-82.
96. Id. at 147-54, 651 A.2d at 884-87.
97. Id. at 154, 651 A.2d at 887.
98. Id. at 139-34, 651 A.2d at 876-77.
99. See supra notes 43-45 and accompanying text.
icy of strong protection for the psychotherapist–patient privilege without necessarily denying essential rights to those under indictment. Criminal defendants still have a right to be heard at trial and still maintain their trial discovery rights. As evidenced by the court’s own uncertainty as to whether the trial court was ruling on a motion under Rule 4-264 or Rule 4-265, distinguishing between pretrial and trial proceedings can be complicated. With the distinction announced in Goldsmith, practicing attorneys must pay special attention to procedural matters when a privilege is at issue.

b. Questioning the Subtle Distinction Between Government Psychotherapists and Private Psychotherapists.—The Goldsmith court noted that “the psychotherapist–patient privileged records at issue in the instant case were not kept by a state agency or required to be kept by a state agency.” This rationale implies that privileged information held by a state-employed psychotherapist is entitled to a lesser degree of protection than records in a private psychotherapist’s office. Such a distinction would be patently unfair. In Avery, the Court of Special Appeals, making no distinction among psychotherapists, ruled that when a witness claimed a privilege, the witness would be in control of the records for purposes of Brady. Therefore, under Avery, no Brady inquiry is necessary when a witness claims a privilege. Indeed, according to the Avery court’s reasoning, no “public-private” analysis is necessary because the privilege evoked belongs solely to the witness and not to the psychiatrist. Thus, the court misread Avery in stating that “[t]he [Avery] court held the psychiatrist was not a State agent.”

Judge Bell, disputing the majority’s interpretation of Zaal, revisited an important footnote that made clear that, although a state agency, a county school board was not part of the “prosecution team” for Brady purposes. Judge Bell properly expressed alarm at the potential for inequity brought about by the court’s discrimination between state-employed and private psychotherapists. The court

100. Goldsmith, 337 Md. at 132, 651 A.2d at 876; see also supra note 12 (noting the uncertainty on this in the trial record). The court entertained both possibilities and ruled on both. Goldsmith, 337 Md. at 132, 651 A.2d at 876.
101. Id. at 125, 651 A.2d at 873; see supra notes 76, 80 and accompanying text.
103. Goldsmith, 337 Md. at 125, 651 A.2d at 873.
105. Goldsmith, 337 Md. at 142, 651 A.2d at 881 (Bell, J., dissenting). Judge Bell noted that, in Zaal, the State was not obligated to produce records because of its role as prosecutor. Id.
106. Id. at 142-43, 651 A.2d at 881-82.
should have set down a uniform standard for all psychotherapists, trusting that any Brady complications could be dealt with as they arose.

c. Assessing the Goldsmith Standard.—In Goldsmith v. State, the Court of Appeals placed a heavy burden on a defendant to establish a reasonable likelihood that privileged material contains exculpatory information necessary for a proper defense.\textsuperscript{107} In his dissent, Judge Bell decried this standard as making the psychotherapist-patient privilege "effectively absolute."\textsuperscript{108}

The Goldsmith court was justified in granting strong protection to privileged psychotherapist-patient records. As noted above, some states have declared the privilege to be absolute, with no opportunity at all for discovery by a criminal defendant.\textsuperscript{109} This fact, combined with the court's recognition of a defendant's right to abrogate the witness's privilege,\textsuperscript{110} supports a characterization of the Goldsmith standard as being less than extreme. An examination of the Courts and Judicial Proceedings Article, section 9-109\textsuperscript{111} also lends credibility to the court's holding. In contrast to the controlling laws in both Ritchie\textsuperscript{112} and Zaal,\textsuperscript{113} the statute in Goldsmith makes no allowance for the disclosure of privileged communications pursuant to a court order.\textsuperscript{114} This distinction imports a higher degree of protection to the privilege at issue in Goldsmith.\textsuperscript{115}

d. The Scope and Long-Term Effects of the Court's Ruling.—There is little doubt that the Goldsmith court enunciated a rigorous standard difficult for defendants to meet.\textsuperscript{116} The Court of Appeals made clear that a defendant's constitutional rights do not extend so far as to abrogate a privacy interest "by the mere assertion of the possibility of impeachment evidence."\textsuperscript{117}

Although vague and strict, the standard the court articulated in Goldsmith is unlikely to render the psychotherapist-patient privilege,
as Judge Bell warned, "effectively absolute."\textsuperscript{118} The Goldsmith standard depends on a large dose of subjectivity for its administration. In particular, the phrase "reasonable likelihood" is open to widely differing interpretation.\textsuperscript{119} Judges and advocates will still encounter a measure of flexibility in the announced rule.

Entering the largely uncharted territory of the psychotherapist-patient privilege, the court left some questions unanswered. Little mention was made of how a defendant should go about fashioning a proffer in order to effectively challenge credibility by meeting the standard put forth. The majority was also silent as to the requisite procedure for review. Judge Chasanow mentioned in camera review more than once, but declined to elaborate.\textsuperscript{120} In his dissent, Judge Bell argued that the varied procedures the court announced in Zaal remain intact.\textsuperscript{121} The Zaal court justified the expansion of review options on the ground that the privacy interest in Zaal was owed a lesser degree of protection than the records at issue in Ritchie.\textsuperscript{122} Extending this reasoning to Goldsmith would produce in camera review as the sole option because the psychotherapist-patient privilege commands even greater protection than the child abuse reports in Ritchie. What should remain untouched from Zaal is the liberal standard of review for a trial court in conducting an in camera proceeding.\textsuperscript{123}

By placing a relatively strong burden on the defendant, but also contemplating the defendant's eventual use of the private information,\textsuperscript{124} the recently adopted Bishop test\textsuperscript{125} is fair to all parties. Judge Chasanow's reference to the Massachusetts case is important because the Goldsmith court offered few details as to the administration of its new standard. The Court of Appeals would have done well simply to adopt the Bishop test in its entirety, but looking to Bishop for guidance was also a wise idea. In light of the still amorphous state of the Goldsmith test, this reference to Bishop may well serve as a tempering influence on the development of the new standard.

### 5. Conclusion

The Goldsmith court attempted to strike a balance between a criminal defendant's trial rights and society's desire to

\textsuperscript{118} Id. at 162, 651 A.2d at 891 (Bell, J., dissenting).
\textsuperscript{119} See supra text accompanying note 92.
\textsuperscript{120} Goldsmith, 337 Md. at 131-32, 651 A.2d at 875-76.
\textsuperscript{121} Id. at 159-62, 651 A.2d at 890-91 (Bell, J., dissenting).
\textsuperscript{123} Id. at 87-88, 602 A.2d at 1264. This standard should remain in effect because it was not at all addressed by the Goldsmith court.
\textsuperscript{125} See supra note 65.
maintain the confidentiality of psychotherapy records. While facially the end result is supportable, the court’s reasoning, especially important in interpretive matters such as these, was problematic. As a result of this missed opportunity to present a unified analysis, it will be up to the lower courts to refine the Goldsmith standard.

ANTHONY M. PETTOLINA

H. Affirming the State’s Right to Try a Criminal Defendant In Absentia

In Walker v. State, the Court of Appeals held that a trial may proceed in a criminal defendant’s absence if the court determines that the defendant is cognizant of when the trial will begin but intentionally fails to appear on that date. In so holding, the court deviated from the United States Supreme Court’s decision that a federal court may not conduct a trial in absentia of a defendant who absconds before the start of trial. The court analyzed the pertinent provisions of Maryland Rule 4-231 and Federal Rule of Criminal Procedure 43, and determined that the language of the federal rule is sufficiently distinct from Maryland’s rule that a Maryland court is not bound by the Supreme Court’s ruling.

The court’s decision in Walker is consistent with prior case law in Maryland concerning the waiver of one’s right to be present at trial. The decision expands the circumstances under which a criminal defendant can effectively waive his right to be present.

This Note argues that the holding in Walker is a logical and sensible interpretation of Rule 4-231. The Walker court did not suggest that all defendants who are absent at the beginning of trial necessarily have relinquished their right to be present. Rather, Walker reaffirms

2. Id. at 255, 658 A.2d at 240.
3. Id. at 261, 658 A.2d at 242 (distinguishing Crosby v. United States, 113 S. Ct. 748 (1993)).
4. See infra note 55.
5. See infra notes 45, 93.
7. See, e.g., Noble v. State, 46 Md. App. 154, 159, 416 A.2d 757, 760 (1980) (holding that the two provisions enumerated in former Maryland Rule 724 are not the only circumstances in which a defendant’s right to be present can be waived); see also Sorrell v. State, 315 Md. 224, 230-91, 554 A.2d 352, 355 (1989) (holding that the court may instruct the jury that it could infer guilt from a defendant’s absence); Barnett v. State, 307 Md. 194, 201-03, 512 A.2d 1071, 1075-76 (1986) (stating that the Maryland rules permit a court to try a defendant in absentia who absconds before his trial begins).
8. The Court of Special Appeals’s holding in Noble, 46 Md. App. at 154, 416 A.2d at 757, marked the beginning of Maryland courts’ willingness to expand the situations in which they will permit trials in absentia.
the court's earlier holding in *Barnett v. State*\(^9\) that if a trial court determines that a criminal defendant made a knowing and voluntary relinquishment of his right to be present, then the Maryland rules permit that court to try the defendant in absentia.\(^10\)

1. **The Case.**—Lebon Walker, Patricia Lee, and Anna Hall were indicted by a grand jury in Montgomery County, Maryland, for allegedly stealing more than $2 million from lenders and investors in a real estate and mortgage scam.\(^11\) The circuit court judge granted the State's motion for a consolidated trial.\(^12\) Following a pretrial detention hearing, Walker, Lee, and Hall were released on bond, and their trial was scheduled for January 18, 1993.\(^13\) However, on January 10, 1993, Walker and Lee disappeared from their apartment, and a bench warrant was issued for their arrest.\(^14\) When the case was called for trial on the scheduled date, both Walker and Lee failed to appear.\(^15\) Upon the court's inquiry, the defense attorney stated that his clients were aware of their trial date and location.\(^16\) It was further revealed that most of Walker and Lee's possessions had been removed from their apartment.\(^17\)

The State argued that due to the complexity of the case and the large number of witnesses who would be testifying, the trial should commence without Walker and Lee.\(^18\) The circuit court agreed.\(^19\) Despite the defense attorney's objection, Walker and Lee were tried in absentia.\(^20\) The defense attorney asked the court to allow him to withdraw from the case, arguing that his clients could not get a fair trial in absentia.\(^21\) The court rejected his dismissal request.\(^22\) Although phys-

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9. 307 Md. 194, 512 A.2d 1071 (1986). The *Barnett* court made clear that if defense counsel could justify the defendant's absence, or if it was later discovered that the defendant had a good faith excuse for failing to appear, the court could grant either a mistrial or a new trial. *Id.* at 214, 512 A.2d at 1081.
11. *Id.* at 255, 658 A.2d at 240.
12. *Id.*
13. *Id.*
14. *Id.* at 255-56, 658 A.2d at 240.
15. *Id.* at 255, 658 A.2d at 240.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 256, 658 A.2d at 240.
20. *Id.* The circuit court based its decision to begin the trial in the defendants' absence on two reasons: (1) the unlikeliness that Walker and Lee would be apprehended quickly, and (2) the burden on the State if the trial were delayed. *Id.*
21. *Id.* The defense attorney also argued that his clients would not want him to validate the proceedings with his participation. *Id.*
22. *Id.* at 257, 658 A.2d at 241.
ically present in the courtroom, the defense attorney refused to participate in any stage of the trial. A jury was selected, sworn, and Walker and Lee were convicted. Nine months after their conviction, Walker and Lee were apprehended in Zambia and returned to the United States.

Walker and Lee appealed their convictions to the Court of Special Appeals. They argued that conducting the trial in their absence violated their common-law right to be present at trial and their constitutional right of confrontation. Before the Court of Special Appeals could consider the case, a writ of certiorari was issued by the Court of Appeals to determine whether a defendant can be tried in absentia if he is aware of the date and location of his trial but absconds prior to the trial's commencement.

2. Legal Background.—

a. Constitutional Interpretation of a Defendant's Rights at Trial.—An accused's right to be present at every stage of his trial is regarded as one of the most fundamental rights incorporated in the Confrontation Clause of the United States Constitution. The Confrontation Clause ensures a criminal defendant that "[i]n all criminal prosecutions, the accused shall enjoy the right to... be confronted..." before proceeding with the trial, the circuit court made sure that the defense attorney thought that he was acting in the best interests of his clients:

THE COURT: May I ask you this, Mr. Greenberg, do you believe, as a strategy of defense of your clients and in their best interests, that it would be appropriate for you not to actively participate in the examination of any witnesses? Is that correct?

MR. GREENBERG: I do believe that.

Defendant Hall, who was present for the duration of the trial, also was convicted.

In addition to their contention that they were wrongly tried in absentia, Walker and Lee also argued that: (1) they were denied effective assistance of counsel due to their attorney's nonparticipation in the trial and by his joint representation of both appellants; (2) they were deprived of the right to counsel during pretrial hearings and; (3) the prosecution knowingly elicited perjury from defendant Hall during grand jury testimony. Because Walker and Lee did not present these three issues to the trial court, the Court of Appeals left those issues for consideration at postconviction proceedings.

23. Id. Before proceeding with the trial, the circuit court made sure that the defense attorney thought that he was acting in the best interests of his clients:

THE COURT: May I ask you this, Mr. Greenberg, do you believe, as a strategy of defense of your clients and in their best interests, that it would be appropriate for you not to actively participate in the examination of any witnesses? Is that correct?

MR. GREENBERG: I do believe that.

24. Id., 658 A.2d at 240-41. Defendant Hall, who was present for the duration of the trial, also was convicted. Id.

25. Id.

26. Id. at 258, 658 A.2d at 241.

27. Id. In addition to their contention that they were wrongly tried in absentia, Walker and Lee also argued that: (1) they were denied effective assistance of counsel due to their attorney's nonparticipation in the trial and by his joint representation of both appellants; (2) they were deprived of the right to counsel during pretrial hearings and; (3) the prosecution knowingly elicited perjury from defendant Hall during grand jury testimony. Id. Because Walker and Lee did not present these three issues to the trial court, the Court of Appeals left those issues for consideration at postconviction proceedings. Id. at 262-63, 658 A.2d at 243.

28. Id. at 258, 658 A.2d at 241.

29. See Lewis v. United States, 146 U.S. 370, 373 (1892) ("It is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses and it is within the scope of this right that he be present... at any... stage when anything may be done in the prosecution by which he is to be affected.") (internal quotations omitted).
with the witnesses against him." The Fourteenth Amendment to the Constitution "makes the guarantees of [the Confrontation Clause] obligatory upon the states."

Although the right of confrontation is fundamental, a defendant can elect to waive this right. In *Diaz v. United States*, the Supreme Court began to recognize situations in which an accused can waive both his constitutional and common-law rights to be present during his trial. Under *Diaz*, if a case is not for a capital offense and the accused is not in custody, the accused can waive his right to be present at trial if he voluntarily absents himself after the trial has begun. The *Diaz* Court reasoned that the law should not permit an accused person to profit from his own wrongful act.

Because the Constitution guarantees the fundamental rights of life and liberty, the Supreme Court believed it essential that before a constitutional right can be relinquished, one must make an "intelligent waiver" of that right. In *Johnson v. Zerbst*, the Court defined

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30. U.S. CONST. amend. VI. Article 21 of the Maryland Declaration of Rights confers the identical right of confrontation to those accused of a crime and tried in the Maryland courts. Article 21 guarantees that "in all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him ... ." MD. CONST. DECL. OF RTS. art. 21.

31. Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that "the Sixth Amendment's right of an accused to confront the witnesses against him is ... a fundamental right and is made obligatory on the states by the Fourteenth Amendment").

32. 223 U.S. 442 (1912).

33. Id. at 455.

34. Id. In *Diaz*, the Court stated:

[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Id.

35. Id. at 452; see also Reynolds v. United States, 98 U.S. 145, 158 (1878) (observing that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts"). In fashioning its ruling, the *Diaz* Court addressed concerns that the United States Court of Appeals for the District of Columbia voiced in *Falk v. United States*, 15 App. D.C. 446 (1899). In *Falk*, the court expressed concern that a criminal defendant would be able to control the course of his trial by absenting himself whenever he pleased. *Id.* at 454. The *Falk* court stated:

It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it.

Id.

an "intelligent waiver" as one that is "an intentional relinquishment or abandonment of a known right or privilege." Whether one made a knowing and voluntary waiver of a constitutional right must be ascertained by the specific facts and circumstances of each case. Thus, for a criminal defendant to effectively waive his right to be present at trial, he must have been aware that he had this right, and he must have voluntarily elected not to appear.

Although the Supreme Court's pronouncement in Johnson was clear, the Court did not specify what constitutes an effective waiver of one's right to be present at trial. In Taylor v. United States, the Supreme Court addressed whether mere voluntary absence from trial is enough to establish an effective waiver of an accused's right to be present. In answering in the affirmative, the Court proclaimed that the real consideration at issue is whether the accused knew he had a right to be present, not whether he was aware that the trial would proceed in his absence if he chose not to attend.

b. Federal Rule of Criminal Procedure 43(b): Allowing Only Narrow Exceptions to When a Defendant Must Be Present for Trial.—In 1945 Congress enacted Federal Rule of Criminal Procedure 43(b), which codified the Diaz holding. Under Rule 43(b)(1), a court may try a criminal defendant in absentia under two circumstances: (1) if the defendant absents himself after his trial has begun; and (2) if the ac-

37. Id.
38. Id. at 464. Although the Johnson Court primarily was concerned with a defendant's ability to waive his Sixth Amendment right to counsel, the Court's assertion as to what constitutes an effective waiver applies to all constitutional rights. Id.
39. Id. "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.
40. See, e.g., United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.) (holding that a trial can proceed against a defendant who was voluntarily absent at the impanelling of the jury), cert. denied sub nom. Santoro v. United States, 409 U.S. 1063 (1972).
42. In Taylor, the petitioner argued that his voluntary absence from trial was not sufficient evidence to establish an effective waiver under the dictates of Johnson. Id. at 19. The petitioner contended that because he was not aware that the trial would continue in his absence, he could not have intentionally relinquished or abandoned a known right or privilege. Id.
43. Id. at 20. "The right at issue is the right to be present, and the question becomes whether that right was effectively waived by [the accused's] voluntary absence." Id. The Taylor Court found it incredible that a defendant who fails to return to the afternoon session of his trial would not know that the trial would continue in his absence. Id.
44. See supra notes 32-35 and accompanying text.
cused is removed from the courtroom because of his disruptive behavior. 45

In 1993, in *Crosby v. United States*, 46 the Supreme Court interpreted the federal rule to hold that a federal court cannot try a defendant in absentia if he absents himself prior to his trial's commencement. 47 In *Crosby*, the defendant attended pretrial conferences and hearings and was told of the date of his trial. 48 On the scheduled date, the defendant did not appear and was not apprehended until six months later. 49 The Court, relying on a strict interpretation of Rule 43, concluded that a defendant is not considered to have effectively waived his right to be present if he absconds before his trial has commenced. 50 The Court found the rule's two waiver provisions exhaustive of the situations in which a defendant can waive the right to be present. 51 Because the Supreme Court found the federal rule dispositive, it did not consider whether it is constitutionally permissible to try a defendant in absentia who disappears before the start of his trial. 52

c. Maryland Rule 4-231: A Broader Range of Exceptions.—A criminal defendant, tried in a Maryland court, also possesses certain rights at trial. Maryland has consistently recognized that a criminal defendant has a common-law right to be present at every stage of his

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45. Federal Rule of Criminal Procedure 43(b)(1) pertains to the waiver of a defendant's right to be present:

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced whether or not the defendant has been informed by the court of the obligation to remain during the trial; or

(2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

FED. R. CRIM. P. 43(b)(1)-(2).

46. 113 S. Ct. 748 (1993).

47. Id. at 753.

48. Id. at 750.

49. Id.

50. Id. at 751.

51. Id. at 758. The Court focused on the restrictive phrase in Federal Rule of Criminal Procedure 43(a) "except as otherwise provided for by this rule" and determined that the drafters of the rule intended the enumerated provisions of Rule 43 to be a comprehensive list of all possible waiver situations. Id. at 750-52.

52. Id. at 753.
"At common law the personal presence of the [accused was] essential to a valid trial and conviction on a charge of felony" and was considered unwaivable for most felony cases.

Against the backdrop of the aforementioned Supreme Court cases, Maryland has devised its own case law and statutory requirements concerning the waiver of one's right to be present at trial. The applicable rule is 4-231, formerly codified until 1983 as Maryland Rule 724. The most noteworthy revision in the new rule is the addition of subparagraph (3) to section (c), which allows a defendant to waive his right to be present if he "personally or through counsel, agrees to or acquiesces in being absent." It is also important to note that Rule 4-231(a) no longer contains a proviso present in former Rule 724(a) that a defendant shall be present "except as provided by these Rules."

In contrast to the Supreme Court's strict interpretation of the federal rule, Maryland courts have subscribed to the belief that the waiver provisions codified in the Maryland rules do not exhaust the possibilities under which a criminal defendant's right to be present can be waived. In Noble v. State, the Court of Special Appeals declared that the two waiver provisions enumerated in Rule 724 are not

53. See Barnett v. State, 307 Md. 194, 202, 512 A.2d 1071, 1075 (1986) ("As we have often pointed out, a criminal defendant's right to be present at every stage of his trial is a common law right." (citing Williams v. State, 292 Md. 201, 211-12, 438 A.2d 1301, 1306 (1981))).

54. WILLIAM E. MIKELL, CLARK'S CRIMINAL PROCEDURE 492 (2d ed. 1918).

55. Maryland Rule 4-231 states in pertinent part:

   (a) When Presence Required.—A defendant shall be present at all times when required by the court.

   (c) Waiver of Right to be Present.—The right to be present . . . is waived by a defendant:

       (1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

       (2) who engages in conduct that justifies exclusion from the courtroom, or

       (3) who, personally or through counsel, agrees to or acquiesces in being absent.

Md. R. 4-231.

56. Md. R. 4-231(c)(3); see supra note 55.

57. Md. R. 4-231(a); see supra note 55.

58. See, e.g., Noble v. State, 46 Md. App. 154, 161, 416 A.2d 757, 761 (1980) (holding that an accused's right to be present at a bench conference can be waived by inaction and does not require an affirmative act based on an intelligent and knowing understanding of his rights); Barnett v. State, 307 Md. 194, 202, 512 A.2d 1071, 1075 (1986) (stating that a defendant who knowingly and voluntarily absents himself before the start of trial falls within the third waiver provision of Rule 4-231(c)).

59. 46 Md. App. at 154, 416 A.2d at 757.
"the only circumstances where the [accused's] right to be present can be waived."\(^6\)

Perhaps the most significant case to be handed down pertaining to the waiver of the right to be present is *Barnett v. State*.\(^6\) In *Barnett*, the Court of Appeals held that an accused can waive both his common-law right to be present at trial and his constitutional right of confrontation if he disappears prior to the commencement of his trial.\(^6\) The *Barnett* court agreed with the *Noble* court that the specific circumstances outlined in the rules are not intended to restrict the possible situations in which a defendant can waive his right to be present.\(^6\) The *Barnett* court also reasoned that subparagraph (3) was added to Rule 4-231(c) to serve as a general provision indicating that the rule does not intend to restrict all possible waiver situations.\(^6\) Thus, although Rule 4-231 does not specifically address a defendant who absconds prior to the beginning of his trial, it does not preclude such a defendant from waiving his right to be present.\(^6\)

In addition to the interpretation of Rule 4-231, *Barnett* held that trying a defendant in absentia who absconds prior to the commencement of his trial is permissible under both the Maryland and United States Constitutions.\(^6\) The *Barnett* court determined that as long as the accused has made a "voluntary relinquishment of a known right to be present," it does not matter whether or not the trial has begun for the accused to effectively waive that right.\(^6\)

d. Other Jurisdictions' Reliance on the Federal Interpretation.— Since *Crosby* was decided in 1993, four states have followed the Supreme Court's holding.\(^6\) Yet the states that have found *Crosby* com-

\(^{60}\) Id. at 159, 416 A.2d at 760.
\(^{61}\) 307 Md. at 194, 512 A.2d at 1071.
\(^{62}\) Id. at 212, 512 A.2d at 1080.
\(^{63}\) Id. at 202, 512 A.2d at 1075.
\(^{64}\) Id. The court cited the Rules Committee advisory note attached to revised Maryland Rule 4-231, which states: "Except when specifically covered by this Rule, the matter of presence of the defendant during any stage of the proceedings is left to case law and the Rule is not intended to exhaust all situations." MD. R. 4-231 committee note.
\(^{65}\) Barnett, 307 Md. at 202-03, 512 A.2d at 1075-76.
\(^{66}\) Id. at 204-14, 512 A.2d at 1076-81.
\(^{67}\) Id. at 210, 512 A.2d at 1079.
\(^{68}\) Since *Crosby* was handed down, in addition to Maryland, four states have considered the issue of whether a defendant, not present at the beginning of trial, can effectively waive the right to be present. These courts have reviewed their respective state statutes and, based upon the rationale in *Crosby*, have concluded that a defendant cannot be considered to have waived his right to be present at trial if he absconds before the trial begins. See *Meadows v. State*, 644 So. 2d 1342, 1346 (Ala. Crim. App. 1994) (holding that a defendant who is not present at the start of trial cannot be tried in absentia); *Jarrett v. State*, 654 So.
pelling have done so either because of analogous provisions in their waiver rule and Federal Rule of Criminal Procedure 43 or because they favor a “bright-line” rule.\textsuperscript{69} For example, in State v. Hammond,\textsuperscript{70} the State of Washington followed Crosby's lead and held that Washington's law pertaining to waiver of the right to be present at trial only permitted trials in absentia of defendants who abscond after their trial has begun.\textsuperscript{71} The Washington rule, however, contains the express language that “[t]he defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by these rules.”\textsuperscript{72} It is unsurprising that Hammond agreed with the reasoning of Crosby—the Washington rule contains the same limiting phrase found in Federal Rule 43.

Similarly, in Sandoval v. State,\textsuperscript{73} the Supreme Court of Mississippi held that Mississippi's state courts could not try a defendant in absentia who was not present at the beginning of the trial.\textsuperscript{74} Like the Washington court, Mississippi came to this conclusion because of an express provision in the state code that the waiver rule in felony cases only allowed a defendant to waive the right to be present if “he be in custody and consenting thereto.”\textsuperscript{75} This condition is more specific than any provision contained in Maryland's rule and thus, more restrictive.

The other two states that have adopted Crosby's rationale are Florida and Alabama. Interestingly, Florida and Alabama courts have based their decisions on specific requirements within their respective

\textsuperscript{69} See Meadows, 644 So. 2d at 1346. “[B]y requiring the defendant’s presence at the beginning of the trial, the court has a bright-line rule that ensures that any later absence on the part of the defendant is a voluntary waiver of the defendant’s right to be present.” Id.; see also Jarrett, 654 So. 2d at 973 (stating that unless the record establishes that the defendant waived the right to be present, voluntary absence before trial begins does not create the presumption that the defendant knew he had the right and voluntarily relinquished that right).

\textsuperscript{70} 854 P.2d at 637.

\textsuperscript{71} Id. at 639.

\textsuperscript{72} Id. at 640 (citing Superior Court Criminal Rules 3.4(a)).

\textsuperscript{73} 631 So. 2d 159 (Miss. 1994).

\textsuperscript{74} Id. at 164.

\textsuperscript{75} Id. (citing Miss. CRIM. CODE ANN. § 99-17-9 (1972)). Section 99-17-9 states, in pertinent part: “In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the court, in his absence, if he be in custody and consenting thereto.” Miss. CODE ANN. § 99-17-9 (1972) (emphasis added).
state waiver rules that are much less limiting than Federal Rule 43.\textsuperscript{76} Both of these statutes provide that a court can conduct a trial in a criminal defendant's absence as long as that absence is voluntary.\textsuperscript{77} Alabama has the additional requirement that the absence must indicate that the defendant knows of his right to be present.\textsuperscript{78} While influenced by \textit{Crosby}, Florida and Alabama were most persuaded by the Supreme Court's dicta. In \textit{Crosby}, the Court posited that the federal rule "treats midtrial flight as a knowing and voluntary waiver of the right to be present"\textsuperscript{79} and "the defendant's initial presence serves to assure that any waiver is indeed knowing."\textsuperscript{80} However, the Court restricted its argument to an interpretation of the federal rule and expressly cautioned that it offered no opinion on whether the right to be present can be waived constitutionally in other circumstances.\textsuperscript{81}

In \textit{Meadows v. State},\textsuperscript{82} Alabama held that in the absence of any "affirmative evidence" that the defendant voluntarily waived his right to be present, the court will adopt the "bright-line rule" that "ensures that any later absence on the part of the defendant is a voluntary waiver of the defendant's right to be present."\textsuperscript{83} Similarly, in \textit{Jarrett v. State},\textsuperscript{84} Florida held that "[v]oluntary absence before trial does not create the presumption [that the defendant knew of his right to be present] that arises when such absence occurs only after trial has begun."\textsuperscript{85} Both of these states favor drawing a clear line between pre- and midtrial flight.

3. \textit{The Court's Reasoning}.—\textit{Walker} holds that trial courts are not precluded from trying an absent defendant who is aware of the date of the trial but voluntarily flees before the trial's commencement.\textsuperscript{86} In so ruling, the court relied on its interpretation of Rule 4-231(c)(3),

\textsuperscript{76} Among the waiver provisions in Florida's statute, a court can proceed with a criminal trial if the defendant "voluntarily absent[s] himself or herself from the presence of the court without leave of court." FLA. R. CRIM. P. 3.180(b). Likewise, the Alabama Rules of Criminal Procedure state in pertinent part that the defendant's presence may be waived "[b]y the defendant's absence from any proceeding, upon the court's finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present." ALA. R. CRIM. P. 9.1(b)(1)(ii).

\textsuperscript{77} See supra note 76 and accompanying text.

\textsuperscript{78} See supra note 76 and accompanying text.


\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} 644 So. 2d 1342 (Ala. Crim. App. 1994).

\textsuperscript{83} Id. at 1346.

\textsuperscript{84} 654 So. 2d 973 (Fla. Dist. Ct. App. 1995).

\textsuperscript{85} Id. at 975.

\textsuperscript{86} Walker, 338 Md. at 258-61, 658 A.2d at 241-43.
which permits a defendant to waive his right to be present at trial if he “personally or through counsel, agrees to or acquiesces in being absent.” The court reaffirmed its prior decision in *Barnett* and held that Rule 4-231(c)(3) permits a trial in absentia of a defendant who knowingly and voluntarily absents himself prior to the trial’s commencement. In so holding, the court rejected Walker and Lee’s assertion that its ruling in *Barnett* was a misinterpretation of Rule 4-231(c)(3).

Writing for a unanimous court, Judge Raker explained that because the Maryland rule differs from its federal counterpart, Maryland courts are not bound by the United States Supreme Court’s decision in *Crosby*, which held that pursuant to Federal Rule of Criminal Procedure 43, a defendant cannot be tried in absentia if he disappears before his trial begins. According to Judge Raker, Rule 4-231(c)(3) “has no analog in the federal rule,” nor does any section of Rule 4-231 contain the restrictive provision found in Federal Rule of Criminal Procedure 43. Thus, the Court of Appeals reasoned that its holding in *Barnett* was not affected by the Supreme Court’s later decision.

In *Crosby*, the Supreme Court found its analysis of Federal Rule of Criminal Procedure 43 to be dispositive and did not address whether, as a matter of constitutional law, the right to be present can be waived prior to trial. Thus, the Court of Appeals found no reason to alter *Barnett’s* conclusion that it is constitutionally permissible to try a de-

87. Md. R. 4-231(c)(3); see supra note 55.
88. See supra notes 61-67 and accompanying text.
89. *Walker*, 338 Md. at 259-60, 658 A.2d at 242. Specifically, *Barnett* reasoned that under Rule 4-231(c)(3), a defendant who knowingly and voluntarily absents himself before the start of the jury selection process “acquiesces” in being absent pursuant to the third waiver provision in Rule 4-231(c). *Barnett v. State*, 307 Md. 194, 202-03, 512 A.2d 1071, 75-76 (1986); see supra note 55.
91. Id. at 260, 658 A.2d at 242 (citing Crosby v. United States, 113 S. Ct. 748 (1993)); see supra notes 46-52 and accompanying text.
93. Id. Federal Rule of Criminal Procedure 43(a) pertains to when the accused’s presence is required: “(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.” Fed. R. Crim. P. 43(a).
94. There is no provision in Federal Rule 43 analogous to Maryland Rule 4-231(c)(3). Additionally, unlike the Maryland rule, the federal rule contains the stipulation that “[t]he defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule.” Fed. R. Crim. P. 43(a) (emphasis added).
fendant in absentia if he absconds before the trial has begun. As long as the trial court, in its discretion, determines that a defendant is cognizant of his right to be present at trial and voluntarily fails to appear, the defendant effectively will have waived that right. It is of little significance whether the trial commenced prior to the defendant's disappearance.

4. Analysis.—

a. Differences Between the Federal and Maryland Rules.—In Walker, the Court of Appeals reaffirmed its position, first articulated in Barnett, that under the Maryland rules a court may conduct a trial without the presence of a criminal defendant who is aware of when his trial will begin but voluntarily fails to appear on the scheduled date. Because the provisions in Maryland Rule 4-231 and Federal Rule 43 are not analogous, the Supreme Court's ruling that Federal Rule 43 permits trials in absentia only where the defendant was present initially had little persuasive impact on the Court of Appeals's interpretation of Rule 4-231. The court's decision in Walker ensures that Maryland courts will not permit a criminal defendant to dictate when and if he is to be tried.

The Walker court stated that the Supreme Court's reasoning in Crosby is "inapposite to our interpretation of Maryland Rule 4-231(c)." This assertion by the court is justified given the language of the Maryland rule. Rule 4-231, like Federal Rule 43, does not contain an express provision providing for the trial in absentia of a defendant who absconds before the start of the trial. However, unlike Rule 4-231, there is a limiting phrase contained in Federal Rule 43 that stipulates that "[t]he defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by this rule." It was the inclusion of this "express mandate" that the Supreme Court found most persuasive in concluding that the waiver provisions enumerated in the federal rule were meant to serve as a comprehensive listing of the circumstances under which the right to be present can be

96. Walker, 338 Md. at 261, 658 A.2d at 242. "We see nothing in Crosby that invites a reexamination of [Barnett's] conclusion." Id.
97. Id. at 258-59, 658 A.2d at 241.
98. Id.
99. Id. at 253-60, 658 A.2d at 239-42.
100. Id. at 261, 658 A.2d at 242.
101. Id.
102. See supra note 55 and accompanying text.
103. Fed. R. Crim. P. 43(a); see supra note 99.
This reasoning is inapplicable to an analysis of the Maryland rule, as there is no analogous limiting phrase in Rule 4-231. Additionally, Rule 724, the predecessor to Rule 4-231, did contain a restrictive clause identical to that found in Federal Rule 43.106 This clause was eliminated when the rule was revised and recodified as Rule 4-231.107 The deletion of the limiting phrase suggests that the waiver provisions in the current rule are not intended to exhaust the possible situations in which a defendant can waive the right to be present.

The Walker court adopted Barnett’s conclusion that subparagraph (3) in Rule 4-231 (c) was incorporated into the rule to serve as a general provision leaving open the possibility that there may be situations other than those specifically designated in the rule that would enable a defendant to waive his common-law right to be present at trial.108 This is a prudent and logical interpretation of the rule. The committee notes following the text of Rule 4-231 expressly state that “[e]xcept when specifically covered by this Rule, the matter of presence of the defendant during any stage of the proceedings is left to case law and the Rule is not intended to exhaust all situations.”109 The committee’s belief is clear: The rule does not provide a comprehensive list of possible waiver situations.

Moreover, as the Barnett court recounted, during a meeting of the Court of Appeals’s Rules Committee concerning the revision of Rule 4-231, Judge McAuliffe made a recommendation to include a third subparagraph in Rule 4-231 (c) that would indicate that Maryland recognizes “other situations when the defendant [or] his counsel can waive the defendant’s right to be present.”110 Subsequently, the committee voted unanimously to adopt the third provision.111 This is one more indication that the underlying premise of the rule is that there

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105. Crosby v. United States, 113 S. Ct. 748, 751 (1993). The Supreme Court reasoned that “[t]he list of situations in which the trial may proceed without the defendant is marked as exclusive not by the ‘expression of one’ circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.” Id.

106. Maryland Rule 724 provided: "The defendant shall be present at every stage of the trial . . . except as provided by these rules." Md. R. 724 (emphasis added).

107. See supra note 55.

108. Walker, 338 Md. at 260, 658 A.2d at 242. The Walker court did not discuss in detail its conclusion that Rule 4-231(c)(3) permitted Walker and Lee to be tried in absentia. Instead, the court referred to Barnett’s analysis of subparagraph (3). Id. at 259-60, 658 A.2d at 242.

109. Md. R. 4-231 committee notes.


111. Id.
may be circumstances, not expressly provided for in the provisions of Rule 4-231, in which a defendant effectively can waive his common law right to be present.

Walker makes clear that Rule 4-231 does not exhaust the possible situations in which a defendant can waive the right of presence at trial. By eschewing the bright-line distinctions favored by other states, the Court of Appeals recognized that there are other circumstances in which a defendant's knowledge of the right to be present can be shown. In so doing, the court opens the door for future cases to expand the circumstances under which a defendant will be considered to have effectively waived his constitutional right of confrontation, as well as his common-law right of presence at trial.

5. Conclusion.—Walker reaffirms the principle espoused in Barnett that Maryland courts are not precluded from trying in absentia a criminal defendant who absconds before his trial begins. In so holding, the court relied on its prior analysis in Barnett and concluded that because Maryland Rule 4-231 is sufficiently distinct from Federal Rule 43, the Supreme Court's decision in Crosby has little persuasive effect. The court recognized that there are more practical circumstances in which a defendant can effectively waive the right to be present at trial than those specifically enumerated in Rule 4-231. Walker paves the way for future cases to expand the circumstances in which a criminal defendant can be tried in absentia. The Walker decision sends a strong message that if a defendant is set to stand trial for a crime in a Maryland court, that trial will proceed in his absence if the trial court determines that his absence is a knowing and voluntary waiver of the right to be present at trial. Maryland courts will not allow a criminal defendant to dictate the course of his trial.

LYNN E. RICCIARDELLA

I. Emphasizing Victims' Rights at the Sentencing Phase of Criminal Proceedings

In Cianos v. State, the Court of Appeals addressed the right of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant. The court held that victims and their families may not appeal a defendant's sentence when oral impact statements are

112. See supra notes 68-85 and accompanying text.
2. Id. at 407, 659 A.2d at 292.
not heard or considered in sentencing a defendant. Despite this ruling, however, the court, in strongly worded dicta, instructed trial judges to give appropriate consideration to the impact that a crime has upon a victim in determining the appropriate sentence given to a criminal defendant. The court explained: "An important step towards accomplishing [the task of considering the crime's impact] is to accept victim impact testimony wherever possible." In reaching this conclusion, the court traced Maryland's past legislation and constitutional amendments regarding victim rights. These measures were enacted in response to the concerns of victims who often feel neglected by the criminal justice system.

The Cianos dicta follows the recent legal trend throughout the United States toward emphasizing victims' rights. The court, however, correctly refused to allow the recognition of victims' rights to take precedence over the public interest in the administration of justice. This Note will review the legal background of written and oral victim impact statements, and outline some of the practical difficulties that allowing oral testimony will present for trial courts, attorneys, victims, and victims' families.

I. The Case.—On January 6, 1994, Sean Patrick Hall entered a guilty plea to two counts of manslaughter by automobile and one count of driving while intoxicated (DWI) after being charged with the deaths of Jerome Robert Barrett and James Nicholas Cianos III. The court scheduled Hall's sentencing and ordered a presentence investigation. At sentencing, the State requested that the court hear an oral address by Evelyn Barrett, the widow of Jerome Barrett, and by Robin Cianos, the mother of James Cianos III. The two had previously submitted written, victim impact statements for the court's consideration. The trial court ruled that there was nothing Ms. Barrett and Ms. Cianos could say that had not already been expressed in their written statements and, therefore, that it would not be beneficial to

3. Id. at 412, 659 A.2d at 294.
4. Id. at 413, 659 A.2d at 295.
5. Id.
6. See infra note 80 and accompanying text.
7. Cianos, 338 Md. at 412-13, 659 A.2d at 294-95.
8. Id. at 407-08, 659 A.2d at 292.
9. Id. at 408, 659 A.2d at 292.
10. Ms. Barrett also sustained serious bodily injuries in the accident. Id. at 408 n.1, 659 A.2d at 292 n.1.
11. Id. at 408, 659 A.2d at 292.
12. Id.
take the additional court time to hear oral testimony. The trial court permitted the State and Hall’s attorney to argue as to sentencing, and allowed Hall’s girlfriend to speak on his behalf. Afterwards, the court imposed Hall’s sentence.

Ms. Cianos and Ms. Barrett filed an application for leave to appeal to the Court of Special Appeals. They argued that the trial court abused its discretion by not allowing them to testify at the sentencing proceeding. Ms. Cianos and Ms. Barrett argued that the Court of Special Appeals was compelled to vacate Hall’s sentence and to remand the case to the trial court for resentencing. However, the Court of Special Appeals denied their application because it determined that the issues raised by the application were moot. The Court of Appeals granted certiorari to address the rights of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant, as provided in Article 27, section 643D.

13. Id.
14. Id. Hall’s girlfriend had also previously submitted a written statement for the court’s review. Id. at 408 n.2, 659 A.2d at 292 n.2.
15. Id. at 408-09, 659 A.2d at 292. Hall received concurrent 5-year sentences, with all but 14 months suspended, on each of the manslaughter counts. Id. In addition, Hall received 4 years probation, 160 hours of community service, and assessment of costs. Id. at 409 n.3, 659 A.2d at 292 n.3. On the DWI count, Hall received one year to be served concurrent with the manslaughter sentences and a $1000 fine. Id. at 409, 659 A.2d at 292. Hall was also ordered to attend Alcoholics Anonymous meetings and to participate in 10 victim impact panel sessions. Id. at 409 n.4, 659 A.2d at 292 n.4.
16. Id. at 409, 659 A.2d at 292-93. The only avenue of appeal from a guilty plea before a circuit court is by application for leave to appeal to the Court of Special Appeals. Id. at 407, 659 A.2d at 292; see also Md. Code Ann., Cts. & Jud. Proc. §§ 12-202, -302 (1995); see infra note 20.
17. Cianos, 338 Md. at 409, 659 A.2d at 293.
18. Id.
19. Id.
20. Id. at 407, 659 A.2d at 292. Under sections 12-202 and 12-302 of the Courts and Judicial Proceedings Article, an order by the Court of Special Appeals granting or denying an application for leave to appeal is not reviewable by the Court of Appeals by way of certiorari. The Court of Appeals, however, may grant certiorari when the intermediate appellate court makes a decision on an application for leave to appeal based on an alleged denial of victims’ rights. See Md. Code Ann., Cts. & Jud. Proc. §§ 12-202, -302 (1995).
21. Article 27, § 643D(a), addressing oral impact testimony, provides in pertinent part: In every case resulting in serious physical injury or death, the victim or a member of the victim’s immediate family, or if the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the required information, the personal representative, guardian, or committee, or other family member may, at the request of the State’s Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.

2. Legal Background.—

a. The Rise of Victim Impact Statements.—In recent years, there has been a growing concern that the criminal justice system devotes an inordinate amount of its time and resources to protecting the rights of criminal defendants while the victims' rights are ignored.22 In response to this concern, Congress and many state legislatures began enacting measures to strengthen the role of the victim as a party to be officially recognized in criminal proceedings.23 One method of victim involvement has been the courts' use of victim impact statements in sentencing criminal defendants.24 Generally, a victim impact statement, written or oral, describes the physical, emotional, and psychological effect the crime had on the victim and the victim's family.25

22. Charlton T. Howard III, Note, Booth v. Maryland—Death Knell for the Victim Impact Statement?, 47 Md. L. Rev. 701, 705 (1987). In 1982, President Ronald Reagan endorsed the Final Report of the President's Task Force on Victims of Crime. This report called for over 100 victim-oriented reforms aimed at state and federal legislatures and the judiciary. In particular, the report stressed that every victim should be allowed to give some form of input during the sentencing of a criminal defendant. See President's Task Force on Victims of Crime, Final Report 77 (1982) [hereinafter President's Task Force]. The Task Force also recommended a federal constitutional amendment that would be appended to the Sixth Amendment to recognize victims' rights. Id. at 114-15. Currently, the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. The proposed modification reads, "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." President's Task Force, supra, at 114-15.

23. As noted by the Court in Booth v. Maryland, 482 U.S. 496 (1987), overruled in part by Payne v. Tennessee, 501 U.S. 808 (1991), at least 36 states now permit the use of some form of victim impact evidence in sentencing proceedings. Id. at 509 n.12.

24. In addition, the pressure for reform has centered on several other general areas, including protection for victims and witnesses of crime, victim compensation, and restitution programs, victim assistance programs, and increasing victim input in the decision-making processes of the criminal justice system. Patrick M. Fahey, Note, Payne v. Tennessee: An Eye for an Eye and Then Some, 25 Conn. L. Rev. 205, 207 (1992).

(i) Identify the victim of the offense;
(ii) Itemize any economic loss suffered by the victim as a result of the offense;
(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

Id.

Generally, four basic types of information have been provided to the sentencing authority by a victim impact statement: (1) the circumstances surrounding the crime and the
Such a statement is used solely during the sentencing phase of a criminal proceeding. On the federal level, Congress passed the Victim and Witness Protection Act of 1982, which amended the Federal Rules of Criminal Procedure to require the inclusion of a victim impact statement as a part of a presentence report submitted to the sentencing authority. Although many states have enacted similar statutes, the admissibility of victim impact statements remains a controversial issue.

b. The Supreme Court’s Treatment of Victim Impact Statements.— The Supreme Court first addressed the admissibility of victim impact statements in Booth v. Maryland. The Booth Court, in a five-to-four decision, held unconstitutional the use of victim impact statements in capital sentencing proceedings. In so holding, the Supreme Court concluded that the Maryland statute, Article 41, section 4-609(c), was invalid to the extent that it required consideration of victim impact statements. The Court determined that introducing victim impact statements could render the sentencing jury’s death penalty decision impermissibly arbitrary and capricious by shifting the focus away from the defendant and onto the victim and the victim’s family. The manner in which the crime was perpetrated; (2) the identity and characteristics of the victim; (3) the effects of the crime on the victim and the victim’s family; and (4) the victim or victim’s family’s opinion of the defendant and of an appropriate sentence. Phillip A. Talbert, Comment, The Relevance of Victim Impact Statements to the Criminal Sentencing Decision, 36 UCLA L. REV. 199, 203 (1988).


27. See Fed. R. CRIM. P. 32(b)(4)(D) (previously codified as Fed. R. CRIM. P. 32(c)(2)(C)), which states in pertinent part: “[The presentence report must contain] verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed.” Id.


29. Id. at 502-03. In the dissent’s view, the full extent of the harm caused by a defendant is germane to deciding an appropriate punishment. Id. at 515-21 (White, Rehnquist, O’Connor, Scalia, J.J., dissenting).

30. Id. at 502-03.

31. The underlying constitutional claim raised in these capital sentencing cases is the Eighth Amendment proscription of cruel and unusual punishment. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. CONST. amend. VIII; see Robinson v. California, 370 U.S. 660, 666 (1962) (applying the prohibitions of the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment). Commencing with Furman v. Georgia, 408 U.S. 288 (1972), the Court has required state death penalty
Court emphasized that the jury must focus on the defendant and his personal characteristics as a unique human being prior to imposing a sentence of death. Two years later, the Supreme Court extended Booth in South Carolina v. Gathers,\(^{32}\) to hold that a prosecutor cannot include a victim impact statement in his closing argument to a jury in a death penalty case.\(^{33}\) Neither Booth nor Gathers expressed an opinion as to the use of victim impact statements in noncapital cases.\(^{34}\)

In Payne v. Tennessee,\(^{35}\) the Supreme Court overruled both Booth and Gathers.\(^{36}\) The Court held that the Eighth Amendment "erects no \textit{per se} bar"\(^{37}\) prohibiting a capital sentencing jury from considering victim impact evidence relating to the victim's personal characteristics and to the emotional impact of the murder on the victim's family.\(^{38}\) In addition, the Payne Court determined that a prosecutor is not pre-

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schemes to conform to the dictates of the Eighth Amendment's prohibition against cruel and unusual punishment. Thus, a state may no longer inflict the death penalty in an arbitrary manner. Sentencing must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

33. Id. at 810. In Gathers, the Court determined that the prosecutor's reading into the sentencing record a religious tract that the murder victim was carrying, and comments about the victim's personal qualities inferred from the victim's possession of a religious tract and voter registration card were grounds for reversal of a sentence of death. Id. at 810-12.

34. Booth, 482 U.S. at 509 n.12. The Booth Court recognized that sentencing considerations may be different in a noncapital context and therefore was careful to note that its holding was "guided by the fact that death is a 'punishment different from all other sanctions.'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion of Stewart, J.)).


37. Id. at 827.
38. Id. at 831. "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no \textit{per se} bar.'" Id. (O'Connor, J., concurring).

The Court in Payne considered only the first type of victim impact evidence presented in Booth—the personal characteristics of the victims and the emotional impact of the murder on the survivors. Id. The Court did not consider the second type of victim impact evidence, which relates to a victim's or family member's characterizations of a defendant or opinion about an appropriate sentence. Thus, it is unclear if it remains unconstitutional to present this second type of impact evidence in a capital case.
cluded from arguing such evidence at a capital sentencing hearing. After Payne, individual states are left to decide whether to include victim impact evidence in assessing the defendant's culpability in a capital sentencing case.

c. Victim Impact Statements: The Development of Maryland Law.—

(i) Statutory Developments.—Maryland has followed the national trend by enacting laws designed to increase meaningful victim involvement in criminal proceedings. The Maryland General Assembly designed a sentencing scheme that required presentence investigation reports to include written victim impact statements in two situations: (1) felonies where the defendant caused physical, psychological, or economic injury to the victim, and (2) misdemeanors where the defendant caused serious physical injury or death. A year later, Maryland required that a victim impact statement be prepared in capital cases. As a result of these laws, Maryland courts have considered written victim impact statements in determining the appropriate sentence for defendants. Maryland has also expanded the rights of victims beyond written victim impact statements to include oral victim testimony. In 1986, the General Assembly passed Article 27, sec-

39. Id. at 827. The Payne Court explained that victim impact statements reflect "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." Id. at 823.

40. Id. at 824-25. If, in a particular case, a witness's testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may still seek appropriate relief under the Due Process Clause of the Fourteenth Amendment. Id. at 825.

41. In fact, Maryland was the first state to use a victim impact statement. See S. REP. NO. 532, 97th Cong., 2d Sess. 10, 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2517-18 (noting that "[t]he victim impact statement was first used in Federal Courts for the District of Maryland in May, 1979, as a way of providing the sentencing judge with information on the victim that might not otherwise be brought to his attention").

42. MD. ANN. CODE art. 41, § 4-609(c) (1993).

43. Id. § 4-609(d).

44. See Tibbs v. State, 72 Md. App. 239, 259, 528 A.2d 510, 519 (holding that a sentencing judge in a noncapital case could consider the impact that a crime had upon the victims), cert. denied, 311 Md. 286, 533 A.2d 1308 (1987); Hurley v. State, 60 Md. App. 539, 564-65, 483 A.2d 1298, 1311 (1984) (finding that a trial court may properly consider the impact a crime had upon its victims before passing on the defendant's sentence), cert. denied, 302 Md. 409, 488 A.2d 500 (1985).

45. See Md. ANN. CODE art. 27, § 643D (1992) (for pertinent text, see infra note 46 and accompanying text); see also Lodowski v. State, 302 Md. 691, 743-44, 490 A.2d 1228, 1254-55 (1985) (declaring, in dicta, that a victim may make oral as well as written statements, even though oral statements are not specifically permitted in the statute), vacated on other grounds, 475 U.S. 1078 (1986). Similarly, other states have extended victims' rights to include oral victim impact testimony. See e.g., CONN. GEN. STAT. ANN. § 54-91a(c) (West
tion 643D, which allows a victim or representative of a victim to address the sentencing judge or jury at the request of the state’s attorney and in the discretion of the sentencing judge. Similarly, Article 27, section 761 provided guidelines for treatment of and assistance to crime victims and witnesses.

The Maryland legislature has continued to enact other victims’ rights measures. One provision allows the victim of violent crime to file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to that victim by Article 27, section 620(b) or section 643D, or Article 41, section 4-609 of the Maryland Code. In addition, by enacting Article 47 of the Maryland Declaration of Rights, Maryland has recently joined the handful of states that have already adopted constitutional amendments on victims’ rights. This provision includes “the right, in a case arising in the circuit court, the right, 1990); N.J. STAT. ANN. § 52:4B-36m-n (West 1995); R.I. GEN. LAWS § 12-28-4 (1994); VT. STAT. ANN. tit. 13, § 7006 (1995). By legislative amendment, New York has recently joined those states permitting the victim to testify in person at the sentencing hearing. N.Y. CRIM. PROC. LAW § 380.50 (McKinney 1994).

For case law prior to the New York amendments, see People v. McCarthy, 519 N.Y.S.2d 118, 119 (N.Y. County Ct. 1987) (limiting crime victim to written statement submitted to sentencing judge, as oral presentation could “becloud the judicial atmosphere”). In McCarthy, the court recognized that the New York legislature contemplated the victim impact statement only as a written document to the mandated presentence report. “The charged atmosphere at sentencing is fraught with the opportunity for someone bent on mischief or with interest in other civil or criminal matters to attempt to intimidate the Court, provoke the defendant or generally disrupt the sentencing proceeding.” Id.

46. Article 27, § 643D provides in pertinent part:

In every case resulting in serious physical injury or death, the victim or a member of the victim’s immediate family, or if the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the required information, the personal representative, guardian, or committee, or other family member may, at the request of the State’s Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.

47. Article 27, § 761 provides in pertinent part:

(12) A crime victim or witness should: . . .

On request of the State’s Attorney to and in the discretion of the judge, be permitted to address the judge or jury or have a victim impact statement read by the judge or jury at sentencing before the imposition of the sentence or at any hearing to consider altering the sentence.

Id. § 761(12).

48. See Md. CODE ANN., CTS. & JUD. PROC. § 12-303.1 (1995); see also infra notes 70-83 and accompanying text.
upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding." 49

(ii) Judicial Developments.—Prior to the Supreme Court’s decision in Booth declaring victim impact statements in capital cases unconstitutional, 50 the Court of Appeals allowed victim impact evidence even in death penalty cases. 51 In complying with the holdings of Booth and Gathers, 52 the Court of Appeals did not allow victim impact statements to be introduced at capital sentencing until after Payne. 53 After the Payne decision, however, the Court of Appeals, in Evans v. State, 54 reaffirmed its pre-Booth position that victim impact evidence may be considered even in capital proceedings. 55 As a result, the court has continued to view victim impact evidence as “relevant and probative.” 56

Although the Supreme Court has remained silent on the issue, Maryland has addressed the use of victim impact statements in non-capital cases. The Court of Appeals has accorded the noncapital sentencing judge “virtually boundless discretion” in conducting the sentencing proceeding. 57

49. See Md. Const. Decl. of Rts. art. 47. For similar constitutional amendments enacted by other states that have granted crime victims the right to be present and to be heard in criminal proceedings, see Fla. Const. art. 1, § 16(b); Tex. Const. art. 1, § 30; Wash. Const. art. 1, § 35. Other constitutional provisions have granted crime victims a right to restitution. See Cal. Const. art. 1, § 28(b); Mich. Const. art. 1, § 24; R.I. Const. art. 1, § 23.

50. See supra notes 28-31 and accompanying text.


52. See supra notes 28-34 and accompanying text.

53. See supra notes 35-40 and accompanying text; see also, e.g., Harris v. State, 312 Md. 225, 235-36, 539 A.2d 637, 642 (1988) (vacating a death sentence because victim impact statements presenting the victim’s family members’ opinions and characterizations of the crime injected an impermissible arbitrary component into the sentencing proceeding); Hunt v. State, 312 Md. 494, 540 A.2d 1125 (1988). In light of Booth, the Hunt court vacated a death sentence and a new sentencing hearing was held on capital conviction because a victim impact statement was improperly admitted in evidence at the sentencing hearing. Id. at 497, 540 A.2d at 1126.


55. Id. at 687-88, 637 A.2d at 180-81.

56. Id.

57. Logan v. State, 289 Md. 460, 408, 425 A.2d 632, 642 (1981); see also Smith v. State, 308 Md. 162, 166, 517 A.2d 1081, 1083 (1986) (according judges broad discretion in conducting sentencing proceedings); Johnson v. State, 274 Md. 536, 542, 336 A.2d 113, 116 (1975) (“[I]t is our belief that the sentencing judge will have difficulty determining the
The court has determined that the Maryland legislature set forth only the minimum standard for factors that a sentencing judge must consider when using victim impact evidence. Thus, in Reid v. State, the Court of Appeals held that the trial judge did not err in considering a written victim impact statement prepared by the victim and forwarded directly to the court, even though a victim impact statement had already been submitted by the Division of Parole and Probation as part of its presentence investigation. Similarly, the Court of Special Appeals, in Ingoglia v. State, noted that the legislature in enacting Article 41, section 4-609 did not purport "to limit the victim's role to the single Victim Impact Statement of the presentence investigation." There, the court determined that the sentencing court did not abuse its discretion in receiving into evidence the sentencing recommendation of the assault victim's mother. It reasoned that the trial court indicated that it would exercise its discretion in imposing the sentence "independently regardless of what anybody thinks including [the victim's mother], the State, [defense counsel] or the defendant." As in Reid, the court in Ingoglia did not mention the recommendation of the victim's family when it imposed sentence.

3. The Court's Reasoning.—In Cianos, the Court of Appeals held that crime victims and their representatives were precluded from chal-

proper sentence . . . if he is forced to bridle himself with mental blinders and thus enter the process of imposing sentence with impaired vision.

58. Reid v. State, 302 Md. 811, 820-25, 490 A.2d 1289, 1294-95 (1985). In Reid, the court explored the legislative history of Article 41, § 124(c) (now codified at Md. Ann. Code art. 41, § 4-609). Senator Garrity, the sponsor of the measure, stressed the purpose behind the proposed legislation. In a hearing before the State Senate Judicial Proceedings Committee on January 19, 1982, he stated: "[This bill] provides the mechanism to place at the judge's disposal all the facts regarding impact of the crime on the victim." Reid, 302 Md. at 816, 490 A.2d at 1292.

59. Reid, 302 Md. at 816, 490 A.2d at 1292.

60. Id. at 812-13, 490 A.2d at 1290.


62. Id. at 670, 651 A.2d at 414 (quoting Reid, 302 Md. at 819, 490 A.2d at 1293).

63. Id. The Maryland court found the words of the Court of Appeals of Wisconsin instructive in determining whether a victim's sentencing recommendation can be received into evidence. In State v. Johnson, 463 N.W.2d 352 (Wis. Ct. App. 1990), the Wisconsin Court of Appeals stated:

[T]rial courts are not rubber stamps. They do not blindly accept or adopt sentencing recommendations from any particular source. . . . We believe that consideration of the comments—even the "wishes"—of a victim is within the sentencing court's prerogatives. Courts are entitled—even encouraged—to consider the rights and interests of the public in imposing a sentence in a particular case.

Id. at 355-56.

64. Ingoglia, 102 Md. App. at 670, 651 A.2d at 414.

65. Id.
The court first addressed Cianos and Barrett's contention that the trial court abused its discretion by not allowing them to testify at the sentencing proceeding. The court found that even if it accepted that Cianos and Barrett were denied their right to address the sentencing court as to the impact of the defendant's crimes upon them, the appeal would still be moot. To support this finding, the court pointed to sections 12-301 and 12-302 of the Courts and Judicial Proceedings Article, which allow only a party to appeal from a final judgment. Section 12-303.1 of the Courts and Judicial Proceedings Article expressly acknowledges that a victim is not a party in a criminal proceeding. Furthermore, even if Cianos and Barrett had applied for leave to appeal prior to the final judgment, such action would not have stayed the criminal proceedings against the defendant. An appeal by a victim or the victim's representatives is collateral and may not interrupt a criminal case, and such an appeal cannot result in reversal of judgment and reopening of the case. Thus, the court concluded the petitioners were not entitled to appeal the final judgment of Hall's conviction and sentence.

The court next addressed Cianos and Barrett's assertion that the absence of a provision expressly precluding a victim from challenging a final criminal judgment implies the right to do so. The court again pointed to the plain language of the relevant statutes, sections 12-301, 12-302, and 12-303.1, to refute their argument. Moreover, the court reasoned that the legislative history demonstrated the legislature's unwillingness to institute a provision that would invalidate a defendant's sentence simply because victim testimony was not taken into account at the sentencing proceeding. The major practical

66. Cianos, 338 Md. at 412, 659 A.2d at 294.
67. Id. at 409, 659 A.2d at 293.
68. Id. at 410, 659 A.2d at 293.
69. Id.
70. Id. at 410-11, 659 A.2d at 293.
72. Cianos, 338 Md. at 411, 659 A.2d at 293-94.
73. Id.
74. Id., 659 A.2d at 294.
75. Id. Ordinarily, where there is no ambiguity in the language of a statute, there is no need to look elsewhere to ascertain the intent of the legislature. Id. Nevertheless, the court in Cianos examined the legislative history of the relevant statutes. Id.
76. Id. at 411-12, 659 A.2d at 294. Senate Bill 132 (1983) provided for victim testimony in addition to the written victim impact statement and stated that a defendant's sentence would be invalidated absent this testimony. The Senate amended S.B. 132 to permit, rather than to mandate, this testimony and to strike the provisions invalidating the defend-
The problem of such a provision would be "the possibility of placing the defendant in jeopardy a second time during the sentencing hearing." Staff of the House Judiciary Committee concluded that the bill "would be acceptable, however, if [the] lines [invalidating the sentence] were deleted. The statute would have no teeth after such a deletion but it would provide the personal input toward which the statute is aimed." Thus, the Cianos court determined that section 12-303.1 does not allow a victim, as a nonparty, to appeal from a final judgment.

After concluding that Cianos and Barrett's application for leave to appeal was properly denied, the court addressed the rights of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant. In dicta, the court detailed the seven Maryland legislative acts concerning victims' rights to demonstrate that the "mandate of the people is clear" in increasingly recognizing victims' rights. The court stated definitively that "trial judges must give appropriate consideration to the impact of crime upon the victims. An important step towards accomplishing that task is to accept victim impact testimony wherever possible." In an attempt to provide future guidance, the court explained that sentencing judges should not request that victims waive their rights to address the court as to the impact of the crimes upon them.

4. Analysis.

a. Balancing the Administration of Justice and Victims' Rights.

In Cianos, the Court of Appeals held that victims and their family members were precluded from challenging the final judgment of conviction and sentence of a defendant. With respect to its holding,
Cianos presented a relatively straightforward case and was thus decided according to the plain meaning of the relevant statutory text. The limitation against challenging the final judgment by nonparties is appropriate for reasons of judicial administration. It would be a miscarriage of justice if a defendant's sentence were invalidated simply because the victim was not permitted to give oral testimony.

Aside from the specific outcome and holding in Cianos, the court seized the opportunity to clarify victims' rights. The court responded to Cianos and Barrett's request that the court give guidance for future cases in the event it found their appeal moot. One of the reasons for the lack of appellate case law on victims' rights provisions is that the State, having obtained the defendant's conviction, has not appealed victims' rights issues in criminal cases. As discussed below, the Court of Appeals's laudable attempt to emphasize a victim's right to address a sentencing court raises as many questions as it purports to answer.

b. The Future Impact of the Court's Dicta.—It is unclear how great an impact the dicta expressed in Cianos will have on Maryland courts in the future. As defined by the Court of Special Appeals, dictum is "any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." Of course, lower courts may simply ignore the court's words of guidance in Cianos, or they may choose to interpret them broadly or narrowly.

85. See supra notes 66-79 and accompanying text.
87. See id.
89. But see Evans v. State, 333 Md. 660, 687, 637 A.2d 117, 131 (noting that there have been many times that the court has adopted and relied on the dicta articulated in Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985)), cert. denied, 115 S. Ct. 109 (1994); Murray v. Comptroller of Treasury, 241 Md. 383, 395, 216 A.2d 897, 904 ("Occasionally a dictum, when it strikes a note resonant with accepted legal principle, becomes as important as the actual decision."); cert. denied, 385 U.S. 816 (1966). Furthermore, in Greenawalt, supra note 88, at 484, the author states:
The precise weight of earlier authority may rest to some extent on whether the point covered was argued by counsel and carefully considered by the court. Dis-
A narrow reading of the opinion suggests a case-by-case approach, in which future sentencing courts will use their statutorily broad discretion to determine when victims' oral testimony should be permitted, and if permitted, what type of victim impact testimony to allow, by whom, and how much. Such a discretionary approach would enable the sentencing court to balance fairness to a defendant with the rights of a victim.

A broader reading of Cianos suggests that oral victim impact testimony will be heard, in addition to the requisite written victim statements, in all criminal cases where victims wish to testify. There are potential difficulties with such a broad interpretation. Victims may, for example, speak at length, recounting in an emotional manner exactly what they stated in their written victim impact statements. If significant resources have already been devoted to the presentence investigation compiling victim impact statements that are complete or nearly complete, it is difficult to justify testimony at the sentencing hearing. Judicial economy may be hampered further by the probable increase in the time needed for sentencing proceedings. The amount of time and resources wasted in litigating this “mini-trial” could be extraordinary. Not only would additional time be needed for testimony, but the defense would need to be given the right to cross-examine, as provided in section 643D. It would be “difficult if not impossible” to provide the defense a fair opportunity to contradict the

cussion that is evidently dictum because of the way a case is finally resolved can have somewhat more power if it reflects extensive argument by counsel and careful judicial consideration.

Id.


91. See supra note 25 and accompanying text (discussing the various types of information that could be provided to the sentencing authority by a victim impact statement).

92. See Md. Ann. Code art. 27, § 643D(b)(1) (providing that if the victim or the victim's representative is permitted to address the judge or jury, the defendant may cross-examine the victim or the victim's representative); see also Gardner v. Florida, 430 U.S. 349, 362 (1977) (concluding that due process requires a defendant be given an opportunity to rebut a presentence report); cf. Miller v. State, 67 Md. App. 666, 509 A.2d 135, cert. denied, 307 Md. 260 (1986). In Miller, the victim of second degree rape, second degree sexual offense, perverted practice, assault with intent to rape, and battery, provided oral impact testimony to the judge in his chambers, even though she had already provided a written victim impact statement as part of the presentence investigation. Id. at 670-71, 509 A.2d at 137. On appeal, the defendant argued that he was improperly sentenced after the judge privately questioned the victim about the impact of the offenses and of her thoughts as to sentencing. Id. at 672, 509 A.2d at 138. The Court of Special Appeals remanded the case for resentencing because it held that the sentencing court should not have taken further statement from the victim in chambers, without giving the defendant the opportunity to hear and refute that statement. Id. “Statements by a victim to a judge should ordinarily be made in the presence of the defendant.” Id. at 675, 509 A.2d at 139.
information being offered by the State. The result illustrated by the above examples suggests that the court failed to consider the practical problems of allowing victim impact testimony.

Although it stressed that trial judges should not deny victims their right to provide victim impact testimony, the Court of Appeals did not discuss what types of victim impact testimony it was interested in promoting and what types, if any, it wished to discourage. Because Cianos was not a capital case, it was not the best possible case to use as a vehicle for discussing oral victim impact testimony. Cianos offers no specific guidance for cases where victims offer opinions about appropriate sentences for criminal defendants. Because Maryland permits the death penalty, a sentence suggested by a victim's family member presents a continuing problem. An emotional appeal for a harsh sentence could improperly influence the decision to impose a death sentence.

The court's dicta also may be read as a judicial message to the General Assembly. The Court of Appeals has informed the legislature that it interprets Article 27, section 643D expansively, limiting the broad discretion trial courts historically have been afforded. If the General Assembly disagrees with the court's reading of section 643D, the General Assembly is invited to amend the statute or to clarify its legislative intent. If the legislature feels strongly that oral testimony is unfairly prejudicial or a waste of judicial resources, it may choose to follow the path taken by those states that have, in the past, limited victims to providing written statements.

While victims' rights groups may celebrate the Cianos dicta, the court's strong words of guidance unfortunately may prove to be difficult to administer and to enforce. The court's recognition of the right of victims to testify may become an empty promise. Indeed, there remains no appropriate remedy for denial of victims' rights. Currently, there is no possibility for resentencing the defendant and little chance of staying a sentencing proceeding. In Cianos, for example, the case was not remanded for resentencing even when the court recognized that the victims' rights were denied outright. This case

93. See Howard, supra note 22, at 720 ("Tactically, it is hard to imagine when cross-examining the victim's family would not be counterproductive, evoking antipathy towards the defendant or counsel. Indeed, such measures may be futile. Rarely can it be shown that grieving family members have exaggerated emotional trauma, depression, fear or anxiety.").

94. See supra notes 57, 82-83 and accompanying text.

95. See supra note 45 and accompanying text.
illustrates that there is no real remedy for noncompliance by judges.\textsuperscript{96} The only victory the victims' families received was a token one: not having to pay the court costs.\textsuperscript{97}

5. \textit{Conclusion}.—Although \textit{Cianos} was not a difficult decision with respect to its holding—proving consistent with Maryland's statutory language and legislative history—its discussion framed in dicta is significant. The court laudably emphasized the rights of victims and their representatives to give oral victim impact testimony at the sentencing phase of criminal proceedings. The court, however, failed to deal with possible problems, both substantive and procedural, that are likely to arise in future sentencing proceedings. Practitioners and sentencing judges will continue to have the formidable task of determining the limits of oral victim impact statements. This task will be particularly difficult in death penalty cases and cases in which victims wish to testify not only as to the effects of the crimes upon them, but also as to their opinion of the defendant and of the appropriate sentence.

\textbf{ILANA SUBAR}

\textsuperscript{96} The Senate Bill 264 review letter of May 17, 1993, addressed to the governor by the attorney general, concluded that while practical problems would render appellate review rare, "the bill serves a legitimate purpose and has legal effect" because "the existence of the remedy may, in itself, act as a check on judges who might otherwise give short shrift to victims rights." \textit{Respondent's Brief at 12, Cianos v. State, 338 Md. 406, 659 A.2d 291 (1995) (No. 107)} (quoting Senate Bill 264 review letter).

\textsuperscript{97} \textit{See supra} note 83.
V. Evidence

A. A New Interpretation of Rule 5-608

In Sahin v. State, the Court of Appeals held that a defendant charged with a veracity-impeaching crime who chooses to testify may offer witness testimony to rehabilitate his reputation for truthfulness and veracity. The court maintained that the State's evidence against defendants for veracity-impeaching crimes is sufficient to constitute an attack on their truthfulness, thereby allowing rehabilitative testimony. In so ruling, the court misinterpreted the intent behind Maryland Rule 5-608 and extended the meaning of "attack," as denoted in the rule, beyond acceptable limits.

The court also held that the crime of drug trafficking is not sufficiently relevant to credibility so as to allow evidence of reputation for truthfulness and veracity as circumstantial evidence of innocence. The court neglected to recognize that historically, evidence to bolster credibility has been allowed only after the prosecution affirmatively has attacked the defendant's credibility. Furthermore, because the category of veracity-impeaching crimes is not fully developed, the court's ruling burdens trial courts with the task of determining whether an alleged crime is a veracity-impeaching crime.

1. The Case.—In 1992 Isa Sahin was charged with four counts of distribution of cocaine and lesser included offenses. Sahin pleaded innocent to these charges. During Sahin's jury trial, a vice detective in the Anne Arundel County Police Department testified that he and an informant were the only persons present during the transactions with the defendant. Testifying in his own defense, Sahin denied the allegations and insisted that he did not know the vice detective or the informant.

Sahin then attempted to introduce evidence of his reputation for truthfulness through the testimony of two character witnesses. The trial judge refused to allow the testimony on two grounds. First, the

2. Id. at 322, 653 A.2d at 461.
3. Id.
4. See infra note 22 and accompanying text.
5. Sahin, 337 Md. at 311-12, 653 A.2d at 455-56.
6. Id. at 307, 653 A.2d at 454.
7. Id.
8. Id. at 308, 653 A.2d at 454.
9. Id. at 309, 653 A.2d at 454.
10. Id.
11. Id.
court stated that Sahin's reputation for truthfulness and veracity was not so relevant to the crime of distribution of narcotics that possession of those traits would serve as circumstantial evidence of innocence. Second, the trial judge recited the familiar rule that a defendant may not introduce evidence to rehabilitate his character until his character has been attacked. The court reasoned that charges against Sahin for distribution of cocaine did not constitute an attack on his veracity. In their closing arguments, both the defense and the prosecution instructed the jury that the case hinged on whether they believed the testimony of Sahin or the vice detective. After the jury returned a verdict against Sahin, the court sentenced him to four concurrent three-year terms.

On appeal, Sahin argued that the circuit court denied him a fair trial because it prohibited him from introducing evidence of his reputation for truthfulness. In an unreported decision, the Court of Special Appeals affirmed Sahin's conviction. The Court of Appeals granted certiorari to consider whether the State's evidence against a defendant constitutes an attack sufficient to allow the defendant to present evidence of his character for truthfulness, when the crime charged is an impeachable offense and the defendant chooses to testify.

2. Legal Background.—

a. Maryland Rule 5-608.—Under Rule 5-608(a)(2), witnesses may not introduce evidence to bolster their credibility until their credibility is attacked. This rule, in direct contradiction of the early law

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12. Id.
13. At the time of Sahin's trial, Maryland common law prohibited evidence of a witness's truthfulness until the witness's credibility had been attacked. Boone v. State, 33 Md. App. 1, 6, 363 A.2d 550, 554 (1976) ("Rehabilitation is only permissible . . . where [a witness's] character or reputation for truth and veracity has been directly attacked."). The rule has since been codified at Md. R. 5-608(a)(2). See infra note 22.
15. Id.
16. Id., 653 A.2d at 455.
17. Id. at 310, 653 A.2d at 455.
18. Id. at 307, 653 A.2d at 454.
19. Id. at 310, 653 A.2d at 455.
20. Id.
21. Id.
22. Rule 5-608(a)(2), adopted in 1994, states, "Rehabilitation by a Character Witness.—After the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person." (emphasis added). Md. R. 5-608(a)(2).
disallowing convicts from testifying, creates a rebuttable presumption of a witness's credibility.\textsuperscript{23} Traditionally, courts deemed defendants incompetent as witnesses, and consequently did not permit the accused to testify.\textsuperscript{24} It was believed that defendants would perjure themselves to increase their chances of a favorable outcome.\textsuperscript{25} As a result, courts admitted credibility evidence only in proceedings in which the defendant was on trial for a crimen falsi offense.\textsuperscript{26}

In 1876, the Maryland legislature enacted a statute that eliminated the "automatic" disqualification of defendants as witnesses.\textsuperscript{27} This Act provided:

In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes and offenses, and in all proceedings in the nature of criminal proceedings in any court of this State, and before a justice of the peace or other officer acting judicially, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him.\textsuperscript{28}

The current law, Rule 5-601\textsuperscript{29} differs little from the 1876 Act and has several justifications. First, the rule serves as a corollary to the evidentiary rule that credibility evidence is inadmissible absent a direct attack.\textsuperscript{30} Second, prior to an attack on credibility, it creates the presumption that all witnesses tell the truth.\textsuperscript{31} Additionally, the rule's limitation on the admission of character evidence is supported by ar-


\textsuperscript{24} See, e.g., Kinnard v. State, 188 Md. 377, 379, 39 A.2d 92, 93 (1944).

\textsuperscript{25} Peter Moser, Compellability of One Spouse to Testify Against the Other in Criminal Cases, 15 MD. L. REV. 16, 18 (1955). "It was believed that if... an accused in a criminal case were permitted to testify, he would tend to commit perjury in order to win his case. Therefore, he was not a competent witness." Id.

\textsuperscript{26} Id. A lie by the defendant is an element of the crimen falsi offense. The offense involves elements of "deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully." State v. Giddens, 335 Md. 205, 213 n.5, 642 A.2d 870, 874 n.5 (1994).

\textsuperscript{27} Md. ANN. CODE art. 35, § 4 (1939).

\textsuperscript{28} Id.

\textsuperscript{29} Md. R. 5-601. The rule states, "Except as otherwise provided by law, every person is competent to be a witness." Id. Convicted perjurers are still classified as incompetent, and are barred from testifying. See LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 130-31 (1994).

\textsuperscript{30} Sahin, 337 Md. at 318, 653 A.2d at 459.

\textsuperscript{31} Id.
arguments that positive character is irrelevant. Finally, restricting a defendant's ability to introduce evidence of his good character limits the length of trials.

Although the Maryland rules prohibit the admission of character evidence prior to an attack on credibility, because the rules do not explain or define what constitutes an attack, it is a judge's responsibility to determine when a witness's credibility has been attacked. Rule 5-608(a)(1) states that an attack may arise as evidence "(A) that the witness has a reputation for untruthfulness, or (B) that, in the character witness's opinion, the witness is an untruthful person." Rule 5-608(a) defines when specific instances of the witness's veracity may be brought into evidence. Additionally, a witness may be impeached by evidence of a prior conviction.

Maryland courts have held that neither persistent cross-examination nor recognition of contradictions between witnesses' testimony constitute an attack sufficient to trigger the rule permitting rehabilitation by a character witness. For example, in Boone v. State, the Court of Special Appeals wrote, "[t]hat which [the defendant] argues was an impeachment of him in this case was simply State's evidence which controverted his position. This was not such an attack upon credibility so as to permit the type of rehabilitation here urged."

b. Veracity-Impeaching Offenses.—The common law prohibited testimony by a person previously convicted of treason, any felony, a misdemeanor involving dishonesty, or crimes relating to the obstruction of justice. Chapter 109 of the Acts of 1864 abolished this rule

32. Id. at 319-20, 653 A.2d at 459-60. As the court observed, witnesses often contradict each other because of honest mistakes, not because of intentional lies. Id.
33. Id. at 321, 653 A.2d at 460.
34. Md. R. 5-608(a)(2); see also Vernon v. Tucker, 30 Md. 456, 462 (1869) (finding trial court "properly refused" to hear testimony about witness's character); Boone v. State, 33 Md. App. 1, 6, 363 A.2d 550, 554 (1976) (finding trial judge did not abuse "his discretion" in permitting admission of character evidence).
35. Md. R. 5-608(a)(1).
36. "The court may permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful...." Md. R. 5-608(a)(4). Evidence of specific instances of veracity may not be brought out during direct examination. Md. R. 5-608(a)(3)(B).
37. Md. R. 5-609; see infra notes 41-42 and accompanying text.
38. See, e.g., Boone, 33 Md. App. at 6-8, 363 A.2d at 554; see infra text accompanying note 40.
40. Boone, 33 Md. App. at 6, 363 A.2d at 554.
41. See, e.g., Prout v. State, 311 Md. 348, 359, 355 A.2d 445, 450 (1976) (holding that the trial judge did not abuse his discretion by refusing to allow credibility impeachment
and permitted a previously convicted person to testify. 42 Maryland continues to follow this rule. 43 Under current law, a convict is permitted to testify, although an opposing party is permitted to impeach the convict's credibility with evidence of conviction for a "veracity-impeaching offense".

A veracity-impeaching offense is an offense for which a conviction would be allowed as evidence in another proceeding to impeach one's testimony. 44 Rule 5-609 states that impeachable crimes include any infamous crime or crime relevant to dishonesty. 45

Courts, however, continue to interpret and expand the meaning of "impeachable crimes." 46 In Ricketts v. State, 47 for example, the court expanded the eligible universe of impeachable crimes to include crimes of "moral turpitude." 48 However, in Prout v. State, 49 dissatisfied with the phrase "moral turpitude," the Court of Appeals urged the standard of "reasoned judgment as to whether the offense affects the defendant's credibility." 50

In Carter v. State, 51 the Court of Special Appeals held that a prior conviction for drug manufacturing could be used for impeachment purposes. 52 The court explained that "[drug manufacturing] necessarily requires several steps involving premeditation and conscious vio-


42. Prout, 311 Md. at 358-59, 535 A.2d at 450. The witness was still subject to possible impeachment by introduction of the prior conviction. Id.

43. "Evidence is admissible to prove the interest of a witness in any proceeding, or the fact of his conviction of an infamous crime." Md. Code Ann., Cts. & Jud. Proc. § 10-905 (1995). The Court of Appeals has held that when § 10-905 is inconsistent with Maryland Rule 5-609, the latter will prevail. The court insists that not every infamous crime is sufficiently relevant to veracity that it may be used to impeach witness testimony. See, e.g., Beales v. State, 329 Md. 263, 273, 619 A.2d 105, 110 (1993) (holding that prior theft conviction was not per se admissible); State v. Giddens, 335 Md. 205, 207 n.2, 214-16, 642 A.2d 870, 871 n.2, 874-75 (1994) (holding that prior conviction for narcotics distribution was an impeachable offense).

44. See, e.g., Giddens, 335 Md. at 215, 642 A.2d at 875; see also infra note 115 and accompanying text (noting the vague, self-defining definition of the term).

45. Md. R. 5-609(a)(1).

46. As recently as 1994, the Court of Appeals acknowledged that the list of impeachable crimes continues to develop. See Giddens, 335 Md. at 216, 642 A.2d at 875; see also James A. Protin, Note, What Is a "Crime Relevant to Credibility"?, 54 Md. L. Rev. 1125 (1995) (criticizing the development of the includable impeachable crimes).


48. Id. at 711-14, 436 A.2d at 912-13.

49. 311 Md. 348, 535 A.2d at 448 (1988).

50. Id. at 362-63, 535 A.2d at 452 (quoting Ricketts, 291 Md. at 714, 436 A.2d at 913).


52. Id. at 694, 566 A.2d at 135.
lation of the law. . . . Furthermore, all of these acts must be carried out surreptitiously to avoid detection and arrest."53 In *Morales v. State*,54 the Court of Appeals limited the holding of *Carter* when it determined that simple possession of controlled substances was not a crime relevant to credibility, and therefore, it could not be used for impeachment purposes.55

In *Giddens v. State*,56 the Court of Special Appeals ruled that distribution of cocaine was not an impeachable offense.57 According to the court, the behavior associated with narcotics distribution need not involve "surreptitious conduct or moral depravity sufficient to suggest a lack of credibility."58 The Court of Appeals reversed, believing that a person previously convicted of drug trafficking would be willing to lie under oath.59 The court explained: "[A] narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie."60

3. The Court's Reasoning.—The Court of Appeals granted certiorari in *Sahin v. State*61 to consider whether the trial court improperly excluded testimony regarding the defendant's reputation for truthfulness and veracity. In a unanimous opinion, the Court of Appeals held that a defendant charged with a "veracity-impeaching offense"62 who elects to take the stand, may introduce testimony regarding his reputation for truthfulness.63 The court also ruled that evidence of a defendant's veracity may not be admitted as circumstantial evidence of innocence of the charge of narcotics distribution.64

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53. *Id* at 693, 566 A.2d at 134-35.
55. *Id* at 339, 600 A.2d at 855.
57. *Id* at 592, 631 A.2d at 504.
58. *Id* at 591, 631 A.2d at 503. The court said, "There is simply no warrant to declare these offenses eligible for impeachment on the theory that they entail secretive behavior." *Id* at 592, 631 A.2d at 504.
60. *Id* at 217, 642 A.2d at 876 (citing United States v. *Ortiz*, 553 F.2d 782 (2d Cir.) (holding that the district court judge did not abuse his discretion by concluding that a prior conviction for heroin distribution is probative of a lack of veracity and therefore admissible for impeachment purposes), *cert. denied*, 434 U.S. 897 (1977)).
61. 337 Md. at 304, 653 A.2d at 452.
62. See *Giddens*, 335 Md. at 219-20, 642 A.2d at 877; see also supra notes 41-42 and accompanying text.
63. *Sahin*, 337 Md. at 322, 653 A.2d at 461.
64. *Id* at 311-12, 653 A.2d at 455-56.
Initially, the court considered whether credibility, viewed as a character trait, pertains to the crime of drug trafficking.\textsuperscript{65} The court rejected this notion, and in so doing, clarified its holding in \textit{State v. Giddens}.\textsuperscript{66} In \textit{Giddens}, the court stated that for purposes of impeachment, a prior conviction of distribution of drugs is relevant to credibility.\textsuperscript{67} In \textit{Sahin}, however, the court explained that there are traits more relevant to the distribution of narcotics than character for truthfulness.\textsuperscript{68} Accordingly, the court held that evidence of Sahin's veracity could not be used as circumstantial evidence of his innocence.\textsuperscript{69}

The court's review, however, did not end with its decision relating to circumstantial evidence. Because Sahin testified as a witness, the court next considered whether Sahin's testimony made evidence as to his character for truthfulness admissible.\textsuperscript{70} The court first determined that the Maryland Rules, including the newly adopted Rule 5-608,\textsuperscript{71} permit all witnesses to rehabilitate their character for truthfulness after the trait has been attacked.\textsuperscript{72} Based upon this finding, the court held that when a defendant charged with an impeachable offense decides to testify in his own defense, the State's evidence against the defendant constitutes an attack sufficient to permit the defendant to present evidence of his good character for truthfulness.\textsuperscript{73}

In reaching this holding the court acknowledged that few courts have held that the prosecution's evidence is equivalent to an attack on credibility.\textsuperscript{74} To further bolster its holding, however, the court quoted from the 1971 Proposed Revision of the Federal Rules of Evi-

\textsuperscript{65} \textit{Id.} at 310, 653 A.2d at 455. Sahin argued that to show circumstantial evidence of innocence, a defendant may always put forth evidence of a character trait relevant to the crime of which he is accused. \textit{Id.} Sahin asserted that the language from \textit{Giddens} and \textit{Ortiz} should be interpreted to find that "credibility is a pertinent character trait of the crime of distribution of narcotics." \textit{Id.}

\textsuperscript{66} 335 Md. at 205, 642 A.2d at 870.

\textsuperscript{67} \textit{Id.} at 217, 642 A.2d at 875-76.

\textsuperscript{68} \textit{Sahin}, 337 Md. at 312-13, 653 A.2d at 456.

\textsuperscript{69} \textit{Id.} at 313, 653 A.2d at 456.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} See supra note 22.

\textsuperscript{72} \textit{Sahin}, 337 Md. at 313, 653 A.2d at 456-57.

\textsuperscript{73} \textit{Id.} at 314, 653 A.2d at 457. Prior to \textit{Sahin v. State}, the Court of Special Appeals found that State evidence contradicting the defendant's testimony did not directly attack a defendant's veracity. Boone v. State, 33 Md. App. 1, 6, 363 A.2d 550, 554 (1976). The Boone court based its holding on previous decisions by the Court of Appeals and other authorities. \textit{Id.} at 6-7, 363 A.2d at 554. In \textit{Sahin}, the court acknowledged that its decision effectively overruled the decision. \textit{Sahin}, 337 Md. at 316, 653 A.2d at 458.

\textsuperscript{74} \textit{Sahin}, 337 Md. at 317, 653 A.2d at 458. The court did discuss People v. Taylor, 225 Cal. Rptr. 733 (Ct. App. 1986), a case that paralleled the court's reasoning in \textit{Sahin}. In \textit{Taylor}, the California court found that if the question of the defendant's credibility is not collateral, (i.e., the primary task of the jury is to assess credibility), then "[e]vidence of
This proposal, which the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ultimately rejected, would have permitted witnesses to testify about any defendant's credibility. Finally, the court concluded its opinion by rejecting the reasons most often given for excluding evidence of a witness's good character until that witness's character has been attacked.

4. Analysis.—In Sahin v. State, the Court of Appeals held that the prosecution's evidence that the defendant committed a veracity-impeaching offense amounted to an attack on the defendant's veracity sufficient to permit him to rehabilitate his reputation for truthfulness and veracity with witness testimony. The Sahin decision is problematic for several reasons. First, the court's holding in Sahin is inconsistent with the common interpretations of rules similar to Maryland Rule 5-608(a)(2). Second, by citing a draft version of the Federal Rules of Evidence, the court interpreted the federal rule in a substantially different manner than did the Evidence Subcommittee of the Maryland Rules Committee. Finally, the task of determining what crimes bear on veracity unduly burdens trial courts.

a. The Majority View of When a Witness's Credibility May Be Rehabilitated.—Maryland Rule 5-608, adopted in 1994, addresses how witnesses may be impeached and when witnesses may rehabilitate their credibility with evidence of truthfulness and veracity. The subsection of the rule interpreted by the court in Sahin v. State, 5-608(a)(2),

defendant's reputation [for truthfulness] could only assist the jury in this determination.”
Id. at 739.


76. Id. “The exception with respect to the accused who testifies is based upon the assumption that the mere circumstance of being the accused is an attack on character.” Id. This proposal ultimately was eliminated. Sahin, 337 Md. at 315-16, 653 A.2d at 457-58.

77. Sahin, 337 Md. at 318-22, 653 A.2d at 459-61. The reasons are as follows: (1) evidence of good character for truthfulness should be excluded absent a direct attack on truthfulness because character evidence as a general rule is inadmissible; (2) character evidence for truthfulness is irrelevant because it is presumed, absent an attack on truthfulness, that all witnesses tell the truth; (3) evidence of good character is irrelevant because witnesses frequently make honest mistakes, not because of deliberate untruthfulness; (4) permitting evidence of good character, absent a character attack, would unduly prolong trials. Id.

78. See supra notes 41-42 and accompanying text.

79. Sahin, 337 Md. at 314, 653 A.2d at 457.

80. See supra note 22 for the text of the rule.
is substantively identical to its federal counterpart, Federal Rule of Evidence 608.\(^1\)

Prior to the adoption of Rule 5-608, Maryland courts followed the common-law rule, which, although similar to Rule 5-608(a)(2), did not permit witnesses to offer evidence of their reputations for truthfulness before an attack on their credibility.\(^2\) Because Rule 5-608(a) is consistent with the common law, Maryland courts interpret the rule in the same manner as they interpreted the common law.\(^3\) Accordingly, in Sahin v. State, the Court of Appeals did not abrogate the prohibition against admissibility of credibility evidence prior to an attack on veracity; rather the court expanded the meaning of an attack.

Over a century ago, the court stressed the importance of disallowing the testimony of credibility witnesses if credibility had not been attacked.\(^4\) The court explained:

\[\text{Such conflict [as contradiction] does not authorize the admission of evidence as to the general character of the witness for truth.} \]

"If this were the practice, great delay and confusion would arise: and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and it would indeed be a trial of witnesses, and not of the action."\(^5\)

Federal courts, applying the analogous federal rule,\(^6\) also require the attack on character to be direct and pronounced. In United States v. Jackson,\(^7\) the Drug Enforcement Administration arrested the de-

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81. Federal Rule of Evidence 608(a)(2) states that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a)(2). In addition, many other states have incorporated Federal Rule 608 into their evidence codes. See infra note 96.

82. Because the Maryland Rules of Evidence were not adopted until 1994, all previous decisions interpret the common-law rule. See Vernon v. Tucker, 30 Md. 456 (1869) (holding witnesses may not rehabilitate their reputations for veracity absent an attack on their truthfulness and mere contradiction does not amount to such an attack); Boone v. State, 33 Md. App. 1, 363 A.2d 550 (1976) (holding, inter alia, that evidence contradicting defendant's claim of accident did not permit him to rehabilitate his reputation for veracity); see also supra text accompanying notes 90-91.

83. See, e.g., Sahin, 337 Md. at 313, 653 A.2d at 456; Wilson v. State, 103 Md. App. 722, 725-26, 654 A.2d 936, 938 (1995) (holding that because defendant was on trial for murder, an "impeachable offense," as defined by the Court of Appeals, the trial court erred in excluding evidence of the defendant's reputation for truthfulness and veracity); see also supra note 13 (discussing the common law at the time of Sahin's trial).

84. Vernon, 30 Md. at 462-63.

85. Id. at 462 (quoting Russell v. Coffin, 8 Pick. 154).

86. Federal Rule 608 does not permit evidence of reputation for truthfulness until the credibility of the witness has been attacked. See supra note 81.

87. 588 F.2d 1046 (5th Cir. 1979).
fendants for possession with intent to distribute heroin. The United States Court of Appeals for the Fifth Circuit held that when defendants elect to testify, they do not automatically acquire the right to call witnesses to bolster their credibility. The court wrote, "[w]here an accused takes the stand as a witness he places his credibility in issue as does any other witness. If the prosecution chooses to attack his credibility, he may then introduce evidence of his good character for truthfulness and veracity."

In United States v. Danehy, the United States Court of Appeals for the Eleventh Circuit held that "[g]overnment counsel pointing out inconsistencies in testimony and arguing that the accused's testimony is not credible does not constitute an attack on the accused's reputation for truthfulness within the meaning of Rule 608." The court concluded that the prosecution's remarks that the witness's testimony was not credible were insufficient to permit the witness to respond with rehabilitative testimony. Finally, in United States v. Dring, the Ninth Circuit held that neither defense-initiated attacks on the defendant's veracity, nor evidence of the defendant's interest in the outcome of the trial were sufficient to trigger rehabilitative testimony.

