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# THE MARYLAND SURVEY: 1995-1996

## Table of Contents

### RECENT DECISIONS: THE MARYLAND COURT OF APPEALS

<table>
<thead>
<tr>
<th>I. CONSTITUTIONAL LAW</th>
<th>................................................</th>
<th>656</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Balancing Media Access to Juvenile Court Proceedings and the First Amendment Freedom of the Press</td>
<td>656</td>
<td></td>
</tr>
<tr>
<td>B. Extending to White Potential Jurors the Equal Protection Right to a Racially Neutral Jury Selection Process</td>
<td>674</td>
<td></td>
</tr>
<tr>
<td>C. Prison Checkpoints and the Fourth Amendment: Balancing Compelling State Interests with the Individual's Reasonable Expectation to Privacy</td>
<td>695</td>
<td></td>
</tr>
<tr>
<td>II. CONTRACTS</td>
<td>................................................</td>
<td>711</td>
</tr>
<tr>
<td>A. A New Construction of Promissory Estoppel</td>
<td>711</td>
<td></td>
</tr>
<tr>
<td>III. CRIMINAL LAW</td>
<td>................................................</td>
<td>729</td>
</tr>
<tr>
<td>A. A &quot;Commonsensical&quot; Approach to Statutory Interpretation</td>
<td>729</td>
<td></td>
</tr>
<tr>
<td>B. Confusing the Doctrine of Transferred Intent</td>
<td>744</td>
<td></td>
</tr>
<tr>
<td>C. Rejecting Inference of Intent to Murder for Knowingly Exposing Another to a Risk of HIV Transmission</td>
<td>762</td>
<td></td>
</tr>
<tr>
<td>D. Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution</td>
<td>780</td>
<td></td>
</tr>
<tr>
<td>E. Restricting the Right to Cross-Examine Witnesses for Bias</td>
<td>793</td>
<td></td>
</tr>
<tr>
<td>F. Crediting Time Spent in Pretrial Home Detention Toward Subsequent Sentences</td>
<td>810</td>
<td></td>
</tr>
<tr>
<td>IV. EMPLOYMENT LAW</td>
<td>................................................</td>
<td>825</td>
</tr>
<tr>
<td>A. Applying the Tort of Wrongful Discharge to Small Businesses</td>
<td>825</td>
<td></td>
</tr>
</tbody>
</table>
V. Evidence ............................................ 849
   A. Judicial Discretion in the Admission of “In Life” Victim Photographs .... 849
   B. Eliminating the Middle Ground of Discretion .................................. 865

VI. Family Law ....................................... 892
   A. Resignation of Guardianship: The Applicable Standard and Its Implications 892
   B. Court-Imposed Grandparental Visitation of Children in Intact Nuclear Families 910
   C. Dismissing the Purpose and Public Policy Surrounding Spousal Support .... 927

VII. Insurance ....................................... 947
   A. Requiring Security on Rental Vehicles Notwithstanding a Violation of the Rental Agreement 947
   B. Negligent Misrepresentation Can Constitute an “Accident” Under a Liability Insurance Policy 967

VIII. Procedure ..................................... 987
   A. Repressed Memory and the Discovery Rule ..................................... 987

IX. Torts ............................................. 1005
   A. Clarifying Maryland’s Exception to the Economic Loss Rule ................. 1005

X. Workers’ Compensation .......................... 1019
   A. Failing to Construe the Workers’ Compensation Act Liberally .............. 1019

Recent Decisions: The United States Court of Appeals for the Fourth Circuit

I. Constitutional Law ............................... 1044
   A. Don’t Ask, Don’t Tell: Unequal Protection in the Military .................. 1044

II. Criminal Law .................................... 1075
   A. Trial Court Deference in Conducting Voir Dire Takes Precedence over the Right to Impartial Jury 1075

III. Education ....................................... 1091
   A. Expelling Disabled Students for Reasons Unrelated to Their Disabilities: What’s the Big IDEA? 1091

IV. Employment Law ............................... 1103
   A. A Strict Construction and Application of Title VII to Same-Sex Sexual Harassment 1103

V. Health Care ...................................... 1126
   A. EMTALA: The Fourth Circuit’s Backdoor Effort to Reconcile the Spirit with the Letter of the Law 1126
VI. PROCEDURE .................................................. 1147
   A. The Fourth Circuit Court of Appeals Holds Occasional Interstate Telephone Calls Insufficient to Sustain Personal Jurisdiction by a Maryland Court ......................... 1147

VII. TORTS .................................................. 1165
   A. Extending a New Form of Absolute Immunity from Tort Liability to Government Contractors .................. 1165

SUPREME COURT CASES

I. EMPLOYMENT LAW ........................................... 1178
   A. Providing Title VII Protections to Former Employees ...... 1178
Recent Decisions
The Maryland Court of Appeals

I. CONSTITUTIONAL LAW

A. Balancing Media Access to Juvenile Court Proceedings and the First Amendment Freedom of the Press

In Baltimore Sun Co. v. State, the Court of Appeals held that a court may restrict the media’s publication of information obtained from confidential juvenile hearings but may not prohibit publication of information obtained from extra-judicial sources. Further, the court held that a juvenile court cannot require the media to publish specific information as a prerequisite to access to juvenile proceedings. In its decision, the Court of Appeals followed the trend set by other state courts to permit media access to juvenile hearings but to restrict publication. The result is a prior restraint on publication which compromises the integrity of a free press.

1. The Case.—On January 17, 1995, the Baltimore City Circuit Court (Division of Juvenile Causes) entered an order granting media access to a previously closed juvenile court proceeding. The proceed-

2. Id. at 442-43, 667 A.2d at 169.
3. Id. at 443, 667 A.2d at 169.
4. See, e.g., In re Minor, 595 N.E.2d 1052, 1053-55 (Ill. 1992) (upholding the juvenile court’s order admitting the media to closed juvenile proceedings on the condition that the minor’s identity not be revealed); Austin Daily Herald v. Mork, 507 N.W.2d 854, 857 (Minn. Ct. App. 1993) (concluding that media restrictions on publication of information obtained during testimony of juvenile victims is permissible); In re H.N., 632 A.2d 537, 539 (N.J. Super. Ct. App. Div. 1993) (vacating order prohibiting media coverage of juvenile proceedings only because it prohibited the media from publishing information that they had lawfully obtained from extra-judicial sources); Edward A. Sherman Publ’g Co. v. Goldberg, 443 A.2d 1252, 1259 (R.I. 1982) (allowing the juvenile court to prohibit the media from publishing information obtained from the proceedings, but not permitting the prohibition of information gleaned from nonjudicial sources).
5. Baltimore Sun, 340 Md. at 449, 667 A.2d at 172.
6. Id. at 444, 667 A.2d at 169. The proceeding had been closed pursuant to section 3-812(e) of the Maryland Code, which states: “The court shall conduct all hearings in an informal manner. It may exclude the general public from a hearing, and admit only those persons having a direct interest in the proceeding and their representatives.” Md. Code Ann., Cts. & Jud. Proc. § 3-812(e) (1995); see also Md. R. 910(b) (“The [juvenile] hearing . . . may be conducted out of the presence of all persons except those whose presence is necessary or desirable.”); Md. R. 921(a) (“Files and records of the court in juvenile pro-
ing concerned the location of Maurice M., a missing child whom the Baltimore City Department of Social Services (DSS) had placed under protective services. The order granting media access to the hearings stipulated that “[a]ny reference to the respondent shall not be to his full legal name; reference will be to ‘Maurice’ or ‘Maurice M.’” Nevertheless, after gaining access, The Baltimore Sun (The Sun) published a computer-enhanced image of the child and identified him as “Maurice Bouknight.”

Following this publication, the juvenile court conducted a hearing to determine if the newspaper had violated the court’s order granting media access to the proceedings. The Sun argued that it had inadvertently used the name “Bouknight” in the caption under

ceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of the court.”).