Similarly, in states with an evidentiary rule comparable to Federal Rule 608, courts have construed the analogous state rule in accordance with the federal courts' interpretations. Seemingly, no state has interpreted the word "attack" to include charges for veracity-impeaching crimes. For example, in State v. Carr, the Supreme Court of Oregon interpreted the term "or otherwise" in the Oregon Evi-

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88. Id. at 1048-50.
89. Id. at 1055.
90. Id.
91. 680 F.2d 1311 (11th Cir. 1982).
92. Id. at 1314; see also Jackson, 588 F.2d at 1055.
93. Danehy, 680 F.2d at 1314.
94. 930 F.2d 687 (9th Cir. 1991).
95. Id. at 690-91.
97. Id. at 140.
98. In Sahin v. State, the Maryland court acknowledged that it has embraced the minority viewpoint. 337 Md. at 317, 653 A.2d at 458. But see Wis. STAT. ANN. § 906.08 (West 1994). Wisconsin has adopted a rule allowing criminal defendants to bolster their credibility when they testify, even absent an attack on veracity. Id.
99. 725 P.2d 1287 (Or. 1986).
evidence Code 608(1)(b)\textsuperscript{100} as referring to testimony of prior instances of conduct by the impeached witness.\textsuperscript{101}

The West Virginia Supreme Court of Appeals ruled in \textit{State v. Zaccagnini}\textsuperscript{102} that a defendant's denial that he committed a crime does not give him the right to have character witnesses testify as to his truth and veracity.\textsuperscript{103} In \textit{People v. Colclasure},\textsuperscript{104} the Illinois Appellate Court held that evidence of reputation for truthfulness is not admissible merely because the defendant chose to testify.\textsuperscript{105}

In \textit{Sahin v. State},\textsuperscript{106} however, the Court of Appeals ignored an overwhelming volume of adverse persuasive authority. Given the precedent set by federal and other state courts, it seems likely that the Maryland Rules Committee intended the courts to construe Rule 5-608 in accordance with Maryland's common law and the Federal Rule of Evidence 608. The Rules Committee clearly modeled Rule 5-608(a)(2) after Federal Rule 608(a)(2).\textsuperscript{107} Although the Committee

\begin{footnotes}
\item[100.] "Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." OR. REV. STAT. § 40.350, Rule 608 (1988) (emphasis added).
\item[101.] \textit{Carr}, 725 P.2d at 1291. By defining "otherwise," the court leaves no room for a broader interpretation. \textit{Id.}; see supra note 100.
\item[102.] 308 S.E.2d 131 (W. Va. 1983). Zaccagnini was charged with possession with intent to deliver LSD and cocaine. \textit{Id.}
\item[103.] \textit{Id.} at 138. The court went on to say that there would be a different result if, during cross-examination, the State persistently attempts to force the defendant to acknowledge the conflicts between his testimony and that of the State's witnesses. Only in that situation would the prosecution be "attacking" the defendant's credibility. \textit{Id.}
\item[104.] 558 N.E.2d 705 (Ill. App. Ct. 1990). The defendant was on trial for first degree murder. \textit{Id.}
\item[105.] \textit{Id.} at 710.
\item[106.] 337 Md. at 504, 653 A.2d at 452.
\item[107.] See, e.g., 20 Md. Reg. pt. II, at 1, 13-14 (issue no. 15) (July 23, 1993) (noting that style changes had been made to bring the text "in closer conformity with how the [federal] courts have construed [the rules]").
\end{footnotes}
made both substantive and cosmetic changes to Rule 5-608, the essential meaning remained intact.

b. Reliance on the 1971 Proposed Revision of the Federal Rules.—The Court of Appeals's discarding of persuasive judicial and legislative authority was unfortunately not the only troublesome point in Sahin. Equally problematic was the court's reliance on a draft version of the Proposed Federal Rules of Evidence. The 1971 revision of the initial draft of the proposed Federal Rules of Evidence would have allowed any defendant who took the stand to present witness testimony of his reputation for truthfulness and veracity. The drafters ultimately rejected the proposed rule because of protest from the Department of Justice and Senator McClellan. The Maryland


Because the Committee found Fed. R. Evid. 608 to be confusingly drafted, Rule 5-608 is substantially new in style and organization.

The part of section (b) of the federal rule that concerns cross-examination of character witnesses is added to section (a) of the Maryland Rule, so that section (a) is devoted to impeachment and rehabilitation of a witness by a character witness, and to impeachment of the character witness by questions about prior acts of the other witness.

Subsection (a)(3) is more detailed than the federal rule. Subsection (a)(3)(A) is contrary to the decision in United States v. Davis, 639 F.2d 239, 245 (5th Cir. 1981). Subsection (a)(3)(B) is consistent with the reading that the federal courts have given to the federal rule.

...[s]ubsection (a)(4) and section (b) echo some of the federal case law.

Because of a conflict with Rule 5-607, the federal rule's restriction in section (b) to "cross-examination" is omitted.

The last paragraph of section (b) of the federal rule is recast as section (c).

Id. at 148.

109. McLain, supra note 29, at 146-49; see also 20 Md. Reg. pt. II, at 14 (issue no. 15) (July 23, 1993). The Committee Reporter wrote, "Subsection (a)(2) [is] consistent with F.R.Ev. 608(a) and Maryland law. . . ." Id.

110. 337 Md. at 317, 653 A.2d at 458.
111. Id. at 314, 653 A.2d at 457.

113. See, e.g., 3 MUELLER & KIRKPATRICK, supra note 97, § 260, at 136 (quoting First KIldienst Letter, 117 Cong. Rec. 33,648, 33,655 (Sept. 28, 1971)). The Department of Justice argued that a rule that would allow a defendant to admit testimony of good credibility whenever the defendant testified, "raises the specter of a long line of ‘oath helpers.’" Id.

114. See, e.g., id. at 196-97 (quoting Sen. McClellan's Letter, 117 Cong. Rec. 33,642, 33,645 (Sept. 28, 1971)). Senator McClellan criticized the "departure from the traditional practice" that would arise if the courts were to allow "an accused to buttress his character for veracity before it is attacked." Id.
court's reliance on this discarded proposal is perplexing. If the Maryland Rules Committee intended for defendants to be treated differently under Rule 5-608, the Committee could have recommended language similar to the 1971 draft.

c. Defining a Veracity-Impeaching Crime.—Another problem presented by the court's ruling in Sahin v. State is the vague, self-defining description of a veracity-impeaching offense.\textsuperscript{115} The trial courts are now presented with the task of deciding whether a crime is sufficiently relevant to credibility to constitute an attack.

Rule 5-609 provides no definition or list of veracity-impeaching crimes.\textsuperscript{116} Where the Court of Appeals has classified a crime as a veracity-impeaching offense, as it did in State v. Giddens,\textsuperscript{117} trial courts will have guidance.\textsuperscript{118} Trial courts will have to decide, however, in cases where the crime charged has not been deemed a veracity-impeaching offense. They have been given very little guidance on how to do so.

5. Conclusion.—Relying on discarded reasoning and misplaced arguments, the Court of Appeals in Sahin v. State, extended the meaning of "attack," as denoted in Maryland Rule 5-608, beyond its intended scope. Rule 5-608 was intended to permit credibility testimony only after the prosecution has attempted to impeach or otherwise discredit the defendant's reputation for truthfulness. Furthermore, because no predetermined list of veracity-impeaching crimes exists, courts are now burdened with determining what crimes constitute veracity-impeaching offenses. By permitting a defendant to offer evidence of truthfulness and veracity regardless of whether the prosecution affirmatively attacks the defendant's credibility, the Court

\textsuperscript{115} The court defined veracity-impeaching offense as "infamous crimes or other crimes relevant to credibility as used in Maryland Rule 5-609. That is, those crimes that are so relevant to credibility that convictions of the crime may be used to attack the credibility of a witness." Sahin, 337 Md. at 307 n.1, 653 A.2d at 453 n.1.

\textsuperscript{116} Rule 5-609 defines the impeachable offense as, "an infamous crime or other crime relevant to . . . credibility." Md. R. 5-609(a)(1).

\textsuperscript{117} 335 Md. 205, 642 A.2d 870 (1994).

\textsuperscript{118} See Protin, supra note 46, at 1137. Protin wrote, "Unfortunately, the Giddens decision did no more than add one specific crime to a piecemeal list of crimes relevant to credibility. The court issued no rules to guide trial judges in this matter of law, nor did it clarify what information could be used to make the determination." Id. (footnote omitted).
Maryland's newly adopted evidence rules.

Catherine J. McCallie
VI. Procedure

A. Denying Trial Courts the Power to Grant Sua Sponte Transfers

In *Urquhart v. Simmons*,\(^1\) the Court of Appeals held that trial courts could not sua sponte transfer an action for the convenience of the parties under Maryland Rule 2-327(c).\(^2\) This holding is in stark contrast to the practice of federal courts, which do allow sua sponte transfers under Title 28, section 1404(a) of the United States Code,\(^3\) from which Rule 2-327 is derived. This narrowly reasoned decision turned on a fine point of statutory construction and did not illuminate the historical or policy underpinnings of the holding.

This Note will describe the concept and history of convenience-of-forum proceedings, both in Maryland and in the federal system. The Note questions the court's restricted approach to the issue of transfers for convenience in *Urquhart*, and suggests that the court missed an opportunity to modernize the use of transfers for convenience.

1. The Case.—In March 1987 Anthony Simmons died from complications of a medical diagnostic procedure performed a few days earlier.\(^4\) Simmons was survived by his wife, Angela Simmons, and their three children, who together brought a wrongful death and survival action against William Tullner, Joann Urquhart, and Maryland Cardiology Associates (MCA), the firm that employed the two doctors.\(^5\) Dr. Tullner performed the procedure on Simmons, and Dr. Urquhart assumed responsibility for Simmons's case when Dr. Tullner left town.\(^6\) Dr. Urquhart conversed with Simmons over the phone during the two days prior to his death, although the exact number of

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2. *Id.* at 15, 660 A.2d at 419. See *infra* note 25 for text of Md. R. 2-327(c).
4. Mr. Simmons underwent a cardiac catheterization. This is a procedure in which a catheter, or thin tube, is inserted into a large blood vessel in the groin area and is extended and manipulated through the body until it reaches the heart. A dye that is opaque to x-rays is injected into the catheter and then x-rays are taken. The dye outlines the interior walls of the blood vessels so that any blockages can be detected. One of the more serious complications of this procedure is a potentially fatal condition called a pulmonary embolism. This occurs when a blood clot forms in the leg at the entry site of the catheter, dislodges, and travels to the lungs, creating a blockage. An autopsy confirmed that this was the cause of Mr. Simmons's death. *Simmons v. Urquhart*, 101 Md. App. 85, 91, 643 A.2d 487, 490 (1994), rev'd, 339 Md. 1, 660 A.2d 412 (1995).
5. *Id.*
6. Dr. Tullner was dismissed from the case prior to trial. *Urquhart*, 339 Md. at 3 n.1, 660 A.2d at 413 n.1.
times they spoke was disputed by the parties, as was the advice that Dr. Urquhart gave to Simmons.⁷

After her husband died, Angela Simmons filed a medical malpractice claim with the Health Claims Arbitration Office, in accordance with statute.⁸ Following discovery, the parties waived arbitration and filed a complaint in the Circuit Court for Prince George's County, Maryland.⁹

Soon after the lawsuit was filed, the health care provider defendants filed a motion to dismiss or, in the alternative, a motion to transfer to the Circuit Court for Montgomery County.¹⁰ The defendants argued that venue was improper in Prince George's County.¹¹ They referred to the "contacts" in the alternate forum¹² and contended that (1) all of MCA's physicians resided in Montgomery County, (2) the business address of each was in Montgomery County, (3) the procedure was performed in Montgomery County, and (4) that Dr. Urquhart had conducted her conversations with the deceased from her office in Montgomery County.¹³ Simmons countered that MCA had an office in Prince George's County, and that her husband had died in Prince George's County.¹⁴

At the hearing on the motion, the trial judge asked if the defendants had really intended to raise a forum non conveniens issue, rather than an improper venue argument.¹⁵ The defendants agreed that the court could "probably draw that analogy" and appealed to the court's

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⁷ Id. at 4-7, 660 A.2d at 414-15.
⁹ Urquhart, 339 Md. at 4, 660 A.2d at 413.
¹⁰ Id. at 4-5, 660 A.2d at 413.
¹² Urquhart, 339 Md. at 5, 660 A.2d at 414. The Court of Special Appeals made note of the fact that the issue of "contacts" typically is associated with disputes over jurisdiction, not venue. Urquhart, 101 Md. App. at 107, 643 A.2d at 498. See International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that assertion of personal jurisdiction meets due process requirements when the defendant has minimum contacts with the forum).
¹³ Urquhart, 339 Md. at 5, 660 A.2d at 414.
¹⁴ Id. The Court of Appeals also noted that Mr. Simmons was a resident of Howard County at the time of his death. Id. at 19 n.8, 660 A.2d at 420 n.8.
¹⁵ Id. at 6, 660 A.2d at 414. Venue rules specify which courts that have jurisdiction (both personal and subject matter) over the action are ones in which the action may be brought. Forum non conveniens, as discussed infra notes 60-80 and accompanying text, permits transfers of cases to another venue, even though the original venue is proper.
The trial judge agreed that the case should be transferred to Montgomery County, and signed the appropriate order.17

After a trial in which the number and nature of the telephone calls between the parties were sharply disputed, the jury found that while Dr. Urquhart was negligent in her response to Simmons's calls, Simmons was contributorily negligent, presumably because he had not gone to the hospital when advised by his wife and another physician to do so.18 Judgment was entered for the defendants.19

Angela Simmons appealed to the Court of Special Appeals, claiming, among other things,° that the trial court abused its discretion by ruling that venue was improper and transferring the action to Montgomery County.20 Simmons also maintained that because the defendants had mistakenly argued improper venue, they should be precluded from arguing in the alternative that the transfer was justified under the separate doctrine of forum non conveniens.21

The Court of Special Appeals agreed with Simmons that the concepts of venue and forum non conveniens are procedurally distinct.22 However, the court did not agree that the defendants' failure to bring a proper motion would preclude a transfer on the basis of forum non conveniens, holding instead that a trial court may transfer a case on its own initiative if it determines that another forum is more appropriate.23

In reaching this holding, the Court of Special Appeals began its analysis by examining the wording of Rule 2-327(c),25 which it de-

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16. Urquhart, 339 Md. at 6, 660 A.2d at 414.
17. Id.
18. Simmons v. Urquhart, 101 Md. App. 85, 97, 643 A.2d 487, 492-93 (1994), rev'd, 339 Md. 1, 660 A.2d 412 (1995). Simmons, who had diabetes, had also phoned Dr. Cheetham, his diabetes physician, for advice. Dr. Cheetham had told him that it would be appropriate to go to the emergency room if he could not contact Dr. Urquhart. Id. at 94, 643 A.2d at 491.
19. Id. at 97, 643 A.2d at 493.
20. Simmons also appealed the trial court's refusal to give a "last clear chance" instruction to the jury. Id. at 89, 643 A.2d at 489. Both appellate courts addressed but did not decide this issue.
21. Urquhart, 339 Md. at 9, 660 A.2d at 414.
23. Id. at 99, 643 A.2d at 493 ("Generally the right to change venue of an action is purely statutory . . . . In comparison, forum non conveniens refers to the discretionary power of a court to transfer an action whenever it appears that a cause may be tried more appropriately in another valid venue.").
24. Id. at 105, 643 A.2d at 496.
25. Rule 2-327(c) states: "On motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the
scribed as the codification of the forum non conveniens doctrine in Maryland. The intermediate court focused on the phrase “on the motion of a party,” declaring that this wording neither prohibited nor licensed a court to transfer a case on its own initiative. It then cited Coins v. State as precedent for the proposition that a court has “inherent authority to control its docket except as expressly limited by statute” and that this authority could be manifested in a sua sponte motion to transfer.

To further support its reasoning, the Court of Special Appeals turned to federal case law addressing Title 28, section 1404(a) of the United States Code, the statute that controls transfers based on convenience in federal court. Maryland Rule 2-327 “is derived from 28 U.S.C. § 1404(a) and is intended to incorporate the body of law construing that statute.” The court cited a number of state and federal cases that interpreted 28 U.S.C. § 1404(a) in a manner that accorded wide discretion to a trial court to transfer cases on its own initiative, and concluded that Maryland courts possess similar authority under Rule 2-327(c).

The Court of Special Appeals then applied the balancing test from Odenton Development Co. v. Lamy to determine if the trial judge had abused his discretion in transferring the case. The intermediate

convenience of the parties and witnesses and serves the interests of justice.” Md. R. 2-327(c).

27. Id. at 100, 643 A.2d at 494.
28. 293 Md. 97, 111, 442 A.2d 550, 557 (1982).
30. Id. at 102, 643 A.2d at 495.
31. It provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a) (1994).
33. Urquhart, 101 Md. App. at 103, 643 A.2d at 496.
34. 320 Md. 33, 575 A.2d 1235 (1990).
35. Urquhart, 101 Md. App. at 105-06, 643 A.2d at 497. In Odenton, the Circuit Court for Baltimore City, pursuant to Rule 2-327(c), transferred a negligence action to the Circuit Court for Anne Arundel County. Odenton, 320 Md. at 38, 575 A.2d at 1237. In affirming the transfer, the Court of Appeals held that “a motion to transfer should be granted only when the balance weighs strongly in favor of the moving party.” Id. at 40, 575 A.2d at 1238. This test weighs the convenience of the parties and witnesses, as well as “those public interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of ‘the interest of justice.’” Id. (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)). The public interest factors that the Court of Special Appeals used in Urquhart are detailed in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (e.g., administrative problems for courts when litigation piles up, the local interest in having local disputes settled at home, and the potential burden on jurors of deciding a dispute
appellate court concluded that there had been an abuse of discretion because the defendants had failed to demonstrate that they would be inconvenienced by a trial in Prince George's County. The court reversed the judgment of the trial court and ordered that the case be remanded and transferred to the Circuit Court for Prince George's County for a new trial.

The defendants appealed, and the Court of Appeals subsequently issued a writ of certiorari.

2. Legal Background.—Venue is a statutory requirement that varies by jurisdiction. In Maryland, venue is proper in the county in which the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. In the case of multiple defendants, the action may be brought in a county where any one of them resides, or where the cause of action arose. A corporate defendant may be sued where it maintains its principal offices in the state. Other considerations are called into play, depending on the circumstances. For example, the venue for a negligence claim may

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that has no relation to their community). See Urquhart, 101 Md. App. at 105 n.9, 643 A.2d at 497 n.9; infra notes 63-65 and accompanying text.

36. Urquhart, 101 Md. App. at 106-07, 643 A.2d at 497-98. This result is not surprising, as it had been well-established by that time that the defendants' argument had been directed at the issue of whether venue was proper, and not whether it was convenient.

37. Id. at 113, 643 A.2d at 500.

38. Urquhart, 339 Md. at 9, 660 A.2d at 416.

39. Jack H. Friedenthal et al., Civil Procedure 79 (1993). Venue is a matter of geography, not to be confused with subject matter or personal jurisdiction. The concepts of subject matter jurisdiction and personal jurisdiction are both firmly rooted in the Constitution and the grant of authority by Congress. Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939). Venue, by contrast, is a creature of statute that merely deals with the best location to hear a case within a judicial system. As the Ninth Circuit explained, "jurisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, is intended for the convenience of the litigants." Washington Pub. Util. Group v. United States Dist. Court, 843 F.2d 319, 328 (9th Cir. 1987) (citation omitted); see also 15 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3801 (1986). There may be more than one proper venue for a given case. The appropriateness of a particular venue is a function of both convenience to the parties and judicial efficiency, which, depending on the jurisdiction, are determined by factors such as the plaintiff's privilege of choice, the residences of the parties, location of counsel, availability of exhibits and witnesses, proximity to the property in an in rem proceeding, the length of the court docket, and the familiarity of the jury or court with a particular issue. Id. §§ 3847-3854. These are the factors that parties must address in motions for change of venue under Rule 2-327(c).


41. Id. § 6-201(a).

42. Id. § 6-201(b).

43. Id.

44. Id. §§ 6-202, -203.
be where the cause of action arose, regardless of the number of defendants. When there are multiple venues to choose from, the plaintiff has the right to select the one in which to proceed. Generally, this choice "should not be disturbed except for weighty reasons."

Venue for federal cases is determined by statute. The factors in determining venue are substantially the same as those in Maryland. One difference is that federal venue also lies wherever "the defendants are subject to personal jurisdiction at the time the action is commenced," which means wherever they can be served with process. In addition, certain federal actions have special venue statutes associated with them.

If an action is filed in a venue that does not meet any of the statutory requirements and the defendant makes a timely objection, the action may be dismissed. However, in the federal system, and in many state jurisdictions including Maryland, the action may also be transferred to a court of proper venue.

Improper venue is not the only justification for dismissal or transfer of an action. In both the Maryland and the federal system, changes of venue are allowed for reasons of convenience.

45. Id. § 6-202(8).
47. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. c (1971); see also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (stating that court weighs relative advantages and obstacles to fair trial and preserves plaintiff's choice of forum unless balance is strongly in favor of defendant's motion to transfer).
49. Id. § 1391(a)(3).
50. FRIEDENTHAL ET AL., supra note 39, at 80.
51. Id. at 79 n.3; see, e.g., 28 U.S.C. § 1396 (1994) (governing tax collection actions); id. § 1400 (governing patent infringement actions); id. § 1401 (governing stockholders' derivative actions).
52. See infra note 92 and accompanying text.
54. Section 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (1994).
55. Rule 2-327(b) states: "If a court sustains a defense of improper venue but determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought." Md. R. 2-327(b).
56. 28 U.S.C. § 1404(a) (1994); Md. CODE ANN., CTS. & JUD. PROC. § 2-327(c); see supra notes 25, 31.
“convenience-of-forum” decisions may also result in either dismissal or transfer of the action.57

a. Convenience of Forum in the Federal System.—Convenience-of-forum decisions in the federal system are governed by both the common-law doctrine of forum non conveniens and by the provisions of Title 28, section 1404(a) of the United States Code.58 There is a distinct difference between the two. Section 1404(a) is reserved for transfers of actions, whereas forum non conveniens authorizes dismissals.59

The term “forum non conveniens” first entered the American legal lexicon in a law review article published in 1929.60 Before that time, references to it had been rare, although the issue of when a court could reject a case had been discussed since the early days of the republic.61 The issue generally arose regarding controversies that had been imported from outside the jurisdiction by two nonresidents.62

The doctrine appeared in a few opinions throughout the 1930s and 40s.63 In 1947, Justice Jackson wrote a “primer” on forum non conveniens in Gulf Oil Corp. v. Gilbert.64 This case, like many that would follow, involved forum-shopping for a suit against a corporate

58. See supra note 31.
59. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (noting that “transfers [under § 1404(a)] are different than dismissals on the ground of forum non conveniens. ... Although the statute was drafted in accordance with the doctrine of forum non conveniens, ... it was intended to be a revision rather than a codification of the common law.”). It is sometimes said that the venue transfer statute is a codification of the doctrine of forum non conveniens, but this is not accurate. Forum non conveniens authorizes dismissal of an action where the forum chosen is seriously inconvenient. Transfer can be ordered even if the forum chosen is not seriously inconvenient, if another would be more convenient.

61. Id. at 3-19.
62. Id.
63. See, e.g., Urquhart v. American-La France Foamite Corp., 144 F.2d 542, 544-45 (D.C. Cir. 1944) (refusing case where parties were nonresidents and there was another suitable forum); Kelley v. American Sugar Ref. Co., 189 F.2d 76, 79 (1st Cir. 1943) (applying the doctrine to avoid interfering in internal affairs of corporation); Wittig v. Canada S.S. Lines, 59 F.2d 428, 480 (2d Cir. 1932) (holding that an admiralty court could reject a case where both the cause of action and the witnesses were located in a foreign jurisdiction, and the parties were foreign).
defendant that operated in many states. In a decision that would be cited frequently thereafter, Justice Jackson described the history of the doctrine, the principles on which it is based, and the factors to consider in its application.

As the Court recognized in Gilbert, the doctrine of forum non conveniens presupposes that there is at least one other jurisdiction in which the defendant is amenable to process. However, if these two forums are not in the same jurisdiction, the court has no authority to effect a transfer and must dismiss the case outright. This situation arises on the federal level when the other possible forum is in another country. In such cases, the court will occasionally decline jurisdiction. This is permitted even if the substantive law of the alternate forum is different and may significantly affect the relative rights of the litigants, as long as the remedy available to the plaintiff is not "clearly inadequate." Where a remedy is unavailable because the statute of limitations has tolled in the alternative jurisdiction, the original court

65. Gilbert, a resident of Virginia, brought suit in the Southern District of New York against Gulf Oil, a Pennsylvania corporation that was licensed to do business in both Virginia and New York. Id. at 502-03. Gilbert alleged that Gulf Oil had carelessly handled a delivery of gasoline, resulting in an explosion and the fiery destruction of his warehouse and its contents. Id. Gulf Oil invoked the doctrine of forum non conveniens to have the case transferred to Virginia where the cause of action arose. Id. at 503. The district court, using New York state law regarding forum non conveniens, granted the motion and dismissed the case. Id. The Second Circuit Court of Appeals took a dim view of the entire doctrine, and reversed. Id. The Supreme Court, in a five-to-four decision, gave credence to the doctrine of forum non conveniens by reversing the Court of Appeals. Id. at 512.

66. Id. at 504-09. The factors enumerated included those relevant to the litigants such as:

(1) the relative ease of access to sources of proof;
(2) the availability of compulsory process for attendance of unwilling witnesses;
(3) the cost of obtaining the attendance of witnesses;
(4) the possibility of a view of the premises;
(5) the enforceability of a judgment if one is obtained;
(6) all other practical problems that make a trial easy, expeditious, and inexpensive.

Id. at 508.

Factors relevant to the public interest included:

(1) the administrative difficulties of congested dockets;
(2) the burdens of jury duty imposed on the local citizenry;
(3) the interest of deciding controversies in the community most affected;
(4) the familiarity of the court with the applicable law.

Id. at 508-09.

67. Id. at 506-07.


69. Id.

70. Gilbert, 330 U.S. at 504.

may either retain jurisdiction or exact an agreement by the defendant to waive that affirmative defense.\textsuperscript{72}

Title 28, section 1404(a) of the United States Code was enacted soon after the Gilbert decision.\textsuperscript{73} Section 1404(a) authorizes transfer even when the forum is not seriously inconvenient so long as another would be more convenient,\textsuperscript{74} and has replaced forum non conveniens as the authority for transfers within the federal system.\textsuperscript{75} Where the more convenient forum is outside the United States, however, forum non conveniens still applies.\textsuperscript{76} Both federal and state courts are accorded broad discretion in considering these factors,\textsuperscript{77} and section 1404(a) transfers are granted more latitude than are dismissals under the doctrine of forum non conveniens.\textsuperscript{78}

\textit{b. Convenience of Forum in the States.}—At the state level, interjurisdictional venues typically involve different states. The courts of one state have no authority to transfer a case to another state, and so must dismiss the case.\textsuperscript{79} If the alternative venue is within the same jurisdiction, intra-jurisdictional transfer rules come into play.\textsuperscript{80}

Unlike its federal counterpart, Maryland law\textsuperscript{81} does not seem to recognize a doctrinal distinction between dismissal and transfer. In

\textsuperscript{72} Restatement (Second) of Conflict of Laws § 84 cmt. c (1971); see, e.g., Piper Aircraft Co., 454 U.S. at 242 (stating that defendants agreed to waive any statute of limitations defense).

\textsuperscript{73} Gilbert was decided in 1947 and 28 U.S.C. § 1404(a) was enacted in 1948.

\textsuperscript{74} See supra note 31.

\textsuperscript{75} Casad, supra note 53, § 4:26, at 78.

\textsuperscript{76} Id.

\textsuperscript{77} See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1987) ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'"); Odenton Dev. Co. v. Lamy, 320 Md. 33, 40, 575 A.2d 1235, 1238 (1990) ("When determining whether a transfer of the action ... is in the interest of justice, a court is vested with wide discretion.").

\textsuperscript{78} Piper Aircraft Co. v. Reyno, 454 U.S. 255, 253 (1981) (stating that when Congress enacted § 1404(a), district courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of forum non conveniens).

\textsuperscript{79} Restatement (Second) of Conflict of Laws § 84 cmt. e (1971).

\textsuperscript{80} In Maryland, such transfers among circuit courts are governed by Rule 2-327(b), (c), and (d); among district courts by Rule 3-326; and between circuit and district courts by Rules 2-327(a), 3-503(a)(2), and 3-325(c). For federal courts, the general transfer statute is 28 U.S.C. § 1404; 28 U.S.C. § 1406 permits transfers to cure improper venue; 28 U.S.C. § 1407 permits transfers for the purpose of consolidating actions; and 28 U.S.C. § 1631 permits transfers for want of jurisdiction.

\textsuperscript{81} The doctrine of forum non conveniens was codified in Maryland at least as early as 1951. Md. Ann. Code art. 23, § 88(b) (1951) (repealed by Acts of 1967, ch. 592, § 1, 1967 Md. Laws 1146). It first appeared in appellate case law in 1954, Thomas v. Hudson Sales Corp., 204 Md. 450, 465, 105 A.2d 225, 232 (1954), and in four other cases up to 1980, Springle v. Cotrell Eng'g Corp., 40 Md. App. 267, 391 A.2d 456 (1978); Lewis v. German-
Springle v. Cottrell Engineering Corp., the Court of Special Appeals stated that Courts and Judicial Proceedings Article, section 6-104—which controls dismissals of actions that could be heard in another forum—"codifies the doctrine of forum non conveniens." Then, in Simmons v. Urquhart, the same court stated that "the doctrine of forum non conveniens is embodied in Rule 2-327(c)," which governs transfers between forums. As a general matter, the Maryland doctrine of forum non conveniens is not restricted to dismissals but also "refers to the discretionary power of a court to transfer an action whenever it appears that the cause may be tried more appropriately in another valid venue."

c. Procedural Rules.—It is generally presumed that a plaintiff has chosen the most convenient forum in which to bring the action, and this presumption must be strongly rebutted if the defendant wishes to effect a change. The plaintiff's choice may be overturned when the chosen forum imposes considerable inconvenience on the defendant and the plaintiff cannot justify the reason for the choice.

Unlike motions based on improper venue, which must be made very early in an action, motions to transfer or dismiss based on fo-


83. Section 6-104(a) states that "[i]f a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers just." MD. CODE ANN., CTS. & JUD. PROC. § 6-104(a) (1995).
84. 40 Md. App. at 270, 391 A.2d at 459.
86. Id. at 99, 643 A.2d at 494.
87. See supra notes 25-26, 80 and accompanying text.
90. Odenton Dev. Co. v. Lamy, 320 Md. 33, 40, 575 A.2d 1235, 1238 (1990). This may not be the case, however, if a contractual forum selection clause has governed the selection. Such clauses are given significant weight in federal actions. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).
91. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) ("[W]hen trial in the chosen forum would 'establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience ...' the court may, in the exercise of its sound discretion, dismiss the case.") (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).
92. Improper venue is a defense under both federal and Maryland law. In the federal system, this defense is included in Federal Rule of Civil Procedure 12(b)(3) and, according to Federal Rule 12(h)(1), it is waived unless pleaded as part of or prior to the party's
rum non conveniens may be made at any time. Nonetheless, it seems unlikely that such motions would be entertained once a trial has begun. In federal district court, motions to transfer, if not made during a hearing or trial, "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The same requirements, worded somewhat differently, are contained in Maryland's general rule concerning the filing of motions. Maryland has an additional requirement, not found in Federal Rule of Civil Procedure 7, that any facts recited in a motion that are not contained in the record must be set forth in an affidavit. Hearings on these motions to transfer are not required, although the Court of Appeals considers it good practice to do so. The significant difference between transfers in the two systems is found in the Urquhart holding—while federal courts may order a transfer for convenience of the parties sua sponte, Urquhart now makes clear that Maryland courts may transfer a case only on motion of one of the parties.

3. The Court's Reasoning.—In Urquhart, the Court of Appeals reversed not only the Court of Special Appeals's decision, but the preliminary conclusions that supported the intermediate court’s decision. The Court of Appeals held that a trial court could not transfer a case under Rule 2-327(c) sua sponte, but could do so only on a motion from one of the parties. However, with regard to the facts presented, it decided that the defendants' original motion to transfer was a sufficient procedural impetus to permit the trial court to exercise its discretion to transfer on the grounds of forum non conveniens, even though that doctrine had not been the basis of the motion.

answer. In Maryland, a defense of improper venue must be made as a motion to dismiss before the answer is filed, and not as part of the answer. Md. R. 2-311.

93. Motions to transfer under Rule 2-327(c) or (d) may be filed at any time. Niemeyer & Richards, supra note 32, at 217.

94. FED. R. CIV. P. 7(b)(1).

95. Md. R. 2-311.

96. Md. R. 2-311(d).


99. Urquhart, 339 Md. at 21, 660 A.2d at 422.

100. Id.

101. Id. at 19, 660 A.2d at 421.
The Court of Appeals construed Rule 2-327 much differently than did the Court of Special Appeals. The Court of Appeals agreed that Rule 2-327(c) was derived from 28 U.S.C. § 1404(a). However, the court also noted that there was a conspicuous difference in the wording of the two statutes. Rule 2-327(c) contains the phrase "[o]n motion of any party," while 28 U.S.C. § 1404(a) does not. Because section 1404(a) contains less restrictive language than Rule 2-327(c), the court found the related federal case law that permitted sua sponte transfers unpersuasive. Writing for the court, Judge Chasanow reasoned that

[i]f Maryland wished to permit a trial court to act sua sponte in transferring an action, Md. Rule 2-327(c) could have adopted the language of 28 U.S.C. § 1404(a) verbatim . . . . Given that this Court adopted the recommendation of the Rules Committee to add the "[o]n the motion of any party" language to the Maryland rule, however, that addition indicates that a motion by a party requesting a transfer is required prior to a trial court transferring an action under Md. Rule 2-327(c).

By the same reasoning, the court rejected the Court of Special Appeals's view that a court could make a Rule 2-327(c) transfer sua sponte because the other paragraphs of Rule 2-327 permit the court to act on its own initiative. Again, the court maintained that by inserting the additional wording only to Rule 2-327(c), it was the intent of the Rules Committee that a party must make a motion to transfer before a trial court could transfer a case.

102. Id. at 11, 660 A.2d at 417.
103. Id.
104. See supra notes 25 and 31.
105. Urquhart, 339 Md. at 12, 660 A.2d at 417.
106. Id.
107. Simmons v. Urquhart, 101 Md. App. 85, 103 n.7, 643 A.2d 487, 496 n.7 (1994), rev'd, 339 Md. 1, 660 A.2d 412 (1995). There are three other sections to Rule 2-327, none of which shares the restrictive language of Rule 2-327(c). Rule 2-327(a) allows a circuit court to transfer an action to a district court when the transferring court determines that the district court has exclusive jurisdiction. No motions are required. Rule 2-327(b) allows a court the option of transferring, rather than dismissing, an action when venue has been found improper. Again, no motion is required. Rule 2-327(d) allows related actions to be transferred and consolidated in one court. Paragraph (2) of this section states that "[a] transfer under this section may be made on motion of a party or on the transferor court's own initiative." Md. R. 2-327(d)(2).
108. Urquhart, 339 Md. at 12, 660 A.2d at 417.
The Court of Appeals distinguished Goins v. State,\textsuperscript{109} a case involving criminal procedure, from the instant case.\textsuperscript{110} In Goins, the trial court sua sponte postponed a criminal trial beyond the 180-day limit imposed by Rule 746.\textsuperscript{111} Rule 746(b) stated that a change of date would be considered "upon motion of a party."\textsuperscript{112} In Goins, the court reasoned that "[t]he mere use of the word 'party' in . . . Rule 746 does not preclude a motion by the court sua sponte."\textsuperscript{113} The court held that "[a] rule authorizing a litigant to file a procedural motion for this purpose . . . should not be construed to prohibit the court from accomplishing the same object sua sponte unless such a construction is compelled by clear language."\textsuperscript{114}

The Court of Appeals in Urquhart believed that while the phrase "on motion of a party" was not a "clear language" prohibition of sua sponte motions under former Rule 746, it was such a prohibition under Rule 2-327(c). Without exploring this contradiction in depth, the court reasoned that the Rule 2-327(c) language was clearer than the Rule 746 language because the Rules Committee specifically recommended its inclusion, and had done so with full knowledge that it made the resulting rule more restrictive than 28 U.S.C. § 1404(a), its progenitor.\textsuperscript{115}

\textsuperscript{109} 293 Md. 97, 442 A.2d 550 (1982).

\textsuperscript{110} In this criminal case, Goins pleaded not guilty by reason of insanity and submitted himself for evaluation by the Department of Health and Mental Hygiene (DHMH). \textit{Id.} at 101, 442 A.2d at 552. Because of its heavy caseload, DHMH requested, and the trial court granted, an extension of time to evaluate Goins. \textit{Id.} at 102, 442 A.2d at 553. This extension had the collateral effect of delaying the trial beyond the statutory limit of 180 days. \textit{Id.} at 103, 442 A.2d at 553. Goins then entered a motion to dismiss the charges against him. \textit{Id.} The Court of Appeals affirmed the trial court's denial of this motion, reasoning that the dilatory action of the defendant constituted good cause for the delay, and thus the trial court could postpone the trial on its own initiative. \textit{Id.} at 111-12, 442 A.2d at 557-58.

\textsuperscript{111} Rule 746 provided as follows:

\textit{a. General Provision}

Within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723, a trial date shall be set which shall be not later than 180 days after the appearance or waiver of counsel or after the appearance of defendant before the court pursuant to Rule 723.

\textit{b. Change of Trial Date}

Upon motion of a party made in writing or in open court and for good cause shown, the county administrative judge or a judge designated by him may grant a change of trial date.

\textit{Md. R. 746 (recodified as Md. R. 4-271).}

\textsuperscript{112} Md. R. 746(b) (recodified as Md. R. 4-271); \textit{see supra} note 111.

\textsuperscript{113} Goins, 293 Md. at 111, 442 A.2d at 557.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} Urquhart, 339 Md. at 13, 660 A.2d at 418.
The court also referred to its conclusion in *Hartford Insurance Co. v. Manor Inn.* In that case, decided the previous term, the Court of Appeals held that the court could not sua sponte grant summary judgment to a party that had not so moved under Rule 2-501(e). Rule 2-501(e) contains a provision similar to “on the motion of a party,” and the court reasoned that this clearly indicated that the court could not act entirely on its own motion. Finally, the *Urquhart* court buttressed its conclusion by citing holdings from other states that also prohibit sua sponte transfers.

Having established that a motion of one of the parties was the only way to transfer a case on the grounds of forum non conveniens, the court turned to the question of whether the defendants actually had made such a motion. The court found that they had. Despite the fact that the original motion to transfer had been based on a theory of improper venue, the defendants’ arguments in support of the motion were interpreted to rely on “any appropriate basis in determining that the case should be transferred to Montgomery

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117. *Id.* at 146-47, 642 A.2d at 225. In *Hartford,* plaintiff insurance company brought a subrogation claim against the State and the Manor Inn of Bethesda for injuries sustained when its insured collided with an escaped mental patient who had stolen an inadequately secured van from the hotel. *Id.* at 138-39, 642 A.2d at 221. The State moved for summary judgment against Hartford Insurance Company, but Manor Inn did not. *Id.* at 140, 642 A.2d at 221-22. The trial court granted the State’s motion, and also sua sponte entered judgment in favor of Manor Inn, notwithstanding the fact that the hotel had not filed a motion. *Id.* The Court of Appeals found the trial court in error. *Id.* at 147, 642 A.2d at 225.
118. *Hartford,* 335 Md. at 146, 642 A.2d at 224. Rule 2-501 states in pertinent part:
   (a) Motion.—Any party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.

   (e) Entry of Judgment.—The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Mo. R. 2-501 (a), (e).
120. *Urquhart,* 339 Md. at 15, 660 A.2d at 419.
121. *Id.*
County," including forum non conveniens. This was enough for the court, which found "that the trial court did not transfer this action sua sponte, but transferred the action only after defendants made a motion to transfer, albeit a motion lacking in proper citation of authority." 

Finally, the court addressed the issue of whether the trial court had properly decided the motion to transfer. The court reiterated its previous holding that "abuse of discretion" is the standard of review for transfers for the convenience of parties and witnesses, and referred to the balancing test announced in *Odenton Development Co. v. Lamy.* The court also reiterated that it "is the moving party who has the burden of proving that the interest of justice would be best served by transferring the action." Applying this test, the Court of Appeals found that there was "ample evidence" to support the trial court's decision. Holding that the trial court had not abused its discretion, the majority reversed the decision of the Court of Special Appeals.

Judge Raker, joined by Judge Bell, concurred in the holding that a trial court may not transfer an action sua sponte, but dissented in the judgment. Judge Raker would have been more stringent in interpreting the defendants' motion as one based on improper venue rather than forum non conveniens, especially in light of the defense counsel's equivocal answer when the trial court pressed for clarification. Judge Raker noted that a motion based on forum non conveniens is procedurally distinct from one based on improper venue,

122. *Id.* at 17, 660 A.2d at 419-20.
123. *Id.* at 17, 660 A.2d at 420.
124. *Id.* (citing *Odenton Dev. Co. v. Lamy*, 320 Md. 33, 40, 575 A.2d 1235, 1238 (1990)).
125. 320 Md. at 40, 575 A.2d at 1238; *see supra* notes 34-35 and accompanying text.
126. *Urquhart*, 339 Md. at 17-18, 660 A.2d at 420 (quoting *Odenton*, 320 Md. at 40, 575 A.2d at 1238).
127. *Id.* at 18, 660 A.2d at 420.
128. *Id.* Each of the individual defendants resided in Montgomery County; all of Mr. Simmons's care was delivered in Montgomery County; both of Mr. Simmons's physicians spoke on the phone with him from their offices in Montgomery County; only one of the eleven witnesses called resided in Prince George's County. *Id.* at 18-19, 660 A.2d at 420-21. Mr. Simmons himself resided in Howard County, not Prince George's County. *Id.* at 18 n.8, 660 A.2d at 420.
129. *Id.* at 20, 660 A.2d at 421.
130. *Id.* at 21, 660 A.2d at 422 (Raker, J., dissenting).
131. *Id.* at 22, 660 A.2d at 422.

[When the trial court expressly asked the defense counsel whether he intended to make a forum non conveniens argument, counsel did not say yes, but rather that one 'could probably draw that analogy.' It appears to me that counsel's answer represented a disavowal of any reliance on forum non conveniens.] *Id.*
and objected to the fact that even had the defendants' motion been sufficient to invoke the doctrine of forum non conveniens, Simmons had not been given the opportunity to brief and properly argue the issue.\textsuperscript{132} Judge Raker also argued that the record did not support the trial court's decision, as it contained no findings of fact that would indicate that the Odenton balancing analysis\textsuperscript{133} had been performed.\textsuperscript{134} Considering that the original venue had been proper, and that the plaintiff's choice of venue should not be disturbed lightly, Judge Raker believed that the trial court had not established sufficient justification to order the transfer.\textsuperscript{135}

4. Analysis.—\textit{Urquhart v. Simmons} is notable less for what it decided than for the issues that it did not reach. The Court of Appeals effected a fine-tuning of Rule 2-327(a),\textsuperscript{136} but did so without overturning an incongruous holding in \textit{Goins v. State}.\textsuperscript{137} In the process, the court avoided an opportunity to reexamine the policy underpinnings of convenience-of-forum transfers and the degree of discretion that trial courts may exercise in ordering them.\textsuperscript{138}

The court held that a trial judge may not order a Rule 2-327(c) transfer without a motion by one of the litigants.\textsuperscript{139} However, the court effectively ruled that there need not be much substance to this motion so long as it serves notice that a transfer is requested.\textsuperscript{140} The court left unchanged the wide discretion that a trial court has in deciding such motions.

\textit{Urquhart} is the second of two recent decisions that have used similar reasoning to limit the initiative that trial courts have in controlling their dockets. In \textit{Hartford Insurance Co. v. Manor Inn},\textsuperscript{141} the Court of Appeals held that a trial court could not sua sponte enter summary

\begin{itemize}
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} See supra note 35.
  \item \textsuperscript{134} \textit{Urquhart}, 339 Md. at 23, 660 A.2d at 423 (Raker, J., dissenting).
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} See supra note 107.
  \item \textsuperscript{137} 297 Md. 97, 442 A.2d 550 (1982); see supra notes 109-115 and accompanying text.
  \item \textsuperscript{138} Neither appellate court opinion addressed the effect of its holding on Rule 3-326(b), the convenience transfer rule for district courts. Except for the words "any other county" in place of "any other circuit court," Rule 3-326(b) is identical to Rule 2-327(c). It is likely that the \textit{Urquhart} prohibition against sua sponte transfers applies to district courts as well.
  \item \textsuperscript{139} \textit{Urquhart}, 339 Md. at 15, 660 A.2d at 419.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} 335 Md. 135, 642 A.2d 219 (1994).
\end{itemize}
judgment in favor of a nonmoving party. In reaching this holding, the court was interpreting Rule 2-501, the summary judgment rule. It is significant to note that the reasoning in Hartford Insurance is almost identical to that in Urquhart. Judge Bell, writing for the court in Hartford Insurance, also focused on the requirement of a "motion" and a "moving party," and he also supported his interpretation with the Rules Committee Report.

Both these holdings are inconsistent with Goins v. State, in which the court held that

except as limited by statute or rule, a trial court has inherent authority to control its own docket. A rule authorizing a litigant to file a procedural motion . . . should not be construed to prohibit the court from accomplishing the same object sua sponte unless such construction is compelled by clear language.

The rule at issue in Goins was Rule 746(b) (now recodified as Rule 4-271(b)), which, like Rule 2-327(c), was instigated by "motion of a party." Although the language in the two rules seems to be virtually identical, the Urquhart court held that legislative history indicated that Rule 2-327(c) is a clear language prohibition of sua sponte motions. In other words, the language of the rule is made clear by language that is not contained in the rule.

One would be hard pressed to find a more attenuated analysis. The court may want to retreat from its holding in Goins without actually overruling that decision or restricting it to its facts. Of the nine judges who decided Goins, only two sat on the Urquhart court; perhaps the attitudes of the judges have correspondingly changed in the intervening years. It is also possible that, by preserving the Goins holding, it is the court's intention to restrict generally the trial judge's ability to reject cases entirely, while still allowing a certain flexibility in scheduling them.

142. Id. at 147, 642 A.2d at 225.
143. Id. at 146, 642 A.2d at 224; see supra note 118.
144. Hartford Ins. Co., 335 Md. at 146, 642 A.2d at 224. The court explained that Rule 2-501, . . . by requiring the entry of judgment in favor or against the moving party, . . . did not contemplate . . . a court's acting entirely on its own motion, that is to say, where none of the parties has moved for summary judgment. That interpretation is consistent with what was intended when the Rules Committee proposed, and this Court adopted, Rule 2-501.

Id.

145. 293 Md. 97, 442 A.2d 550 (1982).
146. Id. at 111, 442 A.2d at 557 (emphasis added).
147. See supra note 111 for text of former Rule 746(b).
148. See supra text accompanying note 115.
Still, there is a question of the importance of this case. The court's true focus may be far broader than simple statutory clarification. The court could have been reacting to real or perceived abuses of procedural devices on the part of trial judges who wish to tailor their dockets. Some commentators, as well as anecdotal evidence, suggest that judges use sua sponte motions to clear a congested docket, to avoid issues of law with which they are unfamiliar, or to relieve themselves of particularly unsavory cases.\footnote{149}

The Court of Appeals also sidestepped an issue that deserved more attention. The court questioned the dubious decision to transfer the case from one adjacent county to another, but did not reverse the trial court.\footnote{150} However, Judge Raker, in her dissent, objected to the fact that the trial judge had made no findings of fact to justify a decision that so minimized the right of the plaintiffs to choose where to file suit.\footnote{151}

Had the trial court generated such findings, it could easily have determined that Prince George's County was more convenient.\footnote{152} The change in venue improved the access of the moving parties, but to the detriment of the plaintiffs and those witnesses who were located at the hospitals and MCA's Laurel office. At first blush, it does not look as if this is a proper "balance of the convenience of the parties and witnesses."\footnote{153} Even if other relevant factors are considered,\footnote{154} the decision is unsupported. For example, three of the Gilbert factors—access to sources of proof, view of the premises, and cost of obtaining the attendance of witnesses—would have been neutrally affected by the change, at most. Three other factors—availability of compulsory process, enforceability of a judgment, and familiarity of the court with the applicable law—were irrelevant because the actions were in the

\footnote{149} See David E. Steinberg, The Motion to Transfer and the Interest of Justice, 66 Notre Dame L. Rev. 443, 500-04 (1990).
\footnote{150} Urquhart, 339 Md. at 19, 466 A.2d at 421 ("We . . . may not have chosen to transfer this case to Montgomery County . . . . Nevertheless, we find that the trial judge did not abuse his discretion in determining that the present action should be transferred to Montgomery County."). In fact, there is some question as to which venue was closer to where the original procedure was performed—the Montgomery County courthouse in Rockville or the Prince George's County courthouse in Upper Marlboro. Id. at 16, 660 A.2d at 419.
\footnote{151} Id. at 23, 660 A.2d at 423 (Raker, J., dissenting).
\footnote{152} The trial court could have looked at street maps to determine the relative distances between sites relevant to the action, and considered typical traffic patterns. Doing so would seem to indicate that Prince George's County was more convenient to the key sites involved in the litigation. See supra notes 12-14 and accompanying text.
\footnote{153} Urquhart, 339 Md. at 18, 660 A.2d at 420.
\footnote{154} See supra note 66 and accompanying text.
\footnote{155} 330 U.S. 501 (1947); see supra note 66 and accompanying text.
\footnote{156} Id.
same legal system. With regard to the factors of local interest, it is
difficult to imagine how two adjacent counties would have exclusive
parochial concerns about the outcome of a malpractice suit, especially
when the practice area of the defendant encompassed both.

Some commentators have argued that it is time to revisit many of
the assumptions that underlie transfer rules such as 28 U.S.C.
§ 1404(a)\(^{157}\) and its derivatives.\(^ {158} \) The Court of Appeals needs to
consider to what degree the typical forum non conveniens situation
“scales down” to the county level. *Gulf Oil Corp. v. Gilbert*\(^ {159}\) is still
cited as the seminal case regarding forum non conveniens, but it was
decided in 1947, before metropolitan counties were linked by eight-
lane beltways. Air travel was still a luxury, and tools that the legal com-
munity takes for granted today, such as fax machines, video tape,
notebook computers, electronic documents, and pocket phones, were
nonexistent. This is not to say that the doctrine does not retain some
justification; compelling a Garrett County defendant to appear in
Wicomico County Circuit Court would be “vexatious” indeed. How-
ever, as Judge Raker asserted, some finding of fact more substantial
than that in *Urquhart* should be required before a transfer is
ordered.\(^ {160}\)

5. **Conclusion.**—In *Urquhart v. Simmons*, the Court of Appeals
held that a Maryland trial court cannot transfer an action sua sponte
under Rule 2-327(c). Transfers under this rule may be effected only
after a motion by one of the parties, although this motion need ex-
press little more than a desire for a venue change. This holding cre-
ates a disparity with federal practice, where a court may transfer a case
on its own initiative.

*Urquhart* is a decision carefully crafted to reach this single issue
and no other, even though it touches on other important matters
such as judicial initiative and the doctrine of forum non conveniens.
The facts of the case presented both justification and opportunity to
take a broad look at the policies underlying certain rules of civil pro-
cedure. The court passed on this opportunity.

Concerning forum non conveniens in particular, the facts of *Ur-
quhart* offer a contemporary setting for an aged doctrine that may not

\(^{157}\) See supra text accompanying notes 73-75.

\(^{158}\) See Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74
CALIF. L. REV. 1259 (1986); Stowell R.R. Kelner, “Adrift On An Uncharted Sea”: A Survey of

\(^{159}\) 330 U.S. 501 (1947).

\(^{160}\) See supra text accompanying note 151.
have adapted well to modern society. Distance does not pose the same inconvenience that it once did, and the doctrine of forum non conveniens should evolve to reflect this. If it does not adapt, it may become just another avenue for producing unintended and inefficient results.

Harry N. Malone

B. Rejecting Appellate Court Conversion of Motions for Summary Judgment into Motions to Dismiss

In Davis v. DiPino, a case of first impression, the Court of Appeals considered whether a motion for summary judgment at trial can be converted into a motion to dismiss on appeal. The court held that when a motion to dismiss was not argued or decided at the trial level, an appellate court may not determine that the lower court improperly granted summary judgment but still affirm the lower court's dismissal of the case on the basis that the complaint failed to state a claim upon which relief could be granted. In so holding, the court maintained the scope of appellate review contemplated by Maryland Rule 8-131(a) in order to prevent procedural prejudice against plaintiffs.

2. Id. at 648, 655 A.2d at 404.
3. Rule 8-131 states in pertinent part:

Scope of Review:
(a) Generally.—The issue of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.
(b) In Court of Appeals—Additional Limitations.—
   (1) Prior Appellate Decision.—Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.
   (2) No Prior Appellate Decision.—Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.
This Note gives a brief synopsis and the history behind the scope of appellate review pursuant to Rule 8-131, including an analysis of the distinctions between a motion to dismiss and a motion for summary judgment. The Note will also survey how other jurisdictions have dealt with the question of whether an appellate court can dismiss a case on pure pleading grounds, when the grounds were not asserted or debated at the trial court. Finally, it will argue that the court ruled correctly and that Davis, while unlikely to have a major impact on practitioners, will encourage proper pleading practices by attorneys.

1. The Case.—On May 12, 1991, Wayne Nelson Davis and a friend were standing on Wicomico Street, near the boardwalk, in Ocean City, Maryland, when Davis observed Bernadette DiPino and Alice Brumbley getting into their vehicle across the street. DiPino and Brumbley were both Ocean City police officers working undercover. The following colloquy then occurred between Davis and his friend:

Davis: “Those are the two girls who tried to sell me some pot and were gonna bust me.”
Friend: “What are they, narcs?”
Davis: “I don’t know what they are.”

The conversation was loud enough for both police officers to hear it, and as a consequence, Officer DiPino later sought a statement of charges in order for the issuance of a summons or warrant for Davis’s arrest. The application alleged that Davis knowingly and willfully advised his friend that Officers DiPino and Brumbley were

Md. R. 8-131.

4. Davis, 337 Md. at 644-45, 655 A.2d at 402.
6. Davis, 337 Md. at 642, 645, 655 A.2d at 402. Because the court was called upon to consider whether Davis had a legal cause of action against the defendants, the court considered the disputed facts contained in the pleadings, proffers, and affidavits in the light most favorable to Davis’s potential causes of action. Id. at 644, 655 A.2d at 402; see also Southland Corp. v. Griffith, 332 Md. 704, 712, 635 A.2d 84, 87 (1993) (stating that in reviewing a disposition by summary judgment, an appellate court resolves all inferences against the party making the motion) (citing Rosenberg v. Helsinki, 328 Md. 664, 674, 616 A.2d 866, 871 (1992)); Hrehorovich v. Harbor Hosp. Ctr., Inc., 93 Md. App. 772, 790, 614 A.2d 1021, 1030 (1992) (noting that in determining whether a factual dispute exists, all inferences should be drawn in the light most favorable to the nonmoving party).

7. Davis, 337 Md. at 645, 655 A.2d at 402. Officer DiPino applied for the statement of charges nearly two months after the conversation between Davis and his friend had occurred. Id.
narcotics officers, thus compromising the detectives' cover and placing them in extreme danger.

Davis was subsequently arrested at his place of employment and was brought before District Court Commissioner Donald E. Turner, who refused to release Davis on personal recognizance and set bond at $50,000. When the case came up for trial on October 2, 1991, the state entered a nolle prosequi as to each charge.

Davis filed a nine-count complaint in the Circuit Court for Worcester County against Officer DiPino, the mayor and City Council of Ocean City, and District Court Commissioner Turner. The complaint alleged violations of Davis's rights under 42 U.S.C. § 1983 and under the Maryland Constitution, and sought injunctive and declaratory relief as well as attorney's fees. Each answered Davis's complaint and filed a motion for summary judgment with supporting affidavits. DiPino's affidavit claimed that Davis's comment was an intentional effort to blow her cover, and that she had no malicious

8. Id. The application alleged that:

[Davis] did knowingly and willfully advise an unknown white male as to the identity and occupation of [DiPino] and . . . Alice N. Brumbley. [DiPino] and Brumbley were working in an undercover capacity on Wicomico St. Ocean City Worcester County Md. While entering a vehicle [DiPino] and Brumbley observed [Davis] state to an unknown white male 'Look those two girls are narcs.' Narcs being a derogatory street term for a narcotics officer. This statement was said in a loud enough voice as so the [detectives] approx[imately] 5 yds away could hear and any passerby could also hear placing the [detectives] in extreme danger and compromising their cover.

9. Id. DiPino presented the application for statement of charges to District Court Commissioner Donald E. Turner, who issued an arrest warrant rather than a summons. Id., 655 A.2d at 402-03. Turner also issued a statement of charges charging Davis with two counts of "obstructing and hindering." Id.

10. Id. at 645-46, 655 A.2d at 403.

11. Id.

12. Id. at 645, 655 A.2d at 402. Count I alleged that DiPino violated Davis's First, Fourth, Fifth, Sixth, and Eighth Amendment rights as protected by 42 U.S.C. § 1983. Id. Count II alleged that DiPino and Ocean City violated Davis's rights under Articles 21, 24, 25, 26, and 40 of the Maryland Declaration of Rights. Id. Counts III through VI were against DiPino and Ocean City for false arrest and imprisonment, malicious prosecution, abuse of process, and intentional infliction of emotional distress. Id. Count VII alleged that Ocean City violated 42 U.S.C. § 1983 for failing to supervise and discipline DiPino. Id. Counts VIII and IX alleged that Turner and other similarly situated court commissioners violated 42 U.S.C. § 1983 and Articles 24 and 26 of the Maryland Declaration of Rights by routinely issuing warrants without a finding of probable cause and routinely ignoring Maryland Rule 4-212(d)(1) by issuing arrest warrants instead of criminal summons. Id.

13. Id. Davis sought money damages from DiPino and Ocean City and requested injunctive and declaratory relief against Turner for issuing the arrest warrant for Davis. Id.

14. Id. at 646, 655 A.2d at 403.
intent or ill will towards Davis.\(^{15}\) In Turner's affidavit, he stated that he had probable cause to believe that "there was a substantial likelihood that [Davis] may have disregarded a mere summons because the charges sought involved the compromising of a police cover."\(^{16}\) Davis filed separate responses in opposition to the motions for summary judgment, along with a supporting affidavit.\(^{17}\) The circuit court heard arguments on the defendants' motions for summary judgment and Davis's opposition, and thereafter granted summary judgment in favor of all defendants.\(^{18}\)

Davis appealed to the Court of Special Appeals, which determined that the defendants "were not entitled to summary judgment on the basis of the affidavits filed by DiPino and Turner."\(^{19}\) Nevertheless, the Court of Special Appeals affirmed the circuit court's decision to terminate the proceedings because "each count of [the] complaint failed to state a claim upon which relief can be granted."\(^{20}\) The Court of Appeals granted certiorari to consider whether the Court of Special Appeals properly dismissed Davis's complaint for failure to adequately plead any claim upon which relief can be granted, when the only motion filed and the only motion on appeal was the trial court's grant of summary judgment.\(^{21}\)

2. **Legal Background.**—The scope of review in appellate proceedings is governed by Rule 8-131.\(^{22}\) Section (a) of the rule provides that an appellate court cannot decide an issue that does not appear in the record and was not raised in or decided by the trial court.\(^{23}\) The purpose of this section is to prevent the procedural unfairness that would

\(^{15}\) Id. Specifically, DiPino stated in her affidavit that Davis's statements were made louder than normal conversation and were "loud enough to be heard by the bouncer... and all others in the vicinity." Id. DiPino stated the bouncer was the subject of an undercover narcotics investigation and that Davis's comment hindered her "ability to operate in an undercover capacity." Id.

\(^{16}\) Id.

\(^{17}\) Turner's affidavit was a response to Davis's assertion that Turner lacked any basis to issue an arrest warrant, rather than a criminal summons, under Rule 2-212(a)(1)(B). See supra note 12 (discussing Counts VIII and IX of Davis's complaint).

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) Id.

\(^{22}\) Davis, 337 Md. at 647, 655 A.2d at 403.

\(^{23}\) See supra note 5 for the text of the rule. Rule 8-131 is derived from former Rules 1085 and 885.
result if a judgment were reversed on appeal on issues that were never raised nor decided below.\textsuperscript{24}

It is a long-standing rule that the Court of Appeals shall in no case decide any point or question that does not plainly appear by the record to have been tried and decided by the court below.\textsuperscript{25} Before the enactment of section (a) of Rule 8-131, the practice of not permitting an appellate court to decide an issue not raised in the trial court was firmly entrenched in case law.\textsuperscript{26} In 1909, the Court of Appeals in \textit{Ward v. Schlosser}\textsuperscript{27} traced the purpose of the rule back to the Act of 1825.\textsuperscript{28} The court stated that the purpose of passing the Act was to remedy an evil which had been severely felt and loudly complained of, that in this court the judgment of the county court was reversed upon points never raised or decided below, and which, had they been there raised, would at once by amendment or otherwise have been obviated and never been presented for consideration by the appellate court.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} Ward v. State, 111 Md. 528, 534, 75 A. 116, 119 (1909).
\item \textsuperscript{25} See, e.g., Basoff v. State, 208 Md. 643, 650, 119 A.2d 917, 921 (1956) (holding that when a party has the option whether to object or not to object, failure to exercise this option while it is still within the power of the trial court to correct the error is regarded as a waiver of it, estopping him from obtaining a review of the point or question on appeal); Banks v. State, 203 Md. 488, 495, 102 A.2d 267, 271 (1954) (noting that the rule was adopted to ensure fairness for all parties in a case and to promote the orderly administration of the law in both civil and criminal cases); Davis v. State, 189 Md. 269, 273, 55 A.2d 702, 704 (1947) (ruling that it is still necessary for the purpose of appeal that some objection be made and that the court below rule on the question in order for the Court of Appeals to review); Courmey v. State, 187 Md. 1, 5, 48 A.2d 430, 431 (1946) (stating that in the absence of a ruling by the court below, there is nothing for the Court of Appeals to review) (citing O'Connor v. Estevez, 182 Md. 541, 546, 35 A.2d 148, 151 (1943)).
\item \textsuperscript{26} Friedman v. Clark, 252 Md. 26, 31, 248 A.2d 867, 870 (1969) (stating section (a) of Rule 8-131 reflects long-established practice); see also Gordon v. State Nat'l Bank, 249 Md. 378, 383, 239 A.2d 915, 918 (1968) (stating that the rule follows the practice that has existed since 1825 (citing Mundell v. Perry, 2 G. & J. 193 (1830))).
\item \textsuperscript{27} Id. at 534, 75 A. at 119. The Act of 1825, chapter 117 (codified at Md. ANN. CODE art. 5, § 12 (1994)) states in pertinent part:
\begin{quote}
That in no case wherein a judgment may hereafter be rendered in any county court, and which may be removed to the court of appeals, by appeal or writ of error, shall the appellant or plaintiff in error, or the appellee or defendant in error, be permitted to urge or insist upon any point or question which shall not appear by the record to have been raised or made in the county court, and upon which that court may have rendered judgment; and the court of appeals shall not reverse or affirm any such judgment on any point or question which shall not appear to have been presented to the county court, and upon which that court may have rendered judgment.
\end{quote}
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Ward, 111 Md. at 534, 75 A. at 119.
\end{itemize}
In the 1954 case of *Banks v. State*, the Court of Appeals held that Rule 8-131(a) applied to both civil and criminal cases. The court reiterated that the primary purpose of the rule was "to ensure fairness for all parties in a case and to promote the orderly administration of the law."

Rule 8-131(a) was further explained by the court in *Clayman v. Prince George's County*. The *Clayman* court refused to consider the issue of standing on appeal because there was nothing in the record that showed that the question of standing was argued before the lower court, and there was no mention of the issue in the briefs of the appellants or the appellee. The court reiterated its concern for the interest of fairness to all parties in a case and stated that providing fairness to the parties may be accomplished by requir[ing] counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and . . . prevent[ing] the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

*Robeson v. State* broadened the scope of appellate review by establishing exceptions to this narrow rule. The Court of Appeals stated that it will ordinarily affirm a judgment on any ground adequately

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31. *Id.* at 495, 102 A.2d at 271; *see also* Basoff v. State, 208 Md. 643, 650, 119 A.2d 917, 921 (1956) (holding that in a criminal case, the rule that the Court of Appeals shall not decide any point that does not plainly appear by the record to have been tried and decided by the court below applies).
32. *Banks*, 203 Md. at 495, 102 A.2d at 271; *see also* Brice v. State, 254 Md. 655, 661, 255 A.2d 28, 31 (1969) (reversing the criminal conviction of a defendant who, to the best of his ability, attempted to record his objections to the court's failure to dispose of the motion to dismiss that he had filed on his own behalf and remanding for new trial); Basoff, 208 Md. at 650, 119 A.2d at 921.
33. 266 Md. 409, 292 A.2d 689 (1972).
34. *Id.* at 415-16, 292 A.2d at 693.
35. *Id.* at 416, 292 A.2d at 693 (citing *Lane v. State*, 226 Md. 81, 89, 172 A.2d 400, 404 (1961), *cert. denied*, 368 U.S. 993 (1962)). In *Lane*, the court stated that one of the principal objectives of Rule 885 (now codified at section (a) of Rule 8-131) is "to require counsel to call any irregularity in the proceedings to the trial court's attention, so that it may be corrected, if possible, as the Court of Appeals does not sit to review the wisdom of, or correct possible errors in, the trial tactics of counsel for the respective parties." *Lane*, 226 Md. at 89, 172 A.2d at 404.
36. *See State v. Zimmerman*, 261 Md. 11, 25, 273 A.2d 156, 163 (1971) (stating that "[t]he interest of justice is best served if there are not piecemeal appeals").
shown by the record, whether or not it was raised by the parties or relied on by the trial court. Thus, an appellate court could affirm a trial court's holding for different grounds than those relied on by the lower court. The Robeson court allowed the State to raise the issue of harmless error for the first time in the Court of Appeals, stating that there are well-recognized exceptions to the narrow scope of appellate review. "One exception is where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties . . . ." The court justified its resolution of the case on grounds of judicial economy.

After Robeson, the scope of appellate review was litigated in a number of cases. The day after the Court of Appeals decided Robeson, the court handed down Offutt v. Montgomery County Board of Education, which, like Robeson, noted that an appellate court may affirm on any ground in the record.

The scope of appellate review was further broadened by the Court of Appeals in Moats v. City of Hagerstown. In Moats, law enforcement officers charged with intentionally misrepresenting facts on overtime reports sought to waive the procedure under the Law Enforcement Officers' Bill of Rights (LEOBOR) and pursue a grievance under a collective bargaining agreement. The Court of Appeals ruled that the Court of Special Appeals properly raised sua sponte an important policy issue concerning the exclusivity of the administrative procedure under LEOBOR. The Moats court recognized that be-

39. Id. at 501-02, 403 A.2d at 1223.
40. Id.
41. Id. at 502, 403 A.2d at 1223.
42. Id.
43. Id. This was explained by the Supreme Court in Securities & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943). "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." Id.
45. Id. at 563 & n.3, 404 A.2d at 285 & n.3; see also Neville v. State, 290 Md. 364, 368-69, 490 A.2d 570, 572 (1981) (holding that under § (b) of Rule 8-131, an appellate court may, on a direct appeal, affirm a trial court's decision on any ground adequately shown by the record, even though not relied on by the trial court or the parties (citing Robeson, 285 Md. at 503-04, 403 A.2d at 1224)); Van Wyk, Inc. v. Fruitrade Int'l, Inc., 98 Md. App. 662, 669, 685 A.2d 14, 18 (1994) (stating that an appellate court will affirm a trial court's judgment on any ground adequately shown by the records, even a ground not relied upon by the trial court (citing Robeson, 285 Md. at 502, 403 A.2d at 1223)).
47. Id. at 521, 597 A.2d at 973.
48. Id. at 526, 597 A.2d at 975.
cause of important public policy considerations, there is a limited category of issues, in addition to jurisdiction, that an appellate court ordinarily will address even though they were not raised by a party.\textsuperscript{49}

Another circumstance in which the Court of Appeals will make an exception to the general rule of appellate review is standing.\textsuperscript{50} The court has held that in circumstances where absence of standing would present an alternative ground for upholding a trial court's judgment, an appellee is entitled to argue that ground in an appellate court.\textsuperscript{51} Moreover, the court has stated that

\begin{quote}
even if lack of standing were not raised by the appellee, an appellate court noticing the issue would normally consider it sua sponte under the principle that a judgment will ordinarily be affirmed on any ground adequately shown by the record, whether or not relied on by the trial court or raised by a party.\textsuperscript{52}
\end{quote}

The most significant modern case defining the scope of appellate review is \textit{State v. Bell},\textsuperscript{53} which held that the Court of Special Appeals did not abuse its discretion in declining to address a question that was

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\item \textsuperscript{49} \textit{See}, \textit{e.g.}, \textit{Muhl v. Magan}, 313 Md. 462, 480-81, 545 A.2d 1321, 1330-31 (1988) (remanding the case of a physician who was denied a preliminary hearing before the Insurance Commission to challenge his insurer's refusal to cover obstetrical practice, under the exhaustion of administrative remedies doctrine for an agency preliminary hearing on the complaint); \textit{Board of Educ. v. Hubbard}, 305 Md. 774, 787, 506 A.2d 625, 631 (1986) (remanding the case of teachers who had filed grievances with the county board of education until the teachers pursued and exhausted their administrative remedies before the State Board of Education); \textit{Maryland Comm'n on Human Relations v. Mass Transit Admin.}, 294 Md. 225, 232, 499 A.2d 385, 388 (1982) (remanding the case and reversing the circuit court's granting of declaratory judgment for an employer who refused to hire the plaintiff because of obesity pursuant to the circuit court's interpretation that obesity was not a handicap within the state anti-discrimination in employment statute); \textit{Secretary, Dep't of Human Resources v. Wilson}, 286 Md. 639, 644-55, 409 A.2d 713, 717 (1979) (remanding the case of whether claimants were eligible to receive an increased weekly unemployment benefit provided by statutory amendment for their previously filed claims until they exhausted their administrative remedy before the Board of Appeals of Employment Security Administration).
\item \textsuperscript{51} \textit{Id.} at 167, 448 A.2d at 939 (citing \textit{Temoney v. State}, 290 Md. 251, 261-62, 429 A.2d 1018, 1023 (1981) (stating that the principle that an appellate court will normally affirm the trial court on a ground adequately shown by record, even though the ground was not one relied upon by the trial court, is as fully applicable in the Court of Appeals as in the Court of Special Appeals)).
\item \textsuperscript{52} \textit{Id.} at 167-68, 448 A.2d at 939 (citing \textit{Robeson v. State}, 285 Md. 498, 502, 403 A.2d 1221 (1979) (holding that an appellate court will normally affirm a trial court on a ground adequately shown by the record, even though that ground was not the one relied upon by the trial court), \textit{cert. denied}, 444 U.S. 1021 (1980)).
\item \textsuperscript{53} 334 Md. 178, 638 A.2d 107 (1994).
\end{itemize}
raised by the State for the first time on appeal.\textsuperscript{54} The court reasoned that it would procedurally prejudice the defendant to let the State change its strategy on appeal concerning what constitutes probable cause for police officers' warrantless search of an automobile, given that the State's prior strategy dissuaded Bell from offering evidence on the matters of probable cause and exigency of the circumstances.\textsuperscript{55} The State, relying on \textit{Robeson v. State},\textsuperscript{56} argued that the Court of Special Appeals should have affirmed the decision because an appellate court has discretion to affirm a decision of a trial court on grounds that had not been relied upon by either the trial court or the parties.\textsuperscript{57} The Court of Appeals held that the State misinterpreted the \textit{Robeson} ruling and stated that even though an appellate court has the discretion to review arguments not raised at the trial level, doing so is not mandatory.\textsuperscript{58}

The \textit{Bell} court clarified \textit{Robeson}: "Clearly, \textit{Robeson} stands not for the proposition that an appellate court \textit{must} examine new, alternative grounds for upholding a trial court's decision, but only for the proposition that it may do so if it deems such review appropriate."\textsuperscript{59} The court further explained that although an appellate court clearly has the discretion to affirm a decision on a ground not raised below, this discretion should be exercised only when it is clear that it will not work an unfair prejudice to the parties or to the court.\textsuperscript{60} The court emphasized that "[t]he concept of fairness is necessarily implicit in any 'entitlement' that may ordinarily exist for the appellee, and again, the matter ultimately rests in the discretion of the appellate court."\textsuperscript{61} In recent cases, the court has continued to hold that the primary purpose of Rule 8-131(a) is "to ensure fairness for all parties in a case and to promote the orderly administration of law."\textsuperscript{62}

In 1994, the court narrowed the discretion of an appellate court to review an issue of first impression in \textit{County Council v. Offen}.\textsuperscript{63} In \textit{Offen}, the court held that the Court of Special Appeals abused its discretion under Rule 8-131(a) by raising sua sponte the doctrine of zon-
ing estoppel. Zoning estoppel was an issue of first impression in Maryland because it had been neither briefed nor argued in either the trial court or in the intermediate appellate court in any prior cases; therefore, it was beyond the scope of appellate review of an administrative action. The court explained that the discretion that an appellate court possesses to consider matters that were not relied upon by the trial judge, or perhaps not even raised by the parties, is not unbridled and exceptions to the general rule should not be applied haphazardly. The Offen court stated that "[i]f an issue does not fall within a common exception to the general ‘raise or waive’ rule, an appellate court should weigh carefully whether its consideration of an issue not raised in the lower court is in fact ‘necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal’ before it exercises its discretion under Rule 8-131(a)."

3. The Court’s Reasoning.—The Davis court held that an appellate court cannot determine that a lower court improperly granted summary judgment and still affirm the trial court’s judgment based on the plaintiff’s failure to plead any claim upon which relief can be granted, when the motion to dismiss was not argued or decided at the trial level. In so ruling, the Court of Appeals maintained the scope of appellate review contemplated by Rule 8-131(a).

In its opinion, the Court of Appeals first discussed the distinctions between the legal standards of a motion to dismiss and a motion for summary judgment, according to the Maryland Rules of Civil Procedure. Pursuant to Rule 2-322(b)(2), dismissal is proper only if the facts alleged in the complaint fail to state a cause of action. In

64. Id. at 511, 639 A.2d at 1076.
65. Id.
66. Id. at 508-09, 639 A.2d at 1074-75; see also Bell, 334 Md. at 187, 638 A.2d at 112 (declining to exercise discretion to consider the State’s probable cause argument, which was raised for the first time on appeal); Crown Oil & Wax Co. v. Glen Const. Co., Inc., 320 Md. 546, 561, 578 A.2d 1184, 1191 (1990) (stating that the court had in its discretion the ability to consider a party’s “successorship theory” in order to avoid unnecessary expense and delay even though it was not previously asserted in the lower court).
67. Offen, 334 Md. at 508-09, 639 A.2d at 1074-75.
68. Id. at 510, 639 A.2d at 1075.
69. Davis, 337 Md. at 648, 655 A.2d at 404.
70. See supra note 3 and accompanying text.
71. Davis, 337 Md. at 648-49, 655 A.2d at 404.
72. Rule 2-322(b)(2) states in pertinent part: “The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: . . . (2) failure to state a claim upon which relief can be granted . . . .” Md. R. 2-322(b)(2).
73. Id.
contrast, the court noted that pursuant to Rule 2-501(e), a motion for summary judgment may be granted only if "there is no genuine dispute as to any material fact and . . . the party in whose favor judgment is entered is entitled to judgment as a matter of law."75

The court next discussed the procedural prejudice that a plaintiff would suffer if an appellate court were allowed to sua sponte grant a motion to dismiss at the appellate level when the motion considered at the trial level was one for summary judgment.76 The court examined Rule 2-322(c) and reiterated that when a trial court grants a motion to dismiss for failure to state a claim upon which relief can be granted, the court also has the discretionary authority to grant the plaintiff leave to amend the complaint to cure any defects.77 The court reasoned that because there is no such discretionary authority to permit the amendment of the complaint subsequent to the grant of

74. Rule 2-501(e) states in pertinent part:

Entry of Judgment:
The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

Md. R. 2-501(e).

75. Davis, 337 Md. at 648, 655 A.2d at 404 (quoting Md. R. 2-501(e)).

76. Id. at 649, 655 A.2d at 404.

77. Rule 2-322(c) states:

A motion under sections (a) and (b) of this Rule shall be determined before trial, except that a court may defer the determination of the defense of failure to state a claim upon which relief can be granted until the trial. In disposing of the motion, the court may dismiss the action or grant such lesser or different relief as may be appropriate. If the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend. The amended complaint shall be filed within 30 days after entry of the order or within such other time as the court may fix. If leave to amend is granted and the plaintiff fails to file an amended complaint within the time prescribed, the court, on motion, may enter an order dismissing the action. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

Md. R. 2-322(c).

78. Davis, 337 Md. at 648, 655 A.2d at 404.
summary judgment, the plaintiff would be procedurally prejudiced. Additionally, the court pointed out that because arguments on an appeal of summary judgment focus solely on whether there are any disputes as to material facts, the arguments are not likely to address whether the complaint failed to plead a claim upon which relief can be granted. The court noted that even if he might not succeed, Davis should be given the opportunity to argue that the pleading adequately alleges or could be amended to allege a sufficient cause of action, and that dismissal is therefore inappropriate.

The Court of Appeals also reviewed its decisions in similar cases to the one at hand, and found that "our cases have consistently held that in appeals from either a motion for summary judgment or a motion to dismiss, an appellate court must focus on whether the trial court properly ruled on the motion before it." Additionally, the court examined the holdings of courts in other jurisdictions and found that they also adhered to the rule that if a trial court never

79. *Id.* at 649, 655 A.2d at 404.
80. *Id.*
81. *Id.* at 651-52, 655 A.2d at 406.
82. *Id.* at 649, 655, 655 A.2d at 404, 406. The Court of Appeals confined its review of the case solely to the pleading issues, and made no determination as to Davis's claim against Commissioner Turner. *Id.* at 653, 655 A.2d at 406. Counts VIII and IX of Davis's complaint alleged that Turner and other similarly situated district court commissioners violated 42 U.S.C. § 1983 and Articles 24 and 26 of the Maryland Declaration of Rights by routinely issuing warrants without any finding of probable cause and routinely ignoring the requirements of Rule 4-212(d)(1) by issuing warrants instead of a criminal summons. *Id.* at 644, 655 A.2d at 402. The complaint sought injunctive and declaratory relief as well as attorney's fees. *Id.* The court noted that in limiting its review solely to Davis's complaint, the Court of Special Appeals did not determine that the facts were insufficient to establish that Turner acted with malice. Thus, the court reasoned that it is not inconceivable that Davis may be able to amend his complaint in order to sufficiently establish that Turner acted with malice in violation of Rule 4-212(d)(1), entitling him to declaratory and injunctive relief. *Id.* at 654, 655 A.2d at 407.
84. *Davis*, 337 Md. at 650, 655 A.2d at 402.
85. See, e.g., *Perez v. Coast to Coast Reforestation Corp.*, 785 P.2d 365, 366 (Or. App. 1990) (deciding "to affirm the dismissal of a case on pure pleading grounds, when only substantive legal reasons for dismissal were presented to the trial judge and when an amendment might cure the defect" (citing *Hendgen v. Forest Grove Community Hosp.*, 780 P.2d 779 (Or. App. 1989))); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624-25 (Utah 1990) (stating that the court would not consider any evidence presented at a preliminary injunction hearing in determining whether the grant of a motion to dismiss for failure to state a claim upon which relief can be granted was proper).
decided whether the plaintiff failed to plead a claim upon which relief can be granted, an appellate court should not consider that issue. 86

The Davis court rejected Davis's reliance on Robeson 87 and Offutt. 88 The court explained that "the issues decided by those cases at the appellate level are clearly distinguishable" 89 because it merely determined that even though the trial court reached its decision through "faulty analysis," the issue was decided correctly, albeit for different reasons. 90 The court distinguished Robeson and Offutt by stating that they represent general exceptions to the rule. 91 The court pointed out that neither Robeson nor Offutt was "decided on alternative procedural grounds by substituting one motion, which was held to be improperly granted, for another motion and then affirming the judgment based on the alternative motion." 92 Additionally, the court emphasized that the general rule is that an appellate court will not address matters that were not raised or decided in the trial court. 93

The court concluded that the distinctions in legal standards between a motion to dismiss and a motion for summary judgment make it unfair and prejudicial to a plaintiff for an appellate court to sua sponte grant a motion to dismiss when the motion on appeal is one for summary judgment. 94 The court stated that "because the Maryland rules do not authorize a motion for summary judgment to be converted into a motion to dismiss at the trial level, this conversion is certainly inappropriate at the appellate level." 95

4. Analysis.—

a. Distinctions Between a Motion to Dismiss and a Motion for Summary Judgment.—The Court of Special Appeals has observed that "[a] motion to dismiss for failure to state a cause of action is a different animal from a motion for summary judgment." 96 One way the motions are distinct is in their standard of review. When reviewing a grant of either a motion to dismiss or a motion for summary judg-

86. Davis, 337 Md. at 649-51, 655 A.2d at 404-05.
89. Davis, 337 Md. at 655, 655 A.2d at 407.
90. Id., 655 A.2d at 407-08.
92. Id.
93. Id.
94. Id. at 656, 655 A.2d at 408.
95. Id.
ment, the appellate court must determine whether the trial court was legally correct; that determination depends on the nature of the relief given.97 A motion to dismiss is proper if a complaint does not disclose, on its face, a legally sufficient cause of action.98 In such a motion, a defendant typically argues that even if the pleaded facts are true, the plaintiff is not entitled to recover under the law.99 Arguments are based on the complaint and the judge can grant the plaintiff leave to amend the complaint.100

On the other hand, the grant of summary judgment is proper only if there is no genuine dispute of any material fact and therefore the movant is entitled to summary judgment as a matter of law.101 The standard for appellate review for a trial court's grant of a motion for summary judgment is whether the court was legally correct.102

Rule 2-322(b)103 gives the trial court discretion to convert a motion to dismiss into a motion for summary judgment; however, the rules are silent as to whether a motion for summary judgment can be converted into a motion to dismiss. Treating a motion to dismiss as a motion for summary judgment would not lead to a different result or any procedural prejudice to the plaintiff at the trial level because all the parties are given a reasonable opportunity to present, in a form suitable for consideration, any additional material pertinent to the motion.104

97. Id.
98. Id. at 785, 614 A.2d at 1027 (citing Bramble v. Thompson, 264 Md. 518, 520, 287 A.2d 265, 267 (1972)).
99. Id. at 784, 614 A.2d at 1027.
100. Id.
103. The last sentence of Rule 2-322(c) provides:
   If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.
Md. R. 2-322(c).
104. Hrehorovich, 93 Md. App. at 784, 614 A.2d at 1027; see also Antigua Condominium Ass'n v. Melba Investors Atl., Inc., 307 Md. 700, 719, 517 A.2d 75, 85 (1986) (discussing the discretion committed to the trial court to give plaintiffs the opportunity to present addi-
On the contrary, if an appellate court were allowed to convert a motion for summary judgment into a motion to dismiss and sua sponte dismiss a complaint, the plaintiff would never have the opportunity to seek leave to amend the complaint to cure any defects. Furthermore, as the Davis court noted, because the arguments on an appeal of a motion for summary judgment focus solely on whether there are any disputes as to material facts, those arguments are not likely to address whether the complaint failed to plead a claim upon which relief can be granted. Thus, if the Davis court had ruled the other way, a plaintiff would be procedurally prejudiced by not being given the opportunity to argue that the pleading adequately alleged or could be amended to allege a legally sufficient cause of action such that dismissal would be inappropriate.

b. Procedural Prejudice.—The Davis court correctly maintained that the distinctions between a motion to dismiss and a motion for summary judgment make it unfair and prejudicial to a plaintiff for an appellate court to sua sponte determine that the plaintiff failed to state a claim upon which relief can be granted and to grant a motion to dismiss when the motion on appeal is one for summary judgment. The court examined the pleadings, proffers, and affidavits presented in the case in the light most favorable to Davis, and found that Davis may have been able to sufficiently allege that DiPino and Turner acted with malice. Thus, the court concluded that Davis was prejudiced as a result of the Court of Special Appeals's sua sponte raising of the issue of the adequacy of the pleadings, because he was precluded from either amending his complaint to plead a legally sufficient cause of action, or from having sufficient opportunity to prepare an argument that he adequately plead a legally sufficient cause of action.

Had the Court of Appeals decided the other way and affirmed the Court of Special Appeals's decision, it could have resulted in a drain on judicial resources, as lawyers would be forced to argue against the mere potential of motions, rather than the actual motion itself. Plaintiffs' lawyers would have to routinely argue against the mot-
tion to dismiss in their pleadings, whether or not the motion was plead by the defense, in order to adequately protect the viability of their client's suit. Furthermore, it would have undermined proper pleading procedures by encouraging crafty tactics on the part of defense lawyers, who could purposely wait until the appellate level to bring a motion to dismiss, so that the plaintiff would not have the opportunity to amend his complaint nor argue against the motion.

c. Recognized Exceptions to the Law of Appellate Review.—Under Rule 8-131(a), the scope of appellate review is "ordinarily" limited to questions raised and decided by the trial court. Nevertheless, as the rule employs the term "ordinarily," it permits exceptions and the Court of Appeals has occasionally decided cases on issues not previously raised.

One such exception that the Davis court discussed is the "faulty reasoning" exception enumerated in Robeson and Offutt. In these cases, the Court of Appeals found that "an appellate court might raise an issue sua sponte in a situation in which a lower court decided a case correctly but reached its result through faulty analysis...[and] affirm the lower court on an alternative ground provided the record is adequate to support that ground." This exception provides an important safeguard for the just resolution of a case.

d. Other Jurisdictions.—In Davis v. DiPino, the Court of Appeals examined how courts in other jurisdictions have dealt with the issue of whether to dismiss a case on the grounds that the complaint failed to state a cause of action when the issue was raised for the first time on appeal. The court examined Perez v. Coast to Coast Reforestation Corp., and found that the Oregon Court of Appeals ruled simi-

111. See supra note 3 and accompanying text.
112. Md. R. 8-131(a); see supra note 3.
113. See, e.g., Squire v. State, 280 Md. 132, 136, 368 A.2d 1019, 1021 (1977) (holding that unique factors existed where a Supreme Court decision handed down four days before the defendant's trial made the trial court's burden-of-proof instructions prejudicially erroneous); Martin G. Imbach, Inc. v. Deegan, 208 Md. 115, 131, 117 A.2d 864, 871 (1955) ("Among the types of cases so excluded or excepted are those presented on demurrer...[O]ther cases which are also excepted or excluded are those arising on motions in arrest of judgment which are considered to be on the same footing as demurrers as regards this rule.").
115. Id. at 649-51, 655 A.2d at 404-06.
116. 785 P.2d 365, 366 (Or. App. 1990) (holding that the trial court's dismissal of the plaintiff's complaint on the ground that the law relied on by the Oregon employees did not apply could not be affirmed on appeal as an alternative pleading basis, particularly
larly to the holding in *Davis*. The court also noted that the Supreme Court of Utah held similarly in the case of *Colman v. Utah State Land Board*. In *Colman*, the court refused to consider any evidence presented at a preliminary injunction hearing in determining whether the grant of a motion to dismiss for failure to state a claim upon which relief can be granted was proper, because the plaintiff did not have the opportunity to submit other evidence to rebut the defendant’s evidence. Additionally, the court stated that if the trial court never decided whether the plaintiff failed to plead a claim upon which relief can be granted, an appellate court should not consider the issue.

Still other jurisdictions have ruled similarly to the Court of Appeals ruling in *Davis*, although not as strictly. The Iowa Court of Appeals held that a motion to dismiss cannot be sustained on appeal on grounds not asserted in the trial court. The Supreme Court of Hawaii held that affirmance of a trial court on a correct, alternative ground not considered by the trial court is proper if the parties had a full and fair opportunity to develop facts relevant to the decision. Additionally, the Supreme Court of Oregon decided to allow looser pleading practices when it held that when a trial court arrives at a correct result based on different grounds from those which were more proper as the basis for the result, the decision will be affirmed provided that the pleadings are sufficiently broad and there is sufficient evidence in the record.

5. Conclusion.—*Davis v. DiPino* marks the first time that the Court of Appeals confronted the question of the silence of the Maryland rules as to whether a motion for summary judgment can be converted into a motion to dismiss. The decision provides guidance to Maryland courts and practitioners in the proper pleading of cases because it clarified that a motion for summary judgment cannot be converted into a motion to dismiss on appeal.

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when an amendment might cure the defect and only substantive legal reasons for dismissal were presented to the judge).

118. *Id.* at 624-25.
119. *Id.*
120. See, e.g., Renander v. Inc., Ltd., 500 N.W.2d 39, 41 (Iowa 1993) (affirming the district court’s granting of a restaurant’s motion to dismiss a complaint from a customer who demonstrated no right to recovery).
121. Geremia v. State, 573 P.2d 107, 113 (Haw. 1977) (affirming the judgment of the district court after finding the plaintiffs had a full and fair opportunity to fulfill their burden of proof but failed to do so).
Davis is unlikely to have a major impact on the way attorneys plead their cases, because the Court of Appeals merely maintained the scope of appellate review as contemplated in Rule 8-131(a). However, the decision is likely to serve as an incentive to practitioners to plead their cases properly. The court’s discussion is instructive for both practitioners and the judiciary, because it stresses the importance of proper pleadings, and defines the correct standard of appellate review. The practical effect of this decision is that plaintiffs will not be prejudiced procedurally by the improper pleading practices of the opposing attorney.

Kristin L. Morris-McCormick
V. Torts

A. Toughening the Standard for Recovering Punitive Damages

In Ellerin v. Fairfax Savings, F.S.B., the Court of Appeals held that a plaintiff may recover punitive damages in an action for fraud only where the plaintiff proves that the defendant had actual knowledge of the falsity at the time of the misrepresentation. The court concluded that punitive damages are not recoverable in an action for fraud where the plaintiff proves that the defendant acted with reckless indifference to the truth. In reaching its conclusion, the court extended the standard for awarding punitive damages in non-intentional tort cases to an intentional tort case. The court distinguished between the two knowledge elements of fraud: actual knowledge of the falsity and reckless indifference as to the truth. It explained that in an action for fraud only, the higher knowledge element of actual knowledge of the falsity satisfies the actual malice required to sustain an award of punitive damages.

This Note traces the history of fraud and punitive damages in Maryland and argues that the court incorrectly modified the standard for recovering punitive damages for intentional torts. The court should have held that the actual malice required for punitive damages is inherent in the elements of fraud. Such a holding not only would have furthered the twin purposes of punitive damages—punishment and deterrence—but also would have ensured that punitive damages are awarded only in cases where the defendant's conduct is sufficiently heinous in character to warrant punitive damages.

1. The Case.—In 1982 Charles Ellerin and Louis Seidel formed a limited partnership, Sherwood Square Associates (SSA), to acquire and restore historic property in Westminster, Maryland. Ellerin and Seidel financed the project through three loans from Fairfax Savings Bank, F.S.A. (Fairfax). As security for the loans, Fairfax took mortgages on the property and buildings. In addition, SSA required personal guarantees from Ellerin and Seidel. Ellerin and Seidel's

2. Id. at 235, 652 A.2d at 1126.
3. Id.
4. Id.
5. Id. at 219-20, 652 A.2d at 1118.
6. The loans to SSA totaled $5,700,000. Id. at 220, 652 A.2d at 1118. The first loan constituted a direct loan from Fairfax to SSA of $850,000. Id.
7. Id., 652 A.2d at 1119.
8. Id.
attorney, R. Bruce Alderman, approved a final draft of the loan documents on December 22, 1982.\(^9\)

Each of the approved loan documents contained two principal provisions, a loan agreement and a completion guaranty. The loan agreements obligated SSA to construct and complete the buildings for the project, and made Ellerin and Seidel personally liable as the general partners of SSA.\(^10\) In the event of default, the loan agreements provided, “'it being the intent that the Land, improvements and rents to issue therefrom shall constitute the sole security and source of funds for the repayment of the Loan’ once the buildings were completed.”\(^11\) Under the completion guaranties, Ellerin, Seidel, their wives, and Tri-Ess Corp.\(^12\) (the guarantors) were personally liable in the event of default until SSA completed “acquisition” of the facility.\(^13\)

On December 29 and 30, 1982, the parties settled on the loans.\(^14\) The plaintiffs later contended that at the time of the settlement they had not been informed of, nor were aware of, any changes to the loan documents approved a week earlier.\(^15\) Unbeknownst to them, Fairfax made several substantive changes to the approved loan documents. The changes extended the liability of the guarantors and SSA past the acquisition date.\(^16\) Under the modified loan documents, the liability of the guarantors extended beyond acquisition of the facility and terminated once SSA had fully satisfied a newly inserted rent-roll requirement.\(^17\) The rent-roll requirement imposed post-completion liability on the guarantors until they leased seventy percent of the leasable space in the completed facility.\(^18\) The personal liability of the guarantors under the rent-roll requirement decreased according to a rent-

\(^9\) Id.
\(^10\) Id. at 221, 652 A.2d at 1119.
\(^11\) Id.
\(^12\) Tri-Ess was a corporation owned by Ellerin and Seidel that operated as the general contractor for the project. Id. at 220, 652 A.2d at 1119.
\(^13\) Id. at 221, 652 A.2d at 1119. Acquisition was defined as “the acquisition, construction, rehabilitation, remodeling, extension, equipping and permanent improvement of the Facility.” Id. at 221 n.3, 652 A.2d at 1119 n.3. As defined in the original completion guaranty, “acquisition” extinguished the personal liability of the guarantors once they completed the buildings. Id. at 221, 652 A.2d at 1119.
\(^14\) Id.
\(^15\) Id. at 223, 652 A.2d at 1120.
\(^16\) Id. at 222, 652 A.2d at 1119-20. The Court of Appeals stated, “It is undisputed that the preapproved loan documents were different from the documents signed at the settlement on December 29 and 30, 1982.” Id. at 221, 652 A.2d at 1119.
\(^17\) Id. at 222, 652 A.2d at 1119.
\(^18\) Id. at 221-22, 652 A.2d at 1119. In addition, the tenants had to be approved by Fairfax. Id.
roll formula reflecting the proportion of the leasable space actually leased in the facility.\textsuperscript{19}

SSA defaulted on the loans in November 1985.\textsuperscript{20} At the time of default, SSA had completed the acquisition of the facility, but had not satisfied the rent-roll requirement.\textsuperscript{21} Accordingly, the guarantors were personally liable to Fairfax under the modified loan documents, but would not have been personally liable if the original loan documents had controlled.\textsuperscript{22} Fairfax filed suit in the Circuit Court of Baltimore County against the guarantors for breach of the completion guaranties, and against Ellerin and Seidel for default on the loan agreements.\textsuperscript{23} After the guarantors filed counterclaims, which included an allegation of fraud in the contract negotiations, the court vacated confessed judgments in favor of Fairfax.\textsuperscript{24}

In the circuit court, a jury found that Fairfax fraudulently inserted the post-completion guaranties into the loan documents without notifying the guarantors or SSA.\textsuperscript{25} However, the circuit court entered a verdict in favor of Fairfax on the ground that the guarantors had ratified the fraud.\textsuperscript{26} On appeal, the Court of Special Appeals reversed, holding that the trial court erred by instructing the jury that the guarantors were barred from recovering damages if they had ratified the fraud by continuing with the project.\textsuperscript{27}

After a second jury trial resulted in a hung jury, a third trial began in 1990.\textsuperscript{28} The trial court instructed the jury to consider whether Ellerin or Seidel or their attorney knew that additional personal guar-

\begin{itemize}
\item [19.] Under the rent-roll formula, the guarantors' post-completion liability could not exceed $1,150,000 per IRB loan. \textit{Id.} at 222, 652 A.2d at 1119-20. For an in-depth explanation of the rent-roll formula see Ellerin v. Fairfax Sav. Ass'n, 78 Md. App. 92, 97 n.4, 552 A.2d 918, 921 n.4, cert. denied, 316 Md. 210, 557 A.2d 1336 (1989).
\item [20.] \textit{E/lerin}, 78 Md. App. at 98, 552 A.2d at 921.
\item [21.] \textit{E/lerin}, 337 Md. at 222, 652 A.2d at 1120.
\item [22.] \textit{Id.}
\item [23.] \textit{Id.} at 222-23, 652 A.2d at 1120.
\item [24.] \textit{Id.} at 223, 652 A.2d at 1120. The guarantors claimed that Fairfax fraudulently changed the original loan documents approved by Alderman on December 22, 1982. \textit{Id.} The guarantors' additional claims of duress and negligent misrepresentation were defeated on summary judgment granted by the trial court in favor of Fairfax. \textit{E/lerin}, 78 Md. App. at 100, 552 A.2d at 922. The guarantors claimed $6,000,000 in compensatory damages and $10,000,000 in punitive damages. \textit{E/lerin}, 337 Md. at 223, 652 A.2d at 1120.
\item [25.] \textit{E/lerin}, 337 Md. at 223, 652 A.2d at 1120.
\item [26.] \textit{Id.}
\item [27.] \textit{E/lerin}, 78 Md. App. at 109, 552 A.2d at 927. The Court of Special Appeals ruled that a party has two alternatives when he discovers fraud. A party may repudiate the agreement and seek rescission, or ratify the contract and seek damages. \textit{Id.}
\item [28.] \textit{E/lerin}, 337 Md. at 225, 652 A.2d at 1121.
\end{itemize}
The jury found
that they did not know of the additions to the loan
documents.