Subsequent to this case, Maryland’s legislature amended section 3-812 of the Courts and Judicial Proceedings Article to allow juvenile court proceedings to be closed. See Act of May 8, 1997, ch. 314, 1997 Md. Laws 759 (to be codified at Md. Code Ann., Cts. & Jud. Proc. § 3-812). The amended statute takes effect on October 1, 1997, and requires open court proceedings when a juvenile is charged with an offense that would be a felony if committed by an adult, unless there is a showing of good cause that the proceedings be closed. See id. (to be codified as amended at Md. Code Ann., Cts. & Jud. Proc. § 3-812(e)(3)). The legislature rejected changes that would require open proceedings absent a showing of good cause when the proceedings concern a child in need of assistance or a child charged with “an act that would be a misdemeanor if committed by an adult.”

7. Baltimore Sun, 340 Md. at 443-44, 667 A.2d at 169. On January 23, 1987, DSS became aware that the then three-month-old Maurice required the Department’s assistance when a local hospital admitted him with a broken leg. Id. at 443, 667 A.2d at 169. The hospital also found evidence of other partially healed fractures. Id. On August 18, 1987, the court placed Maurice under an order of protective services by DSS. Id. By April 7, 1988, however, Maurice’s mother, Jacqueline Bouknight, refused to reveal her son’s whereabouts to DSS. Id. At one point, Ms. Bouknight claimed that Maurice’s aunt in Texas had the child, but a police investigation proved the story false. In re Maurice M., 314 Md. 391, 395 n.5, 550 A.2d 1135, 1137 n.5 (1988), rev’d, 493 U.S. 549 (1990). DSS expressed fear that Ms. Bouknight’s refusal to divulge her son’s location indicated that he might be dead. Id. When Ms. Bouknight refused to cooperate with DSS, the court ordered her jailed until such time as she disclosed Maurice’s whereabouts or produced him in court. Id. at 596, 550 A.2d at 1137. Ms. Bouknight remained in jail until 1995 when the court released her under certain conditions pursuant to its continuing jurisdiction over the case. Baltimore Sun, 340 Md. at 444, 667 A.2d at 169.

8. Baltimore Sun, 340 Md. at 444, 667 A.2d at 169 (alteration in original).

9. Id. Maurice’s last name was not “Bouknight,” but “Bouknight” was Maurice’s mother’s last name. Id. at 459, 667 A.2d at 177.

10. Id. at 444, 667 A.2d at 169. The State argued that The Sun would not have known of the picture’s existence if the newspaper’s representatives had not attended the hearing when the State introduced the picture into evidence. Brief of Appellee at 11, Baltimore Sun Co. v. State, 340 Md. 437, 667 A.2d 166 (1995) (No. 35).

the picture, but the court suspected that the newspaper had acted in bad faith—attempting to circumvent the court order by using a name to identify the child, even if it was not the child's legal name. Consequently, on January 26, 1995, the court proposed an amended version of the court order granting access to the media. The proposed order stipulated:

[T]he child . . . shall only be referred to as Maurice M. or Maurice. The last name of the child shall not be used in any way in publication, either in print or broadcast. No likeness, photograph or visual representation of any kind of the child shall be used or displayed in any news media publications.

Although the proposed order granted access to the media, the juvenile court stated that it would issue the order only on the condition that The Sun agree to publish it. When The Sun refused publication, the court withdrew the proposed order and denied media access to the proceedings. After the media petitioned the court for reconsideration, the court, in an order dated February 6, opened the proceedings to all media representatives, except The Sun. The court's order required that "the media shall not print the full legal name of the Respondent, but may refer to him as 'Maurice' or 'Maurice M.'" and that "[n]o likeness, photograph, or visual representation of any kind of the child as presented in court or made an exhibit shall be used or displayed in any news media publication." The Sun appealed the constitutionality of this order to the Court of Special Appeals. The Sun did not challenge the constitutionality of the statute or rules permitting a court to close juvenile proceedings, nor did it assert a con-

12. Id. at 444-45, 667 A.2d at 170. Because the court intended the order to protect the identity of the child, The Sun arguably defeated the purpose of the order without violating its terms by publishing a name that would identify Maurice. See id. The record did not, however, support the juvenile court's suspicion that The Sun had willfully defied the spirit of the order. Id. at 459, 667 A.2d at 177.
13. Id. at 445, 667 A.2d at 170.
14. Id. (alteration in original).
15. Id. The juvenile court claimed that it could not publicize the order to the extent that it would have liked; therefore, the court stated it needed The Sun to publish the order so that all members of the media would be aware of the restrictions upon access. Id. at 457, 667 A.2d at 176. The Court of Appeals noted, however, that the juvenile court had other means by which to disseminate the order to the members of the media attending the proceeding. Id.
16. Id. at 457, 667 A.2d at 176.
17. Id. at 445, 667 A.2d at 170.
18. Id. at 446, 667 A.2d at 170 (alteration in original).
19. Id.
20. Id.
21. Id. at 447, 667 A.2d at 171.
stitutional right to attend juvenile proceedings. Before the Court of Special Appeals could render a decision, the Court of Appeals issued a writ of certiorari to consider whether the juvenile court had abused its discretion in granting access to the media with limitations on publication.

2. Legal Background.—

a. The History of Juvenile Courts.—The juvenile court system developed because of public disapproval of incarcerating juveniles in adult prisons. The nation’s first statewide juvenile justice system began in Illinois in 1889, and it handled the state’s neglect, dependency, and juvenile delinquency cases. From the beginning, the underpinnings of the juvenile court system rested on rehabilitation and informal court proceedings. Since its inception, however, the system has come under attack. Critics note that the secrecy surrounding juvenile proceedings fosters suspicion among the public that juvenile courts coddle young offenders. Arguing against confidentiality, critics contend that less secrecy surrounding the proceed-

22. Id. The United States Supreme Court has held that the press has a right of access to adult criminal trials under the First Amendment. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). The Supreme Court, however, has never addressed the public’s right of access to juvenile court proceedings. See Susan S. Greenebaum, Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?, 44 WASH. U. J. URB. & CONTEMP. L. 135, 136 (1993); Stephen Jonas, Comment, Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment, 17 COLUM. J.L. & SOC. PROBS. 287, 343-44 (1982).
25. See Jonas, supra note 22, at 290.
26. See id. at 291.
27. See id. at 295.
28. See generally In re Gault, 387 U.S. at 17-18 (1967) (noting that the results of the juvenile court system, “in practice . . . have not been entirely satisfactory”); Hon. Gordon A. Martin, Jr., Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 993, 994-95 (1995) (arguing that removing the secrecy surrounding juvenile proceedings is critical to “rebuilding trust and dissipating the fear that the closed juvenile system fosters”).
29. See Jonas, supra note 22, at 305-06 (stating that the public and the government criticize the juvenile justice system because they feel it is too lenient on young offenders); see also Gilbert Geis, Publicity and Juvenile Court Proceedings, 50 ROCKY MTN. L. REV. 101, 102 (1957) (stating that the secrecy surrounding the juvenile court system has come under attack); Martin, supra note 28, at 393-94 (noting that the theme for the 1995 National Conference on Juvenile Justice was “Strengthening Public Confidence in Juvenile Justice”). The declining confidence in the juvenile justice system may be a result of the public’s perception that crimes committed by juveniles have increased. See Martin, supra note 28, at 398. This perception is based in reality, as juvenile arrests for violent crime increased by 47% between 1988 and 1992. See id. at 393-94.
ings will protect the rights of juvenile offenders, provide better public understanding of the juvenile system, deter would-be juvenile offenders, and garner more support and resources for the juvenile court system in general.  

Advocates of closed proceedings cite rehabilitation and confidentiality as cornerstones of the juvenile court system. Publication of the juvenile's name may stigmatize the juvenile and impede rehabilitation. Furthermore, confidentiality deters juvenile crime committed for the sake of attracting publicity and shields the child's family from unwanted media attention accompanying the child's wrongdoing. 

Although the Supreme Court has held that the public has a right of access to adult criminal trials, the Court has not yet addressed whether the public has a right to attend juvenile proceedings. Maryland allows courts to exclude the public from juvenile proceedings by statute, but there have been no reported cases that directly address this issue. 

b. Prior Restraints.—The Supreme Court first established a presumption that prior restraints on publication are unconstitutional in *Near v. Minnesota*, a case in which the Court struck down a state statute enjoining “malicious, scandalous, and defamatory” publications. In dicta, the Court acknowledged that freedom of the press is not an absolute right. Rather, prior restraints may be permissible during wartime, to bar obscene expression, or to prevent a forceful overthrow of the government. 