The court granted directed verdicts in favor of Fairfax based on the liabil-
ity of the guarantors under the completion guaranties, and Ellerin
and Seidel under the loan agreements.

The jury awarded the guar-
antors compensatory damages on the fraud and emotional distress
counts, and $6,000,000 in punitive damages.

Fairfax objected on
the ground that the trial court did not instruct the jury on the malice
required to support an award of punitive damages.

Fairfax appealed to the Court of Special Appeals, arguing that
the trial court erred by failing to give a jury instruction on the ele-
ments of fraud and by failing to give an instruction on the malice
required to justify an award of punitive damages.

With respect to Fairfax's objection to the trial court's failure to in-
struct the jury on the malice required for punitive damages, the Court
of Special Appeals reversed, vacated the award of punitive damages,
and remanded for a new trial on the issue of punitive damages.

29. Id. At the third trial, Fairfax argued that it intended that the post-completion guar-
anties be a part of the agreement between the parties, and that their absence from the
documents given to Alderman on December 22, 1982 was inadvertent. Fairfax Sav., F.S.B.
v. Ellerin, 94 Md. App. 685, 692, 619 A.2d 141, 144 (1993), aff'd in part and vacated in part,
conference call in which loan terms, including the completion guaranties, were agreed
upon. Id. Ellerin brought forth evidence to show that he rejected a loan from another
bank because that bank required a post-completion guaranty of $1,300,000. Id.

30. Ellerin, 337 Md. at 225, 652 A.2d at 1121.


32. This amount included the $4,371,401.96 awarded to Fairfax on directed verdict.

Id. After the set-off against Fairfax's judgment, the actual compensatory damages awarded
to the guarantors totaled $2,650,695. Ellerin, 337 Md. at 226, 652 A.2d at 1122.

33. Ellerin, 337 Md. at 226, 652 A.2d at 1122.

34. Id. at 225, 652 A.2d at 1121.

35. Id. at 225-26, 652 A.2d at 1121.


37. Id. at 689-90, 619 A.2d at 143.

38. Id. at 695-96, 619 A.2d at 145-46.

39. The Court of Special Appeals reasoned that the actual malice standard established
in Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992), governs an award of puni-
tive damages in an action for fraud. Ellerin, 94 Md. App. at 714, 619 A.2d at 155. The court
stated that actual malice in the context of punitive damages is not inherent in fraud. Id. at
695-96, 619 A.2d at 145-46. The court held that in an action for fraud, additional aggravat-

2. **Legal Background.**

   a. **Fraud.**—McAleer v. Horsey\footnote{Ellerin, 337 Md. at 219, 652 A.2d at 1118.} is considered the seminal case on fraud in Maryland. In McAleer, the court wrote:

   "If the defendant has made a false representation, knowing it to be false, with intent to induce, and has thereby induced the plaintiff to enter into a contract into which, but for that representation, he would not have entered, and the plaintiff has been damned by the falsehood, a case of fraud is made out and an action for damages is maintainable . . . .\footnote{Id. at 454.}"

The development of Maryland's fraud law culminated with the court's enumeration of the five elements of fraud in *Gittings v. Von Dorn*.\footnote{Id. at 15-16, 109 A. at 554.} As stated in *Gittings*, the elements of fraud are:

1. [t]hat the representation made is false;
2. that its falsity was either known to the speaker, or the misrepresentation was made with such a reckless indifference to truth as to be equivalent to actual knowledge;
3. that it was made for the purpose of defrauding the person claiming to be injured thereby;
4. that such person not only relied upon the misrepresentation, but had a right to rely upon it in the full belief of its truth, and that he would not have done the thing from which the injury resulted had not such misrepresentation been made; and
5. that he actually suffered damage directly resulting from such fraudulent misrepresentation.\footnote{Id. at 136 Md. 10, 109 A. 553 (1920).}

Maryland law requires that a party prove the five elements of fraud by clear and convincing evidence.\footnote{35 Md. 439 (1872).}
As the law of fraud has developed, the court has elaborated on the knowledge element. In *Robertson v. Parks*, the Court of Appeals stated that in an action for fraud, it is not necessary to show that the defendant had actual knowledge of the falsity at the time of the representation. In *Cahill v. Applegarth*, the court directly addressed the knowledge element of fraud and ruled that the defendant must act with actual knowledge of the falsity or reckless indifference to the truth. In *Gittings*, the court stated that a defendant's conduct may amount to such reckless indifference to the truth as to be the "equivalent to actual knowledge."

b. Punitive Damages.—The law on punitive damages in Maryland is not as clear as the law on fraud. For the last century, the Court of Appeals has wavered on the proper standard for recovering punitive damages. One of the first cases to consider punitive damages in Maryland was *Philadelphia, Wilmington & Baltimore Railroad Co. v. Hoeftich*. In *Hoeftich*, the court explained that punitive damages are only recoverable where there is "an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act." The *Hoeftich* court stated that punitive damages are awarded to serve two purposes. First, they only should be awarded to punish the wrongdoer for his evil intent. Second, they should deter similar conduct by others.

In *Davis v. Gordon*, the court reaffirmed its holding in *Hoeftich* that punitive damages are awarded only to punish the defendant for his evil intent and to deter others from attempting similar conduct.

In addition, the court established that negligence, no matter how

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46. 76 Md. 118, 24 A. 411 (1892). "It is sufficient if the statement be made for a fraudulent purpose, and without a *bona fide* belief in its truth by the defendant . . . ." *Id.* at 131, 24 A. 412 (1892).
47. 98 Md. 493, 56 A. 794 (1904).
49. 136 Md. 10, 15, 109 A. 553, 554 (1920); see also *Donnelly*, 102 Md. at 13, 61 A. at 306; *Boulden v. Stilwell*, 100 Md. 543, 552, 60 A. 609, 610 (1905).
50. 62 Md. 300 (1884).
51. *Id.* at 307.
52. *Id.*
53. *Id.* The court also stated that "where the act, although wrongful in itself, is committed in the honest assertion of a supposed right—or in the discharge of duty, or without any evil or bad intention, there is no ground on which such [punitive] damages can be awarded." *Id.*
55. *Id.* at 133, 36 A.2d at 701.
gross, does not support an award of punitive damages.\textsuperscript{56} The court stated that the defendant must intend to do injury evidenced by fraud, malice, or evil intent.\textsuperscript{57} The court's decision in \textit{Davis} was significantly modified by \textit{Smith v. Gray Concrete Pipe Co.}\textsuperscript{58} In \textit{Smith}, the court stated that a party may recover punitive damages in certain automobile accident cases upon a showing of implied, rather than actual, malice.\textsuperscript{59} The court held that operating a motor vehicle with a wanton or reckless disregard for human life,\textsuperscript{60} with the known dangers and risks attendant to such conduct, provides the legal equivalent of malice necessary to support an award of punitive damages.\textsuperscript{61} The court defined wanton, reckless disregard for human life as "such conduct as would carry an implication of malice or from which one might determine the existence of actual malice."\textsuperscript{62} Thus, the \textit{Smith} court extended punitive damages to a negligence action, where the defendant's conduct falls just short of being willful or intentional. The court explained that the negligence must be "of such an extraordinary (or outrageous) character as possibly to be the legal equivalent of such actual intent or actual malice."\textsuperscript{63}

In \textit{H&R Block, Inc. v. Testerman},\textsuperscript{64} the court refused to extend \textit{Smith}'s implied malice standard to a negligence action arising out of a contractual relationship.\textsuperscript{65} The \textit{Testerman} court stated that \textit{Smith}'s test for "wanton or reckless disregard for human life in the operation of a motor vehicle" did not apply to torts arising out of a contractual relationship for two reasons.\textsuperscript{66} First, the tort and contract claims in \textit{Testerman} did not involve conduct on the part of the defendant that amounted to a wanton or reckless disregard for human life.\textsuperscript{67} Second, actual malice is required to recover punitive damages in a tort action arising out of a contractual relationship.\textsuperscript{68} The court defined actual

\begin{thebibliography}{9}
\bibitem{56} Id.
\bibitem{57} Id.
\bibitem{58} 267 Md. 149, 297 A.2d 721 (1972).
\bibitem{59} Id. at 173, 297 A.2d at 734.
\bibitem{61} \textit{Smith}, 267 Md. at 168, 297 A.2d at 731.
\bibitem{62} Id. at 167, 297 A.2d at 731 (quoting St. Paul at Chase v. Manufacturers Life Ins., 262 Md. 192, 238-39, 278 A.2d 12, 34-35 (1971)).
\bibitem{63} Id. at 166, 297 A.2d at 730 (quoting \textit{Conklin}, 255 Md. at 71, 257 A.2d at 198).
\bibitem{64} 275 Md. 36, 338 A.2d 48 (1975).
\bibitem{65} In \textit{Testerman}, the plaintiffs sued H&R Block, Inc. in both tort and contract, claiming that H&R Block negligently, wantonly, maliciously, and intentionally prepared their tax returns. \textit{Id.} at 37-38, 338 A.2d at 49.
\bibitem{66} Id. at 46-47, 338 A.2d at 54.
\bibitem{67} Id. at 47, 338 A.2d at 54.
\bibitem{68} Id.
\end{thebibliography}
malice as "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." ⁶⁹

In *Wedeman v. City Chevrolet Co.*, ⁷⁰ the court refined its decision in *Testerman*. The court explained that *Testerman* held that actual malice must be shown to recover punitive damages for a tort arising out of a contractual relationship. ⁷¹ However, punitive damages may be recovered based on a finding of implied malice where the tortious conduct *precedes* the contractual relationship. ⁷² The court defined implied malice as "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others." ⁷³

In *Schaefer v. Miller*, ⁷⁴ the court reaffirmed the *Testerman-Wedeman* standard. In a concurring opinion, however, Judge Eldridge sharply criticized the *Testerman-Wedeman* standard, arguing that the standard should be overruled because it is not supported by Maryland precedent nor followed by other jurisdictions. ⁷⁵ Judge Eldridge stated that "the rule has utterly no relationship to the purposes of punitive damages, leads to irrational results, and has been arbitrarily and inconsistently applied." ⁷⁶ Judge Eldridge concluded that the court should not award punitive damages in negligence actions absent a showing of actual malice. ⁷⁷

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⁶⁹. *Id.* at 43, 338 A.2d at 52.
⁷⁰. 278 Md. 524, 366 A.2d 7 (1976). In *Wedeman*, the plaintiff sued the defendant for fraudulently misrepresenting the condition of an automobile. *Id.* at 525, 366 A.2d at 7.
⁷¹. *Id.* at 528, 366 A.2d at 10.
⁷². *Id.* at 530-31, 366 A.2d at 11-12.
⁷³. *Id.* at 532, 366 A.2d at 13. The court reasoned that implied malice is sufficient to recover punitive damages in an action for fraud because "[they] are more likely to serve their deterrent purpose in a fraud case than in most other instances of tortious conduct." *Id.* at 531-32, 366 A.2d at 12. The court stated that "[t]hose who are tempted ... to engage deliberately in fraudulent conduct for profit are more likely to pause and consider the consequences if made aware that they may be compelled to pay more than the actual loss sustained by the plaintiff." *Id.* at 532, 366 A.2d at 12.
⁷⁴. 322 Md. 297, 587 A.2d 491 (1991) (plurality opinion). In *Schaefer*, three judges joined the opinion of the court and three judges concurred.
⁷⁵. *Id.* at 312, 587 A.2d at 499 (Eldridge, J., concurring).
⁷⁶. *See supra* text accompanying notes 51-53.
⁷⁷. Judge Eldridge believed that the *Testerman-Wedeman* standard was irrational because the requisite malice did not depend on the conduct of the tortious party, but on the time when the party committed the tortious act. *Schaefer*, 322 Md. at 321-22, 587 A.2d at 503-04.
⁷⁸. *Id.* at 312, 587 A.2d at 499.
⁷⁹. *Id.* at 332, 587 A.2d at 508. Judge Eldridge acknowledged that Maryland recognizes a recovery of punitive damages based on an implied malice standard for certain torts. *See infra* note 151 and accompanying text.
In *Owens-Illinois v. Zenobia*, the Court of Appeals, building on Judge Eldridge's concurring opinion in *Schaefer*, overruled the *Tes-terman-Wedeman* "arising out of contract" standard for punitive damages. The court stated that

[w]hether the tort occurred before or after the formation of a contractual relationship should not determine whether actual or implied malice is required for allowing an award of punitive damages. Rather, the availability of a punitive damages award ought to depend upon the heinous nature of the defendant's tortious conduct.

According to the court, "[a]warding punitive damages based upon the heinous nature of the defendant's tortious conduct furthers the historical purposes of punitive damages—punishment and deterrence." The court held that to recover punitive damages in a non-intentional tort action, the plaintiff must prove that "the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., 'actual malice.'" The court recognized that the actual malice standard did not translate easily to a defendant's conduct in a products liability case. The court held that the equivalent of actual malice in the context of a products liability case is actual knowledge of the defect and conscious or deliberate disregard of the foreseeable consequences. The *Zenobia* court declined to modify the standard for recovering punitive damages in intentional tort cases.

In addition to adopting a new standard for recovering punitive damages in non-intentional tort and products liability cases, the *Zenobia* court heightened the standard of proof required for recovering punitive damages. The court held that to recover punitive damages a plaintiff must prove by clear and convincing evidence that the defendant's conduct was characterized by actual malice. The court ex-

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81. Id. at 454, 601 A.2d at 649.
83. *Zenobia*, 325 Md. at 460, 601 A.2d at 652.
84. Id. at 462, 601 A.2d at 653. Subsequent non-intentional tort cases have followed *Zenobia's* standard for recovering punitive damages. For example, in *Komornik v. Sparks*, 331 Md. 720, 629 A.2d 721 (1993), the court denied punitive damages in a negligence action involving an automobile accident. The *Komornik* court emphasized that *Zenobia* overruled the *Smith* implied malice standard for recovering punitive damages with regard to products liability and non-intentional tort cases. Id. at 729, 629 A.2d at 725-26.
85. *Zenobia*, 325 Md. at 460 n.21, 601 A.2d at 653 n.21.
86. Id. at 469, 601 A.2d at 657.
plained that the heightened standard of proof would ensure that punitive damages are properly awarded. 87

3. The Court’s Reasoning.—In Ellerin, the court reviewed the standard for recovery of punitive damages in an action for fraud. Outlining the general purpose for awarding punitive damages, the court observed that Maryland recognizes an award of punitive damages where there is evidence of “‘fraud, or malice, or evil intent.’”88 The award “‘depend[s] upon the heinous nature of the defendant’s tortious conduct,’”89 and is given to punish the tortfeasor for his conduct and to deter similar conduct from others.90 The court concluded that, in most cases, an award of punitive damages is limited to situations in which the defendant’s conduct is characterized by “knowing and deliberate wrongdoing.”91

After tracing the rationale for awarding punitive damages in Maryland, the court analyzed the two mental elements of fraud—a deliberate intent to deceive92 and a knowledge requirement. The knowledge requirement is composed of two alternative parts. The defendant must act with either actual knowledge of the falsity or reckless indifference to the truth.93 The court defined reckless indifference to the truth as “the defendant’s awareness that he does not know whether the representation is true or false.”94 The court emphasized that reckless indifference to the truth represents a higher knowledge

87. Id.
88. Ellerin, 337 Md. at 227, 652 A.2d at 1122 (quoting Philadelphia, Wilm., & Balt. R.R. v. Hoeflich, 62 Md. 300, 304 (1884)). The court defined “actual malice” as intent to injure, ill will, or fraud. Id. at 229, 652 A.2d at 1123.
89. Id. at 227, 652 A.2d at 1122 (quoting Schaefer v. Miller, 322 Md. 297, 321-22, 587 A.2d 491, 503 (1991)).
90. Id. at 228, 652 A.2d at 1123; see also Schaefer, 322 Md. at 321, 587 A.2d at 503.
91. Ellerin, 337 Md. at 228, 652 A.2d at 1123.
92. Id. at 230, 652 A.2d at 1124. The court based this statement on McAleer v. Horsey, 35 Md. 439 (1872), where the court wrote:

An action cannot be supported for telling a bare naked lie, i.e., saying a thing which is false, knowing or not knowing it to be so, and without any intention that another should rely upon the false statement and act upon it; but if a falsehood be knowingly told, with an intention that another should believe it to be true and act upon it, and that person does act upon it and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit ....

Id. at 453.
93. Ellerin, 337 Md. at 231, 652 A.2d at 1124.
94. Id. The court explained that a defendant acts with reckless indifference to the truth where he makes a statement purporting to have actual knowledge, but, in fact knowing that he does not know the truth or falsity of the statement. Id.; see also Robertson v. Parks, 76 Md. 118, 132, 24 A. 411, 413 (1892).
than negligence or gross negligence because the defendant knows that he does not know the truth or falsity of the statement.\textsuperscript{95}

After examining the knowledge elements of fraud, the court analyzed whether the required malice for an award of punitive damages is inherent in the elements of fraud.\textsuperscript{96} The court extended the reasoning of \textit{Zenobia} to the recovery of punitive damages in an intentional tort action, stating that punitive damages are recoverable in fraud cases only where the defendant has actual knowledge of the falsity of a statement and intends to deceive the other party with the statement.\textsuperscript{97} The court ruled that the reckless indifference to the truth element of fraud is not sufficient to recover punitive damages because it does not mean actual knowledge of the falsity.\textsuperscript{98}

Having concluded that only actual knowledge of the falsity supports an award of punitive damages for fraud, the court explained that the trial court's holding was too broad.\textsuperscript{99} Because the trial court did not instruct the jury on fraud, the jury did not expressly find that any officer or agent of Fairfax had actual knowledge of the fraudulent additions to the loan documents, or that any officer or agent of Fairfax intended to deceive the guarantors into accepting the post-completion guaranties.\textsuperscript{100} The court found that the failure to instruct the jury on the elements of fraud was pertinent to the award of punitive damages because actual knowledge must be found to support an award of punitive damages.\textsuperscript{101} Therefore, the Court of Appeals vacated the award of punitive damages and remanded the case for a new trial on the issue of punitive damages.\textsuperscript{102}

\textsuperscript{95} \textit{Ellerin}, 337 Md. at 232, 652 A.2d at 1124-25; see also \textit{Cahill v. Applegarth}, 98 Md. 493, 502, 56 A. 794, 796 (1904). The \textit{Ellerin} court acknowledged that it has never decided a fraud case where the knowledge of the defendant amounted to reckless indifference to the truth. \textit{Ellerin}, 337 Md. at 232, 652 A.2d at 1125.

\textsuperscript{96} \textit{Ellerin}, 337 Md. at 237, 652 A.2d at 1123.

\textsuperscript{97} \textit{Id.} at 234, 652 A.2d at 1126.

\textsuperscript{98} \textit{Id.} at 235, 652 A.2d at 1126. The court stated that "reckless disregard' or 'reckless indifference' concerning the truth of the representation falls short of the mens rea which is required to support an award of punitive damages." \textit{Id.} The court also overruled the Court of Special Appeals by adding that additional aggravating factors are not required to recover punitive damages in a fraud action where the defendant had actual knowledge of the falsity. \textit{Id.} at 236-37, 652 A.2d at 1127.

\textsuperscript{99} \textit{Id.} at 241, 652 A.2d at 1129. The trial court held that the malice required for punitive damages is inherent in the elements of fraud. \textit{Id.} at 240, 652 A.2d at 1129.

\textsuperscript{100} \textit{Id.} at 241, 652 A.2d at 1129.

\textsuperscript{101} \textit{Id.} The Court of Appeals did not address the trial court's failure to instruct the jury on the elements of fraud with respect to compensatory damages because the Court of Special Appeals correctly ruled that Fairfax failed to make a timely objection at trial. \textit{Id.}

\textsuperscript{102} \textit{Id.}
The court also commented on Fairfax’s objection to the excessiveness of the punitive damages award. The court noted that upon request, a jury should be instructed that punitive damages are not to be disproportionate to the wrongfulness of the defendant’s conduct or his ability to pay. Furthermore, an award of punitive damages is reviewable by the trial court for excessiveness. The court suggested that statutory fines should be considered when a trial court reviews an award of punitive damages. The court cautioned, however, that such considerations should not serve as an absolute cap on the amount that a jury can award as punitive damages.

Judge Bell wrote a concurring and dissenting opinion. Judge Bell agreed with the majority that proof of additional aggravating factors is not required to recover punitive damages in an action for fraud. He also agreed that “actual malice” is the correct standard for recovering punitive damages in a fraud action. However, Judge Bell argued that the requisite mental state for punitive damages is inherent in the elements of fraud.

Judge Bell argued that making a representation of fact with an intent to deceive and with actual knowledge that the speaker does not know the truth or falsity of the statement is equivalent to making the statement with actual knowledge of its falsity, and is equally reprehensible. In addition, Judge Bell argued that the jury was instructed on fraud in terms of conduct, rather than the elements of fraud. Because, in his opinion, a finding of fraud inherently includes a finding of the mental state required for punitive damages, Judge Bell argued that Fairfax should be liable for punitive damages based on the jury’s finding of fraud even without an instruction on malice.

Finally, Judge Bell questioned the majority’s guidance regarding excessive awards of punitive damages. Judge Bell argued that, to have meaning, the court’s guidance must be construed as suggesting

103. Id. at 242, 652 A.2d at 1129-30.
104. Id., 652 A.2d at 1130.
105. Id. at 242 n.13, 652 A.2d at 1190 n.13.
106. Id.
107. Id. at 243, 652 A.2d at 1190.
108. Id. at 243-44, 652 A.2d at 1130.
109. Id. at 244, 652 A.2d at 1130.
110. Id., 652 A.2d at 1131.
111. Id. at 246, 652 A.2d at 1131. The trial court instructed the jurors that they could award punitive damages in such an amount “as in your sound judgment and discretion you find will serve to punish [the appellee] for the conduct you have found it engaged in this case.” Id. (quoting the trial court).
112. Id., 652 A.2d at 1192.
113. Id.
the need for a cap on punitive damages.\textsuperscript{114} He warned that instructing the jury to consider the maximum fines imposed by the state, coupled with an instruction that these fines should not be used as a cap, not only would confuse the jury, but "would tend to usurp the jury function."\textsuperscript{115}

4. Analysis.—

a. Actual Malice Is Inherent in Fraud.—The actual malice required to support an award of punitive damages is inherent in the elements of fraud.\textsuperscript{116} The contrary holding in \textit{Ellerin} is based on too subtle a distinction between the knowledge elements of fraud. In \textit{Ellerin}, the court acknowledged that a person acting with reckless indifference to the truth and with an intent to deceive another acts with greater moral turpitude than one acting with negligence or even gross negligence.\textsuperscript{117} Prior Maryland decisions have described reckless indifference to the truth as importing knowledge to the actor, or as being the legal equivalent of actual knowledge.\textsuperscript{118} As Judge Bell stated in his concurring and dissenting opinion in \textit{Ellerin}:

\textquote{[M]aking a representation of a fact, with intent to deceive and actual knowledge that the speaker does not know whether it is fact or not, is as much a misrepresentation as one made with actual knowledge of falsity and that actual knowledge of the former is as reprehensible as actual knowledge of the latter.}\textsuperscript{119}

By treating equivalent states of mind differently when assessing punitive damages, the court makes a distinction where no supportable distinction exists.

When one considers that the definition of reckless indifference to the truth requires that the speaker have "actual knowledge" that he does not know the truth or falsity of the statement, the distinction makes even less sense. Regardless of which knowledge element of fraud is present, a defendant who commits fraud has actual knowl-

114. \textit{Id.} at 246-47, 652 A.2d at 1132.

115. \textit{Id.}

116. \textit{See id.} at 244, 652 A.2d at 1130 (Bell, J., concurring and dissenting).

117. \textit{Id.} at 231, 652 A.2d at 1124.


119. \textit{Ellerin}, 337 Md. at 244, 652 A.2d at 1131.
edge of his wrongdoing. The Ellerin court itself stated that "[w]hen a tort [is] committed willfully and with knowledge of the wrong, instead of by ignorance, mistake or negligence . . . it [is] committed with the requisite 'bad motive' to allow punitive damages." As a result, the court should have concluded that the speaker making a fraudulent representation has acted in a sufficiently heinous manner to support an award of punitive damages, regardless of the applicable knowledge element.

In addition, the court stated that punitive damages are based on the defendant's conscious wrongdoing. A defendant who commits fraud must have an intent to deceive and some form of actual knowledge, whether it be actual knowledge of the falsity or actual knowledge that the defendant does not know the truth or falsity of a statement. Clearly, the defendant's intent to deceive, coupled with his actual knowledge that he does not know the truth or falsity of the statement, qualifies his conduct as a "conscious wrongdoing." Logically then, the court should have concluded that the mental element required for an award of punitive damages is inherent in the elements of fraud.

Moreover, in a fraud action, reckless indifference to the truth does not mean constructive knowledge or substantial knowledge because the defendant has "actual knowledge" of the wrongdoing; the defendant knows that he does not know the truth or falsity of the statement. Applying similar reasoning leads to the conclusion that reckless indifference to the truth does not mean "should have known," as this term is used in negligence and gross negligence cases. Ellerin and prior cases have made it clear that reckless indifference to the truth is a higher mens rea than negligence and gross negligence. In Maryland, reckless indifference to the truth is often defined as being equivalent to actual knowledge of the falsity. Because reckless indifference to the truth is equivalent to actual knowledge and is a higher mental state than constructive knowledge,

120. Id. at 233, 652 A.2d at 1125.
121. Id.
123. See Donnelly v. Baltimore Trust & Guar. Co., 102 Md. 1, 13, 61 A. 301, 306 (1905); Cahill v. Applegarth, 98 Md. 493, 502, 56 A. 794, 796-97 (1904) (stating that failure to know what the defendant ought to have known is not a high enough mental state to constitute fraud).
124. Ellerin, 337 Md. at 231-32, 652 A.2d at 1124-25; see also Cahill, 98 Md. at 502, 56 A. at 796-97.
125. See supra note 118 and accompanying text.
substantial knowledge, and negligence, the court erred in holding that reckless indifference to the truth does not satisfy the actual malice requirement for punitive damages. Rather, the court should have held that the malice required for an award of punitive damages is inherent in the elements of fraud, regardless of which form of knowledge is found.

b. Zenobia Does Not Apply to Intentional Torts.—The Ellerin court should not have relied on dictum in Adams v. Coates to extend Zenobia’s actual malice requirement to an intentional tort such as fraud. Zenobia made it clear that while its holding applied to non-intentional and strict liability tort cases, it did not modify the law on punitive damages for intentional torts. The Zenobia court stated that Schaefer v. Miller reviewed, to some extent, the governing legal principles concerning punitive damages with regard to intentional torts. Schaefer stands for the proposition that Maryland recognizes an implied malice standard for punitive damages for certain torts. Therefore, while dictum in Adams suggests that Zenobia’s actual malice standard should apply to all tort actions, Zenobia itself does not seem to extend its holding in this way. Based on this analysis, the Ellerin court incorrectly relied on Adams as a basis for extending Zenobia to intentional torts. It follows, therefore, that the court’s restriction of recovery of punitive damages for intentional torts to cases where

126. 331 Md. 1, 626 A.2d 36 (1993).
127. Adams stated that the policy enunciated by Zenobia should apply to any award of punitive damages. Id. at 13, 626 A.2d 42. The Adams court defined Zenobia’s policy to mean that punitive damages should only be awarded to punish the defendant for his wrongful conduct and to deter similar conduct from others. Id. Also, punitive damages should “depend upon the heinous nature of the defendant’s tortious conduct.” Id. (quoting Zenobia, 325 Md. at 454, 601 A.2d at 649). Finally, punitive damages should be awarded to “punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud.” Id. (quoting Zenobia, 325 Md. at 454, 601 A.2d at 649).
128. Zenobia, 325 Md. at 460 n.21, 601 A.2d at 653 n.21 (“We shall not at this time . . . reconsider or modify the legal principles concerning the type of conduct which will support an award of punitive damages in so-called intentional tort actions . . . .”).
130. Zenobia, 325 Md. at 460 n.21, 601 A.2d at 653 n.21.
131. Schaefer, 322 Md. at 319-21, 587 A.2d at 502-03 (Eldridge, J., concurring); see, e.g., McClung-Logan v. Thomas, 226 Md. 136, 148, 172 A.2d 494, 500 (1961) (allowing punitive damages in an action for wrongful conversion of personal property where the conduct of the defendant is accompanied with recklessness); Dennis v. Baltimore Transit Co., 189 Md. 610, 616-17, 56 A.2d 813, 816-17 (1948) (allowing punitive damages in a false arrest action where the defendant inflicted the injury maliciously or wantonly with extreme recklessness or utter disregard for the rights of others); Nichols v. Meyer, 139 Md. 450, 457, 115 A. 786, 788 (1921) (allowing punitive damages in an action of trespass de bonis asportatis where the defendant’s conduct was reckless or wanton).
defendant's conduct amounts to actual malice is erroneous. Neither *Zenobia* nor *Schaefer* fully supports this argument.

c. Deviation from the Traditional Definition of Punitive Damages.—The *Ellerin* court's holding deviates from the traditional definition of punitive damages. Historically, Maryland has allowed recovery of punitive damages in cases where there is an element of fraud or where there is conduct characterized by fraud. In prior cases, the court has not distinguished between the two forms of knowledge for fraud in assessing punitive damages. In fact, the *Ellerin* court acknowledged that "[f]rom our earliest decisions to the present day, this Court has consistently listed 'fraud' among the types of dishonest or immoral conduct for which punitive damages are recoverable." Because a finding of fraud has been defined to be a sufficient element to support a recovery of punitive damages, punitive damages should be recoverable in a fraud action regardless of the form of knowledge upon which the finding of fraud is based.

d. The Court's Decision Does Not Further the Purposes of Punitive Damages.—The court's holding that only actual knowledge of the falsity satisfies the actual malice required for an award of punitive damages in an action for fraud does not further the twin goals of punitive damages—punishment and deterrence. Requiring actual knowledge of the falsity to recover punitive damages creates an incentive for a defendant to avoid gaining actual knowledge as to the veracity of his statement. The less a defendant knows about the truth or falsity of a representation, the better off the defendant is in terms of liability. In *Zenobia*, Judge Bell observed that "[i]n cases where there is no actual malice, the totality of the circumstances may reveal conduct on the part of a defendant that is just as heinous as the conduct motivated by that actual malice and, so, for all intents and purposes is the same." While Judge Bell's criticism of the actual malice requirement was written in the context of a nonintentional tort and products

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133. *Ellerin*, 337 Md. at 234, 652 A.2d at 1126.
134. The court tried to circumvent this analysis by stating that no cases of fraud based on reckless indifference to the truth have been decided by the Court of Appeals. *Id.* at 232-33, 652 A.2d at 1125. However, the court did not cite any authority supporting its deviation from the traditional definitions of fraud and punitive damages.
135. See *Zenobia*, 325 Md. at 484-85, 601 A.2d at 665 (Bell, J., concurring and dissenting).
136. *Id.*
137. *Id.* at 481, 601 A.2d at 663.
liability case, his reasoning carries even more weight in the context of an intentional tort case such as fraud. Reckless indifference to the truth, although not exactly the same mental state as actual knowledge of the falsity, constitutes the type of egregious and heinous conduct that punitive damages were developed to punish and deter.

e. An Actual Malice Standard Is Contrary to Precedent Allowing Punitive Damages in an Action for Fraud.—Zenobia overruled both the Testerman—Wedeman “arising out of contract standard” and the Smith implied malice standard for punitive damage awards. Zenobia, however, did not overrule the principles set forth in Wedeman pertaining to the recovery of punitive damages in an action for fraud. As the Wedeman court stated, “[p]unitive damages are more likely to serve their deterrent purpose in a fraud case than in most other instances of tortious conduct.” The Wedeman court held that actual malice is not required to recover punitive damages in cases of actionable fraud preceding a contractual relationship. Based on this holding and Zenobia’s self-imposed limitation not to modify the standard for recovering punitive damages for intentional torts, the Ellerin court erred in holding that actual knowledge is required for recovery of punitive damages in an action for fraud.

f. Ellerin: Judicial Tort Reform?—The court’s recent decisions concerning punitive damages will have a severe impact on a plaintiff’s ability to recover punitive damages in Maryland. By requiring a showing of actual malice, defined by Zenobia and Ellerin to include actual knowledge of the wrongdoing, and raising the burden of proof for punitive damages to clear and convincing evidence, the court precludes recovery of punitive damages in cases where the defendant’s conduct is sufficiently heinous and egregious in character to deserve a punitive damages award.

The court’s decision in Ellerin may evidence an intent by the court to force the legislature to more actively consider tort reform. As such, it is not surprising that the Ellerin decision comes at a time when interest groups are preparing for a major battle over tort reform in the General Assembly. Perhaps the court’s recent decisions modifying the standards of recovery for punitive damages are an attempt to

139. Id. at 532, 366 A.2d at 13.
140. See Jane Bowling, An Uneasy Peace: Maryland Tort Reform Initiatives Put on Hold, DAILY REC., Feb. 9, 1995, at 1. Some of the interest groups involved in the tort reform debate are the Maryland Chamber of Commerce, the Maryland State Bar Association, the Tort Reform Coalition, and the Maryland Civil Trial Lawyers Association. Id.
steer the legislature in a clear direction concerning tort reform. Whatever the court's motives, it should not involve itself in the tort reform debate or take tort reform out of the hands of the legislature.

The court's recent decisions likely will fuel the tort reform debate in Annapolis, not only because the court raised the standard for punitive damages, but also because of the *Ellerin* court's comment concerning the excessiveness of punitive damage awards. The court's discussion in *Ellerin* of the need to consider the maximum statutory fines in Maryland to determine whether an award of punitive damages is excessive likely will serve as the starting point for the next groundbreaking decision concerning punitive damages, or will serve as guidance to legislators seeking to place a statutory cap on punitive damages. In his dissenting opinion in *Ellerin*, Judge Bell stated "[i]f the majority is not suggesting that the [statutory fines] constitute a cap... it is difficult to understand the purpose of the footnote." Therefore, if the court is not laying a direct judicial foundation for placing a cap on punitive damages, it is at a minimum suggesting a need for the legislature to do so. In addition, the court is putting lower courts on notice that punitive damages must be examined with extreme scrutiny for excessiveness. This may cause lower courts to be overly reluctant in allowing punitive damage awards, despite the presence of heinous and egregious conduct.

5. Conclusion.—The court's decision in *Ellerin* erroneously extends *Zenobia*'s actual knowledge requirement to intentional torts. The court extended *Zenobia* to intentional torts by manipulating case law and ignoring precedent that defined punitive damages as evil intent, ill will, or *fraud*. Based on precedent and the twin purposes of punitive damages, the court should have held that punitive damages are recoverable in an action for fraud, regardless of which form of knowledge supports the finding of fraud. Such a finding would better serve the punishment and deterrent purposes of punitive damages. The court's decision will no doubt serve as the authority for modifying the standard of recovery for punitive damages in all tort cases. There is also little doubt that the court's decision will fuel the tort reform debate in Annapolis, as legislators and lobbyists attempt to codify or overturn the tort reform enacted by the Court of Appeals.

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141. *Ellerin*, 337 Md. at 246, 652 A.2d at 1132 (Bell, J., dissenting).
B. Maryland's Rejection of Attractive Nuisance Doctrine

In *Baltimore Gas & Electric Co. v. Lane*, the Court of Appeals considered whether a utility company could be held liable for a child's injuries caused by an empty cable spool left by a utility company near a residential area and moved onto a playground by neighborhood children. The court properly affirmed the decision of the Court of Special Appeals to deny summary judgment in favor of the defendant Baltimore Gas and Electric Company (BGE); however, the majority opinion adopted an illogical analysis to reach this result. Although the court recognized the foreseeability of neighborhood children using the object for recreational purposes, Chief Judge Murphy based the decision on an unfounded interpretation of the trespasser rule. In so holding, the court refused to follow the national trend of accepting the attractive nuisance doctrine.

1. The Case.—In June 1985 employees of BGE were engaged in construction and maintenance activities near the Meade Village Housing Project. Upon completion of their work, the employees left an "unattended, unmarked and unsecured" cable spool, weighing nearly half a ton, in front of a day care center and in close proximity to the community playground. Tyrone Lane, a minor and a resident of Meade Village, initially noticed the spool when several boys pushed it into the playground and rode it down a hill. Lane attempted to repeat the boys' actions, but became scared and dismounted the spool, after which it rolled over him and caused severe injuries to his face, head, and body.

With his mother as next friend, Lane filed a complaint against BGE, alleging negligence in that BGE "knew or should have known by the exercise of reasonable care that the . . . spool was reasonably dangerous for . . . children . . . who might come into contact with it." BGE denied liability and filed a motion for summary judgment, claiming Lane to be a trespasser to whom no duty was owed other than to avoid willful and wanton injury. BGE further alleged that Lane's in-
juries were not proximately caused by BGE's alleged negligence, and that Lane's claims were barred by the defenses of contributory negligence and assumption of risk. Without explaining its decision, the Circuit Court for Baltimore City granted BGE's motion for summary judgment. Recognizing foreseeability as a question of disputable fact, the Court of Special Appeals reversed, holding that "reasonable persons could . . . conclude that it is foreseeable that children would move the spool to a nearby playground." The Court of Appeals granted certiorari to consider: (1) whether, as a matter of law, the trespasser rule precluded BGE's liability for Lane's injury; and (2) whether foreseeable intervening acts precluded summary judgment for BGE.

2. Legal Background.—

a. The Origin and Evolution of the Attractive Nuisance Doctrine.—According to traditional tort law, the extent of duty that an owner or occupier of land owes to an entrant upon that land depends upon the entrant's status while on the property. Generally, a property owner owes no duty to a trespasser "except to refrain from willfully or wantonly injuring or entrapping the trespasser." An exception to this severe rule has developed, however, with respect to child trespassers.

The United States Supreme Court first enunciated this special exception available to trespassing children in its 1873 decision, Sioux City & Pacific Railroad v. Stout. The Stout Court allowed recovery after a trespassing child was injured while playing with a railroad turntable. Under this new doctrine, a possessor of land was liable for injuries to trespassing children caused by conditions or objects on the premises if the possessor knew or should have known that the condition or object was located where children were likely to trespass. The doctrine

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11. Id.
12. Id. at 42, 656 A.2d at 310.
13. Id., 656 A.2d at 310-11.
15. Wagner v. Doehring, 315 Md. 97, 101, 553 A.2d 684, 686 (1989); Rowley v. Mayor of Baltimore, 305 Md. 456, 464-65, 505 A.2d 494, 498 (1986); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 58 (5th ed. 1984). Although traditional tort law only recognizes the classifications of trespasser, licensee, and invitee, Maryland also recognizes a distinction between licensee by invitation and bare licensee. See infra note 47.
16. Wagner, 315 Md. at 102, 553 A.2d at 687.
17. 84 U.S. (17 Wall.) 657 (1873).
18. Id. at 662.
19. Id. at 661-62.
thus required the occupier of land to exercise reasonable care to protect against possible injury to minors.20

Following the Stout decision, the Minnesota Supreme Court introduced the term “attractive nuisance” and articulated a modified approach grounded in allurement or attraction.21 The court based its decision on the judicial fiction that enticement, i.e., the object or condition that attracted the child, substituted for an invitation and rendered the child an invitee.22 Accordingly, the enticement made the defendant responsible for the trespass and estopped the defendant from using the trespass defensively against the child.23

In the 1920s courts modified the attractive nuisance doctrine to better balance the conflicting interests of the child trespasser and the landowner.24 This approach discarded the necessity of allurement or enticement onto the land and viewed the child-trespasser law as essentially an issue of ordinary negligence.25 Moreover, the fact that the child was a trespasser was only one of the facts to be taken into account in determining the defendant’s duty of care.26 In 1934 the American Law Institute promulgated the Restatement of Torts, which adopted this modified approach.27 The Restatement rule recognized

20. Id. at 661. The Stout decision was based on the foreseeability of injury to a minor, rather than the minor’s status while on the property. Id. at 660.
22. Id. at 211.
23. KEETON ET AL., supra note 15, § 59, at 400.
24. Id. at 401.
25. Id. This negligence standard as applied to the landowner is illustrated in § 283 of the Restatement (Second) of Torts, which asserts the standard to be that of a “reasonable man.” RESTATEMENT (SECOND) OF TORTS § 283 (1965). Comment b of § 283 reads in pertinent part: “The words ‘reasonable man’ denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.” Id. cmt. b. Foreseeability and reasonable care provide the determining factors of reasonable conduct. Id. §§ 289, 290. Foreseeability of injury is an essential, initial element governing liability of a possessor of land for harm to a trespassing child. KEETON ET AL., supra note 15, § 59, at 401.
26. KEETON ET AL., supra note 15, § 59, at 401. The surrounding facts and circumstances must infer to an individual of reasonable intelligence that children are likely to frequent the location. Id. Under this approach, negligence is to be determined by weighing the probability and the gravity of the possible harm against the utility of the defendant’s conduct. The public interest in the free use of land is such that, in general, [the landowner] will not be required to take precautions which are so burdensome or expensive as to be unreasonable in light of the risk, or to make his premises “child-proof.” WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 76, at 444 (2d ed. 1955); see also State v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 346-47, 4 A.2d 789, 741 (1939); Glastris v. Union Elec. Co., 542 S.W.2d 65, 71 (Mo. 1976); Burk Royalty Co. v. Pace, 620 S.W.2d 882, 885 (Tex. 1981).
27. RESTATEMENT OF TORTS § 339 (1934), as modified by RESTATEMENT (SECOND) OF TORTS § 339 (1965).
the child’s status as a trespasser while imposing on the landowner a limited duty of reasonable care toward the child.\textsuperscript{28}

\textit{b. Maryland’s Rejection of the Attractive Nuisance Doctrine: A Minority Approach.}—Section 339 regarding attractive nuisance has proven to be “one of [the] most effective single sections [of the \textit{Restatement of Torts}].”\textsuperscript{29} This section, as modified in the second \textit{Restatement}, has been cited frequently and generally has been accepted by state courts.\textsuperscript{30} In failing to adopt the attractive nuisance doctrine,\textsuperscript{31} Maryland remains one of only three jurisdictions that has neither created a special duty towards trespassing children in the form of the attractive nuisance doctrine nor abrogated the distinctions of duty based on one’s status as invitee, licensee, or trespasser.\textsuperscript{32}

\begin{itemize}
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} KEETON ET AL., \textit{supra} note 15, \$ 59, at 402; see also infra note 32; PROSSER, \textit{supra} note 26, \$ 76, at 440 (recognizing the widespread acceptance of the doctrine).
  \item \textsuperscript{32} Other than Maryland, only Vermont and Ohio have refused to provide a special duty of care towards children injured while trespassing. Hannan v. Ehrlich, 131 N.E. 504, 508 (Ohio 1921) (asserting that the attractive nuisance doctrine would impose a “greater burden and higher duty for the protection of children” on the community than the child’s parents); Hillier v. Noble, 458 A.2d 1101, 1103 (Vt. 1983) (“Our rule is that the owner or occupant is under no obligation to a trespasser, whether adult or child, to protect him from injury by reason of the unsafe and dangerous conditions of the premises.” (quoting Trudo v. Lazarus, 73 A.2d 306, 307 (Vt. 1950))). However, it appears that Ohio may be on the verge of adopting a version of the attractive nuisance doctrine. See Wills v. Frank Hoover Supply, 497 N.E.2d 1118, 1122 (Ohio 1986) (reversing lower court’s grant of summary judgment in favor of lessor where issue still remained as to whether risks and injury were foreseeable); Elliott v. Nagy, 488 N.E.2d 853, 856 (Ohio 1986) (“We hold that the attractive nuisance doctrine will not extend tort liability to the owner of a home swimming pool where the presence of a child who was injured or drowned therein was not foreseeable by the property owner.”).
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Maryland courts consistently have held that the doctrine of attractive nuisance does not apply in the state, and that only accepted tort principles can determine the liability of the parties. Since 1894, in *Mergenthaler v. Kirby,* Maryland courts have expressly rejected any exception to the rule that trespassers take the premises as they find them. The Court of Appeals identified the Maryland formulation of the trespasser rule in *Macke Laundry Service Co. v. Weber,* stating that "a landowner is obliged to accord to a trespasser, even one of tender years, a duty which does not transcend the obligation to abstain from willful or wanton misconduct and entrapment."

Maryland courts offered little explanation for their rejection of the attractive nuisance doctrine. In the majority of decisions regarding child trespassers, the courts merely recited boilerplate statements dismissing the validity of the doctrine. In *State v. Baltimore Fidelity Warehouse,* the Court of Appeals acknowledged the societal value of the attractive nuisance doctrine, yet rejected the rule based on precedent. Judge Parke explained:

Although the doctrine of attractive nuisance is supported by arguments which are rooted in the policy of the law to establish rules which tend to safeguard life and to keep persons from bodily harm, nevertheless this Court has not applied the doctrine of attractive nuisance, but has left the right and

33. State v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 349, 4 A.2d 739, 742 (1939) ("The trespasser must accept the property as he finds it and the general rule is that the occupier of property owes no duty to trespassers except to refrain from willfully [sic] injuring them.").

34. 79 Md. 182, 28 A. 1065 (1894).


36. 267 Md. 426, 298 A.2d 27 (1972).

37. *Id.* at 428, 298 A.2d at 29; see also *Fopma v. Board of County Comm’rs,* 254 Md. 232, 234, 254 A.2d 351, 352 (1969); *Herring,* 252 Md. at 241, 249 A.2d at 719; Levine v. Miller, 218 Md. 74, 79, 145 A.2d 418, 421 (1958).

38. See *Murphy v. Baltimore Gas & Elec. Co.,* 290 Md. 186, 195, 428 A.2d 459, 465 (1981) ("Moreover, the 'attractive nuisance doctrine' has been expressly rejected in this State."); *Macke Laundry Serv. Co. v. Weber,* 267 Md. 426, 428, 298 A.2d 27, 29 (1972) ("Nothing is more certain than that we have consistently declined to adopt the doctrine of attractive nuisance in cases involving children who are licensees or trespassers."); Hicks v. Hitaffer, 256 Md. 659, 669, 261 A.2d 769, 773 (1970) ("The attractive nuisance doctrine has not been adopted in Maryland."); *Hensley v. Henkels & McCoy, Inc.,* 258 Md. 397, 411, 265 A.2d 897, 905 (1970) ("Maryland has specifically rejected the attractive nuisance doctrine."); *Ritter v. City of Baltimore,* 219 Md. 477, 478, 150 A.2d 260, 261 (1959) ("[T]he attractive nuisance doctrine is not accepted in this State."); *Conrad v. City of Takoma Park,* 208 Md. 363, 369, 118 A.2d 497, 499 (1955) ("[T]he attractive nuisance doctrine has not been recognized in Maryland.").

39. 176 Md. 341, 4 A.2d 739 (1939).
liability of the parties for solution in accordance with the applicable principles of torts.40

Only one Maryland case has explained its rejection of the doctrine.41 In Mondshour v. Moore,42 the Court of Appeals asserted that "a rigid adherence to fundamental principles at all times and a stern insensibility to the results which an unvarying enforcement of those principles may occasionally entail, are the surest, if not the only, means by which stability and certainty in the administration of the law may be secured."43

3. The Court's Reasoning.—The Lane court held that the circuit court's decision was not appropriate because unresolved questions of material fact precluded summary judgment.44 Writing for the majority, Chief Judge Murphy based his decision on two theories: the trespasser rule and the theory of proximate cause.45

The majority grounded its reasoning in the premise that the extent of duty, owed by a possessor of property to those who come in contact with it, depends on the person's status while on the property.46 In determining the level of care required, the court recognized four classifications of status: invitee, licensee by invitation, bare licensee, and trespasser.47 The majority emphasized that these classifications apply to both personal property and real property. Therefore, the court explained that "[i]t is possible . . . for a person to trespass

40. Id. at 349, 4 A.2d at 742.
42. Id.
43. Id. at 617, 261 A.2d at 482 (quoting Demuth v. Old Town Bank, 85 Md. 315, 319-20, 37 A. 266, 266 (1897)).
44. 338 Md. at 47, 53, 656 A.2d at 313, 316.
45. Id. at 42, 656 A.2d at 311.
46. Id. at 44, 656 A.2d at 311; see also Wagner v. Doehring, 315 Md. 97, 101, 553 A.2d 684, 686 (1989) ("In Maryland, the liability of an owner of real property is dependent upon the standard of care owed to an individual . . . [which] depends upon the individual's status while on the real property.").
47. Lane, 338 Md. at 44, 656 A.2d at 312. The court stated:

To an invitee—one on the property for a purpose related to the possessor's business—the possessor owes a duty of ordinary care to keep the property safe for the invitee. To a licensee by invitation—essentially a social guest—the possessor owes a duty to exercise reasonable care to warn the guest of dangerous conditions that are known to the possessor but not easily discoverable. To a bare licensee—one on the property with permission but for his or her own purposes—the possessor owes a duty only to refrain from willfully or wantonly injuring the licensee and from creating "new and undisclosed sources of danger without warning the licensee." To a trespasser—one on the property without permission—the possessor owes no duty "except to refrain from willfully or wantonly injuring or entrapping the trespasser."

Id. (citations omitted).
upon personal property without trespassing on the real property upon which the personal property sits."\textsuperscript{48}

Chief Judge Murphy further asserted that the requisite duty flows from the possession of property, rather than the ownership of it.\textsuperscript{49} Relief of the duties associated with the possession occurs when an owner relinquishes possession.\textsuperscript{50} However, as the majority noted, the former possessor cannot escape liability by claiming that the injury occurred while the plaintiff trespassed on property that it no longer possessed because the tort of trespass, by definition, requires infringement on an owner's right of possession.\textsuperscript{51} Applying such a rationale to the facts at hand, the court concluded that Lane did not trespass on the spool because BGE lost both actual and constructive possession of the object prior to the time of the alleged trespass.\textsuperscript{52}

The court reemphasized the inappropriate nature of summary judgment in its discussion of proximate cause.\textsuperscript{53} Citing \textit{Lashley v. Dawson},\textsuperscript{54} the majority noted that "[t]he true rule is that what is proximate cause of an injury is ordinarily a question for the jury. It is only when the facts are undisputed, and susceptible of but one inference, that the question is one of law for the court."\textsuperscript{55} A reasonable fact-finder, according to Chief Judge Murphy, could find it foreseeable that, when BGE left the spool near a residential neighborhood, children would use the object for recreational purposes.\textsuperscript{56} Thus, the majority held that the matter of foreseeability was an issue of material fact that required jury determination.\textsuperscript{57}

Judge Chasanow, joined by Judge Bell, concurred with the majority's holding but wrote separately to provide an alternative legal analy-
sis. Judge Chasanow expressed concern regarding the majority's reasoning, commenting that "the majority fails to critically analyze the applicability of real property trespasser rules to children trespassing on personal property." The concurrence argued that the attractive nuisance doctrine provided a preferable approach to establish BGE's liability. Recognizing that Maryland courts previously have rejected the doctrine where children are trespassers or licensees on the defendant's real property, Judge Chasanow suggested a limited application of the rule when both the child, as invitee, and the chattel have equal rights on the realty.

4. Analysis.—

\[a.\] Attractive Nuisance—A Reasonable Solution to the Need to Protect Children.—In *Baltimore Gas & Electric v. Lane*, the Court of Appeals determined that BGE could be liable for injuries that occurred after one of the utility company's empty cable spools rolled over and injured a child. Although the court's holding—reversal of the circuit court's summary judgment order in favor of BGE—is proper, the rationale underlying the decision is unsound.

The majority based its holding on the assertion that Lane was not a trespasser and, therefore, deserved a higher standard of care. Chief Judge Murphy contended that Lane could not be a trespasser to the spool because "BGE, at the time of the alleged trespass, had given up all physical control over the spool and had indeed lost possession of it (actual and constructive)." Because a person can only trespass on personal property that is in another's possession, the key inquiry rests on when BGE lost possession of the spool. The majority failed to provide an adequate response to this question.

The court proposed two possible explanations for BGE's loss of possession. First, possession may have ceased when the utility employees left the object unattended in the neighborhood. In a footnote, Chief Judge Murphy recognized that such an argument may

58. *Id.* at 54, 656 A.2d at 316 (Chasanow, J., concurring).
59. *Id.*, 656 A.2d at 317.
60. *Id.* at 58, 656 A.2d at 318.
61. *Id.* at 59, 656 A.2d at 319.
62. *Id.* at 53, 656 A.2d at 316.
63. *Id.* at 47-48, 656 A.2d at 313-14; *see also supra* note 52 and accompanying text.
64. *Lane*, 338 Md. at 47, 656 A.2d at 313.
65. *See supra* note 52.
66. *Lane*, 338 Md. at 47 n.6, 656 A.2d at 313 n.6.
cause inconsistencies in the understanding of possession, because temporary release of physical control does not equate abandonment. Rather, an owner retains possession through a present intent and ability to control the object. In this instance, however, the record provided no evidence that BGE intended to relinquish control. On the contrary, Lane acknowledged that BGE had worked in the neighborhood for a week before the injury, during which time the spool remained on the worksite.

Second, the court suggested that the intervening act of the other children moving the spool broke the link of possession. Despite adherence to this argument, the majority conceded that this theory may yield an unintended result, exposing BGE to liability based solely on an intervening act. The concurrence identified the faulty logic of such an assertion. Judge Chasanow remarked:

[T]he Court fails to explain why BGE should be liable since when BGE had possession, the spool was on its base on level ground and not dangerous to children. It was only after the spool was turned on its side and rolled by the initial trespassers to the top of a hill that it became dangerous to eight-year-old Lane.

67. Id. ("[R]uling that BGE lost possession of the spool when the employees left it unattended in the neighborhood might be inconsistent with concept of possession as it is generally applied in other areas of the law.").

68. See RESTATEMENT (SECOND) OF TORTS § 216 cmt. c (1965):

Cases arise in which one who has been in possession of a chattel temporarily relinquishes physical control of it, without abandoning the chattel. In such a case, so long as no other person has obtained possession by acquiring physical control over the chattel with the intention of exercising such control on his own behalf, or on behalf of another, the law protects the property interest by attributing the possession to the original possessor.

Id.

69. Id. § 216; see also Rowley v. Mayor of Baltimore, 305 Md. 456, 464, 505 A.2d 494, 498 (1986).

70. Lane, 338 Md. at 41, 656 A.2d at 310.

71. Id.

72. Id. at 47, 656 A.2d at 313 ("[T]he finder of fact could conclude that BGE had lost possession of the spool when some other neighborhood children—not including Lane—took possession of it for recreational purposes . . . ").

73. Id. at 47 n. 6, 656 A.2d at 313 n. 6 ("We recognize that deeming BGE to have been in possession of the spool until it was moved might generate the somewhat strange result of increasing BGE's exposure to liability based solely on the existence of an intervening event—the moving of the spool.").

74. Id. at 56, 656 A.2d at 318 (Chasanow, J., concurring) ("[T]he most unusual aspect of the majority's opinion is the apparent implication that the first group of children who used the spool were trespassers, and BGE would not be liable to them for simple negligence, but since Lane was a subsequent user, BGE is liable to Lane for negligence.").

75. Id. at 57, 656 A.2d at 318.
Instead of adopting the attractive nuisance doctrine, the court applied a convoluted analysis that in effect created an elevated standard of care to *subsequent trespassers*.

The court's continued refusal to acknowledge any version of the attractive nuisance doctrine fails to recognize the societal value of protecting children from foreseeable injury. In fact, Maryland provides a trespassing child no greater protection than a trespassing adult, despite the legally recognized distinction in levels of maturity and judgment. 76 Maryland's long-standing position is based on *Mergenthaler v. Kirby*, 77 an 1894 decision. Since that time, however, many jurisdictions have adopted some form of the *Restatement* rule in an attempt to balance the interests of property owners and unsuspecting children. 78 Nonetheless, Maryland has failed to reevaluate its position in light of the recent developments in tort law.

In 1939, the Court of Appeals refused to apply the attractive nuisance doctrine to impose liability for the drowning death of a child who trespassed on the defendant's raft. 79 The court applied the enticement argument and clearly opposed creating any undue burden upon the landowner. 80 This holding was founded on a theory that the *Restatement* evolved to replace. The *Restatement* discarded the notion of allurement and couched the doctrine in general negligence terms. 81 Maryland courts, however, refuse to examine the current interpreta-

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76. Comment c of § 339 reads, in pertinent part:

[I]n our present hazardous civilization some types of danger have become common, which an immature adolescent may reasonably not appreciate, although an adult may be expected to do so. The [attractive nuisance] rule . . . is not limited to “young children,” or to those “of tender years,” so long as the child is still too young to appreciate the danger . . . .

*Restatement (Second) of Torts* § 339 cmt. c (1965); see also *Laser v. Wilson*, 58 Md. App. 434, 442, 473 A.2d 523, 527 (1984) (recognizing the distinction between the judgment of a child and an adult); *Huffman v. Appalachian Power Co.*, 415 S.E.2d 145, 153 (W. Va. 1991) ("[C]hildren are often heedless and, because of their inexperience and immaturity, cannot fully appreciate the harm that can occur from a dangerous condition or instrumentality. These considerations are not present with an adult trespasser."); *Prosser, supra* note 26, § 76, at 438 ("Because of his immaturity and lack of judgment, the child is incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing, and he cannot be expected to assume the risk and look out for himself.").

77. 79 Md. 182, 28 A. 1065 (1894); see *supra* notes 34-35 and accompanying text.

78. *See supra* note 30.


80. *Id.* at 348, 4 A.2d at 742 ("[The landowner's] lawful use of the raft in the course of its lawful business was other than what was reasonably necessary and permitted, if owners are to have the ordinary beneficial use of property within the limits of their own property rights.").

81. *Keeton et al., supra* note 15, § 58, at 401. Discussing conditions that are highly dangerous to trespassing children, the *Restatement* notes:
tion of the rule and continue to summarily dismiss the applicability of the doctrine.

In *Mondshour v. Moore*, the Court of Appeals rejected the use of the attractive nuisance doctrine out of respect for precedent. The *Mondshour* court cited concern with consistent application of established legal principles. This rationale, however, directly opposes the decision in *Lane*, which created "a novel new exception for children who would seem to be trespassers to chattels, but who are not deemed trespassers because someone else trespassed before they did." The *Lane* approach neither maintained stability in the interpretation of legal theory nor adopted a doctrine recognized by a majority of jurisdictions. To the contrary, by rejecting the attractive nuisance doctrine, the Court of Appeals created the sort of inconsistencies that it has sought to avoid.

b. The Concurrence's Compromise.—Although the concurrence in *Lane* recognized Maryland's previous rejection of the attractive nuisance doctrine, Judge Chasanow nevertheless urged the court to adopt a compromise theory. Judge Chasanow's suggestion required neither outright acceptance nor rejection of the Restatement theory. Instead, he contended that when both the child and the personal property have an equal right to be on a piece of land, the attractive nuisance doctrine should apply, thereby imposing liability for foresee-
able injury. Thus, if a child enters the land as an invitee, the possessor of any object on the land that caused injury to the child would be subject to liability if the possessor knew or had reason to know of the child's presence. This doctrine would still permit application of the trespasser rule when an individual, regardless of age, trespassed on another's real property. This compromise is not inconsistent with existing case law.

Prior to Judge Chasanow's suggestion, the court did not distinguish between a person injured while trespassing on real property and a person injured while trespassing on an object located on real property to which he was an invitee. This theory represents a necessary advance in Maryland's understanding of tort law; it balances the rights of property owners with society's need to protect children from foreseeable injury.

5. Conclusion.—The Lane court held that a utility company could be liable for a child's injuries caused by an empty cable spool left by a utility company near a residential area and moved onto a playground by neighborhood children. This case provided an ideal situation for the Court of Appeals to adopt a limited version of the attractive nuisance doctrine; nevertheless, the court rejected this legal theory and instead created an exception to the trespasser rule that likely will prove untenable.

Tort law has evolved since Maryland initially rejected the attractive nuisance doctrine in 1894. The Restatement has abandoned the notions of "allurement" and "enticement," and many jurisdictions have prudently adopted the doctrine as society has become more threatening for children. Nevertheless, Maryland steadfastly clings to its antiquated property theories. When the opportunity next arises, the Court of Appeals should take affirmative steps toward modernizing its approach to tort law.

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88. Id.
89. Id.
90. See State v. Baltimore Fidelity Warehouse Co., 176 Md. 341, 348, 4 A.2d 739, 742 (1939) ("Notwithstanding the adoption of this doctrine in numerous States, the tendency is to restrict its application."); Grube v. Mayor of Baltimore, 132 Md. 355, 361, 103 A. 948, 951 (1918) ("The doctrines of attractive nuisances . . . may be justly applied in some cases.").
91. See supra notes 34-35 and accompanying text.
92. See supra notes 24-27 and accompanying text.
93. See supra notes 29-30 and accompanying text.
94. See supra note 76 and accompanying text.
C. Loss of Consortium and the Cap on Noneconomic Damages

In Oaks v. Connors, the Court of Appeals held that Maryland’s statutory cap on noneconomic damages applies in the aggregate to noneconomic damages awarded to the marital unit for loss of consortium and to noneconomic damages awarded to the physically injured spouse for personal injuries. In so holding, the court effectuated the intent of the legislature. The court examined the language of the cap statute, the legislative history of the statute, and the case law defining the parameters of a loss of consortium claim. Oaks represents a broadening of the application of the statutory cap to personal injury claims.

1. The Case.—While driving to work on July 5, 1989, Willie James Oaks lost control of his car, causing it to cross the center line of Maryland Route 176 and to strike the van in which Anna Connors was a passenger. The collision, which was caused by Oaks’s driving through an accumulation of rain water at an excessive rate of speed, resulted in severe injury to Connors. In addition to serious neurological and psychological damage, Connors sustained multiple fractures to her right hand and arm. These injuries rendered her incapable of providing care for her invalid husband, Herbert Connors, in the same manner she had prior to the accident.

The Connorses filed a complaint against Oaks alleging that the accident and resulting injuries to Anna Connors were attributable to Oaks’s negligent driving. Anna Connors individually sought dam-

2. Id. at 38, 660 A.2d at 430.
3. Id. at 34-36, 660 A.2d at 428-29.
5. Id. at 34-35, 660 A.2d at 427; see also Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1327-28 (D. Md. 1989) (describing the research on insurance availability in Maryland conducted by the Governor’s Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Malpractice Insurance); Murphy v. Edmonds, 325 Md. 342, 368-70, 601 A.2d 102, 114-16 (1992) (describing the insurance availability crisis that led to the enactment of the cap statute).
8. Id.
9. Id. at 28, 660 A.2d at 425.
10. Id.
11. Id. at 29, 660 A.2d at 425. The Connorses’ complaint also asserted respondeat superior liability against Oaks’s employer, Giant Food, Inc., for the negligent driving of its
ages for the personal injuries she sustained, and she and her husband jointly sought damages for harm caused to their marital relationship. At the close of a jury trial in the Circuit Court for Anne Arundel County, Anna Connors was awarded $84,200 in economic damages and $350,000 in noneconomic damages for her personal injury claim. The jury also awarded the Connorses $130,000 in noneconomic damages for their loss of consortium claim. The trial court vacated the Connorses' loss of consortium award so that the judgment rendered by the jury would comply with Maryland's statutory cap on noneconomic damages. The trial judge determined that

employee while allegedly in the course of his employment. In addressing the respondeat superior issue, the court considered the following facts: (1) Oaks was operating his personal vehicle en route to his job with Giant when he negligently collided with Connors; (2) Giant required Oaks to have a personal vehicle in the event that travel was necessary, yet Giant did not specify the type of vehicle required, nor pay for the vehicle, its fuel, or its maintenance; and (3) the accident occurred prior to Oaks's scheduled work hours, and Oaks was not performing any duties for Giant at the time of the accident. In light of these facts, the Court of Appeals concluded that Giant was not to be held vicariously liable for Oaks's negligence. In so concluding, the court vacated the decision of the Court of Special Appeals as to Giant. The court stated that "[t]he doctrine of respondeat superior, in Maryland, allows an employer to be vicariously liable for the tortious conduct of its employee when that employee was acting within the scope of the employment relationship." The court held Oaks not to be acting within the scope of his employment at the time of the accident, because his employer at that time did not have the "right to control" Oaks's actions, nor did Giant either expressly or impliedly consent to Oaks's use of the automobile. Consent and right to control, the court stated, are essential in finding an employer vicariously liable in the automobile context. In addition, driving to and from work generally does not constitute acting within the scope of employment for the purpose of respondeat superior liability because it does not involve advancing the interests of the employer. The Court of Appeals's decision with regard to the respondeat superior claim is entirely consistent with relevant precedent.

12. Id. at 29, 660 A.2d at 425.
13. Id.
15. Id.
16. Id. The trial court ordered that the Connorses' aggregate noneconomic damages award be reduced by $130,000 to comply with Maryland's statutory cap on noneconomic damages. Id. at 30 n.5, 660 A.2d at 426 n.5. It did not, however, specify which noneconomic damages award—the award for personal injury or the award for loss of consortium—should be reduced. This decision was reserved for the Connorses, who elected to have the $130,000 in noneconomic damages for loss of consortium reduced to zero, rather than having the $350,000 in noneconomic damages for personal injury reduced by $130,000. Id.

the cap applied "in the aggregate" to an award of noneconomic damages for personal injury and an award of noneconomic damages for loss of consortium. Consequently, the total award for noneconomic damages for both of the Connorses' claims could not exceed the statutorily imposed limit of $350,000.

The Connorses appealed that part of the judgment vacating their loss of consortium award. In the Court of Special Appeals, they maintained that the cap should be applied separately, rather than in the aggregate, to noneconomic damages for personal injury and to noneconomic damages for loss of consortium. That court agreed with their contention, stating that "[a]lthough a claim for loss of consortium must be adjudicated concurrently with the individual claim of the physically injured spouse, the claim for loss of consortium is a separate and distinct cause of action." Because a loss of consortium claim is a distinct cause of action, and because the statute man-

18. Id. The General Assembly amended the statutory cap on noneconomic damages in 1994. Oaks, 339 Md. at 34 n.6, 660 A.2d at 428 n.6. The amendment raised the statutory cap on noneconomic damages to $500,000. Id. The $500,000 cap went into effect on October 1, 1994 and is, therefore, inapplicable to the Oaks case, which was instituted prior to that date. Id. The Oaks case is governed by the $350,000 statutory cap on noneconomic damages that applies to all causes of action arising after July 1, 1986, but before October 1, 1994. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b).
19. Oaks, 339 Md. at 29-30, 660 A.2d at 426. The Connorses also appealed from the judgment rendered in favor of Oaks's employer, Giant, on the issue of respondent superior liability. Id. at 30, 660 A.2d at 426; see supra note 11. The Connorses contended that, contrary to the ruling of the trial court, Oaks was furthering the interest of his employer at the time of the accident. Connors, 100 Md. App. at 530, 642 A.2d at 248. The Court of Special Appeals agreed with this contention and held Giant liable on the theory of respondent superior. Id. at 531-41, 642 A.2d at 248-53. The Court of Appeals subsequently vacated this finding in favor of Giant. Oaks, 339 Md. at 38, 660 A.2d at 430; see supra note 11.
20. Connors, 100 Md. App. at 550-51, 642 A.2d at 248. The Connorses also argued that the trial court erred in its application of the cap statute because the award constituted economic rather than noneconomic damages and, therefore, was not subject to the damage cap. Id. at 541, 642 A.2d at 253. While the court recognized that "an award for loss of consortium may encompass both economic and noneconomic elements," it maintained that the award under consideration was one for purely noneconomic damages. Id. at 542, 642 A.2d at 254. Of probative value to the court in making this determination were the trial judge's instruction to the jury on the consortium claim, the verdict sheet presented to the jury, and the closing argument made by counsel for the respondents. All characterized the damage to the Connorses' marital relationship in terms of loss of affection, society, companionship, and sexual relations—the quintessential noneconomic injuries in a loss of consortium claim. Id. at 542-44, 642 A.2d at 254-55. Absent was any discussion of "the nature of the household and caretaking functions Mrs. Connors could no longer perform and the pecuniary impact on the marriage of those limitations," these functions being the pertinent areas of inquiry in assessing economic damages in a loss of consortium claim. Id. at 544, 642 A.2d at 255.
21. Id. at 544-51, 642 A.2d at 255-58.
22. Id. at 547, 642 A.2d at 256-57.
dates that "[i]n any action for damages for personal injury . . . an award for noneconomic damages may not exceed $350,000,"23 the court held that the statutory cap of $350,000 must necessarily apply individually to a cause of action in loss of consortium.24 The court affirmed the judgment in favor of Anna Connors and ordered the reinstatement of the Connorses' loss of consortium award of $130,000.25

The Court of Appeals granted certiorari26 to determine whether Maryland's statutory cap on noneconomic damages applied separately to the individual claim of the injured spouse and to the loss of consortium claim by the marital unit.27

2. Legal Background.—In Deems v. Western Maryland Railway Co.,28 the Court of Appeals did not create a new cause of action with respect to loss of consortium.29 Nonetheless, it did extend the right to make a consortium claim to a wife,30 thereby creating an important new "substantive right."31 In so doing, the court clarified the nature of a claim for loss of consortium, both definitionally and procedurally.32 The Deems court defined loss of consortium to be "the loss of society, affection, assistance, and conjugal fellowship."33 Such loss the court characterized as derivative of, rather than distinct from, the injuries caused to one spouse through the tortious conduct of a third party.34 Procedurally, in order to avoid the potential for double recoveries, the court mandated that a consortium claim be filed jointly by the marital unit and be tried concurrently with the physically injured spouse's claim for personal injury.35

24. Connors, 100 Md. App. at 549, 642 A.2d at 257.
25. Id. at 552, 642 A.2d at 259.
27. Id. at 27, 660 A.2d at 425.
28. 247 Md. 95, 231 A.2d 514 (1967) (holding that either a wife or a husband could assert loss of consortium claim against third party whose tortious conduct caused the harm suffered by physically injured spouse; such claims must be asserted in joint action by the marital unit and must be tried concurrently with the claim of the physically injured spouse).
30. The right to assert a claim for loss of consortium was, prior to Deems, already available to the husband of a physically injured woman. Deems, 247 Md. at 100, 231 A.2d at 517. Deems extended this right to the wife of a physically injured man. Id. at 114, 231 A.2d at 525.
32. Deems, 247 Md. at 100-11, 231 A.2d at 517-23.
33. Id. at 100, 231 A.2d at 517.
34. Id. at 108-11, 231 A.2d at 521-23.
35. Id.
In 1986 the General Assembly enacted section 11-108 of the Courts and Judicial Proceedings Article mandating a $350,000 cap on noneconomic damages awarded in personal injury actions.\(^{36}\) Both the Governor's Task Force to Study Liability Insurance\(^{37}\) and the Joint Executive/Legislative Task Force on Medical Malpractice Insurance had recommended the cap statute.\(^{38}\) The task forces were responding to what the governor and legislature perceived to be a crisis in insurance availability in Maryland.\(^{39}\) Each task force concluded that a cap on noneconomic damages would have a positive effect on the insurance industry and would enable insurance carriers to set rates more accurately by increasing the predictability of damage awards.\(^{40}\) Perhaps most important was the belief that the damage cap would "lend greater stability to the insurance market and make it more attractive to underwriters."\(^{41}\)

Having concluded that an insurance crisis necessitated the implementation of a damage cap, the task forces determined, and the General Assembly agreed, that the appropriate type of damages to limit were those awarded for noneconomic loss.\(^{42}\) Noneconomic damages were deemed to be the "primary source of overly generous and arbitrary liability claim payments."\(^{43}\) The Governor's Task Force report attributed such exorbitance and arbitrariness in the granting of noneconomic damages to the emotional and subjective elements involved in rendering such awards, as well as to the fact that noneconomic losses are not "easily amenable to accurate, or even approximate, monetary valuation."\(^{44}\)

Despite challenges to the cap's constitutionality, the cap statute has been applied in a number of cases to limit the amount of noneconomic damages recoverable in a personal injury action.\(^{45}\)


\(^{39}\) Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1327 (D. Md. 1989) (holding that the cap on noneconomic damages did not violate either the state or federal constitution and explaining the history of the cap statute).

\(^{40}\) Id. at 1328 (quoting the Governor's Task Force, supra note 37).

\(^{41}\) Id.

\(^{42}\) Id. at 1927.

\(^{43}\) Id. at 1328.

\(^{44}\) Id.

Franklin v. Mazda Motor Corp., the United States District Court for the District of Maryland applied the rational basis test in determining that section 11-108 did not violate either the Maryland or the United States Constitution. In particular, the court held that the damage cap did not violate either the separation of powers doctrine or the plaintiff’s right to a jury trial.

More recently, in Murphy v. Edmonds, the Court of Appeals also invoked the rational basis test in determining that the cap statute did not violate either the state or federal Constitution. The court determined that the General Assembly enacted the statute “to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public.” This satisfied the requisite legitimate governmental interest that initially must be established for a statute to pass the rational basis test. In addition, the court found the damage cap to be a means reasonably related to achieving this legitimate interest; consequently, the court upheld the constitutionality of the cap statute.

3. The Court’s Reasoning.—In Oaks v. Connors, the Court of Appeals held that a loss of consortium claim by the marital unit was derivative of a personal injury claim by the physically injured spouse. The two claims, therefore, constituted a single action and as such were

47. The rational basis test is a judicial standard of review used when determining the constitutionality of governmental action. Murphy v. Edmonds, 325 Md. 342, 355-57, 601 A.2d 102, 108-09 (1992). It represents the most deferential standard of review and is typically employed in instances where a statute is being challenged on equal protection grounds. Id. at 355, 601 A.2d at 108. For a statutory provision to pass the rational basis test and withstand a constitutional challenge, the government must be pursuing a legitimate governmental objective in enacting the statute. Id. at 355-57, 601 A.2d at 108-09. The statute also must be rationally related to the achievement of that objective. Id.
48. Franklin, 704 F. Supp. at 1337. In Franklin, the court concluded that “[r]educing uncertainty in damages awards and increasing the availability of insurance through reduced costs in Maryland surely are valid legislative goals. And the method chosen, that is by imposing an economic limitation on damages not otherwise measurable economically, is reasonably related to these goals.” Id.
49. Id. at 1334-36.
51. Id. at 361-62, 601 A.2d at 111-12.
52. Id. at 369, 601 A.2d at 115.
53. See id. at 361-62, 601 A.2d at 111-12.
54. Id.
55. Id. at 370, 601 A.2d at 116. The Oaks court deferred to Murphy in order to dispose of the constitutional arguments made by the Connorses in opposition to the statutory cap on noneconomic damages. Oaks, 339 Md. at 37, 660 A.2d at 429. In so doing, the court reaffirmed Murphy. Id., 660 A.2d at 430.
56. Oaks, 339 Md. at 38, 660 A.2d at 430.
subject to a single cap for noneconomic damages.\textsuperscript{57} In so holding, the court relied on statutory interpretation to ascertain and effectuate the intent of the General Assembly in adopting the cap statute.\textsuperscript{58} The court rejected the Connors' argument that the loss of consortium claim was separate from the claim of the physically injured spouse.\textsuperscript{59}

Proceeding on the premise that the language of a statute should be given effect if it is clear and unambiguous when construed according to its everyday meaning, the court examined the language of section 11-108.\textsuperscript{60} Section 11-108(a)(1)(i) defines noneconomic damages as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury."\textsuperscript{61} The court treated this provision as dispositive of the legislature's intent that noneconomic damages for loss of consortium be treated in the same manner as all other noneconomic damages for the purpose of applying section 11-108.\textsuperscript{62} In particular, the General Assembly's express inclusion of loss of consortium under the heading of noneconomic damages indicated that

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damages for loss of consortium [were] governed by the same $350,000 limit as the other items enumerated in Sec. 11-108(a)(1)(i). It would be illogical to conclude that a separate cap should apply to loss of consortium damages and not to the damages awarded for the other items listed in Sec. 11-108(a)(1)(i) as the Connors' argument . . . suggest[ed].\textsuperscript{63}
\end{quote}

The court found further support for its holding in section 11-108(b), which provides that "[i]n any action for damages for personal injury . . . an award for noneconomic damages may not exceed $350,000."\textsuperscript{64} Focusing on the singular nature of the terms "any action" and "an award," the court determined the ordinary meaning of these terms to be that in each individual personal injury action, "which includes the injured individual's underlying claim for damages along with all claims arising therefrom," a single award of noneconomic damages should be made and this award should be made in accordance with the damage cap.\textsuperscript{65} Thus, the court con-

\begin{small}
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 34-38, 660 A.2d at 428-30.
\textsuperscript{59} Id. at 37-38, 660 A.2d at 430.
\textsuperscript{60} Id. at 34-38, 660 A.2d at 428-30.
\textsuperscript{62} Oaks, 339 Md. at 36, 660 A.2d at 429.
\textsuperscript{63} Id.
\textsuperscript{65} Oaks, 339 Md. at 36, 660 A.2d at 429.
\end{small}
cluded that, because a loss of consortium claim arises from the injured spouse's claim for personal injuries, the two claims constituted a single action for damages for personal injury and together were subject to the $350,000 cap on noneconomic damages.\textsuperscript{66}

To buttress its conclusion that the General Assembly intended noneconomic damages for loss of consortium to be subject to the same cap as noneconomic damages for those other injuries enumerated in section 11-108(a)(1)(i), the court examined the statutory scheme in which section 11-108 was passed.\textsuperscript{67} The court noted the provisions of section 11-109(b), which state:

As part of the verdict in any action for damages for personal injury . . . the trier of fact shall itemize the award to reflect the monetary amount awarded for:

1. Past medical expenses;
2. Future medical expenses;
3. Past loss of earnings;
4. Future loss of earnings;
5. Noneconomic damages; and
6. Other damages.\textsuperscript{68}

In itemizing the preceding damage categories, the drafters of section 11-109 did not make a distinction among the several types of noneconomic damages.\textsuperscript{69} In particular, the drafters declined to distinguish consortium damages from the other types of noneconomic damages delineated in section 11-108(a)(1)(i).\textsuperscript{70} This inclusion of consortium damages under the general rubric of noneconomic damages was taken by the court as more evidence that the General Assembly intended that consortium damages be treated in the same manner as other noneconomic damages for the purposes of applying the cap on noneconomic damages.\textsuperscript{71}

In addition to examining the language of sections 11-108 and 11-109 to determine legislative intent with regard to loss of consortium damages and the cap statute, the court also relied on its decision in \textit{Murphy}.\textsuperscript{72} In \textit{Murphy}, the court attributed the promulgation and enactment of section 11-108 in large part to the "legislatively perceived crisis concerning the availability and cost of liability insurance" due to

\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{MD. CODE ANN., CTS. & JUD. PROC. § 11-109(b) (1995).}
\textsuperscript{69} \textit{Oaks}, 339 Md. at 36, 660 A.2d at 429.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id. at 35, 660 A.2d at 428.}
large noneconomic damage awards in personal injury suits.73 Allowing the application of a separate cap to noneconomic damages arising out of a loss of consortium claim would effectively permit double recoveries by the injured spouse in an action for personal injuries.74 Rather than receiving the maximum $350,000 in noneconomic damages allowed by the statute, the injured spouse potentially could receive up to $525,000 if a separate cap were applied to the marital unit's loss of consortium claim.75 Such excessive recoveries, the court reasoned, were precisely what the legislature sought to prevent in enacting section 11-108.76

Finally, while confirming that harm caused to the marital relationship as a result of physical injury to one spouse is a compensable injury,77 the Oaks court rejected the Connorses' assertion that a loss of consortium claim was separate and distinct from the claim made by the physically injured spouse.78 Rather, the court maintained, a loss of consortium claim by the marital unit was derivative of a personal injury claim by the injured spouse and the two constituted a single cause of action.79 Because the injuries at issue in both claims arose from a "single source," the harm sought to be remedied by the loss of consortium claim was "inextricably intertwined" with the harm sought to be remedied by the physically injured spouse.80 The court believed that the derivative—as opposed to separate and distinct—nature of the loss of consortium claim was further evidenced by the requirement, first articulated in Deems, that a consortium claim be filed jointly by the marital unit and tried concurrently with the claim of the physically injured spouse.81

75. Id. at 38, 660 A.2d at 430. Of the $525,000, $350,000 would be for the noneconomic damages awarded to the physically injured spouse for her personal injury claim while the remaining $175,000 would be attributable to her half of the $350,000 in noneconomic damages for loss of consortium. Id.
76. Id.
77. Id. at 38, 660 A.2d at 428. Relying on the seminal case of Deems v. Western Md. Ry. Co., 247 Md. 95, 231 A.2d 514 (1967), and its progeny, the court defined the relationship between the loss of consortium claim by the marital unit and the individual claim of the physically injured spouse. Oaks, 339 Md. at 33-34, 660 A.2d at 428.
78. Oaks, 339 Md. at 37, 660 A.2d at 430. In a cursory fashion, the court disposed of the constitutional question raised by respondents. Id.; see supra notes 45-55 and accompanying text.
80. Id. at 37, 660 A.2d at 430.
81. Id. at 34, 660 A.2d at 430.
4. Analysis.—In reaching a decision contrary to that reached by the Oaks court, the Court of Special Appeals made several compelling policy arguments regarding the propriety of applying a single cap to noneconomic damages awarded for a loss of consortium claim by the marital unit and for a personal injury claim by the physically injured spouse.\(^8\) The most compelling argument that the Court of Appeals failed to address is that "the application of a single cap may have the effect of eviscerating the award for loss of consortium, making such a claim a meaningless procedural existence."\(^8\) For example, in instances where the physically injured spouse has been so severely injured that her own recovery for noneconomic damages arising out of her personal injury claim reaches the $350,000 statutorily imposed ceiling, the uninjured spouse, under the rule articulated in Oaks, will be left without the possibility of any remedy whatsoever.\(^8\) This would effectively render the uninjured spouse's substantive right to recover for loss of consortium an illusory right. Allowing for a right where there is potentially no remedy is unsound policy.\(^8\) It creates an expectation of compensation that cannot be realized. It should be noted that the General Assembly's 1994 amendment of section 11-108, increasing the maximum amount of noneconomic damages recoverable in a personal injury action to $500,000, ameliorates somewhat the seeming injustice to the uninjured spouse that may be occasioned by capping damages.\(^8\)

Despite the Court of Special Appeals's compelling policy arguments, the legislature's intent in enacting the cap statute supports the Court of Appeals's conclusion. The court's primary duty in deciding whether or in what manner to enforce a statutory provision is to ascen-
tain and effectuate the legislature's intent regarding that provision.\textsuperscript{87} The Court of Appeals accomplished this end by employing the tenets of statutory construction.\textsuperscript{88} Having ascertained the intent of the legislature through an examination of the plain meaning of sections 11-108 and 11-109, the Oaks court reached a conclusion that was consistent with that intent: The cap statute applies in the aggregate, rather than separately, to an award of noneconomic damages for loss of consortium and an award of noneconomic damages for personal injury.\textsuperscript{89}

The relevant statutory provisions make clear that damages for loss of consortium are to be treated in the same manner as all other types of noneconomic damages for the purposes of applying section 11-108.\textsuperscript{90} The legislature brought noneconomic loss of consortium damages within the purview of the larger category of noneconomic damages in section 11-108 when it defined noneconomic damages as "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, and other nonpecuniary injury."\textsuperscript{91} As the court recognized, no attempt was made to distinguish between loss of consortium damages and other types of noneconomic damages, such as pain and suffering.\textsuperscript{92} Consequently, loss of consortium damages should be treated in the same manner as the other damages enumerated in the statute. For the purposes of section 11-108, this means that noneconomic damages for loss of consortium are to be subject to the same cap as other noneconomic damages.\textsuperscript{93}

An examination of the plain meaning of section 11-109 further substantiates the court's determination that damages for loss of consortium are to be treated like all other noneconomic damages for the purpose of applying the cap.\textsuperscript{94} Section 11-109 mandates itemizing the damages that make up an award rendered in a personal injury action.\textsuperscript{95} Damages for loss of consortium are not among those damages that must be itemized; nonetheless, general noneconomic damages must be itemized.\textsuperscript{96} This suggests that awards for loss of consortium

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\item \textsuperscript{87} See, e.g., Parrison v. State, 335 Md. 554, 559, 644 A.2d 537, 539 (1994) (stating that "[i]t is well settled that the cardinal rule of statutory interpretation is to ascertain and effectuate legislative intent").
\item \textsuperscript{88} Oaks, 339 Md. at 34-38, 660 A.2d at 428-30.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{92} See id.
\item \textsuperscript{93} Oaks, 339 Md. at 34-38, 660 A.2d at 428-30.
\item \textsuperscript{94} Id.
\item \textsuperscript{96} Md. Code Ann., Cts. & Jud. Proc. § 11-109(b) (5).
\end{itemize}
are included under the more inclusive category of general noneconomic damages. 97 It also suggests that awards for loss of consortium are an element of damages in a personal injury action, rather than being an element of damages in a separate and distinct loss of consortium action, as the Court of Special Appeals concluded. 98

Finally, section 11-108(b) provides that "in any action for damages for personal injury . . . an award for noneconomic damages may not exceed $350,000." 99 As section 11-109 indicates, loss of consortium damages are implicated in, rather than separate from, an action for damages for personal injury. 100 Because the derivative claim for loss of consortium by the marital unit and the underlying claim for personal injuries by the physically injured spouse constitute one action, the total dollar amount of damages awarded for both claims may not exceed the statutory cap in order to comply with section 11-108. 101

The Oaks court need not have relied exclusively on the language of the cap statute, however, to ascertain the intent of the General Assembly in enacting section 11-108. It had before it ample evidence indicating that the legislature intended to limit the amount of noneconomic damages awarded in personal injury actions so that insurance might be made more affordable throughout the state. 102 Evidencing this intent were the findings of the Governor's Task Force, upon which the General Assembly relied in drafting the statute. 103 Particularly persuasive to the legislature was the Task Force's finding that

[t]he ceiling on noneconomic damages will help contain awards within realistic limits. . . . The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters. A substantial portion of the verdicts being returned in liability cases are for noneconomic losses. . . .

There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. . . .

97. Id. § 11-108(a)(1)(i).
100. Oaks, 339 Md. at 36, 660 A.2d at 429.
101. Id. at 34-38, 660 A.2d at 428-30.
103. See supra notes 37-38 and accompanying text.
A cap on allowable pain and suffering awards will help reduce the incidents of unrealistically high liability jury awards.\textsuperscript{104}

Supplementing this finding was the report of the Joint Executive/Legislative Task Force similarly stating that "[s]everity of awards . . . [is] a primary factor causing escalating premiums [and] states which have imposed a ceiling . . . have experienced a reduction in the severity of the awards."\textsuperscript{105} Thus, the purpose of the cap was to limit what the General Assembly perceived to be unwieldy and arbitrary noneconomic damages awards.\textsuperscript{106} The decision in Oaks, which limits the amount of noneconomic damages recoverable in personal injury actions, recognizes and is in accord with this intent.

Perhaps an even more compelling indication that the decision in Oaks comports with the intent of the General Assembly are the amendments made to section 11-108 by the 1994 General Assembly.\textsuperscript{107} Although the Oaks court interpreted the 1986 version of the cap statute, subsequent amendments further evidence the intent of the legislature to limit noneconomic recovery.\textsuperscript{108} In addition to raising the cap to $500,000, the 1994 General Assembly enacted amendments that reversed a Court of Appeals ruling\textsuperscript{109} that held that noneconomic damages awarded in wrongful death actions were not subject to section 11-108.\textsuperscript{110} More important, the legislature pronounced that, contrary to the decision in Bartucco v. Wright,\textsuperscript{111} the cap would apply in the aggregate to "all persons who claim injury by or through . . . [the tort] victim."\textsuperscript{112} This provision, although formulated in the context of wrongful death actions, seems equally applicable to the loss of consortium claim of the marital unit and the personal injury claim of the physically injured spouse. Both claims, and the damages awarded pur-

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\textsuperscript{104} Governor's Task Force, supra note 37, at 10-11.
\textsuperscript{105} Joint Executive/Legislative Task Force, supra note 38, at 26, 28.
\textsuperscript{106} Murphy, 325 Md. at 368-70, 601 A.2d at 114-16.
\textsuperscript{108} See supra note 18.
\textsuperscript{109} United States v. Streidel, 329 Md. 533, 620 A.2d 905 (1993) (holding that Maryland's statutory cap on noneconomic damages awarded in personal injury actions is inapplicable to wrongful death actions).
\textsuperscript{111} 746 F. Supp. 604 (D. Md. 1990) (holding that cap on noneconomic damages applied separately to each parent in a wrongful death action).
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suant to those claims, arise from "injury by or through... [the tort] victim,"" that is, the physically injured spouse.

The plain meaning of sections 11-108 and 11-109, in conjunction with explicit indications by the legislature that it intended to limit recoveries for noneconomic damages, warrant the conclusion that the legislature intended that a single cap should apply to noneconomic damages for loss of consortium awarded to the marital unit and to noneconomic damages for personal injury awarded to the physically injured spouse. The Court of Appeals merely effectuated that intent.

5. Conclusion.—In Oaks, the Court of Appeals limited the amount of noneconomic damages recoverable for loss of consortium by holding that Maryland's statutory cap on noneconomic damages applies in the aggregate to the noneconomic damages awarded for a loss of consortium claim and to the noneconomic damages attributed to the underlying claim of the physically injured spouse. This holding effectively means that the total award of noneconomic damages in a personal injury action consisting of both a loss of consortium claim by the marital unit and a negligence claim by the injured spouse may not exceed the statutorily imposed limit. The holding accurately reflects the intent of the General Assembly in drafting the cap statute, which was to curtail large noneconomic damage awards to ensure the availability of liability insurance in the State of Maryland.

D. Maryland Refuses to Abrogate Parental Tort Immunity

In Warren v. Warren, the Court of Appeals reaffirmed the viability of parent–child tort immunity. In reaching this conclusion, the court underscored its belief that the abolition of parental immunity would interfere with domestic tranquility and parental discretion in determining appropriate discipline for their children. Because of this belief, the court refused to create an exception to parental immunity for motor vehicle torts. The court reasoned that compulsory motor vehi-

113. Id.
114. Oaks, 339 Md. at 38, 660 A.2d at 430.
115. Id.
116. Id. at 35, 660 A.2d at 428.
2. Id. at 619, 650 A.2d at 252.
3. Id. at 626, 650 A.2d at 256.
4. Id. at 627, 650 A.2d at 256. Forty-two states and the District of Columbia permit suits between parents and children for motor vehicle torts. See id. at 627 n.2, 650 A.2d at
cle insurance is required by legislative creation and therefore any exception affecting this type of insurance should be approved by the legislature.\(^5\) The court also declined to extend parent–child immunity to stepparents, regardless of whether they stand *in loco parentis*.\(^6\) Here, the court found that because stepparents have no legally imposed duties, extending parental immunity to stepparents would grant an undeserved benefit.\(^7\)

In so holding, the court refused to acknowledge the changes that have occurred in society since parental immunity was first adopted in Maryland in 1930.\(^8\) Rather than abolishing the arcane doctrine completely and replacing it with a more appropriate standard, the court drew a bizarre line, allowing only biological parents the protection of parental immunity.\(^9\)

This Note will argue that Maryland should judicially abrogate the parental immunity doctrine. In its place, the court should employ a reasonable parent standard to determine tort liability between parents and children.

1. The Case.—Albert Downes Warren III (Albert) was born to Christina Warren (Christina) and Albert Downes Warren, Jr. (Warren) on June 4, 1984.\(^10\) The Warrens were divorced on January 3, 1986, and received joint custody of Albert.\(^11\) Albert lived with his mother, and his father had liberal visitation rights.\(^12\) Warren married Elizabeth McNeill (Elizabeth) on January 18, 1991.\(^13\) Subsequently, on March 8, 1991, Albert and Elizabeth were involved in an automobile accident due to Elizabeth’s negligence.\(^14\) Albert suffered numerous injuries in the accident, including irreversible brain damage and partial paralysis.\(^15\)

Albert’s biological parents filed suit on behalf of Albert against Elizabeth in the Circuit Court for Queen Anne’s County, seeking

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256 n.2. Only Maryland and seven other states continue to apply parental immunity for motor vehicle torts. See id. at 621 n.1, 650 A.2d at 253 n.1.
5. Id. at 626-28, 650 A.2d at 256-57.
6. Id. at 628, 650 A.2d at 257.
7. Id. at 629, 650 A.2d at 257.
8. Schneider v. Schneider, 160 Md. 18, 23, 152 A. 498, 500 (1930), was the first Maryland case to recognize parental immunity. See infra notes 42-43 and accompanying text.
10. Id. at 620, 650 A.2d at 253.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
monetary damages for the injuries Albert suffered in the accident. The only issue before the trial court was whether Elizabeth should receive the benefit of parental immunity. The trial court held that Elizabeth was not protected by immunity and entered judgment in favor of Albert for the amount of $1,750,000. Elizabeth filed an appeal with the Court of Special Appeals, but the Court of Appeals issued a writ of certiorari prior to consideration of the case by the intermediate court of appeals.

2. **Legal Background.**

   a. **The Inception of Parent-Child Immunity.**—Parent-child immunity is a common-law rule that prevents suits within families. The first case to recognize parent-child tort immunity was *Hewellette v. George*. In *Hewellette*, the Mississippi Supreme Court, without legal precedent, refused to maintain a minor's cause of action against her mother for false imprisonment after the mother maliciously attempted to institutionalize the minor in an insane asylum. The court reasoned,

   [S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society . . . forbid[s] to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

   Along with *Hewellette*, *McKelvey v. McKelvey* and *Roller v. Roller* established the foundation for the modern parental immunity doc-

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16. Id.
17. Id.
18. Id.
19. Id. The parties stipulated that Albert's injuries resulted from Elizabeth's negligence and that the present value of the damages sustained by Albert was $1,750,000. *Id.*
20. Id.
21. 9 So. 885, 887 (Miss. 1891).
23. *Hewellette*, 9 So. at 887.
24. 77 S.W. 664, 664 (Tenn. 1903) (barring a child's action against her father or stepmother for cruel and inhuman treatment inflicted upon her by her stepmother), overruled by *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994).
These cases are credited with establishing the major rationales upon which courts based their reasoning in applying and upholding the parental immunity doctrine. These include:

1. The fear of fraudulent or collusive claims, 2. The interest in maintaining family harmony, 3. The protection of parental discretion, authority, and control, 4. The protection of the family exchequer, 5. The possibility of inheritance from the child-decedent by the parent-tortfeasor, and 6. The similarity between interspousal immunity and parental immunity.