30. See Jonas, *supra* note 22, at 297 (enumerating arguments in favor of access and publicity). The Maryland legislature has accepted this reasoning as evidenced by its recent enactment of Senate Bill 560, which requires open juvenile court proceedings absent a showing of good cause to close the proceedings when the juvenile is charged with an offense that would be a felony if committed by an adult. *See Act of May 8, 1997, ch. 314, 1997 Md. Laws 759 (to be codified as amended at Md. Code Ann., Cts. & Jud. Proc. § 3-812(e)(3), (4)).*  
32. See id. at 296.  
33. See id. at 296-97.  
34. See *supra* note 22.  
35. See *supra* note 6 and accompanying text.  
36. 283 U.S. 697 (1931). In *Near*, the State of Minnesota repeatedly enjoined production of a magazine known as *The Saturday Press* under the State's nuisance law. *Id. at 702. Although the periodical had published malicious and scandalous articles about public officials on a regular basis, the Supreme Court ruled that injunctions before publication seriously infringe on the freedom of the press. *Id. at 706, 722-23.*  
37. *Id. at 702.*  
38. *Id. at 716.*  
39. *Id.*
The Supreme Court further explained what may constitute a prior restraint in Pell v. Procunier. In Pell, the Court held that a California statute limiting press interviews with prisoners did not constitute a prior restraint on publication in violation of the First Amendment. The Court reasoned: "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally." Because the state statute did not deny the media access to publicly available information, the state statute at issue did not violate the media's First Amendment rights. In dissent, Justice Powell argued that the California statute violated the media's constitutional right to inform the public about its government. Similarly, Justice Douglas, also dissenting, expressed concern that the Court relied too heavily on the fact that the press had as much access to information as the general public, noting that "'[t]he Constitution specifically selected . . . [the press] to play an important role in the discussion of public affairs.'" Consequently, Justice Douglas found the statute too broad to achieve the government's interest in maintaining prison security and, as such, in violation of the public's right to know as guaranteed by the First Amendment.

In Nebraska Press Ass'n v. Stuart, the Supreme Court struck down a court order for imposing a prior restraint. That order prohibited the media from reporting the names of victims and incriminating statements made by the accused until the court impaneled a jury. Because the case received national exposure, the Court found itself torn between two competing rights—the right to trial by an impartial jury under the Sixth Amendment and the freedom of the press under the First Amendment. The Court declined to rank one fundamental

41. Id. at 835. The California statute prohibited press interviews with particular inmates. Id. at 819. The media still had access to interviews with prison inmates selected at random, but could no longer request to interview particular individuals. Id. at 821. The Court reasoned that the interest of security justified the restrictions on the media. Id. at 827.
42. Id. at 834.
43. Id. at 835.
44. Id. (Powell, J., concurring in part and dissenting in part).
45. Id. at 841 (Douglas, J., dissenting).
46. Id. (alteration in original) (quoting Mills v. Alabama, 384 U.S. 214, 219 (1966)).
47. Id.
49. Id. at 570.
50. Id. at 543.
51. Id. at 542.
52. Id. at 547.
right above the other, but acknowledged the heavy presumption against prior restraints. In striking down the order as unconstitutional, however, the Court noted the availability of other means of controlling pretrial publicity surrounding an open court proceeding short of imposing a prior restraint.

c. Media Publication.—In Cox Broadcasting Corp. v. Cohn, the Supreme Court held that states may not prohibit publication of a rape victim's name when that name is part of publicly available judicial records. Although the Court concluded that the First and Fourteenth Amendments shield the press from liability for truthful publication of material obtained from court records, the Court declined to consider the constitutionality of a state policy prohibiting access to records of juvenile court proceedings.