For approximately thirty years these rationales were used "for the perpetuation of the parental immunity doctrine in the United States." Legal commentators eventually began to question the validity of the doctrine, charging that "these policy concerns are either too nebulous or outdated." While uniform in their belief that traditional parent-child tort immunity should be abrogated, these commentators have offered differing solutions. Many advocate the doctrine's complete abrogation, while others suggest significant amendment to the doctrine. The Restatement (Second) of Torts adopted still another ap—

25. 79 P. 788, 789 (Wash. 1905) (stating that a child who was raped by her father could not sue him for the pain and suffering she endured).


27. Id.


29. Id. at 115.


31. See Rhonda I. Framm, Comment, Parent-Child Tort Immunity: Time for Maryland to Abrogate an Anachronism, 11 U. BALTIMORE L. REV. 435, 466 (1982) (advocating the Court of Appeals as the appropriate forum to abrogate Maryland's parental immunity); Christine V. Pate, Comment, Parent-Child Immunity: The Case for Abolition, 6 SAN DIEGO L. REV. 286, 296 (1969) (arguing that the public policy reasons for abrogating husband-wife immunity should also serve as the basis behind abrogating parent-child immunity); Virginia B. Townes, Note, The First District Declines to Adopt the Doctrine of Parental Immunity, 10 FLA. ST. U. L. REV. 185, 196 (1982) (calling for the Florida Supreme Court to abolish its parental immunity doctrine).

32. See William E. McCurdy, Torts Between Parent and Child, 5 VILL. L. REV. 521, 559-60 (1960) (arguing that parental immunity should be abolished in personal injury cases due to automobile liability insurance); William E. McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030, 1077-82 (1930) (stating that parental immunity should be confined to areas of parental control and discipline); Martin J. Rooney & Colleen M. Rooney, Parental Tort Immunity: Spare the Liability, Spoil the Parent, 25 NEW ENGL. L. REV. 1161, 1179-84 (1991) (arguing that parental immunity should be retained for discretionary actions of parents toward their children, including instruction, discipline, and any necessary provisions); Kathryn W. Lovill, Note, Frye v. Frye: Maryland Sacrifices the Child for the
Another proposal is the creation of a new rule based on a "reasonable parent" standard. Over the past century, many jurisdictions have either completely abolished the doctrine or never judicially recognized it. Other courts continued to follow the rule with significant exceptions. The most common exceptions to the rule are in cases involving emancipation of the Family, 46 Md. L. Rev. 194, 203-08 (1986) (criticizing Maryland's failure to abrogate parental immunity for negligent activities outside of the parent-child relationship).

33. The Restatement provides:

Parent and Child: (1) A parent or child is not immune from tort liability to the other solely by reason of that relationship. (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.

Restatement (Second) of Torts § 895G (1979).


35. See Hollister, supra note 26, at 525-27 (arguing that parental immunity should be replaced with a reasonable parent standard); Caroline E. Johnson, A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases, 21 FLA. ST. U. L. Rev. 617, 654-55 (1999) (maintaining that the reasonable parent standard allows the balancing of parents' rights to discipline their children against the children's rights to seek redress); Isabel Wingert, Parent-Child Tort Immunity, 50 LA. L. Rev. 1131, 1141-42 (1990) (calling for Louisiana to abandon parental immunity in favor of a reasonable and prudent parent standard); Carla M. Marcolin, Comment, Rousey v. Rousey: The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity, 37 CATH. U. L. Rev. 767, 787-89 (1988) (asserting that the reasonable parent standard would lend predictability to measuring liability in the wake of the abolition of parental liability); Note, Parent-Child Immunity, 49 Md. L. Rev. 761, 772-73 (1990) (advocating that Maryland should replace the parental immunity doctrine with a parental conduct reasonableness test) [hereinafter Parent-Child Immunity II].


pated children,\textsuperscript{38} intentional torts or gross negligence,\textsuperscript{39} children who are employed by their parent(s),\textsuperscript{40} and motor vehicle torts.\textsuperscript{41}

\textbf{b. The Development of Parent-Child Immunity in Maryland.---} Maryland adopted the parent-child immunity doctrine in \textit{Schneider v. Schneider}.\textsuperscript{42} In \textit{Schneider}, the court held that a mother was barred from recovery of damages for her injuries suffered in an automobile accident caused by her son's negligence.\textsuperscript{43} Since \textit{Schneider}, the Court of Appeals has been exceedingly unwilling to make changes to the parent-child immunity doctrine, allowing only two exceptions to the doctrine.\textsuperscript{44} First, in \textit{Waltzinger v. Brisner},\textsuperscript{45} a mother sued her adult son for injuries sustained in an automobile accident caused by her son's negligence.\textsuperscript{46} The Court of Appeals held that children emancipated at the time of the tortious conduct could bring suits against their parents and vice versa.\textsuperscript{47}

Second, in \textit{Mahnke v. Moore},\textsuperscript{48} the Court of Appeals held that children who are victims of cruel and inhuman, or wanton and malicious conduct, will not be prevented from recovering from their parents for their injuries.\textsuperscript{49} In \textit{Mahnke}, the plaintiff was allowed to recover from her father's estate for shock, mental anguish, and permanent nervous and physical injuries after the father shot the mother in the child's presence, left the child with the mother's body for six days, and then committed suicide in front of her.\textsuperscript{50} The court reasoned that "[w]hen . . . the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, . . . cannot logically be applied, for when he is guilty of such acts

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\item \textsuperscript{38} Martinez v. Southern Pac. Co., 288 P.2d 868, 873 (Cal. 1955) (holding that an emancipated child may bring a suit in tort against his parent(s)).
\item \textsuperscript{39} Mahnke v. Moore, 197 Md. 61, 68, 77 A.2d 923, 926 (1951) (holding that a child in Maryland has a right of action against a parent for injuries resulting from an intentional tort).
\item \textsuperscript{40} Trevarton v. Trevarton, 378 P.2d 640, 643 (Colo. 1963) (adopting the business or employment exception to parental immunity).
\item \textsuperscript{41} Ooms v. Ooms, 316 A.2d 783, 785 (Conn. 1972) (noting Connecticut's statutory abrogation of parental immunity for motor vehicle negligence).
\item \textsuperscript{42} 160 Md. 18, 21-24, 152 A. 498, 499-500 (1930). \textit{Schneider} "fashioned a broad reciprocal immunity under which parents and children could not assert any claim for civil redress." \textit{Warren}, 336 Md. at 622, 650 A.2d at 254.
\item \textsuperscript{43} \textit{Schneider}, 160 Md. at 21-24, 152 A. at 499-500.
\item \textsuperscript{44} Smith v. Gross, 319 Md. 138, 145, 571 A.2d 1219, 1222 (1990).
\item \textsuperscript{45} 212 Md. 107, 128 A.2d 617 (1957).
\item \textsuperscript{46} \textit{Id.} at 110-11, 128 A.2d at 618.
\item \textsuperscript{47} \textit{Id.} at 126, 128 A.2d at 627.
\item \textsuperscript{48} 197 Md. 61, 77 A.2d 923 (1951).
\item \textsuperscript{49} \textit{Id.} at 69-70, 77 A.2d at 927.
\item \textsuperscript{50} \textit{Id.} at 68, 77 A.2d at 924.
\end{itemize}
he forfeits his parental authority and privileges, including his immunity from suit."51

Since establishing these exceptions to the doctrine, Maryland courts have refused on five separate occasions to amend the rule or to reconsider its public policy principles.52 Each time, the court has deferred to the legislature as the appropriate body for change.53 In *Latz v. Latz*,54 the Court of Special Appeals refused to create an exception for motor vehicle torts when the driver had insurance.55 The court stated that "[i]f there is a need for change let it come by legislative enactment."56

In *Montz v. Mendoloff*,57 the Court of Special Appeals declined to make an exception for torts involving alleged gross negligence.58 Again, the court cited the legislature's inaction, finding that "[the rule] is now more firmly embedded in the law of Maryland and [we] decline to change it."59

Similarly, the Court of Special Appeals in *Shell Oil Co. v. Ryckman*,60 refused to find a business exception to parental immunity.61 This case involved an oil company's claim for contribution from a lessee of one of its gas stations for damages paid to the lessee's son after he was injured at the place of business.62 The court held that parent–child immunity prevented the indemnification action after the company had settled with the child.63

In *Frye v. Frye*,64 the Court of Appeals refused to abolish parental immunity despite the court's abrogation of interspousal immunity.65

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51. *Id.* at 68, 77 A.2d at 926.
52. See Parent–Child Immunity I, supra note 30, at 1329.
53. *Id.*
55. *Id.* at 729-30, 272 A.2d at 440.
56. *Id.* at 734, 272 A.2d at 443.
58. *Id.* at 224-25, 388 A.2d at 571. The court found that the tortious action in this case did not fall within the Mahnke standard for wanton and willful misconduct and found no indication of abandonment of parental authority. *Id.* at 225, 388 A.2d at 571.
59. *Id.* at 224, 388 A.2d at 570.
60. 43 Md. App. 1, 403 A.2d 379 (1979).
63. *Id.* at 4-5, 403 A.2d at 381.
64. 305 Md. 542, 505 A.2d 826 (1986). For a detailed discussion of this case, see Lovill, supra note 32, passim.
The court again reasoned that the legislature would be a more proper place to determine the scope of parental immunity, stating, "[W]ho can best resolve [the issues], the seven judges of this Court or the members of the General Assembly?" Finally, the Court of Appeals reaffirmed the Frye holding in Smith v. Gross, explaining that despite changing values, "'both this Court and the legislature have been faithful to the promotion of the stability, harmony and peace of the family and to the preservation of parental authority and the family unity as a matter of public policy in the best interests of society.'"

3. The Court's Reasoning.—In affirming the holding of the trial court, the court in Warren considered three issues:

(1) whether Maryland should follow the growing number of jurisdictions that have completely abrogated parent-child tort immunity; (2) whether the immunity should be partially abrogated in cases involving motor vehicle torts; and (3) if the doctrine is not abrogated, whether it should be extended to protect stepparents as well as biological parents.

The court answered all three questions in the negative. Rather, the court chose to reiterate its holding in Frye "that the policy justifications previously expressed by this Court continue[] to support parent-child tort immunity." The court determined that, along with the preservation of family harmony, parent-child immunity rests on three generally accepted policy justifications: "preservation of parental discipline and control, prevention of fraud and collusion, and the threat that litigation will deplete family resources." The court considered the "'shifting values in [our] changing world,'" but determined that adhering to the stated policy of promoting family stability,

the reasons for abrogation of interspousal immunity "are . . . not pertinent or relevant with respect to the abrogation of parent-child immunity." Frye, 305 Md. at 553, 505 A.2d at 832.

66. Frye, 305 Md. at 566, 505 A.2d at 838.
68. Smith, 319 Md. at 147, 571 A.2d at 1223 (quoting Frye, 305 Md. at 561, 505 A.2d at 836).
69. Warren, 336 Md. at 621, 650 A.2d at 253.
70. Id.
71. Id. at 625, 650 A.2d at 256.
72. Id. at 625, 650 A.2d at 255.
73. Id. (citations omitted).
74. Id. at 624, 650 A.2d at 255 (quoting Frye v. Frye, 305 Md. 542, 561, 505 A.2d 826, 836 (1986)).
harmony, and peace was still in the best interest of society. The court quoted its decision in Frye that "it is clear that today's parent-child relationship, as recognized by this Court and the legislature, furnishes no compelling reason to abrogate the rule." The court found that "family life and values" had not significantly changed since the court last addressed the issue in Frye and it therefore believed that the best interests of both parents and children would be served by retaining the immunity. The court reasoned that abrogating the immunity would cause greater disruption within the family, infringe upon parental discretion in raising and disciplining children, and would "allow the courts to become the arbiter of parent-child disputes and the overseer of parental decisions."

The court also refused to abrogate parent-child immunity in cases involving motor vehicle torts. The court reasoned that any such exception must be created by the General Assembly. The court again relied upon its holding in Frye where it found that "compulsory motor vehicle liability insurance . . . is exclusively a creature of the legislature . . . . The exclusion of motor torts from the parent-child immunity rule would inevitably have some impact on the insurance scheme and the social policy it furthers." The Frye court determined that this impact should be resolved by the legislature rather than the court.

While the court refused to abolish parent-child immunity completely or to partially abrogate the immunity for motor vehicle torts, the court also was unwilling to extend parent-child immunity to stepparents, regardless of whether they stand in loco parentis to the injured child. The court, while noting that stepparenting is more common today than when parent-child immunity was first adopted by the court, recognized "the many duties imposed by the biological relationship between natural parents and children." The court stated that "such duties are imposed upon stepparents by law."

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75. Id.
76. Id. (quoting Frye, 305 Md. at 561, 505 A.2d at 836).
77. Id. at 626, 650 A.2d at 256.
78. Id.
79. Id. at 627, 650 A.2d at 256.
80. Id. at 627-28, 650 A.2d at 256-57.
81. Id. at 626, 650 A.2d at 256 (quoting Frye v. Frye, 305 Md. 542, 567, 505 A.2d 826, 839 (1986)).
82. Frye, 305 Md. at 567, 505 A.2d at 839.
83. Warren, 336 Md. at 628, 650 A.2d at 257.
84. Id.
85. Id. at 629, 650 A.2d at 257. The court continued, "Neither side in a stepparent-stepchild relationship is obligated to the other; stepparents are free to leave the family via
reasoned that a suit between a stepchild and stepparent is akin to a suit between two individuals who have no legal obligations to each other. Thus, the court held "that the lack of reciprocal legal obligations between stepparent and stepchild mandates that parent-child immunity not be extended to that relationship."  

In a strongly worded concurring opinion, Judge Raker disagreed with the majority's holding that a stepparent standing in loco parentis should not receive parental immunity. This determination did not affect Judge Raker's opinion in the instant case because she found that, as a matter of fact, Elizabeth did not attain that status.

In her concurrence, Judge Raker emphasized her dissatisfaction with the court's continued use of the parental immunity doctrine. Referring to the court's decision in Frye, she stated, "[o]bserving that this state is out of step with the rest of the nation, this Court nonetheless refused to change the rule, holding that the change, if at all, should come from the General Assembly." Nonetheless, she recognized the need to follow precedent. "I believe the principle of stare decisis and the inaction of the legislature militate against abolition of parent-child immunity today. . . . If we were writing on a clean slate, however, I might find otherwise," she wrote.

While Judge Raker refused to advocate the abolition of parental immunity, she did not find, as the majority had, any justification for refusing to apply the rule to a stepparent who stands in loco parentis to a stepchild. Judge Raker was persuaded by the California Supreme Court's holding in Trudell v. Leatherby, where that court held that stepparents were immune from suit for tortious actions against their stepchildren. The court in Trudell wrote that parental immunity protects against intrafamily suits that cause discord among the family and disrupt the peace and harmony that should exist in a house-

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86. Id., 650 A.2d at 258.
87. Id. at 631, 650 A.2d at 258.
88. Id. (Raker, J., concurring).
89. Id.
90. Id.
91. Id. at 632, 650 A.2d at 259 (citations omitted).
92. Id.
93. 300 P. 7 (Cal. 1931).
94. Warren, 336 Md. at 632-33, 650 A.2d at 259 (Raker, J., concurring); see also Trudell, 300 P. at 9-10.
hold.  The court then found that these same concerns exist when a
stepparent is sued by a stepchild.

Judge Raker agreed with the majority's concern for giving a bene-
fit to stepparents who had no duties to their stepchildren; however,
she noted that a rule considering the in loco parentis status of a steppar-
ent would cure the potential of giving a stepparent an unjust bene-
fit. Judge Raker reasoned that it seemed contrary to public policy to
discourage a stepparent from assuming parental duties to a child in
need of such care, particularly in today's world where stepparenting
has become increasingly commonplace.

4. Analysis.—In Warren, the Court of Appeals held that the need
to maintain domestic tranquility in the family remains the basis for
the parent–child immunity doctrine. The court grounded its reluc-
tance to completely abrogate parent–child immunity on this belief
and on its refusal to make policy determinations on an issue that it
believed to be in the province of the General Assembly. Unfortunately, the court's determination that parental immunity continues to
be of value fails to consider today's ever-changing society and its res-
sulting public policy concerns. Furthermore, the court's insistence
upon recognizing parental immunity solely for biological parents is
illogical.

a. Abolition of Parental Immunity.—Maryland has become one
of the nation's most conservative states on the issue of parental immu-
nity. While other states have refused to abrogate parental immu-
nity for many reasons, Maryland has relied on two reasons for
continuing to adhere to this antiquated doctrine.

One of the primary justifications that the Court of Appeals em-
ployed for retaining parent–child immunity is the desire to preserve
domestic tranquility. Given the prevalence of liability insurance in
today's society, however, this basis for the immunity makes little

95. Trudell, 300 P. at 9.
96. Id.
97. Warren, 336 Md. at 633, 650 A.2d at 259 (Raker, J., concurring).
98. Id. at 633-34, 650 A.2d at 259-60.
99. Id. at 626, 650 A.2d at 256.
100. Id. at 626-30, 650 A.2d at 256-58.
101. See supra notes 4, 36 (showing that Maryland is one of the few states without abroga-
tion for motor vehicle torts or complete abrogation of the doctrine).
102. See Andrews, supra note 22, at 120-24 (discussing common reasons why states have
refused to abrogate the parental immunity doctrine).
103. Warren, 336 Md. at 626, 650 A.2d at 256.
One commentator has argued that "virtually no [parent-child] suits are brought except where there is insurance. And where there is [insurance], none of these threats to the family exists at all." Furthermore, it is hard to believe that an uncompensated tort truly adds to the harmony and peace of an otherwise happy household. Arguing that parental discipline and domestic tranquility would be disturbed by these types of suits seems to suggest "that an uncompensated tort makes for peace in the family and respect for the parent."

Moreover, this justification is tenuous, as none of these arguments has been held sufficient to bar an action by or against an unemancipated minor for a tort against property, although they are all quite obviously equally applicable in such a case. Nor . . . have they been sufficient to prevent an action for a personal tort between minor brothers and sisters, which uniformly has been allowed.

In fact, the harm to domestic tranquility seems greater in property suits, where parents usually pay for damages, whereas the parents' insurance company typically pays for tort claims.

The second major justification for refusing to abolish parental immunity is that it is the legislature's prerogative to change the rule. This argument carries little weight given that, as the court recognized, parent-child immunity is a judicially created rule adopted by the Court of Appeals in 1930. Moreover, despite its stated policy of deference to the legislature, the Court of Appeals has seen fit to amend the rule in other circumstances where it believes public policy is no longer served. While Judge Raker expressed her dissatisfaction with the doctrine of parental immunity in her concurring opinion, it is unfortunate that she joined the majority and hid behind the veil of stare decisis and the inaction of the legislature.

105. Id. (quoting Fleming James, Jr., Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J., 549, 553 (1948)) (alteration in original).
107. Id. at 905-06.
109. Warren, 386 Md. at 622, 650 A.2d at 254.
110. Id. at 622, 650 A.2d at 254; see also supra note 42 and accompanying text (discussing the court's adoption of the rule).
111. See supra notes 45-51 and accompanying text (discussing the court's decisions in Waltzinger and Mahnke).
112. Warren, 396 Md. at 681-34, 650 A.2d at 258-60.
b. Stepparents Standing In Loco Parentis.—The court further muddled this arcane doctrine by refusing to extend the rule to include those stepparents standing in loco parentis to an injured stepchild. While a complete abrogation of parental immunity would be preferable, if the court must insist on continuing to apply the doctrine, it should have made some concession to stepparents who have taken on parental duties to their stepchildren.

The court made much of the fact that while biological parents clearly have legal obligations to their children, stepparents have no such obligations to their stepchildren. However, stepparents often take on obligations to their stepchildren although not legally required to do so. It is nonsensical that biological parents retain this immunity after they leave the biological child and play no further role in the biological child’s upbringing, while a stepparent who is involved with the child’s everyday life receives no immunity.

Judge Raker proposed a more workable solution in her concurring opinion. She endorsed the view taken by the Minnesota Supreme Court in London Guarantee & Accident Co. v. Smith, which recognized immunity for stepparents who stand in loco parentis to their spouse’s child from another marriage. The majority never discussed this alternative. This is unfortunate given that public policy should encourage stepparents to take on increased parental obligations toward their stepchildren.

c. The Reasonable and Prudent Parent Standard.—Other state courts have adopted a number of alternatives to parental immunity. If Maryland finally abrogates parent–child tort immunity, it should adopt the standard first announced by the California Supreme Court

113. Id. at 631, 650 A.2d at 258.
114. Id. at 629, 650 A.2d at 257.
115. Id. at 634, 650 A.2d at 259-60.
116. 64 N.W.2d 781, 785 (Minn. 1954).
117. The “parental supervision” approach has been used in Texas where immunity has been granted “only where the parent’s conduct could be characterized as the exercise of parental authority, discipline, supervision, or discretion.” Andrews, supra note 22, at 124 (footnote omitted); see, e.g., Farley v. MM Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (holding that, in giving instructions to his employee son, a father was acting outside of the sphere of parental duties and thus, a suit by the son was not barred by the parental immunity doctrine); Felderhoff v. Felderhoff, 473 S.W.2d 928, 993 (Tex. 1971) (holding that parental immunity did not bar a son’s action where he sustained injuries when his father accidentally engaged farm equipment that the son was cleaning as an employee of the father’s business partnership). The New York Court of Appeals has held that parents have no legal duty to supervise their children properly. Holodook v. Spencer, 324 N.E.2d 338, 344 (N.Y. 1974).
in *Gibson v. Gibson.* The *Gibson* court held that a child could sue her parents for ordinary negligence. Specifically, "the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent parent have done in similar circumstances?" This standard permits a child to recover if the parent fails to meet the standard of care required by parents, while still recognizing that parents need some discretion regarding their children. The standard provides a child recourse only against a parent who fails to act as a reasonable parent would have under similar circumstances. The reasonable parent standard applies a uniform method in determining the propriety of holding a parent responsible to his child for negligence.

Although this standard has received almost universal academic approval, it has drawn some judicial criticism. Idaho's Supreme Court, for example, rejected the reasonable parent standard, finding that it would be impossible to adopt a single standard for its citizens because of the "diversity in [their] religious, ethnic, and cultural backgrounds." This argument ignores the usage of the reasonable person standard in all tort actions, regardless of the defendant's background. Also, reasonableness is determined by viewing a reasonable parent's behavior in a similar situation to that encountered by the defendant. Finally, juries can be instructed to take into consideration any variables that will differ from parent to parent.

5. **Conclusion.**—In *Warren v. Warren,* the Court of Appeals refused to abrogate parental tort immunity, to abrogate it partially for motor vehicle torts, or to allow stepparents the protection of the immunity. The rationale behind this holding is grounded in the be-

118. 479 P.2d 648 (Cal. 1971) (en banc).
119. Id. at 653.
120. Id.
122. Id. at 526.
125. See *supra* note 35 (listing the legal commentators who support the use of the reasonable parent standard to determine tort liability between parents and children).
126. Marcolin, *supra* note 35, at 787 n.173. For a further discussion of criticism of the reasonable parent standard, see id. at 787-88.
129. Id.
130. Id.; see also Andrews, *supra* note 22, at 126 (discussing the use of the reasonable parent standard with juries).
131. 336 Md. at 618, 650 A.2d at 252.
132. Id. at 621, 650 A.2d at 253.
lief that allowing intrafamily suits would cause great disruption to domestic tranquility. This holding fails to recognize the changes that have taken place in a society that would be better served by an abrogation of parent-child immunity. Maryland should follow the lead of the many other states that have abolished this doctrine and replaced it with a reasonable and prudent parent standard. This standard would not preclude injured children from filing tort actions against their parents and, at the same time, would preserve the unique relationship between parents and their children.

David A. Leib

133. Id. at 626, 650 A.2d at 256.
Recent Developments
The Maryland General Assembly

I. CRIMINAL LAW

A. Maryland's Child Sexual Offender Notification and Registration Law

In 1995, the General Assembly passed legislation that requires any child sexual offender\(^1\) to register with a local law enforcement agency.\(^2\) The law requires that school principals in the county where the child sexual offender resides be notified immediately of the registration statement\(^3\) and authorizes the local law enforcement agency to notify certain community organizations or individuals of the offender's registration.\(^4\) This new law applies prospectively to offenders convicted of offenses occurring after October 1, 1995.\(^5\) After a discussion of the public policy and historical background of child sexual offender registration and notification laws, this Note will detail the key provisions of Maryland's new law. It then will discuss the possible constitutional challenges and recommend changes to the new law.

1. "Child sexual offender" is defined as: a person who has been convicted of child sexual abuse, as defined in Md. ANN. CODE art. 27, § 35C (1995); first or second degree rape, as defined in id. §§ 462, 463; first, second, or third degree sexual offense, as defined in id. §§ 464, 464A, 464B; or fourth degree sexual offense as defined in id. § 464C; and ordered by the court to register as part of a sentence or condition of probation. "Child sexual offender" also includes one found not criminally responsible for any of the above-listed offenses, or one convicted in another state of an offense that, if committed in Maryland, would constitute one of the above-listed offenses. Act of May 9, 1995, ch. 142, 1995 Md. Laws 1820, 1822 (codified as amended at Md. ANN. CODE art. 27, § 692B (1995)).

2. Act of May 9, 1995, ch. 142, 1995 Md. Laws 1820 (codified as amended at Mo. ANN. CODE art. 27, § 692B (1995)). A "Local Law Enforcement Agency" is defined as the "law enforcement agency in a county that has been designated by resolution of the county governing body as the primary law enforcement unit in the county." Md. ANN. CODE art. 27, § 692B(a)(3).


4. "[A] local law enforcement agency may provide notice of a registration statement to the following organizations if the agency determines that such notice is necessary to protect the public interest:

   (I) A community organization;
   (II) A religious organization; and
   (III) Any other organization that relates to children or youth." Id. § 692B(d)(3).

1. Background.—

a. History of Sexual Offender Registration and Notification Laws.—Many state legislatures have found that sex offenders pose a high risk of recidivism and a danger to their communities.\(^6\) In response, these states require sex offenders to register with the local law enforcement agency in the jurisdiction where they live in order to assist law enforcement personnel in protecting their communities, conducting investigations, and quickly apprehending offenders who commit new sex offenses.\(^7\) Some statutes further allow the local law enforcement agency to notify certain segments of the public regarding the sex offender's presence in their community in order to "provide a public awareness whereby members of the community might be more vigilant in protecting themselves and their children."\(^8\)

Often, states have adopted their sex offender registration and notification laws in reaction to public outrage over specific heinous sexual crimes committed by previously convicted sexual offenders. For example, a drive toward community registration and notification laws began in Washington State in 1989, after the arrest of child sex offender Earl Shriner.\(^9\) Shriner had kidnapped a seven-year-old boy, took the boy into the woods, raped him, stabbed him, and cut off his penis.\(^10\) The young victim survived and was able to identify Shriner as his attacker.\(^11\) After the attack, state residents were shocked to learn that prison authorities had released Shriner at the end of an earlier sentence, despite their knowledge that he still might be dangerous.\(^12\) In response to the public outcry, then Governor Booth Gardner

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10. Id.

11. Id.

12. Id. Shriner had a history of violent crimes. He killed a schoolmate at the age of 16. After Shriner's release from a mental institute, he kidnapped and assaulted two teenage girls. Shriner once told a prison cellmate that he wanted a van equipped with cages so he could capture children, sexually abuse them, and then murder them. Jerry Seper, Official Defends Not Committing Child Molester, WASH. TIMES, July 24, 1984, at A3.
formed a task force to study community protection. Acting on the task force's recommendation, the Washington legislature adopted a statute requiring all convicted sex offenders to register with the county sheriff.

This unfortunate scenario was repeated in California. When twelve-year-old Polly Klaas was snatched from her bedroom in Petaluma, California, the community searched for her and waited anxiously for two months. Richard Allen Davis was eventually charged with her kidnapping and murder. Davis had been “convicted for two earlier kidnappings of women and arrested in twenty-one incidents, including assault with a deadly weapon, burglary and grand theft.” Polly Klaas's murder inspired tough repeat-offender statutes, new registries, and public notification laws for sexual crimes.

Likewise, New Jersey enacted a sexual offender registration act in response to the public outcry following the rape and murder of seven-year-old Megan Kanka by Jesse Timmendequas, a convicted sex offender who lived across the street from Megan's home. At the time of the murder, New Jersey had no mechanism by which residents or police could be notified that a convicted sex offender lived in their neighborhood. The nation's attention was drawn to the tragedy, and New Jersey subsequently enacted a sex offender registration law that required sexual offenders to register with the local law enforcement agency and mandated public notification. In memory of Megan Kanka, these types of laws are commonly referred to as “Megan’s

13. State v. Ward, 869 P.2d 1062, 1065 (Wash. 1994). The public was deeply affected by the case:

Public concern continued to mount as the media relayed stories about Shriner, the system's failure to protect the public from him, and the seven-year-old's slow recovery. Thousands of letters and calls were received in the Governor's office about Shriner. Public forums were held about child sexual assault and proposed legislation. Indeed, Shriner's vicious crime finally galvanized the Washington legislature to enact a new civil commitment system.


16. Id.

17. Id.


Forty-seven states have Megan's laws requiring sexual offender registration. In addition, Congress recently enacted a federal Megan's law.

b. **Public Policy and Political Debate Regarding Megan’s Laws.**—Megan's laws are based on the belief that mandatory registration and public notification better equip a community to protect its children from sex offenders. Because of their high rate of recidivism and low rate of successful rehabilitation, child molesters are viewed by many people as society's most dangerous threat to children. Although conflicting data exist, the New Jersey Supreme Court recently found that “[c]oncerning the basic facts, . . . there is no dispute: . . . the relative recidivism rate of sex offenders is high compared to other offenders; treatment success of sex offenders exhibiting repetitive and compulsive characteristics is low; and the time span between the initial offense and reoffense can be long.” Studies suggest that the recidivism rate for child sex offenders is somewhere between thirty and seventy-five percent.

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22. See Michele L. Earl-Hubbard, The Child Sex Offender Registration Laws: The Punishment, Liberty, Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 Nw. U. L. Rev. 778, 862 & n.6 (1996). The three states that have no such laws are: Nebraska, Carolina, and Vermont. See id.
23. See infra note 45.
24. See supra notes 6-7 and accompanying text. Maryland Delegate Dana Lee Dembrow, D-Montgomery County, said that there are two natural advocates to a Megan's law. "Get tough on crime types say this is the proper . . . punishment for this type of crime." Bradley A. Kukuk, Maryland’s “Megan’s Law” Takes Effect Absent Legal Challenge, DAILY REC., Oct. 14, 1995, at 19. The other group is motivated by “improving the deterrent value and helping an individual with unhealthy mental urges to conduct themselves in such a way that children are not hurt.” Id.
25. See infra notes 27-29 and accompanying text.
26. "Serial child abductors and molesters pose one of the most dangerous threats to the safety of our children. . . . [E]ach of these criminals typically has a very large number of victims and a long history of criminal behavior.” ANN WOLBERT BURGESS ET AL., CHILD TRAUMA I, ISSUES & RESEARCH 443 (1992); see also Poritz, 662 A.2d at 372-77 (stating that “as far as society is concerned, sex offenses of the kind covered by [Megan’s] law are among the most abhorrent of all offenses.”).
27. Poritz, 662 A.2d at 374 n.1.
28. BURGESS ET AL., supra note 26, at 423. Data based on treatment program for child molesters conducted during a four-year follow up of 53 untreated and 64 treated child molesters. Id. The study found a recidivism rate of 32% and 14% respectively. However, the study included only incest offenders, and indicated that the recidivism rate if incest offenders were dropped would be 40% to 42%. Id. Attorney General Janet Reno stated that "convicted child molesters have a recidivism rate as high as 40% to 75%, according to some studies.” Justice Department to Defend Megan’s Law from News Service Reports, REC. N. N.J., Feb. 10, 1995, at A-17.
While studies suggest that treatment does lower the recidivism rate for sexual offenders, the post-treatment rate of recidivism is nevertheless still high.\(^{29}\) Although sexual offenders undoubtedly can be helped by treatment, it is questionable whether they can ever be cured.\(^{30}\) Many child molesters are as addicted to their sexual behavior as an alcoholic is to alcohol.\(^{31}\) In her book, *Treating Child Sex Offenders and Victims*, Dr. Anna Salter states that many child molesters "are more frightened of being without the addiction than of continuing it. Thus the [child molester's] goal . . . may not be to cease molesting children" but merely to complete training in order to qualify for release or end his mandatory rehabilitation training.\(^{32}\)

The treatment of sex offenders, even if effective, often is not offered to the majority of sex offenders in jail.\(^{33}\) Although innovative treatments are being shown to lower drastically the rates of recidivism, the vast majority of sex offenders in prison receive little or no treatment.\(^{34}\) Fay Honey Knapp, director of the Safer Society Program in Orwell, Vermont, a national referral service for sex offenders seeking therapy, said that "[b]y conservative estimate, more than seventy-five percent of jailed sex offenders get no help at all."\(^{35}\)

Finally, violent sexual crimes against children have severe social repercussions.\(^{36}\) The effects of child sexual abuse on the victim include a variety of long-term emotional, behavioral, social, and sexual

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29. Over a five-year period, 25\% of treated offenders were charged with a serious sexual offense. *Burgess et al.*, supra note 26, at 422.

30. "Child sexual abuse is a treatable problem. Treatable is defined as helping the offender learn ways of minimizing the risk of reoffense. It does not imply cure." Dr. Anna C. Salter, *Treating Child Sex Offenders and Victims* 67 (1988); see also *ABC News Forum: Men, Sex, & Rape* (ABC television broadcast, May 5, 1992). Dr. Fred Berlin, Director of the Sexual Disorders Clinic at Johns Hopkins University, testified:

I don't think you can cure rapists. I don't think everybody can be helped. I think there are some people too dangerous to be in the community. The reality is, though, that sooner or later—and this is a fact—the majority of people who commit sex offenses do come back out . . . . It's very dangerous to the community that many of them come out more-worse [sic] than the way in which they went in . . . .


32. *Id.*

33. For example, California, with more than 15,000 jailed sex offenders, offers treatment in only one experimental program for 46 rapists and child molesters. New York, with over 3800 jailed sex offenders, has a treatment program in only one prison. Daniel Goleman, *Therapies Offer Hope for Sex Offenders*, *N.Y. Times*, Apr. 14, 1992, at C1 (quoting Fay Honey Knapp, Director of the Safer Society Program in Orwell, Vermont).

34. *Id.*

35. *Id.*

problems, including “sleeping and eating disorders; psychological re-
actions of fears and anxiety, depression, mood changes, guilt, and
shame . . . suicide attempts, substance abuse, gender identity confu-
sion and sexual dysfunction.” In addition, parents of the victims ex-
perience high levels of psychological distress that may exacerbate the
victim’s condition.

2. Maryland’s Megan’s Law.—

a. Legislative History.—As in other states, Maryland’s new law
was partly prompted by public outrage over a specific incident of child
sexual abuse. In the summer of 1993 a young Dundalk child was sexu-
ally assaulted by a nineteen-year-old next-door neighbor. The man
was charged, pled guilty, and was sentenced to serve six years in jail.
After thirteen months, the convicted child molester was released and
returned home to his former residence. The victim and his parents
only became aware of the child molester’s release when they saw him
walking into his house next door. The victim’s parents, outraged
that a known child molester could be released back into their neigh-
borhood without their knowledge, lobbied Maryland Senator Norman
Stone, D-Baltimore County, to propose a Megan’s law in Maryland.

The General Assembly was also motivated by the federal Jacob
Wetterling Crimes Against Children and Sexual Violent Offender Re-

gistration Program (Crimes Against Children Act). According to the
Crimes Against Children Act, “[a] person who is convicted of a crimi-
nal offense against a victim who is a minor or who is convicted of a
sexually violent offense [must] register . . . with a designated State law
enforcement agency for [ten years after release] . . . .” Any person

37. Id. at xv.
38. Id. at 251-52.
39. Letter from Mr. Anthony Taylor, father of the sexually assaulted Dundalk child, to
the Senate Judiciary Committee (undated) (on file with the Md. Senate Judiciary
Committee).
40. Id.
41. Id.
42. Id.
43. Telephone Interview with Senator Norman Stone, D-Baltimore County (Sept. 12,
1995).
(1996).
110 Stat. 1345 (1996). The term "sexually violent offense" means any offense consisting of
defined types of sexual abuse or physical contact with intent to commit such abuse. Id.
§ 14071 (a)(3)(B).

In addition to this registration requirement, Congress recently enacted legislation re-
quiring police to notify the public when dangerous offenders move into their neighbor-
designated a "sexually violent predator" is required to register indefinitely. The Crimes Against Children Act requires each state to enact a law that complies with the federal guidelines by 1998 or lose up to ten percent of federal funding received under the Omnibus Crime Control Act of 1968.

On January 18, 1995, Senator Stone introduced Senate Bill 79. The bill required convicted child sex offenders to register for ten years with the local law enforcement agency where the child sex offender lives. Senate Bill 79 further required the local law enforcement agency to notify the local school superintendent of the child sex offender's release and allowed the law enforcement agency to notify community, religious, or youth organizations if necessary to protect the public. Senate Bill 79 also required the offender to send written notice to his neighbors to inform them of his name, address, and a brief description of the crime for which he was convicted, along with a recent photograph of himself. On March 24, 1995, the Senate unanimously approved the bill.

On January 27, 1995, Delegate Dana Lee Dembrow, D-Montgomery County, introduced House Bill 230, using the Crimes Against Children Act as a template. Unlike Senate Bill 79, House Bill 230 required child criminal offenders and all violent sex offenders to register with the local law enforcement agency, as was mandated in the


46. The term "sexually violent predator" means "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." Id. § 14071(a)(3)(C). The determination that a criminal is a sexually violent predator is made by the sentencing court guided by a state board composed of experts in the field of behavior and treatment of sexual offenders. Id. § 14071(a)(2). The indefinite registration requirement ends upon a determination that the person is no longer a sexually violent predator. Id.

47. Id. § 14071(f)(2)(A). If Maryland fails to comply, the state could lose $800,000 in 1998. MARYLAND GEN. ASSEMBLY, DEP'T OF FISCAL SERVS., FISCAL NOTE ON S.B. 79 (1995).


50. Id. at 1826-27.

51. Id. (proposed amendment not part of final enactment). The bill required the offender to send written notice to each residence within: (1) a one mile radius if the offender resided in a rural area or, (2) a three block radius if the offender resided in an urban area. Id.


53. Id.; Kukuk, supra note 24, at 19.
Crimes Against Children Act.\textsuperscript{54} House Bill 230 did not require the offender to notify any segment of the public, but allowed the local law enforcement agency to release registry information as it determines necessary to protect the public.\textsuperscript{55} On March 28, 1995, the House passed the bill by a vote of 132 to 1.\textsuperscript{56}

In early April, the House–Senate Conference Committee met to craft a compromise measure.\textsuperscript{57} The Committee agreed that the offender only would be required to notify the police, and that the police could notify certain community organizations as they determined necessary for public safety.\textsuperscript{58} The Committee further agreed that the new law would apply prospectively,\textsuperscript{59} and would pertain only to child sex offenders.\textsuperscript{60} Delegate Dembrow approved of the final version, saying “I think that this bill is crafted in such a way that it will withstand constitutional scrutiny. I believe that we . . . ultimately came out with a conservative approach that would at least create a statewide registry for child sex offenders.”\textsuperscript{61} On May 9, 1995, the governor signed Senate Bill 79 into law.\textsuperscript{62}

\textit{b. Statutory Provisions.}—Maryland’s new law includes two main requirements, child sex offender registration and limited public notification.\textsuperscript{63} The statute prospectively applies to all offenders who commit offenses after October 1, 1995,\textsuperscript{64} and requires any Maryland resident convicted\textsuperscript{65} as a child sexual offender\textsuperscript{66} to register with the
local law enforcement agency where the offender resides within seven days after his release from the custody of a supervising authority. An offender who is not a Maryland resident must register within seven days after establishing a residence in Maryland or applying for a Maryland driver’s license. The registration consists of a sworn statement by the offender consisting of the offender’s name, address, place of employment, Social Security number, description of the crime for which he was convicted, date and jurisdiction of the crime, list of any aliases the offender used, fingerprints, and a photograph. The offender must register within seven days after changing residences and must register annually with the local law enforcement agency for a period of ten years. A knowing violation of the registration requirement is a misdemeanor and is punishable by a fine of up to $5,000 and imprisonment for up to three years.

The second part of Maryland’s Megan’s law provides for several layers of limited public notification that serve both to facilitate the registration process and to alert those primarily responsible for the safety of children. When the offender is released from the custody of a supervising authority, that authority must notify the local law enforcement agency of the county where the offender resides. The local law enforcement agency must, in turn, notify the Department of Public Safety and Correctional Services, the department tasked with

67. Md. Ann. Code art. 27, § 692B(a)(2)(iv). “Local law enforcement agency” is defined as the law enforcement agency in a county that has been designated by resolution of the county governing body as the primary law enforcement unit in the county. Id.
68. Id. § 692B(a)(4)(i)-(iii). “Release” is defined as any type of release from the custody of a supervising authority to include release on parole, mandatory supervision, work release, and any type of temporary leave other than leave that is granted on an emergency basis. Release does not include escape. Id.
69. Id. § 692B(a)(5)(i)-(vi). “Supervising authority” includes: the Secretary of Public Safety and Correctional Services; the administrator of any local or regional detention center; the court that grants probation before judgment, probation after judgment, or a suspended sentence; the director of the Patuxent Institution; the Secretary of Health and Mental Hygiene; or the court that convicts the sex offender but does not include a term of imprisonment. Id.
70. Id. § 692B(c)(2)(ii). A supervising authority must notify a sexual offender in writing of the requirement to register and must obtain a signed statement from the offender acknowledging receipt of such notice. Id.
71. Id. § 692B(b)(2).
72. Id. § 692B(h).
73. Id. § 692B(k). The original Senate bill proposed that failure to register would constitute a felony and would be punishable by up to 10 years in prison and a fine of not more than $10,000. Md. S.B. 79, §J, 1995 Md. Laws 1820, 1829. Senator Stone stated that the change to misdemeanor and $5,000 was one of the compromises reached by the General Assembly. Telephone Interview with Senator Norman Stone (Sept. 14, 1995).
74. See supra note 69.
maintaining a central registry of all child sexual offenders required to register in Maryland. After being released, the offender must register within seven days, and the local law enforcement agency can initiate criminal action for failure to do so.

Additionally, the offender's supervising authority must notify certain individuals and organizations of the offender's release. The supervising authority must notify any victim of the crime for which the offender was convicted or any witness who testified against the offender if that person sends written notification to the state's attorney requesting that he be notified of the offender's release. The state's attorney may also mandate notification of individuals as he sees fit. Within five days of offender registration, the local law enforcement agency must notify the county superintendent of schools, who must in turn notify the county school principals within five days. Finally, the local law enforcement agency may notify religious, community, or other organizations related to children and youth if the law enforcement agency determines such notice necessary to protect the public interest.

3. Constitutional Challenges Facing Maryland's New Law.—Maryland's new law faces several potential constitutional challenges—that it violates the Eighth Amendment prohibition against cruel and unusual punishment, the offender's right to privacy, and the Fourteenth Amendment right to due process.

a. Eighth Amendment Prohibition on Cruel and Unusual Punishment.—The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The original intent of the Eighth Amendment was to protect Americans from tor-
ture and barbarous punishment.\textsuperscript{84} As the Eighth Amendment has matured, however, the Supreme Court has broadened its coverage to prohibit punishment that involves "unnecessary and wanton infliction of pain"\textsuperscript{85} or "punishment that is grossly disproportionate to the offense."\textsuperscript{86} In determining whether government action violates the Eighth Amendment, a court must ask whether the action constitutes punishment and if so, whether it is cruel and unusual.\textsuperscript{87}

In DeVeau v. Braister,\textsuperscript{88} the Supreme Court stated that in order to determine whether a law is punishment, the court must decide "whether the legislative aim was to punish that individual for past activity."\textsuperscript{89} In United States v. Ward,\textsuperscript{90} however, the Supreme Court noted that even when the legislative purpose is regulatory, the courts must ask "whether the actual effect of the statute is so punitive as to negate the legislature's regulatory intent."\textsuperscript{91}

In order to determine if a legislative act is punitive or regulatory, the Supreme Court laid out factors to be considered in Kennedy v. Mendoza-Martinez.\textsuperscript{92} The factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether historically it has been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.\textsuperscript{93} Using the Kennedy factors,

\begin{itemize}
  \item 85. Id. at 102-03.
  \item 88. 363 U.S. 144 (1960).
  \item 89. Id. at 160 (determining whether the New York Waterfront Commission Act of 1953, which prevented any laborer convicted of a felony from holding office in any waterfront labor organization, was punitive in order to decide if the law was an ex post facto law).
  \item 90. 448 U.S. 246 (1980).
  \item 91. Id. at 248-49.
  \item 92. 372 U.S. 144, 168-69 (1963). Some courts have rejected the Kennedy factors for determining whether a restriction is punitive. Instead, these courts have used a test outlined by the Supreme Court in Trop v. Dulles, 356 U.S. 86 (1958). See, e.g., People v. Adams, 581 N.E.2d 637, 640 (Ill. 1991). In Trop, the Supreme Court looked exclusively to the purpose behind the statute. Trop, 356 U.S. at 96. If the statute imposes a disability for the purpose of punishment, it is punitive, but if the statute imposes a disability for any other legitimate government purpose, it is nonpenal. Id.
  \item 93. Kennedy, 372 U.S. at 168-69 (citations omitted).
\end{itemize}
lower courts have reached differing conclusions regarding whether sexual registration and notification laws are punitive or regulatory.\textsuperscript{94}

Once a court determines a law to be punitive, the next step is to determine whether the restriction imposed by the law is cruel and unusual. The Supreme Court outlined the test for determining whether punishment is cruel and unusual in \textit{Solem v. Helm}.\textsuperscript{95} In \textit{Solem}, the Court considered whether a sentence of life imprisonment without possibility of parole for bouncing a $100 check constituted cruel and unusual punishment.\textsuperscript{96} After noting that the idea of proportionality was implicit in the Eighth Amendment and that the Eighth Amendment proscribes grossly disproportionate punishment,\textsuperscript{97} the Court considered three factors to determine whether the punishment was cruel and unusual: "i) the gravity of the offense and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction, that is whether more serious crimes are subject to the same penalty or to less serious penalties; and iii) the sentences imposed for commission of the same crime in other jurisdictions."\textsuperscript{98}

\(\text{(i) Application to Sex Offender Registration Statutes.}---\text{One of the most recent cases to determine whether a sex offender registration and notification law is punitive is} \textit{Artway v. Attorney General}.\textsuperscript{99} \textit{In Artway}, the United States District Court of New Jersey considered whether New Jersey's Megan's law violates the Constitution's Ex Post Facto Clause and the Eighth Amendment prohibition on cruel and unusual punishment.\textsuperscript{100} Considering all of the \textit{Kennedy} factors to-

\textsuperscript{94} \textit{See}, \textit{e.g.}, \textit{State v. Noble}, 829 P.2d 1217, 1224 (Ariz. 1992) (holding that Arizona’s statute requiring sex offender registration was not punitive); \textit{State v. Ward}, 869 P.2d 1062, 1074 (Wash. 1994) (holding that the Washington statute requiring sex offender registration and limited public notification was not punitive). \textit{But see In re Reed}, 663 P.2d 216, 220 (Cal. 1983) (concluding that California’s registration law was punitive).

\textsuperscript{95} 463 U.S. 277 (1983).

\textsuperscript{96} The individual received such severe punishment because of his six prior felony convictions. \textit{Id.} at 277.

\textsuperscript{97} \textit{Id.} at 278. The Court found a sentence of life imprisonment without possibility of parole significantly disproportionate to respondent’s crime, and therefore prohibited by the Eighth Amendment. \textit{Id.}

\textsuperscript{98} \textit{Id.} at 668. New Jersey's Megan's law requires sex offenders to register with the police and allows the police to release "relevant and necessary information concerning registrants when ... necessary for public protection." \textit{N.J. Stat. Ann.} § 2C:7-1 to -11 (West 1995).


\textsuperscript{100} \textit{Id.} at 668. The Third Circuit affirmed the district court’s judgment insofar as it held that the registrations provisions of New Jersey's law were constitutional. \textit{Artway}, 1996 WL 170671, at *2. Because Artway's challenge to the notification provisions was unripe, the Third Circuit
together, the district court determined that while the registration portion of Megan's law is nonpunitive, the "public notification provisions of Megan's law constitute more a form of punishment than a regulatory scheme."\textsuperscript{101}

Applying the first \textit{Kennedy} factor, the \textit{Artway} court found that Megan's law involved an affirmative disability or restraint.\textsuperscript{102} The court stated that although a convicted sex offender's record might leave the offender subject to periodic investigation or suspicion by the police, public access to judicial proceedings would grant police the same information obtainable through mandatory registration, implying that "registration" alone is not an affirmative disability or restraint.\textsuperscript{103}

However, the court also found that the public notification portion of the law far exceeds public access to criminal records.\textsuperscript{104} "This information, under Megan's Law, is available not just to those who take the time and effort to search out courthouse records, telephone books, or other sources of public information, but to each and every member of a registrant's community, whether they are interested or not."\textsuperscript{105} Citing the Arizona Supreme Court's analysis of Arizona's sex offender registration law in \textit{State v. Noble},\textsuperscript{106} the district court found that the "public dissemination of a registrant's information may well affect his employability, his business associations if he is self-employed . . . , his associations with his neighbors, and thus his ability to return to a normal private law-abiding life in the community."\textsuperscript{107} Accordingly, the court found that the notification portion of Megan's law involved an affirmative disability or restraint.\textsuperscript{108}


\textsuperscript{102.} \textit{Artway}, 876 F. Supp. at 689.

\textsuperscript{103.} \textit{Id.}

\textsuperscript{104.} \textit{Id.}

\textsuperscript{105.} \textit{Id.}


\textsuperscript{107.} \textit{Artway}, 876 F. Supp. at 688-89.

\textsuperscript{108.} \textit{Id.}; \textit{cf.} \textit{In re Reed}, 663 P.2d 216, 218 (Cal. 1983) (holding lifetime registration imposed affirmative disability or restraint, even though the information is restricted to police access, because "the ignominious badge carried by the convicted sex offender can remain for a lifetime").
Analyzing the second through fifth *Kennedy* factors, the court first stressed that notification historically has been regarded as punishment.\(^{109}\) For the second factor, the court found that in light of the long history of "branding," public notification can be historically perceived as punitive.\(^{110}\) For the third factor, the *Artway* court found that Megan's law comes into play only after a finding of scienter because registration and notification were predicated on conviction of a sexual offense that requires scienter.\(^{111}\) For the fourth factor, the court concluded that the registration and notification requirements of Megan's law promote the traditional aims of punishment—namely retribution and deterrence—because the advertised aim of Megan's law is an effort to increase the vigilance of parents in protecting their children and to deter reoffense by sex offenders.\(^{112}\) The court noted that the "stated objective, regardless of how innocuously it has been couched by the Legislature, clearly constitutes a traditional element of punishment: deterrence."\(^{113}\) Finally, for the fifth factor, the court found that the behavior to which sex offender registration and notification laws apply, a convicted sex offense, obviously is already a crime.\(^{114}\)

Applying the sixth and seventh factors, the court concluded that the alternative purpose assignable to registration and notification mandated by Megan's law was to protect the public by increasing community awareness of the risk of having a convicted sex offender with a high proclivity towards reoffense living in its neighborhood.\(^{115}\) The court found, however, that the alternative purpose was so closely aligned with the fourth factor, deterrence, that the alternative purpose was still punitive.\(^{116}\)

Weighing all the *Kennedy* factors, the court found that the registration provision of Megan's law was not punitive.\(^{117}\) However, the court found that the notification provision was punitive, stating that the notification requirement of "Megan's Law is an excessive intrusion into the realm of punishment sufficient to find that its effect, if not its purpose, is punitive."\(^{118}\)

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110. *Id.*
111. *Id.*
112. *Id.* at 690.
113. *Id.* But see State v. Ward, 869 P.2d 1062, 1072-73 (Wash. 1994) (refusing to hold that the secondary deterrent effect outweighed the legislature’s primary intent to "aid law enforcement agencies’ efforts to protect their communities").
115. *Id.*
116. *Id.* at 692.
117. *Id.*
118. *Id.*
The next step is to determine whether sexual offenders registration laws are cruel and unusual. In *In re Reed*,\(^{119}\) the California Supreme Court applied the *Solem* factors to conclude that requiring someone convicted of a sexual misdemeanor to register for life with the police department was cruel and unusual punishment.\(^{120}\) First, the court noted that the petitioner’s offense was not very grave and that his punishment was extremely harsh.\(^{121}\) He was arrested for violation of section 647(a) of the California Penal Code, which criminalized “lewd and dissolute acts, or loitering in or about public toilets in public parks.”\(^{122}\) Second, the court noted that in California, far more heinous crimes do not trigger police registration—for example child pornography, bigamy, bestiality, and prostitution.\(^{123}\) Third, the court noted that at that time, 1983, only five states required convicted sex offenders to register with police departments.\(^ {124}\) Finding all three factors persuasive, the court ruled that the registration statute was cruel and unusual because it imposed excessive punishment on relatively minor crimes.\(^ {125}\) However, the majority conceded that notification is valid as applied to offenses that are more heinous, such as child molestation.\(^ {126}\)

(ii) Application to Maryland’s Law.—Applying the tests above, Maryland’s new law does not impose cruel and unusual punishment. Balancing the *Kennedy* factors,\(^ {127}\) Maryland’s new law likely would be determined punitive. Using the rationale applied by the district court in *Artway*, a court could find that Maryland’s ten-year registration and public notification requirement (1) constitutes an affirmative disability or restraint, (2) historically has been regarded as punishment, (3) comes into play only after conviction of a sexual offense requiring scienter, (4) promotes a traditional aim of punishment—deterrence, (5) applies to behavior that is already a crime, and (6)-(7) has no alternative purpose not closely aligned with deterrence.

\(^{119}\) 663 P.2d 216 (Cal. 1983).
\(^{120}\) Id. at 222.
\(^{121}\) Id. at 221.
\(^{122}\) CAL. PENAL CODE § 647(a) (West 1995).
\(^{123}\) Reed, 663 P.2d at 221-22.
\(^{124}\) Id. at 222. The court may have reached a different conclusion today, when 47 states have adopted sex offender registration laws, many states have some sort of accompanying public notification, and the federal government has adopted the Crimes Against Children Act urging every state to require sex offender registration and limited public notification. See supra note 22 and accompanying text.
\(^{125}\) Reed, 663 P.2d at 221-22.
\(^{126}\) Id. at 224 (Kaus, J., dissenting).
\(^{127}\) See supra text accompanying note 93.
However, application of the three *Solem* factors\(^\text{128}\) suggests that Maryland’s new law is not cruel and unusual. The Supreme Court in *Solem* emphasized that the Eighth Amendment proscribes *grossly* disproportionate punishment considering the gravity of the offense and the harshness of the penalty.\(^\text{129}\) Unlike the offense considered by the California Supreme Court in *In re Reed*,\(^\text{130}\) all offenses that trigger the Maryland notification and registration requirement are felonies that carry a minimum sentence of at least ten years in jail.\(^\text{131}\) Additionally, the harshness of the penalty imposed by Maryland’s Megan’s law is lessened by several factors. While notification of certain individuals may be mandatory in some cases, the provision for notifying community organizations is proportional to the severity of the crime. Law enforcement agencies are not required to notify the public regarding every offense automatically, but may only release information “necessary to protect the public interest”\(^\text{132}\) according to the agency’s established procedures.\(^\text{133}\)

Considering the third *Solem* factor, a reviewing court could determine that Maryland’s statute imposes punishment similar to that in other jurisdictions. Sexual offender registration and notification statutes are commonplace today. Forty-seven states have some form of registration, while many states have some form of notification.\(^\text{134}\)

Recent Fourth Circuit case law indicates that the court would not be receptive to an Eighth Amendment challenge to the law. In *United States v. Polk*,\(^\text{135}\) Polk argued that his sentence of five consecutive five-year terms for mail fraud was cruel and unusual punishment.\(^\text{136}\) The Fourth Circuit rejected Polk’s argument, stating that “*Solem* does not require a proportionality review of any sentence less than life imprisonment without possibility of parole.”\(^\text{137}\) The court cited its previous holding in *United States v. Whitehead*,\(^\text{138}\) where it recognized that “[t]rial courts are vested with broad discretion in sentencing and, if a sentence is within statutory limits, it will not be reversed absent ex-

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\(^\text{128}\) See supra note 98 and accompanying text.


\(^\text{130}\) 663 P.2d 216 (Cal. 1983); see supra notes 119-125 and accompanying text.


\(^\text{133}\) Id.; see also supra notes 80-81 and accompanying text.

\(^\text{134}\) See supra note 22 and accompanying text.

\(^\text{135}\) 905 F.2d 54 (4th Cir. 1990).

\(^\text{136}\) Id. at 55.

\(^\text{137}\) Id. (quoting United States v. Whitehead, 849 F.2d 849, 860 (4th Cir. 1988)).

\(^\text{138}\) 849 F.2d at 849.
traordinary circumstances." Recently, in United States v. Lockhart, when the defendant claimed that his 120-month sentence violated the Eighth Amendment prohibition on cruel and unusual punishment, the Fourth Circuit cited Polk and declined to consider his argument.

b. Invasion of Privacy.—The next constitutional challenge Maryland's new law may face is invasion of privacy. Sex offenders could charge that a requirement to register with the police department and, more importantly, having their registration information publicly released, violates their right to privacy. Although the United States Constitution provides no express guarantee of privacy, in Griswold v. Connecticut, the Supreme Court recognized that there are certain "zones of privacy" that the government cannot invade. In Roe v. Wade, the Supreme Court defined this penumbral right to privacy, stating that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included" in the constitutional guarantee of personal privacy. The Court in Roe listed several areas that deserve protection under this right to privacy: "marriage, procreation, contraception, family relationships, child rearing, and education." Four years later, in Whalen v. Roe, the Supreme Court explained that the right to privacy includes the individual interest in avoiding disclosure of personal matters.

In Walls v. City of Petersburg, the Fourth Circuit discussed disclosure of personal matters. In that case, Walls, a city employee of Petersburg, Virginia, was discharged after she refused to complete a background questionnaire including questions about her previous arrests and personal financial information. Walls alleged that by requiring her to answer the questionnaire, the City of Petersburg violated her right to privacy. The Fourth Circuit stated that in or-

139. Id. at 860.
140. 58 F.3d 86 (4th Cir. 1995).
141. Id. at 89.
142. 381 U.S. 479 (1965) (finding a Connecticut law restricting the use of contraceptives by married couples to be unconstitutional).
143. Id. at 485.
144. 410 U.S. 113 (1973).
145. Id. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
146. Id. at 152-53 (citations omitted).
148. Id. at 599-600.
149. 895 F.2d 188 (4th Cir. 1990).
150. Id. at 190.
151. Id. at 189.
der to determine whether matters of personal information are entitled to privacy protection, courts must first decide whether the individual had a reasonable expectation of confidentiality.152 "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny."153 The court found that because questions regarding Walls's prior arrests were available from public records, she had no expectation of privacy.154 However, the court also found that she did have a reasonable expectation of confidentiality concerning her private financial information and therefore had a constitutional right to privacy over those matters.155

The court did note, however, that the right to privacy is not absolute.156 It must be balanced against the state's interest in disclosing the information.157 The court determined that Walls had considerable responsibility as administrator of the Community Diversion Incentive program.158 The court held that the "strong public interest in avoiding corruption . . . outweighs [the] limited privacy expectations in this financial disclosure requirement,"159 and that consequently, the city had demonstrated a compelling interest in requiring her to disclose the information.160

More recently, in Hodge v. Jones,161 the Fourth Circuit considered whether the state could maintain records and release information pertaining to suspected child abuse after the allegedly abusive parents had been cleared of the charges.162 While recognizing the parents' right to keep certain information private, the court noted that the "maxim of . . . privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest."163 The court held that the "legitimate interest in curtailing the abuse and neglect of its minor citizens" outweighed the "pale shadow briefly cast over the Hodges by the state's actions."164

152. Id. at 192.
153. Id.
154. Id. at 194.
155. Id.
156. Id. at 192.
157. Id.
158. Id. at 194 (citations omitted).
159. Id. (quoting Fraternal Order of Police v. Philadelphia, 812 F.2d 105, 116 (3d Cir. 1987)).
160. Id.
161. 31 F.3d 157 (4th Cir. 1994).
162. Id. at 157-58.
163. Id. at 163-64.
164. Id.
One other consideration in weighing the competing interests of the government and the individual is the possibility of unauthorized disclosure of information entitled to privacy protection. The Fourth Circuit has stated that "[w]hen there are precautions to prevent unwarranted disclosure, an individual's privacy interest is weakened." In Walls, the information obtained through a background investigation was kept in a private filing cabinet to which only a limited number of people had access. The court believed that such precautions were "reasonable and sufficient" to protect Walls's privacy interests, but noted that "if this type of information had been more widely distributed, our conclusions might have been different."

In Doe v. Poritz, the Supreme Court of New Jersey decided that a sexual offender registration and notification statute does not violate an offender's right to privacy. Citing the Fourth Circuit's approach in Walls, the court first determined that a sex offender had no reasonable expectation of privacy concerning the registration statute because "[r]equiring disclosure of plaintiff's prior arrest and conviction . . . does not implicate the right to privacy, as those records are publicly available." The court explained, however, that a sex offender does have a reasonable expectation of privacy concerning the notification statute. Although the disclosed information may have been available to the public prior to police dissemination,

[i]n exposing those various bits of information to the public, the Notification Law links various bits of information—name, appearance, address, and crime—that otherwise might remain unconnected. However public any of those individual pieces of information may be, were it not for the Notification Law, those connections might never be made. . . . [A] privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public. . . . Those convicted of crime may have no cognizable privacy interest in the fact of their conviction, but the Notifi-
cation Law, given the compilation and dissemination of information, nonetheless implicates a privacy interest.\footnote{174}{Id. at 411.}

The New Jersey court next determined that the state's interest justifying public disclosure substantially outweighed the plaintiff's interest in privacy.\footnote{175}{Id.} The court said that "[t]here is an express public policy militating toward disclosure: the danger of recidivism posed by sex offenders. The state interest in protecting the safety of members of the public from sex offenders is clear and compelling."\footnote{176}{Id. at 412.}

The court was, in part, persuaded by the fact that

the degree and scope of disclosure is carefully calibrated to the need for public disclosure: the risk of reoffense. The greater the risk of reoffense, the greater is the scope of disclosure. . . . Only that information necessary to alert the public of, and protect the public from, the risk posed by the offender is released.\footnote{177}{Id.}

Thus, the Supreme Court of New Jersey determined that neither the registration nor notification statutes violated the plaintiff's constitutional right to privacy.\footnote{178}{Id. But see infra notes 192-197 and accompanying text (noting that the court found that the law violated sex offender's Fourteenth Amendment due process rights).}

Maryland's law also should pass constitutional muster if challenged as an invasion of privacy. The logic in Doe v. Poritz,\footnote{179}{662 A.2d at 367.} Hodge v. Jones,\footnote{180}{31 F.3d 157 (4th Cir. 1994).} and Walls v. City of Petersburg\footnote{181}{895 F.2d 188 (4th Cir. 1990).} reveals that although a sex offender has no reasonable expectation of privacy concerning the registration provision, the offender may have a reasonable expectation of privacy concerning Maryland's notification provision. When convicted sex offenders register in Maryland, they must provide their full name, address, and place of employment; a description of the crime for which they were convicted; the date of and jurisdiction in which they were convicted; a list of any aliases used; a photograph; and fingerprints.\footnote{182}{Md. Ann. Code art. 27, § 692B(b)(2) (1995).} While most of the information is available to the diligent public, "a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public."\footnote{183}{Poritz, 662 A.2d at 411.}
Even though the sex offender may have a reasonable expectation of privacy regarding Maryland’s public notification provision, the state’s compelling interest outweighs the offender’s privacy concerns. The high rate of recidivism\(^{184}\) and the high number of victims\(^{185}\) assignable to sex offenders pose a great risk of reoffense to the community. The General Assembly’s interest in protecting the public and in preventing reoffense outweighs the inconvenience and loss of privacy borne by the convicted sex offender.

c. Fourteenth Amendment Guarantee of Due Process.—The final potential constitutional challenge facing Maryland’s registration and notification law is whether it violates the offender’s right to due process. The United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”\(^{186}\) In 1976, the Supreme Court decided *Paul v. Davis*,\(^{187}\) in which Davis claimed that the chief of police of Louisville, Kentucky, violated Davis’s right to due process\(^{188}\) by circulating a flier to the businessmen of Louisville containing Davis’s name and picture and identifying him as an active shoplifter.\(^{189}\) Davis claimed that the flier deprived him of his “liberty” because he could not enter the local stores without fear of being suspected of shoplifting.\(^{190}\) The Supreme Court denied Davis’s claim, stating that “reputation alone, apart from some more tangible interests such as employment, is [neither] ‘liberty’ [nor] ‘property’” and by itself, is not “sufficient to invoke the procedural protection of the Due Process Clause.”\(^{191}\)

In *Doe v. Poritz*,\(^{192}\) the Supreme Court of New Jersey concluded that New Jersey’s Megan’s law violated a sex offender’s Fourteenth Amendment right to due process.\(^{193}\) Recognizing that *Paul v. Davis*\(^{194}\) held that mere damage to reputation alone is not actionable under the Due Process Clause, the court stated that the proper test is therefore “whether plaintiff has established damage to reputation and im-

\(^{184}\) See supra notes 27-32 and accompanying text.

\(^{185}\) One study estimates that the “average adolescent sex offender may commit 380 sex crimes over his lifetime.” *Burgess et al.*, supra note 26, at 418.

\(^{186}\) U.S. CONST. amend. XIV, § 1.


\(^{188}\) Id. at 696-97.

\(^{189}\) Id. at 695.

\(^{190}\) Id. at 697.

\(^{191}\) Id. at 701.

\(^{192}\) 662 A.2d 367 (N.J. 1995); see supra notes 170-178 and accompanying text.

\(^{193}\) *Poritz*, 662 A.2d at 420-21.

\(^{194}\) 424 U.S. 693 (1976).
The court said that the "additional interest" that was impaired was the offender's right to privacy. Therefore, the court concluded that the "harm to plaintiff's reputation, when coupled with the incursion on his right of privacy, although justified by the compelling state interest, constitutes a protectable interest" and therefore entitles the plaintiff to a right of due process that was violated by the law.

In *Hodge v. Jones*, the Fourth Circuit reached the opposite holding. The Hodges claimed that the Carroll County Department of Social Services violated their right to due process by maintaining records of alleged child abuse after the Hodges had been cleared of all charges. After clarifying that *Paul v. Davis* requires "loss of a tangible interest" in order to evoke the due process guarantee, the Fourth Circuit stated that the Hodges "neither alleged nor demonstrated any alteration of legal status or injury resulting from any purported defamation that would warrant a finding of a deprivation of a liberty interest otherwise shielded by the substantive and procedural guaranties of the Fourteenth Amendment."

If challenged, Maryland's new law should not be found to violate the Fourteenth Amendment's guarantee of due process. Unlike New Jersey's law, Maryland's new law allows only limited public notification of the victim, witnesses, and certain community organizations. Even if the sex offender's reputation is injured, this injury is neither loss of property nor liberty as defined by *Paul v. Davis* and *Hodge v. Jones*, and thus does not evoke the Fourteenth Amendment's right to due process.

4. Analysis.—In adopting Maryland's Megan's law, the General Assembly appears to have benefited from constitutional challenges facing similar statutes in other jurisdictions and adopted a statute that will avoid these challenges. However, Maryland's new law does not comply with the federal guidelines issued in the Crimes Against Chil-

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196. Id.; see supra text accompanying notes 173-174.
197. *Poritz*, 662 A.2d at 419.
198. 31 F.3d 157, 164 (4th Cir 1994); see supra notes 161-164 and accompanying text.
200. Id. at 165 (quoting *Paul v. Davis*, 424 U.S. 693, 708-09 (1976)).
201. Id. The opinion suggests that if the defamation was great enough to cause alteration of legal status or personal injury (perhaps satisfied by loss of property or employment), the court would find that reputational injury would violate due process. Id.
202. See supra text accompanying notes 78-81.
203. See supra notes 191, 200-201 and accompanying text.
204. See supra text accompanying note 61.
dren Act.\footnote{205} In order to avoid losing approximately $800,000 in funding,\footnote{206} Maryland must make several changes to the new law. The legislature must require that all sexual offenders register for a period of ten years and further require that sexually violent predators register for life.\footnote{207} Maryland’s law requires only child sex offenders to register.\footnote{208} In order to comply with the Crimes Against Children Act, the General Assembly should amend Maryland’s new law by adopting sections (A) (8) and (9), and sections (H) and (I) of House Bill 230, as originally amended.\footnote{209}

Section (I), as originally amended, of House Bill 230 required all sex offenders to register for a minimum of ten years.\footnote{210} The bill also provided that if a sex offender is convicted of a sexually violent offense, the court must determine whether the offender is a sexually violent predator.\footnote{211} Any offender designated as a sexually violent predator would be required to register for life.\footnote{212}

Amending Maryland’s new law will not subject it to greater constitutional challenge. The heightened registration requirement will withstand allegations that it constitutes cruel and unusual punishment, invades the privacy of the sexually violent predator, or violates his guarantee of due process.

Requiring a sexually violent predator to register for life will defeat a challenge that it constitutes cruel and unusual punishment. Punishment is only deemed cruel and unusual if it is grossly disproportionate to the offense.\footnote{213} By designating an offender as a predator, the court is concluding that he was not only convicted of a violent

\footnote{205. 42 U.S.C.A. § 14071 (West 1995); see supra notes 44-47 and accompanying text.}
\footnote{206. See supra note 47.}
\footnote{207. See supra notes 45-46 and accompanying text. Maryland must also ensure that its law complies with the notification requirements of the recently enacted federal Megan’s law. See supra note 45.}
\footnote{208. See supra text accompanying note 60.}
\footnote{209. Md. H.B. 230, 1995 Md. Laws 4071, 4074, 4077-78. Section (A) (8) defined “sexually violent offense” as first or second degree rape, first or second degree sexual offense, or assault with intent to commit the same against child or adult victim. Id. at 4074. Maryland’s new law only applies to offenses “involving an individual under the age of 15 years.” Act of May 9, 1995, ch. 142, 1995 Md. Laws 1820, 1822 (codified as amended at Md. ANN. CODE art. 27, § 692B (1995)). Md. H.B. 230, 1995 Md. Laws 4071, 4074, § (A) (9) separately defined a “sexually violent predator” as a sex offender who “suffers from a mental abnormality or personality disorder that makes the offender likely to commit a sexually violent offense.” Id. Md. H.B. 230, §§ (H)-(I) required lifetime registration for sexually violent predators. Id. at 4077-78.}
\footnote{211. Id. at 4077; see also supra note 46 (discussing how the court determines if the offender is a sexually violent predator).}
\footnote{212. Md. H.B. 230, 1995 Md. Laws 4071, 4078.}
\footnote{213. Solem v. Helm, 463 U.S. 277, 288 (1983).}
sexual offense, but that he is likely to reoffend. As the Supreme Court noted in *Solem v. Helm*, the legislature is granted substantial deference in determining appropriate punishments and “outside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.”

Lifetime registration for sexual predators equally will withstand a challenge that it invades the predator’s privacy. The Crimes Against Children Act requires that predators register until the court finds the offender is no longer a predator. The Act recognizes that the more dangerous sexual offenders remain a threat to the public longer than ten years. According to the Forum on Corrections Research, although the greatest risk period appears to be the first five to ten years following release “almost one quarter of the recidivists were reconvicted more than 10 years after being released.” The state’s compelling interest in protecting the public from the danger posed by a predator outweighs the invasion of the sexually violent predator’s privacy.

Finally, the heightened registration requirement does not violate predators’ due process rights. Lifetime registration does not deny the predator of any “liberty” or “property” necessary to evoke the due process clause. However, even if lifetime registration is found to evoke due process concerns, House Bill 230 satisfies the requirements of due process. The bill requires that the court designate an offender as a predator. The bill further provides the predator with a chance to petition the court to reevaluate his designation and to introduce evidence during his hearing. Thus, requiring predators to register for life does not make Maryland’s new law more vulnerable to constitutional challenge.

5. Conclusion.—Maryland’s Child Sexual Offender Registration and Notification law was adopted in order to comply with the Crimes Against Children Act and to provide greater protection for the public from the unique danger posed by sexual offenders. In its current form, the new law does not comply with the Crimes Against Children Act and only protects the public from child sexual offenders. When...

215. 463 U.S. 277 (1983); see supra notes 95-98 and accompanying text.
218. 5 FORUM ON CORRECTIONS RESEARCH, WHEN ARE SEX OFFENDERS AT RISK FOR REOFFENDING? 9 (1995).
219. See supra notes 186-203 and accompanying text.
221. Id. at 4078.
the General Assembly amends the new law to affect all sexual offenders and to require sexually violent predators to register for life, the General Assembly will fully meet its original goal.

GREGORY G. GILLETTE
II. OCCUPATIONAL HEALTH LAW

A. Reining in the Occupational Health Regulators: The Ban on Smoking in the Workplace

Following an arduous battle between the governor and state legislators, and their subsequent concessionary efforts, the 1995 General Assembly enacted House Bill 1368, the "Smoking in the Workplace Act," which was expressly designed to curtail the Division of Labor and Industry's (the Division) pervasive workplace smoking regulations. The Act amended the statutes granting authority to the Secretary of the Department of Labor, Licensing, and Regulation (Secretary) and the Commissioner of the Division of Labor and Industry (Commissioner) to adopt regulations to carry out their duties, which include removing health hazards from the workplace. The 1995 amendments preclude the Secretary and Commissioner from regulating the smoking of tobacco products in certain locations, most notably bars, restaurants, and hotel sleeping rooms. Following a brief summary of the impact of tobacco smoke on health, this Note will review the complex history of this legislation, discuss the smoking ban's procedural distinctiveness compared with efforts by other states as well as its substantive effectiveness, and raise questions unanswered by the new law.

1. Public Health Background.—For several decades, the medical and scientific communities have stressed the adverse health effects of tobacco smoke. Epidemiological studies dating back to the 1930s have examined the relationship between smoking and lung cancer.

2. The Division is a unit within the Department of Labor, Licensing, and Regulation.
4. At the time of the bill's enactment, the agency was known as the Department of Licensing and Regulation.
7. See infra notes 94-101 and accompanying text.
The magnitude of research increased throughout the 1950s, and investigations have continued since then at an untiring pace.\(^9\) The federal government periodically has reported exhaustive research summaries and new scientific findings. The United States surgeon general released the first Public Health Service report on smoking and health in 1964.\(^10\) This report confirmed the link between cigarette smoking and lung cancer.\(^11\) In a 1971 report, the surgeon general described the association between smoking and heart disease.\(^12\) In a 1986 report, the surgeon general concluded that environmental tobacco smoke (ETS)\(^13\) is causally related to disease, including lung cancer, in healthy nonsmokers.\(^14\) In 1991, the Public Health Service's National Institute for Occupational Safety and Health reported the dangers of ETS in the workplace\(^15\) and recommended that employers ban workplace smoking.\(^16\) In 1992, the Environmental Protection Agency classified ETS as a Group A (known human) carcinogen.\(^17\)

Maryland citizens have not escaped the consequences of smoking tobacco or inhaling ETS.\(^18\) According to the latest American Cancer Society report, Maryland has the fourth highest cancer mortality rate

\(^9\) See id. at 5-10.
\(^11\) Id. at 31.
\(^14\) Centers for Disease Control, supra note 13, at 7. Epidemiological studies have also linked ETS with an increased risk of death from heart disease. Stanton A. Glantz & William W. Parmley, Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry, 85 Circulation 1, 10 (1991).
\(^16\) Id. at 12-13.
\(^17\) Office of Health & Env'tl Assessment, supra note 13, § 1.4.
\(^18\) In 1993, the total smoking-related direct care cost, indirect mortality cost, and indirect morbidity cost was estimated at $1.5 billion. Norma F. Kanarek et al., Md. Dep't of Health & Mental Hygiene, Changes in the Prevalence and Costs of Cigarette Smoking and Smoking-Attributable Deaths, Maryland 1987-93, 44 Md. Med. J. 823, 826-27 (1995).
in the United States. Lung cancer accounts for the largest proportion of the state’s cancer mortality, and eighty percent of the state’s lung cancer deaths are primarily attributable to smoking. Furthermore, cardiovascular disease (CVD) is the most prevalent cause of death in Maryland, and sixteen percent of the state’s CVD deaths are primarily attributable to smoking. In 1993, at least a thousand deaths in Maryland resulted from exposure to ETS. In that same year, the State’s Cancer Council recommended that Maryland, through its occupational safety and health act, regulate cigarette smoking in the workplace.

2. Legal Context.—To date, neither Congress nor the United States Department of Labor’s Occupational Safety and Health Administration (OSHA) has regulated smoking in the workplace. Although local smoking restrictions exist in many Maryland counties, prior to the current statutes and regulations, the State of Maryland did not have a broad-based workplace smoking standard.

19. American Cancer Society, Cancer Facts and Figures—1995, at 8 (1995) (reporting combined data for the years 1987 through 1991). In 1991 Maryland had the highest cancer mortality in the nation. Maryland Cancer Consortium & MD. Dep’t of Health & Mental Hygiene, Maryland Cancer Control Plan 3 (Jan. 1991) (reporting data from 1940 to 1987). This change in rank has been ascribed to an increase of lung cancer cases in other states, rather than to a decrease of cases in Maryland. Kanarek et al., supra note 18, at 823 (citations omitted).


23. SAMMEC, supra note 21; Division of Health Stat., supra note 20, at 23 (providing data for SAMMEC calculation).


Several smoking-related bills were introduced during the 1994 session of the General Assembly.\textsuperscript{29} House Bill 1044 would have allowed smoking to be regulated as a hazard in the workplace, but it was later withdrawn.\textsuperscript{30} The standing committees never reported on House Bill 143, the Clean Indoor Air Act, and reported unfavorably on House Bill 120, the Smoking in Public Places Act.\textsuperscript{31} Finally, Maryland has no appellate precedent in which an employee has sued an employer for failure to provide a smoke-free workplace.\textsuperscript{32}

\textit{a. The Regulations.}—On November 1, 1993, in response to safety concerns,\textsuperscript{33} Maryland's high cancer mortality rate, and the hazards of ETS, then Secretary of the Department of Licensing and Regulation (Department), William A. Fogle, Jr., requested that the Maryland Occupational Safety and Health (MOSH) Advisory Board (Board) consider the issue of regulating smoking in the workplace.\textsuperscript{34} The Board held two public hearings in December 1993\textsuperscript{35} and deliber-
ated during three meetings in early 1994. The Board submitted its report to the Commissioner of the Division of Labor and Industry (Division), recommending that smoking be prohibited in enclosed workplaces with exceptions for the “hospitality industry.” The exceptions were a result of the Board’s concern about a smoking prohibition’s economic impact on businesses in this industry.

The Commissioner disagreed with the Board’s concerns and drafted regulations similar to the Board’s proposal, but without ex-

federal and state health officials, scientists, physicians, employers, employees, Action on Smoking and Health (a health advocacy group), the Tobacco Institute (a tobacco company trade association), and Phillip Morris Companies, Inc. Id. The Board received volumes of supporting documents. Id.

The Board quickly concluded that ETS is detrimental and warrants regulation. Id. at 32-33 (citing Md. Code Ann., Lab. & Empl. § 5-308 (1991), which requires that the condition be regarded as detrimental to safety and health in order to be regulated). The Board stated that “the appropriate and legally permissible approach is to prohibit smoking in indoor workplaces, with certain workplaces excluded.” Id. at 52. In reaching this conclusion, the Board referred to the “reasonably necessary” guidelines and feasibility stipulations in Md. Code Ann., Lab. & Empl. §§ 5-101(e), 5-309(c) (1991 & Supp. 1995). See Board Report at 44-45 (footnote omitted). The Board explained that, “[w]ith respect to feasibility, because tobacco smoke has an indispensable role in virtually no production process or in the delivery of few services and because a smoking prohibition is not costly, in the case of most industries there is no question that the regulation is feasible.” Id.

The Board drafted proposed regulations that required employers to prohibit smoking in enclosed workplaces except within a designated smoking area. Record, supra note 34, at 58-60. Employers may permit smoking in a smoking area that must be a separately enclosed room with ventilation that exhausts directly to the outdoors. Id. These regulations exempted bars, restaurants, hotel sleeping rooms, and convention or conference establishments while in use for a private function. Id. The regulations also exempted tobacconist establishments that engage in the sale of tobacco, vehicles used during the course of employment when occupied by only one person, and analytical laboratories if smoking is a necessary part of their research to determine the health effects of tobacco smoke. Id.

The Board stated that “applying a smoking prohibition to the hospitality industry could affect patron behavior and hence may have an economic impact on the industry.” Board Report, supra note 37, at 54. The Board cautioned that because employees in this industry face great risks from ETS, further investigation into the economic feasibility of extending the prohibition is warranted. Id. at 55-56.

The Commissioner stated that once a substance is deemed a hazard to employees, “it must be regulated in a manner ensuring that no employee . . . suffers material impairment of health or functional capacity . . . . An industry may be excluded on grounds of economic infeasibility only if the cost of compliance would threaten the economic viability of the industry.” Letter from Henry Koellein, Commissioner, Division of Labor and Industry, to Howard Marshall, Chairman, Maryland Occupational Safety and Health Advisory Board (Mar. 7, 1994), in Record, supra note 34, at 61-62 (referring to “economic feasibility” as interpreted in American Iron & Steel Inst. v. Occupational Safety & Health Admin., 577 F.2d 825, 835 (3d Cir. 1978)). The Commissioner concluded that any economic impact on restaurants, bars, and other establishments would not materially threaten the industry. Id.
cepting the hospitality industry. The Commissioner held a public hearing on the proposed regulations. Based on all of the testimony and documents submitted, the Commissioner determined that there was sufficient workplace risk to warrant regulation, and that the appropriate scope of the regulations was to prohibit indoor smoking unless an employer constructed a specially ventilated smoking area. The Commissioner also concluded that it was economically feasible for restaurants and bars to comply with the regulations. The Commissioner published notice of final action on Code of Maryland Administrative Regulations (COMAR) 09.12.23: Prohibition on Smoking in an Enclosed Workplace, effective August 1, 1994.

b. The Cases.—On July 22, 1994, the same day the regulations were published, plaintiffs consisting mainly of Maryland restaur-

While the Commissioner's efforts were in progress, the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (AELR) conducted its own review of the proposed regulations, pursuant to Md. Code Ann., State Gov't § 10-110 (1993). As part of this review, the General Assembly's Department of Fiscal Services prepared a fiscal impact statement. Fiscal Services took issue with the statement that most small businesses should have no problem meeting the requirements of the regulation. Department of Fiscal Servs., Md. General Assembly, Control No. 0074, Proposed Regulation (AELR Review)—Fiscal Analysis (Mar. 11, 1994) (on file with Department of Legislative Reference, Annapolis, Md.) (referring to a statement made in the Commissioner's notice of proposed action to be published in the Maryland Register on April 15, 1994, see infra note 40). Fiscal Services stated that small businesses will not be able to afford the great expense of building a separately ventilated smoking area, and they will be forced to ban smoking. Id.

The AELR Committee counsel's analysis of the validity of the regulations raised issues concerning the extent of the Division's statutory authority and the regulations' consistency with legislative intent. Counsel for the Joint Committee, supra note 29, at 1-2. Pursuant to its authority, the AELR Committee may suggest changes to a proposed regulation, but has sole veto power only when the regulation is an emergency measure. Compare Md. Code Ann., State Gov't § 10-111(b) (1993 & Supp. 1994) with Md. Code Ann., State Gov't § 10-111.1 (1993) (granting the governor ultimate decision-making power over a non-emergency measure).

40. The proposed regulations were published in the Maryland Register. Prohibition on Smoking in an Enclosed Workplace, Notice of Proposed Action, 21 Md. Reg. 682, 682-83 (Apr. 15, 1994).

41. Decision of Commissioner, supra note 35, at 1336. Approximately 47 witnesses provided testimony, including physicians and scientists appearing at the request of Phillip Morris Co., the Tobacco Institute, or the Commissioner; representatives from the American Industrial Hygiene Association, the American Cancer Society, Action on Smoking and Health, and the Coalition for Smoke Free Maryland Workplaces; restaurant and bar owners; employers involved in the tobacco industry; and representatives from the Restaurant Association of Maryland and the Maryland State Licensed Beverage Association. Id. at 1336-37, 1349-50.

42. Id. at 1344-48.

43. Id. at 1348-49.

44. Id. at 1349-51.

rant, bar, and hotel owners; trade associations; and cigarette manufacturers initiated an action in the Circuit Court for Talbot County requesting injunctive and declaratory relief. On July 27, the circuit court granted a ten-day ex parte injunction to stay the implementation of COMAR 09.12.23. The circuit court renewed this ex parte injunction, and, applying the test outlined in Department of Transportation v. Armacost, granted the plaintiffs' motion for an interlocutory injunction. The State appealed, and the Court of Appeals granted certiorari prior to adjudication by the Court of Special Appeals. On February 24, 1995, the Court of Appeals held that the circuit court abused its discretion in granting the interlocutory injunction, vacated the injunction and remanded the case for further proceedings.

46. Record, supra note 34, at 91-118 (citing Complaint, H & G Restaurant, Inc. v. Fogle (Cir. Ct. Talbot Co. 1994) (No. CG 2460), vacated 337 Md. 441, 654 A.2d 449 (1995)).

A health advocacy group, Action on Smoking and Health (ASH), filed suit in Baltimore City before the plaintiffs in H & G Restaurant filed their suit in Talbot County. Petition of Action on Smoking and Health (ASH) (Cir. Ct. Balt. City 1994) (No. 94-194013). ASH's suit requested the court to determine the legality of the regulation. Id. Both sides accused each other of forum-shopping. Tom Stuckey, Fight Over Smoking Ban Heats Up, DAILY RECORD, July 26, 1994, at 9. In H & G Restaurant, the State moved to transfer the plaintiffs' action to Baltimore City Circuit Court to be consolidated with Petition of ASH, but later withdrew its motion. Transcript at 91-92, H & G Restaurant, Inc. (No. CG 2460) (July 27, 1994).

ASH moved for an emergency stay of one of the new regulations that authorized the establishment of designated smoking areas within enclosed workplaces. Emergency Motion for Stay of Regulation 09.12.23, Petition of ASH (July 22, 1994) (No. 94-194013). The court denied ASH's motion, noting its decision was not inconsistent with the Talbot County Circuit Court's decision to grant an ex parte injunction. Order, Petition of ASH, No. 94-194013 (July 28, 1994); see infra text accompanying note 47. The court explained that ASH's challenge was limited to one regulation whereas H & G Restaurant's challenge encompassed the series of five smoking regulations, and each suit involved different classes of petitioners having different interests. Order, Petition of ASH, No. 94-194013 (July 28, 1994). The stay granted by the Talbot County Circuit Court was controlling.


49. 299 Md. 392, 404-05, 474 A.2d 191, 197 (1984); see infra note 50.

50. Order, H & G Restaurant, Inc., No. CG 2460 (Aug. 12, 1994), available in Record, supra note 34, at 311. Under the Armacost test, the court examined the likelihood of plaintiffs' success on the merits, the balance between injury to the defendants by granting the injunction and injury resulting from its refusal, whether the plaintiffs would suffer irreparable harm if the injunction were not granted, and the public interest. Record, supra note 34, at 907-08 (citing Transcript at 909-15, H & G Restaurant, Inc., No. CG 2460 (Aug. 12, 1994)). The court held that all four factors favored granting the plaintiffs' motion for interlocutory injunction, including the likelihood of success on the merits because the plaintiffs had raised questions as to the validity of the regulations and the adequacy of the Commissioner's feasibility and economic impact analyses. Id. at 308.


52. Fogle v. H & G Restaurant, Inc., 337 Md. 441, 469-70, 654 A.2d 449, 463 (1995). On remand to determine the merits of the case, the Circuit Court for Talbot County found
The appellees (plaintiffs) maintained that the Commissioner exceeded his authority to promulgate the occupational safety and health standard by failing to comply with the substantive and procedural requirements for the adoption of such regulations and by appropriating power belonging to the legislature. The appellees further contended that the Commissioner issued regulations that violated the United States Constitution and the Maryland Declaration of Rights. To avoid substituting its judgment for that of the agency's, the court limited its review to the question of whether the Division, in promulgating regulations under Title 5 (Occupational Safety and Health), performed within the scope of its quasi-legislative duty, as delegated by the General Assembly. The court concluded that the appellees had "little likelihood" of success in challenging the Commissioner's actions, and should not have been granted an interlocutory injunction.

The court found that there was ample scientific evidence for the Commissioner to have concluded that "ETS constitutes a 'significant risk' to the health of Maryland employees." The court also found that there was sufficient evidence to support the Commissioner's decision that a complete prohibition against smoking in enclosed workplaces, with allowance for a separately ventilated smoking area, was an appropriate method of handling the ETS health risk. Furthermore, as statutorily required, the Commissioner had conducted an adequate assessment of the economic impact and feasibility of the proposed regulations and provided for a meaningful opportunity for public comment. The court held that the General Assembly had not legis-

that "[e]xcept as preempted by the enactment of HB 1368, the ETS Regulation, COMAR .09.12.23, is valid and enforceable." Opinion and Order at 20, H & G Restaurant, Inc., No. CG 2460 (Apr. 3, 1995).

54. Id. at 465-69, 654 A.2d at 461-63; see infra notes 63-65 and accompanying text.
55. H & G Restaurant, 337 Md. at 454, 654 A.2d at 455 (quoting Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 224, 334 A.2d 514, 523 (1975)).

A regulation adopted by the Commissioner under Title 5 is deemed prima facie lawful and reasonable. Id. at 452-53, 654 A.2d at 455 (citing the presumption defined by Md. CODE ANN., LAB. & EMP'L § 5-215(c)(3) (1991)). Courts generally defer to the promulgating agency because of its sphere of expertise. Id. at 455, 654 A.2d at 456 (citing Givner v. Commissioner of Health, 207 Md. 184, 192, 113 A.2d 899, 903 (1954)).

56. Id. at 457, 654 A.2d at 457.
57. Id. at 459, 654 A.2d at 458.
58. Id.
59. Id. at 461-62, 654 A.2d at 459.
60. Id. at 462-63, 654 A.2d at 459-60.
lated smoking in an inclusive way, and thus there was no implied pre-
emption of the regulation of smoking in the workplace.61

The court easily disposed of the appellees' remaining claims: vio-
lolation of the products clause of the MOSH Act,62 violation of due pro-
cess,63 violation of the right to privacy,64 and violation of the First
Amendment.65 Because there was virtually no likelihood of success
based on any of the claims, the court did not examine the other
Armacost factors.66 The regulations were slated to take effect on
March 27, 1995.67

3. Political and Legislative History.—Amidst fears of economic
repercussions in the hospitality industry and charges of "bureaucratic
overreach,"68 Maryland legislators introduced virtually identical emer-
gency bills into the House of Delegates and the Senate, on March 2
and March 6, respectively.69 The purpose of the bills was to prohibit

61. Id. at 464, 654 A.2d at 460.
62. Id. at 464-65, 654 A.2d at 460. The appellees argued that the regulations unduly
burdened interstate commerce in violation of MOSH's products clause. Id. at 464, 654
A.2d at 460. The products clause refers, in pertinent part, to a situation where the stan-
dard set by local regulation needs to be different from an existing federal standard. Md.
CODE ANN., LAB. & EMPL. § 5-309(a)(2) (1991 & Supp. 1995). Because the federal govern-
ment has not yet adopted a workplace ETS standard, the court stated that the products
clause was inapplicable. H & G Restaurant, 337 Md. at 465, 654 A.2d at 461.
63. H & G Restaurant, 337 Md. at 465-67, 654 A.2d at 461-62. The appellees argued
that because the Commissioner did not submit the regulations to OSHA for approval,
there was no opportunity for public comment, and they were deprived of their due process
right to be heard by OSHA. Id. at 465-66, 654 A.2d at 461-62. The court stated that the
Commissioner did not need OSHA approval, and therefore the appellees were not de-
prived of due process. Id. at 466, 654 A.2d at 461. The appellees also asserted that the
regulations were unconstitutionally vague in scope and application, but the court found
that the regulations' wording was reasonable and understandable. Id. at 466-67, 654 A.2d
at 461-62.
64. Id. at 467-68, 654 A.2d at 462-63. In response to the appellees' argument that the
regulations could prohibit smoking in private homes, the court stated that this was simply a
misinterpretation of the scope of the regulations. Id. at 468, 654 A.2d at 463.
65. Id. at 469, 654 A.2d at 463. The appellees argued that requiring the posting of “no
smoking” signs in enclosed workplaces is a violation of freedom of speech. Id. The court
responded that “[t]he sign posting requirement was clearly designed to protect the health
and safety of workers and cannot be construed as an attempt to compel employers to use
their private property as a billboard for the State's ideological message.” Id.
66. Id. at 457, 654 A.2d at 457; see supra note 50.
67. H & G Restaurant, 337 Md. at 470, 654 A.2d at 463.
68. Barry Rascovar, Victory Cigars for All!, BALT. SUN, Apr. 2, 1995, at F3; see also
John Roll, Governor's Decision to Ban Workplace Smoking Draws Both Support, Criticism,
DAILY REC-
ord, Mar. 3, 1995, at 12 ("'I think the regulations are Orwellian in nature,' said Senate
President Thomas V. Mike Miller (D-Prince George's County). 'It's Big Brotherism at its
worst. It's a classic example of government going too far.'").
69. These proposed bills would amend Business Regulation, section 2-105 and Labor
and Employment, sections 2-106 and 5-314. House Bill 1368 was introduced by Delegate
the Department's Secretary and the Division's Commissioner from restricting smoking under certain circumstances, as well as to authorize the Secretary and Commissioner to adopt regulations under certain limited conditions.\textsuperscript{70} House Bill 1368 and Senate Bill 860 were to apply retroactively, and thus would affect any regulations already proposed or adopted, including COMAR 09.12.23.\textsuperscript{71}

On March 2, Governor Parris N. Glendening announced his decision to support the Division's workplace smoking ban.\textsuperscript{72} The governor emphasized that he would veto any effort to exempt establishments other than small taverns.\textsuperscript{73} The legislators intended to override a veto by the governor, and demonstrated their ability to do so with the large number of cosponsors on each bill.\textsuperscript{74} A period of vigorous compromise efforts began between the legislators and the governor while the bills moved through the legislative process.\textsuperscript{75}

Both bills emerged from their respective standing committees\textsuperscript{76} and second and third readings with nearly identical amend-
Both passed their respective chambers by a wide margin. Senate Bill 860 was introduced in the House on March 15, and passed with minor amendments. House Bill 1368 was introduced into the Senate on March 17. At this point, the bills’ paths diverged.

The Senate concurred with the House amendments to Senate Bill 860, and the bill was enrolled on March 20. On March 27, the effective date of the regulations, the governor vetoed Senate Bill 860. On this juncture, both bills enumerated the areas in which the Secretary and Commissioner could not restrict smoking: in a private residence that is not open to the public for business purposes; in the area where alcohol is consumed in an establishment (excluding restaurants and hotels as defined by Md. Ann. Code art. 2B, § 1-102 (1994) that possess an alcoholic beverages license; in the area where alcohol is consumed in a hotel or motel bar; and in the area where alcohol is consumed in a club that possesses an alcoholic beverages license. Md. H.B. 1368 § 1, 1995 Sess. (third reader); Md. S.B. 860 § 1, 1995 Sess. (third reader). Between the first and third readers, the main differences in the proposed exemptions were the addition of “clubs,” the addition, for clarity’s sake, of “private homes,” and greater specificity of smoking-permitted areas in each of the enumerated businesses. Cf supra note 70.

The Secretary and Commissioner were permitted to adopt regulations to prohibit smoking in areas of a restaurant that possesses an alcoholic beverages license and a hotel or motel subject to the following restrictions: that between 50% and 60% of the area of the restaurant or of the hotel or motel rooms be subject to the smoking prohibition and that structural or atmospheric conditions do not have to be modified. Md. H.B. 1368 § 1; Md. S.B. 860 § 1. Compared with the first reader, the third reader allowed the Secretary and Commissioner to prohibit smoking over a slightly larger area in certain establishments. See supra note 70. Furthermore, these provisions did not prevent the owner of any establishment from restricting smoking to a greater extent. Md. H.B. 1368 § 1; Md. S.B. 860 § 1. The Secretary and Commissioner were also allowed, pursuant to the same criteria for restaurants, to restrict smoking in fraternal, religious, patriotic, or charitable organizations; fire companies; or rescue squads, if these entities were subject to their authority, during an event open to the public on the entity’s property. Id. On third reading, the Senate Bill passed by a margin of 34 to 12. Voting Record, Md. S.B. 860 (Mar. 15, 1995). The House Bill passed by a vote of 99 to 38. Voting Record, Md. H.B. 1368 (Mar. 16, 1995).

Voting Record, Md. S.B. 860 (Mar. 18, 1995).


Letter from Parris N. Glendening, Governor, State of Maryland, to Thomas V. "Mike" Miller, President, Maryland Senate (Mar. 27, 1995) in Advance Sheets VI, 1995 Md. Laws 3641. In his veto letter, the governor discussed his views on the technical and legal problems with Senate Bill 860. Id. (relying on analyses provided by the attorney general (published in 22 Md. Reg. 692 (1995))). The retroactivity clause in the bill might be construed to displace not only COMAR 09.12.23 in its entirety, but other smoking-related regulations (for example, regulations that prohibit smoking where workers are exposed to asbestos). Id. The governor expressed his concern over the language of the bill that permitted the Commissioner to adopt additional regulations. Id. Permissible regulations necessarily would be delayed until the process of promulgating these additional regulations was complete, and thus they could not take effect simultaneously with the statutory exemptions. Id. Finally, the governor was concerned that the bill did not expressly prevent preemption of more restrictive local ordinances, and did not require smoking areas to be separately enclosed. Id.
this same day, major amendments to House Bill 1368 were offered on third reading by the Finance Committee, adopted by the Senate, accepted by the House, and approved by the governor.\textsuperscript{88}

Several factors culminated in the ability to reach agreement by "the deadline." The governor wanted a strong smoking prohibition.\textsuperscript{84} The governor was also motivated to strive for a compromise bill rather than rely on his veto power, which he knew would result in a humbling override.\textsuperscript{85} While many legislators were concerned with the economic impact on certain businesses, there were moderates in the legislature who were willing to negotiate.\textsuperscript{86}

The governor and the legislators arrived at a successful compromise facilitated in part by health advocates whose strategy was to secure as much protection as possible for those employees who were most at risk from ETS.\textsuperscript{87} The time had come, albeit abruptly, for a ban on smoking in most places of employment. A smoking prohibition was not hotly controversial in office workplaces, and already many such workplaces were prohibiting smoking.\textsuperscript{88} While bars and taverns were non-negotiable, restaurants provided an opportunity for reconciliation.\textsuperscript{89} The governor gradually relinquished his stance in the restaurant debate,\textsuperscript{90} and legislators conceded the criteria for the designated smoking areas, the removal of the retroactivity language, and the addition of the local preemption prohibition.\textsuperscript{91} House Bill 1368, as amended, took effect on March 27, 1995.\textsuperscript{92}

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\textsuperscript{84.} See Babington & Gillis, supra note 75 (noting that the governor had worried that the General Assembly would carve out larger exceptions to the bill if he did not compromise).
\textsuperscript{85.} Id.
\textsuperscript{86.} Telephone Interviews with Eric S. Gally, Communications/Public Policy Director, American Cancer Society, Maryland Division, Inc. (Sept. 21, 1995; Nov. 19, 1995).
\textsuperscript{87.} Id.
\textsuperscript{88.} Id.
\textsuperscript{89.} Id.
\textsuperscript{90.} See Babington & Gillis, supra note 75.
\textsuperscript{91.} See supra note 82; see also Babington & Gillis, supra note 75 (discussing the criteria for the designated smoking area).
\textsuperscript{92.} Act of March 27, 1995, ch. 5, 1995 Md. Laws 350. The attorney general had issued an opinion discussing the effective date of the statute (published in 22 Md. Reg. 688 (1995)). The attorney general stated that the statutes should take effect on June 1, 1995. Id. He based his decision on Md. Const. art. XVI, § 2 which states that "[n]o measure creating or abolishing any office, or changing the salary, term or duty of any officer, or
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4. **Impact of the Statute.**—Although the language in the statute focuses on permitting smoking rather than restricting the Secretary's and Commissioner's authority, the effect is nonetheless limiting. The General Assembly carved out key exceptions to the sweeping protections afforded by the Division's regulations; the Secretary and the Commissioner no longer have regulatory control over the smoking of tobacco products in restaurants, bars, clubs, and hotel sleeping rooms. Restrictions on smoking in these workplaces have been legislatively defined.

The statute permits smoking in a bar or tavern, in a hotel or motel bar, in a club that possesses an alcoholic beverages license and allows consumption on the premises, and in a private residence not open to the public for business. The statute limits the size of the smoking area in restaurants with an alcoholic beverages license to forty percent of the total area of the restaurant, to be comprised of a bar or bar area, a separately enclosed room, or a combination of the two. The statute does not require modification of atmospheric con-

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granting any franchise or special privilege, or creating any vested right or interest, shall be enacted as an emergency law." *Id.* The attorney general reasoned that "House Bill 1368 . . . eliminates what had been the statutory duty of the Commissioner to provide the maximum protection possible against ETS for an entire class of employees—those who work in hospitality industry establishments." *Id.*

Because this opinion was written before the major amendments to the bill, it is debatable whether the analysis remained viable. If the analysis held, this distinction between emergency and nonemergency laws would be important if Maryland voters had opted to petition for a referendum. If the bill were an emergency law, the bill would have become effective on the day of enactment and would have remained in effect until the referendum. See Md. Const. art. XVI, § 2. If the bill were a nonemergency law and the voters gathered enough signatures for a referendum, the enacted bill would not go into effect in June 1995, but would await the outcome of the referendum in November 1996. See *id.* Citing the impossibility of separating the restaurant issue (where a majority of citizens want smoking prohibited) from the bar issue (where most citizens want smoking permitted), antismoking groups decided not to put the bill on a referendum. *Smoking Foes Won’t Challenge Hospitality Industry’s Exemption,* Balt. Sun, Apr. 1, 1995, at B4.

93. See Md. H.B. 1368, 1995 Sess. (enrolled bill). The title of the bill was changed from "Smoking—Prohibition on Adoption of Regulations to Restrict Smoking" to "Smoking in the Workplace." *Id.*

94. *Id.* Local governments have not been similarly limited. The Act expressly states that it does not preempt local authorities from restricting workplace smoking to a greater extent. Act of March 27, 1995, ch. 5, 1995 Md. Laws 350, § 2 (uncodified). For an application of this section, see 22 Md. Reg. 1773 (1995).


96. See, e.g., Md. Code Ann., Bus. Reg. § 2-105(d)(1)(i)5B. In comparison with the pre-compromise bill, this represents a reduction in the proportionate size of the smoking area. *Cf.* supra note 77. The requirement that the smoking area must be in separately enclosed room (except if the smoking area is the bar or bar area) was the direct result of the gubernatorial-legislative compromise. See supra notes 82, 91 and accompanying text.
ditions in the separately enclosed designated smoking area. Unenumerated establishments that possess an alcoholic beverages license and allow consumption on the premises may permit smoking in a separately enclosed room.

For restaurants without an alcoholic beverages license, the statute permits the size of the smoking area to be no more than forty percent of the total area of the restaurant. The statute limits the smoking-permitted sleeping rooms in a hotel or motel to forty percent. Finally, the statute permits smoking in up to forty percent of the premises of a fraternal, religious, patriotic, or charitable organization; a fire company; or rescue squad, if the organizations are subject to the authority of the Secretary or Commissioner, during a public event.

The remainder of COMAR 09.12.23 still exists; it has not been preempted in its entirety. Employers in all enclosed workplaces covered by the regulations and not included in the statute must prohibit smoking or provide a designated smoking area that must be a separately enclosed room with a ventilation system that exhausts directly to the outdoors. The Division remains in charge of enforcing the regulations and is also responsible for enforcing the statutory restrictions.

5. Analysis of the Statute’s Genesis and Consequences.—The procedure leading to the passage of Maryland’s smoking ban was unique. Maryland is the only state to attempt to restrict smoking in all private sector workplaces through its occupational safety and health regulatory agency. In New York, regulations promulgated by the state’s Public Health Council were voided by the Court of Appeals of New York, resulting in the subsequent legislative enactment of a clean

98. See, e.g., id. § 2-105(d)(1)(i)7.
99. See, e.g., id. § 2-105(d)(1)(i)5A. In contrast with the pre-compromise bill, the statute includes smoking restrictions for restaurants without an alcoholic beverages license, adding to the businesses to which the Commissioner’s regulations do not apply.
100. See, e.g., id. at § 2-105(d)(1)(i)6. In comparison with the pre-compromise bill, this represents a reduction in the percentage of smoking rooms. Cf. supra note 77.
102. Because the statute does not include the pre-compromise bill’s retroactivity clause, it is unlikely that other regulations previously adopted by the Division have been preempted.
103. Although the means were different, the end result of Maryland’s attempt is procedurally similar to Washington State’s. Washington’s office workplace smoking is governed by its Department of Labor and Industries’ administrative regulations. See infra note 123. Smoking in restaurants and bars is governed by statute. See infra note 123.
104. Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987). The court stated that through efforts aimed at protecting nonsmokers from the harms of ETS, the Public Health Council
indoor air act.\textsuperscript{105} Minnesota statutorily limited smoking in the workplace, and granted authority to the Commissioner of the Department of Labor and Industry to adopt rules to implement the statutory provisions.\textsuperscript{106} New Hampshire granted authority to the director of its Public Health Services Division to adopt rules to implement specific sections of its statutes.\textsuperscript{107} California and Wisconsin have restricted workplace smoking as a labor matter, but have done so by statutory means.\textsuperscript{108}

Because Maryland chose an unconventional route to achieve its workplace smoking ban, the process was replete with uncertainty. In addition to facing a controversial regulatory beginning, Maryland's smoking ban was confronted with judicial challenges that were subsequently overshadowed by legislative action. After the regulations were promulgated successfully and passed judicial scrutiny, it was unclear whether the smoking ban would survive the statutory recasting. Once survival became likely, it was still unpredictable in what form the regulations, and the authority of the promulgating agency, would emerge.\textsuperscript{109}

Unlike other states' laws, Maryland's smoking statute was not motivated primarily by a desire to protect employees from the dangers of tobacco smoke.\textsuperscript{110} Instead, Maryland's statute originated out of economic and social concerns.\textsuperscript{111} The exemptions "demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." \textit{Id.} The court continued by stating that "[s]triking the proper balance among health concerns, cost and privacy interests, however, is a uniquely legislative function." \textit{Id.}

\textsuperscript{106} 
\textsuperscript{107} MiN. STAT. ANN. § 144.417 (West 1989 & Supp. 1995). A 1984 amendment transferred the granted authority from the Commissioner of Labor and Industry to the Commissioner of Health. \textit{Id.}
\textsuperscript{108} 
\textsuperscript{109} See infra notes 119, 126.
\textsuperscript{109} The conflict between the legislators and the governor made a strong smoking ban seem unlikely. The legislators and the governor differed on central issues. \textit{See supra} note 73 and accompanying text. If necessary, the legislature was prepared to override a gubernatorial veto of the proposed bill. \textit{See supra} note 74 and accompanying text. The result would have been a more lenient smoking ban, by way of a further weakening of the regulations.
\textsuperscript{110} Other states' legislators acknowledged the harmful effects of tobacco smoke in conjunction with enacting workplace smoking standards. This acknowledgement has been communicated either expressly, by stating that the statute's purpose is to protect citizens' health, or impliedly, leaving it to be gleaned at the very least from the statute's name, such as "clean indoor air act," and its placement under a code's health title.

For example, California's legislature stated that its intent was to reduce employee exposure to ETS to a threshold level tolerating only insignificantly harmful effects. \textit{Cal.}
nomic concerns for the businesses affected by the Division's smoking regulations, as well as allegations that the regulatory agency exceeded its delegated authority.\textsuperscript{111} Maryland's statute was created specifically to supersede the Division's actions and to overlay the administrative regulations. The legislature reined in the Division, and the resulting statute weakened, but did not negate, the regulations.\textsuperscript{112} Maryland's smoking ban now exists as a patchwork combination of regulations and statutes.

To succeed in restricting workplace smoking, it may well have been necessary for Maryland to use a procedurally novel strategy and to make the concomitant modification in the role of its regulatory agency. Previous legislative efforts to create a smoking ban had failed just one year earlier.\textsuperscript{113} Maryland is a tobacco-producing state, and the tobacco lobby is highly influential.\textsuperscript{114} Furthermore, when legislators tend to focus on the perceived adverse economic effects a smok-

\textsuperscript{111} See supra note 68 and accompanying text. The amendments to Labor and Employment § 5-314, although under an occupational safety and health title, are not expressly nor impliedly related to health.

\textsuperscript{112} Had the regulations retained their full effect, Maryland would have had the strongest workplace smoking ban in the United States. Cf. infra note 119 (discussing California's smoking ban, currently the most restrictive in the nation).

\textsuperscript{113} See supra notes 29-31 and accompanying text.

\textsuperscript{114} Peter Jacobson and his colleagues have suggested that the success or failure of antismoking legislation can be traced to the framing of the legislative debates over such laws. Peter D. Jacobson et al., \textit{The Politics of Antismoking Legislation}, 18 J. Health Pol., Pol'y & L. 787, 800-01 (1993). Jacobson suggested that the debates are steered by the tobacco industry. Id.

In 1995, in addition to the gubernatorial influence and the active health advocacy groups providing a counterbalance to the powerful tobacco lobby in Maryland, the smoking restrictions had the support of the Department of Health and Mental Hygiene. See generally Amy Goldstein, \textit{Smoking Under the Gun in Md., Study Tracks Cancer, Cigarette Use}, Wash. Post, Mar. 23, 1995, at M1 (citing steadfast support by Martin P. Wasserman, Maryland's Secretary of Health and Mental Hygiene).
ing ban might have on businesses, public health concerns inevitably take a back seat.\textsuperscript{115}

The resulting patchwork of regulations and statutes has left several gaps in Maryland's antismoking laws. Nonetheless, Maryland has become one of four states with the staunchest workplace smoking restrictions in the nation.\textsuperscript{116} The Coalition on Smoking OR Health\textsuperscript{117} has categorized the fifty states according to the breadth of their laws governing smoking in public places.\textsuperscript{118} Maryland received the highest restrictions rating of "comprehensive," along with California,\textsuperscript{119} Ver-

\textsuperscript{115} A frequently cited study reported that a smoking ban had no effect on restaurant revenue. Stanton A. Glantz & Lisa R.A. Smith, The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales, 84 AM. J. PUB. HEALTH 1081 (1994). It may be inappropriate, however, to extrapolate these findings to predict the effects in Maryland because the study focused on city ordinances, not statewide legislation.

\textsuperscript{116} See Coalition on Smoking OR Health, State Legislated Actions on Tobacco Issues app. b, (Jessica Bartelt ed., 2d prtg. 1994) (updated June 1995). As of June 1995, 23 states had laws restricting smoking in private sector workplaces. Id. The laws in all but one of these states included restrictions on smoking in restaurants. Id.

\textsuperscript{117} The Coalition on Smoking OR Health is a Washington, D.C.-based health advocacy coalition of the American Cancer Society, American Lung Association, and American Heart Association.

\textsuperscript{118} COALITION ON SMOKING OR HEALTH, supra note 116, at app. c. The Coalition determined states' comprehensiveness of smoking restrictions by analyzing restrictions in indoor "public places" including government workplaces, private sector workplaces (such as offices), schools and day care centers, health care facilities, places of public access (means of transportation, retail stores, grocery stores, libraries, museums), and restaurants. Id. at app. b. Those states offering the upper echelons of protection can be distinguished by their protection against ETS in bars, restaurants, and private sector workplaces.

It is important to note that the rating system is based on an overall "smoking restrictiveness" score, which is a total of the individual restrictiveness scores achieved in the various public places. See id. at apps. b, c. Because private sector workplaces are generally regulated later rather than earlier in a state's chronology of restricting smoking, an overall rating of "comprehensive" will correlate with a strong smoking ban in private sector workplaces. See id. passim. However, an overall rating of "extensive" does not necessarily correlate with a strong smoking ban in these workplaces. See id. Thus, a rating category of "extensive" consists of states that have stringent smoking restrictions in many public places. See id. Those states offering the upper echelons of protection can be distinguished by their protection against ETS in bars, restaurants, and private sector workplaces.

It is likely, however, that limiting an analysis to states that received a rating of "comprehensive" or "extensive" would overlook a state that had strong smoking restrictions in private sector workplaces, but regulations weak enough in other public places so that the state would not receive either of these highest overall ratings.

\textsuperscript{119} See CAL. LABOR CODE § 6404.5 (West Supp. 1995). California has the toughest antismoking law in the nation. Smoking of tobacco products is prohibited in all enclosed places of employment, id. § 6404.5(b), except for designated breakrooms that are separately ventilated to the outdoors, id. § 6404.5(d)(13). Sixty-five percent of hotel guest rooms are excepted. Id. § 6404.5(d)(1). Restaurants are not excepted. Smoking in bars and taverns will be permitted until the earlier of either Jan. 1, 1997, or adoption of a regulation by the federal Occupational Safety and Health Standards Board. Id. § 6404.5(f)(1).
mont, New Hampshire, Washington, New York, Minnesota, and Wisconsin received a rating of "exten-

120. See Vt. Stat. Ann. tit. 18, §§ 1421-1428, 1741-1746 (Supp. 1995). Employers are required to establish, or negotiate through the collective-bargaining process, a written smoking policy to prohibit smoking throughout the workplace or restrict smoking to designated enclosed areas. Id. § 1422. An employer may permit smoking in a designated enclosed area if three-fourths of the employees agree and if smoking will not cause physical irritation to nonsmoking employees. Id. § 1423. Since July 1, 1995, smoking has not been permitted in restaurants, bars, and common areas of hotels. Id. § 1744.

121. See Utah Code Ann. §§ 26-38-1 to -9 (1995 & Supp. 1995). In nonpublic workplaces, an employer must establish or negotiate through the collective-bargaining process a written smoking policy that prohibits smoking in the workplace, restricts smoking to a designated enclosed area, or restricts smoking to a designated unenclosed area if three-fourths of the employees agree and smoke does not enter the work areas of nonsmoking employees. Id. § 26-38-5. If the local health department determines that restricting smoking to designated areas does not prevent smoke in the work areas of nonsmoking employees, it shall require the employer to prohibit smoking in the workplace. Id. § 26-38-5(3). Furthermore, smoking is prohibited in restaurants, id. § 26-38-2(1)(c), but hotel guest rooms and taverns are excepted, id. § 26-38-3(2).

122. See N.H. Rev. Stat. Ann. §§ 155:64-:77 (1994 & Supp. 1994). In all private workplaces with four or more employees or volunteers, smoking is restricted to effectively segregated areas. Id. § 155:65(XVII), :66(l). If smoking cannot be effectively segregated, it must be banned. Id. § 155:66(l). Exemptions from these restrictions include restaurants with a seating capacity of fewer than 50 people and hotel guest rooms. Id. § 155:67.


124. See N.Y. Pub. Health Law §§ 1399-n to -x (McKinny 1990 & Supp. 1995). Employers must adopt and implement a written smoking policy for the workplace. Id. § 1399-o(6). The policy must require that the employer provide nonsmoking employees with a smoke-free work area, id. § 1399-o(6)(a), however, the employer is not required to make any expenditures or structural changes to create this area, id. § 1399-o(6)(h). Owners of restaurants with seating capacities greater than 50 people must designate a contiguous nonsmoking area sufficient to meet customer demand, but not greater than 70% of the indoor seating capacity. Id. § 1399-o(5). Hotel guest rooms and bars are exempted from these restrictions. Id. § 1399-q.

125. See Minn. Stat. Ann. §§ 144.411–417 (West 1989 & Supp. 1995). Smoking is prohibited in workplaces except in designated smoking areas. Id. § 144.414. Private, enclosed offices occupied exclusively by smokers are excluded. Id. § 144.413. Restaurants are not excluded. Id. The criteria for the designated smoking area can be met by existing physical barriers and a ventilation system. Id. § 144.415.

126. See Wis. Stat. Ann. § 101.123 (West 1988 & Supp. 1994). Smoking is prohibited in offices except in designated smoking areas. Id. § 101.123(4). Employers are not required to make any structural or ventilation changes to create a smoking area. Id. § 101.123(4)(c). Restaurants with a liquor license and a seating capacity of over 50 people are excepted if the sales of alcoholic beverages account for more than 50% of receipts. Id. § 101.123(3)(d).
Prior to its current workplace smoking ban, Maryland had received a rating of "moderate." Interestingly, there is vast disparity between Maryland and other states in penalties for violating smoking restrictions. In Maryland, an employer can be fined up to $7000 for a violation, and not less than $5000 for a willful violation. A willful and repeated violator can be fined up to $70,000. With the exception of New York, the fines in other states generally range from $100 to $500.

The threat of high fines notwithstanding, consistent implementation of Maryland's smoking restrictions may be difficult. No additional funds have been allocated to the Department for enforcement to accommodate the expected increase in workload. Moreover, because the smoking ban's purpose is to protect workers, rather than patrons, only complaints received by employees will be investigated.

Despite its comprehensive workplace smoking ban, Maryland must still grapple with the reality that some of its citizens who are most at risk from ETS remain at risk. The protection afforded to bar and restaurant employees under the regulations was eliminated by the statutory enactments. Scientific studies have shown that under non-smoke-free conditions, the levels of ETS in restaurants are approximately 1.6 to 2 times higher than in office workplaces and that ETS

127. COALITION ON SMOKING OR HEALTH, supra note 116, at app. c. Michigan and Hawaii were also rated as having extensive smoking restrictions in public places. Id. Because neither state has restrictions in private sector workplaces, id. at app. b, both were excluded from the discussion.
128. Id. at 63.
130. Id.
133. Id. After the six-month grace period ended, alleged violations had been filed against 21 businesses, mostly restaurants. Charles Babington, Glendening's Shift on Smoking Ban Sparks Outcry, WASH. POST, Nov. 4, 1995, at B1. Conflict has arisen between the legislators and the governor. See id. Not all of the alleged violations were filed on behalf of employees. Id. The governor stated that he is in favor of a "'common sense'" approach to enforcement. Id. The legislators, however, believe that a promise made to them and to employers to investigate only complaints filed by employees, which they say was pivotal during the compromise negotiations, has been broken. Id.
levels in bars are 3.9 to 6.1 times higher than in offices. One study concluded that ETS is a significant health hazard for employees in these workplaces and that smoking should be banned in restaurants and bars. This differential in protection from ETS may spawn future litigation by Maryland employees making an equal protection claim or Americans with Disabilities Act (ADA) argument.

Resolution of this issue may take many forms within the state. Local jurisdictions may enact stronger laws. Employers, of their own accord, may institute stricter smoking prohibitions. Legislators may tighten the exceptions granted by the statute. It is yet unclear whether the Division will be able to promulgate other regulations to restrict smoking that will not conflict with the new statute.

Eventually, state solutions may be mooted by the federal Occupational Safety and Health Administration (OSHA) or the Food and Drug Administration (FDA). OSHA published notice for comment on its proposed regulation of ETS. After declaring that nicotine in cigarettes is a drug, the FDA published notice inviting commentary on the jurisdictional issue between the FDA and its regulation of tobacco products. Federal interventions, should they occur, will not be realized soon. In the meantime, Maryland is responsible for providing for the safety and health of its citizens.


135. Id. at 491-92. An estimated 50% increase in lung cancer among food service workers is in part attributable to ETS. Id.

136. Id. at 492-93.

137. Bar or restaurant employees may argue under the Fourteenth Amendment’s Equal Protection Clause that the state should protect them from ETS to the same extent as the state protects other employees. The same employees might argue that, because of their constant exposure and ensuing sensitivity to ETS on the job, they are “disabled” under the ADA. See John C. Fox, An Assessment of the Current Legal Climate Concerning Smoking in the Workplace, 13 ST. LOUIS U. PUB. L. REV. 591, 597-99 (1994). The employer would then have to respond by providing a “reasonable accommodation” in the work environment. Id. at 600.

Furthermore, owners of small restaurants without an alcoholic beverages license may make “discrimination” claims. These restaurants do not have bars and are too small to build a separately enclosed smoking area. Thus, these restaurants will necessarily have to become smoke-free. The Restaurant Association of Maryland approved of the Commissioner’s proposed draft of the regulations precisely to avoid this discrepancy. Decision of Commissioner, supra note 35, at 1349. The Commissioner’s draft provided for equal treatment of all restaurants and bars. Id.; see supra text accompanying notes 39-40.

138. Relying on stronger local laws, however, results in geographic disparities in protection against ETS. Jacobson et al., supra note 114, at 816.

139. See supra note 26.

6. Conclusion.—After the ban's complicated and laborious journey through all branches of government, Maryland succeeded in achieving workplace smoking restrictions for its workers. As a byproduct, the General Assembly deprived the Division of Labor and Industry of some of its authority. In order for Maryland to attain broad protection against ETS in the workplace, this concession may have been essential.

For nearly one-half century, scientists have been verifying the health hazards of tobacco smoke. Nevertheless, significant numbers of smoking-related diseases and deaths are still occurring today. Restaurant and bar workers are at particularly high risk of suffering from the hazardous effects of ETS. Although Maryland’s smoking ban is one of the toughest in the nation, restaurant and bar employees are left partially or wholly unprotected from tobacco smoke in the workplace. Given these facts, public health concerns should trump any balancing test weighing these considerations against monetary interests.

Despite the possibility that workplace smoking ban issues at the state level may be mooted with federal action by OSHA or FDA, Maryland should act now. At a minimum, Maryland should institute just as strong a ban on smoking in restaurants and bars as it has in other workplaces. This step would complete the bold venture that Maryland has undertaken to reduce harmful conditions in its workplaces.

CLAUDIA J. ZUCKERMAN
III. Torts

A. Delegates Deliver a Deathblow to Maryland's Health Claims Arbitration System

In response to the medical malpractice crisis of the mid-1970s, the General Assembly enacted the Health Care Malpractice Claims Act in 1976, requiring plaintiffs to submit medical malpractice claims to nonbinding arbitration before filing suit in court. Since its inception, the Health Claims Arbitration (HCA) system has been criticized for perceived weaknesses by health care providers and both the plaintiffs' and defendants' bar.

During the 1995 session, the General Assembly unanimously enacted House Bill 1049, permitting either party to unilaterally waive arbitration and proceed to circuit court in cases filed on or after October 1, 1995. Because both plaintiffs' and defendants' attorneys dislike the arbitration system, parties are likely to waive the overwhelming majority of cases, effectively destroying the health claims arbitration system.

The irony of House Bill 1049 is that health claims arbitration has been far more successful than its critics have acknowledged.

4. Telephone Interview, Barbara Minnick, Maryland General Assembly, Office of Legislative Reference (Nov. 20, 1995).
6. See infra notes 190-194 and accompanying text.
of health claims arbitration in Maryland is in sight, not because the system achieved none of its objectives, but rather because it failed to gain the political support it required to survive.8

Section 1 of this Note will briefly describe the malpractice crisis that gave rise to the Health Care Malpractice Claims statute. Section 2 will summarize the enactment and subsequent evolution of health claims arbitration in Maryland. Section 3 will examine the criticisms leveled against health claims arbitration and assess the system's efficacy. Section 4 will examine the impact of the unilateral waiver statute on the practice of medical malpractice law in Maryland.

1. The Medical Malpractice Crisis.—In the late 1960s and early 1970s the number of paid medical malpractice claims per physician ("frequency") and the amount paid on such claims ("severity") soared.9 This led insurers to seek dramatic rate increases in many states,10 and prompted the withdrawal of insurers from many medical malpractice insurance markets.11 In response, almost every state legislature enacted some sort of tort reform.12 The causes of the 1970s torts crisis, and the subsequent torts crisis in the mid-1980s,13 defy easy explanation and are beyond the scope of this Note.14

8. See infra text accompanying notes 183-186.
11. Heintz, supra note 10, at 533 n.3 (reporting that by mid-1975 at least 12 states had experienced the withdrawal of a major carrier from the medical malpractice market); see infra notes 15-19 and accompanying text (discussing the Maryland experience).
12. Abraham, supra note 9, at 489; Danzon, supra note 10, at 413. The terms "tort reform" and "crisis" are used without endorsing the merits of the statutory changes and without accepting or denying the existence of a crisis situation.
2. The Medical Malpractice Crisis in Maryland.—

a. The Birth of Health Claims Arbitration.—On June 17, 1974, St. Paul Fire & Marine Insurance Company ("St. Paul"), the malpractice carrier for eighty-five percent of physicians then practicing in the state,\(^1\) informed the Maryland Medical and Chirurgical Faculty, the leading organization of doctors in the state, that because the Insurance Commissioner had refused its requested rate increase, it would withdraw from the Maryland medical malpractice market effective no later than January 1, 1975.\(^2\) So began the Maryland medical malpractice crisis.

Under an insurance regulation statute,\(^3\) the Insurance Commissioner of Maryland ordered St. Paul to continue coverage at current rates.\(^4\) Although St. Paul eventually had the order overturned,\(^5\) the General Assembly used the intervening period to respond to the crisis. Three major malpractice initiatives were enacted during the 1975 session. The General Assembly created the Medical Mutual Liability Insurance Society to provide malpractice insurance to Maryland health care providers,\(^6\) shortened the "tail" effect\(^7\) by modifying the statute

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16. Id. Maryland was one of at least 12 states experiencing the withdrawal of at least one major medical malpractice carrier. Heintz, supra note 10, at 533 n.3.
19. Id. at 144, 339 A.2d at 299.
21. McGuirk & Rafferty, supra note 20, at 10. Unlike injuries from other torts, injuries resulting from negligent medical care may not surface until years later. Abraham, supra note 9, at 492-94. Under the discovery rule, the statute of limitations for filing tort claims does not start running until the injury is discovered or should have been discovered by the exercise of reasonable diligence. Black's Law Dictionary 466 (6th ed. 1990). The "long tail" effect occurs because medical malpractice insurers find it difficult to predict how many malpractice incidents will occur per year and what amount of reserves will suffice to pay all claims. Commentators differ as to whether shortening the statute of limitations can substantially reduce the total claims paid by insurers. Compare McGuirk & Rafferty, supra note 20, at 18-19 (finding "no merit in the proposition advanced (principally by the insurance industry) that there is a long 'tail' in injury recognition for a significant number of claims") and Nye et al., supra note 14, at 1529 (finding the long tail explanation of the malpractice insurance crisis "not sufficient") with Danzon, supra note 10, at 416-17 (finding that shortening the statute of limitations reduced claim frequency). But see Sanders & Joyce, supra note 14, at 260-61 (discussing the limitations of Danzon's methodology).
of limitations for medical malpractice cases, and attempted to improve the quality of health care by strengthening the peer review process. Proposals to create a mandatory arbitration proceeding with limited judicial review were considered but rejected because of their questionable constitutionality.

A revised, nonbinding arbitration procedure, the Health Care Malpractice Claims Act, was enacted the following year. The Act made submission of malpractice claims to an arbitration panel a precondition for filing suit against a health care provider. To avoid depriving parties of their right to a jury trial, the arbitration proceeding is nonbinding. At the conclusion of the arbitration, either party may reject the panel's finding and file suit in circuit court to nullify the panel's award. In the circuit court proceeding, the panel award may be admitted into evidence, and is presumed correct, unless vacated because of error. A party who rejects the panel award and receives a less favorable result in court must bear the costs of the court proceeding.

The arbitration system is administered by the Health Claims Arbitration Office. Arbitration panels consist of an attorney, a physician (preferably of the same specialty as a defendant health care provider), and a layman. The attorney member is appointed first and serves as panel chair. He is empowered to rule on all matters of procedure and law. The Maryland Rules of Procedure apply to arbitration proceed-


23. McGuirk & Rafferty, supra note 20, at 10; see Md. Code Ann., Health Occ. § 14-504 (1994) (providing immunity from civil liability for those reporting suspected negligence to the appropriate authorities).


27. See infra note 39 and accompanying text.


29. Id. § 3-2A-06(d) ("The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct."). Maryland is the only state that not only admits the panel's decision into evidence, but also accords it a presumption of correctness. Jean A. Macchiaroli, Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Ills, 58 Geo. Wash. L. Rev. 181, 193 (1990).


31. Id. § 3-2A-02.

32. Id. § 3-2A-03(c).

33. Id. § 3-2A-05(a), (c). The authority of the panel chairman, as originally defined in § 3-2A-05(c), with regard to all "prehearing procedures, including issues relating to discovery," was construed narrowly in Stifler v. Weiner, 62 Md. App. 19, 488 A.2d 192 (holding
ings, with the exception of provisions relating to time for discovery and some evidentiary rules. The panel is required to make its award within one year of the date on which all defendants are served.

b. The Evolution of Health Claims Arbitration.—Since its enactment, the Health Claims Arbitration Act has been the subject of much litigation. In Attorney General v. Johnson, the Court of Appeals upheld the constitutionality of the arbitration statute, finding that the statute is not an impermissible delegation of judicial power to an executive agency, does not place an unconstitutional burden on the right to a jury trial, and does not deprive litigants of their due process or equal protection rights. Since the failure of this constitutional challenge, appellate courts have addressed the need to submit claims to arbitration in a variety of contexts.

that the panel chairman's authority to decide matters of law did not permit him to unilaterally issue summary judgment, because summary judgment amounted to an award and only the full panel could render an award), cert. denied, 304 Md. 96, 497 A.2d 819 (1985). In response the General Assembly amended § 3-2A-05 in 1985 to make it clear that the panel chairman had the authority to rule on all questions of law. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(a); see also McClurkin v. Maldonado, 304 Md. 225, 234, 498 A.2d 626, 631 (1985) (noting panel chairman has authority to issue summary judgment if no issues of fact are present).

34. Discovery must be completed within 270 days of service of defendants, rather than in the time as determined by the Maryland Rules. Md. Code Ann., Cts. & Jud. Proc. § 3-2A0-5(b)(2); see also Md. Regs. Code tit. 01, § 03.01.09B (1987).

35. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(b)(3) (allowing for admission of hospital and health care records); Md. Regs. Code tit. 01, § 03.01.11D ("The arbitration panel is not bound by the technical rules of evidence.").


39. Id. at 290-95, 385 A.2d at 67-75; see Md. Code Ann., Const., Decl. of Rights arts. 19, 23.

40. Johnson, 282 Md. at 306-13, 385 A.2d at 75-80.

41. See, e.g., Davison v. Sinai Hosp., 462 F. Supp. 778, 780 (D. Md. 1978) (holding that the Health Claims Arbitration Act is substantive and not procedural, and thus pursuant to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, the Act applies to all malpractice cases, regardless of diversity of citizenship of the parties), aff'd, 617 F.2d 361 (4th Cir. 1980) (per curiam); Bailey v. Woel, 302 Md. 38, 42-44, 485 A.2d 265, 267-68 (1984) (holding that claimant who has attempted to speed arbitration and move on to circuit proceed-
Since 1976, the General Assembly has enacted several statutes affecting health claims arbitration.\textsuperscript{42} Responding to a second medical malpractice crisis,\textsuperscript{43} in 1986 the General Assembly enacted a cap of $350,000 on noneconomic tort damages,\textsuperscript{44} and attempted to curtail meritless claims by requiring that a plaintiff provide an expert's affidavit (the "certificate of merit") attesting to the merit of his contentions.\textsuperscript{45}

In 1987 the General Assembly passed several provisions intended to reduce the total claims paid by insurers. The General Assembly abolished the collateral source rule, permitting the panel to reduce


\textsuperscript{44} Act of May 27, 1986, ch. 639, 1986 Md. Laws 2347 (codified as Md. CODE ANN., CTS. & JUD. PROC. §§ 11-108 to -109 (1995)). In 1994, the cap was raised to $500,000 for claims where the injury occurred after October 1, 1994, with the cap rising by $15,000 each year. Md. CODE ANN., CTS. & JUD. PROC. § 11-105(b)(2). If two or more claimants file, damages are limited to 150\% of the amount allowed for an individual. Id. § 11-108(6)(3) (ii); see also Schobel, \textit{supra} note 43 (discussing the amendments to the cap).

\textsuperscript{45} Act of May 27, 1986, ch. 640, 1986 Md. Laws 2353, 2356-57 (codified as Md. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b) (1995)). Although the statute calls the affidavit a "certificate of qualified expert," practitioners commonly refer to it as a "certificate of merit." A certificate must be filed in all cases except where the sole claim is the lack of informed consent. Md. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b). Claimant's certificate must state that a deviation from the standard of care occurred, and that this deviation was the proximate cause of the alleged injury. Id. § 3-2A-04(b)(1) (i). A defendant health care provider must file an expert's statement that either no deviation occurred, or that the deviation, if any, did not proximately cause claimant's injury. Id. § 3-2A-04(b)(2). Failure of either party to comply within the requisite time period may result in a dismissal of plaintiff's claim or an adjudication against the defendant on the issue of liability. Id. § 3-2A-04(b)(1), (2). To avoid the "hired gun" problem, no expert may spend more than twenty percent of his professional time as an expert witness. Id. § 3-2A-04(b)(4). Where the defendant is a physician, the Director of the Health Claims Arbitration Office must forward a copy of both certificates to the State Board of Physician Quality Assurance, the state body that investigates physician malpractice. Id. § 3-2A-04(b)(6).
the amount of the award by any payments plaintiff has received from other sources, such as insurance.\textsuperscript{46} It also permitted periodic payments to allow payment of economic damages without the need to estimate life expectancy.\textsuperscript{47} Finally, for those cases where neither the plaintiff nor the defendant wishes to go through arbitration, the General Assembly permitted the parties to proceed directly to court if all parties mutually waive the arbitration proceeding.\textsuperscript{48}

Finally, in 1993, the General Assembly modified the standard of care applicable to medical malpractice cases.\textsuperscript{49} Although it appears that the statute is a return to the locality rule,\textsuperscript{50} no Maryland appellate court has confirmed this to date.

3. \textit{Judging Health Claims Arbitration.}\textemdash

\textit{a. Evaluation Difficulties.}\textemdash Submission of medical malpractice claims to an alternative forum is by no means unique to Maryland. Approximately half of the states have health claims arbitration.\textsuperscript{51} Some states have had enormous success with HCA; other states have repealed their statutes.\textsuperscript{52} Evaluating the efficacy of HCA first requires

\begin{itemize}
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id. (codified as Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A (1995)). Once parties agree to waive, their agreement is binding, Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A(b)(2), and the plaintiff must file a complaint within 60 days of waiver or face the possibility of dismissal, id. § 3-2A-06A(c)(3).
\item \textsuperscript{49} Md. Code Ann., Cts. & Jud. Proc. § 3-2A-02(c) (1995) (adopting as the standard of care "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action").
\item \textsuperscript{50} The locality rule required that an expert witness in medical malpractice cases be from the same community as the defendant health care provider to ensure that the witness was familiar with the standard of care required of the defendant. Abraham, supra note 9, at 496. Because many physicians were loathe to testify against colleagues or friends, and feared repercussions from other physicians if they did testify, plaintiffs faced a "conspiracy of silence," in which egregious cases of malpractice were not litigated for want of an expert. See generally W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 (5th ed. 1984). The "nationalization" of the standard of care through medical school accreditation and the propagation of medical journals led most states to reject the locality rule in favor of a national standard of care. Id.; see also Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, 192-202, 349 A.2d 245-53 (1975) (rejecting the locality rule for a national standard of care in Maryland).
\item \textsuperscript{51} Macchiaroli, supra note 29, at 186 & n.11, 188. The United States Department of Health and Human Services has recommended the adoption of such alternative dispute resolution mechanisms by all states. Id. at 187. The details vary from state to state, but virtually all such statutes encourage or require submission of medical malpractice disputes to a panel of health care providers, attorneys, and sometimes laymen. Id. at 189-90.
\item \textsuperscript{52} See Debra L. Fortenberry, Note, Screening Panels: Corrective Surgery or Amputation, 4 Ohio St. J. on Disp. Resol. 255, 260-61, 264-66 (1989) (describing the repeal of Ohio's
determining its objectives, a process not as easy as many commentators have suggested.

If health claims arbitration is to be judged by the intent of the legislators who enacted it, then the text of the law itself provides the best source of that intent. Unfortunately, the Health Care Malpractice Claims statute contains no legislative findings or statement of purpose. While some inferences may be gleaned by examining the reports and testimony considered during the 1976 legislative session, the value of such inferences is limited, because committee reports and testimonies express the views of their authors, not the General Assembly as a whole, and because the record is mixed and ambiguous.63 Indeed, even the Court of Appeals had great difficulty divining the legislature’s intent, finding that the task force that drafted the HCA statute “was ambiguous as to the precise purpose arbitration would serve.”64 The best the court could do was to adopt the vague formulation of the trial court, that the legislature hoped HCA would “reduce the cost of medical malpractice claims, thus reducing the cost of liability insurance and stabilizing the [medical malpractice insurance] market.”65 The academic literature yields nothing more: commentators fervently dispute the purposes of HCA systems enacted across the country,66 and this lack of consensus extends to Maryland.67

Certainly few would dispute that the General Assembly enacted the Health Care Malpractice Claims Act as a response to the medical malpractice crisis.68 Considering that St. Paul Fire & Marine Insurance Company had recently withdrawn coverage for eighty-five per-

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55. Id.
56. See, e.g., Fortenberry, supra note 52, at 256-57 (HCA’s primary purpose to ensure availability of malpractice insurance); Macchiaroli, supra note 29, at 186 (HCA’s purpose to expedite resolution process to reduce transactional costs); Neil D. Schor, Health Care Providers and Alternative Dispute Resolution: Needed Medicine to Combat Medical Malpractice Claims, 4 Ohio St. J. on Disp. Resol. 65, 66 (1989) (HCA’s purpose to reduce the number of claims filed and reduce the awards given to plaintiffs).
57. Two advocates of the original statute, for instance, cannot agree as to whether the legislature expected HCA to diminish verdict size. See infra notes 64-65 and accompanying text.
58. See supra notes 15-25 and accompanying text; McGuirk & Rafferty, supra note 20, at 10 (quoting Senator McGuirk, Chairman of the Economic Affairs Committee: “Throughout its deliberations, the General Assembly acted in a crisis atmosphere.”); see also Attorney
cent of the physicians in the state, the Court of Appeals’s conclusion that the General Assembly hoped to reduce costs and stabilize medical malpractice premiums was a reasonable one. The actual mechanisms by which HCA might obtain this end, however, continue to be debated.

Measuring the effect of HCA on frequency and severity of claims is a difficult task. Merely examining the availability of malpractice insurance in Maryland is insufficient. Because measuring the impact of tort reforms on premiums also requires consideration of insurance cycles, interest rates, the reinsurance market, and many other variables, it is nearly impossible to determine whether any changes in malpractice premiums are a product of HCA or some other factor. Without sophisticated analyses, it is impossible to determine whether insurance remains available because of health claims arbitration, or in spite of it.

Few studies have ever attempted to control for the many variables involved. Those evaluations that have attempted to control for external factors to determine the efficacy of HCA and other tort reforms have been forced to grapple with the tension inherent in uncertain and sometimes conflicting goals. If, for instance, a given HCA scheme resolves claims with less expense, but does so erroneously, has the goal of keeping costs down been achieved only at the expense of justice? If HCA reduces the costs of litigating a claim, insurers will expend less per lawsuit—but if this encourages claimants with marginal cases to file suit, increasing the volume of cases, are the savings partially offset, or even entirely surpassed, by expenditures on these new cases? Assessing the success of health claims arbitration requires going beyond the question of whether HCA has decreased the frequency and severity of claims paid by insurers, and exploring how HCA might achieve such goals.

b. Reforming the Decision-Making Process.—Some commentators have suggested that the General Assembly intended for HCA to
diminish the total claims paid by defendants by removing the decision from the "irrational" jury, and placing it in the hands of a panel of "dispassionate, level-headed experts."63 A more "rational" decision-maker, these commentators have argued, would produce fewer and smaller plaintiffs' verdicts.64 Others argue that the legislature had no intention of altering the probability of a plaintiff's verdict or the size of that verdict.65

(i) The Probability of Winning.—Critics of HCA argue that arbitration panels find for the plaintiff more frequently than do juries. The Liebmann Report, a 1984 study, found that defendants win only fifty-eight percent of cases in HCA, significantly lower than the eighty to ninety percent national rate.66 A comparison of the most recent Maryland arbitration data available67 for those medical malpractice cases mutually waived68 and tried in circuit court confirms this: Maryland defendants win sixty-two percent of claims heard by panels, and seventy percent of claims that are mutually waived and heard by juries.69 The causes of this difference are unclear. Perhaps, contrary to

63. See, e.g., MacAlister & Scanlan, supra note 7, at 500-01; Schor, supra note 56, at 68.
64. Controversy, supra note 36, at 122 ("It was felt that the damages would be more reasonable when compared to those awarded by juries."); MacAlister & Scanlan, supra note 7, at 500-01 & n.134; Thomas B. Metzloff, Alternative Dispute Resolution Strategies in Medical Malpractice, 9 ALASKA L. REV. 429, 435 (1991); Schor, supra note 56, at 66.
65. A legislator who participated in the enactment of the Health Care Malpractice Claims statute insists that the Assembly would never have agreed to a statute that would diminish the verdicts of meritorious claimants. Eileen Ursic, Maryland Health Claim Arbitration System, As Viewed by Delegate Joseph E. Owens, Walter R. Tabler, Esq., and Marvin Ellin, Esq., 12 U. Balt. L.F., Winter 1981-82, at 14-15 (quoting Delegate Joseph E. Owens: "I don't think that the members of the legislature felt that there would be great reduction in the awards. . . . I don't think we could have sold an arbitration board if the emphasis was on 'we'll reduce the awards'.").
67. Morlock & Malitz, Testimony, supra note 7. All works by Morlock and Malitz are based on a database they constructed of all medical malpractice cases filed in Maryland since the advent of Health Claims Arbitration. Interview with Laura L. Morlock, Professor, & Faye E. Malitz, Research Associate, Johns Hopkins University School of Hygiene and Public Health, in Baltimore, Md. (Sept. 21, 1995) [hereinafter Morlock & Malitz, Interview]. The testimony summarizes data for the 5665 claims closed as of 1999, although claims which were tried in circuit court were followed until August 1994. Id. Certain claims filed were distorting influences and were culled from the data. These include hundreds of asbestos cases, which were not tried in HCA and are not representative of medical malpractice cases. Id.
68. See supra note 48 and accompanying text (discussing mutual waiver).
69. Morlock & Malitz, Testimony, supra note 7. This data provides a fairer comparison, because contrasting Maryland with national data ignores the possibility that some factor other than HCA accounts for the decreased percentage of defendant victories, i.e., Mary-
expectations,\textsuperscript{70} panels are pro-plaintiff. On the other hand, if panelists truly make more rational decisions, perhaps HCA panels are simply finding that defendants commit malpractice more frequently than juries have heretofore recognized.

(ii) Reducing Verdict Size.—Early studies disputed the effect of HCA on verdict size. The Liebmann Report concluded that panel awards were significantly higher than jury awards.\textsuperscript{71} A governor's task force found panel awards similar to, or even slightly lower than, jury verdicts.\textsuperscript{72} But the most recent published data show that HCA verdicts tend to be substantially lower: of medical malpractice cases studied, the average panel award was $289,561, while the average malpractice jury award was $412,532.\textsuperscript{73} If the trend depicted in this data has continued, then regardless of the intent of the legislature, HCA has lowered the size of plaintiffs' verdicts. Medical malpractice attorneys have recognized that panels award smaller sums: of respondents to an informal survey of medical malpractice attorneys,\textsuperscript{74} six percent thought that panel awards are generally higher, fifty-seven percent

\textsuperscript{70}. See supra notes 63-64 and accompanying text.

\textsuperscript{71}. LIEBMANN REPORT, supra note 3, at 13-14. As a former Director of the Health Claims Arbitration Office noted, any increase may be a product not of HCA, but of a national trend towards higher verdicts. Controversy, supra note 36, at 122.

\textsuperscript{72}. McGUIRK REPORT, supra note 3, at 7.


\textsuperscript{74}. Author's Survey of Medical Malpractice Attorneys (Oct. 1995) [hereinafter Author's Survey]. The author conducted an informal survey of 114 medical malpractice attorneys. Attorneys were selected from those who listed medical or professional malpractice in their 1995 Martindale-Hubbell biography. Results are based on the replies received from 55 attorneys, 25 of whom represent primarily claimants, 28 of whom represent primarily defendants, and 2 of whom regularly represent both claimants and defendants. All figures presented are rounded to the nearest percent, sometimes resulting in totals of 101%. "Unresponsive" refers both to respondents who claimed they had no basis for responding, and to respondents who did not choose one of the provided responses.

The author acknowledges and emphasizes the informal nature of this study. Attorneys were selected from Martindale-Hubbell because no comprehensive list of medical malpractice attorneys could be located. The attorneys who listed themselves in Martindale-Hubbell are by no means representative of all Maryland malpractice attorneys. Furthermore, while the number of practicing malpractice attorneys cannot be ascertained, 114 may not be an adequate sample size to represent them.

While the survey cannot produce representative statistics that can pinpoint attorneys' perceptions of HCA, it can provide descriptive statistics, suggestive of trends. The high percentage of respondents who concurred on many survey questions, see infra notes 113, 114, 160, 161, 162, 168, may fairly portray the feelings of other practitioners.
thought that awards are generally lower, with twenty-eight percent perceiving no difference between panel awards and jury verdicts.\textsuperscript{75}

c. Filtering Meritless Claims.—While many claims are settled with an indemnity paid to the claimant, many are voluntarily or involuntarily dismissed without payment.\textsuperscript{76} Of those unsettled claims that do reach a jury or panel, most are won by the health care provider.\textsuperscript{77} This suggests that many meritless malpractice suits are filed by those who hope either to play on juror sympathy or to induce insurers to offer a low settlement to avoid litigation costs.\textsuperscript{78} Commentators vary widely in their estimates of the number of such cases,\textsuperscript{79} but they do agree that one major purpose of most health claims arbitration statutes is to deter claimants from filing meritless suits.\textsuperscript{80} Advocates expected HCA would deter meritless claims, either by providing a forum for early settlement,\textsuperscript{81} or by encouraging claimants to drop doubtful claims rather than to litigate them.\textsuperscript{82} Its ability to do either is questionable.

(ii) Encouraging Settlement.—Nationally, insurers encourage litigation by refusing to settle most claims until the claimant files suit.\textsuperscript{83} Some commentators argue that HCA provides better opportunities than traditional judicial settings for parties to resolve their dispute between filing and the hearing or trial.\textsuperscript{84} However, the evidence does not support this premise; the Hughes study of 29,785 medical malpractice claims from across the country shows that HCA systems

\textsuperscript{75} Author's Survey, supra note 74. All of those who thought panel awards are higher were defense attorneys. Numbers do not total 100\% because some respondents were unresponsive.

\textsuperscript{76} Metzloff, supra note 64, at 431.

\textsuperscript{77} See supra notes 65-69 and accompanying text; see also Harold A. Sakayan, Arbitration and Screening Panels: Recent Experience and Trends, 17 Forum 682, 686 (1982).

\textsuperscript{78} MacAlister & Scanlan, supra note 7, at 500-01.

\textsuperscript{79} Metzloff, supra note 64, at 431 n.8.

\textsuperscript{80} Id. at 431-32, 436-37; Sakayan, supra note 77, at 683; Schor, supra note 56, at 68. For comparable arguments concerning Maryland's HCA, see MacAlister & Scanlan, supra note 7, at 500-01; Ursic, supra note 65, at 14-15.;

\textsuperscript{81} Abraham, supra note 9, at 513-14; Macchiaroli, supra note 29, at 243; Metzloff, supra note 64, at 436-37, apps. at 456-57; Sakayan, supra note 77, at 683.

\textsuperscript{82} See Abraham, supra note 9, at 514; MacAlister & Scanlan, supra note 7, at 500-01; Macchiaroli, supra note 29, at 242 & n.337.

\textsuperscript{83} JAMES S. KARALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 31 (1986) (finding that of all dollars paid to medical malpractice claimants, 86\% to 93.5\% were paid only after a suit was filed, depending on the year and study examined). Between 1977 and 1992 only 7\% of Maryland claims were settled with payment without the claimant filing suit. Morlock & Malitz, Testimony, supra note 7.

\textsuperscript{84} See supra note 81 and accompanying text.
generally have no statistically significant impact on the proportion of cases settled.\textsuperscript{85}

Maryland rates of pre-adjudication settlement are similarly discouraging. The General Assembly's summary of the unilateral waiver statute\textsuperscript{86} notes that only nine percent of claims required trial before the enactment of HCA, and that now twenty-three percent require adjudication either by an HCA panel or jury.\textsuperscript{87} Such an increase was inevitable if, as its proponents hoped, HCA does indeed lower the costs of litigation, because more claimants will be able to afford to press their claims.\textsuperscript{88} Yet this seems an inadequate explanation, because Maryland attorneys surveyed believe that HCA raises the overall costs of litigation.\textsuperscript{89} Health claims arbitration does, however, seem to encourage settlement between the panel hearing and the jury trial.\textsuperscript{90}

However, researchers are unable to explore an equally important piece of the settlement puzzle, the impact of HCA on the size of settlements. Unfortunately, only anecdotal data are available, as many parties make nondisclosure a condition of settlement to safeguard the reputation of the health care provider. It has been suggested that HCA may significantly reduce the levels of settlements that claimants obtain.\textsuperscript{91} A plaintiff who wins in a circuit court proceeding may rest fairly comfortably, because the only appeal available to the defendant is the narrow question of whether harmful legal error occurred.\textsuperscript{91}

\textsuperscript{85} Hughes, \textit{supra} note 14, at 71.

\textsuperscript{86} See \textit{supra} notes 4-5 and accompanying text.

\textsuperscript{87} GENERAL ASSEMBLY OF MD., DEP'T OF LEGIS.-REFERENCE, 1995 SESSION REVIEW 203 (1995). \textit{But see infra} text accompanying notes 163-167 (questioning the significance of these numbers).

\textsuperscript{88} See \textit{supra} note 62.

\textsuperscript{89} See \textit{infra} note 168.

\textsuperscript{90} See \textit{infra} notes 157-159 and accompanying text.

\textsuperscript{91} Macchiaroli, \textit{supra} note 29, at 249 ("A defendant who does not prevail before the panel may refuse to settle the action, thus forcing the plaintiff to incur the costs of trial. The defendant may take this step with impunity. . . . [T]he defendant may be able to take advantage of docket delays to wear down the plaintiff, thus increasing the likelihood of a low settlement figure prior to verdict."); Metzloff, \textit{supra} note 64, at 432 & n.13 (noting that critics of HCA suggest the system forces patients to settle claims for significantly less than the true value of their claims); Schor, \textit{supra} note 56, at 72 & n.54 (noting that because health care providers were winning nearly 80% of cases heard by screening panels in New York, "providers are put in an advantageous position to force settlement or abandonment of claims").

The type of injury may play a significant role in claimant's decision to settle because claimants facing medical bills may not be able to wait long enough to go through an arbitration hearing, trial, and appeal. One government study suggests defendants abuse the settlement process in tort cases. \textsc{Paul C. Weiler, Medical Malpractice On Trial} 54 (1991) (citations omitted). The average settlement for "grave" and "major" injuries was approximately 25% of the total economic damages; settlements for the average "emotional" and "insignificant" injuries were 400% of the plaintiff's economic damages. \textit{Id.}
Thus, most plaintiffs who are victorious in circuit court should reasonably anticipate a settlement offer fairly close to the jury’s verdict. A claimant who wins in HCA, however, faces the necessity of having to retry the entire case-in-chief, which includes incurring significant expert witness fees. Although the plaintiff has the advantage of the presumption of correctness of the panel’s award, a plaintiff may still lose in circuit court. Rather than face the added expenses and the possibility of losing, claimants may settle for significantly less than the panel’s award. While this may serve HCA’s purpose of decreasing the frequency and severity of awards, compelling plaintiffs to accept smaller settlements for meritorious claims may contravene the fundamental purpose of the judicial system, the furtherance of justice.

(ii) Encouraging Claim-Dropping.—HCA advocates have argued that the extra level of procedure that HCA imposes and the lack of a sympathetic jury discourage spurious claims. Proponents of this argument draw support from the fact that four states that repealed their HCA schemes experienced such an upsurge of malpractice filings that they reenacted alternative dispute resolution mechanisms. Relying on early data, critics of HCA responded that by speeding resolution, HCA actually encourages more filings. But an absolute increase in the number of cases does not itself prove HCA’s failure to deter filings: Only comparing Maryland’s litigation rates to national rates will permit determination of whether HCA is contributing to the growth in suits filed. While no comprehensive post-1984 nationwide data are available to determine whether Maryland’s filing rate has grown faster than the national rate, informal studies based on estimates and physician surveys suggest that the filing rate for Maryland lies just below the national average. Anecdotal data support this result: The largest physician carrier in Maryland discounted 1990 premiums by twenty percent, attributing the discount to a decrease in

92. Cf. Fortenberry, supra note 52, at 265 (noting that the Arizona screening panel process increased the costs of litigation).
93. See supra note 29 and accompanying text. But see infra notes 151-153 and accompanying text (discussing the Court of Appeals’s interpretation of that presumption to include a continuing burden on plaintiff at trial to prove malpractice).
94. See supra note 91.
95. See supra note 80 and accompanying text.
96. Controversy, supra note 36, at 125. The four states were Florida, Maine, Wisconsin, and Nevada. Id.
97. See infra notes 169-174 and accompanying text.
98. MacAlister & Scanlan, supra note 7, at 502-03; LIEBMAN REPORT, supra note 3, at 14-16. For a discussion of this “freeway principle,” see supra note 62.
99. Morlock, supra note 73, at 61.
Whether HCA or some other factor has slowed the growth in filings remains unclear.

The single most effective mechanism for discouraging claimants may be the certificate of merit. Since 1986, the statute has required each litigant to file an affidavit from an expert attesting that in the expert’s professional opinion, the litigant has a meritorious claim or defense. This requirement may have contributed to a drop of approximately thirty-six percent in filing rates in the year after it took effect. Filing rates are only now returning to their precertificate levels. Critics of this requirement note that litigants who have perfectly good claims that could be supported by discovery are barred if they cannot persuade a medical expert to sign an affidavit based on limited information. The requirement that an expert be retained in all cases is particularly burdensome on the poor: the proportion of economically disadvantaged litigants filing suits dropped after the enactment of the certificate requirement.

HCA advocates hoped that HCA would encourage those with meritless claims who do file suit to dismiss their cases early. Hughes found that although HCA does not encourage settlement, it does increase the rate of out-of-court resolution by increasing drop rates: litigants compelled to submit their claims to HCA drop their claims more often than those who may pursue their claims in court without the intermediate step. Based on this data, one advocate of HCA concluded that the claimants must have realized that their claims lacked merit. It seems equally plausible to conclude that the claimants abandoned meritorious claims rather than face the extra expenses and risks imposed by an extra level of litigation. Disincentives to litigate impede meritorious claims as well as meritless ones.

100. Faye E. Malitz et al., Impact of Legislative Actions on Malpractice Claims Filed in Maryland, Paper Presented at the Annual Meeting of the American Public Health Association 6 (Oct. 22-26, 1989) (on file with the author of this Note).
101. See supra note 45 and accompanying text.
103. See supra note 100, at 2.
104. Morlock & Malitz, Testimony, supra note 7.
106. Malitz et al., supra note 100, at 5-6. Of course most claimants would have had to hire an expert witness were the case taken to trial, but because so few cases settle before filing of a claim, see supra note 88, the certificate of merit effectively requires retention of an expert not merely before trial, but before insurers will consider settlement.
108. See supra note 85 and accompanying text.
109. Hughes, supra note 14, at 75-76.
110. Macchiaroli, supra note 29, at 242 n.387.
111. See, e.g., Metzloff, supra note 64, at 432 & n.13.
bona fide malpractice victim might be willing to expend tens of thousands of dollars in expert witness fees once, but might not be willing to face the risk twice.\textsuperscript{112}

Despite the evidence of a decrease in claims filed, Maryland attorneys responding to the author's survey remain convinced that HCA has no deterrent effect. While nine percent of claimants' attorneys felt that HCA encouraged filing and thirty percent felt that HCA deters filing, fifty-two percent felt that HCA has no deterrent effect at all.\textsuperscript{113} Of defense attorneys, seven percent thought that claimants were encouraged by HCA, seven percent thought that HCA deters filing, and sixty-one percent found no effect.\textsuperscript{114}

\textit{d. Reducing the Costs of Medical Malpractice Litigation.—}Because of the highly technical nature of medical malpractice cases, litigation expenses tend to run much higher than in most other areas of legal practice.\textsuperscript{115} With few exceptions, medical malpractice cases require the use of an expert witness to help the jury determine the standard of care and whether the defendant deviated from that standard. Expert witnesses often charge between $100 and $400 per hour, and multiple experts in a complex suit may force each party to spend more than $10,000 in expenses for experts in preparing trial testimony.\textsuperscript{116} Both claimants' and defendants' insurers must incur these costs whether they win or lose. In addition, the complexity of medical malpractice litigation requires significant hours of attorney preparation time.\textsuperscript{117}

Medical malpractice litigation costs society billions of dollars each year.\textsuperscript{118} Accordingly, reducing litigation costs has great potential to permit plaintiffs to receive compensation while holding down insurance costs. HCA advocates hoped to reduce attorneys fees and other litigation costs by confining medical malpractice disputes to a more
informal, less costly forum,\textsuperscript{119} and by reducing the time it takes to resolve such disputes.\textsuperscript{120} Again, HCA's success is questionable.

\textit{(i) Attorneys' Fees.}—Attorney compensation accounts for a large portion of the total expenditures in malpractice litigation. Plaintiffs' fees and expenses for claims in which suit was filed\textsuperscript{121} averaged thirty-six percent of the average amount recovered.\textsuperscript{122} Defense costs, which include fees for cases where the insurer paid no indemnity,\textsuperscript{123} averaged 29.6\% of the average compensation paid, of which a full 87.2\% consisted of attorneys' fees.\textsuperscript{124} While the costs of medical malpractice litigation are higher than those of most types of litigation, they are not disproportionately so, considering the complexity of such suits.\textsuperscript{125} Attorneys' fees for tort suits generally are estimated at thirty to thirty-one percent of total compensation paid for plaintiffs, and thirty percent for defendants.\textsuperscript{126} Although plaintiffs' fees do tend to run higher than those of defendants,\textsuperscript{127} this seems a more than fair reward for the risk claimants' attorneys take: While defendants' attorneys receive a fee regardless of the outcome, plaintiffs' attorneys typically collect their fee only when they win. Of more concern are defendants' and their insurers' litigation costs. The medical malpractice insurance industry spends more money defending claims than it does on all of its administrative costs combined.\textsuperscript{128} One study estimated that half of premium increases in

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\textsuperscript{119} Schor, \textit{supra} note 56, at 68.
\textsuperscript{120} MacAlister & Scanlan, \textit{supra} note 7, at 501; Quinn, \textit{supra} note 20, at 78-79; Sakayan, \textit{supra} note 77, at 683; Schor, \textit{supra} note 56, at 66.
\textsuperscript{121} Data on attorneys' fees for suits that are resolved without the filing of a suit generally do not appear in court or insurance industry records and accordingly are difficult to estimate. \textit{See generally KAKALIK & PACE, supra note} 83, at 59.
\textsuperscript{122} \textit{Id.} at 41. Expert witness fees are included in the expense estimates provided. Considering that most plaintiff's contingency arrangements provide for plaintiff's counsel to receive 33\% to 40\% of the recovery as fee, Kakalik and Pace's estimate seems realistic. \textit{Id.} at 38, 113.
\textsuperscript{123} Because plaintiffs almost always enter into contingency arrangements with their attorneys, the overwhelming majority of fees paid to plaintiffs' counsel are paid on contingency. Though plaintiffs typically remain responsible for expenses incurred other than attorney's fees, \textit{see KAKALIK & PACE, supra note} 83, at 59, these expenses are difficult to track because neither insurance data nor court records are likely to refer to them. \textit{Cf. id.} at 1 (noting that most litigation expenses and compensation payments are private expenditures and are not reported publicly).
\textsuperscript{124} \textit{Id.} at 54-55.
\textsuperscript{125} \textit{Cf. id.} (noting the complexity and expense of medical malpractice suits).
\textsuperscript{126} \textit{Id.} at 42, 54.
\textsuperscript{127} \textit{See supra text} accompanying notes 121-122.
\textsuperscript{128} Nye et al., \textit{supra} note 14, at 1511-12 n.44. Of all medical malpractice expenses, 17\% were expended on administrative expenses of running the company, 18.4\% were spent
the 1970s malpractice crisis resulted from costs associated with malpractice defense, especially defense attorneys' fees.\textsuperscript{129} According to 1986 data, the Medical Mutual Liability Insurance Society of Maryland\textsuperscript{130} spent almost half of its legal expenditures on cases it closed without payment.\textsuperscript{131} Settling more cases may significantly lower legal costs. However, if an insurer routinely offers low-level settlements to meritless cases to avoid the nuisance of litigation, the insurer may find many more meritless claims being filed. The line between cheaply settling cases of arguable merit and needlessly settling specious claims is by no means easy to define.

(ii) Keeping Cases Out of Court.—Critics charge that HCA increases, not decreases, the delay and expense of medical malpractice litigation.\textsuperscript{132} Systemic savings result only if three facts are true: (a) HCA costs less than traditional litigation, (b) expenses saved are not exceeded by the duplicative costs of those who seek a de novo court hearing, and (c) HCA does not encourage additional litigants to submit their claims to a trier of fact.

(a) A Less Costly Forum?—For HCA actually to reduce costs, the HCA proceeding must be different in some significant way from traditional litigation in a courtroom. Otherwise, HCA will not reduce costs, but merely will require that the costs be incurred in a different forum. Alternative dispute resolution mechanisms such as arbitration and mediation are intended to achieve such savings by providing for a more informal proceeding, with relaxed rules of procedure and evidence, and sometimes a prohibition against expert witnesses.\textsuperscript{133} In Maryland, however, HCA differs little from a trial. Though the rules of evidence are relaxed, the rules of procedure still apply.\textsuperscript{134} Parties are limited to two experts of any single specialty,\textsuperscript{135} but two experts at over $250 per hour can add up quickly. Parties have little motivation defending claims, and the remaining 64.6% of expenses went to successful claimants and their counsel. \textit{Id.}

\textsuperscript{129} McGuirk & Rafferty, \textit{supra} note 20, at 15.
\textsuperscript{130} See \textit{supra} note 20 and accompanying text.
\textsuperscript{131} Controversy, \textit{supra} note 36, at 124.
\textsuperscript{132} Weiler, \textit{supra} note 91, at 42; MacAlister & Scanlan, \textit{supra} note 7, at 500-04.
\textsuperscript{133} Cf. Abraham, \textit{supra} note 9, at 516 (noting that the informal procedures of HCA have the potential to reduce transactional costs); Macchiaroli, \textit{supra} note 29, at 186 (suggesting the purpose of HCA panels is to reduce transactional costs of litigation).
\textsuperscript{134} See \textit{supra} notes 34-35 and accompanying text (describing procedural and evidentiary rules).
to hold back because an unfavorable panel award will be admitted into evidence with a presumption of correctness in any appeal of a panel's decision. What were intended to be informal screening panels have turned into full-blown trials, with little opportunity to reduce attorneys' or experts' fees. HCA does seem to decrease the administrative costs of trying a case, but these constitute only a tiny portion of total expenses.

(b) The Systemic Cost of De Novo Appeals.—If any costs saved by health claims arbitration are surpassed by the costs of those who litigate a second time in a de novo appeal, then HCA has increased, not decreased, the costs of medical malpractice litigation. Critics charge that the admissibility of the panel's decision, and even Maryland's unique presumption of correctness, do little to deter either party from continuing to circuit court, and that HCA accordingly increases delays and costs. MacAlister and Scanlan, for instance, argue that claimants have little to lose, because claimants contesting the presumption of the panel award's correctness must meet the same burden, a preponderance of the evidence, as claimants face in the arbitration proceeding. In practical terms, however, it seems unlikely that a realistic claimant's attorney, having lost the first round, would not consider seriously whether the case is worth the time and effort of a second trial. Furthermore, not every attorney would agree that the claimant's burden of proof is the same. An attorney

136. See Weiler, supra note 91, at 42 (finding screening panels a mere "dress rehearsal for the real trial"); Abraham, supra note 9, at 516 (finding prehearing preparation panel adjudication to be particularly rigorous where the panel award is admissible); MacAlister & Scanlan, supra note 7, at 503 ("Because hearings before the arbitration panels are tried as though they were being litigated in court . . . [t]he litigants must retain experts to testify, conduct investigations, take depositions, and wage discovery battles."). 137. See supra text accompanying note 29. But cf. infra notes 151-153 and accompanying text (discussing the Court of Appeals's confusing interpretation of that presumption). 138. MacAlister & Scanlan, supra note 7, at 503. 139. Maryland Dep't of Budget & Fiscal Planning, Div. of Management Analysis & Audits, Management Analysis Study of the Health Claims Arbitration Office and Selected Aspects of the Arbitration Process 45-46 (Oct. 1984) [hereinafter Management Study]. 140. Karalik & Pace, supra note 83, at 65. 141. Attorney Gen. v. Johnson, 282 Md. 274, 281, 385 A.2d 57, 61, appeal dismissed, 439 U.S. 805 (1978), overruled in part by Newell v. Richards, 323 Md. 717, 594 A.2d 1152 (1991); Quinn, supra note 20, at 94 n.129. 142. See supra note 29 and accompanying text. But cf. infra notes 151-153 and accompanying text (discussing the Court of Appeals's confusing interpretation of that presumption). 143. See, e.g., MacAlister & Scanlan, supra note 7, at 501. 144. Id. 145. Quinn, supra note 20, at 96.
who attempts to prove his case without attempting to rebut the panel’s finding faces a compelling closing argument from the defendant: “Ladies and gentlemen, a panel of experts considered the evidence that you heard, and found my client not responsible for any injuries alleged. Are you convinced that these experts were wrong?” Effectively, claimants must prove not only the elements of malpractice, but also that the panel made so grievous an error that the jury should contradict the panel’s decision.\textsuperscript{146} Despite MacAlister and Scanlan’s contentions, claimants across the country have found the additional expenses, delays, and the admissibility of the panel’s decision so serious an obstacle that they have alleged repeatedly that HCA places an unconstitutional barrier on their right to a jury trial.\textsuperscript{147} Indeed, the Court of Appeals agreed that HCA places significant additional burdens on claimants’ right to a jury trial, although they found these burdens insufficient to render HCA unconstitutional.\textsuperscript{148}

MacAlister and Scanlan also contended that a defendant facing a panel award has little to lose by trying the case de novo.\textsuperscript{149} This proposition seems no more plausible than the contention that an unfavorable award does not deter claimants. Under the original understanding of the statute’s presumption of correctness, a defendant not only had to incur significant additional attorney’s fees, but also had to rebut the findings of a panel that the defendant committed malpractice, causing injuries to the claimant. The presumption, practitioners thought, required that the defendant health care provider disprove the claimant’s case.\textsuperscript{150} In doing so, the defendant would have to prove that the plaintiff had failed to prove his case, and to find a way to discredit the panel’s decision, lest he face a closing argument from the plaintiff similar to the one described above. However, \textit{Newell v. Richards} reconfigured the allocation of burdens in cases where the panel found for the plaintiff.\textsuperscript{151} In \textit{Newell}, the Court of Appeals interpreted the presumption of correctness to mean that the

\textsuperscript{146} Id. ("A plaintiff’s unsuccessful attack on a panel decision, about which he has little information, will necessarily undermine his case with respect to primary negligence, and juries are not likely to disregard entirely the evidence of the award unless the plaintiff satisfactorily establishes why it was incorrect."). Anecdotal evidence offered by some respondents to the Author’s Survey suggests that many practitioners attempt to undermine the panel award by presenting some piece of new evidence and suggesting that the panel would have concluded otherwise were they exposed to that evidence. \textit{See} Author’s Survey, \textit{supra} note 74.

\textsuperscript{147} \textit{See generally} Macchiaroli, \textit{supra} note 29, at 197-222.

\textsuperscript{148} \textit{See supra} note 39 and accompanying text; \textit{see also} Quinn, \textit{supra} note 20, at 97.

\textsuperscript{149} MacAlister & Scanlan, \textit{supra} note 7, at 501.

\textsuperscript{150} \textit{See, e.g.}, \textit{id.} at 501-02.

\textsuperscript{151} 323 Md. 717, 594 A.2d 1152 (1991).
"burden is on the health care provider to show that the award is not correct," but that the claimant retains the burden of proving the elements of malpractice. Because in theory both the panel and jury are adjudicating the same question, the distinction between the claimant's burden to prove malpractice and the defendant's burden to prove that the panel incorrectly found malpractice seems a difficult one, and certainly one most juries would find difficult to comprehend. By retaining the claimant's burden of proving malpractice, however, the court in *Newell* necessarily alleviated some of the burden on the defendant and placed it on the claimant.

By relieving the health care provider's burden of proof to some degree in a de novo appeal, *Newell* certainly lowered a defendant's disincentives to appeal. However, even after *Newell*, defendants face the risk that a jury, which most defendants expect to be sympathetic to plaintiffs, will award even more damages to the claimant than the panel did. Practically speaking, the burden of additional legal costs, court costs, and the presumption of correctness makes a de novo appeal an uphill battle that neither claimants nor health care providers would reasonably take lightly.

MacAlister and Scanlan pointed to what at first appears to be powerful evidence to the contrary. They noted that actions to nullify the panel award were filed in over half of the cases tried by the panel. But this statistic is misleading. Any party who wishes to preserve the right to a de novo proceeding must file a notice of rejection within thirty days after being served with the award, or the party forfeits the right to contest the award. Unless the parties agree to settle without further litigation within the first thirty days or his client abandons his case, any attorney who fails to file the notice of nullification may be committing malpractice. The true test of the deterrent

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152. Id. at 783-34, 594 A.2d at 1160.

153. In *Newell*, the court provided a standard jury instruction for medical malpractice cases: "The claim in this case was submitted to arbitration. . . . You are not bound by the arbitrator’s decision. However, under the law that decision is presumed to be correct and the [health care provider] has the burden of proving by a preponderance of the evidence that the decision is wrong." Id. at 794, 594 A.2d at 1161 (quoting MARYLAND CIVIL PATTERN JURY INSTRUCTION § 27:2, at 595). However, *Newell* also requires that, upon the defendant’s request, this instruction be preceded by an instruction that the plaintiff has the burden of proving his case. Id. How a jury will interpret such apparently conflicting instructions is difficult to ascertain, but certainly the pre-*Newell* instruction, which omitted the plaintiff’s burden instruction, would leave a jury more likely to find that the panel’s award for the claimant was correct.

154. See MacAlister & Scanlan, supra note 7, at 500-01.

155. Id. at 502.

156. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06(a) (1995).
effect of the panel's award is not the proportion of cases in which notices were filed, but the proportion of cases that were actually tried in a de novo proceeding. As Morlock and Malitz found, of the 5665 cases filed in HCA between 1977 and 1992, 1012 actions to nullify were filed in circuit court.157 Of these, only 217 (21.4% of nullifications filed and 3.8% of total cases filed) were actually tried by a jury.158 The large majority of cases in which nullifications were filed were settled or dismissed with prejudice.159 Clearly, the admissibility of the panel award holds far more deterrent effects for litigants than MacAlister and Scanlan suggest.

Despite the clear evidence that few litigants tried their cases in de novo proceedings, ninety-three percent of respondents to the author's survey thought that HCA did not deter claimants from litigating a second time,160 and eighty-two percent thought that HCA did not deter defendants from trying the case again.161 When asked to choose a description that characterizes HCA in Maryland, forty-five percent thought that most cases were heard by a jury, while only forty-three percent correctly understood that there were many appeals, but that most appeals were settled before reaching a jury.162

158. Id. The General Assembly's Department of Fiscal Services estimates that the actual number of cases heard by a jury is less than three percent. MARYLAND GENERAL ASSEMBLY, DEP'T OF FISCAL SERVICES, FISCAL NOTE FOR H.B. 1049 (1995) [hereinafter FISCAL NOTE] (on file in the General Assembly's Office of Legislative Reference, file number 1995 H.B. 1049).
159. Morlock & Malitz, Testimony, supra note 7. Many of the cases dismissed with prejudice are presumed to be settlements in which the health care provider did not want the details of the settlement listed in the public record. They were, of course, successful, preventing determination of precisely how many of these cases settled. Morlock & Malitz, Interview, supra note 67.
160. Author's Survey, supra note 74. Respondents were asked, "Does the presumption of correctness deter claimants from filing a de novo appeal and going to trial?" Of claimants' attorneys, 13% replied "yes" and the remaining replied "no." Of defendants' attorneys, none thought claimants were deterred, 96% thought they were not deterred, and the remaining respondents were unresponsive. Id.
161. Id. Respondents were asked, "Does the presumption of correctness deter defendants from filing a de novo appeal and going to trial?" Of claimants' attorneys, 4% replied "yes," 76% replied "no," and the remaining respondents were unresponsive. Id. Of defendants' attorneys, 11% thought defendants were deterred, 89% thought they were not deterred, and none were unresponsive. Id.
162. Id. Of total respondents, 45% chose "Most cases heard by the Arbitration Panel are appealed and heard by a circuit court jury"; 43% correctly chose "Most cases heard by the Arbitration Panel are appealed, but are settled or otherwise disposed of before they are heard by a circuit court jury"; and 12% chose "Most cases heard by the Arbitration Panel are settled no later than the award, and few cases are appealed to circuit court." Id. Claimants' attorneys were approximately as likely as defense attorneys to choose each possible response.
(c) Are More Claims Tied?—Even though few claims are tried before both the HCA panel and a jury, if claimants are less likely to settle or drop claims and more likely to submit their claims to either a panel or jury, then the savings of HCA, if any, are surpassed by the costs to society of hearing additional claims. The finding that the percentage of claims tried by panel or jury has risen from nine percent to twenty-three percent\(^{163}\) seems at first to offer conclusive proof that HCA has indeed created a "freeway" effect, increasing the number of claims heard by a finder of fact.\(^{164}\)

However, this increase easily could be a product of the change in the population of claims filed. If HCA has indeed encouraged many plaintiffs to drop their claims,\(^{165}\) then the only remaining claims are those that claimants and their attorneys thought highly likely to result in an award. If HCA does not, as research shows, promote settlement,\(^{166}\) then logically these cases will be tried either by a panel or a court. The increased percentage of cases tried may thus result not from an increased willingness of litigants to try rather than settle or drop claims, but from fewer plaintiffs filing poor claims that they would later drop. The dramatic decrease in filing rates after the enactment of the certificate of merit requirement supports this argument.\(^{167}\)

Without some means to control for the effects of HCA on the population of claims filed, it is impossible to determine whether HCA has increased or decreased the total costs of medical malpractice litigation in Maryland. However, the political viability of HCA depended not on actual data, but on perceptions. Maryland medical malpractice attorneys perceive that the system has completely failed to decrease the costs of litigation. Of total responding attorneys, ninety-one percent thought that HCA raised the overall costs of medical malpractice litigation.\(^{168}\)

4. Speeding Claim Resolution.—HCA advocates hoped that by speeding the resolution of claims, HCA would resolve claims with less

\(^{163}\) See supra text accompanying notes 86-87.

\(^{164}\) See supra note 62 and accompanying text for an explanation of the "freeway principle."

\(^{165}\) See supra notes 80, 107-112 and accompanying text.

\(^{166}\) See supra text accompanying note 85.

\(^{167}\) See supra text accompanying note 103. For a more in depth discussion of the impact of legislative reforms on the population of cases in the system, see Hughes, supra note 14.

\(^{168}\) Author's Survey, supra note 74. Of claimants' attorneys, 88% thought HCA increased systemic costs; of defendants' attorneys, 96% perceived an increase in overall litigation costs. Id.
expense, but critics have contended that HCA further delays the final resolution of the case. MacAlister and Scanlan have suggested that because of delays imposed by HCA, an “injured patient cannot count on having his injuries redressed for at least seven years.”

While the HCA statute requires that the panel shall make its award within one year of service of defendants, this deadline has become meaningless because litigants ignore it and panel chairs refuse to enforce it.

In the small proportion of cases where the claim is heard by both panel and jury, the duration of the litigation almost inevitably will be prolonged, but the hard data again contradict MacAlister and Scanlan’s assertions: while the national average length of time required to resolve a malpractice dispute is 25 months, the average in Maryland is 23.5 months, and the median time in Maryland is only 19 months.

Again, despite the facts, both plaintiffs’ and defense attorneys believe that HCA prolongs medical malpractice cases. Of all respondents, ninety-six percent thought that HCA slows resolution of medical malpractice disputes, and only four percent correctly perceived that HCA speeds the process up.


a. The Failure of Health Claims Arbitration.—Although evidence shows that HCA panels speed claim resolution and are more likely than juries to find for plaintiffs, the burden that HCA places on plaintiffs makes it no surprise that the plaintiffs’ bar is generally...

169. See, e.g., Fortenberry, supra note 52, at 257.
171. MacAlister & Scanlan, supra note 7, at 503.
172. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(g) (1995). This deadline can be extended, however, “for good cause shown.” Id. § 3-2A-05(j).
173. Controversy, supra note 36, at 122. Maryland is not unique in this respect: “nearly every state has failed to meet its statutory time limit for convening a panel.” Sakayan, supra note 77, at 687.
174. Telephone Interview with Faye E. Malitz, Research Associate, Johns Hopkins University School of Hygiene and Public Health (Nov. 22, 1995).
175. Author’s Survey, supra note 74. Asked to answer “In general, has arbitration quickened or slowed the ultimate resolution of the claim?” 92% of claimants’ counsel and 100% of defendants’ counsel replied that HCA slows cases down. Id. The remaining 8% correctly thought HCA has sped resolution of medical malpractice disputes; no attorneys on either side were unresponsive. Id.
176. See supra notes 169-174 and accompanying text.
177. See supra note 69 and accompanying text.
opposed to health claims arbitration.\textsuperscript{178} But when evidence demonstrates that HCA reduces verdict size,\textsuperscript{179} discourages claimants from litigating,\textsuperscript{180} and results in few de novo appeals,\textsuperscript{181} one would expect the defense bar to support what has amounted to a significant barrier to both meritorious and meritless claims. But many defense attorneys have joined the plaintiffs’ bar in opposing health claims arbitration.\textsuperscript{182} The failure of HCA, then, is not that it fulfilled none of its goals. The real failure of HCA is not one of substantive inadequacies, but of perception and politics. The proponents of Health Claims Arbitration failed to persuade opponents of HCA and the legislators themselves that HCA fulfilled its mission, and accordingly popular myths, not hard data, informed the legislators’ decision. Although panels speed resolution, ninety-six percent of surveyed attorneys believe it slows resolution.\textsuperscript{183} Although HCA deters claimants, sixty-five percent of respondents think it either encourages claimants to file or has no deterrent effects.\textsuperscript{184} Although remarkably few cases are appealed to circuit court, ninety-three percent of attorneys think the presumption of correctness does not deter claimants from filing for a de novo trial, and eighty-two percent think that the presumption does not deter defendants.\textsuperscript{185}

If these numbers represent the public’s perception of health claims arbitration, then it should come as no surprise that the General Assembly passed the unilateral waiver statute unanimously.\textsuperscript{186} Indeed, the only surprise is that none of the prior repeal bills were enacted, and that the Assembly enacted a waiver bill rather than the original bill, which would have repealed HCA outright.

The decision to permit waiver rather than repeal may have been a concession to the only group that supported HCA, the insurance in-

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\textsuperscript{179} See supra note 73 and accompanying text.

\textsuperscript{180} See supra notes 80, 107-112 and accompanying text.

\textsuperscript{181} See supra notes 145-159 and accompanying text.

\textsuperscript{182} One often-cited complaint added by respondents to the author's survey may help to explain defendants' dislike of HCA. Many apparently perceive HCA as a discovery tool for plaintiffs, where they can explore the details of the defendants' case before an actual trial. Author's Survey, supra note 74.

\textsuperscript{183} See supra note 175 and accompanying text.

\textsuperscript{184} See supra note 114.

\textsuperscript{185} See supra notes 160-161 and accompanying text.

\textsuperscript{186} See supra note 4 and accompanying text.
One of the bill's sponsors, Delegate Kenneth C. Montague (D-Baltimore City), reported that the amendment was made in response to the testimony of one attorney that attorneys who handle smaller cases prefer HCA over jury trials. This may be an expensive concession. Currently the Health Claims Arbitration Office staff handle more than 600 cases each year. If the majority of these cases waive out of arbitration, the cost to the judicial system—and accordingly, the state—may run more than $860,000.

b. The Impact of House Bill 1049.—To determine the fate of health claims arbitration in Maryland, the author made two inquiries. First, because House Bill 1049 affects only those claims filed after October 1, 1995, HCA filing rates were examined to determine if claimants were holding back claims so that they could take advantage of the new waiver provision. The rate for cases filed between January 1 and June 30 increased by 3.8% from 1994 to 1995. A month after Governor Glendening signed the bill into law, filing rates plummeted: rather than following the previous trend of a 3.8% increase, the filing

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187. See Witness List for H.B. 1049, supra note 178. It seems reasonable that insurers, who subsist on numbers, percentages, and probabilities, would be more easily persuaded by statistical proof than other interested parties.

188. Telephone Interview with Delegate Kenneth C. Montague, Jr., Chairman of the House Judiciary Committee, Maryland General Assembly (Oct. 20, 1995). But see McGuirk & Rafferty, supra note 20, at 16, discussing a study that found that HCA discourages the filing of small claims.

189. Although no reliable data comparing the cost of judicial and HCA resolution exist, a comprehensive analysis performed in 1984, when the total cases filed for the previous year was 578, conservatively estimated that the costs of additional judges and support staff required to handle the medical malpractice workload would cost the State of Maryland between $162,000 to $580,350. See MANAGEMENT STUDY, supra note 139, at 45-46. Current filing rates are comparable to 1983, with claimants filing 616 cases in 1994. Morlock & Malitz, Testimony, supra note 7. If dumping 600 cases per year into the judicial system would conservatively cost as much as $580,350 in 1983 dollars, the cost of abolishing Health Claims Arbitration today could easily exceed $860,000. See BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 491 (11th ed. 1995) (estimating from consumer price index Table No. 760).

The budget analysis prepared for H.B. 1049, see FISCAL NOTE, supra note 158, estimated that expenditures may rise by an "indeterminate" amount, and assumed that the additional caseload could be handled "with[in] existing budget resources." This three-page note appears to ignore the added complexity of medical malpractice suits. See supra text accompanying notes 115-117. Considering the Fiscal Note's lack of depth, the 1984 analysis seems a more reliable source.


191. Data compiled by the author at the Health Claims Arbitration Office. Claimants filed 290 cases between January 1 and June 30, 1994. During the same period in 1995, claimants filed 301 cases. Id.
rate plummeted by 44.8% compared to the same period in 1994. When this Note went to press it was too early to determine how many of these claimants actually are waiving, but the fact that so many are positioning themselves to have the option bodes poorly for the future of health claims arbitration.

The second inquiry to assess the impact of House Bill 1049 was a survey question, "For those cases filed after October 1, 1995, in which unilateral waiver of Health Claims Arbitration is permitted, in approximately what percentage of your medical malpractice cases do you anticipate waiving?" An astounding eighty-four percent of claimants' attorneys and seventy-eight percent of defendants' attorneys replied that they expected to waive more than eighty percent of their cases. The probability that both the claimants' and defendants' attorneys in any given case will be among those who prefer HCA seems exceedingly low. If these numbers are at all representative, the majority of HCA cases will waive. As the currently pending caseload is resolved, it is likely that the Health Claims Arbitration Office may be forced to lay off staff, and the General Assembly will have no choice but to finish the task it started during the 1995 session, and finally repeal the Health Care Malpractice Claims statute.

c. The End of Health Claims Arbitration in Maryland.—Despite the tremendous unpopularity of health claims arbitration among lawyers, HCA has served health care providers and their insurers well. The great success of HCA was not that it encouraged settlement, but that it deterred many potential claimants from pursuing their claims. Whether the claims were meritorious or meritless, this saved insurers money. Health claims arbitration may cost less to administer than courtroom trials, but it also threatens both litigants with significantly increased litigation expenses. Because health care providers and their insurance companies are typically much better able to absorb the increased costs of such litigation, HCA may have created a larger burden on claimants than on defendants. Rather than enacting the unilateral waiver provision, the legislature could have in-

192. Id. Between July 1 and September 30, 1994, 183 cases were filed; during the same period in 1995, 101 cases were filed. Id.
193. See Author's Survey, supra note 74.
194. Id. Respondents were permitted to respond that they would waive in 0–20%, 21–40%, 41–60%, 61–80%, or 81–100% of their cases. Id.
195. See supra notes 157-159 and accompanying text.
196. See supra note 139 and accompanying text.
197. See supra 115-168 and accompanying text.
increased the informality of HCA to lower expenses and reduce this burden on claimants while maintaining the system. Instead, the General Assembly has at long last removed one of the barriers it had erected between claimants and their rights to be compensated for medical malpractice.

As for the increases in claims made and paid that prompted the enactment of HCA, insurers need not worry about a new medical malpractice crisis in Maryland. The number of claims filed will probably increase now that HCA no longer stands in their way. But the single best deterrent, the certificate of merit requirement, remains in effect, even for those cases that waive HCA. The measures that most effectively decrease the amount that insurers must pay out—verdict caps, elimination of the collateral source rule, and shortening the statute of limitations—remain the law in Maryland. Insurer outlays in Maryland are thus unlikely to increase more quickly than they have over the past several years.

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198. See supra text accompanying note 133.
199. See supra notes 15-25, 58 and accompanying text.
200. See supra text accompanying note 96.
201. See supra notes 101-106 and accompanying text.
203. Danzon, supra note 10, at 416-17 (finding that the three best methods of reducing total claims paid are capping verdict size, eliminating the collateral source rule, and shortening the statute of limitations); see supra notes 22, 44, 46 and accompanying text.
Recent Decisions
The United States Court of Appeals for the Fourth Circuit

I. CIVIL RIGHTS

A. The Applicability of Administrative Claim Preclusion to 42 U.S.C. § 1983 Suits

In Dionne v. Mayor of Baltimore,1 the Court of Appeals for the Fourth Circuit, addressing a question of first impression,2 held that an unreviewed administrative judgment will not have claim preclusive3 effect in a subsequent federal civil rights suit based on Title 42, § 1983 of the United States Code (section 1983).4 In so holding, the Fourth Circuit followed the lead established by the Eleventh Circuit in Gjellum v. City of Birmingham.5 Significantly, the Ninth Circuit simultaneously issued an opinion, Miller v. County of Santa Cruz,6 holding, in direct contrast to Dionne, that an unreviewed administrative decision will be accorded claim preclusive effect in a federal section 1983 suit.7 This Note examines the purposes and reasons for preclusion, particularly administrative preclusion, and its applications to federal suits based on various federal civil rights statutes. This Note concludes that Dionne is a logical decision and is legally well-grounded. In contrast, the Miller decision not only ignores many important policy considerations, but it fails to examine preclusion adequately in the section 1983

1. 40 F.3d 677 (4th Cir. 1994).
2. Id. at 681.
3. For purposes of this Note, claim preclusion is synonymous with "res judicata" and issue preclusion is synonymous with "collateral estoppel." See Robert H. Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C. L. Rev. 59, 59 n.1 (1984). Claim preclusion is a bar to litigation of any claims arising out of the same transaction or series of transactions on which a prior suit was based when the claimant had an opportunity to raise such claims in the prior action. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). This procedural rule requires parties to consolidate all closely related matters into one suit. More narrowly, issue preclusion is a bar to the relitigation of issues that were properly before the judicial body in the first suit between the same parties, actually adjudicated, and essential to the judgment. Id. §§ 27-28.
4. Dionne, 40 F.3d at 681-82, 685.
5. 829 F.2d 1056 (11th Cir. 1987) (holding an unreviewed administrative proceeding will not have claim preclusive effect in a same-transaction federal § 1983 suit).
6. 39 F.3d 1080 (9th Cir. 1994).
7. Id. at 1088.
The Fourth Circuit's decision is significant for its protection of an individual's right to a federal forum for section 1983 claims and for its simultaneous promotion of judicial economy and of federalism.

1. The Case.—William Dionne began working for the City of Baltimore (the City) in 1985 as chief of Media Technical Services in the mayor's Office of Cable and Communications. He continued in that position until October 11, 1990, when his supervisor, Joyce Jefferson-Daniels, sent him a letter of termination for allegedly violating Baltimore Civil Service Commission (BCSC) Rule 56. The termination was effective immediately. Dionne claimed that he did not receive any notice of the alleged violation prior to the October 11 termination letter. In compliance with BCSC disciplinary hearing regulations, Dionne filed a timely request for an investigation of his discharge and the lack of proper BCSC pretermination protections.

In the ensuing hearing, the hearing officer found that the City had violated Dionne's right to due process by breaching BCSC pretermination rules and by failing to prove the Rule 56 allegations made against Dionne. On April 16, 1991, the BCSC adopted the findings of the hearing officer and his recommendations of reinstatement, back pay, and loss of benefits. Pursuant to the BCSC rules, the City had thirty days to appeal the hearing officer's decision. The City did not appeal. Dionne wrote the BCSC requesting that it compel the City to obey the decision of the hearing officer, but the City still did not take any action towards Dionne. On May 24, 1991, Dionne filed a complaint in the Circuit Court for Baltimore City seeking a writ of mandamus directing the City and Jefferson-Daniels to follow the orders of the BCSC.