The Supreme Court addressed the restrictions a trial court may place on media coverage of open juvenile proceedings in Oklahoma Publishing Co. v. District Court. In Oklahoma Publishing, the trial court issued a pretrial order prohibiting the media from publishing the name or photograph of an eleven-year-old boy charged with second degree murder. Because the trial court had opened the juvenile's trial to the public, the Supreme Court relied on Cox and Nebraska Press to conclude that the First and Fourteenth Amendments prohib-

53. See id. at 561 ("But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.").
54. Id.
55. Id. at 563-64. Instead of imposing a prior restraint, the Court suggested that pretrial publicity could be controlled by a change of venue, postponing the trial, thoroughly questioning jurors to eliminate those who had formed opinions as to innocence or guilt before trial, instructing the jury to decide the case based on evidence presented in trial, sequestering jurors, and imposing gag orders on the parties, lawyers, and police. Id.
57. Id. at 496.
58. The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. 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." U.S. Const. amend. XIV.
60. 450 U.S. 308, 310 (1977) (per curiam).
61. Id. at 308-09.
62. Although there is some question as to whether the trial judge opened the juvenile proceedings to the public, the Court noted that the judge, prosecutor, and defense counsel knew that the media were present at the hearing even if the judge never expressly opened the proceedings to the public. Id. at 311. Furthermore, the Court found no evidence that the press acquired the information without "the State's implicit approval." Id.
ited the court from preventing the publication of information made publicly available.\textsuperscript{63}

The Supreme Court considered the tension between juvenile proceedings and the freedom of the press more closely in \textit{Smith v. Daily Mail Publishing Co.}\textsuperscript{64} In \textit{Smith}, the Supreme Court held that states cannot punish the media for truthfully publishing the name of a juvenile delinquent that they had obtained legally.\textsuperscript{65} \textit{Smith} differed from \textit{Cox} and \textit{Oklahoma Publishing} because the newspaper in \textit{Smith} had obtained the juvenile's name by interviewing police and witnesses at the scene of the crime,\textsuperscript{66} whereas the media representatives in the other cases had obtained the names from the court.\textsuperscript{67} The \textit{Smith} Court concluded that the source of the information does not matter, so long as the media had obtained the information legally.\textsuperscript{68} In balancing the juvenile's right to anonymity against the freedom of the press, the Court determined that the First Amendment prevails over the state's interest in maintaining anonymity for juveniles when the media legally obtain their information.\textsuperscript{69}

Although the Supreme Court has not considered whether a state may restrict publication of information that the media obtain from juvenile proceedings that are conditionally open to the media,\textsuperscript{70} state courts have examined the issue.\textsuperscript{71} In \textit{Edward A. Sherman Publishing Co. v. Goldberg},\textsuperscript{72} the Supreme Court of Rhode Island held that a juvenile court may prohibit the media from publishing the identity of a juve-

\begin{itemize}
  \item \textsuperscript{63} Id. at 310.
  \item \textsuperscript{64} 443 U.S. 97 (1979).
  \item \textsuperscript{65} Id. at 105.
  \item \textsuperscript{66} Id. at 99.
  \item \textsuperscript{67} See \textit{Oklahoma Publ'g}, 430 U.S. at 309 (stating that the reporter learned the juvenile's name during open court proceedings); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 472 (1975) (noting that the reporter learned the rape victim's name from examining court documents made available to him in the courtroom).
  \item \textsuperscript{68} \textit{Smith}, 443 U.S. at 103-04.
  \item \textsuperscript{69} Id. at 104.
  \item \textsuperscript{70} See \textit{supra} note 22.
  \item \textsuperscript{71} See, e.g., \textit{San Bernardino County Dep't of Pub. Soc. Servs. v. Superior Ct.}, 283 Cal. Rptr. 332, 334 (Ct. App. 1991) (determining whether the juvenile court abused its discretion by allowing the media to attend juvenile proceedings on condition that the media abide by certain limitations on publication); \textit{In re Minor}, 595 N.E.2d 1052 (Ill. 1992) (considering whether a juvenile court can grant access to juvenile proceedings on condition that the media not disclose the juvenile's identity); \textit{In re H.N.}, 632 A.2d 537, 539 (N.J. Super. Ct. App. Div. 1993) (holding that an order restricting publication of information obtained from juvenile court proceedings was overly broad); \textit{Edward A. Sherman Publ'g Co. v. Goldberg}, 443 A.2d 1252, 1254 (R.I. 1982) (determining whether a juvenile court can allow media access to a juvenile proceeding on condition that the media agree not to publish the name of the minor child).
  \item \textsuperscript{72} 443 A.2d 1252 (R.I. 1982).
\end{itemize}
nile if the media received that information through attendance at a juvenile proceeding. The court also held that a juvenile court may not prohibit the media from publishing information obtained from nonjudicial sources.