8. See id. at 1030. The analysis in Miller is not as fully developed and legally supported as that in either Gjellum or Dionne. See infra notes 138-153 and accompanying text.
10. Id. A Rule 56 violation refers to "fraud, theft, misrepresentation of work performance, misappropriation of funds, unauthorized use of City property, obstruction of an official investigation or any other act of dishonesty." Id. at *1 n.3.
11. Id. at *1.
12. Id.
13. Dionne, 40 F.3d at 679-80.
14. Id. at 680.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
Jefferson-Daniels immediately sent Dionne a letter of reinstatement upon being served with Dionne’s circuit court complaint on May 29, 1991. The letter informed Dionne that he would receive all of his back pay and lost benefits and that he would be reinstated to his former position. The letter also informed Dionne that his position would be eliminated as of June 30, 1991 due to budget cuts. Dionne resumed his position and worked until June 14, 1991.

On June 25, 1991, Dionne filed a section 1983 suit in the United States District Court against the Mayor and City Council of Baltimore, and against Jefferson-Daniels in her individual and official capacities, for violation of his due process rights. Dionne claimed that his termination and the elimination of his position violated his right to due process, and that the City and Jefferson-Daniels eliminated his position as retaliation against him for demanding an administrative hearing, thus violating his First Amendment rights. Together with the two constitutional claims, Dionne also asserted the state law claims of wrongful discharge and intentional infliction of emotional distress. His claimed damages included back pay, lost benefits, future earnings, future benefits, other compensatory damages, punitive damages, costs, and attorney’s fees.

The City and Jefferson-Daniels moved for summary judgment, and the district court dismissed Dionne’s complaint. The district court dismissed the section 1983 claim based on the October 1990 termination, finding that Dionne had effectively waived his right to bring such a cause of action by electing an administrative remedy, therefore foreclosing a subsequent federal suit. The district court also found that legislative immunity barred Dionne’s retaliation claims against the City. With respect to the elimination of Dionne’s position shortly upon his reinstatement, the court concluded that Dionne

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20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id. at 680 n.6.
27. Id. at 680.
28. Id.
30. Id. at *3. The City’s budgetary power, exercised through creation, abolition, or modification of city employment positions, gave rise to an effective legislative immunity defense. Id.; see also infra note 118 and accompanying text.
“enjoyed no property right in the continued existence of his job,” and therefore, he could not assert an actionable section 1983 claim on that basis. Dionne appealed to the Court of Appeals for the Fourth Circuit. The court of appeals framed the issue as whether the prior unreviewed administrative hearing precluded Dionne from asserting a section 1983 claim in federal court arising out of the same transaction.

2. Legal Background.—Common-law preclusion principles were developed by courts “to provide finality to the resolution of disputes, to conserve judicial resources, and to relieve parties of the burden of repetitious litigation.” When a subsequent action is brought in a different state court or in federal court the Constitution and federal law require that “full faith and credit” must be given to the initial state court decision. The text of the full faith and credit statute requires that federal and state courts respect the judgments of all states and treat them as they would be treated by the issuing states. Effectively, this means that courts must apply the preclusion laws of the state in which the court that rendered the earlier decision is located.

32. Id. at *3-5.
33. Dionne, 40 F.3d at 681.
34. Id. The court of appeals rejected the lower court’s election-of-remedies analysis and Instead found the issue to be one of preclusion. The court cited Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 51 n.14 (1974), in which the Supreme Court explained that election of remedies better applies to cases where the plaintiff “pursues remedies that are legally or factually inconsistent” or where there is a risk of double recovery. Id. The court did not find these problems present in Dionne’s suit. Dionne, 40 F.3d at 681; see also 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4476 (Supp. 1994) (stating “the election label has traditionally been used to explain decisions that today seem better explained in terms of claim preclusion”).
35. Smith, supra note 3, at 59.
36. U.S. CONST. art. IV, § 1. The article states: “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.” Id. The constitutional provision is implemented by 28 U.S.C. § 1738 (1988), which states in part:

Such Acts [of the legislature of any State, Territory or Possession], records and judicial proceedings or copies thereof, so authenticated, 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.

Id. Neither the constitutional clause nor its implementing statute establishes interstate preclusion rules. Smith, supra note 3, at 60.
37. 28 U.S.C. § 1738; see supra note 36.
38. See Smith, supra note 3, at 60-61 (explaining “full faith and credit’ considerations” and preclusion rules and providing a historical discussion of full faith and credit and early case law).
and courts must accord the same finality to a prior judgment of a
court in another state as would be accorded to a prior judgment ren-
dered by a court in the same state.\textsuperscript{99} Claim preclusion and issue pre-
clusion are thus the common-law procedural mechanisms by which
courts apply the principle of full faith and credit to state court
judgments.\textsuperscript{40}

In \textit{University of Tennessee v. Elliott},\textsuperscript{41} however, the Supreme Court
explained that the full faith and credit statute predates the existence
of administrative agencies.\textsuperscript{42} Therefore, the statute does not require
preclusion of claims previously adjudicated in unreviewed administra-
tive decisions.\textsuperscript{43} Because there is no statutory rule, federal common
law governs.\textsuperscript{44}

In the area of administrative preclusion, the Supreme Court has
opined that a state court review of administrative proceedings should
be treated as an original state court judgment for claim and issue pre-
clusion purposes.\textsuperscript{45} In \textit{United States v. Utah Construction \& Mining
Co.},\textsuperscript{46} the Court held that "[w]hen an administrative agency is acting
in a judicial capacity and resolves disputed issues of fact properly
before it which the parties have had an adequate opportunity to lit-
gate, the courts have not hesitated to apply res judicata to enforce
repose."\textsuperscript{47} When a state agency decision meets this standard and has
been reviewed by the state courts, the United States Supreme Court

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} 478 U.S. 788 (1986). The \textit{Elliott} case involved a black employee of the University of
Tennessee who filed a Title VII and § 1983 suit in federal district court alleging that his
discharge was racially motivated. \textit{Id.} at 790-91. These claims were pursued after the
employee received partial relief from an administrative proceeding. \textit{Id.} at 791-92. The Court
was faced with determining whether the unreviewed administrative proceeding precluded
the employee from maintaining his federal civil rights claims in federal court. \textit{Id.} at 794.
The Court decided that the unreviewed state agency proceeding would not bar relitigation
of issues regarding the employee's Title VII claim, but would preclude the relitigation of
issues regarding the employee's § 1983 claim. \textit{Id.} at 796, 799.
\item \textsuperscript{42} \textit{Id.} at 794-95.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 794; see infra notes 69-73 and accompanying text.
\item \textsuperscript{45} \textit{Kremer v. Chemical Constr. Corp.}, 465 U.S. 461, 465-67 (1982); see infra note 48
and accompanying text.
\item \textsuperscript{46} 384 U.S. 394 (1966).
\item \textsuperscript{47} \textit{Id.} at 422 (citations omitted). The Court, concerned with due process, decided
that if an administrative agency conducted a quasi-judicial proceeding ensuring fairness in
procedures and legal analysis, and addressed those issues relevant to the dispute, claim
preclusion should apply in later federal suits. \textit{Id.}
\end{itemize}
\end{footnotesize}
has not hesitated to apply federal common-law rules of preclusion to such decisions.\textsuperscript{48}

Section 1983 provides individuals with a statutory right to a federal forum to bring grievances arising from deprivations of right by state and local officials.\textsuperscript{49} However, the Supreme Court has held that the full faith and credit statute requires application of traditional rules of claim and issue preclusion to prior state court judgments in federal section 1983 suits.\textsuperscript{50} Thus, Supreme Court precedent squarely supports the application of issue and claim preclusion to both prior state court decisions and administrative proceedings reviewed by state courts in federal section 1983 actions.

The next logical question is whether unreviewed state agency decisions should be accorded the same preclusive effect as state court decisions and state-court-reviewed agency decisions. The Supreme Court has dealt with this issue in a piecemeal fashion. Its decisions in the civil rights arena have depended upon: (1) whether the subsequent federal suit is based on Title VII,\textsuperscript{51} the Age Discrimination in Employment Act (ADEA),\textsuperscript{52} section 1981,\textsuperscript{53} or section 1983; and (2) whether the issue in a given case involves applying claim preclusion or issue preclusion.\textsuperscript{54} The Supreme Court has not yet issued an opinion on every possible combination of the above factors, but some federal cir-

\begin{itemize}
\item[48.] See, e.g., \textit{Kremer}, 456 U.S. at 485 (holding that federal common laws of preclusion would apply to administrative proceedings reviewed by state courts in federal Title VII cases).
\item[49.] 42 U.S.C. § 1983 (1988) states in part:
\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\ldots
\end{quote}
\textit{Id.}
\item[52.] 29 U.S.C. §§ 621-634 (1988). A claimant may bring an ADEA action based on discriminatory treatment regarding one's age by an employer or a prospective employer in the employment setting. \textit{Id.} § 626(c)(1).
\item[54.] \textit{See infra} notes 60-76 and accompanying text.
\end{itemize}
The rationales for issue preclusion and claim preclusion have varied depending on the type of civil rights law at issue, resulting in a "statute-specific" approach to preclusion principles. In most cases, the Supreme Court and the circuits have found an administrative agency's fact-finding does not preclude relitigation of issues in a subsequent federal civil rights suit, with the exception of subsequent section 1983 actions. However, federal application of claim preclusion is more unsettled. The circuits have split regarding the claim preclusive effect of unreviewed agency decisions in subsequent Title VII, ADEA, section 1983, and section 1981 federal suits. The follow-

55. See, e.g., Gjellum v. City of Birmingham, 829 F.2d 1056 (11th Cir. 1987) (dealing with the issue of an unreviewed administrative agency decision and claim preclusion in a subsequent § 1983 suit).

56. The courts are able to be "statute-specific" with application of preclusion principles because the Supreme Court has stated that the full faith and credit statute does not apply to unreviewed state agency proceedings, but rather that federal common-law rules of preclusion will apply, thereby giving the courts more flexibility in fashioning their doctrines. See University of Tenn. v. Elliott, 478 U.S. 788, 794-95 (1986) ("Title 28 U.S.C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative fact-finding at issue in this case. However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute.").

57. Id.

58. Id.; see also infra notes 60-67 and accompanying text.

59. See infra notes 61, 63, 65, 67, 77-80 and accompanying text.
ing chart summarizes the current status of the law regarding issue preclusion and claim preclusion of unreviewed administrative decisions in later federal civil rights suits:

<table>
<thead>
<tr>
<th>CIVIL RIGHTS STATUTE</th>
<th>ISSUE PRECLUSION</th>
<th>CLAIM PRECLUSION</th>
</tr>
</thead>
<tbody>
<tr>
<td>TITLE VII</td>
<td>No(^{60})</td>
<td>Yes and No(^{61})</td>
</tr>
<tr>
<td>42 U.S.C. § 1981</td>
<td>Depends(^{62})</td>
<td>Yes and No(^{63})</td>
</tr>
<tr>
<td>ADEA</td>
<td>No(^{64})</td>
<td>Yes and No(^{65})</td>
</tr>
<tr>
<td>42 U.S.C. § 1983</td>
<td>Yes(^{66})</td>
<td>Yes and No(^{67})</td>
</tr>
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Different legislative histories, legislative intent, and specific purposes for enactment account for varied application of issue preclusion and claim preclusion to unreviewed agency judgments in subsequent federal suits.\(^{68}\) For example, in the Title VII context, the statute itself provides for Equal Employment Opportunity Commission (EEOC) review of state agency decisions and a trial *de novo* in federal court.\(^{69}\)

60. *See Elliott*, 478 U.S. at 796 (holding an unreviewed administrative proceeding does not bar a subsequent Title VII suit in federal court).


62. *See Kelley v. TYK Refractories Co.*, 860 F.2d 1188, 1195 (3d Cir. 1988) (holding the findings of an unreviewed state agency have no issue preclusive effect in a subsequent § 1981 action in federal court when the standard of law in the agency decision is different from § 1981).

63. *See supra* note 61.


65. *See Stillians v. Iowa*, 843 F.2d 276, 282 (8th Cir. 1988) (holding an unreviewed administrative proceeding will bar a later ADEA claim in federal court). *But see Duggan v. Board of Educ.*, 818 F.2d 1291, 1297 (7th Cir. 1987) (holding an unreviewed state agency's fact-finding does not bar relitigation in a federal Title VII or ADEA suit).


67. *See Gjellum v. City of Birmingham*, 829 F.2d 1056, 1070 (11th Cir. 1987) (holding an unreviewed agency decision does not have claim preclusive effect in a later federal suit); *Dionne*, 40 F.3d 685 (same). *But see Miller v. County of Santa Cruz*, 39 F.3d 1030, 1038 (9th Cir. 1994) (holding an unreviewed administrative proceeding is accorded the same preclusive effect as a state court decision in a later § 1983 federal suit).


69. 42 U.S.C. § 2000e-4 (1988); *see also Elliott*, 478 U.S. at 795-96 (reasoning that an unreviewed state agency's fact-finding that is subordinate to EEOC findings could not logically be accorded preclusive effect in a federal Title VII suit).
This unique federal agency proceeding led the Court in *Elliott* to conclude that issue preclusion would not bar relitigation of state agency fact-finding in subsequent Title VII suits in federal court. In the same case, however, the Court noted that legislative histories of section 1983 and other Reconstruction-era civil rights statutes such as section 1981 were silent as to an "implied repeal" of the full faith and credit statute. Thus, the Court found that the sound policy considerations of conserving judicial resources and preserving federalism warranted a federal common-law rule of preclusion. The Court held that unreviewed state administrative proceedings did have preclusive effect on the employee's claims under the Reconstruction-era civil rights statutes.

Moreover, the courts have split on ADEA preclusion rules. The Seventh Circuit compared ADEA with Title VII to find that Congress did not intend for an unreviewed state agency decision to foreclose a claimant's right to a federal forum in either case. On the other hand, the Eighth Circuit distinguished Title VII from ADEA, finding no legislative intent to create an absolute right to a federal forum for ADEA claims.

Despite the apparent conflicts among the circuits as to the application of administrative claim preclusion to the various civil rights actions, the Supreme Court has yet to issue a decisive opinion. Besides the Fourth Circuit, two circuits have issued conflicting opinions on whether unreviewed administrative decisions will be accorded claim preclusive effect in section 1983 actions. The Eleventh Circuit did not apply administrative claim preclusion in the section 1983 context in *Gjellum*. In contrast, the Ninth Circuit's *Miller* decision conflicted

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71. Id. at 796-97. The "implied repeal" analysis was used by the Supreme Court in *Elliott* to justify application of administrative issue preclusion with respect to the § 1983 suit, but not to the Title VII claim. *See id.* at 795-96. The implied repeal doctrine involves an examination into whether the language of the civil rights statutes in any way provides for congressional intent to reject a full faith and credit application of preclusion principles. Kuczynski, *supra* note 68, at 1114-15.
73. Id. at 799.
74. *See supra* note 65.
75. Duggan v. Board of Educ., 818 F.2d 1291, 1294-97 (7th Cir. 1987).
76. Stillians v. Iowa, 843 F.2d 276, 281-82 (8th Cir. 1988).
77. *See Gjellum* v. City of Birmingham, 829 F.2d 1056, 1064-65 (11th Cir. 1987) (holding that claim preclusion will not apply to an unreviewed state agency decision in a subsequent § 1983 federal suit). *But see Miller v. County of Santa Cruz*, 39 F.3d 1030, 1038 (9th Cir. 1994) (holding that claim preclusion will apply to an unreviewed state agency decision in a subsequent § 1983 federal suit).
78. *Gjellum*, 829 F.2d at 1065, 1070.
with *Gjellum* both in its reasoning and outcome.\(^{79}\) In *Dionne*, the Fourth Circuit concurred with the Eleventh Circuit; the *Dionne* court did not consider the arguments raised in *Miller*, which was decided shortly before *Dionne*.\(^{80}\)

3. The Court's Reasoning.—The *Dionne* court held that an unreviewed administrative judgment does not preclude a later section 1983 action in federal court arising out of the same transaction.\(^{81}\) The court framed the issue not as one of election of remedies,\(^{82}\) but rather as one of res judicata.\(^{83}\) The *Dionne* court cited an Eleventh Circuit case, *Gjellum v. City of Birmingham*, for arguments in favor of denying preclusive effect to unreviewed administrative decisions in section 1983 actions in federal court.\(^{84}\) The *Dionne* court also detailed the logical steps it took to arrive at its holding.

The court first explained that the full faith and credit statute does not require the application of issue or claim preclusion to unreviewed state agency decisions.\(^{85}\) The *Dionne* court relied on the reasoning in *Elliott*\(^{86}\) in enumerating several cogent purposes for applying issue preclusion to unreviewed administrative judgments in later section 1983 actions.

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79. *See Miller*, 39 F.3d at 1038.
80. 40 F.3d at 681. The *Dionne* case was decided on November 22, 1994, and the *Miller* case was decided on November 8, 1994, and was amended on December 27, 1994.
81. *Id.* at 685.
82. The lower court rested its decision to award summary judgment to the defendants on an election of remedies rationale. The court held that by successfully pursuing post-termination remedies, Dionne was precluded from filing a further cause of action in federal court. *Dionne v. Mayor of Baltimore*, No. 91-1770, 1992 WL 373149 at *6 (D. Md. Oct. 8, 1992).
83. *Dionne*, 40 F.3d at 681. The court agreed with a Ninth Circuit opinion, *Haphey v. Linn County*, 953 F.2d 549, 552 (9th Cir. 1992) (en banc), that found that "state claim and issue preclusion rules should normally be employed when courts are considering whether utilization of state court [or administrative agency] proceedings prevents later utilization of federal proceedings." *Id.* In that case the plaintiffs, sheriff's deputies, were laid off and filed an administrative grievance with the state employment relations board alleging discriminatory discharges based on their union activities. *Id.* at 550. The administrative body awarded the plaintiffs reinstatement and back pay. *Id.* The plaintiffs then filed a § 1983 action in federal court. *Id.* The Ninth Circuit held that "when an employee of a state or local governmental entity presents a claim for reinstatement to a state administrative agency, that is not an election of remedies." *Id.* at 552. The court did not decide whether claim preclusion would bar the plaintiffs from pursuing their damage claims. *Id.; see also supra note 34.*
84. 829 F.2d 1056, 1065 (11th Cir. 1987).
85. *Dionne*, 40 F.3d at 681-82.
86. *Id.* at 682 (citing University of Tenn. v. Elliott, 478 U.S. 788, 794 (1986) (explaining that 28 U.S.C. § 1738 predates administrative proceedings and is therefore not binding on such unreviewed judgments)); *see also supra* text accompanying notes 35-43.
87. *See supra* notes 41-44 and accompanying text.
actions. Two of the foremost economical reasons to support application of issue preclusion in this situation are relieving crowded court dockets and avoiding repetitive and costly litigation. Preserving federalism and providing for more uniformity in decisions also support the application of state issue preclusion principles to unreviewed administrative judgments.

The Dionne court distinguished the results of claim preclusion from those of issue preclusion to show the need for different rules. Claim preclusion aids in furthering economic and social values, as does issue preclusion; however, claim preclusion results in a more "drastic" outcome. A plaintiff must assert all possible causes of action in the original proceeding or forever lose the opportunity to raise them. With this in mind, the court adhered to the test that a plaintiff must have a "fair opportunity to advance all its 'same transaction' claims in a single unitary proceeding" in order to grant a claim preclusion defense.

The court determined that Dionne did not have a fair opportunity to raise all causes of action in his administrative proceeding. The court contrasted administrative proceedings with state court proceedings, explaining that administrative hearings have a more "limited substantive and remedial scope." For example, Dionne was not able to advance the section 1983 constitutional theories and remedies in the state agency proceeding. The court relied on the Restatement (Second) of Judgments, section 26(1)(c), in stating that "claim preclusion [is] inapplicable where plaintiff [is] 'unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the [administrative tribunal].'" The court concluded that Dionne fell within this category of plaintiffs unable to assert all of his

88. Dionne, 40 F.3d at 682.
89. Id.
90. Id.
91. Id. at 683.
92. Id.
93. Id.
94. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (1982).
95. Dionne, 40 F.3d at 683.
96. Id.
97. Id.
98. Id. Dionne was unable to claim remedies including lost benefits, loss of future earnings, and benefits caused by emotional distress, punitive damages, and attorney's fees in the administrative proceeding. Id. The administrative proceeding limited Dionne's claims to reinstatement and back pay, based solely on the issue of whether Jefferson-Daniels had just cause to discharge Dionne. Id.
99. Id.
claims in a single administrative proceeding and, therefore, was not precluded from filing a "same transaction" section 1983 suit.100

The possibility of alternative forums presented another issue for the Dionne court.101 Dionne was free to bring his section 1983 action straight to state court without any exhaustion of remedies problem because section 1983 claims do not require a prerequisite administrative hearing.102 However, had Dionne brought the section 1983 claim in state court along with the state law claim of wrongful discharge, the entire suit likely would have been dismissed for failure to exhaust available administrative remedies concerning the state law claim.103 The court also explained that if Dionne tried to bring the section 1983 action alone in state court, he most likely would have lost the opportunity to commence the state agency proceeding regarding the wrongful discharge claim within the short five-day statute of limitations.104 Consequently, the court reasoned that because the administrative hearing did not provide Dionne with an adequate forum to adjudicate all of his possible claims in a single proceeding, it would not be appropriate to apply claim preclusion to bar his federal action.105

The Dionne court also found that enforcing the drastic measure of claim preclusion in this case would not advance the judicial economy benefits offered by issue preclusion.106 The application of claim preclusion would force most plaintiffs to bring their claims initially in federal court out of fear of losing certain causes of action by pursuing the administrative route.107 This would place a heavier financial and

100. Id.
101. Id.
102. Id.
103. Id.; see also Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 51, 459 A.2d 205, 209 (1983) (holding that "[t]o exhaust administrative remedies, ordinarily a party must pursue the prescribed administrative procedure to its conclusion and await its final outcome"). Judge Widener, in his dissent, argued that the state court would not be compelled to dismiss the entire suit for failure to exhaust the administrative remedies regarding the wrongful discharge claim. Dionne, 40 F.3d at 687 (Widener, J., concurring in part and dissenting in part). He cited Esslinger v. Baltimore City, 95 Md. App. 607, 614-15, 622 A.2d 774, 778 (1993), which held that a plaintiff asserting a § 1983 cause of action in state court need not exhaust his administrative remedies prior to bringing the § 1983 action. Dionne, 40 F.3d at 687 (Widener, J., concurring in part and dissenting in part).
104. Dionne, 40 F.3d at 683-84. The BCSC rules provide five days within which to appeal sanctions. Id. at 684.
105. Id.
106. Id.
107. Id.
time burden on the federal court system. The court did not want to discourage plaintiffs from seeking administrative remedies, which are generally cheaper, easier, and less time-consuming than litigation.

Through examining the legislative history of section 1983, the court observed that this act was intended to increase federal jurisdiction and to provide a special route to the federal courts. In light of this historical information, the court found that section 1983 actions should not be barred by earlier unreviewed state agency proceedings because such a bar would take away the statutory right to a federal forum.

Finally, the court noted another distinction between issue preclusion and claim preclusion. As the Supreme Court discussed in Elliott, one of the purposes of applying issue preclusion to unreviewed state agency decisions is to prevent inconsistent judgments. However, the Dionne court anticipated "no appreciable risk of inconsistent decisions" from its refusal to apply state claim preclusion law to unreviewed administrative decisions. The Elliott decision, barring the relitigation of issues already addressed by the unreviewed administrative body, would also prevent the chance of inconsistent outcomes in the later section 1983 suit. The court further reasoned that there would be no risk of double recoveries because any section 1983 award would be reduced by any state agency award.

The court found that the district court correctly dismissed Dionne's second section 1983 claim that alleged that the City de-

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108. *Id.; see infra* notes 160-161 and accompanying text.

109. *Dionne*, 40 F.3d at 684; *see also* Frazier v. King, 873 F.2d 820, 824 (5th Cir. 1989) (discussing the undesirable result of "encourag[ing] plaintiffs to bypass administrative proceedings in order to preserve their claims under § 1983"); Gjellum v. City of Birmingham, 829 F.2d 1056, 1064 (11th Cir. 1987) (noting "the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding").


111. *Dionne*, 40 F.3d at 684.

112. *Id.; see also* University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986).

113. *Dionne*, 40 F.3d at 684.

114. *Id.*

115. *Id.* at 685 (citing Gjellum v. City of Birmingham, 829 F.2d 1056, 1069 (11th Cir. 1987)); *see supra* notes 69-73 and accompanying text.

prived him of his due process rights by eliminating his position immediately upon his reinstatement. 117 The court determined that "Dionne enjoyed no property right in the continued existence of his job and consequently his position could be abolished by the legislature without notice and a hearing." 118 Because there was no due process violation, Dionne had no actionable section 1983 claim. 119

Judge Widener concurred in part and dissented in part. 120 He disagreed with the majority's reasoning regarding the inapplicability of the claim preclusion issue to unreviewed administrative decisions. 121 He believed that the state court forum would in fact provide a fair opportunity for Dionne to raise all his claims, including the section 1983 action. 122 Judge Widener concluded that Dionne waived his section 1983 action because he elected the administrative remedy instead of filing suit in state or federal court. 123 He insisted that this was an election of remedies situation giving rise to the problems of piecemeal litigation and of subjecting defendants to defending themselves in two fora for claims arising out of the same transaction. 124

Judge Widener raised serious concerns regarding the role of the states in deciding the scope of state agency proceedings. 125 He believed that this determination is clearly within the states' discretion and the federal courts should remain uninvolved. 126 He did not agree with the majority's view that applying claim preclusion would en-

117. Dionne, 40 F.3d at 685.
118. Id.; see also Goldsmith v. Mayor of Baltimore, 845 F.2d 61, 64 (4th Cir. 1988) (holding that the state has the legislative power to create or abolish state jobs).
119. Dionne, 40 F.3d at 685.
120. Id. at 685-88 (Widener, J., concurring in part and dissenting in part). Judge Widener agreed with part III of the opinion that Dionne had no property interest in the continued existence in his position and, therefore, had no actionable § 1983 claim. Id. at 685. Judge Widener, however, disagreed with the majority's comment in dicta that if Dionne should be successful on remand in showing that any damages from the elimination of his job were "causally linked" to the discharge, he should be able to recover those damages as well. Id. at 685 n.15. Judge Widener found a flaw in the logic of this comment because the majority had already found Dionne to have no actionable property right. Id. at 685-86.
121. Id. at 686-87.
123. Dionne, 40 F.3d at 686 (Widener, J., concurring in part and dissenting in part). Judge Widener approached this case as an election of remedies issue. Dionne, instead of filing a claim in state or federal court, chose the administrative route. Therefore, he should be barred from relitigating the same claim in a different forum. Id. at 686-87.
124. Id. at 686 n.1.
125. Id. at 687.
126. Id. at 687 n.3.
courage plaintiffs to file in the overburdened federal courts instead of electing the cheaper, quicker administrative route, thus resulting in less state agency adjudications. Judge Widener thought that allowing such a result would actually motivate states to use their discretion to broaden the scope of their agency proceedings so as to avoid multiple litigation and reduce burdens on defendants. From this analysis, Judge Widener maintained that the federal courts would not become overburdened and the states would be able to exercise their sovereign power to define the scope of state agency proceedings.

Finally, Judge Widener did not accept the majority's view that Dionne's state law cause of action would have been dismissed for failure to exhaust his administrative remedies. Judge Widener noted that the Court of Special Appeals held in Esslinger that a plaintiff suing under section 1983 need not exhaust his administrative remedies. Judge Widener believed that Dionne was not deprived of any substantive remedy by choosing the administrative route, as he obtained a favorable verdict, back pay, and reinstatement. In Judge Widener's view, recovery under different theories of law and in different fora is burdensome and should not be protected by federal law. Therefore, he disagreed with the majority in its decision to allow Dionne's section 1983 action to go forward. Judge Widener believed that Dionne had a choice of fora, that he chose the administrative route, and that he should therefore be limited to the remedies available from his choice.

4. Analysis.—In light of relevant legal reasoning and a balancing of competing policy issues, the Fourth Circuit held that an unreviewed administrative decision will not bar a later same-transaction section 1983 suit in federal court. The court in Dionne also drew upon Supreme Court and other federal circuit analysis in related preclusion cases to support its decision.

127. Id.
128. Id.
129. Id.
130. Id. at 687 (citing Esslinger v. Baltimore City, 95 Md. App. 607, 614-15, 622 A.2d 774, 778 (1993)); see also supra note 103.
131. Dionne, 40 F.3d at 688 (Widener, J., concurring in part and dissenting in part).
132. Id.
133. Id.
134. Id. at 685.
135. See, e.g., University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (holding federal courts in § 1983 actions must accord issue preclusive effect to an administrative agency's fact-finding if the agency was acting in a judicial capacity); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1982) (holding no legislative intent in Title VII to depart from
On the precise issue of administrative claim preclusion in section 1983 actions, the Fourth Circuit's opinion is more logical and legally grounded than the contemporaneous Ninth Circuit decision in *Miller.* Not only did the Ninth Circuit fail to analyze the issue in light of other federal civil rights statutes, but it also failed to address the reasoning used by the Eleventh Circuit seven years prior. The Fourth Circuit, on the other hand, more thoroughly analyzed the precise issue of administrative claim preclusion in section 1983 actions and was therefore more convincing. *Dionne* represents an appropriate compromise between the compelling policy goal of promoting efficiency by respecting the competency of administrative agencies acting in a judicial capacity and the equally important end of preserving a federal judicial forum for section 1983 claimants.

a. Gjellum, Miller, and Dionne Compared.—In 1987, the Eleventh Circuit became the first circuit to issue an opinion on the claim preclusive effect of an unreviewed state agency decision in a subsequent federal section 1983 suit. In that case, John Gjellum, a Birmingham police officer, was suspended for taping conversations between himself and his superiors regarding police business and for divulging that information to the public without police authority. Gjellum appealed his suspension to the Jefferson County Personnel Board (JCPB), which ordered the City to reinstate him and award him back pay. The City appealed the JCPB decision to the state court system, which affirmed the agency decision. Gjellum then filed a section 1983 action in federal court. The court found that the administrative proceeding barred him from litigating the action in federal court. The Eleventh Circuit reversed, however, finding that in some cases, the federal courts are better able to be the final adjudicators of federal civil rights actions than are state agencies. It found

traditional rules of issue and claim preclusion when an administrative proceeding received state court review); United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (reiterating that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose"); see also supra part 2.

136. 39 F.3d 1030 (9th Cir. 1994); see also supra text accompanying notes 6-7.
137. Gjellum v. City of Birmingham, 829 F.2d 1056 (11th Cir. 1987); see also infra text accompanying notes 138-144.
138. *Gjellum,* 829 F.2d at 1070.
139. *Id.* at 1058.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1064-65.
that the special nature of section 1983, which provides the federal government a right to "step in where the state courts were unable or unwilling to protect federal rights," supports denying administrative claim preclusion.144 In Dionne, the Fourth Circuit adopted many of the policy arguments presented in Gjellum to arrive at the same outcome.145 Both the Fourth and Eleventh Circuits carefully analyzed the competing policy interests and examined the issues in the context of administrative preclusion, comparing section 1983 to other federal civil rights statutes. This careful consideration makes both the Gjellum and Dionne decisions convincing.

On the other hand, in Miller, the Ninth Circuit held that administrative claim preclusion would bar a subsequent section 1983 suit in federal court.146 The Miller opinion was written at approximately the same time as the Fourth Circuit opinion in Dionne,147 yet it takes a completely different stance. The Miller case arose after Miller appealed the local civil service commission's decision to uphold his termination as a county sheriff's employee.148 He filed a section 1983 suit in federal district court, which granted summary judgment for the county on res judicata and collateral estoppel grounds.149 The Ninth Circuit affirmed the judgment in light of precedent that convinced the court that claim preclusion was appropriate in this context.150 The Ninth Circuit based its analysis on the adequacy of the administrative agency adjudication, but otherwise appeared to have written the opinion in a vacuum, neither mentioning the seven-year-old Eleventh Circuit decision nor addressing relevant case law regarding administrative preclusion in other contexts.151

The Fourth Circuit's outcome in Dionne is in direct conflict with the outcome in Miller. The Fourth Circuit considered the very same

144. Id. at 1064 (quoting Haring v. Prosise, 462 U.S. 306, 313-14 (1983)).
145. See Dionne, 40 F.3d at 681-82.
146. Miller v. County of Santa Cruz, 39 F.3d 1090, 1098 (9th Cir. 1994).
147. See supra note 80.
148. Miller, 39 F.3d at 1032.
149. Id.
150. Id. at 1032-38. The Ninth Circuit relied on Plaine v. McCabe, 797 F.2d 713, 720-21 (9th Cir. 1986), which held that an unreviewed fairness determination in the securities law area barred a subsequent federal suit because the agency was acting in a judicial capacity and resolved disputed issues properly before it. Miller, 39 F.3d at 1033. The Miller court also relied on Eilrich v. Remas, 839 F.2d 630, 632 (9th Cir.), cert. denied, 488 U.S. 819 (1988), in which the court held that whether the agency acted in a judicial capacity and resolved disputed issues of fact properly before it was the only test needed for the application of claim preclusion. Miller, 39 F.3d at 1033. The Ninth Circuit failed to analyze the whole legal issue—it did not examine the special status accorded to federally created civil rights statutes, in particular § 1983.
151. Miller, 39 F.3d at 1033-38.
issues regarding the adequacy of state agency proceedings; however, it also considered many other factors including judicial economy, support for state sovereignty and federalism, and protection of an individual's right to a federal forum for adjudication of federal civil rights. Moreover, the Fourth Circuit also addressed the uniqueness of section 1983 and the purpose of its enactment and concluded that claim preclusion would not be appropriate or beneficial in this context. The Dionne opinion, like Gjellum, is a more complete analysis of important relevant issues and is better supported than Miller.

b. Reconciling Competing Policy Issues.—The issue facing the Dionne court presented many strong policy arguments for and against the application of claim preclusion in section 1983 suits. Supporters of applying administrative claim preclusion to section 1983 suits present several solid arguments in its favor. The most important argument is the need to conserve judicial resources and avoid inconsistent judgments. Traditional preclusion principles were developed in part to avoid repetitive litigation that could unduly burden defendants by requiring them to mount costly and time-consuming defenses in several fora while also risking inconsistent judgments and double penalties. Consequently, the Supreme Court in Elliott found that findings of fact would be subject to issue preclusion in section 1983 suits, which would serve to avoid unfair, "piecemeal" litigation.

The Dionne holding does not deny the existence of strong economic and fairness arguments in favor of applying preclusion, but reasons that these benefits are not as significant when barring a claimant's section 1983 action. Claim preclusion creates a more "drastic" situation for claimants because, while it may enforce repose, it eliminates a claimant's entire federal civil rights claim. Therefore, the Dionne court reasonably examined more cautiously the benefits of preclusion, mindful of the extreme consequences preclusion would impose on claimants.

152. Dionne, 40 F.3d at 681-85.
153. Id. at 684-85.
155. Id.; see also Dionne, 40 F.3d at 686 n.1 (Widener, J., concurring in part and dissenting in part).
156. Dionne, 40 F.3d at 686 n.1 (Widener, J., concurring in part and dissenting in part).
157. University of Tenn. v. Elliott, 478 U.S. 788, 798-99 (1986); see supra notes 70-73 and accompanying text.
158. Dionne, 40 F.3d at 682-83.
159. Id. at 683.
Contrary to the judicial economy argument put forth in support of the application of claim preclusion, had the Dionne court held that claim preclusion applied to unreviewed administrative decisions in section 1983 suits, the court believed it would have effectively discouraged claimants from using the cheaper, more efficient administrative route in favor of going directly to federal court in order to preserve their section 1983 claims. Thus, preventing claim preclusion of unreviewed administrative decisions may provide for fewer federal section 1983 suits because claimants who are successful in the administrative route may not need or desire to relitigate in federal court.

Another argument raised by supporters of claim preclusion harkens back to the notions of federalism and comity. In supporting the finality and competency of state agencies, the federal government must give credence to their proceedings and findings. These goals are furthered by according issue preclusive effect to state agency fact-finding in most cases. Issue preclusion encourages the parties to fully adjudicate their claims through the administrative route because they will not have another chance to relitigate the issues. This situation is the optimum compromise between claim preclusion on the one hand and de novo review by the federal district court on the other. An agency’s fact-finding is preclusive, but the statutory civil right to bring a section 1983 action in a federal forum is still alive. This situation also encourages more effective and efficient adjudication by the parties because they do not have another chance to relitigate crucial issues in federal court.

160. Id. at 684. The court feared that

[b]ecause plaintiffs might well choose to bypass the administrative agency and go directly to federal or state court with a § 1983 claim rather than forfeit the right to pursue that claim, the cost of litigation and the burden on the federal court system could well rise, instead of fall, if claim preclusion applied.

Id.

161. It is plausible that Dionne himself would not have filed the § 1983 claim in federal court had Jefferson-Daniels not ignored the administrative decision to reinstate him. Had Jefferson-Daniels reinstated him, issued him back pay and benefits, and not abolished his position, Dionne may have been satisfied with the four-day administrative hearing without the need to file a burdensome § 1983 suit.

162. See, e.g., University of Tenn. v. Elliott, 478 U.S. 788, 800-01 (1986) (Stevens, J., dissenting) (finding that claim preclusion in § 1983 suits does not advance the principles of federalism and finality because to hold otherwise would discourage state agency litigation, thus effectively not respecting state agencies); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 504-05 (1982) (Blackmun, J., dissenting) (finding that in the Title VII area, issue preclusion may cause plaintiffs to forego state court review of administrative decisions, thus effectively disrespecting state judicial functions).
Failing to apply claim preclusion to section 1983 actions does not offend the ideals of state sovereignty because the factual findings of the agencies are still accorded issue preclusive effect. A state agency judgment is not nullified when a section 1983 suit is later filed because, assuming the administrative agency was "acting in a judicial capacity, and resolv[ing] disputed issues of fact properly before it," those findings have preclusive effect in the federal suit. The federal courts, in fact, would be respecting the state agencies while also permitting a claimant to pursue the further statutorily created federal civil right in federal court. The Dionne decision affirmatively supports state agency competence by preventing situations where claimants, fearful of losing their section 1983 right, would forego state agency proceedings, opting instead to sue immediately in federal court.

Perhaps the most important reason for denying claim preclusion to an unreviewed state agency decision in a subsequent same-transaction federal lawsuit is the unique nature of section 1983. The generally accepted purpose for enactment of section 1983 and its predecessor, section 1 of the Civil Rights Act of 1871, was to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Congress enacted the predecessor to section 1983 during the post-Civil War Reconstruction Era, reflecting a belief in a strong role for the federal government in protecting individual constitutional rights. Fear of constitutional deprivations by state officials and a belief that "state courts were being used to harass and injure individuals" ran deep enough for Congress to create a "uniquely federal remedy against incursions under the claimed authority of state law." In light of this historical background, the Dionne court reasonably believed that access to the federal courts for section 1983 claims should not be foreclosed. Applying issue preclusion to unreviewed administrative decisions would sufficiently preserve traditional notions of federalism without the need to usurp an individual's special federal claim.

164. Dionne, 40 F.3d at 684.
165. Id.
168. Id. at 240.
169. Id. at 239.
170. Dionne, 40 F.3d at 684.
5. *Conclusion.*—The decision by the Fourth Circuit in *Dionne v. Mayor of Baltimore* fits properly within the framework of existing federal law regarding administrative preclusion. Dealing with an issue previously addressed only by the Eleventh Circuit and, more recently, the Ninth Circuit, the *Dionne* court upheld the basic legal reasoning espoused by the Supreme Court and the majority of other circuits with respect to the general issue of administrative preclusion. The *Dionne* court also carefully examined the various policy arguments on each side of the claim preclusion issue and determined that the greatest good would be served by barring claim preclusion of unreviewed administrative decisions in section 1983 suits.

The *Dionne* holding allows an individual alleging deprivation of constitutional rights by state officials under color of law to maintain the option of pursing an administrative remedy without forfeiting the right to a federal section 1983 suit. The Fourth Circuit's opinion respects the quasi-judicial functions of state agencies by not discouraging claimants from using the administrative avenue. State agencies do not become useless, but in fact become essential mechanisms of adjudicating claims in an efficient manner, thus diminishing the need for federal courts to adjudicate every civil rights suit.

After *Dionne*, litigants will not bypass the state administrative route for fear of foregoing their right to a federal cause of action. Conceivably, many litigants who receive favorable verdicts from administrative agencies will not feel the need to extend the litigation process by filing a later civil rights suit in federal court. Thus, by effectively encouraging the use of administrative agencies, *Dionne* promotes judicial efficiency and respect for state agencies, without depriving individuals of the statutory right to a federal forum as prescribed in section 1983.

**BRIDGET M. ENG**

### B. Advancing Toward Color-Blind Application of Strict Scrutiny in Higher Education

In *Podberesky v. Kirwan*, the Court of Appeals for the Fourth Circuit held that the University of Maryland's (the University) merit-
based scholarship program for African-American students cannot be sustained as a remedial affirmative action measure under the Equal Protection Clause of the Fourteenth Amendment. The court applied a two-pronged test to evaluate the program's effectiveness in redressing the consequences of the University's past discrimination against African-Americans. The test, set forth in two Supreme Court cases involving challenges to affirmative action plans outside the educational context, requires the court to consider: (1) whether there is a "strong basis in evidence" to support the conclusion that the remedial action is necessary; and (2) whether the chosen remedy is "narrowly tailored" to meet the stated remedial goal. The Fourth Circuit found that the University of Maryland's program failed both prongs.

This Note will argue that the Fourth Circuit correctly decided Podberesky given the Supreme Court's emphatic prohibition of the use of race-based remedial measures to combat "societal discrimination." While the record in Podberesky leaves no doubt that the University had

2. Podberesky IV, 38 F.3d at 161; see also U.S. CONST. amend. XIV, § 1. Section I reads in pertinent part, "[n]o state . . . shall deny to any person within its jurisdiction the equal protection of the laws." Id.

3. Podberesky IV, 38 F.3d at 153.


5. Wygant, 476 U.S. at 277.

6. Id. at 279-80; see also United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion). Paradise set up a framework for addressing the "narrowly tailored" question, identifying four criteria for judging the nexus between a remedial plan and the interest it purports to serve: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." Id.; see infra note 102 (discussing the Fourth Circuit's comparison of the fact patterns in Paradise and Podberesky IV and the resulting need to adjust the Paradise factors to fit a race-exclusive minority scholarship case); see also Podberesky v. Kirwan, 838 F. Supp. 1075, 1094 (D. Md. 1993) [hereinafter Podberesky III] (listing the Paradise criteria), vacated, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995).

7. Podberesky IV, 38 F.3d at 156-58.

8. Id. at 155; see also Wygant, 476 U.S. at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."); Croson, 488 U.S. at 499 (noting, in striking down Richmond's set-aside program for minority contractors, that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota").
engaged in discriminatory practices in the past, the University nevertheless failed to establish a nexus between those past practices and its current use of a racial classification. The Supreme Court consistently has stated that, "of all the criteria by which men and women can be judged, the most pernicious is that of race." The Fourth Circuit's decision thus represents an advance in Equal Protection jurisprudence toward the goal of color-blindness, and a recognition that fair competition between qualified persons is the best assurance of societal equality.

The decision also highlights the incompatibility of the strict scrutiny test, as applied, with the Supreme Court's use in Wygant v. Jackson Board of Education of the phrase "strong basis in evidence." The latter, somewhat ambiguous language suggests that a reviewing court should adopt a deferential posture when evaluating race-based remedial measures. Yet, such deference by a reviewing court is inconsis-

9. Podberesky II, 838 F. Supp. at 1077-81. The district court, on remand, discussed in detail the unfortunate history of discrimination at the College Park campus and throughout the University of Maryland educational system. Judge Motz noted that the president of the University in 1937 recommended privatization of the College Park campus as a way to block the admission of African-American graduate students. Id. at 1078. Even following the Supreme Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), which mooted the debate about the propriety of integrating the University of Maryland system, "the state did little to promote integration." Podberesky III, 838 F. Supp. at 1078. African-American students at the University's College Park campus during the early 1960s found themselves in a "notably inhospitable" environment. Id. African-American student enrollment stayed below 1% of the undergraduate population from 1954 until the end of the 1960s. Id. at 1079. The district court recounted how the problem persisted into the 1970s, highlighting, among other things, the University's failure to provide financial support for the building of fraternity and sorority houses for African-American students, and a general lack of interest in attracting African-American students to College Park. Id. at 1079-80.

10. Podberesky IV, 38 F.3d at 154-55 (rejecting the University's analysis of present effects).

11. Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (citing Croson, 488 U.S. at 500). The Fourth Circuit agreed with the district court that the standard of review of "such an overtly racial yardstick" as a race-based scholarship was strict scrutiny. Podberesky IV, 38 F.3d at 152-53.

12. It is an oft-cited maxim that strict scrutiny is "the most exacting judicial examination." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1986) (plurality opinion); see supra text accompanying note 5.

13. 476 U.S. 267, 277 (1986) (plurality opinion); see supra text accompanying note 5.

14. In his decision on remand, District Judge Motz noted that the parties had debated the meaning of "strong evidentiary basis." Podberesky III, 838 F. Supp. 1075, 1083 n.49 (D. Md. 1993), vacated, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995). The University argued that this standard is the functional equivalent of the "substantial evidence" test, a deferential standard that generally is described as more than a scintilla, but less than a preponderance of the evidence presented. Id.; see Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966) (describing the test); see also infra notes 145-149 (comparing the "substantial evidence" and "arbitrary and capricious" standards of review).
tent with the rigorous review inherent in strict scrutiny analysis.\textsuperscript{15} This Note therefore will argue that the \textit{Wygant} language must be reevaluated and refined so that the defendant's burden of production in a reverse discrimination case is in line with the searching analysis that a reviewing court must undertake in applying strict scrutiny.

1. The Case.—Daniel J. Podberesky, a Hispanic man, was admitted to the University of Maryland at College Park in the fall of 1989.\textsuperscript{16} Along with his application, Podberesky sought consideration for an academic scholarship.\textsuperscript{17} Podberesky did not qualify for consideration under the University's Francis Scott Key Scholars Program;\textsuperscript{18} however, his credentials exceeded those required for consideration under the Benjamin Banneker Scholarship Program, a system of merit-based scholarships established in 1978 as a partial remedy for past discriminatory action by the State of Maryland.\textsuperscript{19} Podberesky was not considered for the Banneker program, however, because only African-American students were eligible.\textsuperscript{20}

Podberesky sued in the United States District Court for the District of Maryland, challenging the legality and constitutionality of the Banneker program.\textsuperscript{21} He sought injunctive and compensatory relief under 42 U.S.C. §§ 1981\textsuperscript{22} and 1983,\textsuperscript{23} and Title VI of the 1964 Civil Rights Act.\textsuperscript{24}

\textsuperscript{15} See \textit{Bakke}, 438 U.S. at 291 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). In \textit{Croson}, Justice O'Connor stated that judicial inquiry into the justification for race-based measures must be "searching." Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). Justice O'Connor further stated that the purpose of strict scrutiny is to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." \textit{Id.}


\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} at 54 n.2. To be considered under the Key program, an applicant must have a "predictive index" (calculated by reference to grade point average and Scholastic Aptitude Test score) of 60. Podberesky's predictive index was 59; therefore, he was not entitled to be considered for a Key scholarship. \textit{Id.}

\textsuperscript{19} \textit{Id.} at 54.

\textsuperscript{20} \textit{Id.}


\textsuperscript{22} 42 U.S.C. § 1981 (1994). Section 1981 guarantees "equal rights under the law" and provides, in relevant part, that

\[a\]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
Rights Act. Both Podberesky and the University moved for summary judgment, and the district court held in the University's favor. Podberesky appealed, and the Fourth Circuit reversed the grant of summary judgment, remanding the action to the district court for a specific determination as to the present effects of the University's past discrimination. Following remand, the University conducted an administrative fact-finding process to decide whether to continue the Banneker program, resulting in the issuance in April 1993 of a decision and report in which the University concluded that the program should be continued. Thereafter, the parties engaged in additional discovery, culminating in another round of summary judgment motions, which were argued on October 22, 1993.

The district court, finding that "strong evidence" supported the University's findings in its April 1993 decision and report, again held in the University's favor. Podberesky again appealed to the

Id.


24. 42 U.S.C. § 2000d (1994). Title VI states, in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id. Because the Fourth Circuit in Podberesky focused on the constitutional issues, a discussion of Title VI's applicability to race-based scholarships is beyond the scope of this Note. For such a discussion, see Jerome W.D. Stokes, Race-Based Scholarships and Title VI: Are They Friends of Bill?, 82 ED. LAW REP. 17 (1993) (recounting the history, implementation, and interpretation of the statute with particular emphasis on the educational context).


26. Podberesky II, 956 F.2d 52, 57 (4th Cir. 1992). The Fourth Circuit stated that the district court failed to identify with specificity any present effects of past discrimination, but rather, "merely found that it would be prudent to keep the race-exclusionary scholarship in place" pending the outcome of a study of Maryland's higher education system by the Office for Civil Rights of the United States Department of Health, Education, and Welfare (now the Department of Education). Id. The Fourth Circuit noted that while such an approach may be deemed fair to the University, "it does not satisfy constitutional standards." Id.


28. Id. at 1077.

29. Id. at 1083. The decision and report identified four effects of the University's past discrimination, which, Judge Motz found, persist into the present: "a poor reputation of the university in the African-American community . . . ; underrepresentation of African-Americans in the student population; low retention and graduation rates of African-Americans; and perceptions of a campus climate that is hostile to African-Americans." Id. at 1082. The district court also found that the program was narrowly tailored to remedy those four present effects of past discrimination. Id. at 1094.

30. Id. at 1099.
Fourth Circuit, which heard argument on May 10, 1994. On October 27, 1994, the court vacated the district court's decision and remanded the matter to the district court for entry of an order granting Podberesky's motion for summary judgment, and requiring the University to re-examine Podberesky's admission to the Banneker program. The Fourth Circuit denied petitions for rehearing, and the Supreme Court denied certiorari on May 22, 1995.

2. Legal Background.—

a. The Education Cases.—Podberesky highlights the omnipresent tension between the Fourteenth Amendment's guarantee of equal protection "and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." The problems associated with discrimination in education repeatedly have been brought before the nation's judiciary. The recognition that education is critical in enabling citizens to enjoy fully other constitutionally protected rights prompted the district court in Podberesky to observe "that discrimination in schooling is the most odious form of discrimination."

Under the doctrine of "separate but equal" set down in Plessy v. Ferguson, racial segregation in the nation's educational system was
legally sanctioned until the Supreme Court’s landmark decision in *Brown v. Board of Education*. Brown expressly overruled the “separate but equal” doctrine, insofar as it applied to education. In the years following *Brown*, the Supreme Court struggled to implement *Brown’s* directive without overstepping the bounds of the judiciary’s equitable powers.

Before *Brown*, the Supreme Court had addressed the issue of discrimination in institutions of higher education in a separate series of cases. Thus, by the time the Supreme Court first addressed the issue of reverse discrimination at the university level, in the seminal case of *Regents of the University of California v. Bakke*, it was an established principle of law that “decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment.”

40. 347 U.S. 483 (1954) (holding state-sponsored school segregation to be invalid under the Constitution).  
41. Id. at 495.  
42. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955) (discussing the extent of the equitable powers of the federal courts with regard to school desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 1 (1971) (noting that the Supreme Court had granted certiorari “to review important issues as to the duties of school authorities and the scope of powers of federal courts” with respect to implementing the *Brown* mandate).  
43. See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950) (holding that assignment of African-American plaintiff to a classroom row reserved for “colored” students, and assignment to special tables in library and cafeteria, deprived plaintiff of equal protection of the laws); *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (finding that legal education equivalent to that offered to Caucasian students was not available in separate law school designated for African-Americans); *Sipuel v. Board of Regents*, 332 U.S. 631, 633 (1948) (citing *Gaines* for the proposition that Oklahoma must provide African-American applicant with legal education in conformity with the Equal Protection Clause); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938) (holding that Missouri’s requirement that African-American students go outside Missouri to obtain legal education was a denial of equal protection). As the Supreme Court noted in *Brown*, none of those cases required a reexamination of the doctrine of *Plessy*. *Brown*, 347 U.S. at 492.  
45. Id. at 287. The issue of preferential minority admissions was raised, before *Bakke*, in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam opinion). Marco DeFunis, a Caucasian male denied admission at the University of Washington Law School, challenged the school admissions policies as racially discriminatory. *Id.* at 314. The Supreme Court of Washington reversed a trial court order that the school admit DeFunis, but this did not occur until DeFunis was in his second year of law school. *Id.* at 315. The Supreme Court stayed the judgment of the Washington Supreme Court pending final disposition of the case, and, as a result, DeFunis was nearly finished with his law school education by the time the matter reached the Supreme Court. *Id.* As a result, the Supreme Court refused to decide the preferential admissions issue on mootness grounds. *Id.* at 319-20; see also *Bistline*, supra note 36, at 289 (noting that *DeFunis* represented the first time the Supreme Court was called upon to determine the validity of a minority-preference admissions program).
b. Bakke and the Issue of Reverse Discrimination.—In Bakke, the Court confronted numerous issues, born of the uneasy commingling of equal protection principles with the perceived need to ameliorate the effects of past discrimination against minorities.46 Allan Bakke, a Caucasian male denied admission to the Medical School of the University of California at Davis, challenged the legality of the University's special admissions program, which was designed to guarantee admission of a specified number of students from certain minority groups.47 Employing a legal strategy similar to Podberesky's, Bakke alleged that the special program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause; Article I, section 21 of the California Constitution; and Title VI of the 1964 Civil Rights Act.48 The Supreme Court held that the program was illegal, but that race may be one of a number of factors considered by a school in passing on student applications.49

While Bakke's importance may be diluted somewhat by the Court's inability to coalesce on pivotal issues,50 the Bakke Court nevertheless articulated important principles that later would figure prominently in cases such as Wygant, Croson, and Podberesky. Bakke, for example, made it clear that while a racial preference may be remedial in its purpose, such a preference "is undeniably a classification based on race and ethnic background."51 Thus, strict scrutiny is implicated.52 Furthermore, in his opinion Justice Powell disapproved of

46. See Bakke, 438 U.S. at 281 (noting that the parties "focused exclusively upon the validity of the special admissions program under the Equal Protection Clause") (opinion of Powell, J.).
47. Id. at 269-70.
48. Id. at 278 & nn.9-11.
49. Id. at 271-72.
50. Six separate opinions were filed in Bakke. This collection of opinions demonstrates the difficulty of the issues with which the Court wrestled. On the two principal holdings, the Court was fragmented, with Justice Powell representing a fragile middle ground. Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens concurred in the judgment with respect to the illegality of the race-based admissions program. Id. at 421 (Stevens, J., concurring in the judgment in part and dissenting in part). However, these Justices felt that the medical school's preferential program was proscribed under Title VI. Id. Justices Brennan, Marshall, White, and Blackmun, on the other hand, disagreed with the application of strict scrutiny. Id. at 357-58 (Brennan, J., concurring in the judgment in part and dissenting in part). These Justices agreed that government may take race into account when it acts to remedy disadvantages caused by past racial prejudices, but would have upheld the medical school's affirmative action program. Id. at 325-26.
51. Id. at 289.
52. Id. In Bakke, the medical school urged the Court to adopt a more restrictive view of equal protection, and hold that discrimination against members of the Caucasian majority cannot be regarded as suspect if its purpose could be characterized as "benign." Id. at 294. Justice Powell flatly rejected this proposition. Id. at 295. He adopted an absolutist stance
using race-based classifications to remedy the effects of societal discrimination. 53

c. Wygant and Croson: "Societal Discrimination" and the Application of Strict Scrutiny.—In Wygant v. Jackson Board of Education, 54 the Supreme Court held that a provision in a municipal collective bargaining agreement under which minority teachers benefitted from preferential protection from layoffs violated the Fourteenth Amendment. 55 Justice Powell, writing for a plurality, once again discussed the insufficiency of societal discrimination as a basis for racial classifications. 56 This time, he stated even more forcefully the unacceptability of this justification, noting that a purportedly remedial racial classification cannot be upheld without "some showing of prior discrimination by the governmental unit involved." 57 Justice Powell found that the school board's interest in providing minority role models for its minority students was an insufficient justification for a racial classification. 58

Wygant's most significant contribution may have been Justice Powell's discussion of the evidentiary support that will be required before race-based remedial actions can be upheld. 59 Such support is critical when the constitutionality of the remedy is challenged by a nonminority litigant. 60 "In such a case," Justice Powell wrote, "the trial court must make a factual determination that the employer had a 'strong basis in evidence' for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program." 61 However, unless the trial court makes the requisite factual determination that the employer's conclusion was appropriately supported by sufficient evidence, Justice Powell explained, an appellate

regarding strict scrutiny, advocating its application in all cases involving race-based classifications, regardless of whether the classification purports to aid "relatively victimized groups." Id. at 307.

53. See id. (stating that the "effects of 'societal discrimination'" constitutes an "amorphous concept of injury that may be ageless in its reach into the past").
55. Id. at 273.
56. Id. at 274-76.
57. Id. at 274-75.
58. Id.; see also Podberesky IV, 38 F.3d at 159 (noting the plurality's rejection of the "role-model theory").
59. Wygant, 476 U.S. at 277-78.
60. Id. at 274.
61. Id. at 277-78.
court reviewing a challenge to a remedial action will be unable to decide whether the race-based action is justified.\textsuperscript{62}

Hence, under \textit{Wygant}, it is possible that a race-based remedial action will be upheld if the employer satisfies its burden of producing a “strong basis in evidence,”\textsuperscript{63} and shows that the remedy adopted was “narrowly tailored.”\textsuperscript{64} This language, as District Judge Motz noted, is significant for the party seeking to maintain a race-based remedial measure.\textsuperscript{65} It is readily interpreted to mean, in the words of Judge Motz, that that party need not prove present effects of past discrimination beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence. The standard . . . is less than a preponderance of the evidence. To require any greater a standard would be in explicit contradiction of the Court’s requirement in \textit{Croson} that the burden of persuasion remain with the plaintiff in reverse discrimination cases.\textsuperscript{66}

The Supreme Court granted certiorari in \textit{Richmond v. J.A. Croson Co.}\textsuperscript{67} to consider \textit{Wygant}’s applicability to the minority set-aside program adopted by the City of Richmond, Virginia.\textsuperscript{68} \textit{Croson} may be viewed as having clarified the standard of review for remedial race-based measures by state and local governments, ruling in favor of an application of strict scrutiny.\textsuperscript{69} While commentators may question whether the \textit{Croson} Court truly embraced strict scrutiny in this context,\textsuperscript{70} neither the district court nor the Fourth Circuit in \textit{Podberesky}

\begin{itemize}
  \item \textsuperscript{62} \textit{Id.} Establishing the requisite “strong basis in evidence” constitutes the first part of the two-pronged test under which racially restrictive scholarship programs are evaluated. See Bistline, \textit{supra} note 36 at 295. The scholarship programs also must be “narrowly tailored” to further their stated remedial goals. \textit{Id.; see supra} note 6 and \textit{infra} note 102 and accompanying text (discussing the factors set forth in United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion), for deciding whether a measure is “narrowly tailored”).
  \item \textsuperscript{63} \textit{Wygant}, 476 U.S. at 277-78.
  \item \textsuperscript{64} \textit{Id.} at 279-80.
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} 488 U.S. 469 (1989).
  \item \textsuperscript{68} \textit{Id.} at 477.
  \item \textsuperscript{69} \textit{Id.} at 493. Justice O’Connor stated that the judicial inquiry into the justification for race-based measures must be “searching.” \textit{Id.; see supra} note 15 (discussing \textit{Croson}).
  \item \textsuperscript{70} See, \textit{e.g.}, Douglas D. Scherer, \textit{Affirmative Action Doctrine and the Conflicting Messages of Croson}, 38 U. KAN. L. REV. 281 (1990). In an article published approximately a year after \textit{Croson} was handed down, Scherer questioned whether there was a true consensus, despite the fact that five members of the Court approved of strict scrutiny:

At first glance, the significance of \textit{Croson} would seem to be the emergence of a strict scrutiny approach to remedial race-conscious affirmative action plans. In
raised the possibility of a less searching inquiry in a case involving a governmental actor. Moreover, any doubt as to the Fourth Circuit's position was dispelled in 1993, when, in Maryland Troopers Ass'n v. Evans, a unanimous three-judge panel of the Fourth Circuit applied strict scrutiny and struck down numerical racial hiring goals adopted by the Maryland State Police. In so holding, the panel stated firmly that "race is an impermissible arbiter of human fortunes."

3. The Court's Reasoning.—In Podberesky, a unanimous three-judge panel of the Fourth Circuit held that the district court erred on two counts: (1) in finding that the University had produced sufficient evidence of present effects of past discrimination to justify the Banneker program; and (2) in finding that the program was narrowly tailored to its stated remedial purpose.

a. Strict Scrutiny.—The Fourth Circuit emphasized the heavy burden that strict scrutiny imposes upon a party seeking to uphold a
race-based classification. Because the University of Maryland chose the Banneker program, which excludes from competition all races but one, the University, at the outset, was "burdened with a presumption that its choice cannot be sustained." The Fourth Circuit conceded that the district court "correctly recited ... that the standard of review of such an overtly open racial yardstick was strict scrutiny." But, the panel went on to imply that the district court merely had paid lip service to strict scrutiny, and to criticize the district court's "restlessness in compliance with that standard."

The panel specifically rejected the district court's conclusion that the University's own findings of present effects of past discrimination "ipso facto" established the necessity for relief. In so holding, the Fourth Circuit clarified what it will require as strong evidence of present effects of past discrimination: "[T]he party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." Thus, the district court erred in stating that if the University itself found strong evidence to support any of its proffered effects, the race-based program would be justified. Instead, the Fourth Circuit held that a court charged with assessing the need for a race-based remedial measure must itself examine the effects alleged to have been caused by discrimination.

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77. Id. at 152.
78. Id.
79. Id. at 152-53.
80. Id. at 153. The "restlessness" that the Fourth Circuit noticed in District Judge Motz's opinion is illustrated by the following statement of Judge Motz:

There is a danger (created in part by the images of microscope and magnifying glass which the term "strict scrutiny" brings to mind) that a judge will become myopic when confronted with statistics such as these and assume that a single reference pool must be selected. In fact, such a narrowing of perspective is neither necessary nor proper.

Podberesky III, 838 F. Supp. 1075, 1089 (D. Md. 1993), vacated, 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct. 2001 (1995). Judge Motz concluded that both he and the Fourth Circuit "may have constructed too rigid a framework of analysis," and that "the various restrictions that the Court has applied to affirmative action programs in the employment context—particularly the prohibitions against remedying the effects of 'societal discrimination,' or discrimination that was done by another 'governmental unit'—appear inappropriate in the education context where the effects of past discrimination are obviously societal in scope." Id. at 1097-98.

The Fourth Circuit, however, rejected Judge Motz's "alternate analysis." Podberesky IV, 38 F.3d at 153 n.1; see also Podberesky III, 838 F. Supp. at 1097-99 (discussing special concerns relative to discrimination in schooling).

82. Id.
83. Podberesky IV, 38 F.3d at 154.
and make its own factual finding that "they were caused by the past discrimination and [that] they are of a type that justifies the program." 84

b. A Genuine Issue of Material Fact.—In addition, the Fourth Circuit found that the district court committed a procedural error in granting summary judgment when both parties had filed cross-motions for summary judgment and there was a genuine issue of material fact remaining. 85 Reviewing the grant of summary judgment de novo, the Fourth Circuit discerned an evidentiary dispute pertaining to the second and third "present effects" that the University had asserted, respectively, underrepresentation in the student population and low retention and graduation rates for African-American students. 86 Podberesky had offered evidence that the attrition rate for African-American students resulted from economic and other factors unrelated to past discrimination. 87 Given this factual disagreement, the Fourth Circuit said, summary judgment was inappropriate. 88 Citing Federal Rule of Civil Procedure 56, 89 the court stated, "[T]he rule's language is clear that it is not enough for the district court to determine that the moving party has the winning legal argument; in accepting that argument, the district court must also ensure that there is no genuine issue as to any material fact before a grant of summary judgment is proper." 90

With respect to the alleged underrepresentation of African-Americans, the Fourth Circuit first observed that the selection of the correct "reference pool" was critical. 91 The panel stated that the district

84. Id.
85. Id. at 155.
86. Id.
87. Id. at 156. The district court rejected Podberesky's evidence, reasoning that economic concerns often are more pressing for African-American students because these students frequently come from less wealthy backgrounds. Id.; see Podberesky III, 838 F. Supp. at 1091-92.
88. Podberesky IV, 38 F.3d at 156. The Fourth Circuit considered the facts in the light most favorable to Podberesky, the nonmoving party. Id.
89. Rule 56 provides, in pertinent part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).
90. Podberesky IV, 38 F.3d at 156.
91. Id. The reference pool refers to the larger control group of African-Americans against which the representation or underrepresentation of African-American students at the University of Maryland must be measured. Id. The district court tried to broaden its analysis to account for the fact that "we still live in a time when many African-Americans of college age are disadvantaged ... because their forebears received an inferior education
court correctly had determined the threshold legal issue of whether the pool should consist of the general population or a smaller, qualification-specific group, and, appropriately, had rejected a pool of all graduating high school seniors. However, the panel faulted the district court’s attempt to resolve the factual dispute regarding the effective minimum admission criteria. According to the panel, the district court erred in declining to decide the requisite qualification for membership in the reference pool, and in examining instead the statistics “as a whole to determine whether they provide strong evidence of present effects of past discrimination.” Moreover, the Fourth Circuit found, the district court also erred in resolving at the summary judgment stage the factual dispute about the effective minimum criteria for admission.

Under Maryland’s segregated school system, of which UMCP stood at the top. Podberesky III, 838 F. Supp. at 1089. Thus, the district court rejected the use of a “reference pool” of qualified applicants consisting of high school graduates who were, in fact, eligible for admission to the University, reasoning that “the admissions process contains too many variables to define the reference pool by inflexible objective criteria which, in fact, are not mechanically applied by the University.” Id.

92. Podberesky IV, 38 F.3d at 156.
93. Id.; see also Podberesky III, 838 F. Supp. at 1089.
94. Podberesky IV, 38 F.3d at 156-57.
95. Id. at 157; Podberesky III, 838 F. Supp. at 1089. Judge Motz had rejected, as an improper and unnecessary narrowing of perspective, the notion “that a single reference pool should be selected.” Podberesky III, 838 F. Supp. at 1089. “Rather, the judge should look at the statistics as a whole to determine if they provide strong evidence of the existence of present effects of past discrimination.” Id. Judge Motz did not decide the requisite qualification for membership in a particular reference pool, but instead focused on the relatively low percentage of incoming African-American students at the College Park campus (15%) compared to the percentage of African Americans that met general course curriculum requirements (17.9%) and the percentage of African Americans who had taken the Scholastic Aptitude Test (SAT) (22%). Id. After considering the evidence, Judge Motz had “no difficulty in finding a strong evidentiary basis” for the finding that African-American students are underrepresented at College Park. Id.

96. Podberesky IV, 38 F.3d at 157. Notwithstanding its detailed discussion of the reference pool, the Fourth Circuit was primarily concerned with the district court’s attempt to resolve conflicts in the evidence at the summary judgment stage. Id. The district court’s resolution of these issues was complicated by the fact that the University did not submit sufficient data to facilitate a determination of the percentage, in relation to all graduating Maryland high school seniors, of African-American students who met the University’s minimum admission requirements. Id. at 157 n.4. Podberesky proposed a reference pool composed of graduating seniors who met these requirements, which he listed as follows: “completion of the required high school course curriculum, maintenance of a 2.0 grade point average and attaining a verbal S.A.T. score of 270; and a math S.A.T. score of 380.” Podberesky III, 838 F. Supp. at 1087. One dispute in the case centered on whether these minimum requirements should have defined the reference pool, as Podberesky had urged. The Fourth Circuit suggested that the district court could have denied the University’s motion for summary judgment and given it more time to produce the relevant figures. Podberesky IV, 38 F.3d at 157 n.4.
Although a denial of summary judgment ordinarily is not appealable, the Fourth Circuit noted that the district court’s orders on the motions had disposed of all of the parties’ claims, thus placing the orders within the Fourth Circuit’s appellate jurisdiction. The panel then turned its attention to the denial of Podberesky’s motion for summary judgment.

c. Present Effects of Past Discrimination.—The Fourth Circuit rejected the district court’s conclusions regarding each of the present effects articulated by the University. At the outset, the panel disposed of the notion that the first alleged effect, the University’s poor reputation in the African-American community, and the fourth alleged effect, a perceived racially hostile campus climate, were sufficient, by themselves, to justify the Banneker program. The panel then concluded that the Banneker program was not “narrowly tailored to remedy the underrepresentation and attrition problems.” In determining whether the Banneker program was narrowly tailored to ameliorate the present effects of past discrimination, the

97. Podberesky IV, 38 F.3d at 157.
98. Id.
99. The panel addressed each of the proffered “present effects” individually. Id. at 154-57.
100. Id. at 154. The panel commented that “any poor reputation the University may have in the African-American community is tied solely to knowledge of the University’s discrimination before it admitted African-American students.” Id. The hostile climate effect proffered by the University, the Fourth Circuit found, suffered from another flaw: its main support was found in a survey of student attitudes and reported results of student focus groups. Id. However, the panel pointed out that for an articulated effect to justify a race-based program, there must be a nexus between the past discrimination and the effect. Id.; see also United States v. Fordice, 505 U.S. 717, 729-30 (1992). The Fourth Circuit was not satisfied that the requisite connection existed, and indicated that it was more likely that the purported racial hostility on the campus resulted from present societal discrimination. Podberesky IV, 38 F.3d at 154.
101. Podberesky IV, 38 F.3d at 158. Because the panel already decided that the alleged poor reputation of the University among African-Americans and the hostile environment on campus were not sufficient to justify the Banneker program, it was not necessary for it to consider whether the program was narrowly tailored in relation to these problems. Id. at 158 n.9.
102. See supra note 6 (discussing the four-part test set forth in United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion), for evaluating whether a program is “narrowly tailored”). In Podberesky, the Fourth Circuit commented that, because the Banneker eligibility prerequisite of African descent does not establish the same type of racial quota as the 50% promotion requirement in Paradise, the tests articulated in that case, and adopted by the Fourth Circuit in Hayes v. North State Law Enforcement Officers Ass’n, 10 F.3d 207, 216 (4th Cir. 1993), required some adjustment to fit a race-exclusive minority scholarship case. Podberesky IV, 38 F.3d at 158 n.10. The court noted that, although Croson also involved an outright racial quota, it also dealt with a claim of present effects of past discrimination. Id. Therefore, the Fourth Circuit considered the factors used by the Croson Court.
Fourth Circuit was empowered to consider possible race-neutral alternatives and whether the program actually furthered a different objective from the one it purported to remedy.\(^{103}\) The panel concluded that, while the Banneker program claimed to address the attrition problem by attracting high-achieving African-American students who were more likely to stay through graduation,\(^{104}\) such an analysis failed to establish the requisite nexus between problem and remedy.\(^{105}\) The court observed that, if the purpose of the program was to attract only high-achieving African-American students, it could not be sustained.\(^{106}\) "High achievers, whether African-American or not, are not the group against which the University discriminated in the past."\(^{107}\) Moreover, the court concluded that the district court erred in giving no weight to Podberesky's argument that the Banneker program is not narrowly tailored\(^{108}\) because the scholarships are open to non-Maryland residents.\(^{109}\) The Fourth Circuit also criticized the district court's reasoning that Banneker scholars would serve as mentors and role models for other African-American students,\(^{110}\) noting that the Supreme Court in Wygant "expressly rejected the role-model theory as a basis for implementing a race-conscious remedy."\(^{111}\) Finally, the Fourth Circuit criticized the district court's failure to account for rea-

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\(^{103}\) Podberesky IV, 38 F.3d at 158; see Croson, 488 U.S. at 507 (discussing Richmond's failure to consider race-neutral measures).

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) Id.

\(^{109}\) Id. at 158 & n.11. The Fourth Circuit observed that "awarding Banneker Scholarships to non-residents of Maryland is not narrowly tailored to correcting the condition that the University argues, that not enough qualified African-American Maryland residents attend at College Park." Id. at 159; see also Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989) (noting the importance of tailoring the relief "to those who truly have suffered the effects of prior discrimination").


\(^{111}\) Podberesky IV, 38 F.3d at 159; see Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion); cf. Podberesky III, 838 F. Supp. at 1095 n.73. The district court recognized that Wygant had held that a "role model theory" was an impermissible basis for an affirmative action program, but reasoned that the program struck down in Wygant involved using role models to combat societal discrimination. Id. In this case, Judge Motz wrote, "the role model function of the Banneker scholars is directly related to eliminating specific present effects of past discrimination." Id.
sons, other than discrimination, that prompt qualified African-Americans to attend other colleges.\textsuperscript{112}

4. Analysis.—

a. The Mandate for Strict Scrutiny.—In Podberesky, the Fourth Circuit applied the two-pronged test of Wygant and Croson\textsuperscript{113} to reject a race-based measure calculated to compensate for the effects of past discrimination by a governmental actor. The court applied strict scrutiny in a straightforward manner and rejected any attempt to tailor the analysis to account for special concerns raised by discrimination in education. The court also reiterated the unacceptability of the “role model” justification for a race-based measure.

The Fourth Circuit’s decision is in line with the Supreme Court’s consistent disapproval of unequal treatment of persons based on race, whatever the stated purpose. Nearly two decades ago, in Bakke, Justice Powell plainly stated this principle: “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”\textsuperscript{114} It is true that the Justices gave local courts wide latitude, following the decision in Brown v. Board of Education,\textsuperscript{115} to exercise their equitable powers to eradicate public school segregation.\textsuperscript{116} Nevertheless, “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”\textsuperscript{117}

The Supreme Court recently reinforced this notion in a post-Podberesky case, Adarand Constructors, Inc. v. Pena.\textsuperscript{118} In Adarand, a case that challenged the constitutionality of a federal program designed to provide highway contracts to “disadvantaged” business enterprises,\textsuperscript{119}

\textsuperscript{112} Podberesky IV, 38 F.3d at 159-60 & n.13. The district court, for example, did not account for African Americans who choose to apply only to out-of-state colleges, or predominantly African-American institutions. \textit{id}. While declining to speculate on the extent to which variables such as these might reduce the size of the reference pool, the Fourth Circuit asserted that “the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny.” \textit{id}. at 160.

\textsuperscript{113} See supra notes 3-6 and accompanying text.


\textsuperscript{115} 347 U.S. 483 (1954).

\textsuperscript{116} See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).


\textsuperscript{118} 115 S. Ct. 2097 (1995).

\textsuperscript{119} \textit{id}. at 2101.
the Court took the *Croson* analysis a step further. The Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Justice O'Connor's opinion for the Court concluded that the Court's affirmative action cases, from *Bakke* through *Croson*, had established three propositions with respect to governmental racial classifications. The first of these is skepticism: "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.'" The second proposition, Justice O'Connor wrote, is consistency: "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" The third proposition is congruence: "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'"

The first and second of these propositions, of course, figure most prominently in an analysis of *Podberesky*, which involved action by a state, rather than a federal, entity. Most significant, however, is Justice O'Connor's conclusion that the three propositions, taken together, mean that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." Thus, in *Adarand*, the Court overruled *Metro Broadcasting, Inc. v. FCC*, a case that had held that "benign" federal racial classifications need only satisfy intermediate scrutiny, even in the face of *Croson*’s conclusion that such classifications enacted by a state must satisfy strict scrutiny.

Justice O'Connor's *Adarand* analysis sends the message that "good intentions" will not suffice in future cases to sustain race-based classifications. In *Adarand*, Justice O'Connor drove this point home with language borrowed from Justice Stevens in an earlier dissent:

"[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as

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120. *Id.* at 2113.
121. *Id.* at 2111.
122. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion)).
123. *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).
124. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).
125. *Id.*
resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.\textsuperscript{128}

Even before \textit{Adarand}, the Fourth Circuit had acknowledged the potential harm that may result from injudicious uses of race-conscious remedies: "While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome. State-sponsored racial criteria in particular may sacrifice the indivisible character of American citizenship."\textsuperscript{129}

Hence, given the clear mandate of the applicable precedents, the Podberesky court had little choice. Its decision, which appears unassailable after \textit{Adarand}, represents a recognition that, absent the most compelling circumstances, a race-based measure moves equal protection jurisprudence backward rather than forward. Justice Powell stated this eloquently in \textit{Bakke}. In rejecting the medical school's position that discrimination against members of the white "majority" cannot be regarded as suspect if it has a "benign" purpose, Justice Powell declared that "[t]he clock of our liberties . . . cannot be turned back . . . ."\textsuperscript{130} He noted the "serious problems of justice connected with the idea of preference itself."\textsuperscript{131} One such problem is that it may not always be clear that a preference is benign.\textsuperscript{132} Moreover, preferential programs may enforce stereotypical notions that certain groups cannot achieve success without special protection.\textsuperscript{133} Finally, and perhaps most importantly, Justice Powell noted that the constitutional principle of equal protection cannot "vary with the ebb and flow of political forces."\textsuperscript{134} Tying the meaning of such a principle to shifting political and social judgments of disparity in opportunity "undermines the chances for consistent application of the Constitution from one

\textsuperscript{128} Id. at 2113 (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

\textsuperscript{129} Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993).

\textsuperscript{130} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294-95 (1978) (opinion of Powell, J.).

\textsuperscript{131} Id. at 298.

\textsuperscript{132} Id.

\textsuperscript{133} Id.

\textsuperscript{134} Id.
generation to the next, a critical feature of its coherent interpretation.”

b. The Problematic Language of Wygant: Deference v. Skepticism.—The Fourth Circuit appropriately imposed a weighty responsibility on reviewing courts to engage in a careful examination of the perceived effects of past discrimination. This is consistent with the notion in Adarand “that courts should take a skeptical view of all governmental racial classifications.” A court may not merely accept the word of the party seeking approval for a race-based classification.

Thus, according to the Fourth Circuit, the district court in Podberesky “was incorrect in stating that if the University found strong evidence to support any of its proffered effects, the program would be justified.” It was the district court’s responsibility to examine each proffered effect and make a determination that the effect and the classification were sufficiently connected. That connection, the Fourth Circuit said, has two components. First, the effect must have been caused by the past discrimination. Second, the effect must be of “sufficient magnitude” to justify the race-based program.

While this probing into the cause and effect relationship between past discrimination and perceived present results is consistent with the searching analysis implied by the phrase “strict scrutiny,” it raises important questions about the phrase “strong basis in evidence.” At the trial court level, both the district court and the parties in Podberesky wrestled with this language, and Judge Motz noted that there was furious debate about its meaning. Ultimately, both sides agreed that the University’s burden required it “to produce something less than the preponderance of the evidence.”

Significantly, the University had argued that “strong basis in evidence” is the functional equivalent of the “substantial evidence” test, a deferential standard commonly applied in judicial review of administrative adjudications. The Fourth Circuit has described the “substantial evidence” test, somewhat obliquely, as either “'less than a

135. Id. at 299.
136. Podberesky IV, 38 F.3d at 154.
138. Podberesky IV, 38 F.3d at 154.
139. Id.
140. Id. at 153.
141. Id.
144. Id.
preponderance but more than a scintilla," or as enough evidence "as a reasonable mind might accept as adequate to support a conclusion and . . . sufficient to justify a refusal to direct a verdict were the case before a jury." That the Wygant terminology is subject to such an interpretation is bolstered by Judge Motz's characterization of the University's evidentiary burden: "They need not prove these present effects of past discrimination beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence." Having established that "strong basis in evidence" implies a somewhat deferential level of review, the district court apparently concluded, not unreasonably, that the University knew best its own past and present conditions with respect to race relations, had engaged in self-study, and had crafted a reasonable and judicious response to its self-diagnosed problems.

The Fourth Circuit's criticism of this aspect of the district court's analysis points to a fundamental area of disagreement that reaches deep into the philosophical underpinnings of strict scrutiny analysis with respect to race-based remedial measures. Podberesky has shown that the language of Wygant should be clarified. The phrase "strong basis in evidence" implies a level of deference, rather than the "skepticism" that Adarand suggests should govern a reviewing court's analysis. Yet Adarand's command that reviewing courts must be skeptical

145. Id. (quoting Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966); Teague v. Califano, 560 F.2d 615 (4th Cir. 1977)). In Celebrezze, the Fourth Circuit explained that "substantial evidence" consists of "evidence which a reasoning mind would accept as sufficient to support a particular conclusion . . . If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence.'" Celebrezze, 368 F.2d at 642.

146. Podberesky III, 838 F. Supp. at 1083 n.49. Judge Motz emphasized that the standard the University "must meet is less than a preponderance of the evidence. To require any greater a standard would be in explicit contradiction of the Court's requirement in Croson that the burden of persuasion remains with the plaintiff in reverse discrimination cases." Id. (citing Richmond v. J.A. Croson Co., 488 U.S. 464, 500 (1989)).

147. Id. at 1084-86.

148. In his November 18, 1993 opinion, Judge Motz demonstrated his belief that the University's own findings of present effects of past discrimination were consistent with the remedy it chose to address them:

The question posed in this case is whether a public university, racially segregated by law for almost a century and actively resistant to integration for at least twenty years thereafter, may—after confronting the injustice of its past—voluntarily seek to remedy the resulting problems of its present, by spending one percent of its financial aid budget to provide scholarships to approximately thirty high-achieving African-American students each year.

Id. at 1076.

149. Deference is implied because of the close resemblance between "strong basis in evidence" and "substantial evidence." See supra notes 145-146 and accompanying text. The "substantial evidence" test itself has been likened to the highly deferential "arbitrary and capricious" standard of review. See Association of Data Processing Serv. Orgs., Inc. v. Board
of all governmental racial classifications is inconsistent with the practice of imposing a light evidentiary burden on a party seeking to uphold a race-based classification. It is, in sum, anomalous to suggest that "the strictest judicial scrutiny" can be applied honestly if the defendant in a discrimination case is held to a standard of proof that is even lower than a preponderance of the evidence. Thus, one means of ameliorating the semantic confusion caused by the "strong basis in evidence" prong of the Wygant test would be to require the defendant in a reverse discrimination case to establish by a preponderance of the evidence that remedial action is necessary to remedy the present effects of past discrimination.

5. Conclusion.—In Podberesky v. Kirwan, the Fourth Circuit recognized that the use of race as a "reparational device" perpetuates societal inequality. In striking down the Benjamin Banneker Scholarship Program, the court reinforced the notion that strict scrutiny must apply to all racial classifications, regardless of the race or social status of the purported beneficiary.

Nevertheless, the ambiguity of the Wygant evidentiary burden remains troubling. The issue appears to be settled in the Fourth Circuit, by virtue of the court's unapologetic application of strict scrutiny. However, the conflict between the Fourth Circuit and the district court has revealed the need for clarification. The Supreme Court's denial of certiorari in Podberesky eliminated an opportunity to address this issue. It is to be hoped that a future case will provide the vehicle for this much-needed revisitation of Wygant.

Susan A. Winchurch

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151. Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993).
152. See supra note 34 and accompanying text.
II. CONSTITUTIONAL LAW

A. Justifying Restrictions on Speech and Religion

In American Life League, Inc. v. Reno,1 the Court of Appeals for the Fourth Circuit upheld the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994 (the Access Act or Act).2 In reaching this decision, the court held that the Act is a valid exercise of Congress’s power under the Commerce Clause,3 and does not violate the Free Speech Clause or the Free Exercise Clause of the First Amendment.4 Rather, it serves substantial governmental interests of preserving the peace, maintaining access to reproductive health facilities, protecting interstate commerce, and securing the constitutional rights of citizens.5

The court further asserted that the Act did not violate the Religious Freedom Restoration Act (RFRA),6 holding that even if one assumes that the Access Act burdens religious exercise, it protects the paramount interests of public safety and welfare.7 The court examined the Act’s stated purpose, definitions, and rules of construction,8 and found the Act clear and precise,9 and content and viewpoint neutral.10

2. Id. at 645. The Act is codified at 18 U.S.C. § 248 (1994); see infra text accompanying notes 22-25 for the language and provisions of the statute. See also infra note 141 for definitions of important statutory terms.
3. U.S. CONST. art. I, § 8, cl. 3. “The Congress shall have Power... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...” Id. See infra notes 36-47, 104-119 and accompanying text for an overview of Commerce Clause jurisprudence and the Fourth Circuit’s application of the clause to this case.
4. U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id.
5. American Life League, 47 F.3d at 647, 652.
7. American Life League, 47 F.3d at 655.
8. Id. at 646, 649.
9. Id. at 653.
10. Id. at 651.
While analyzing the First Amendment issues in detail, the court dealt only briefly with the Commerce Clause issue. One federal district court has since ruled the Act an unconstitutional exercise of Congress's Commerce Clause power—a decision subsequently reversed on appeal. However, the United States Courts of Appeals for the Seventh, Eighth, and Eleventh Circuits have followed the Fourth Circuit's decision, and have buttressed the Commerce Clause argument by analyzing the Act under the recent Supreme Court Commerce Clause decision of United States v. Lopez. All other district

11. The court, inter alia, applied the test of United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that Congress may prohibit and punish conduct that has certain expressive elements in order to further substantial governmental interests). American Life League, 47 F.3d at 651-52. For a summary of the test and when it is applied, see infra notes 54-56 and accompanying text. For the Fourth Circuit's application of the test in this case, see infra notes 127-133 and accompanying text.


13. United States v. Wilson, 880 F. Supp. 621, 623, 634, 636 (E.D. Wis.) (holding that the portion of the Act that prohibits nonviolent obstruction of clinic entrances is beyond the scope of Congress's commerce power), rev'd, 73 F.3d 675 (7th Cir. 1995).

14. United States v. Wilson, 73 F.3d 675, 679-80 (7th Cir. 1995) (holding that Congress had authority under the Commerce Clause to pass the Act, which "is constitutional as a regulation that substantially affects interstate commerce"), rev'd 880 F. Supp. 621 (E.D. Wis. 1995).

15. Id.

16. United States v. Dinwiddie, 76 F.3d 913, 919 (8th Cir. 1996) ("We hold that [the Access Act] is within Congress's commerce power and is not facially inconsistent with the First Amendment.").

17. Cheffer v. Reno, 55 F.3d 1517, 1521-22, 1524 (11th Cir. 1995) (holding that the Act was within the Commerce Clause power of Congress, did not violate the Freedom of Speech or Free Exercise Clauses of the First Amendment, did not violate the Tenth Amendment or RFRA, and that claim asserting violation of Eighth Amendment was not ripe).

18. Wilson, 73 F.3d at 677 ("Every other federal court to address the issue has upheld the constitutionality of the Access Act, including two circuit courts . . . . We agree with these courts and reverse the district court's decision."); Dinwiddie, 76 F.3d at 924 ("[L]ike every other court that has considered the question, [we] conclude that [the Act] does not violate the First Amendment."); Cheffer, 55 F.3d at 1520 ("We agree with the Fourth Circuit that the Access Act is within Congress's Commerce power . . . ."); and id. at 1521 ("Unable to improve on the Fourth Circuit's analysis, we follow American Life League and adopt its rationale on the free speech issues.").

American Life League, Cheffer, and Wilson refer to the Freedom of Access to Clinic Entrances Act as the "Access Act," or "Act." American Life League, Inc. v. Reno, 47 F.3d 642, 645 (4th Cir.), cert denied, 116 S. Ct. 55 (1995); Cheffer, 55 F.3d at 1518; Wilson, 73 F.3d at 676. Dinwiddie refers to it as "FACE." Dinwiddie, 76 F.3d at 916. This Note will follow the lead of American Life League in referring to it as the Access Act or Act.

19. 115 S. Ct. 1624, 1626 (1995) (holding that the Gun-Free School Zones Act was an unconstitutional exercise of the Commerce Clause). The Eleventh Circuit distinguished Lopez, reasoning that the Act does regulate commercial activity, and noting the extensive legislative findings supporting Congress's conclusion that the regulated activity substantially affects interstate commerce. Cheffer, 55 F.3d at 1520 (citing the discussion of legislative history in American Life League, 47 F.3d at 647).
courts that have heard similar challenges to the Act have declared the Act constitutional.20

After reviewing the relevant history of First Amendment and Commerce Clause jurisprudence, including the debate surrounding the First Amendment and the expressive and religious elements of abortion protest, this Note will discuss the integrity of the Fourth Circuit's decision. The decision illuminates recent and controversial changes in the political and intellectual foundation of long-established judicial principles pertaining to the First Amendment and the Commerce Clause.

1. The Case.—When the Freedom of Access to Clinic Entrances Act was signed into law by President Clinton on May 26, 1994, the American Life League and various individuals (plaintiffs) filed an action challenging its constitutionality in the United States District Court for the Eastern District of Virginia.21 The Act penalizes anyone who

The Seventh Circuit reviewed the legislative findings in detail, and concluded that (1) "it is plainly rational that reproductive health facilities are engaged in interstate commerce and that obstruction of such facilities brings commerce to a halt." Wilson, 73 F.3d at 681; (2) "[a] rational basis exists for finding that interstate travel of individuals seeking reproductive health services is substantial, and that obstructing those individuals therefore substantially affects interstate commerce," id.; (3) "the evidence Congress relied upon reveals a substantial threat to the national reproductive health services market," id. at 682; and (4) "the effort to close reproductive health facilities is organized on a national scale." Id. at 683. Wilson also distinguished Lopez: "We agree with the Eleventh Circuit that the Access Act, unlike the Gun-Free School Zones Act, regulates a commercial activity—the provision of reproductive health services." Id.

The Eighth Circuit explained that Lopez did not require holding the Act invalid: First, unlike the Gun-Free School Zones Act, FACE prohibits interference with a commercial activity—the provision and receipt of reproductive-health services . . . . Second, in Lopez, the Supreme Court did not overturn . . . any . . . opinion holding that Congress has the power to regulate conduct that reduces interstate commerce in a good or service . . . . Therefore, Lopez notwithstanding, FACE is a valid exercise of Congress's power to regulate activity that substantially affects interstate commerce. Dinwiddie, 76 F.3d at 921.

20. See, e.g., Reily v. Reno, 860 F. Supp. 693, 704, 708, 709 (D. Ariz. 1994) (holding, inter alia, that Congress had authority under the Commerce Clause to enact the Act, and that the Act does not violate the First Amendment); Cook v. Reno, 859 F. Supp. 1008, 1010-11 (W.D. La. 1994) (holding that the Act does not violate the First Amendment, and that Congress did not abuse its commerce power and pass the Act to chill the protests of anti-abortionists); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1431-32 (S.D. Cal. 1994) (holding that the Act does not violate the First Amendment and was a legitimate exercise of Congress's Commerce Clause power).

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship;
(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.22

Both criminal penalties and civil remedies are available.23 The Act provides definitions of crucial terms,24 and a rule of construction asserting, inter alia, that

[n]othing in this section shall be construed—
(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution; [or]
(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference.25

The district court rejected the plaintiffs' first complaint because it did not allege that plaintiffs would engage in activity that would violate the Act.26 The court ruled that an amended complaint by the plaintiffs was ripe for judicial consideration, because it alleged that while the plaintiffs did not condone violence, they intended to obstruct entrances to abortion facilities, and their activities were designed to interfere with, intimidate, or injure those seeking or providing abortions.27

23. Id. § 248(b)(c).
24. Id. § 248(e); see infra note 141 and accompanying text.
27. Id.
On June 3, 1994, the court allowed the National Abortion Federation, the Commonwealth Women's Clinic, Capitol Women's Clinic, Dr. George Tiller, Dr. Susan Wicklund, and the National Organization for Women to intervene on behalf of the defendants. The plaintiffs filed a motion for class certification that was dismissed on June 10, 1994.

The district court ruled that the Freedom of Access to Clinic Entrances Act (1) is a legitimate exercise of congressional authority under the Commerce Clause; (2) proscribes conduct that is not protected under the First Amendment; (3) is neither vague nor overbroad; (4) is clear, unambiguous, and viewpoint neutral; and (5) does not violate either the Free Exercise Clause of the First Amendment or RFRA. The district court therefore granted the United States' motion and dismissed the plaintiffs' second amended complaint with prejudice, rendering their preliminary injunction motion moot. The plaintiffs appealed.

2. Legal Background.—There is a long and venerable history of Commerce Clause and First Amendment jurisprudence. The debate surrounding abortion has an equally compelling, albeit more recent, jurisprudential and legislative history. In American Life League, principles generated by each of these three developments collide. The following discussion focuses on the most salient points necessary for understanding the consequences of the Fourth Circuit's decision.

a. The Commerce Clause.—The Constitution grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The nature of the congressional commerce power originally was defined by Chief Justice Marshall as "the power to . . . prescribe the rule by which commerce [concerning more than one state] is to be governed." The Supreme Court has frequently shifted its focus in its Commerce

28. Id. at 139 n.1.
29. Id.
30. Id. at 141.
31. Id. at 142.
32. Id. at 141-43.
33. Id. at 144.
34. Id.
35. Id.
36. U.S. Const. art. I, § 8, cl. 3.
Clause jurisprudence. Mid-twentieth century decisions expanded congressional authority. With *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, *Katzenbach v. McClung*, and *Heart of Atlanta Motel, Inc. v. United States*, the Court adopted a rational basis test for determining whether Congress had the authority to regulate an activity.

Most recently, in *United States v. Lopez*, the Supreme Court asserted that three categories of activity are subject to congressional regulation under the Commerce Clause:

First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.

*Lopez* emphasized that Congress must clearly indicate its purpose when invoking the Commerce Clause. The Court asserted that a comprehensive legislative history, while not normally required, provides important evidence that an activity substantially affects interstate commerce. This evidence is necessary for the Court properly to determine whether the judgment of the legislature is sound.

38. At different times throughout its history, the Court has focused on state laws that restricted interstate commerce, as well as congressional regulation of activities that mingled interstate and intrastate aspects of commerce, affected interstate commerce directly and indirectly, had a "close and substantial relation to interstate commerce," and passed a rational basis for regulation test. For an excellent summary of the history of Commerce Clause jurisprudence, see the recent Supreme Court decision *United States v. Lopez*, 115 S. Ct. 1624, 1626-30 (1995). See also supra note 19 and accompanying text.
40. 452 U.S. 264, 268 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977—designed to protect the environment from the harmful effects of surface mining—was constitutional under the Commerce Clause).
41. 379 U.S. 294, 304-05 (1964) (holding that Title II of the Civil Rights Act of 1964 and its application to restaurants serving food in interstate commerce was a constitutional exercise of Congress's power under the Commerce Clause).
42. 379 U.S. 241, 258, 261-62 (1964) (holding that Title II of the Civil Rights Act of 1964—as applied to public accommodations serving interstate travelers—was a constitutional exercise of Congress's commerce power).
43. See *Lopez*, 115 S. Ct. at 1629.
44. Id. at 1629-30.
45. Id. at 1631-32.
46. Id. at 1632.
47. Id.
b. The First Amendment: Conduct and Freedom of Speech.—The First Amendment does not protect acts of force or violence,\textsuperscript{48} true threats of force,\textsuperscript{49} or physical obstructions.\textsuperscript{50} The message expressed by conduct, however, is the focus of First Amendment inquiry.\textsuperscript{51} When a law prohibiting conduct is content and viewpoint based (i.e., the law restricts conduct because of its expressive elements), then the court must subject the law to strict scrutiny.\textsuperscript{52} The strict scrutiny test requires that the law serve a compelling state interest and be narrowly tailored to accomplish that interest.\textsuperscript{53}

A law that is content and viewpoint neutral also is subject to First Amendment scrutiny if the law potentially or incidentally affects conduct with protected expressive elements.\textsuperscript{54} A content and viewpoint neutral law is subject to an intermediate level of scrutiny,\textsuperscript{55} and is justified

\textsuperscript{48} See Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196, 2199, 2201-02 (1993) (9-0 decision) (holding that an enhanced penalty for a violent crime motivated by the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry did not violate the First and Fourteenth Amendments).

\textsuperscript{49} See Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (holding that a threat to the life of the president was protected by the First Amendment because it was a political statement and not a true threat). "What is a threat must be distinguished from what is constitutionally protected speech." \textit{Id.} at 707.

\textsuperscript{50} See Cameron v. Johnson, 390 U.S. 611, 617 (1968) (holding that a state anti-picketing law prohibiting obstruction of and interference with ingress to and egress from public property was a valid regulation).

\textsuperscript{51} See R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 391 (1992) (holding that a municipal ordinance prohibiting placement of symbols that one knows or reasonably should know arouse anger or other strong feelings in others on the basis of race, color, creed, nationality, religion, or gender violated the First Amendment because it censored expressive element of conduct). "We have long held... that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses..." \textit{Id.} at 385; see also Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2523, 2527 (1994) (holding, inter alia, that prohibiting anti-abortion demonstrations within a 36-foot buffer zone around an abortion clinic did not violate the First Amendment); Ward v. Rock Against Racism, 491 U.S. 781, 791, 803 (1989) (holding that sound-amplification guidelines for bandshell use was a constitutional restriction on expression that served substantial governmental interests and was narrowly tailored to achieve its goals).

\textsuperscript{52} See Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

\textsuperscript{53} Perry, 460 U.S. at 45. The Perry Court held that a contract between a public school board and a local union, granting the union access to the interschool mail system, and denying all rival unions such access, was constitutional. \textit{Id.} at 55.

\textsuperscript{54} See United States v. O'Brien, 391 U.S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

\textsuperscript{55} American Life League, 47 F.3d at 651.
if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{56}

Conduct may not be restricted because of its message unless there are compelling governmental interests and inadequate alternatives.\textsuperscript{57} Conduct that symbolizes expression may be subject, however, to reasonable time, place, and manner restrictions.\textsuperscript{58} In \textit{Clark v. Community for Creative Non-Violence}, the Supreme Court explained that “restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”\textsuperscript{59} These elements are very similar to those required for intermediate-level scrutiny.\textsuperscript{60}

When a court scrutinizes a law for potential violation of the First Amendment, the court also examines it for vagueness and overbreadth.\textsuperscript{61} The Supreme Court explained in \textit{Grayned v. City of Rockford}\textsuperscript{62} that a statute is unconstitutionally vague if it does not satisfy the Court’s criteria of (1) “fair warning,”\textsuperscript{63} (2) precise standards for application,\textsuperscript{64} and (3) careful delineation of boundaries of areas forbidden

\textsuperscript{56} \textit{O'Brien}, 391 U.S. at 377.
\textsuperscript{57} \textit{R.A.V. v. City of St. Paul, Minnesota}, 505 U.S. 377, 395-96 (1992); see \textit{supra} note 51 and accompanying text. For an example of a valid content-based restriction, see \textit{Burson v. Freeman}, 504 U.S. 191, 198-94 (1992). The \textit{Burson} Court held that a state law prohibiting a vote solicitation and display or distribution of campaign items within 100 feet of a polling place did not violate the First and Fourteenth Amendments. \textit{Id.} at 211.
\textsuperscript{58} Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that a regulation prohibiting sleeping in certain parks was a reasonable time, place, or manner restriction on expression, was a reasonable regulation of symbolic conduct, and served substantial governmental interests).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} See \textit{O'Brien}, 391 U.S. at 377; \textit{supra} text accompanying note 56.
\textsuperscript{61} The Supreme Court has asserted that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108 (1972) (holding that an ordinance prohibiting picketing within the vicinity of a primary or secondary school violated the Equal Protection Clause of the Fourteenth Amendment, and that an ordinance restricting noise within the vicinity of a primary or secondary school was a constitutional time, place, and manner restriction). The Court has also indicated that “[a] clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” \textit{Id.} at 114.
\textsuperscript{62} \textit{Id.} at 104.
\textsuperscript{63} \textit{Id.} at 108.
\textsuperscript{64} \textit{Id.}
by the statute. The *Grayned* Court indicated that a law is overbroad if it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." The Court established a standard for determining when a statute is overbroad on its face in *Broadrick v. Oklahoma:* "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

c. The First Amendment: The Free Exercise Clause.—The Free Exercise Clause of the First Amendment proclaims that "Congress shall make no law . . . prohibiting the free exercise [of religion]." As the Court held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* the government "may not enact laws that suppress religious belief or practice." However, in *Employment Division, Department of Human Resources v. Smith,* the Court held that the government may enact laws that incidentally affect the exercise of religion as long as the laws are neutral and generally applicable. According to the Court in *Smith,* such laws need not pass a compelling governmental interest test.

In response to the Supreme Court's ruling in *Smith,* Congress passed the Religious Freedom Restoration Act of 1993 (RFRA). The Act was intended to reestablish the test articulated in *Sherbert v. Verner,* and *Wisconsin v. Yoder.* That test provides that "[g]overnment

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65. Id. at 109.
66. Id. at 115.
67. 413 U.S. 601 (1973) (holding that an Oklahoma statute proscribing political activities of the state's civil servants was not vague or overbroad).
68. Id. at 615; see also *Houston v. Hill,* 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face.").
69. U.S. CONST. amend. I.
70. 113 S. Ct. 2217 (1993) (declaring that ordinances outlawing the killing of animals for religious reasons violated the Free Exercise Clause).
71. Id. at 2222.
72. 494 U.S. 872, 878-79 (1990) (holding that criminal prohibition of the use of the peyote drug and denial of unemployment compensation to persons dismissed because of their use of that drug, even though such use was for religious purposes, did not violate the Free Exercise Clause).
73. Id.
74. Id. at 885; see also infra notes 77-79 and accompanying text.
77. 374 U.S. 398, 403, 410 (1963) (holding that denying unemployment benefits to an individual because that individual refuses for religious reasons to work on her Sabbath does not serve compelling state interests and is in violation of the First and Fourteenth Amendments).
may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

\[79\]

d. Anti-Abortion Activist Conduct and Passage of the Freedom of Access to Clinic Entrances Act.—Congress passed the Access Act\[80\] in response to “[a] nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence . . . barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work [at these facilities] . . . and the patients who seek their services.”\[81\] Anti-abortion protestors have resorted to using arson, bombs, and chemicals in their efforts to prevent access to reproductive health facilities.\[82\] Tactics including blockades, threats of violence, and murder are intended to prevent women from receiving “safe and legal abortion services.”\[83\]

Congress found that states and local jurisdictions were unable to control such violent and obstructive activity.\[84\] Congress asserted that this activity violated federal and state statutory and constitutional rights of citizens, and burdened interstate commerce.\[85\] The Supreme Court decision in Bray v. Alexandria Women’s Health Clinic also spurred Congress to pass the Act. Prior to Bray, claims against such violent conduct were often brought successfully before the fed-
eral judiciary under 42 U.S.C. § 1985(3). In *Bray*, however, the Supreme Court held that victims harmed by the obstructive behavior of anti-abortionists did not have a remedy under § 1985. Finally, Congress concluded that such conduct may be prohibited and redress for victims established "without abridging the exercise of any rights guaranteed under the First Amendment to the Constitution or under any other law."

Those senators and representatives who opposed the Act expressed concern that it failed to distinguish adequately between violent and nonviolent behavior. Among their First Amendment arguments, dissenters claimed the Act would "chill constitutionally protected speech." Some senators claimed the Act "would protect illegal abortions" and elevate the right to abortion above the First Amendment. Senators also asserted that "[t]he 'abortion-centric' language of [the bill] . . . may fail to deliver the promised protection of pro-life facilities, . . . [and that the bill] discriminates against the pro-life viewpoint."

Dissenters in the House argued that the bill did not provide equal protection to abortion and anti-abortion facilities. Representatives questioned whether Congress ought to be legislating in this area at all, claiming that states already had laws to deal with illegal actions by abortion protestors, and that there were federal statutes provid-

91. See H.R. Conf. Rep. No. 488 at 7. This statute was first enacted as the Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (1873). Section 1985(3) of that Act provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

*Id.*


95. S. Rep. No. 117 at 49. The House Report also pointed out that "[t]he threat of significant money DAMAGES, including punitive damages is likely to 'chill' speech, much of which is protected under the first amendment." H.R. Rep. No. 306 at 26.


97. *Id.* at 48.


99. *Id.* at 21.

100. *Id.* at 21-22.
ing the means by which states could ask for federal assistance. 101 Congressmen bemoaned the vague language of the bill, 102 and were skeptical as to proponents' claims that the bill was modeled after 18 U.S.C. § 245 and 42 U.S.C. § 3631. 103

3. The Court's Reasoning.—In American Life League, Inc. v. Reno, the Court of Appeals for the Fourth Circuit held that Congress had the authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act regulating certain violent, threatening, or obstructive conduct affecting access to and provision of reproductive health services. 104 The court further held that the Act did not violate the First Amendment of the Constitution. 105

After reviewing the facts of the case, the court considered the legislative history of the Access Act, 106 and applied the Commerce Clause test articulated in Heart of Atlanta Motel, Inc. v. United States, 107 Katzenbach v. McClung, 108 and Hodel v. Virginia Surface Mining & Reclamation Ass'n. 109 "[a] federal statute is valid under the Commerce Clause if Congress (1) rationally concluded that the regulated activity affects interstate commerce and (2) chose a regulatory means reasonably adapted to a permissible end." 110 The court found that "Congress rationally concluded that violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce." 111

To support the first prong of the Commerce Clause test, the court relied upon evidence that women travel interstate to receive reproductive health services, 112 doctors and staff work in an interstate
and medical and office supplies are purchased through channels of interstate commerce. Addressing the second prong of the test, the court found the regulations and penalties of the Act permissible and designed to discourage violence, and obstructive and destructive behavior aimed at women seeking to exercise their constitutional right to choose an abortion, at doctors and other health care providers working at reproductive health care facilities, and at the physical plant and equipment of such facilities.

In essence, the court found the Act protective of "the free flow of goods and services in commerce." The court rejected the plaintiffs' arguments that the Act gave federal courts excessive jurisdiction, and that regulation of conduct affecting public safety at clinics be left to individual states.

Turning to the First Amendment issue, the court found that although the Act is intended to prohibit unprotected conduct, such as the use of force or violence, true threats of force, and physical obstructions, "[t]he Act might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing." The court therefore examined the Act to determine if it violated the First Amendment.

The court found the Act to be content and viewpoint neutral because its prohibition of obstructive conduct was "justified without ref-

113. American Life League, 47 F.3d at 647. The Senate reported that "[c]linic employees sometimes travel across State lines to work . . . . Like Dr. David Gunn, the physician who was killed in Pensacola, FL, some doctors who perform abortions work in facilities in more than one State." S. REP. NO. 117 at 31.

114. American Life League, 47 F.3d at 647. The Senate explained that "[c]linics and other abortion service providers . . . purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income." S. REP. NO. 117 at 31.

115. American Life League, 47 F.3d at 647; see also Roe v. Wade, 410 U.S. 113, 154, 164-66 (1973) (holding that a right to privacy is founded in the Due Process Clause of the Fourteenth Amendment, and a woman's right to choose abortion is included in this right to privacy, which is nonetheless qualified by the stage of pregnancy and subsequently compelling state interests), limited by Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), modified, Planned Parenthood v. Casey, 505 U.S. 833 (1992).

116. The court referred specifically to the murder of Dr. David Gunn in 1993. American Life League, 47 F.3d at 647.

117. Id.

118. Id.

119. Id. at 648.

120. Id.; see also supra note 48 and accompanying text.

121. American Life League, 47 F.3d at 648; see also supra note 49 and accompanying text.

122. American Life League, 47 F.3d at 648; see also supra note 50 and accompanying text.

123. American Life League, 47 F.3d at 648.

124. Id.
ference to the content of the violator's message or point of view."125 The Act's motive requirement (i.e., the Act penalizes anyone who injures, intimidates, or interferes with a person "because that person is . . . obtaining or providing reproductive health services") "simply narrows its reach, and this narrowing is within congressional prerogative."126

Because the Act was held to be content and viewpoint neutral, the court applied a standard of intermediate scrutiny, first articulated in United States v. O'Brien.127 According to O'Brien, a government regulation does not violate the First Amendment "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."128 The court in American Life League found substantial governmental interests in (1) "protecting public health, safety, and commerce,"129 and (2) "protecting women and men from violence and threats in the exercise of their rights."130 In applying the next prong of the O'Brien test, the court reiterated its holding that the Act was content and viewpoint neutral, and, therefore, did not serve as a pretext to suppress freedom of expression.131 To support the "narrowly tailored" prong of the test, the court found that "the Act leaves open ample alternative means for communication."132 The court thus concluded that the Act passes the O'Brien test.133

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125. Id. at 649; see generally supra notes 51-56 and accompanying text.
126. Id. at 650. The court also discussed Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (9-0 decision), discussed supra note 48, and R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992), discussed supra notes 51, 57 and accompanying text, to support its argument that there is a distinction between legislation aimed at expressive elements of conduct and legislation aimed at proscribable elements. American Life League, 47 F.3d at 650.
127. 391 U.S. 367 (1968); see supra notes 54-56 and accompanying text.
129. American Life League, 47 F.3d at 651.
130. Id.
131. Id. at 652.
132. Id. The Fourth Circuit failed to mention explicitly a fourth prong to the O'Brien test: the regulation must be "within the constitutional power of the Government." O'Brien 391 U.S. at 377; see supra note 56 and accompanying text. The court dealt with the constitutional power of Congress to enact the law in its separate discussion of the Commerce Clause. American Life League, 47 F.3d at 647; see also supra notes 107-119 and accompanying text. However, the connection between the Commerce Clause and the First Amendment is significant in this case. See infra notes 188-205 and accompanying text.
133. American Life League, 47 F.3d at 652.
The court also addressed the issues of the Act's alleged overbreadth and vagueness, which the plaintiffs asserted would have a "chilling effect" on their peaceful demonstration activities.\textsuperscript{134} Applying the principles of \textit{Houston v. Hill},\textsuperscript{135} \textit{Broadrick v. Oklahoma},\textsuperscript{136} and \textit{Grayned v. City of Rockford},\textsuperscript{137} the court examined the Access Act to see if the scope of the proscribed activities was unjustified, and if the Act provided a "person of ordinary intelligence a reasonable opportunity to know what is prohibited ... ."\textsuperscript{138} The court compared the Access Act to the antipicketing law upheld in \textit{Cameron v. Johnson}.\textsuperscript{139} Finding the Access Act to speak "in clear, common words,"\textsuperscript{139} and indeed, to define its important terms,\textsuperscript{141} the court held that it "is neither overbroad nor vague."\textsuperscript{142}

The plaintiffs' final freedom of speech challenge addressed by the court was the claim that the Act's civil damage provision was unconstitutional.\textsuperscript{143} Under the Act, an injured party "may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation."\textsuperscript{144} The court flatly rejected the plaintiffs' reliance on \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{145} and asserted knowing "of

\textsuperscript{134} Id.
\textsuperscript{135} 482 U.S. 451 (1987); see supra note 68 and accompanying text.
\textsuperscript{136} 413 U.S. 601 (1973); see supra notes 67-68 and accompanying text.
\textsuperscript{137} 408 U.S. 104 (1972); see supra notes 61-66 and accompanying text.
\textsuperscript{138} American Life League, 47 F.3d at 653 (quoting Grayned, 408 U.S. at 108).
\textsuperscript{139} Id. (citing Cameron v. Johnson, 390 U.S. 611 (1968)); see also supra note 50 and accompanying text. The court explained that "[t]he Supreme Court rejected the vagueness challenge [in Cameron] on the grounds that the terms 'obstruct,' 'unreasonably,' and 'interfere with' were perfectly clear, widely used, and well understood." American Life League, 47 F.3d at 653.
\textsuperscript{140} Id.; see 18 U.S.C. § 248(e) (1994). Definitions include:
\begin{itemize}
 \item (2) \textbf{INTERFERE WITH.—}The term "interfere with" means to restrict a person's freedom of movement.
 \item (3) \textbf{INTIMDATE.—}The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.
 \item (4) \textbf{PHYSICAL OBSTRUCTION.—}The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.
\end{itemize}
\textsuperscript{141} Id.
\textsuperscript{142} American Life League, 47 F.3d at 653.
\textsuperscript{143} Id. at 658-54.
\textsuperscript{144} 18 U.S.C. § 248(c)(1)(B).
\textsuperscript{145} 458 U.S. 886, 920, 925-26, 929 (1982) (holding, inter alia, that an individual may not be held liable because some of the members of a group to which he belonged advocated or committed violent acts).
no rule prohibiting a liquidated damages provision that may in a particular case impose more than actual damages for unprotected activity.”

By using an argument analogous to its freedom of speech argument, the court concluded that the Access Act did not violate the Free Exercise Clause of the First Amendment: the Act "punishes conduct for the harm it causes, not because the conduct is religiously motivated." Finally, the court examined the plaintiffs' claim that the Access Act violated RFRA. The court held that even assuming that the Access Act places a substantial burden on the plaintiffs' exercise of religion, the Act nonetheless serves compelling governmental interests and is the least restrictive means available to further those interests.

4. Analysis.—In American Life League, the Court of Appeals for the Fourth Circuit held that the Freedom of Access to Clinic Entrances Act of 1994 is a constitutional exercise of Congress's commerce power and does not violate the First Amendment. Although the United States District Court for the Eastern District of Wisconsin subsequently held the Act unconstitutional under the Commerce Clause and the Fourteenth Amendment, the Seventh, Eighth, and Eleventh Circuit Courts of Appeals rejected the Wisconsin district

146. American Life League, 47 F.3d at 653-54.
147. Id. at 654. The court rejected the plaintiffs' reliance on Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993); see supra notes 70-71 and accompanying text.
148. 42 U.S.C. § 2000bb (Supp. V 1994); see supra text accompanying notes 76-79 for an explanation of RFRA.
149. American Life League, 47 F.3d at 656.
150. Id. at 647-48, 652.
151. United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), rev'd, 73 F.3d 675 (7th Cir. 1995).
court's argument,152 and chose instead to follow the Fourth Circuit decision.153

The United States Supreme Court denied certiorari to American Life League.154 Because only four circuits have ruled on the Act's constitutionality, it is too soon to predict conflict among the circuits—a situation that ultimately could compel Supreme Court intervention.155 The decision in American Life League is based upon well-established principles of First Amendment jurisprudence,156 and is sound in its Commerce Clause analysis as well.157 But the intellectual foundation of and political support for these principles are shifting.158 While the Fourth Circuit's decision and the Supreme Court's denial of certiorari suggest these doctrines are settled, a closer examination of intellectual and political debate reveals intriguing enigmas that may lead to future challenges.

152. Wilson, 73 F.3d at 680; United States v. Dinwiddie, 76 F.3d 913, 921 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995); see supra notes 18-19 and accompanying text. Because Wilson, Dinwiddie, and Cheffer were decided after both American Life League, 47 F.3d 642, and United States v. Lopez, 115 S. Ct. 1624 (1995), see supra notes 19, 44-47 and accompanying text, these courts distinguished the Freedom of Access to Clinic Entrances Act from the Gun-Free School Zones Act, as discussed supra in note 19. Wilson, 73 F.3d at 683-84; Dinwiddie, 76 F.3d at 921; Cheffer, 55 F.3d at 1520. These courts disagreed with the Wilson district court's reasoning:

We are not persuaded by the Wilson court's reasoning that the Access Act is beyond Congress' Commerce Clause authority because the Act does not regulate commercial entities, i.e. the reproductive health providers, 'but rather regulates private conduct affecting commercial entities.' . . . The Wilson court cites no authority, nor can we find any, for the proposition that Congress' Commerce Clause authority extends only to the regulation of commercial actors, and not private individuals who interfere with commercial activities in interstate commerce. Id. at 1520 n.6 (citing Wilson, 880 F. Supp. at 628). The Seventh Circuit agreed: "There is no authority for the proposition that Congress's power extends only to the regulation of commercial entities." Wilson, 73 F.3d at 684; accord Dinwiddie, 76 F.3d at 921.

153. Wilson, 73 F.3d at 677; Cheffer, 55 F.3d at 1520. Dinwiddie followed Wilson, 73 F.3d at 682-89, and Cheffer, 55 F.3d at 1520-21, for its Commerce Clause holding, Dinwiddie, 76 F.3d at 921 n.4, and American Life League, 47 F.3d at 648-53, and Cheffer, 55 F.3d at 1521-22, for its First Amendment holding. Dinwiddie, 76 F.3d at 924 n.8.


155. Conflicting decisions among the circuit courts on the constitutionality of the Access Act would indicate confusion in First Amendment and Commerce Clause interpretation, and a need for the Supreme Court to clarify or resolve these constitutional principles as they function within the context of the Act.


a. **Questioning the Principles of Free Speech.**—*In American Life League,* the distinction between proscribable elements of conduct and protected expressive elements of conduct provides one of the bases for the court's First Amendment reasoning.\(^{159}\) Government "may properly regulate the clash of bodies but not the stirring of hearts and minds."\(^{160}\) In the debate over First Amendment principles, "new critics" would dispose of this distinction and have government regulate both, given that "speech constructs us and conditions our actions.... If we are socially malconstructed, government should be free to reconstruct us in a better light by regulating not only our actions, as it already does, but our speech as well."\(^{161}\)

*American Life League* analyzed the Access Act for possible violation of such a distinction between "mind and body,"\(^{162}\) and noted that the Act potentially could restrict protected expressive elements of conduct.\(^{163}\) Consequently, the court examined the Act for content and viewpoint neutrality and concluded that expressive elements were not targeted.\(^{164}\) The court then applied intermediate scrutiny and held that speech was sufficiently protected.\(^{165}\) Closer analysis reveals that the new critics may have won: not only is violent and obstructive con-

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\(^{159}\) *American Life League,* 47 F.3d at 648-51.


\(^{161}\) Id. at 977. Stanley Fish asserts that

[t]here is an entire book to be written about the stigmatization and devaluation of the body in First Amendment jurisprudence, but for the moment I will point out that First Amendment jurisprudence works only if you assume that mental activities, even when they emerge into speech, remain safely quarantined in the cortex and do not spill over into the real world, where they can inflict harm. This assumption is crazy, and the frantic and sometimes comical manipulation of the speech/action distinction by courts is an involuntary and unwitting acknowledgment of just how crazy it is.

**STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO** 125-26 (1994).

\(^{162}\) Sullivan claims that "the now-conventional free speech consensus can be boiled down to three basic and fundamental distinctions: the distinction between mind and body, the distinction between public and private, and the distinction between government's purpose in enacting laws and government's effect." Sullivan, *Resurrecting,* supra note 160, at 976.

\(^{163}\) The court stated that "[t]he Act might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing." *American Life League,* 47 F.3d at 648.

\(^{164}\) Id. at 649-51.

\(^{165}\) Id. at 652.
duct proscribed, but oppositional speech expressed through peaceful conduct also might be restricted.\(^{166}\)

Because the Act allows for peaceful protest in the form of, for example, prayer, chants, counseling, picketing, and handbill distribution,\(^{167}\) the Fourth Circuit did not hold that the Act targets the anti-abortion viewpoint, even though the Act specifically provides that a violator must commit the proscribed conduct "because . . . [the victim] is . . . obtaining or providing reproductive health services."\(^{168}\) To justify its holding that the Act is content and viewpoint neutral,\(^{169}\) the court compared the Act to a Wisconsin statute enhancing the penalty for a crime committed "because of the victim's race";\(^{170}\) to Title VII, which prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, or national origin";\(^{171}\) and to the Fair Housing Act, which "prohibits using force or the threat of force to injure, intimidate, or interfere with a person 'because' he is participating in certain housing programs."\(^{172}\)

The Wisconsin statute, Title VII, and the Fair Housing Act all target proscribable conduct, but not on the basis of the viewpoint (i.e., bias) expressed by the conduct.\(^{173}\) The American Life League court

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166. This relates to a paradox that has bedeviled First Amendment jurisprudence: some content-neutral laws restrict more speech than content-based laws. Geoffrey Stone gives an example:

[A] law banning all billboards restricts more speech than a law banning Nazi billboards, and a law limiting the political activities of public employees restricts more speech than a law limiting the Socialist political activities of public employees. Under current doctrine, however, the Court subjects the content-based restrictions to a more stringent standard of justification than the more suppressive content-neutral restrictions. Why?


Stone answers the question he poses by analyzing four considerations that the Court takes into account when applying different scrutiny to content-neutral and content-based restrictions: "equality," "communicative impact," "distortion of public debate," and "motivation." Id. at 201-33. Stone also analyzes "ambiguous restrictions" that do not fit neatly into content-neutral or viewpoint-based restrictions. Id. at 233-51.

167. See American Life League, 47 F.3d at 650.


169. American Life League, 47 F.3d at 651.

170. Id. at 650 (discussing Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993)); see supra notes 48, 126 and accompanying text.


172. Id. (discussing and emphasizing a "because" provision of 42 U.S.C. § 3631(a) (1994)). The Fourth Circuit referred to § 3631 in its entirety. Id.

claimed that the Access Act similarly targets conduct resulting from an anti-abortion viewpoint, but that the Act does not target the anti-abortion viewpoint itself.174

Indeed, laws discriminating on the basis of viewpoint are so much "the cardinal First Amendment sin that legislatures now will take pains not to be caught at it."175 Content-neutral regulations that happen to restrict speech almost always are upheld.176 Less speech, however, is the ultimate effect of such content-neutral laws.177 Although other peaceful forms of protest remain a viable option to abortion protestors, protestors' fears that the Act will have a chilling effect on their speech cannot be discounted entirely.

In First Amendment jurisprudence, the distinction between what a law targets and what it actually hits has been referred to as the "purpose/effect" distinction.178 In American Life League, the court found that the purpose of the Access Act was not to prohibit expression of a particular message or a point of view, but rather, to protect public safety and interstate commerce.179 Some critics of the traditional distinction between the purpose and effect of a law may, depending upon their political inclinations, view the effect of the Access Act as more important than its purpose:180 "[s]uch a view sees free speech as

174. American Life League, 47 F.3d at 649-51.
175. Sullivan, Discrimination, supra note 156, at 446.
176. Sullivan asserts, "[I]f a challenged regulation aims at something other than content, then the government nearly always wins." Id. at 447; see also Cass R. Sunstein, Democracy and the Problem of Free Speech 11-12 (1993). Sunstein explains that "[w]e need to distinguish among three possible kinds of restrictions on speech: content-neutral restrictions; viewpoint-based restrictions; and content-based restrictions." Id. at 11. Viewpoint-based restrictions impose a penalty based upon the speaker's expressed viewpoint. Id. at 12. Viewpoint-neutral restrictions may be content-based, e.g., the government bans "all political speech in a certain place," but the government does not ban only Fascist political speech. Id. Sunstein asserts that "[t]he key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view." Id.
177. Sullivan, Discrimination, supra note 156, at 447; see also Stone, supra note 166, at 189.
178. See Sullivan, Discrimination, supra note 156, at 443; Sullivan, Resurrecting, supra note 160, at 978.
179. American Life League, 47 F.3d at 648-49.
180. In recent years, the political attractiveness of the First Amendment has shifted from the liberal left to the conservative right. See Sullivan, Discrimination, supra note 156, at 439-40. Sullivan remarks that calls for regulation now come from the left; calls for greater freedom, from the right. Id. at 440. Fish makes similar observations when he discusses the differences between "consequentialist" and "non-consequentialist" positions on free speech: "'Free speech' always means for consequentialists 'free speech so long as it furthers rather than subverts our core values'." Fish, supra note 161, at 14. Non-consequentialists believe that "freedom of speech is not subordinate to some other value or tied to the calculation of empirical effects but is asserted and honored simply for itself." Id.
valuable because it is instrumental to some other end—truth, self-government, individual autonomy, collective tolerance, or, as some new free speech regulators urge, deliberative public discourse.\textsuperscript{182} Anti-abortion activists would not be consoled by the Access Act's rule of construction proclaiming that the Act may not be construed as prohibiting "any expressive conduct"\textsuperscript{183} because their expressive conduct includes peaceful, but obstructive picketing.\textsuperscript{184}

Notwithstanding the distinction between a law's purpose and effect, content-neutral laws that incidentally restrict protected speech have been found justifiable when substantial governmental interests are served.\textsuperscript{185} Indeed, although the means of abortion protestors to communicate their message has been restricted by the Access Act, substantial governmental interests are served by the Act,\textsuperscript{186} and ample "opportunities and outlets for expression" remain available.\textsuperscript{187} The integrity of the Fourth Circuit's decision, therefore, may rest most firmly on these conclusions.

\textit{b. The Commerce Clause: A Means to Regulate Speech and Religion.}—Opportunities for expression are available in both public and private realms.\textsuperscript{188} The distinction between public and private regulation of speech was addressed implicitly by the Fourth Circuit in its consideration of Congress's power to enact the Access Act pursuant to the Commerce Clause. Indeed, debate rages over the need for greater regulation of the "marketplace of ideas."\textsuperscript{189} Although speech and commodities have been analogized,\textsuperscript{190} there may be reason to

\begin{itemize}
\item \textsuperscript{182} Id.
\item \textsuperscript{183} See supra note 25 and accompanying text.
\item \textsuperscript{184} American Life League, 47 F.3d at 648.
\item \textsuperscript{185} United States v. O'Brien, 391 U.S. 367, 376 (1968); see also Stone, supra note 166, at 190-93.
\item \textsuperscript{186} See supra text accompanying notes 129-130.
\item \textsuperscript{187} See supra text accompanying notes 132, 167.
\item \textsuperscript{188} The distinction between public and private regulation of speech is the third distinction that is prevalent in First Amendment jurisprudence. See Sullivan, Discrimination, supra note 156, at 443; Sullivan, Resurrecting, supra note 160, at 978.
\item \textsuperscript{190} In defending what she calls an "asymmetry" in government regulation of speech and products, Sullivan offers three reasons for maintaining the status quo: First, one might see speech as indeed a product, but one with sufficiently different properties from other products as to warrant a very different kind of regulatory regime. Second, one might see speech as a product much like other
feel greater skepticism and mistrust of government regulation of speech than of commodities,\textsuperscript{191} which may account for the disparity in federal government regulation of commerce and speech.\textsuperscript{192}

Congressional opponents of the Access Act argued that the majority exaggerated the dangers of abortion protest.\textsuperscript{193} Justice Scalia employed a similar argument in his partial dissent in \textit{Madsen v. Women's Health Center, Inc.}\textsuperscript{194} Abortion opponents assert that "loose predictions that protest will turn violent should no more stop Randall Terry from peaceful protest than they once did civil rights demonstrators."\textsuperscript{195}

However, only the means of anti-abortion activist expression has been restricted by the Access Act.\textsuperscript{196} Limits have been placed on their demonstrations. The restriction on the means of their protest "is connected to legitimate, neutral justifications":\textsuperscript{197} preserving the peace and protecting access to health facilities, constitutional rights, and interstate commerce.\textsuperscript{198} These justifications for the Access Act—an Act that the court noted may potentially restrict expressive elements of conduct,\textsuperscript{199} and place a substantial burden on religious exercise\textsuperscript{200}—satisfy both the substantial interest test of First Amendment intermediate scrutiny,\textsuperscript{201} and the compelling interest test of RFRA.\textsuperscript{202} The Fourth Circuit decision thus exposes an intriguing difference between

\begin{itemize}
  \item products, but distrust government more in speech than in economic markets, based on the prediction that risks of majoritarian error or self-dealing will be greater in the former than in the latter. Third, and most dramatic, because it involves a certain heresy against that canonical passage by Holmes, one might decide that the analogy between speech and economic markets is misguided, and that freedoms of speech and economic transactions are different at the core.
\end{itemize}

\begin{itemize}
  \item Sullivan, \textit{Free Speech}, supra note 189, at 959.
  \item 193. \textit{See supra} notes 94-103 and accompanying text.
  \item 195. Sullivan, \textit{Discrimination}, supra note 156, at 441.
  \item 196. Sunstein distinguishes between viewpoint-based restrictions and restrictions on the means of expressing a viewpoint. \textit{Sunstein}, supra note 176, at 189.
  \item 197. \textit{See id.} "Viewpoint discrimination is not established by the fact that in some hypotheticals, one side has a greater means of expression than another, at least—and this is the critical point—if the restriction on means is connected to legitimate, neutral justifications." \textit{Id.}
  \item 198. \textit{American Life League}, 47 F.3d at 647-48, 652.
  \item 199. \textit{Id.} at 648.
  \item 200. \textit{Id.} at 655.
  \item 201. \textit{Id.} at 652.
  \item 202. \textit{Id.} at 656.
\end{itemize}
the standards applied to preserve freedom of speech and those applied to preserve freedom of religious exercise.

In essence, the Access Act demonstrates how Congress may regulate the "marketplace of ideas" through its power to regulate "commercial intercourse." The controversy over disparate federal government regulation of commerce and speech is thus ironically illuminated in a decision that makes restrictions on speech and religion dependant upon substantial commercial interests.

5. Conclusion.—The implications of the Fourth Circuit's decision in American Life League, Inc. v. Reno are subtle, but compelling. Speech and religious exercise may indeed be restricted through the federal government's power to regulate commerce. The court concluded that the Freedom of Access to Clinic Entrances Act is content neutral, yet conceded that some protected expressive elements of conduct may be proscribed by the Act. Less speech is the result of these incidental restrictions. Attempts to distinguish between speech and conduct are thus sometimes unconvincing. The current intellectual and political debate over First Amendment doctrine reveals this paradox, which is manifest in the Fourth Circuit's decision. Nevertheless, the court properly held that the Act's incidental restrictions on speech are no greater than necessary to further the substantial governmental interests of protecting public health, safety, and commerce, and the constitutional and statutory rights of citizens. In essence, the court's decision rests most soundly on its conclusions that protected speech was not targeted, substantial governmental interests are served, and adequate alternatives for expression remain available.

BETTY S. DIENER

B. Reaffirming a Narrow Interpretation of the Perez "Manifest Necessity" Doctrine

In United States v. Sloan,1 the Court of Appeals for the Fourth Circuit held that Willie E. Sloan could not be retried after the trial

203. See supra note 189 and accompanying text.
204. Justice Marshall's definition of commerce in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824), when viewed in the context of federal restrictions on conduct at reproductive health services, offers a rather ironic pun: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Id.
205. See generally Sullivan, Free Speech, supra note 189.
1. 36 F.3d 386 (4th Cir. 1994).
court's sua sponte declaration of a mistrial during his first trial on charges of embezzlement, mail fraud, and violation of the Taft-Hartley Act.\(^2\) The trial judge declared a mistrial when, late in the defense's case-in-chief, Sloan decided not to testify on his own behalf.\(^3\) After the United States rescheduled Sloan for trial, the Fourth Circuit held, on double jeopardy grounds,\(^4\) that Sloan could not be retried because no "manifest necessity"\(^5\) existed for the trial court's declaration of a mistrial.\(^6\) To determine whether a "manifest necessity" existed, the court applied a standard first set forth over 170 years ago in *United States v. Perez.*\(^7\) Under *Perez*, a defendant may be retried if "manifest necessity" or the "ends of public justice" required a mistrial.\(^8\)

In prohibiting a retrial of Sloan, the court failed to consider the "public justice" component of the *Perez* formulation,\(^9\) and instead, only examined whether manifest necessity required a mistrial.\(^10\) The Supreme Court, however, has held that the ends of public justice may, in limited circumstances, take precedence over a defendant's right to trial by a single tribunal.\(^11\) The vague concept of public justice has been interpreted to mean either the public's interest in fair, unbiased


\(^3\) *Sloan*, 36 F.3d at 388.

\(^4\) U.S. CONST. amend. V. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

\(^5\) See infra notes 7-8 and accompanying text.

\(^6\) *Sloan*, 36 F.3d at 401.

\(^7\) 22 U.S. 579, 580 (1824) (holding that a defendant may be retried when a jury is discharged from giving a verdict for reasons of "manifest necessity," or because the "ends of public justice would otherwise be defeated").

\(^8\) *Id.* at 580; see also infra text accompanying notes 58-66.

\(^9\) *Perez*, 22 U.S. at 580.

\(^10\) *Sloan*, 36 F.3d at 401. The court concluded that "[t]here was no manifest necessity for the district court's *sua sponte* declaration of a mistrial over Sloan's objections. Thus, when the Government sought to retry Sloan, his motion to dismiss the indictment on double jeopardy grounds should have been granted." *Id.*

\(^11\) See *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (holding that a trial judge's decision to declare a mistrial based on improper argument must be accorded great deference, and that there is public interest in the prosecutor having "one full and fair opportunity to present his evidence to an impartial jury"); *Illinois v. Somerville*, 410 U.S. 458, 471 (1973) (holding that a mistrial met the standard of manifest necessity when the ends of public justice would not be served by allowing a trial to continue under an insufficient indictment); *United States v. Jorn*, 400 U.S. 470, 484 (1971) (holding that while a defendant cannot be guaranteed "a single proceeding free from harmful governmental or judicial error," a trial judge must make every effort to exercise sound discretion when discharging a jury); *Gori v. United States*, 367 U.S. 364, 367-68 (1961) (holding that a mistrial granted in the interest of the defendant and based upon sound judicial discretion does not prevent a retrial); *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (holding that under certain circum-
judicial administration\textsuperscript{12} or the public’s interest in the complete prosecution of those accused of felonies.\textsuperscript{13} In Sloan, the court did not consider the impact of either meaning on the trial judge’s decision to declare a mistrial. Had the court more broadly interpreted the \textit{Perez} standard, Sloan likely would have been retried.

\textbf{1. The Case.}—On April 13, 1993, the grand jury for the Eastern District of North Carolina returned a ten-count indictment against Willie E. Sloan for acts Sloan allegedly committed while serving as president of Local 1426 of the International Longshoreman’s Association.\textsuperscript{14} His trial began on December 6, 1993.\textsuperscript{15} Opening statements by defense counsel included what the government called a “Horatio Alger-like” account of “the long history of Willie E. Sloan’s rise from humble origins to that of a union President.”\textsuperscript{16} In its appellate brief\textsuperscript{17} the Government asserted that this portion of the opening statement was improper because the defense “was unable to produce the testimony via the defendant” to support it.\textsuperscript{18}

In reviewing the trial transcript, the court noted five occasions that defense counsel represented that Sloan would testify.\textsuperscript{19} Defense counsel’s first representation occurred while the Government’s eighteenth witness, James Earl Carroll, testified.\textsuperscript{20} When defense counsel attempted to impeach Carroll with evidence of Carroll’s prior conviction for bribery and racketeering,\textsuperscript{21} the trial judge asked defense counsel if Sloan would testify.\textsuperscript{22} After counsel indicated that he would, the judge ruled that the impeachment information could only

\textsuperscript{12} Hunter, 336 U.S. at 689 (“[A] defendant’s valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public’s interest in fair trials designed to end in just judgments.”).
\textsuperscript{13} Somervile, 410 U.S. at 463. The Court has asserted that “the defendant’s interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.” \textit{Id.} at 471; see also Hunter, 336 U.S. at 689.
\textsuperscript{14} Sloan, 36 F.3d at 389. The government charged Sloan with accepting payment from an employer in violation of the Taft-Hartley Act, embezzling from the union, and mail fraud. \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} After the mistrial, defense counsel filed an affidavit and the Government filed a response to that affidavit. \textit{See id.} at 392 n.5. The Court of Appeals relied upon those documents and the trial transcript, as well as the appellate briefs. \textit{See e.g., id.} at 392, 397.
\textsuperscript{18} \textit{Id.} at 389 (quoting the Government’s brief); \textit{see also id.} at 397.
\textsuperscript{19} \textit{Id.} at 396-97.
\textsuperscript{20} \textit{Id.} at 389.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
be admitted into evidence through the testimony of Sloan. In accordance with this ruling, defense counsel did not refer to Carroll’s previous conviction during cross-examination.

The issue of Sloan testifying arose again during the defense’s cross-examination of Government witness Scipio Hawkins. After Hawkins denied knowing of certain threats and attacks on Sloan, defense counsel attempted to impeach Hawkins by introducing evidence that demonstrated Hawkins’s knowledge of such incidents. The court ruled that counsel could ask Hawkins to identify the incriminating documents, thereby permitting counsel to enter the documents into evidence. The court, however, stated that Sloan would have to testify as to the documents’ contents. Despite the court’s ruling—to which the Government did not object—defense counsel never asked Hawkins about the documents.

The record indicates that the issue of Sloan testifying occurred a third time when the Government announced that it planned to impeach Sloan with information about false affidavits he filed in previous litigation. Noting that defense counsel “says his client’s going to testify,” the Government explained that it planned to question any witness accused of filing false affidavits about such incidents. The district judge refused the Government’s request to use the information to impeach defense witnesses.

When defense counsel attempted to question its witness Andrew Canoutas, Sloan’s former attorney, about a deed of trust he prepared for Sloan, the court sustained the Government’s objection on the grounds of hearsay. Although defense counsel argued that Sloan’s testimony would corroborate Canoutas’s answer, the court neverthe-

23. Id.
24. Id.
25. Id.
26. Id. at 389-90.
27. Id. at 390.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id. (quoting from trial court transcript).
33. Id.
34. Id. The district judge, before whom the matter of the false affidavits had occurred, initially noted that he did not “recall” the prior case. Id.
35. Id.
36. Id. at 390-91 (“[D]efense counsel argued that the government had been permitted to ask about the deed of trust on cross-examination ‘for the purpose of making it look as if there was something strange about Mr. Canoutas doing it.’”).
less upheld the objection noting that there was "'nothing to corroborate . . . at this point.'"\(^{37}\)

The fourth representation that Sloan would testify occurred when the Government again mentioned the false affidavits.\(^{38}\) The trial judge indicated that the Government would "probably" be able to impeach Sloan and other witnesses with them.\(^{39}\) Thereafter, defense counsel asked the court for a recess to look into the matter of the false affidavits.\(^{40}\) The court recessed for the weekend.\(^{41}\)

At a pretrial meeting on the following Tuesday, Sloan's counsel revealed that "'unless things changed'" Sloan would not testify.\(^{42}\) According to defense counsel's affidavit,\(^{43}\) the court "'immediately'" declared a mistrial because "'it had relied on counsel's statement that Mr. Sloan would be a witness when it made certain rulings and felt sure the Government was prejudiced because it might have offered other objections or witnesses had it known the defendant would not testify.'"\(^{44}\) Despite the defense's objection, when the court reconvened the judge informed the jury of the mistrial.\(^{45}\)

A written order, issued fifteen days later, revealed the court’s reasons for declaring a mistrial:

[Defense counsel's representations to [the court] and to the United States preempted a fair determination of the issues. . . . In the court's view, reliance upon defense counsel's unequivocal assertion that defendant would testify rendered the trial fundamentally unfair to the United States. The integrity of the judicial process demands that the court and the

\(^{37}\) Id. at 391 (quoting the trial court transcript).

\(^{38}\) Id. ("During the testimony of the ninth defense witness, Buster Smalls, the question of Sloan's filing a false affidavit and whether he would testify again arose.").

\(^{39}\) Id. At this moment in the trial, the judge noted that he remembered the issue of the false affidavits and commented: "'I'll tell you what happened. There were affidavits filed by both the employers and the union . . . and both . . . were false." Id.

\(^{40}\) Id. Defense counsel asserted that the United States had not given him notice of the false affidavits and that he had only learned of them through a newspaper article. Id.

\(^{41}\) Id.

\(^{42}\) Id. at 392 (quoting defense counsel's affidavit). Following the mistrial declaration, defense counsel filed an affidavit that stated that over the weekend Sloan decided not to testify in light of the possible damage that could result from cross-examination regarding the false affidavits. Id. at 391.

\(^{43}\) The court relied on defense counsel's affidavit and the Government's response and appellate brief, as no transcript was taken over the weekend. Id. at 391-92.

\(^{44}\) Id. at 392 (quoting defense counsel's affidavit).

\(^{45}\) Id.
attorneys who appear before it as its officers be able to rely upon the others' respective representations.\textsuperscript{46}

When the court scheduled the case for retrial, "Sloan moved to dismiss the indictment on the 'grounds of double jeopardy.'"\textsuperscript{47} The court denied the motion, "stating that to 'preclude a retrial in this matter would be manifestly unjust and unfairly would exalt form over substance.'"\textsuperscript{48} From this order, Sloan filed this interlocutory appeal\textsuperscript{49} and the district court stayed the trial.\textsuperscript{50}

2. Legal Background.—

\textbf{a. Double Jeopardy Jurisprudence: Balancing the Defendant's Rights with the Public's Rights.—}The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."\textsuperscript{51} Jeopardy attaches "in a jury trial when the jury is impaneled and sworn."\textsuperscript{52} From that point on, the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury.\textsuperscript{53} In limited circumstances, however, this right may be

\textsuperscript{46} Id. at 392-93. In its written order, the court noted that it did not "fault" or "blame" defense counsel, nor did it consider the late decision that Sloan would not testify a "premeditated ploy." \textit{Id.} at 399.

\textsuperscript{47} Id.; see \textit{supra} note 4.

\textsuperscript{48} Sloan, 36 F.3d at 393 (quoting the trial court's denial of motion to dismiss on the basis of double jeopardy).

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} \textit{See supra} note 4. The policy behind the clause is the recognition that [t]he 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. Green v. United States, 355 U.S. 184, 187-88 (1957) (holding that defendant found guilty of second degree murder, when jury had a choice of first degree murder, could not be retried on charge of first degree murder).


\textsuperscript{53} \textit{E.g.}, Crist, 437 U.S. at 36 (holding that defendant’s "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy); United States v. Jorn, 400 U.S. 470, 479 (1971) (holding that society's awareness of heavy personal strain of a criminal trial is manifested in its willingness to limit the State to a single criminal proceeding); Harris v. Young, 607 F.2d 1081, 1086 (4th Cir. 1979) (holding that noncompliance with discovery orders did not constitute manifest necessity to order a mistrial), \textit{cert. denied}, 444 U.S. 1025 (1980).
subordinated to the public's interest in fair and just judgments.\textsuperscript{54} The Supreme Court reconciled this conflict between the defendant's rights and the public's rights 170 years ago in \textit{United States v. Perez}.\textsuperscript{55} Under \textit{Perez}, a criminal defendant can be retried only if manifest necessity or the ends of public justice required the trial judge to declare a mistrial.\textsuperscript{56} Justice Story, writing for the \textit{Perez} Court, declared:

\begin{quote}
We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere . . . . [B]ut, after weighing the question with due deliberation, we are of the opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial.\textsuperscript{57}
\end{quote}

\begin{enumerate}
\item Manifest Necessity.—The Fourth Circuit consistently has followed \textit{Perez}.\textsuperscript{58} However, because of the many factual situations in which courts declare mistrials, "the Supreme Court has refused to apply the manifest necessity standard in a mechanical fashion."\textsuperscript{59} Nevertheless, the \textit{Perez} rule permits retrial if the trial judge declares a mistrial after finding that the jury is "deadlocked, biased, or unduly

\textsuperscript{55} 22 U.S. at 579; see supra notes 7-8 and accompanying text.
\textsuperscript{56} Perez, 22 U.S. at 580; see also infra text accompanying notes 58-66.
\textsuperscript{57} Perez, 22 U.S. at 580.
\textsuperscript{58} See, e.g., United States v. Shafer, 987 F.2d 1054, 1057 (4th Cir. 1993) (holding that motive for mistrial was improper and other alternatives to a mistrial were available); United States v. Council, 973 F.2d 251, 255 (4th Cir. 1992) (holding that acquittal on two counts was actually a dismissal and could be retried, while other counts were barred from rehearing by double jeopardy); United States v. Sartori, 730 F.2d 973, 975 (4th Cir. 1984) (holding that circumstances surrounding recusal of trial judge did not warrant manifest necessity for calling a mistrial); Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1120-21 (4th Cir. 1973) (holding that both prongs of the Perez test were met in declaration of a mistrial due to the circumstances surrounding suspected juror bias), cert. denied, 419 U.S. 876 (1974).
\textsuperscript{59} Sartori, 730 F.2d at 975; see also Arizona v. Washington, 434 U.S. 497, 506 (1978) (holding that Perez does not "describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge"); Illinois v. Somerville, 410 U.S. 458, 462 (1979) (holding that the Perez formulation "consistently adhered to by this Court . . . abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial").
Courts also recognize manifest necessity “when the behavior of the defendant or her counsel triggered the mistrial,” or if mistrial resulted from a defense motion. On the other hand, the Supreme Court has held that double jeopardy forbids the court from granting a mistrial to give the prosecution “another opportunity to supply evidence which it failed to muster in the first proceeding.”

(ii) The “Ends of Public Justice.”—In *Illinois v. Somerville*, the Supreme Court attempted to define *Perez*’s “ends of public justice” component. The Court noted that the interests of the public in seeing that a criminal prosecution proceed to verdict... need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the “ends of public justice,” or, more precisely, “the public’s interest in fair trials designed to end in just judgments,” has not been disregarded by this Court.

The Court held that the need for a mistrial may “yield... to the public’s interest in fair trials designed to end in just judgments.” Therefore, the public’s interest in secure, unreversible judgments fits within *Perez*’s “ends of public justice” component.

Most recently, in *Arizona v. Washington* the Supreme Court considered society’s interest in final judgments. The Court emphasized the need to balance a defendant’s right to be tried by a particular jury with the public’s interest in providing the Government with a full opportunity to try its case.

Although the *Sloan* court did not follow the Supreme Court’s broad interpretation of *Perez*, it did follow Fourth Circuit precedent regarding double jeopardy. While the court in *Whitfield v. Warden of Maryland House of Correction* applied a balancing test reminiscent of the Supreme Court’s approach, in the four most recent cases decided by the Fourth Circuit the court focused solely on whether mani-

60. Loeb et al., supra note 52, at 1041.
61. Id. at 1041-43.
64. Id. at 463 (citing *Perez*, 22 U.S. at 580; *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).
65. Id. at 469-71 (quoting United States v. Jorn, 400 U.S. 470, 480 (1971)).
66. Id. at 471.
68. Id. at 505; see also *Wade*, 336 U.S. at 689.
69. See supra notes 63-68 and accompanying text.
71. Id. at 1121.
fest necessity existed for the declaration of the mistrial. In each of these cases, the court failed to balance the defendant's right to a trial in a single tribunal with the requirements of evenhanded judicial administration and the needs of law enforcement.

b. Standard of Review for Mistrial Declarations.—The abuse of discretion standard is used to review a trial court's decision to declare a mistrial based on manifest necessity or the ends of public justice. In Arizona v. Washington, the Supreme Court explained that the "spectrum of trial problems" and the varying degree to which those problems can be assessed by a reviewing court demand that "the trial judge's determination [be] . . . entitled to special respect." However, a judge need not make an explicit finding of manifest necessity for a reviewing court to find that it existed.

In determining whether the trial judge exercised sound discretion in declaring a mistrial, reviewing courts look at different factors. In a case of possible jury bias or prejudice, the Supreme Court in Illinois v. Somerville applied "a general approach, premised on the 'public justice' policy enunciated in United States v. Perez." Under this standard, a trial judge has properly exercised his discretion to declare a mistrial if an impartial verdict could not have been reached or if an error would have made reversal on appeal a certainty.

More helpful for reviewing a judge's decision are the factors set forth in Arizona v. Washington. The factors include: (1) whether the judge acted precipitately; (2) if both the defense and prosecution

72. See, e.g., United States v. Shafer, 987 F.2d 1054, 1059 (4th Cir. 1993) (holding that there was no manifest necessity for mistrial where Government belatedly produced exculpatory documents); United States v. Council, 973 F.2d 251, 256 (4th Cir. 1992) (holding that manifest necessity for mistrial did not exist where "the trial court cited fairness to the defendant as a reason for its ruling"); United States v. Von Spivey, 895 F.2d 176, 178 (4th Cir. 1990) (holding that under the circumstances defense counsel's illness constituted manifest necessity for mistrial and reenactment was not a violation of double jeopardy); United States v. Sartori, 730 F.2d 973, 977 (4th Cir. 1984) (holding that circumstances surrounding recusal of trial judge did not warrant manifest necessity for calling a mistrial).
73. See supra notes 11-13 and accompanying text and note 72.
74. See, e.g., United States v. Shafer, 987 F.2d 1054, 1058 (4th Cir. 1993); Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979), cert. denied, 444 U.S. 1025 (1980).
75. 437 U.S. 497 (1978).
76. Id. at 510.
77. Id.
78. Id. at 517.
80. Id. at 464; see also United States v. Perez, 22 U.S. 579, 580 (1824).
82. 434 U.S. 497 (1978).
83. Id. at 515.
had a full opportunity to explain their positions; and (3) whether the judge “accorded careful consideration to [the defendant’s] interest in having the trial concluded in a single proceeding.” Many courts also look at whether the trial judge considered alternative remedies, such as curative instructions, before declaring a mistrial.

3. The Court’s Reasoning.—In Sloan, the trial judge declared a mistrial because the court “‘relied upon . . . representations [that Sloan would testify] in its rulings upon evidentiary issues in both the Government’s and the defendant’s cases-in-chief, [and] admitt[ed] evidence presumed to be corroborative of defendant’s anticipated testimony.’” Writing for the majority, Judge Motz found this reasoning unconvincing, noting that there is simply no support in the record for the district court’s finding that reliance on defense counsel’s representations that Sloan would testify caused it to make evidentiary rulings and the government to make or fail to make objections, which rendered the trial fundamentally unfair to the United States when Sloan ultimately decided not to testify. In other words, no reason, let alone a manifest necessity, is apparent in the record to justify a mistrial on the ground set forth by the court.

The Fourth Circuit also found it significant that the issue of Sloan testifying was not mentioned in the record “until the trial was half over and defense counsel was cross-examining the Government’s eighteenth witness.” Furthermore, the court noted that in the two instances in which the issue of Sloan testifying was raised during the Government’s case-in-chief, the trial judge made rulings that “did not affect [the Government’s] portion of the trial in any way.” In the case of Government witness Carroll, the trial judge prohibited defense

84. Id. at 515-16.
85. Id. at 516.
86. See, e.g., United States v. Jorn, 400 U.S. 470, 487 (1971) (“[N]o consideration was given to the possibility of a trial continuance . . . .”); see also United States v. Von Spivey, 895 F.2d 176, 178 (4th Cir. 1990) (“[The] district court considered every reasonable resolution to the situation posed by defense counsel’s illness.”); United States v. Sartori, 730 F.2d 973, 976 (4th Cir. 1984) (“[O]ther obvious and adequate alternatives to a mistrial were available in this case.”); Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979) (“In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial.”), cert. denied, 444 U.S. 1025 (1980).
87. Sloan, 36 F.3d at 392 (quoting the trial court’s written order).
88. Id. at 397.
89. Id. at 396.
90. Id.
counsel from impeaching Carroll with information about a previous conviction because Sloan could testify about the conviction.91 As for Government witness Hawkins, the court allowed the defense to cross-examine Hawkins only about the identity, not the contents, of four grievances and a letter.92 The defense never actually pursued this opportunity.93

The court also found that the two representations relating to Sloan's testimony that occurred during the defense's case-in-chief did not affect the admission of evidence in the trial.94 In the first instance, the trial judge prohibited Andrew Canoutas from testifying about Sloan's deed of trust, which was "'presumed to be corroborative of defendant's anticipated testimony.'"95 In the second, a mistrial was declared before the court had even decided whether or not it would allow the Government to cross-examine defense witnesses about Sloan's false affidavits.96

Although the Government did not request a mistrial,97 it did argue that the defense's opening statement, which contained the "Horatio Alger-like" account of Sloan's life, justified a mistrial.98 The Fourth Circuit, however, found nothing in the trial court's order to support this contention.99 In fact, the court of appeals noted that the district judge's order did not even mention the defense's opening statement.100 Furthermore, the court maintained that if the trial judge's declaration of a mistrial resulted from defense's opening state-

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91. Id.; see also supra text accompanying notes 20-24.
92. Sloan, 36 F.3d at 389-90, 396.
93. Id. at 396; see also supra text accompanying notes 25-30.
94. Sloan, 36 F.3d at 396.
95. Id. (quoting the trial court's written order); see also supra text accompanying notes 35-37.
96. Sloan, 36 F.3d at 396; see also supra text accompanying notes 38-44.
97. The Government claimed it "merely acceded to what the Court was clearly going to do." Sloan, 36 F.3d at 392; see also id. at 392 n.4.
98. Id. at 397.
99. Id.
100. Id. Nonetheless, the court briefly addressed the Government's core argument that, "while ... not improper when given, the defense opening statement necessitated a mistrial 'when the defense was unable to produce testimony via the defendant to support the Horatio Alger-like statements made to the jury.'" Id. (quoting the Government's brief). The court noted that the Government failed to take into account the "well-established principle that when 'an opening statement is an objective summary of evidence [counsel] reasonably expects to produce, a subsequent failure in proof will not necessarily result in a mistrial.'" Id. at 398 (quoting United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986) (alteration in original)). The court explained that a different result might have issued if the objectionable material in the opening statement was highly prejudicial and unable to be cured by instruction or other remedy. In this case, however, even the government conceded that the statement was not "'per se objectionable.'" Id. (citation omitted).
ment, the judge should have considered other readily available alternatives to mistrial, such as curative instructions.101

Although the majority accepted the trial court's assertion that the trial transcript did not reflect off-the-record comments that affected the trial judge's rulings, the court nevertheless concluded that the trial judge failed to exercise sound discretion in declaring a mistrial.102 While acknowledging the sanctity of a trial court's discretion, the court noted that it had "carefully, indeed painstakingly, examined the record"103 and found nothing to support even an implied finding of manifest necessity.104 Thus, the court held that, in the absence of manifest necessity for a retrial, Sloan's "motion to dismiss the indictment on double jeopardy grounds should have been granted."105

In his dissent, Judge Niemeyer argued that the trial judge did not abuse his discretion in declaring a mistrial.106 He asserted that "[b]eyond circumstances where the defendant has been acquitted, or might have been acquitted because of an inadequacy of the government's evidence," the Supreme Court generally has given broad discretion to the trial judge to retry a defendant, even when a mistrial ruling may appear hasty or unclear.107 Judge Niemeyer asserted that the double jeopardy protections

fall into two categories: (1) an absolute protection, where the defendant has been acquitted (or convicted) or would have been acquitted ... and (2) a discretionary grant of protection at issue here, where the trial is aborted because of trial error or some other event tending to defeat the ends of public justice.108

As it is impossible to define all the circumstances in which double jeopardy protection applies, Judge Niemeyer argued that a trial judge's discretion must be broad.109

Judge Niemeyer also concurred with the trial judge's assertion that the trial transcript could not reveal the instances in which the court remained silent based on defense counsel's representation that Sloan would testify.110 Finding that the defendant's decision not to

101. Id. at 399-400.
102. Id. at 400-01.
103. Id. at 401.
104. Id.
105. Id.
106. Id. at 405-06 (Niemeyer, J., dissenting).
107. Id. at 404.
108. Id.
109. Id. at 404-05.
110. Id. at 405.
testify was abrupt,\textsuperscript{111} that this decision changed the “trial’s structural assumption,”\textsuperscript{112} and that a written record was unavailable to the district court when it prepared its order,\textsuperscript{113} Judge Niemeyer concluded that while the court might be “inclined to question the wisdom of the district court’s order based on the bare record, . . . speculation does not require us to find that the district court abused its broad discretion.”\textsuperscript{114}

Finally, Judge Niemeyer asserted that the “public justice” aspect of the \textit{Perez} formulation demands that “the government be given the opportunity to complete a prosecution, unless its own actions preclude such an opportunity and as long as a district court did not act in bad faith or otherwise abuse its discretion.”\textsuperscript{115} Judge Niemeyer urged the court not to “deny the public its right to prosecute fully and fairly those accused of felonies.”\textsuperscript{116}

4. \textbf{Analysis}.—

\textit{a.} \textit{Perez Misinterpreted.—}\textit{Sloan} does not represent a fundamental shift from prior Fourth Circuit decisions relating to double jeopardy. Nonetheless, the case does provide an opportunity to scrutinize the court’s misapplication of \textit{Perez} and to comment on the incorrect standard of review employed by the appellate court.

Under current Fourth Circuit jurisprudence, the court will not overturn a trial judge’s determination that a defendant may be retried if analysis of the trial transcript reveals that a mistrial was \textit{absolutely necessary} and that \textit{no} alternatives to mistrial existed.\textsuperscript{117} By using such a strict, inflexible standard of review, the court applied the \textit{Perez} standard in precisely the “mechanical fashion” that the Supreme Court has rejected.\textsuperscript{118} As the Supreme Court in \textit{Washington} explained, “[the language of \textit{Perez} does] not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word ‘necessity’ cannot be interpreted literally.”\textsuperscript{119}

\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.; see also} United States v. \textit{Perez}, 22 U.S. 579, 580 (1824).
\textsuperscript{116} \textit{Sloan}, 36 F.3d at 405.
\textsuperscript{117} \textit{See supra notes} 70-73 \textit{and accompanying text.}
\textsuperscript{118} \textit{See supra note} 59 \textit{and accompanying text.}
The Sloan court did not affirmatively reject the balanced reasoning of the Supreme Court in *Arizona v. Washington*, 120 *Illinois v. Somerville*, 121 and *Gori v. United States* 122 in favor of a stricter approach. In fact, the court actually recited the history of *Perez* and its progeny. 123 In practice, however, the Fourth Circuit's application of a single factor test—whether the mistrial was absolutely necessary—indicates that the court misinterpreted the Supreme Court holdings relating to *Perez*.

The Fourth Circuit's rigid interpretation of *Perez* is problematic for several reasons. First, an inflexible interpretation of *Perez* may inhibit judges in the execution of their duties. 125 The Supreme Court noted in *Gori* that requiring judges to apply "formalistic artificialities" could make them "unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." 126 Expressing the same concern, the Court in *Washington* noted that "[t]he adoption of a stringent standard of appellate review in this area... would seriously impede the trial judge in the proper performance of his 'duty...'." 127

Under the Fourth Circuit's current interpretation of the *Perez* doctrine, if a trial judge believes that an incident during trial prejudiced a party, the judge might hesitate to declare a mistrial if the trial transcript alone would not adequately support the judge's determination. 128 On the same basis, a judge may delay a mistrial determination until certain that the trial transcript reveals the prejudicial event. 129 A trial judge in the Fourth Circuit also may hesitate to declare a mistrial if any alternatives, even possibly inadequate alternatives, to mistrial existed. These effects are especially problematic in light of the judiciary's desire to expedite trials and avoid delay. Any result that creates unwarranted expenses and burdens litigants or the court runs contrary to the "ends of public justice" component of *Perez*. Further, any result that additionally burdens a criminal defendant

120. *Id.*
123. Sloan, 36 F.3d at 393-95.
124. See infra text accompanying notes 153-154.
126. *Id.*
128. See supra text accompanying note 117.
129. See supra text accompanying notes 125-127.
clearly violates the principles underpinning the purpose of double jeopardy protections.  

b. Lack of Deference to the District Judge's Discretion.—A second problem with the Sloan decision is the court's failure to defer to the discretion of the trial judge. The Supreme Court's ruling in Washington explains why a mistrial determination is left to the discretion of the trial judge. In Washington, the trial judge granted the prosecutor's motion for a mistrial based on improper and prejudicial comments made during defense counsel's opening statement. In that case, the Supreme Court noted that "the extent of the possible bias cannot be measured," that "some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions," and that a mistrial was not "in a strict, literal sense . . . necessary." The Court, however, allowed a retrial of the defendant and commented that "[n]evertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation."

The issues before the Fourth Circuit in Sloan were substantively similar to those before the Supreme Court in Washington: the difficulty in measuring the extent of prejudice to the prosecutor; the availability of alternatives to a mistrial; and the public's interest in evenhanded judicial administration. Despite the fact that in reviewing Sloan the court purported to follow Washington, the Sloan court actually applied a far more inflexible interpretation of Perez. In prohibiting a retrial, the Sloan court focused solely on the bare requirement that a mistrial be absolutely necessary for a defendant to be retried.

In United States v. Gori, a case that, like Sloan, involved possible prejudice to a party, the Supreme Court read Perez as allowing a flexible, balanced approach to the determination of whether a defendant

130. The Gori Court noted that cases requiring the "safeguard of the Fifth Amendment" are those cases "in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." Gori, 367 U.S. at 369.
132. See generally id. at 509-14.
133. Id. at 498-501.
134. Id. at 511.
135. Id.
136. Id.
137. Id.
138. Sloan, 36 F.3d at 395-95.
139. Id. at 388-89.
could be retried.\textsuperscript{141} In that case, the trial judge declared a mistrial when he inferred that the prosecutor's line of questioning would soon lead to inappropriate statements about the defendant's criminal record.\textsuperscript{142} Although the Court found that the judge's action showed "an overeager solicitude" to the accused,\textsuperscript{143} the Court held that the defendant could be retried.\textsuperscript{144} The Court determined that the mistrial declaration was hasty and the reason for it "not 'entirely clear,'"\textsuperscript{145} but nevertheless held that the fundamental concepts of judicial administration give broad discretion to a judge, a responsibility "which 'is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal.'"\textsuperscript{146}

In \textit{Sloan}, the court failed to consider the special position of a trial judge in determining whether a party has been prejudiced during trial. Although, admittedly, the record offered little support for the trial judge's decision,\textsuperscript{147} even the majority acknowledged that intangible off-the-record factors likely provided additional support.\textsuperscript{148} And in overturning the trial judge's decision, the court failed to consider the underlying reason for the judge's action—the desire to prevent prejudice to a party.\textsuperscript{149} More important, however, the court seemed to ignore the very reason that a mistrial determination rests within a judge's discretion—that the trial judge occupies a special position in the "'heated atmosphere'" of the courtroom.\textsuperscript{150}

As Judge Niemeyer pointed out, the transcript from Sloan's trial indicated that a basis did exist for the trial judge's action.\textsuperscript{151} The record revealed that the trial court decided several evidentiary rulings

\begin{itemize}
  \item \textsuperscript{141} \textit{Sloan}, 36 F.3d at 366-70.
  \item \textsuperscript{142} \textit{Sloan}, 36 F.3d at 365-66.
  \item \textsuperscript{143} \textit{Sloan}, 36 F.3d at 367.
  \item \textsuperscript{144} \textit{Sloan}, 36 F.3d at 365.
  \item \textsuperscript{145} \textit{Sloan}, 36 F.3d at 366 (quoting United States v. Gori, 282 F.2d 43, 46, 48 (2d Cir. 1960)).
  \item \textsuperscript{146} \textit{Sloan}, 36 F.3d at 365 (quoting \textit{Gori}, 282 F.2d at 47).
  \item \textsuperscript{147} Judge Niemeyer noted that the Court of Appeals "might be inclined to question the wisdom of the district court's order based on the bare record" but urged the majority to go beyond the transcript in making its determination. \textit{Sloan}, 36 F.3d at 405 (Niemeyer, J., dissenting).
  \item \textsuperscript{148} See supra text accompanying note 102.
  \item \textsuperscript{149} The trial judge declared that "[d]efense counsel's unequivocal assertion that defendant would testify rendered the trial fundamentally unfair to the United States. The integrity of the judicial process demands that the court and the attorneys who appear before it as its officers be able to rely upon the others' respective representations." \textit{Sloan}, 36 F.3d at 393 (quoting the trial court's written order).
  \item \textsuperscript{150} \textit{Gori}, 367 U.S. at 366 (quoting \textit{Gori}, 282 F.2d at 47).
  \item \textsuperscript{151} \textit{Sloan}, 36 F.3d at 405 (Niemeyer, J., dissenting).
\end{itemize}
based on the assumption that Sloan would testify. Whether Sloan's decision not to testify actually influenced the admittance of evidence or resulted in prejudice to a party is a separate issue. It can be inferred from the transcript that the Government and the court thought and received reassurances that Sloan would testify until they learned late in the trial that he would not. Under these facts, the trial judge was in the best position to decide to what degree defense counsel's representations that Sloan would testify influenced the structure of the trial. The judge also was best able to determine whether an alternative to mistrial would have cured the damage wrought by Sloan's decision not to testify. The trial judge's decision should have been respected.

5. Conclusion.—The first sentence in the Sloan majority opinion states that "[t]he sole question presented here is whether the declaration of a mistrial was justified by 'manifest necessity.'" The court concluded that "[b]ecause Sloan's decision not to testify did not create a 'manifest necessity' requiring declaration of a mistrial, we must reverse." This language makes clear that the Fourth Circuit adhered to an unduly formalistic interpretation of Perez that directly contradicts the flexible, balancing approach encouraged by the Supreme Court. Most important, the Fourth Circuit's approach ignores the "ends of public justice" component of Perez, thereby exposing defendants to the burdens of successive, oppressive prosecution that the double jeopardy clause of the Constitution intended to prevent.

VIRGINIA M. ROWTHORN

C. Permitting the Use of Videoconferencing in Civil Commitment Hearings

In United States v. Baker, a divided panel of the Court of Appeals for the Fourth Circuit held that the use of videoconferencing procedures in a civil commitment hearing does not violate an inmate's pro-

152. See supra text accompanying notes 19-40.
153. Sloan, 36 F.3d at 388.
154. Id. at 389.
2. The relevant statutory provision is 18 U.S.C. § 4245 (1994), which permits the federal government to involuntarily commit federal prisoners for psychiatric care in an appropriate institution under certain circumstances. See also Baker, 45 F.3d at 840 (discussing the criteria that the Government must satisfy to justify involuntary commitment under § 4245). Also relevant for purposes of this Note is 18 U.S.C. § 4247(d) (1994), which provides for certain procedural rights at a civil commitment hearing. Other statutory provisions exist that provide for similar commitment of federal prisoners. See 18 U.S.C. §§ 4241-4246 (1994).
This holding is consistent with existing Supreme Court constitutional law, and reflects increasing judicial acceptance of the use of technology in the courtroom. The reasoning of the court is flawed, however, because of the difficulties arising from the application of the Supreme Court's procedural due process test enunciated in *Mathews v. Eldridge.*

1. The Case.—Leroy Baker was serving a fifteen-year federal sentence for bank robbery when the government transferred him to the Federal Correctional Institution at Butner, North Carolina ("FCI Butner") for voluntary psychiatric treatment. The staff diagnosed Baker as a paranoid schizophrenic, and he subsequently began refusing all medication. Eventually, he required continuing seclusion because of inappropriate behavior and psychoses, and the staff determined that Baker should be placed in a facility for involuntary treatment.

On July 22, 1993, the United States moved that the District Court for the Eastern District of North Carolina, pursuant to 18 U.S.C. § 4245, determine "the present mental condition of Leroy Baker." The government also moved to conduct the hearing by videoconference, pursuant to a pilot program involving the use of videoconferencing to conduct commitment hearings. On July 30, 1993, the district court granted the Government's motion to hold the hearing by videoconference. Shortly thereafter, Baker's appointed counsel objected to the use of the videoconferencing procedures. Specifically, Baker argued that the use of videoconferencing violated his Fifth Amendment procedural due process rights, his Sixth Amend-

3. *Baker,* 45 F.3d at 840.
5. *Baker,* 45 F.3d at 841.
6. *Id.*
7. *Id.*
9. *Baker,* 45 F.3d at 841. FCI Butner is located in the Middle District of North Carolina, but is defined statutorily as part of the Eastern District of North Carolina. 28 U.S.C. § 113(a) (1988 & Supp. 1993); see also *Baker,* 45 F.3d at 841 n.2. 18 U.S.C. § 4245 permits the involuntary commitment of federal inmates to psychiatric facilities if the government proves by a preponderance of the evidence that the inmate is suffering from a mental disease or defect that requires care in such a facility. 18 U.S.C. § 4245.
10. *Baker,* 45 F.3d at 841. In March of 1993, the Judicial Conference of the United States authorized the District Court for the Eastern District of North Carolina to conduct commitment hearings via teleconferencing as part of a pilot program.
11. *Id.*
12. *Id.*
ment right to effective counsel, and his statutory rights to counsel and confrontation under 18 U.S.C. § 4247(d).\textsuperscript{13}

The district court held Baker's competency hearing on August 13, 1993, using the videoconference procedure.\textsuperscript{14} Baker's image was transmitted from FCI Butner, where he remained, to the courthouse in Raleigh via live television broadcast.\textsuperscript{15} According to the district court, video and audio transmission were clear, the court reporter had no apparent difficulty transcribing the proceedings, and facial expressions and demeanor were easily observable.\textsuperscript{16} Baker, however, complained that neither video nor audio transmission quality were sufficient, that the constant switching between images prohibited witnesses from seeing their questioners and prevented the judge from viewing Baker and his attorney during cross-examination, and that the setup prevented Baker's attorney from effectively observing the judge during cross-examination.\textsuperscript{17}

At the close of the hearing, the court found that the Government had established, by a preponderance of the evidence, that Baker suffered from a mental disease or defect requiring custody for treatment.\textsuperscript{18} Baker did not challenge this determination on appeal.\textsuperscript{19}

After the competency hearing, the district court allowed both sides to present evidence and arguments concerning Baker's objec-

\textsuperscript{13} Id. at 840; see also United States v. Baker, 836 F. Supp. 1237, 1240 (E.D.N.C. 1993), aff'd, 45 F.3d 837 (4th Cir.), cert. denied, 116 S. Ct. 194 (1995).

\textsuperscript{14} Baker, 45 F.3d at 841. Apparently, this was the first such hearing to employ the videoconferencing technology. See Baker, 836 F. Supp. at 1238 ("What is unusual about the proceeding . . . is that it was conducted through the medium of video conference technology, or 'teleconferencing'.") (footnote omitted).

\textsuperscript{15} Baker, 45 F.3d at 841. Present at FCI Butner were Baker, his attorney, the Government's witness, two security officers, Baker's counselor, and observers. Id. At the Raleigh courthouse were District Judge Britt, an assistant United States attorney, the court reporter, the deputy clerk of court, a federal public defender, and spectators. Id.

\textsuperscript{16} Id. at 842; see also Baker, 836 F. Supp. at 1239.

\textsuperscript{17} Baker, 45 F.3d at 842. Baker argued that the technical equipment arrangement was not an adequate substitute for being physically present at the hearing. Id. at 841-42. Two cameras and various monitors were installed at both FCI Butner and the courthouse. Id. at 841. At FCI Butner, one camera focused on Baker and his attorney, and could zoom in on Baker. Id. The other focused on the witness stand. Id. The courtroom had a monitor for the judge and one positioned in front of Government counsel's table, facing the rear of the courtroom. Id. One camera focused on the judge, and the other on the assistant U.S. attorney. Id. At each location, the monitors could only display the images from one of the two cameras at the other location. Id. at 841-42. Remote controls allowed the judge and Baker's attorney to switch between images at their respective locations. Id. Baker's complaints about "constant switching" of images resulted from this setup. Id. at 842.

\textsuperscript{18} Id. at 841; see also Baker, 836 F. Supp. at 1238. The only witness to testify at the hearing was a psychologist with FCI Butner on behalf of the Government. Baker, 45 F.3d at 842.

\textsuperscript{19} Baker, 45 F.3d at 841.
tions to the videoconferencing procedure. Baker introduced documentary and expert testimonial evidence to illustrate the potential dangers of the videoconferencing procedures. The district court held that the videoconference procedures did not violate Baker's constitutional or statutory rights. Baker appealed this ruling to the Court of Appeals for the Fourth Circuit.

2. Legal Background.—

a. Constitutional Procedural Due Process Rights in a Commitment Hearing.—In holding that the videoconferencing hearing did not violate Baker's procedural due process rights, the Fourth Circuit relied heavily on Mathews v. Eldridge and its progeny. In Mathews, the Supreme Court addressed the issue of whether the Due Process Clause of the Fifth Amendment required an evidentiary hearing before the Social Security Administration terminated disability benefits. Justice Powell, writing for the Court, held that the Due Process Clause did not require such a hearing, and that existing agency procedures were adequate. To reach this result, the Court enumerated a three-pronged balancing test to determine what procedural due process rights attach when government action threatens an individual's life, liberty, or property interest. The Court considered:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Significantly for the Fourth Circuit, the Mathews Court noted in its analysis of the second prong that the decision whether to discon-

20. Id.
21. Id.
22. Id.; see also Baker, 836 F. Supp. at 1246.
23. Baker, 45 F.3d at 841.
25. The Due Process Clause of the Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
27. Id. at 349.
28. Id.
29. Id. at 335.
30. Id.
continue the disability benefits turns in most cases on "routine, standard, and unbiased medical reports by physician specialists," thus substantially reducing the value of an evidentiary hearing.\(^{31}\)

Three years after the *Mathews* decision, in *Addington v. Texas*,\(^{32}\) the Supreme Court considered the standard of proof that the Fourteenth Amendment's Due Process Clause\(^{33}\) required in a civil commitment proceeding.\(^{34}\) The Court reasoned that although "state power is not exercised in a punitive sense" in a civil commitment hearing,\(^{35}\) such hearings can deprive the respondent of a significant liberty interest.\(^{36}\) Therefore, due process protections attach to respondents in civil commitment hearings.\(^{37}\)

The Court in *Addington* applied the *Mathews* test\(^{38}\) and held that the "clear and convincing evidence" standard satisfied the Due Process Clause of the Fourteenth Amendment.\(^{39}\) In analyzing the "erroneous deprivation of liberty" aspect of the test's second prong, the Court noted that the basic inquiry in a civil commitment hearing of whether a person is mentally ill and dangerous turns on expert medical testimony.\(^{40}\) Expert testimony, according to the Court, requires a

\(^{31}\) Id. at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).

\(^{32}\) 441 U.S. 418, 428 (1979); see also United States v. Copely, 935 F.2d 669, 672 (4th Cir. 1991) (holding that a defendant has a right to a hearing "to determine by clear and convincing evidence if the defendant is dangerous before being civilly committed").

\(^{33}\) The Fourteenth Amendment's Due Process Clause states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.

\(^{34}\) Addington, 441 U.S. at 419-20. In *Addington*, the defendant was arrested for threatening his mother. Id. at 420. Prior to the arrest, he had been committed to various hospitals on seven occasions because of his emotional and mental difficulties. Id. Addington's mother petitioned the Texas trial court for Addington's involuntary commitment, pursuant to Texas law. Id. After trial, the jury found, by clear and convincing evidence, that Addington was mentally ill and that he required hospitalization for his own or for others' welfare. Id. at 421. Addington had objected to the judge's instructions, and appealed. Id. The intermediate state appellate court reversed, holding that procedural due process required a standard of proof of "beyond a reasonable doubt." Id. at 421-22. The Texas Supreme Court reversed the intermediate court, holding that a "preponderance of the evidence" standard adequately comported with due process. Id. at 422. The United States Supreme Court vacated the judgment and held that a "clear and convincing evidence" standard was required. Id. at 423.

\(^{35}\) Id. at 428.

\(^{36}\) Id. at 425.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id. at 427.

\(^{40}\) Id. at 429.
subjective analysis instead of the factual determination required in a criminal trial.  

A year later, the Supreme Court held in *Vitek v. Jones* that certain procedural due process protections are available to respondents in federal and state commitment hearings. The minimum procedural protections that attach are: (1) written notice to the person that transfer to a mental hospital is being considered; (2) a hearing at which evidence is presented and the respondent has a chance to be heard and to present evidence; (3) absent a showing of good cause, the right to confront witnesses; (4) an independent decisionmaker; (5) a written, reasoned decision; (6) access to an independent advisor, not necessarily an attorney; (7) and timely notice of the hearing and of these rights. The Court noted in *Vitek*, as in *Addington*, that “adverse social consequences” can attach to the committed individual, and that although the question of a person’s mental state is essentially medical and turns on expert testimony, it is precisely “[t]he subtleties and nuances of psychiatric diagnoses” that necessitate an adversarial hearing.

The final Supreme Court case that the *Baker* court looked to was *Maryland v. Craig*. In *Craig*, the Court addressed whether permitting a child witness in a child abuse case to testify via closed-circuit television violated the defendant’s Confrontation Clause rights. The Court held that it did not, reasoning that although face-to-face confrontation is a fundamental aspect of the Confrontation Clause, it is not an absolute right. The central purpose of the Confrontation Clause, according to the Court, “is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”

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41. *Id.* at 429-30. Because of the subjectivity involved in psychiatric diagnoses, the Court found as a practical matter that proof beyond a reasonable doubt would be inappropriate in a civil commitment proceeding. *Id.* at 490.

42. 445 U.S. 480 (1980).

43. *Id.* at 489-90.

44. *Id.* at 494-95.

45. *Id.* at 491-92 (quoting *Addington*, 441 U.S. at 425-26).

46. *Id.* at 495 (quoting *Addington*, 441 U.S. at 430).


48. *Id.* at 840.

49. *Id.* at 857.

50. *Id.* at 844.

51. *Id.* at 845.
est at stake that necessitates dispensing with face-to-face confronta-
tion, the defendant's rights are not violated.\textsuperscript{52}

Circuit considered the Eighth Circuit's decision in \textit{United States v. Velt-
man}\textsuperscript{53} in addressing Baker's statutory rights.\textsuperscript{54} The \textit{Veltman} court, in
determining how to evaluate a civil commitment respondent's waiver
of his § 4247(d) right to counsel, noted that Congress had decided
not to offer the full panoply of procedural protections available to
criminal defendants.\textsuperscript{55} According to the Eighth Circuit, Congress ap-
parently sought merely "to satisfy the Supreme Court's holding in
\textit{Vitek v. Jones} . . . requiring certain due process protections for prisoner
transfers to mental hospitals."\textsuperscript{56}

3. \textit{The Court's Reasoning.—}A divided panel of the Fourth Circuit
Court of Appeals affirmed the district court's holding that the use of
teleconferencing in Baker's involuntary commitment hearing did not
violate his constitutional or statutory rights.\textsuperscript{57}

\textit{a. Constitutional Rights in an Involuntary Commitment Hear-
ing.—}The majority first noted that "[a] commitment hearing is a civil
matter"\textsuperscript{58} because "state power is not exercised in a punitive sense."\textsuperscript{59}
Therefore, the respondent in such a hearing is not entitled to the
same constitutional rights as a criminal defendant.\textsuperscript{60} However, the
court recognized that a commitment hearing can result in significant
impairment of a liberty interest,\textsuperscript{61} and that certain procedural due
process protections are available to respondents in federal and state
commitment hearings.\textsuperscript{62} The court reasoned that the videoconfer-
ence procedures did not preclude these rights.\textsuperscript{63} Thus, the only con-
stitutional issue before the court was whether the videoconference

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at 857.
\item \textsuperscript{53} 9 F.3d 718 (8th Cir. 1993), \textit{cert. denied}, 114 S. Ct. 1572 (1994).
\item \textsuperscript{54} \textit{Baker}, 45 F.3d at 848.
\item \textsuperscript{55} \textit{Veltman}, 9 F.3d at 721.
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Baker}, 45 F.3d at 847.
\item \textsuperscript{58} \textit{Id.} at 842.
\item \textsuperscript{59} \textit{Id.} (quoting \textit{Addington v. Texas}, 441 U.S. 418, 428 (1979)).
\item \textsuperscript{60} \textit{Baker}, 45 F.3d at 842-43 ("Thus, the constitutional rights to which a defendant in a
criminal trial is entitled do not adhere to a respondent in a commitment hearing.").
\item \textsuperscript{61} \textit{Id.} at 842; \textit{see also} \textit{Vitek v. Jones}, 445 U.S. 480 (1980).
\item \textsuperscript{62} \textit{Baker}, 45 F.3d at 843; \textit{see also supra} text accompanying notes 42-44.
\item \textsuperscript{63} \textit{Baker}, 45 F.3d at 842.
\end{itemize}
procedure adequately preserved the essence of Baker's procedural due process rights.64

To answer this question, the majority turned to the Supreme Court's three-pronged Mathews analysis.65 In applying the "private interest" prong, the court reasoned that the curtailment of liberty resulting from a commitment hearing is less than that resulting from a criminal proceeding, because the latter involves the exercise of government power in a punitive sense.66 Further, civil commitment is temporary, and ceases when the person committed no longer suffers from the mental disease or defect that renders him dangerous to others.67 The court expressly rejected Baker's arguments that the indefinite duration of civil commitment, and its accompanying stigma, renders such a distinction meaningless.68 The court believed that this distinction is valid, and pointed to the differing burdens of proof as evidence.69 Nevertheless, the court concluded that the private interest at stake was great. Therefore, in order to uphold the use of videoconferencing, the Government's interest in the use of videoconferencing also must be great while the risk of erroneous deprivation of liberty must be small.70

The court then applied the second prong of the Mathews test: the risk of erroneous deprivation of Baker's liberty interest through the use of videoconferencing procedures, and the added value, if any, of further procedural safeguards.71 The court based its analysis on the differing goals of a criminal proceeding and a civil commitment hearing.72 Specifically, the court reasoned that the purpose of the former is to discover the truth through rigorous examination of the evidence,

64. Id.
65. Id. at 845; see also supra text accompanying notes 24-31.
66. Baker, 45 F.3d at 845; see also Heller v. Doe, 113 S. Ct. 2637, 2645 (1993) ("[C]onfinement in prison is punitive and hence more onerous that confinement in a mental hospital.").
67. Baker, 45 F.3d at 844.
68. Id.
69. Id. With respect to the differing burdens of proof, the court referred again to Heller, 113 S. Ct. at 2645: "[B]ecause confinement in prison is punitive and hence more onerous that confinement in a mental hospital, . . . the Due Process Clause subjects the former to proof beyond a reasonable doubt, . . . whereas it requires in the latter case only clear and convincing evidence." Baker, 45 F.3d at 844 (citations omitted in original).
70. Baker, 45 F.3d at 844.
71. Id.
72. Id. The court indicated in a footnote that it assumed, without deciding, that the use of videoconferencing in a criminal trial would violate one or more constitutional rights of the defendant. Id. at 844 n.4.
followed by extensive fact finding. Therefore, a criminal proceeding requires confrontation rights and effective assistance of counsel. In contrast, the purpose of a civil commitment hearing is to determine whether the respondent should be committed. This determination is essentially medical, and is based largely on expert testimony whose persuasiveness depends not on the experts’ demeanor, but on their qualifications. Thus, the goal of cross-examination changes from “poking holes” in a witness’s testimony in the former, to determining the basis and limits of experts’ opinions in the latter. Providing a respondent in a civil commitment hearing with confrontation rights less expansive than those afforded by the Sixth Amendment runs less risk of erroneous deprivation of liberty than affording the same limited rights to a criminal defendant because of the distinctly different nature of cross-examination in the context of commitment hearings.

The court rejected Baker’s arguments that the videoconference procedure unduly risked erroneous deprivation of his liberty. The court first indicated that the expert testimony, not the respondent’s impression on the judge, was the relevant factor in a competency determination due to the unique nature of the hearing. Next, the court indicated that Baker did not react adversely to the videoconferencing procedure, and that loss of confidence in the hearing was irrelevant: “there is no constitutional right to a hearing in which the participants have confidence.”

Baker also claimed that requiring defense counsel to address the court via videoconference, while allowing the Government to argue “live” before the judge, impaired Baker’s attorney from presenting an effective defense. The court noted that this argument went to the question of “counsel’s ability to ascertain the facts on direct and cross-

73. Id. at 844 (citing Maryland v. Craig, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to a rigorous testing in the context of an adversary proceeding before the trier of fact.”)).
74. Id.
75. Id. at 844-45 (citing Vitek v. Jones, 445 U.S. 480 (1980)).
76. Id. at 845.
77. Id.
78. Id.
79. Baker argued that the procedure interfered with his ability to present an effective defense because: (1) it impeded his ability “to make a favorable impression on the court”; (2) it impaired his ability to understand and appreciate the importance of the hearing; and (3) it reduced his confidence in the hearing’s fairness and impartiality. Id.
80. Id.
81. Id. at 845-46.
82. Id. at 846.
83. Id.
examination," which is not an essential part of a commitment proceeding.\textsuperscript{84} The court also indicated that counsel's "decided preference" for arguing "live" had no bearing on videoconferencing's constitutionality.\textsuperscript{85}

The \textit{Baker} court then applied the "government interest" prong of the \textit{Mathews} test, and indicated that fiscal and administrative concerns may be taken into account.\textsuperscript{86} The district court had found that videoconferencing would be far less expensive than an in-person hearing.\textsuperscript{87} The court also noted the administrative difficulties of transporting mentally unstable persons to court, the burdens of supervising them, and safety concerns "inherent in transporting a potentially mentally unstable person to a courthouse."\textsuperscript{88} The court reasoned that the Government's interests were substantial.\textsuperscript{89} Because these interests are substantial, and the risk of erroneous deprivation of liberty is small, the court held that the videoconference procedure did not violate Baker's constitutional due process rights despite the substantial curtailment of liberty that could result.\textsuperscript{90}

\begin{itemize}
  \item \textit{b. Statutory Rights Under 18 U.S.C. § 4247(d).}—Baker also claimed that the videoconferencing procedure violated his statutory rights under 18 U.S.C. § 4247(d).\textsuperscript{91} Because a statute cannot grant rights less expansive than those granted by the Constitution, the court reasoned that the only relevant question was whether section 4247(d) granted any additional rights not provided by the Fifth Amendment's Due Process Clause.\textsuperscript{92} To answer this question, the \textit{Baker} court first turned to the Eighth Circuit's decision in \textit{United States v. Veltman}.\textsuperscript{93}

The \textit{Baker} court also noted that the legislative history of section 4247(d) indicated that it was intended "to meet certain due process

\begin{footnotes}
  \item 84. \textit{Id.}
  \item 85. \textit{Id.}
  \item 86. \textit{Id.} at 847.
  \item 88. \textit{Baker, 45 F.3d at 847.} The court noted that "[m]any such persons require medication and supervision. Thus, any such transport is both hazardous to the respondents and a burden to prison and courthouse officials." \textit{Id.} The court indicated that such concerns would be "substantially alleviated" with the videoconferencing procedure. \textit{Id.}
  \item 89. \textit{Id.}
  \item 90. \textit{Id.}
  \item 91. \textit{Id.}
  \item 92. \textit{Id.} at 847-48.
  \item 93. 9 F.3d 718 (8th Cir. 1993), cert. denied, 114 S. Ct. 1572 (1994); \textit{see also supra} notes 53-56 and accompanying text.
\end{footnotes}
requirements." Therefore, the court held that section 4247(d) afforded no greater due process protections than those provided by the Constitution, which effectively disposed of Baker's argument.

Judge Widener dissented in a brief opinion objecting not to the decision per se, but rather to the vehicle that brought it before the court. He first noted that this case was obviously a test case brought to determine whether the videoconferencing procedures sufficiently preserved the due process rights of the respondent. After summarizing the testimony presented at the hearing, Judge Widener pointed out that it was uncontested that Baker was suffering from a mental disease or defect, and that he should be taken into custody for treatment. Therefore, the court should not resolve the important issues surrounding the videoconference procedure because of the uncontested nature of the hearing. Rather, a contested case is needed "before we should ascertain whether a man should be deprived of his liberty by a merely televised witness and whether a man should be so deprived of the opportunity to be present and face and address the court."

4. Analysis.—The Baker court held that the use of videoconferencing procedures in a civil commitment hearing did not violate constitutional or statutory due process rights. This holding is


One major change the Committee has made in existing law is to require a court hearing before a prisoner may be transferred to a mental hospital if he objects to such a transfer. The necessity for such a hearing in State cases was made clear by the Supreme Court in Vitek v. Jones . . . . It is to insure that Federal prisoners continue to receive fair and just treatment that the Committee has included the protective procedures of section 4245.


95. Baker, 45 F.3d at 848.
96. Id. at 850 (Widener, J., dissenting).
97. Id.
98. Id. at 848-50.
99. Id. at 850.
100. Id.

The issues in this case are profound. They are directly concerned with human liberty, which, of course, other than life, is the most important value the law protects. I think we unnecessarily fall into error by accepting, deciding, and, by publication, putting our stamp of approval on a procedure of the most profound importance in a case which is essentially uncontested.

Id.
101. Id.
102. Id. at 840.
consistent with recent Supreme Court and federal procedural due process jurisprudence with respect to civil commitment. Additionally, the holding is consistent with a gradual acceptance of the use of new technologies in courtrooms around the country.

a. The Baker Court's Reasoning on Its Own Terms.—In reaching its result, the Baker court correctly reasoned that the Supreme Court’s due process analysis enumerated in Mathews v. Eldridge applied to this case. However, the Fourth Circuit’s application of Mathews to determine whether the use of videoconferencing in a civil commitment proceeding violated Baker’s procedural due process rights is troublesome. The court, in analyzing the nature of the private interest at stake, reasoned that the liberty interest affected in a commitment proceeding is great, but not as great as imprisonment resulting from criminal prosecution. The court relied on two propositions to reach this conclusion: first, that civil commitment is not punitive in nature, and second, that commitment only lasts until the person committed recovers from his mental illness. However, this reasoning ignores concrete realities of civil commitment: the social stigma that attaches to the person committed, the indefinite nature of commitment, and the sometimes lackluster conditions of mental institutions.

The Fourth Circuit also pointed to the therapeutic, rather than punitive, nature of civil commitment as a justification for finding that the private interest at stake in this case is different from that of a criminal proceeding. The court looked to the differing burdens of proof between a civil commitment proceeding and a criminal prosecution as evidence that the liberty interests involved in each are not merely “theoretically” different, but are actually different. By using

104. Baker, 45 F.3d at 843.
105. Id. at 844.
106. Id.; see supra note 69.
107. Baker, 45 F.3d at 844.
108. Vitek v. Jones, 445 U.S. 480, 492 (1980) (“It is indisputable that commitment to a mental hospital ‘can engender adverse social consequences to the individual’ and that ‘[w]hether we label this phenomena “stigma” or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.”).
110. See Adam Cohen, A Governor with a Mission, Time, Sept. 4, 1995, at 92 (noting that federal and state judges have declared Alabama mental institutions constitutionally inadequate).
111. Baker, 45 F.3d at 844.
112. Id.
one distinction to support another, the *Baker* majority never directly addressed *why* different procedural due process protections attach to an inmate in a civil commitment proceeding than to a defendant in a criminal prosecution. Although it is true, as the *Baker* majority indicated, that the Supreme Court recognized such a distinction, the Supreme Court also recognized that there is, in fact, a stigma that attaches to those who are involuntarily committed. While the *Baker* majority purported to follow Supreme Court precedent, there is little in the opinion that directly supports the proposition that the *Baker* court advanced.

The *Baker* court’s application of *Mathews’s* second prong is equally problematic. The court pointed to the differing purposes of a criminal trial and an involuntary commitment hearing to conclude that the latter proceeding requires less extensive procedural due process rights. This reasoning is consistent with other cases that determine what procedural due process and confrontation rights are required in a given case, and reflects courts’ growing acceptance of technology to streamline procedures. However, merely classifying the determination made in an involuntary commitment hearing as medical does not per se decide what process is due. Rather, this distinction is technical and formalistic, and overlooks the truth-finding function of an involuntary commitment hearing. Even though the Supreme Court has classified the determination as “medical,” it also admonished that “[i]t is precisely ‘[t]he subtleties and nuances of psy-

114. Id. at 429.
117. *Baker*, 45 F.3d at 844-45.

Similarly, a great deal of case law at the federal and state levels has applied the *Mathews* due process analysis to determine what process is due in a civil proceeding, and has reached similar results. See, e.g., *Doolin Sec. Sav. Bank v. FDIC*, 53 F.3d 1395, 1403 (4th Cir.) (holding that FDIC procedures for assessment of risk classification did not violate procedural due process according to the *Mathews* analysis), *cert. denied*, 116 S. Ct. 473 (1995); *Guinan v. State*, 769 S.W.2d 427, 431 (Mo.) (en banc) (holding that the use of two-way, closed-circuit television in postconviction hearing did not violate defendant’s right to a fair trial), *cert. denied*, 493 U.S. 900 (1989); *Ohio Ass’n of Pub. Sch. Employees v. Lakewood City Sch. Dist. Bd. of Educ.*, 624 N.E.2d 1043, 1045 (Ohio 1994) (holding that there were no absolute confrontation rights in pretermination hearing).

117. See infra notes 131-154.
chiatric diagnoses' that justify the requirement of adversary hearings" in these cases.\textsuperscript{119} Additionally, the inherently subjective nature of the evidence presented in a commitment proceeding\textsuperscript{120} also supports the need for increased procedural due process. The \textit{Baker} court overlooked these points.

Furthermore, the court overstated the benefits afforded to the Government by videoconferencing procedure. The court believed that the procedure will reduce substantially the costs of hearings, reduce administrative burdens of transporting mentally unstable persons to the courthouse, and eliminate security concerns.\textsuperscript{121} However, neither the Fourth Circuit nor the district court made any statistical comparison of the costs of the procedure and its savings; the court merely stated that there are savings but provided no evidence of the type or magnitude of such savings. Additionally, the court may have overstated the administrative savings, given that the use of closed-circuit television may simply transfer the travel burdens to private defense attorneys and public defenders.\textsuperscript{122}

The district court also pointed to the increased comfort of inmates, who can remain in familiar surroundings.\textsuperscript{123} Although in some cases the inmates may feel more comfortable participating from their facilities, in others the use of this procedure may simply increase the alienation and dehumanization that some inmates feel towards the justice system.\textsuperscript{124} The court's analysis under \textit{Mathews}'s third prong does not rest on a solid basis of evidence.

The inconsistencies in the court's reasoning are ultimately linked to the inherent flaws of constitutional balancing tests. As one commentator has noted, a frequent problem with balancing as a method of constitutional interpretation is the lack of an external scale to compare competing interests; there is no "common currency for comparison."\textsuperscript{125} The result is often an inability to adequately compare competing constitutional interests, and the adoption of a "seat-of-the-pants approach."\textsuperscript{126} Thus, in \textit{Baker} the court weighed the three fac-

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} See \textit{Addington v. Texas}, 441 U.S. 418, 429 (1979) (noting the "lack of certainty" and "fallibility" of psychiatric diagnosis).

\textsuperscript{121} \textit{Baker}, 45 F.3d at 847.


\textsuperscript{124} Thaxton, \textit{supra} note 122, at 196-98.


\textsuperscript{126} \textit{Id.} at 974.
tors expressed in *Mathews*, and arrived at the conclusion that the videoconferencing procedure is constitutional, while having no way to assign these interests relative weights, and therefore no qualitative or quantitative basis for its determination. Additionally, no reason was given as to why only the three *Mathews* factors should be taken into account. This reflects another weakness of constitutional balancing: the tendency to neglect the "full inventory of relevant interests" in favor of a mysteriously important few.\(^{127}\)

Perhaps the Fourth Circuit ought to make a fundamental inquiry into whether a given procedure affords the aggrieved party a fair opportunity to present his case.\(^{128}\) Such an inquiry is far from unprecedented,\(^{129}\) and can minimize the difficulties of balancing while reaching a fair result. However, notwithstanding the weaknesses of constitutional balancing tests, the structure of the *Baker* court's procedural due process analysis is unquestionably loyal to *Mathews*. Additionally, the *Baker* court's reasoning is consistent with other Fourth Circuit procedural due process jurisprudence.\(^{130}\)

**b. The Integration of Technology in the Courtroom.**—As one judge has noted, were Daniel Webster alive today, he would experience little difficulty arguing before a modern judge in a modern courtroom.\(^{131}\) While other professions have changed dramatically since Webster's death, the legal profession has changed very little.\(^{132}\) The electronic and information ages have revolutionized American life, yet the courts barely have begun to bring these technologies into the courtroom.\(^{133}\) Until 1965, for example, the use of a video camera

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127. Id. at 977.
128. Id. at 994-95.
129. See id. at 996-98.
130. See, e.g., Ritter v. Cecil County Office of Housing & Community Dev., 33 F.3d 323, 330 (4th Cir. 1994) (holding that procedural due process protections depend on "time, place, and circumstances" of deprivation); Jordan v. Jackson, 15 F.3d 333, 345-53 (4th Cir. 1994) (holding that Virginia statute permitting emergency removal of child from parents' custody and allowing delay of judicial review for up to 65 hours was not violative of procedural due process); Plumer v. Maryland, 915 F.2d 927, 932 (4th Cir. 1990) (holding that Maryland procedures for revocation of driver's license comport with procedural due process requirements).
132. Id.
133. For a general overview of the electronic media's struggle to gain access to the courtroom, see Kathleen M. Krygier, Comment, *The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms*, 3 COMM.LAW CONSPECTUS 71 (1995). But see Alexander, supra note 131 (arguing that the primary effect of new technology in courts has been to increase costs and delay, rather than convenience).
in the courtroom was considered a per se violation of due process.134
In recent years, however, courts have begun to experiment with new technologies in response to increasingly crowded dockets.135 The Baker decision falls squarely within this trend.

(i) Telephone Hearings and Telephone Conferencing.—A number of courts have experimented with the integration of telephone technology. Several states have considered using telephone conferencing in interstate child support cases,136 and some states employ telephone conferencing for intrastate child administrative hearings.137 A number of other states have used or are using telephone hearings for depositions, evidentiary matters, and the issuance of orders.138 Although coordination of the parties can be difficult,139 the technique has several advantages. Telephone conferencing permits out-of-state parties to be “present” when otherwise unable to attend the hearing.140 The technology is inexpensive and easy to use.141 Its use can eliminate wasteful attorney transit time, traffic delays, and parking problems, especially when the matter is minor or uncontested.142 This technology is perhaps most useful in large states with relatively small populations.143 Drawbacks include the inability to observe the

134. Estes v. Texas, 381 U.S. 532, 538 (1965). Before the Estes decision, most states had adopted rules that virtually banned cameras, and later, the electronic media from the courtroom. This trend is traceable to the massive publicity that surrounded the Bruno Hauptmann trial. See Krygier, supra note 133, at 72-75. Since 1981, the Supreme Court has liberalized the electronic media’s ease of access to court. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (indicating that the exclusion of the electronic media to protect a juvenile victim must be determined on a case-by-case basis); Chandler v. Florida, 449 U.S. 560, 573-74 (1981) (holding that there was no absolute ban on cameras in court, and that the states were free to experiment with their use). Today, 47 states permit television cameras in their courtrooms, but the federal courts continue to restrict their access. See Krygier, supra note 133, at 76.

135. See Fredric I. Lederer, Technology Comes to the Courtroom, and..., 43 EMORY L.J. 1995, 1096 (1994) (providing an overview of recent efforts to integrate technology into the courtroom).


137. Id.


140. Id. at 13-14.

141. Id.

142. DeFoor & Sechen, supra note 138, at 595-96.

143. Id. at 597.
speaker, the difficulty of handling complex matters, and the depersonalization of legal proceedings.\textsuperscript{144} Many courts in states employing telephone conferencing hearings have held that the procedure does not offend constitutional due process.\textsuperscript{145}

\textit{(ii) Televised Court Proceedings.}—Similarly, a number of jurisdictions have begun to integrate television into the courtroom to facilitate many matters. Perhaps the most common use of televised proceedings is the use of closed-circuit testimony of child abuse victims, such as the Maryland procedure held constitutional in \textit{Maryland v. Craig}.\textsuperscript{146} Additionally, a number of jurisdictions have experimented with television in other contexts. Phoenix; Philadelphia; Suffolk County; New York; Boise; Las Vegas; Santa Barbara; Los Angeles County; and Miami all have experimented with video arraignments of misdemeanor defendants, with varying degrees of success.\textsuperscript{147} The use of closed-circuit television arraignments appears to be increasingly popular.\textsuperscript{148} One commentator has estimated that approximately 160 to 200 such systems are currently in place across the United States.\textsuperscript{149} The advantages of remote arraignment include a substantial reduction in cost, streamlined procedures, and increased security.\textsuperscript{150} Its disadvantages include decreased personal contact between defendant and judge,\textsuperscript{151} and the possible alienation of the defendants from the criminal justice system.\textsuperscript{152} It appears that no court has addressed whether these procedures are constitutional under the Fifth or Sixth

\textsuperscript{144} Id. at 607-08; Lederer, \textit{supra} note 135, at 1121.
\textsuperscript{146} 497 U.S. 836 (1990). See id. at 853-54 nn.2-4 for a listing of states that employ various video technologies to facilitate victim testimony in child abuse cases. The relevant Maryland provision is located at Md. CODE ANN., CTS. & JUD. PROC. § 9-102 (1995).
\textsuperscript{149} Id. Professor Lederer’s information comes from data at the National Center for State Courts. Id. at 1102 n.93.
\textsuperscript{151} Thaxton, \textit{supra} note 122, at 195-96.
\textsuperscript{152} Id.
Amendments in a criminal case, but, as the Ninth Circuit has noted, they do violate the Federal Rules of Criminal Procedure.

A survey of these developments strongly suggests that the Fourth Circuit's Baker decision fits squarely within the courts' increasing use of and confidence in telephone and television technologies. The clear, modern trend of the courts is to find such procedures constitutional. Certain risks may inhere in videoconferencing procedures generally, but the courts' increasing dockets and scarce resources inevitably are leading them to adopt these procedures for the sake of administrative convenience and efficiency. Thus, it is hardly surprising that the Fourth Circuit extended the availability of such procedures to civil commitment hearings.

5. Conclusion.—The Fourth Circuit's holding in United States v. Baker upholding the constitutionality of the use of videoconferencing in a civil commitment hearing loyally follows existing Supreme Court due process doctrine, as enumerated in Mathews. In this sense, the decision is correct in that it follows and applies legal precedent. Although the court's reasoning is flawed to some extent, many of these flaws are likely due to the inherent problems associated with the Supreme Court's due process balancing test. Furthermore, the decision is consistent with the judicial trend of incorporating audiovisual technology into the courtroom to streamline procedures or to serve other important goals, such as protecting child abuse victims. Given the increasing strains on judicial dockets without a corresponding increase in judicial resources, this acceptance is to be expected. Concurrently, judicial concepts of what procedures adequately preserve due process and other important constitutional rights likely will con-

153. See Valenzuela-Gonzalez v. United States Dist. Ct., 915 F.2d 1276, 1280 (9th Cir. 1990) (stating in dicta that it "is not immediately apparent" if the Fifth or Sixth Amendments prohibit the use of closed-circuit television arraignment).

However, some remote arraignments do appear to have survived legal challenge. Professor Lederer notes that such procedures survived legal challenge in Pennsylvania. See Lederer, supra note 155, at 1104 (noting Commonwealth v. Terebieniec, 408 A.2d 1120, 1124 (Pa. Super. 1979) (holding that closed-circuit arraignment did not unconstitutionally prejudice the proceeding)).

154. Valenzuela-Gonzalez, 915 F.2d at 1280. Fed. R. Crim. P. 43(a) states: "Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Id.; see also Valenzuela-Gonzalez, 915 F.2d at 1281 (holding that arraignment by closed-circuit television violates Fed. R. Crim. P. 43(a)).
tinue to evolve in a direction that facilitates such incorporation. The *Baker* decision is part of this evolution.

Michael A. Stodghill
III. Criminal Law

A. Limiting the Self-Representation Right in Child Sex Abuse Cases

In *Fields v. Murray*,¹ the United States Court of Appeals for the Fourth Circuit, sitting en banc, considered a criminal defendant's assertion of the right to self-representation in a child sex abuse case.² In a seven-to-five decision,³ the court upheld the lower court's ruling that one letter indicating an intention to proceed pro se—out of several communications between the defendant and the court—did not rise to the level of a "clear and unequivocal" assertion of the self-representation right.⁴ In denying the defendant's petition for federal habeas corpus relief, the *Fields* court held alternatively that even if the defendant had properly invoked his right to self-representation, the trial court was entitled to deny the right because the defendant's sole purpose was to cross-examine personally the child witnesses whom he had been charged with sexually abusing.⁵

*Fields* permits a trial court to deny alleged child sex offenders the opportunity to cross-examine their accusers personally, thus extending the rule of *Maryland v. Craig*,⁶ which allows courts to prevent face-to-face confrontation between a defendant and child witnesses in sexual abuse cases upon a proper showing of necessity.⁷ In the context of a pro se defendant, however, *Fields* establishes a lower threshold of necessity.⁸ Additionally, *Fields* allows a trial court to deny the self-representation right entirely if the defendant's sole purpose is to cross-examine child witnesses. In so ruling, the Fourth Circuit suggested that denial of the pro se right, although clearly and unequivocally invoked, may in some circumstances constitute harmless error. The court also implied that a trial court may deny a defendant's right to self-representation based upon the defendant's reasons for invoking it.

1. The Case.—In 1988 Gary Fields was charged in Newport News, Virginia, with sexually abusing his daughter and a number of her

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2. *Id.* at 1025.
3. *Id.* at 1024.
4. *Id.* at 1033-34.
5. *Id.* at 1037.
6. 497 U.S. 836, 860 (1990) (holding that when the state makes an adequate showing of necessity, child abuse victims may testify against their alleged abuser via closed-circuit television).
7. *See infra* notes 51-57 and accompanying text.
8. *See infra* notes 98-99 and accompanying text.
friends. In the first letter, Fields asked to be appointed co-counsel so that he could question the child witnesses at trial. Fields believed that the children lied at his preliminary hearing, and he believed they could not “look [him] in the eye and lie to [him].” In his second letter to the judge, Fields asked the court to appoint new counsel because he disagreed with the defense strategy of his court-appointed attorneys, again noting that he wanted to question the child witnesses himself at trial. Two weeks later, in his third letter to the judge, Fields stated that he had “no choice left but to dismiss” his court-appointed attorneys and to “act as [his] own counsel [sic] at the trial.” In this third letter, Fields severely criticized one of his attorneys and indicated that he never wanted to see the lawyer “again under any circumstances.” Fields wrote, “I regret taking this action, but I am convinced I have no choice... Without the opportunity to personally defend myself justice will not be served.” Fields also asked the judge to “have a law clerk or someone appropriate” contact him so that he could give them a “list of evidence and witnesses” that he needed.

Less than two weeks after receiving Fields’s third letter, the judge held a pretrial hearing in which he talked to Fields about his letters. Part of the discussion focused on Fields’s insistence that he be permitted to conduct cross-examination of the child witnesses. In addition, one of Field’s lawyers, Oldric Labell, informed the judge that Fields “would like to represent himself with us as mere legal advisors.” The judge told Labell that he was “going to keep both of you in as attorneys.” The judge explained that he would allow Fields to submit

9. Fields, 49 F.3d at 1026. Fields was charged with six counts of aggravated sexual battery, one count of forcible sodomy, and one count of rape. Id.
10. Id.
11. Id. at 1026-27.
12. Id. at 1026.
13. Id.
14. Id. at 1026-27.
15. Id. at 1039 (Ervin, C.J., dissenting).
16. Id. Fields accused his attorney, Oldric J. Labell, of incompetence and procrastination and criticized him for having “never kept a promise to show up on schedule either, which leads me to believe he has a certain lack of intestinal fortitude.” Id.
17. Id.
18. Id.
19. Id. at 1027.
20. Id.
21. Id. at 1043 (Ervin, C.J., dissenting).
22. Id.
questions through his attorneys, but that Fields himself would not be allowed to cross-examine the children "under any circumstance."\textsuperscript{23}

After a bench trial,\textsuperscript{24} Fields was convicted on five counts of aggravated sexual battery.\textsuperscript{25} He appealed his conviction to the Court of Appeals of Virginia, arguing, inter alia, that the trial court violated his right to self-representation.\textsuperscript{26} The Virginia court affirmed the trial court, and the Supreme Court of Virginia denied Fields's petition for review.\textsuperscript{27} In 1991 Fields filed a federal habeas corpus petition in the Eastern District of Virginia, again claiming that his right to self-representation had been improperly denied.\textsuperscript{28} The district court referred the issue to a magistrate who, after de novo review,\textsuperscript{29} recommended that the petition be denied.\textsuperscript{30} The district court accepted the magistrate's recommendation and denied the writ.\textsuperscript{31} A three-judge panel for the Fourth Circuit reversed the lower court, and upon de novo review\textsuperscript{32} held that Fields had properly invoked his right to self-representation.\textsuperscript{33} Subsequently, the Court of Appeals for the Fourth Circuit vacated the opinion of the three-judge panel and granted rehearing en banc.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{23} Id. at 1040.
\item \textsuperscript{25} \textit{Fields}, 49 F.3d at 1028. Fields was acquitted on the sodomy and rape counts; the sixth aggravated sexual battery count on which Fields was charged originally was stricken from the indictment. \textit{Id.} n.6.
\item \textsuperscript{27} Fields v. Virginia, No. 901282 (Va. Nov. 26, 1990) (order denying petition for appeal).
\item \textsuperscript{29} Id. at *8.
\item \textsuperscript{30} Id. at *11.
\item \textsuperscript{31} \textit{Fields}, No. 91-100-N, 1991 U.S. Dist. LEXIS 21140, at *3.
\item \textsuperscript{32} \textit{Fields}, No. 91-7169, 1994 U.S. App. LEXIS 3138, at *4 (concluding that the waiver of the constitutional right to counsel is not a question of fact, but rather application of law to fact and therefore was subject to de novo review).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} \textit{Fields}, 49 F.3d at 1025.
\end{itemize}
2. Legal Background.—

a. The Right to Self-Representation.—In Faretta v. California, the Supreme Court held that a criminal defendant has a constitutional right to self-representation. Although this right is not explicit in the Sixth Amendment, the Faretta majority found the right "necessarily implied by the structure of the Amendment," noting that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Because the right to self-representation involves waiver of the right to counsel, the right to proceed pro se must be made "knowingly and intelligently." The Court did not provide a framework to assist in determining whether a defendant's waiver of the right to counsel is knowing and intelligent. The Fourth Circuit, however, has held that to trigger the self-representation right, a defendant must assert it "clearly and unequivocally" before trial. Due to the competing nature of the right to counsel and the right to self-representation, the court has acknowledged that the right to counsel is "preeminent" and therefore a trial court

35. 422 U.S. 806 (1975).
36. Id. at 836.
37. U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence").
38. Faretta, 422 U.S. at 819.
39. Id. at 819-20.
40. See Johnson v. Zerbst, 304 U.S. 458 (1938) (holding that pro se defendant who knowingly and intelligently waives the right to counsel may not contest the conviction claiming denial of the right to counsel).
41. Faretta, 422 U.S. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). The Faretta Court stated that although the pro se defendant need not "have the skill and experience of a lawyer . . . he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).
42. See United States v. Gallop, 838 F.2d 105, 109 (4th Cir.), cert. denied, 487 U.S. 1211 (1988). The court observed in Gallop that Faretta "did not lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether the defendant's decision was 'knowing and intelligent.'" Id.
43. United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979) (holding that a trial court may deny a defendant's pro se request when it is made after the jury is selected but not yet sworn), cert. denied, 444 U.S. 1084 (1980); McNamara v. Riddle, 563 F.2d 125, 127 (4th Cir. 1977) (holding that the self-representation right must be requested by the defendant and that the right is not asserted when the defendant's court-appointed counsel asks the court to be relieved because of a disagreement with the defendant).
44. United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985) (holding that the trial court properly balanced the defendant's right to counsel and the right to self-representation by appointing counsel to argue complex legal issues on appeal while also permitting the defendant to submit a supplemental brief).
should "indulge in every reasonable presumption against [its] waiver." 45

The self-representation right, however, is not absolute. 46 The Supreme Court has held that the pro se right may be terminated if a defendant becomes disruptive or refuses to comply with courtroom procedure, 47 and that it does not carry over to appeal. 48 Additionally, the Fourth Circuit has held that the right may be waived if not invoked in a timely manner 49 and may be restricted if the court believes it is being used for purposeful delay. 50

b. Protecting the Interests of Child Witnesses in Sex Abuse Cases.— In Maryland v. Craig, 51 the Supreme Court held that the State’s interests in protecting child abuse victims may sufficiently outweigh a defendant’s Confrontation Clause 52 right to face her accusers in court. 53 The Court upheld a Maryland statute permitting a child to testify over closed-circuit television and outside the presence of the defendant. 54 To invoke the use of closed-circuit testimony, the statute required a finding by the judge that forcing the child to testify in front of the defendant would “result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” 55

Justice O’Connor, writing for the majority, observed that the Court had never held that the Confrontation Clause guaranteed a defendant a face-to-face meeting with witnesses. 56 Instead, restrictions

45. Brewer v. Williams, 430 U.S. 387, 404 (1977) (holding that a represented defendant did not waive the right to counsel when police elicited incriminating statements from the defendant without asking whether the defendant wished to relinquish the right).


47. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

48. Price v. Johnson, 334 U.S. 266, 285 (1948) ("[A] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court.").

49. See, e.g., United States v. Dunlap, 577 F.2d 867, 868 (4th Cir.) (holding that if the self-representation right is not asserted before trial it is within the discretion of the trial court whether to allow defendant to proceed pro se), cert. denied, 439 U.S. 858 (1978).

50. United States v. Gallop, 838 F.2d 105, 110 (4th Cir.) (stating that a trial court may appoint standby counsel when defendant invokes self-representation right on the day before trial), cert. denied, 487 U.S. 1211 (1988).


52. U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

53. Craig, 497 U.S. at 853.


55. Id. § 9-102(a)(2).

on the right to confront one's accusers were valid if they satisfied a two-pronged test: (1) the purpose of the Confrontation Clause—to ensure the reliability of the testimony—was otherwise assured, and (2) the denial of the face-to-face confrontation was necessary to further an important public policy. 57 Even though the Maryland statute restricted face-to-face confrontation, the Court found that it satisfied the first prong because it preserved the other elements of confrontation—oath, cross-examination, and observation of demeanor by the trier of fact. 58 The statute satisfied the second prong because the State had a sufficient interest in protecting child abuse victims from testifying in front of their alleged abuser, so long as the trial court determined "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." 59 Such a finding requires a court to hear evidence and to make a case-specific finding as to whether the child would be traumatized by testifying in front of the defendant. 60 The Court did not define the minimum level of trauma needed to permit use of the closed-circuit procedure, but simply stated that the Maryland statute met constitutional standards. 61 The Supreme Court did not consider the scope of its ruling in the context of self-representation because the Maryland statute expressly did not apply to pro se defendants. 62

3. The Court's Reasoning.—The Fourth Circuit upheld the district court's determination that Fields had not clearly and unequivocally invoked his right to self-representation. 63 After analyzing Fields's let-

57. Craig, 497 U.S. at 850.
58. Id. at 851.
59. Id. at 856.
60. Id. at 855.
61. Id.
63. Fields, 49 F.3d at 1034. The Fields court found that a presumption-of-correctness standard of review should be applied when considering whether a defendant has properly invoked the right to self-representation. Id. In reaching this result, the court first considered whether a defendant's assertion of the right to self-representation was a question of fact or the application of law to fact. Id. at 1029-32. The court used the Supreme Court's methodology in Miller v. Fenton, 474 U.S. 104 (1985), to determine whether the trial court or the appeals court is in a better position to decide the issue. Fields, 49 F.3d at 1030. The Fields court asked: (1) whether the legal standard being applied was complex or simple and straightforward; (2) whether observing the state trial court proceeding is important in resolving the question; and (3) whether allowing the state court to decide the question poses an elevated risk of bias that the constitutional right in question will not be protected. Id. The court found that the legal standard was simple and straightforward, that observing the trial court proceedings was important in resolving the question, and that allowing the state court to decide the issue did not pose an elevated risk that Fields's right to self-
letters to the judge and the transcript of the pretrial hearing, the court stated that "Fields only mentioned the possibility of proceeding pro se at one point, in his third letter." Of particular significance to the court was Fields's failure to raise the self-representation claim at the pretrial hearing where the conversation focused on Fields's continued desire to personally cross-examine the child witnesses. The court concluded that "[t]he record taken as a whole . . . discloses only a single statement in one letter from Fields that perhaps indicated a desire to proceed pro se, although it is not entirely clear that Fields intended it as such." The court also noted Fields's reference in his third letter expressing "regret" about wanting to represent himself and a remark in his second letter indicating a "reluctance" to act as co-counsel. Consequently, the court concluded that these facts fairly supported the district court's determination that Fields had not clearly and unequivocally asserted his right to self-representation.

The court could have disposed of the case upon this determination, but instead decided to consider an issue that was left unanswered in Craig—whether pro se defendants have a constitutional right to engage in face-to-face cross-examination of their alleged victims.

In deciding this issue, the court held in the alternative that even if Fields had clearly and unequivocally asserted his self-representation right, the state trial court committed no error. The court analogized Fields's pro se rights to the Confrontation Clause rights at issue in Craig and reasoned that the self-representation right to cross-examine witnesses personally could be restricted if (1) the purposes of the right would have been otherwise assured, and (2) denial of the right was necessary to further an important public policy. Noting that the purposes of the self-representation right are to allow the defendant to affirm his dignity and autonomy and to present what he

representation would not be protected. *Id.* at 1032. Therefore, the court determined that the question was one of fact to be reviewed under a presumption-of-correctness standard. *Id.* The court noted that other courts that have faced the issue also have considered the assertion of the self-representation right as a factual question. *Id.; see, e.g.,* Cain v. Peters, 972 F.2d 748, 749 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 1310 (1993); Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir. 1994), *cert. denied,* 115 S. Ct. 741 (1995).

64. *Fields,* 49 F.3d at 1033.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1034.
69. See supra note 62 and accompanying text.
70. *Fields,* 49 F.3d at 1034.
71. *Id.* at 1035.
believes to be his best possible defense, the court recognized that questioning witnesses is just one of many elements that comprise the right. Hence, as with the Confrontation Clause rights at issue in Craig, the Fields court concluded that denying the right to cross-examine the children personally would have "inhibited Fields' dignity and autonomy to some degree," but because he could have conducted every other part of his defense, his dignity and autonomy "would have been 'otherwise assured.'"

In considering whether the denial of Fields's right to cross-examine the child witnesses was necessary to further an important public interest, the court essentially adopted the second prong of the Craig analysis. In Craig, the Court found a sufficient State interest in protecting the psychological well-being of child sexual abuse victims to prevent face-to-face confrontation. The Fields court similarly concluded that the State's interest in protecting children "from the emotional trauma of being cross-examined by their alleged abuser is at least as great as, and likely greater than, the State's interest in Craig." In applying the second prong of the analysis, the Fields court declined to extend the Craig requirement that a trial court hear evidence and make a case-specific finding that the child would be traumatized as a result of testifying in the defendant's presence. The court distinguished the two cases, stating that "[i]t is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence." Thus, the court created a low threshold for finding that a child will be traumatized if her alleged abuser conducts the questioning. Whether the defendant can overcome such a finding, and how, the court did not answer.

The court agreed with the trial court's decision to restrict Fields's personal cross-examination of the child witnesses on the basis of: (1)

72. Id.
73. Id. The Fields court observed that "[t]he elements of a defendant's self-representation right include 'control[ling] the organization and content of his own defense, . . . mak[ing] motions, . . . argu[ing] points of law, . . . participat[ing] in the voir dire, . . . question[ing] witnesses, and . . . address[ing] the court and the jury at appropriate points in the trial.'" Id. (quoting McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)) (alterations in original).
74. Id. (quoting Maryland v. Craig, 497 U.S. 836, 850 (1990)).
75. Id. at 1036.
76. Craig, 497 U.S. at 857.
77. Fields, 49 F.3d at 1036.
78. Id.
79. Id.
80. See infra notes 98-99 and accompanying text.
the indictment that charged Fields with raping, sodomizing, and battering the children, one of whom was his daughter; (2) Fields's first letter, which noted that all of the girls "call[ed] him dad," and that he treated them as his own children; (3) an assertion in the first letter that admitted "that one of the[ ] girls 'burst into tears' at a preliminary hearing 'because she was embarrassed' and that the same girl 'had wet the bed repeatedly'"; and (4) Fields's request, in the same letter, that he would "not approach them closer than three feet" and would request permission if for some reason he needed to get closer. The court concluded that Fields intended to "intimidate" the girls and that the trial court reasonably found that the girls would suffer emotional harm if subjected to Fields's personal cross-examination. Thus, adequate justification existed for denying Fields's right to cross-examine the girls personally because the girls would have suffered emotional trauma.

After justifying the denial of Fields's personal cross-examination of the children, the court found no error in denying Fields the right to represent himself. The court concluded that "[b]ecause Fields concedes that this personal cross-examination was his sole purpose in representing himself, the trial court committed no error even if Fields invoked his self-representation right clearly and unequivocally." In his dissent, Judge Ervin, joined by four other judges, disagreed with the majority's conclusion that Fields had not clearly and unequivocally asserted his self-representation right. Judge Ervin observed that a "steady progression" was apparent from Fields's letters, which culminated in his request to defend himself. Judge Ervin further criticized the majority's application of Craig to the self-representation scenario as "wholly misguided." The dissent acknowledged that Craig may be invoked properly by a trial court to limit a defendant's

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81. Fields, 49 F.3d at 1036.
82. Id.
83. Id.
84. Id. at 1037.
85. Id.
86. Id. (Ervin, C.J., dissenting)
87. Id. at 1042. Judge Ervin noted that in Fields's first letter he indicated his dissatisfaction with his court-appointed counsel and his desire to act as co-counsel. Id. Fields's second letter included more criticism of his lawyers and asked the court to appoint new counsel and to permit Fields to act as co-counsel. Id. In the third letter, after having his earlier requests denied, Fields announced that he was dismissing his court-appointed lawyers and wished to proceed pro se. Id.
88. Id. at 1037.
self-representation rights, but not to "eliminat[e] the right altogether." 99

4. Analysis.—

a. Invoking the Right to Self-Representation.—In Fields, the Fourth Circuit engaged in a broad inquiry to determine whether the defendant had properly invoked his right to self-representation. Although, in his third letter, Fields had indicated a desire to proceed pro se, the Fourth Circuit considered Fields's request in the context of his previous letters and pretrial conversation with the court to determine whether he had asserted the right "clearly and unequivocally." 90

By concluding that Fields had not done so, the court broke with its previous indication that receipt of a defendant's written request to proceed pro se followed by a denial by the trial judge would constitute a violation of the Faretta right. 91 Instead, Fields demonstrates that to be clear and unequivocal, a defendant must assert the pro se right inside the courtroom, and the defendant must elicit a specific denial from the trial court in order to create an adequate record for appeal. 92 Unless a defendant forcefully and persistently does so, 93 a trial court remains justified in presuming that the right to counsel has not been waived. 94

b. Restricting a Defendant's Right to Conduct Cross-Examination.—In Craig, the Supreme Court recognized the necessary state interest in protecting victims of child abuse from the trauma associated with having to testify in front of their alleged abuser. 95 The Court carefully balanced the government's interest with that of the defendant's confrontation right and permitted modification of that right upon an adequate showing of necessity by the State and emotional

89. Id. at 1047; see supra text accompanying notes 57-58.
90. Fields, 49 F.3d at 1038-34; see supra notes 63-68 and accompanying text.
91. McNamara v. Riddle, 563 F.2d 125, 127 (4th Cir. 1977) (stating that unless a defendant makes a specific pro se request and a trial court rules on the request there is no denial of the self-representation right).
92. In his dissenting opinion, Judge Ervin argued that Fields's third letter included a specific request to represent himself and that the trial judge effectively ruled on the request when he told Fields's lawyers that he "was going to keep both of you in as his attorneys." Fields, 49 F.3d at 1040-41 n.1 (Ervin, C.J., dissenting); see supra text accompanying notes 21-23 and accompanying text.
93. In his dissenting opinion, Judge Ervin observed, "Absent a Zen-like persistence in uttering a single mantra, or the ability to spout crisp legalese with full citation to binding authority, a defendant's desire to represent himself will not be respected." Fields, 49 F.3d at 1044 (Ervin, C.J., dissenting).
94. See supra notes 43-45 and accompanying text.
trauma to the child witnesses. In Fields, the Fourth Circuit recognized a similar need to protect children from emotional trauma when subjected to questioning by their alleged abuser. However, Fields permits a trial court simply to rely upon an indictment, the relationship between the victim and the accused, and any outward sign of emotion on the part of the victim to satisfy the emotional trauma element required by Craig. Thus, Fields significantly dilutes the second prong of the Craig analysis to the extent that a sustainable finding of necessity may simply be based upon a trial judge’s personal aversion to cross-examination of a child witness by her alleged abuser. This aspect of the Fields analysis is difficult to reconcile with the Supreme Court’s observation in McKaskle v. Wiggins that a “pro se defendant must be allowed . . . to question witnesses . . . at appropriate points in the trial,” which suggests that a Craig hearing is equally appropriate when the constitutionally protected right to self-representation is at stake.

c. Denying the Self-Representation Right in Child Sex Abuse Cases.—In Fields, the Fourth Circuit held, in the alternative, that because the defendant’s sole purpose for wanting to proceed pro se was to cross-examine the child witnesses personally, the trial court committed no error even if Fields had clearly and unequivocally invoked

96. See supra text accompanying notes 57-60.
97. Fields, 49 F.3d at 1047. Even the dissent recognized the need to protect the welfare of child witnesses and suggested that the trial court could employ a range of procedures to accomplish this goal including:
installing a screen or other barrier between the defendant and the witnesses; conducting closed sessions out of the courtroom; placing the defendant and the witnesses in separate rooms; requiring the defendant to submit his questions to the judge who, after scanning them, would read them aloud to the witnesses; and requiring the defendant to remain seated at counsel table while questioning the witnesses.
Id. 1047 at n.4 (Ervin, C.J., dissenting).
98. Id. at 1036.
99. Id. at 1040 (Ervin, C.J., dissenting). Judge Ervin observed that the trial judge was determined to deny Fields the right to cross-examine his accusers under any scenario. He quoted the trial judge in his pretrial exchange with the defendant:
To allow him to stand up here as a father and as a defendant, [and] question a thirteen year old . . . is inconceivable. I can’t think of putting a child any more ill at ease than to have her own defendant father who she’s accused of sexually abusing her standing up here and questioning her.
Id.
101. Id. at 174 (emphasis added); see also Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting). Justice Scalia questioned, in the context of a custody dispute where a parent has not seen a child for several months, whether society would desire denying a parent the right to ask a child if the allegations of sexual abuse were true. Id.
his self-representation right. The court offered no specific explanation as to why the trial court's refusal would not have resulted in error. The court's analysis, however, suggests that because Fields's right to cross-examine the children personally could have been restricted under Craig, and because this cross-examination was his sole reason for invoking the right, the trial judge did not deny Fields anything to which he was otherwise entitled. In essence, the Fourth Circuit suggested that, at worst, the trial court committed harmless error. Such an analysis, however, cannot be reconciled with the Supreme Court's pronouncement in McKaskle that the denial of the self-representation right "is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." Instead of being viewed as harmless error, the court's denial of the pro se right in child abuse cases may be justified if viewed as a waiver. Under this rationale, the defendant's personal cross-examination of the child witness could be equated to an abuse of court procedure, or threatened disruption of the courtroom. Although the Faretta right may be denied in such circumstances, generally such disruptive conduct "must occur before the court can deny a defendant his right to pro se representation." In these cases, the Court has embraced the appointment of "standby counsel" to assist a pro se defendant in the event that the self-representation right is waived, either voluntarily or involuntarily. Fields, however, suggests the Fourth Circuit's willingness to allow a complete denial of the Faretta right when a trial court determines that the defendant's sole purpose for proceeding pro se might be to disrupt the court or to intimidate witnesses. In such circumstances, Fields may permit a trial court to "force an attorney on to a defendant . . . and say that the self-representation right's underlying concern with defendant autonomy can be preserved."

102. Fields, 49 F.3d at 1037.
103. Id.
104. McKaskle, 465 U.S. at 177 n.8.
105. See supra note 49 and accompanying text.
107. Id.; see also United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972). The court in Dougherty noted that the right of self-representation implies that a defendant will cooperate with the rules set by the trial court. Id. at 1126. "The possibility that reasonable cooperation may be withheld, and the right later waived, is not a reason for denying the right of self-representation at the start." Id.
109. Fields, 49 F.3d at 1047 (Ervin, C.J., dissenting).
5. Conclusion.—In Fields, the Fourth Circuit extended the protections afforded child sexual abuse victims under Maryland v. Craig to cases in which a defendant intends to represent himself. But, by eliminating the requirement that a trial court hear evidence to determine whether a child will actually be traumatized by the defendant’s personal cross-examination, the court has weighted the scales against the pro se litigant. Although Fields effectively eliminates any opportunity for a child sex abuse defendant to intimidate an accuser through face-to-face cross-examination, the decision also denies a defendant the chance to elicit the truth from a child accuser.

Beyond the context of child sex abuse cases, Fields indicates the Fourth Circuit’s willingness to make it more difficult for a defendant to invoke the right to self-representation on two fronts. First, in order to initially trigger the pro se right, Fields suggests doing so “clearly and unequivocally” requires that a defendant personally assert the right in the courtroom and persist in doing so until the trial court rules on the request. Second, the Fourth Circuit may have opened the door to a dramatic erosion of the Faretta right by permitting a court to proscribe the right entirely based upon the purpose for which the defendant intends to use it.

Paul A. Fioravanti, Jr.
IV. ENVIRONMENTAL LAW

A. Federal Maritime Preemption of State Law Protecting Natural Oyster Bars

In Maryland Department of Natural Resources v. Kellum, the United States Court of Appeals for the Fourth Circuit held that federal maritime law preempted a Maryland statute imposing strict liability for damages to natural oyster bars. In reaching this conclusion, the court reaffirmed the rule stated in Southern Pacific Co. v. Jensen that state law does not apply if it conflicts with or materially alters federal maritime law. While many courts recently have applied preemption analysis in a manner that gives more latitude to the states to apply their own laws, in Kellum the Fourth Circuit declined to do so, applying Jensen formalistically.

1. The Case.—On May 13, 1987, a tugboat pushing a barge loaded with pea gravel left the Maryland Rock Facility at Lovers Point and headed south on the Potomac River. Both vessels were under the command of appellant Captain Charles Kellum, and were owned and operated by appellant C.G. Willis, Inc. (Willis). Almost an hour after leaving the Maryland Rock Facility, the barge ran aground in shallow water near the Huggins Point lighted day marker number two,
at the mouth of Breton Bay in the Potomac River. At the time, Kellum was not using a navigation chart, and the oyster bar upon which the barge grounded was unmarked by buoy or other navigational aids.

Kellum immediately activated the tug's two six-foot propellers in an attempt to refloat the grounded barge. Approximately an hour and twenty minutes later, Kellum succeeded with the help of the rising tide, and he continued downstream. Twenty minutes later the Maryland Natural Resources Police stopped Kellum and informed him that he had damaged part of a natural oyster bar. Kellum testified that, had he known the barge was stranded on an oyster bar, he would not have activated the tug's propellers but would have waited for the rising tide alone to free the boat so as to prevent damage to the oyster bed.

The Maryland Department of Natural Resources (DNR) sued Kellum and Willis in the United States District Court for the District of Maryland. The complaint set forth two counts, one for strict liability under section 4-1118.1 of the Natural Resources Code and one

9. Brief for Appellants at 5-6, Maryland Dep't of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995) (No. 93-1030).
10. Brief for Appellees at 3, Kellum (No. 93-1030).
11. Brief for Appellants at 6, Kellum (No. 93-1030). The State of Maryland contended that adequate notice of the location of the oyster bar is provided by Maryland law, which allows the filing of oyster bar survey charts in the clerk's office of the applicable Maryland county, in this case, St. Mary's County. Brief for Appellees at 27, Kellum (No. 93-1030); see also Md. Code Ann., Nat. Res. § 4-1102 (1989); id., Real Prop. § 3-102 (1988). Such a concept of constructive notice stretches reasonableness to its extreme. Every ship that plies Maryland's navigable waters certainly cannot be expected to visit the clerk's office of the circuit court of the applicable county to research which areas might have oyster bars. Furthermore, failing to designate the location of oyster bars by buoy or map does not reasonably comport with enforcing a strict liability standard. By not requesting the National Oceanic and Atmospheric Administration (NOAA) or any other federal agency to mark the oyster bar on commonly used navigational charts, the State of Maryland virtually kept secret the very oyster bars it wished to protect under the highest standard of care.
12. Kellum, 51 F.3d at 1222.
13. Id.
14. Brief for Appellants at 6, Kellum (No. 93-1030).
15. Kellum, 51 F.3d at 1222. The Maryland Department of Natural Resources claimed that the sole cause of damage to the oyster bars arose from the churning of the propellers. Brief for Appellees at 38-39, Kellum (No. 98-1080).
16. The Potomac River Fisheries Commission was co-plaintiff. Kellum, 51 F.3d at 1220.

(a) Prohibited.—Except for normal harvesting activities, the dredging and transplanting of oyster shell or seed oysters as part of the Department's Oyster
based on negligence.\textsuperscript{19} The court granted DNR's motion for summary judgment on the issue of liability under the Maryland statute, holding that federal maritime law did not preempt the statute.\textsuperscript{20} The district court then proceeded to hear evidence on damages only and entered a judgment for $76,200, plus costs, against Kellum and Wil-lis.\textsuperscript{21} The defendants filed an appeal challenging the district court's ruling that the federal maritime law did not preempt the Maryland statute, and arguing that the evidence was not sufficient to support the damage award.\textsuperscript{22}

2. Legal Background.—Federal jurisdiction over maritime cases dates back to the origins of our judicial system. The Admiralty Clause\textsuperscript{23} of the Constitution provides that "all Cases of admiralty and maritime Jurisdiction" fall under the judicial power of the United States.\textsuperscript{24} Congress first implemented this grant of subject-matter jurisdiction in the Judiciary Act of 1789,\textsuperscript{25} which gave the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."\textsuperscript{26} The modern statute conferring maritime jurisdiction to the federal district courts appears in the Judicial Code\textsuperscript{27} and is commonly referred to as the "saving-to-suitors" clause.\textsuperscript{28} The provision endows fed-

\textsuperscript{19} 19. Kellum, 51 F.3d at 1222.
\textsuperscript{20} 20. Id. at 1223.
\textsuperscript{21} 21. Id.
\textsuperscript{22} 22. Id.
\textsuperscript{23} 23. U.S. CONST. art. III, § 2.
\textsuperscript{24} 24. Id.
\textsuperscript{26} 26. Id.
\textsuperscript{27} 27. 28 U.S.C. § 1333 (1988). The section states: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Id.
\textsuperscript{28} 28. 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3672 (1985). The saving-to-suitors clause has the effect of providing a plaintiff who has an in personam claim with several ways to proceed. Id. A plaintiff who wishes to bring a claim for damages
eral courts with the "authority to develop a substantive body of 
general maritime law applicable to cases within the admiralty and 
maritime jurisdiction." 29

The congressional grant to the federal courts to develop a body 
of general maritime law, however, does not foreclose state law on the 
subject, as the saving-to-suitors clause leaves the states some latitude to 
create their own maritime law. 30 Just how far this latitude extends has 
been described as "one of the most perplexing issues in the law." 31 In 
the body of admiralty decisions that the Supreme Court has decided 
over the years, one guiding principle has been the basic presumption 
that underlies the constitutional grant of federal admiralty jurisdic-
tion: the governing law of the sea must be predictable and uniform 
throughout the nation. 32 The Court articulated this principle as early 
as 1875:

[T]he convenience of the commercial world, bound to-
gether, as it is, by mutual relations of trade and intercourse, 
demands that, in all essential things wherein those relations 
bring them in contact, there should be a uniform law 
founded on natural reason and justice. . . .

One thing, however, is unquestionable; the Constitution 
must have referred to a system of law co-extensive with, and 
operating uniformly in, the whole country. It certainly could 
not have been the intention to place the rules and limits of 
maritime law under the disposal and regulation of the sev-
eral States, as that would have defeated the uniformity and 
consistency at which the Constitution aimed on all subjects

for breach of a maritime contract, for example, has the following options. First, the claim-
ant may bring the claim in a federal district court under the grant of original subject mat-
ter jurisdiction contained in 28 U.S.C. § 1333. Id. Neither diversity of citizenship nor a 
minimum amount in controversy need be shown. Alternately, the plaintiff might also 
bring a claim in a state court or United States district court by virtue of the saving-to-suitors 
clause. Id. To pursue the latter option, however, the plaintiff must satisfy the amount in 
controversy and diversity of citizenship requirements. Id.

29. 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 4-1 (2d ed. 1987) (em-
phasis omitted).

30. States are generally free to create their own maritime laws and customs so long as 
state provisions do not substantially alter the general maritime law. Application of state law 
is especially robust in situations where state interests are deemed extremely important and 
federal interests are minimal. See infra notes 53-56 and accompanying text.

31. 1 Schoenbaum, supra note 29, § 4-4.

32. See The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875) (explaining the need for 
uniformity in federal maritime law); Lizabeth L. Burrell, Current Problems in Maritime Uni-
formity, 5 U.S.F. Mar. L.J. 67 (1992) (presenting historical view of uniformity doctrine in 
maritime law).
of a commercial character affecting the intercourse of the States with each other or with foreign states.  

In order to attain the objective of uniformity that underlies admiralty jurisdiction, the aforementioned latitude that state courts and state legislatures have to alter the general federal maritime law has been limited. The resulting body of law generally does not allow the application of state statutes that significantly modify the national substantive maritime law. The landmark case of Chelentis v. Luckenbach Steamship Company is illustrative.

In Chelentis, a seaman aboard ship injured his leg and was hospitalized for three months, during which time it became necessary to amputate his leg. The seaman brought an action for negligence against his employer under the saving-to-suitors clause, seeking full indemnity for the injuries sustained. When the case reached the Supreme Court, Justice McReynolds ruled that because the seaman's work was maritime in nature and his employment was pursuant to a maritime contract, his injuries must be classified as maritime. Therefore, the rights and liabilities of the parties fell under federal admiralty jurisdiction.

The principal legal issue in Chelentis involved the extent of damages available to the injured plaintiff. While the plaintiff was demanding full indemnity pursuant to the common law of his state, under general maritime law, the owner of a vessel was liable only for the maintenance, cure, and wages of an injured mariner. The Court held that when a plaintiff brings an action under the saving-to-suitors clause, whether in a state court or under the nonmaritime jurisdiction of a federal court, the rights and liabilities of the parties are controlled by federal admiralty law. While states retain legislative power over actions that arise within their borders, state legislation cannot significantly alter the general admiralty law.

33. The Lottawanna, 88 U.S. (21 Wall.) at 572-75.
34. 14 Wright et al., supra note 28, § 3672 (providing overview of rationale for federal maritime jurisdiction).
35. Id.
37. Id. at 378.
38. Id. at 378-79.
39. Id. at 384.
40. Id.
41. Id. at 379-80.
42. Id. Congress passed the Jones Act, 46 U.S.C. 688 (1988), in 1920 to overrule the "maintenance and cure" rule. 14 Wright et al., supra note 28, § 3672.
43. 14 Wright et al., supra note 28, § 3672.
44. Chelentis, 247 U.S. at 384.
One year earlier, in *Southern Pacific Co. v. Jensen*,<sup>45</sup> the Court had attempted to define the scope of permissible state modification of the general maritime law.<sup>46</sup> In *Jensen*, the Court struck down a New York workmen's compensation law as it applied to maritime workers on the ground that additional relief available by such statutes is "of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."<sup>47</sup> The Court described the potential results of the application of the New York statute to foreign ships, warning of what would ensue if state law at variance with federal maritime law controlled: "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."<sup>48</sup>

Despite *Jensen*'s apparent mandate of the supremacy of federal maritime law, courts have nonetheless developed significant areas in which state law controls.<sup>49</sup> Thus, the general maritime law is not a complete system devoid of gaps; indeed, in the absence of controlling maritime law, state law is said to "fill in the gaps."<sup>50</sup> In the years since *Jensen*, the Supreme Court has tried to clarify the areas in which the

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45. 244 U.S. 205 (1917).
46. *Id.* at 216.
47. *Id.* at 218. Specifically, in *Jensen*, a New York workmen's compensation statute conflicted with general maritime law. New York courts had interpreted the statute such that no ship could load or discharge cargo in the state without fully complying with the statute. The statute was successfully challenged on the ground that only Congress can create law on maritime matters; if a state law affects the uniformity in the nation's waters as envisioned in the federal scheme, it must yield to federal law. 14 WRIGHT ET AL., *supra* note 28, § 3672.
49. See *supra* note 5 and accompanying text. Courts have tended to rely on the concept of state police power to suggest the applicability of a balancing test between local and federal interests. This has, on occasion, led to a rejection of federal maritime laws, even in cases that fall under maritime tort jurisdiction and that clearly establish federal maritime rights. See, e.g., Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1532-33 (11th Cir. 1990) (holding that state worker's compensation law rather than federal maritime law applied to personal injury claim of land-based electrician), *cert. denied*, 498 U.S. 1026 (1991). It is unclear, however, whether a balancing of the constitutional principle of uniformity can occur without destroying the very principle itself.
50. Burrell, *supra* note 32, at 71. Burrell argues that some courts "seem to go out of their way to find and widen such gaps, characterizing their use of state law as 'interstitial' or as 'supplementing' the general maritime law." *Id.* But see David Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 S. Ct. Rev. 158, 168-69 (arguing that applicability of state laws in maritime cases should be determined by balancing the state and federal interests).
application of state law does not offend the uniformity principle. In doing so, members of the Court have at times questioned whether determining the availability of state law based on the existence of a gap in the federal maritime law is a properly reasoned theory of federalism in admiralty.

In Hess v. United States, Justice Harlan stated that "[t]he true inquiry thus becomes one involving the nature of the state interest . . . and] the extent to which such interest intrudes upon federal concerns." Hess pinpoints the conflict of interests often present in admiralty law: the fact that an occurrence is maritime in nature does not deprive a state of its legitimate interest over such occurrences within its borders; yet, the federal grant of jurisdiction in the Constitution was made to preserve federal interests in maritime and commercial affairs. Thus, the Court began to fashion a doctrine in the years after Jensen, albeit a doctrine it did not always choose to apply, that requires a balancing of state and federal interests.

One year after Hess, the Court employed this balancing test in Kossick v. United Fruit Co. The Kossick Court was faced with the question of whether to apply a state statute of frauds rule, which would have rendered unenforceable an oral promise by an employer to pay for an employee's injuries, or the federal rule, which would have resulted in the enforcement of the promise. The Court balanced the federal and state interests and held that a contract between a seaman and his employer was not "peculiarly a matter of state and local concern"; consequently, the oral promise was enforceable.


52. See Currie, supra note 50, at 167-68. Currie comments that the gap theory was both "difficult to apply" and "artificial" at best. Id. at 168. In particular, allowing state law to apply only in the "gaps" in federal law created a situation where the result of a claim depended on whether the type of issue had been previously adjudicated in federal court. Id.

53. 361 U.S. 314, 321 (1960) (holding that a state wrongful death statute applied to an independent contractor who drowned while making bridge repairs.).

54. Id. at 331 (Harlan, J., dissenting).

55. See Currie, supra note 50, at 169.

56. For a detailed example of a balancing theory of preemption analysis, see Brockington v. Certified Elec., Inc., 903 F.2d 1525, 1532-33 (11th Cir. 1990) (discussing factors in giving effect to state law to the exclusion of a conflicting admiralty law), cert. denied, 498 U.S. 1026 (1991).


58. Id. at 732.

59. Id. at 741.
After Kossick, courts continued to balance state and federal interests such that a particular state law might govern in a case even when national uniformity was impaired, on the theory that the predominant interest was a local rather than federal matter. The application of such a doctrine has been termed "maritime but local." For example, in Askew v. American Waterways Operators, Inc. the Court upheld a Florida statute that imposed strict liability for damages to private and state property caused by oil spillage and noted that "[t]he Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose." The Askew Court stated its analysis of federalism directly:

[A] State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.

On similar grounds, the Fourth Circuit upheld a Virginia oil pollution control statute in Steuart Transportation Co. v. Allied Towing Corp. The analysis in Steuart, like that in Askew, centered on the absence of an actual conflict between state and federal law, coupled with no clear intention of Congress to preempt the field. Askew and Steuart reveal a trend in maritime jurisprudence to permit the states to enforce local laws to protect and police their waters, so long as they do not significantly alter federal law.

3. The Court's Reasoning.—Writing for a unanimous panel, Judge Widener's opinion quickly delivered its knockout punch to the Maryland strict liability statute. After briefly reviewing the law concerning the stranding of vessels, the court concluded that strandings

60. See, e.g., Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986) (citing Kossick as providing the appropriate test for balancing state and federal interests).
63. Id. at 336.
64. Id. at 339 (internal quotations omitted).
65. 596 F.2d 609 (4th Cir. 1979).
66. Id. at 620-21.
67. Kellum, 51 F.3d at 1221.
uniformly have been treated as maritime torts subject to the rules of decision provided by federal maritime law, both as to liability and damages.68 Consequently, the plaintiff had to prove causation and fault before liability was imposed.69 The court stated, "Liability for collisions . . . and other types of marine casualties is based upon a finding of fault that contributed to the damage incurred. From earliest times, this rule has been consistently applied."70 Thus, the court concluded that because section 4-1118.1 created liability without fault for any party causing damage to a natural oyster bar in Maryland waters, it would be valid only if it did not substantially alter the federal maritime law of torts.71

In assessing the validity of the Maryland statute, the court reviewed the finding of the district court72 that held section 4-1118.1(b) valid under Askew v. American Waterways Operators, Inc.73 DNR asked the court to follow Askew,74 in which the maritime-but-local doctrine was employed by the court to uphold a state statute that significantly modified federal law.75 Kellum, on the other hand, argued that the traditional Jensen rule applied,76 which mandates that state law cannot work material prejudice to general maritime law.77 The court noted that the Florida strict liability statute challenged in Askew, unlike the Maryland statute at issue in Kellum, was permitted by an explicit congressional waiver of preemption written into the Federal Water Pollution Control Act,78 the act with which the Florida statute79 purportedly conflicted.80 The Maryland statute did not conflict with any federal acts; rather, it conflicted with the general body of federal maritime law that has developed over the years and that provided no equivalent waiver.81

68. Id. at 1223. Neither party presented any authority to suggest that the case should not be regarded as a maritime tort. Id.
69. Id. at 1224.
70. Id. (emphasis added) (quoting 1 SCHOENBAUM, supra note 29, at 444).
72. 51 F.3d at 1220 (4th Cir. 1995) (No. 93-1050).
74. Kellum, 51 F.3d at 1223.
78. Kellum, 51 F.3d at 1225-26.
79. Id.
The court thus rejected the district court's reliance on Askew as well as DNR's argument that Askew decided the case.\(^8\) Ironically, while the court did not follow Askew's holding that favored state law, it found language in Askew that provided guidance on how to dispose of Kellum: "Jensen and Knickerbocker Ice have been confined to their facts, viz., to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews."\(^8\)

Because Kellum involved a vessel plying the high seas, the court reasoned, the Jensen rule applied.\(^8\) That rule mandates that a state law that conflicts with or materially seeks to change the federal maritime law cannot stand;\(^8\) consequently, the court invalidated the Maryland statute because a strict liability standard materially alters the general maritime standard of negligence.\(^8\) Kellum was disposed of on this single rule.\(^8\)

In short, the court declined to characterize Maryland's interest in protecting its oyster bars as maritime but local, opting instead for an interpretation that promotes national uniformity of the law governing navigable waters.\(^8\) In the process, section 4-1118.1 was invalidated, seven years after its adoption.

4. **Analysis.**—The State of Maryland's efforts to provide a remedy for damage to unleased oyster bars began more than ten years

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82. *Id.* at 1226.
84. *Kellum*, 51 F.3d at 1225-26.
85. See *supra* notes 3, 45-48 and accompanying text.
86. *Kellum*, 51 F.3d at 1226. The action in strict liability was vacated by the court and remanded to the federal district court for further proceedings. *Id.* The federal district court would be obligated to apply the general maritime negligence standard, which includes the rule of proportionate fault. *Id.*
87. Nonetheless, in the latter part of the opinion, the court assembled a thorough list of cases in which state maritime law was invalidated due to impermissible conflict with federal law. See, e.g., *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628-32 (1959) (holding state law regarding gratuitous licensees not permitted to substantially alter federal maritime law); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953) (holding state contributory negligence law may not deprive seaman of substantial federal admiralty rights); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 73-74 (6th Cir. 1990) (ruling federal standard of reasonable care applied rather than a state standard of a very high degree of care in a suit involving a passenger injured at sea).
88. One highly unusual element of the opinion is that at no place is there any mention of the need for national uniformity of the sea. One is hard pressed to find any preemption case involving the rule of Jensen in which the court does not offer an analysis of the national need for uniformity. The court did not address any of the uniformity arguments raised in the appellants' brief to the Court of Appeals. See Brief for Appellants at 13-16, *Maryland Dep't of Natural Resources v. Kellum*, 51 F.3d 1220 (4th Cir. 1995) (No. 93-1030). In this context, the court's reliance on Jensen seems highly mechanical, merely applying the appropriate precedent without much analysis of the federalism concerns.
In 1984, five years before the passage of section 4-1118.1, only oyster bars leased by the state were protected by statute. The statutory protection imposed criminal liability for a variety of acts, including willful or unauthorized destruction of oyster bottoms, as well as catching or transferring of oysters on a leased bottom. In the early 1980s, a 500-ton barge grounded on a non-leased oyster bar on the Nanticoke River, leading the General Assembly to increased concern over damage to non-leased oyster bottoms. Especially troubling was the absence of any statutory basis for legal action against persons who damaged non-leased oyster bottoms. As a result, legislators enacted section 4-1118.1 in 1989, and created a new statutory cause of action intended to extend the protection given to public oyster bars and substantially increase the authority of DNR to protect resources.

Though well-intentioned, section 4-1118.1 was flawed from its inception in several ways. First, the drafters seem to have overlooked the fact that any incident causing damage to oyster bars almost certainly would take place in navigable waters. Such a location immediately triggers admiralty jurisdiction, which in turn raises the possibility of federal preemption. In order to avoid preemption, a state statute must be drafted so that it does not conflict impermissibly with the federal scheme of maritime law.

The Maryland statute presents several apparent conflicts with federal law. First, under general maritime law, damages arising from collisions and groundings require findings of fault and causation as predicates to liability. Thus, any scheme of liability without fault

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89. Brief for Appellees at 11-15, Maryland Dep't of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995) (No. 93-1030).
90. Md. CODE ANN., NAT. RES. § 4-11A-15(a) (1989). Owners of leased oyster bottom rights would have a common-law remedy, of course, such as trespass and negligence, without regard to statutory protection. Brief for Appellees at 11, Kellum (No. 93-1030).
91. Brief for Appellants at 10, Kellum (No. 93-1030).
92. The proposed legislation was entitled "Oysters—Destroying Natural Oyster Bars." Brief for Appellants at 9, Kellum (No. 93-1030). The State of Maryland, as owner of the land under Maryland tidal waters had, and still has, the same right to bring an action for damages as any other owner of land. See Maine v. M/V Tamano, 357 F. Supp. 1097, 1101-02 (S.D. Me. 1973) (holding state has standing to bring claim for damages to state-owned land).
93. Brief for Appellees at 16-17, Kellum (No. 93-1030). The fiscal note describing the impact of the bill is as follows: "The bill has no negative impact, but could provide funds for site specific restoration in the event of any further damage to benthic resources." Ch. 622, 1985 Md. Laws 55.
94. See supra text accompanying notes 43-44.
95. This is the Jensen rule on which Kellum is disposed. See supra notes 84-87 and accompanying text.
96. See supra text accompanying notes 69-70.
presents an immediate conflict with the federal system. Second, there are problems with the allocation of fault. The language of section 4-1118.1 does not allow for a system of proportionate fault, nor was it so interpreted by the district court in *Kellum.* Proportionate fault has long been the accepted doctrine for allocation of damages in maritime torts, whereby each party may be held liable for the cost of the damage for which it is responsible. In short, a strict liability standard conflicts with the accepted federal maritime scheme of comparative negligence.

Liability without fault also undermines the uniform system of rules that admiralty law attempts to create. An imposition of strict liability upon mariners who damage oyster bars in Maryland waters for whatever reason, without prior notice to those mariners of that possibility, affects more than merely local interests. It affects interstate and international mariners, whose interest is at the very heart of the uniformity requirement of federal maritime law. For example, it is quite possible that navigators fearful of being hauled into court and held strictly liable for damage to oyster bars would choose an alternate, most likely longer, shipping route, increasing the cost of freight and goods carried through the stream of interstate commerce. This could, in turn, give rise to higher insurance costs for vessels traveling through Maryland waters. Such an outcome would place undue burdens on interstate commerce and create conditions that federal maritime law specifically has attempted to avoid.

Such burdens are especially troubling in cases like *Kellum,* where Maryland was lax in demarcating the oyster bar. The oyster bar in *Kellum* extended into a channel marked for navigation by commercial vessels, yet the oyster bar was not designated on navigation charts typically relied upon by such vessels. If Maryland wishes to hold ma-

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97. *Kellum,* 51 F.3d at 1223.
99. See supra note 86 and accompanying text.
100. See supra note 32 and accompanying text.
101. Brief for Appellants at 15, Maryland Dep't of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995) (No. 93-1030).
102. Id.
103. It is entirely conceivable that an endangered ship could drop anchor, for safety reasons, and be held liable for any damage caused to oyster bars below the vessel. Section 4-1118.1 gives no quarter to those who cause damage, regardless of the amount of care used by mariners.
104. *Kellum,* 51 F.3d at 1222.
105. Brief for Appellants at 16, *Kellum* (No. 99-1090); see also supra note 11 and accompanying text.
riners to a higher standard of care in maritime navigation, it is essential, at the very least, that protected areas that extend into navigable channels be marked by the state.

Underlying this case is the central theme in admiralty law: the national need for uniformity. Addressing this theme, Kellum and Willis aptly argued in their petition to the Fourth Circuit:

Passing through state to state and being subject to differing standards of liability, without knowing which standard applies at which time, clearly destroys the uniformity sought by federal maritime law. The fact that vessels do travel so frequently between different states' waters is a good reason to keep the law of liability constant; otherwise, navigators and vessel owners and operators are subject to the whims of each state through whose waters they pass, with no practical advance notice of which liability standard will apply at any particular place.

The national need for uniformity is not incompatible with the State of Maryland's legitimate interest in protecting her oyster bars. A comparative negligence standard allows Maryland full recovery in the event that a defendant is completely at fault for damage to an oyster bar, and a lesser share if Maryland contributes to the damage. A strict liability standard skews the maritime scheme in the favor of the State of Maryland, and potentially holds a mariner liable for occurrences completely out of his control.

Finally, the Kellum decision reinforces the delineation between maritime cases that fall under the Jensen rule and those that fall under Askew. The court emphasized that Askew involved a scenario in which a federal act presupposed a coordinated effort with the states. Thus, the federal law in Askew involved a congressional enactment that contained an explicit waiver of federal preemption, thereby foreclosing the preemption issue. Askew, in fact, states that the Jensen rule may still apply in situations "relating to the relationship

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106. See supra note 32 and accompanying text.
107. Brief for Appellants at 16, Kellum (No. 93-1030).
108. See supra note 98 and accompanying text.
110. See supra text accompanying notes 62-64.
111. Kellum, 51 F.3d at 1225. Unlike Kellum, Askew dealt with a situation where both the State of Florida and the federal government were concerned with the availability of respective cleanup costs for oil spills. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 326 (1973). In Kellum, damaged oysters are solely the property of Maryland, Kellum, 51 F.3d at 1224, and no such system of collaboration between the state and federal government is conceived, id. at 1225.
112. Askew, 411 U.S. at 329.
of vessels, plying the high seas and our navigable waters, and to their crews."\textsuperscript{113} In other words, incidents that occur on the high seas, as opposed to the shoreside, are governed by \textit{Jensen}, which emphasized the need for uniformity in maritime law.\textsuperscript{114} Incidents on the shoreside, the \textit{Kellum} court went on to explain, may be governed by \textit{Askew},\textsuperscript{115} which allowed a state maritime statute that did not conflict with federal law.\textsuperscript{116}

This distinction, although never referred to explicitly in either \textit{Askew} or \textit{Kellum}, is apparently based on the fact that the need for national uniformity is greatest in navigable channels where interstate commerce is frequent. Therefore, it seems certain that federal law will apply to any incident involving a vessel navigating commercial channels or the "high seas."\textsuperscript{117} Less clear, however, are the situations where a state law may be upheld in spite of countervailing federal law, in the name of state police power. The \textit{Kellum} decision makes no mention of the maritime-but-local doctrine, nor does it even remotely explore or weigh Maryland's interests in state resources.

Thus, \textit{Kellum} leaves Maryland in the following position. The state may enact legislation concerning commercial channels in state waters provided that the law does not substantially alter the federal general maritime law. For shoreside marine areas, however, the picture is less clear. If the state's interests are sufficiently great, any judicial review would probably, though not certainly, involve an \textit{Askew} analysis. Such an analysis should include a greater consideration of local interests, perhaps under the rubric of the maritime-but-local doctrine.\textsuperscript{118} As these considerations were not at issue in \textit{Kellum}, the outcome of any such cases is open to conjecture.

5. \textit{Conclusion}.—While the \textit{Jensen} rule is becoming less pervasive, the facts surrounding \textit{Kellum} provide one example where its application is still sound. Though well-intended, Maryland's attempt to protect her natural oyster bars through a strict-liability statute was ill-conceived. The statute yielded an extremely limited measure of extra protection to Maryland's oyster bars at best, and at worst, placed a potentially great burden on vessels traveling Maryland's waters. While the Fourth Circuit's analysis of federal maritime preemption gave lit-

\begin{thebibliography}{9}
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\bibitem{113} Id. at 344.
\bibitem{114} See supra notes 3, 45-48 and accompanying text.
\bibitem{115} \textit{Kellum}, 51 F.3d at 1225.
\bibitem{116} See supra text accompanying notes 60-64.
\bibitem{117} See supra text accompanying note 48.
\bibitem{118} See supra text accompanying notes 60-64.
\end{thebibliography}
tle indication of a willingness to allow the states to develop laws that diverge from the federal maritime law, the facts of *Kellum* seem to have provided little temptation. Finally, while the court’s application of the *Jensen* doctrine comported with previous cases, the opinion in *Kellum* failed to clarify what set of circumstances would lead the court to relax its strict adherence to *Jensen*.

*Samuel C. Steinbach*
V. Procedure

A. A Literal Interpretation of the Federal Rule Governing Voluntary Dismissal

In *Camacho v. Mancuso*, the United States Court of Appeals for the Fourth Circuit considered whether the signature of only one party on a stipulation of dismissal satisfies the requirements of Federal Rule of Civil Procedure 41(a)(1)(ii) when both parties previously agreed to dismiss the lawsuit. In considering this case of first impression, the court ruled that the written stipulation of dismissal was invalid; such a stipulation must contain the signatures of both parties even if both parties orally agree to dismiss the cause of action. Even though the signature requirement is a safeguard that is in place to shield defendants, the *Camacho* court properly rejected the opportunity to carve an exception that arose, at least in part, because of the defendants' lack of diligence.

1. The Case.—On January 10, 1990, Montgomery County police officers arrested Fernando Camacho, who later claimed that the arrest was illegal and that it violated his rights under state and federal law. On April 8, 1991, Camacho and his wife filed an action in federal district court against Montgomery County and three county officers, seeking damages under 42 U.S.C. § 1983 and under several state common-law tort theories. The defendants answered the complaint and later filed a motion for judgment on the pleadings, seeking a dismissal of the state law claims. On September 15, 1991, the

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1. 53 F.3d 48 (4th Cir. 1995).
2. Id. at 50.
3. Id. at 53.
4. Id. at 51.
5. Id. at 53.

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*
9. *Id.* at 2. By the time the plaintiffs filed the state law claims in April 1991, the 180-day period of limitations for notice to the defendants of the state claims had expired. *Id.* The relevant Maryland statute provides that "an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim
Camachos' attorney contacted opposing counsel to express their willingness to voluntarily dismiss the case. Counsel for the defendants agreed to the dismissal. On December 16, 1991, the Camachos filed a notice of dismissal without prejudice, signed only by their counsel, in the district court. The court did not approve the dismissal, nor did the defendants file any record of their assent to the stipulation. Moreover, the clerk did not officially docket the case as closed until September 1, 1992. Even though the three-year statute of limitations for filing a § 1983 claim expired on January 10, 1993, the plaintiffs filed a motion to reopen or reinstate the action on March 22, 1993. The district court deferred ruling on the motion to reopen until it resolved the defendants' 1991 motion for judgment on the pleadings. The district court then granted the defendants' motion as to the state tort claims and granted the plaintiffs' motion to re-

required by this section is given within 180 days after the injury." MD. CODE ANN., CTS. & JUD. PROC. § 5-404 (1989).
10. Camacho, 53 F.3d at 50.
11. Id.
12. Id. It was undisputed that the attorney for the Camachos expressed the intent of his clients by signing and filing the stipulation. Id. at 54 (Motz, J., dissenting). Neither party alleged that the Camachos' counsel defeated the interest of his clients by signing the dismissal. Id.
13. Id. at 50.
14. Id. Judge Garbis indicated in his memorandum opinion that he viewed reopening the case as necessary to correct the faulty dismissal based on a notice that was inadequate under Rule 41(a)(1)(ii). Camacho v. Montgomery County, Md., No. MJG-91-969, slip op. at 5 (D. Md. June 17, 1994), aff'd sub nom. Camacho v. Mancuso, 53 F.3d 48 (4th Cir. 1995). Judge Garbis speculated that the 10-month delay in docketing the notice was due to a processing error in the clerk's office. Id. at 4. The court concluded that the case was not properly closed by the clerk because the parties failed to comply with the provisions of Rule 41(a). Id.
15. Historically, the courts have had to determine the appropriate period of limitations for 42 U.S.C. § 1983 actions because it is not provided by federal statute. Stephen J. Shapiro, Choosing the Appropriate State Statute of Limitations for Section 1983 Claims after Wilson v. Garcia: A Theory Applied to Maryland Law, 16 U. BALTIMORE L. REV. 242, 243 (1987). Congress instructed the federal courts to adopt state statutes of limitation when no federal rule exists. 42 U.S.C. § 1988 (1988). In Maryland, most tort claims are subject to a three-year period of limitations. See MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1989) (stating that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced").
16. Camacho, 53 F.3d at 50.
17. Id.
18. Id. Judge Garbis ruled that the plaintiffs did not provide timely notice as to their state law claims; thus, they were barred from bringing the claims. Camacho, No. MJG-91-969, slip op. at 2; see supra note 9. Plaintiffs also filed a motion to waive the state notice requirement; however, Judge Garbis stated that the plaintiffs failed to provide adequate reasons for their waiver proposition. Camacho, No. MJG-91-969, slip op. at 3. The court thus disregarded the plaintiffs' "excuses" for missing the state deadline. Id.
pen as to the federal claim.\textsuperscript{19} However, the district court certified its ruling on the plaintiffs' motion for interlocutory appeal\textsuperscript{20} in recognition of the case's "unique posture."\textsuperscript{21} On September 26, 1994, the court of appeals agreed to hear the appeal.\textsuperscript{22}

2. \textit{Legal Background.}—Federal Rule 41(a)(1) permits a plaintiff to voluntarily dismiss a case in two ways that do not require the court's consent: by the unilateral dismissal of the plaintiff and by a signed stipulation of the parties.\textsuperscript{23} The first, and simplest, method permits

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\item\textsuperscript{19} \textit{Camacho}, 53 F.3d at 50.
\item\textsuperscript{20} 28 U.S.C. \$ 1292(b) provides in pertinent part:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. \textit{Id.}
\item\textsuperscript{21} \textit{Camacho}, 53 F.3d at 50-51. The court conceded that the issue was debatable in that the defendants could contend that the reopening of the action effectuated an extension of the statute of limitations. \textit{Camacho}, No. MJG-91-969, slip op. at 5. The court considered the permitted reopening to be a rectification of an erroneous closing. \textit{Id.}; see also supra note 14.
\item\textsuperscript{22} \textit{Camacho}, 53 F.3d at 51.
\item\textsuperscript{23} Fed. R. Civ. P. 41(a)(1) provides:
Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including the same claim. \textit{Id.}

Prior to the promulgation of the Federal Rules of Civil Procedure in 1938, state statutes governed the right of dismissal according to the Conformity Act. 5 \textsc{James Moore et al., Moore's Federal Practice,} \textsuperscript{1} 41.02[1] (2d ed. 1995). Typically, state statutes permitted voluntary nonsuits as a matter of right at any time before the retirement of the jury. \textit{Id.}; see also \textit{In re Skinner & Eddy Corp.}, 265 U.S. 86, 92-93 (1924) (issuing a writ of mandamus to correct the lower court's vacating of the plaintiff's order of dismissal); \textit{Barrett v. Virginian Ry. Co.}, 250 U.S. 473, 476 (1919) (sustaining the plaintiff's right to a voluntary nonsuit even after the judge granted the defendant's motion for a directed verdict).

In the former equity courts, the plaintiff who was willing to pay costs possessed an unqualified right of dismissal before the final hearing "unless the defendant could point to some prejudice over and above the mere vexation of possibly being sued again." \textit{Leach v. Ross Heater & Mfg. Co.}, 104 F.2d 88, 90 (2d Cir. 1939); see also \textit{McGowan v. Columbia River Packers' Ass'n}, 245 U.S. 352, 357-58 (1917) (ruling that the plaintiff should have been permitted to dismiss the action after an intervening decision in another case proved that the plaintiff had no grounds for complaint on a particular issue). In addition, the equity courts recognized the limitation to the plaintiff's unilateral right of dismissal, if the
the plaintiff to file a notice of dismissal before the adverse party serves an answer or a motion for summary judgment.\textsuperscript{24} Generally, courts protect the plaintiff’s right to unilaterally file a notice of dismissal prior to the opposing party’s response.\textsuperscript{25} However, in \textit{Harvey Aluminum, Inc. v. American Cyanamid Co.},\textsuperscript{26} the Court of Appeals for the Second Circuit held that a hearing on the plaintiff’s motion for a preliminary injunction involved the merits of the suit and the plaintiff was precluded from unilaterally terminating the suit even though the defendant had not yet made a responsive pleading.\textsuperscript{27} Subsequent decisions have limited the \textit{Harvey} holding to its facts.\textsuperscript{28}

\begin{footnotesize}
\begin{enumerate}
\item[24.] FED. R. CIV. P. 41(a)(1)(i).
\item[25.] Id.; cf. Safeguard Business Sys., Inc. v. Hoeffel, 907 F.2d 861, 863 (8th Cir. 1990) (“Rule 41 provides that the plaintiff loses the right [to unilaterally dismiss an action] when an answer or a motion for summary judgment is filed.”); Hamilton v. Shearson-Lehman Am. Express, Inc., 815 F.2d 1532, 1534 (9th Cir. 1987) (affirming the plaintiff’s unencumbered right to dismiss prior to the defendant’s response); Thorp v. Scarne, 599 F.2d 1169, 1176 (2d Cir. 1979) (holding that if the defendant does not exercise either option to terminate the plaintiff’s right to dismiss voluntarily, the plaintiff is entitled to dismiss the action without prejudice); D.C. Elecs., Inc. v. Nartron Corp., 511 F.2d 294, 298 (6th Cir. 1975) (stating that the defendant can protect himself from the plaintiff’s capricious dismissal by merely filing an answer or motion for summary judgment).
\item[26.] 203 F.2d 105 (2d Cir.), cert. denied, 345 U.S. 964 (1953).
\item[27.] Id. at 107-08.
\item[28.] Charles A. Wright & Arthur R. Miller, \textit{Federal Practice and Procedure} § 2363 (1995); see also \textit{In re Piper Aircraft Distrib. Sys.}, 551 F.2d 213, 220 (8th Cir. 1977) (indicating that the “point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right” is when the defendant first answers or files a motion for summary judgment); \textit{D.C. Elecs., Inc.}, 511 F.2d at 298 (holding that the language of Rule 41(a)(1)(i) is clear and unambiguous and bars judicial discretion except in the determination of whether the defendant’s response was filed prior to the filing of a notice of dismissal).
\end{enumerate}
\end{footnotesize}
The plaintiff's right of unilateral dismissal terminates when the defendant files an answer or a motion for summary judgment.29 At that point, the plaintiff may dismiss the cause of action "by filing a stipulation of dismissal signed by all parties who have appeared in the action."30 Most courts that have interpreted Federal Rule 41(a)(1) have required the signatures of both sides of the action to appear on a notice of voluntary dismissal.31 In Morris v. City of Hobart,32 for example, the Tenth Circuit determined that a document entitled "Dismissal with Prejudice" failed to satisfy Federal Rule 41(a)(1)(ii) because it contained only the signature of the plaintiff.33 The Fifth Circuit also maintained the multiple signature requirement in Wheeler v. American Home Products Corp. (Boyle Midway Division).34 In that case, in light of the fact that the lower court had denied the plaintiffs' motion for class action status, the court ruled that the stipulation of dismissal with the signatures of the original plaintiffs was not sufficient to dismiss the case because it did not include the signatures of the plaintiff-intervenors.35 The court stated that Federal Rule 41(a)(1) did not authorize dismissal as to the intervenors because the stipulation was not signed by all the parties involved in the suit.36

In McCall-Bey v. Frazen,37 the Seventh Circuit noted that the requirement to file a stipulation is not simply a technicality.38 Rather, "[i]t provides a permanent record that facilitates the application of the doctrine of res judicata to subsequent related litigation."39 The McCall-Bey court indicated that the proper filing of notices of dismissal assists in the management of dockets by apprising the court of its case backlog.40

30. Id.
31. See infra notes 32-36 and accompanying text.
32. 39 F.3d 1105 (10th Cir. 1994).
33. Id. at 1109.
34. 582 F.2d 891 (5th Cir. 1977).
35. Id. at 896. In Wheeler, the original four plaintiffs brought suit as a class action under Title VII of the Civil Rights Act of 1964 claiming sexual discrimination. Id. at 893. Eight additional employees were permitted to intervene. Id. The original plaintiffs agreed to settle the case without consulting the intervenors who, therefore, did not sign or consent to the agreement. Id. Although the lower court dismissed the case with prejudice, the Fifth Circuit reversed the dismissal based on the failure to meet the signature requirement. Id. at 894.
36. Id. at 896.
37. 777 F.2d 1178 (7th Cir. 1985).
38. Id. at 1185.
39. Id.
40. Id.
On the other hand, other circuits have refused to take "a purely mechanistic approach" to interpreting Federal Rule 41(a)(1)(ii). For example, a few circuits have held that an oral stipulation before the court will suffice in place of a written stipulation signed by both parties. However, in each of these cases, the presiding judge had an opportunity to certify that both parties agreed to the dismissal. In Pipeliners Local 798 v. Ellerd, for instance, the court held that the plaintiff's explicit oral stipulation in open court met the requirements for voluntary dismissal. Likewise, in Eitel v. McCool, the court concluded that a mutual intent to dismiss with prejudice existed after hearing the parties' oral arguments by telephone. Moreover, in Broadcast Music, Inc. v. M.T.S. Enterprises, Inc., the court dismissed an action after counsel for the appellee confirmed that a statement he made in open court was intended to dismiss all claims against two particular defendants. The Ninth Circuit held on appeal that the oral dismissal sufficed to meet Federal Rule 41(a)(1)(ii), thus adopting the Pipeliners exception to the requirement of a written stipulation. Furthermore, in Oswalt v. Scripto, Inc., the Fifth Circuit criticized a strict requirement of a formal dismissal document.

41. Camacho, 53 F.3d at 51.
42. Id.
43. Id.; see, e.g., Broadcast Music, Inc. v. M.T.S. Enters., Inc., 811 F.2d 278, 279 n.1 (9th Cir. 1987) (ruling that voluntary dismissal during the course of a trial is acceptable); Eitel v. McCool, 782 F.2d 1470, 1472 n.3 (9th Cir. 1986) (holding that after hearing parties' oral arguments by telephone, the district court properly dismissed the case); Pipeliners Local 798 v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974) (holding that verbal stipulation in open court constituted a voluntary dismissal of complaint).
44. 503 F.2d at 1193.
45. Id. at 1199. The appellee in Pipeliners announced in open court that he dismissed all actions against all parties except those in the counterclaim. The court held that his statement constituted a dismissal "even though no formal stipulation of dismissal was signed by all of the parties to the action as contemplated by Fed. R. Civ. P., Rule 41(a), 28 U.S.C.A." Id.
46. 782 F.2d at 1470.
47. Id. at 1472 n.3.
48. 811 F.2d 278 (9th Cir. 1987).
49. Id. at 279 n.1.
50. Id. The same court later held in Carter v. Beverly Hills Sav. & Loan Ass'n, 884 F.2d 1186 (9th Cir. 1989), that the district court had no basis for dismissing an action in which the parties had not stipulated to a dismissal either orally or in writing. Id. at 1191. In Carter, the attorneys for both parties stipulated to the court's vacating of the scheduled pretrial conference and trial dates because the parties had initially agreed upon a settlement. Id. The lower court dismissed the lawsuit although the parties did not make such a request. Id.
51. 616 F.2d 191 (5th Cir. 1980).
52. Id. at 194. In Oswalt, the plaintiff brought suit against a Japanese cigarette lighter manufacturer and an American distributor alleging that the lighter malfunctioned. Id. at 192. The plaintiffs and the American distributor, Scripto, Inc., reached a settlement.
held that although the parties did not formally file a notice of dismis-
sal, the court would regard a settlement agreement presented to the
court as a stipulated dismissal of the action.53

3. The Court’s Reasoning.—In Camacho, the Fourth Circuit for the
first time confronted the issue of whether a stipulation of dismissal
signed by only one party is sufficient to satisfy the requirements of
Federal Rule 41(a)(1)(ii) where both parties had clearly intended to
dismiss the case.54 The court held that when only one party signs and
files a stipulation for dismissal, the requirements of Federal Rule
41(a)(1)(ii) have not been met.55 The court expressed its belief that
the underlying reason for the rule governing voluntary dismissal is to
prevent the plaintiff from summarily dismissing a case without ap-
proval from the adverse party.56 In order to verify that both parties
agree to the finality of such a measure, the rule requires tangible ac-
knowledgment of the stipulation.57

The Camacho court recognized that other circuits have not taken
a rigid approach to applying Federal Rule 41(a)(1).58 However, the
court also realized that deciding the case in favor of the defendants
would further liberalize the interpretation of the rule. The Fourth
Circuit was not willing to do so.59 The court reasoned that upholding
the integrity of the rule outweighed the significance of granting the
parties’ initial intent to dismiss this
case.60 In making its decision, the
court championed the rights of defendants who have a “strong inter-

agreement whereby the plaintiffs agreed not to prosecute the company in exchange for
$125,000. Id. at 193. The agreement also stated that the plaintiffs would indemnify
Scripto, Inc., for the amount of any recovery they received from the Japanese manufac-
turer, Tokai-Seiki KK. Id. When the district court determined that it did not have personal
jurisdiction over Tokai-Seiki KK, the plaintiffs and Scripto filed an appeal and presented
the settlement agreement. Id.

53. Id. at 194. In Furlong v. Havee, 885 F.2d 815 (11th Cir. 1989), the court adhered to
the bright-line rule by invalidating a plaintiff’s argument that the parties stipulated to a
dismissal. Id. at 818. Nevertheless, the court made clear that if both parties had signed the
stipulation or had represented to the court that they had settled their dispute, the parties
would have “satisfied the spirit of the rule” and thus the court would have regarded the
case as having been terminated. Id. Although the Eleventh Circuit cited Oswalt as author-
ity, it also referred to United States v. Transocean Air Lines, Inc., 356 F.2d 702 (5th Cir.
1966), which indicated that only a stipulation signed by all of the parties can effect a dis-
missal. Id. at 705.

54. Camacho, 53 F.3d at 50.
55. Id. at 53.
56. Id. at 51.
57. Id.
58. Id.; see also supra notes 41-53 and accompanying text.
59. Camacho, 53 F.3d at 51.
60. Id.
est in the resolution of an action, especially after [they have] taken the time and spent the money to file a responsive pleading."⁶¹ Allowing a plaintiff to dismiss a case without properly adhering to the rule could subvert defendants' right to clear their name or eradicate possible stains on their reputation.⁶²

In addition, the *Camacho* court posited that Rule 41(a)(1)(ii) permits the judiciary to gauge its caseload.⁶³ The majority opinion adopted the reasoning set forth in *McCall-Bey v. Frazen*.⁶⁴ The *McCall-Bey* court determined that the rule is not "merely a technicality,"⁶⁵ and stated that "[i]f [the] parties did not have to notify the court that they had ended their dispute, the court would have no idea of the size of its backlog without inquiring into the status of every inactive case."⁶⁶ The court in *Camacho* also cited decisions from other circuits that adhered to the signature requirement of the rule.⁶⁷

Judge Motz dissented, criticizing the majority's underlying reason for permitting the plaintiffs to reopen the case.⁶⁸ Judge Motz conceded that the reason for Federal Rule 41(a)(1)(ii) is to protect the defendant against arbitrary dismissals.⁶⁹ However, she stressed that in this case both parties had agreed that the cause of action should be dismissed.⁷⁰ Judge Motz further pointed out that a Federal Rule 41(a)(1)(ii) stipulation does not require court approval in order to be effective.⁷¹ Therefore, Judge Motz believed the court was penalizing the defendants because the plaintiffs filed an improper stipulation.⁷² Her dissent expounded that the court's strict interpretation of the

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⁶¹. *Id.*

⁶². *Id.* Even former equity courts recognized that some limits should restrain the plaintiff's power to dismiss an action. In *Chicago & Alton R.R. v. Union Rolling Mill Co.*, 109 U.S. 702 (1883), the Court noted:

"The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court . . . . After a defendant has been put to trouble in making his defence, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants."

*Id.* at 714 (quoting *Conner v. Drake*, 1 Ohio St. 166, 170 (Ohio 1853)).

⁶³. 53 F.3d at 51.

⁶⁴. 777 F.2d 1178 (7th Cir. 1985); *see supra* text accompanying notes 37-40.

⁶⁵. *McCall-Bey*, 777 F.2d at 1185.

⁶⁶. *Id.*

⁶⁷. 53 F.3d at 52.

⁶⁸. *Id.* at 53 (Motz, J., dissenting).

⁶⁹. *Id.* at 53-54.

⁷⁰. *Id.* at 54.

⁷¹. *Id.* at 53; *see infra* note 96.

⁷². *Camacho*, 53 F.3d at 54 (Motz, J., dissenting).
rule, in light of the parties' undisputed agreement to dismiss the case, was an elevation of "form over substance."  

4. Analysis.—The Camacho court made an appropriate decision that remains true to the dual purposes of Federal Rule 41(a)(1). The rule was designed to "facilitate the plaintiff's ability to take a voluntary dismissal of an action, while limiting abuse of the practice by restricting the right to the early stages of the action."  

After the issue has been joined, the plaintiff's unqualified right to dismiss is limited in order to protect the defendant's entitlement to a decree on the merits.  

The court was clear that it could have ruled in the defendants' favor by allowing the incomplete stipulation of dismissal to terminate the lawsuit, yet the court expressed legitimate concern about the future ramifications of such a decision. The majority considered not only the immediate gratification of the parties to the instant action, but also the rights of future parties who may present similar circumstances. The court determined that "[a]lthough in this case [dismissal] would not subvert the parties' original intent, we believe that in future cases it would compromise the interests that Rule 41's procedural hurdles safeguard: the defendant's interests in the cause of action and the court's interest in judicial efficiency."  

The court expressed concern that by removing the requirement that both parties' signatures appear on a written stipulation, Federal Rule 41(a)(1)(ii) would be transformed into a vehicle by which a plaintiff could summarily dismiss an action at any time.  

The majority considered that other circuits have not used a bright-line test for compliance with the rule and have in some instances totally deviated from the literal meaning of the rule by allowing an oral stipulation of dismissal to suffice. However, in those cases, the oral stipulation was made in open court or in conference with the trial judge. Thus, at a minimum, the presiding judge "ensure[d] that the parties agreed to the dismissal as per Federal Rule 41(a)(1)(ii)." The Camacho court was justifiably concerned that rul-

73. Id. at 53.
74. 5 Moore et al., supra note 23, ¶ 41.02[1].
75. Id.; see also supra notes 29-30, 55-57, 61-62 and accompanying text.
76. Camacho, 53 F.3d at 51.
77. Id.
78. Id.
79. Id.
80. Id.; see also supra notes 42-53 and accompanying text.
81. Camacho, 53 F.3d at 51.
ing in the defendants' favor here would force the court to venture beyond the scope of the rule and beyond the exceptions that already existed.\textsuperscript{82}

The dissent saw the literal application of the rule in this case as a violation of the rule's purpose because the court's decision created a "means for plaintiffs to avoid by a technicality the dismissal of an action which they initially . . . unequivocally sought to dismiss."\textsuperscript{83} The majority correctly responded that counsel for both parties bore the responsibility to ensure that the stipulation complied with the requirements of the rule.\textsuperscript{84} The Fourth Circuit opined that while the plaintiffs were at fault for failing to secure the defendants' signatures on the notice of dismissal, the defendants also failed to ensure that their signatures appeared on the notice of dismissal or that their consent to the dismissal was placed on the record.\textsuperscript{85} Even though the rule was created to protect the rights of defendants, the defendants in this case did not take the necessary steps to effectuate such protection.

The dissent conceded that if the oral dismissal had been with prejudice, or if the written notice had not been timely, the court would have been justified in finding that an out-of-court oral stipulation did not meet the requirements of the rule.\textsuperscript{86} Generally, the filing of a notice or stipulation of dismissal is without prejudice, unless the plaintiff previously dismissed the same cause of action.\textsuperscript{87} Hence, the dissent suggested that if the lower court had dismissed the action without prejudice, the plaintiffs would have been able to bring a new complaint on their claim.\textsuperscript{88}

Yet, if the court had permitted the plaintiffs' notice of dismissal to take effect, the Camachos would have been barred from instituting another suit on the same grounds because the three-year statute of limitations already had expired.\textsuperscript{89} Moreover, the fact that the stipulation was contemporaneous and timely does not compensate for the fact that it was also faulty. The majority correctly refused to examine whether the plaintiffs had an opportunity to commence another suit on the same cause of action in order to decide whether the parties sufficiently complied with the rule to effectuate a dismissal. Hinging the efficacy of a dismissal upon its prejudicial status would create a

\begin{itemize}
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id. at 53 (Motz, J., dissenting).
  \item \textsuperscript{84} Id. (majority opinion).
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id. at 54 (Motz, J., dissenting).
  \item \textsuperscript{87} 5 \textsc{Moore et al.}, supra note 23, \textsuperscript{1} 41.02[2].
  \item \textsuperscript{88} \textsc{Camacho}, 53 F.3d at 54 (Motz, J., dissenting).
  \item \textsuperscript{89} See supra note 15.
\end{itemize}
level of judicial involvement that Federal Rule 41(a)(1) did not intend.90

Furthermore, the dissent's reliance upon Oswalt v. Scripto, Inc.91 as an example of how the Camacho decision epitomized the elevation of form over substance is misplaced.92 Oswalt is distinguishable from Camacho because, although the Oswalts did not formally file a written stipulation of dismissal, both parties made representations to the district court regarding their signed settlement agreement.93 Thus, the lower court in Oswalt had written proof that afforded the court an opportunity to verify that both parties agreed to dismissal.94 The trial court in Camacho had no such proof.

Although permitting the dismissal of this case would seem to create only a narrow exception to Federal Rule 41(a)(1), close examination reveals vast possible consequences. Denying the plaintiffs' motion to reopen the case would permit the filing of a notice of dismissal signed by one party on the condition that both parties agreed to terminate the case. Such a ruling would create enormous problems for the courts, as there would be no efficient means for the court to ensure that the parties had in fact reached an agreement.95 Moreover, if the agreement was disputed, it would require subsequent court involvement to reach a determination as to its validity.96 Currently, the rule requiring both signatures, or at least only permitting an oral stipulation presented before the court, circumvents that prob-

90. See supra note 23; infra note 96.
91. 616 F.2d 191 (5th Cir. 1980).
92. Camacho, 53 F.3d at 53 (Motz, J., dissenting).
93. Oswalt, 616 F.2d at 194-95.
94. Id.; see also supra notes 51-53 and accompanying text.
95. See Ocean Drilling & Exploration Co. v. Mont Boat Rental Servs., 799 F.2d 213 (5th Cir. 1986) (invalidating the plaintiff's contention that the parties orally agreed to dismiss only a portion of the claim because the record contained no evidence of the alleged stipulation). The court reasoned that
   [a]lthough Rule 41 expressly requires a written stipulation, the courts have not insisted on a writing when it is clear that the parties have in fact entered into the contemplated stipulation. The evidence must, however, be unequivocal and in the record to satisfy the patent purpose of the requirement—to avoid later dispute. An off-the-record oral stipulation, even if proved, would not satisfy the requirements of Rule 41 for it would lead to the very problems here presented, problems the requirement was designed to avert.
   Id. at 218.
96. Undoubtedly, court approval is not necessary under Rule 41 in order for a stipulation of dismissal to be effective. Camacho, 53 F.3d at 53 (Motz, J., dissenting); see, e.g., Safeguard Business Sys., Inc. v. Hoeffel, 907 F.2d 861, 863 (8th Cir. 1990) ("Because the rule permits dismissal as of right, it requires only notice to the court, not a motion, and permission or order of court is not required."); 5 MOORE ET AL., supra note 23, ¶ 41.02[1] (asserting that Rule 41(a)(1) does not necessitate the consent of the court).
lem. In both instances, the rights of the defendant are protected. The rule's language is unambiguous and finding "narrow" exceptions to mend the mistakes of each party would erode the very purpose of the rule.

5. **Conclusion.**—Although allowing an exception to Federal Rule 41(a)(1)(ii) would have met each parties' original goal of dismissing the case, the court in *Camacho* eschewed the opportunity to stray further from the language of the rule. In ruling on an issue of first impression for the circuit, the court took the conservative route and upheld the stated requirements of the rule. The majority's refusal to create a novel exception properly avoided the creation of precedent that would have permitted a plaintiff to terminate a cause of action with a faulty notice of dismissal. Although allowing an exception in the instant case would not have caused undue prejudice, the court took an appropriately forward-looking stance and determined that the risks of such an exception were too high.

Jo An R. Leone