Similarly, in In re Minor, the Supreme Court of Illinois upheld the right of a trial court to prohibit the media from publishing the names of juvenile victims of abuse if the media obtained the names of the victims through attendance at the juvenile proceedings. In so ruling, the court emphasized the importance of anonymity for juvenile victims of abuse as opposed to juvenile delinquents.

The Minnesota Court of Appeals has also focused on the juvenile victim's need for anonymity. In Austin Daily Herald v. Mork, the Minnesota Court of Appeals upheld the decision of a trial court that granted media access to the testimony of juvenile victims of sexual abuse, provided that the media not publish the names or juvenile records of the victims and witnesses. The Austin court made clear that its decision did not prohibit the media from disseminating information they obtained from other sources and emphasized that the restrictions on the media did not constitute a prior restraint.

In re Hughes County Action NO. JUV 90-3 represents the minority view with respect to the publication of information and juvenile proceedings by the media. In In re Hughes County, the Supreme Court of South Dakota allowed a trial judge to condition media access to juvenile proceedings on the media's agreement not to publish the

73. Id. at 1259.
74. Id. The court indicated that "nonjudicial" sources referred to information obtained by the media's own investigations or "under similar circumstances." Id.
75. 595 N.E.2d 1052 (Ill. 1992).
76. Id. at 1054.
77. Id. at 1053. The court noted a distinction between the privacy needs of juvenile delinquents and juvenile victims of abuse. Id. at 1056. The court acknowledged that the confidentiality traditionally associated with the juvenile court system had come under attack, but the re-evaluation of the system's confidentiality resulted from the rise in major crimes by juvenile offenders. Id. at 1053. Some believe that publication of the names of juvenile offenders will deter juvenile crime. See id. The court stressed, however, that the juveniles in the instant case were not delinquents, but rather, victims. Id. at 1056. As the Illinois court opined, the juveniles "were thrust into the juvenile system by actions of third parties, not by their own actions." Id. Consequently, the court emphasized a greater need for anonymity when the minor was a victim. Id.
78. 507 N.W.2d 854 (Minn. Ct. App. 1993).
79. Id. at 858. Austin was an adult criminal trial, but the trial court closed the courtroom to the public during the juvenile victims' testimony. Id. at 856.
80. Id. at 858.
81. Id. at 856.
82. 452 N.W.2d 128 (S.D. 1990).
83. See Baltimore Sun, 340 Md. at 451, 667 A.2d at 172.
"names, pictures, place of residence or identity of any parties involved." When the media refused to agree to the limitations, the trial judge closed the proceedings. Notably, the trial court's offer not to close the proceedings prohibited the media from publishing information obtained outside of the court proceedings. The Supreme Court of South Dakota did not view the trial court's decision to close the proceedings as a punishment for the media's refusal to abide by the limitations of the court's offer. Rather, it considered the demands of the trial court an alternative to closing the proceedings entirely.

3. The Court's Reasoning.—In Baltimore Sun Co. v. State, the Court of Appeals held that an order granting media access to juvenile proceedings was unconstitutional to the extent that the order prohibited publication of information obtained from sources outside of such proceedings. In reaching this conclusion, the court considered whether the juvenile court abused its discretion when it barred The Sun from the courtroom after the newspaper published a picture of the juvenile at issue, along with the name "Maurice Bouknight," in violation of the January 17 order. Writing for the court, Chief Judge Murphy noted that the Supreme Court has not decided what conditions are appropriate when granting media access to juvenile proceedings that are otherwise closed. Consequently, the court's opinion focused on decisions from other states regarding the publication of information obtained from sources outside of open juvenile proceedings. Because the judiciary has the discretion to prohibit the media from attending juvenile court proceedings, the court reasoned that courts are permitted to restrict the press when granting access to juvenile proceedings, but the court further held that the juvenile court may not bar publication of information obtained outside of the proceedings.

84. In re Hughes County, 452 N.W.2d at 130.
85. Id.
86. Id. at 132.
87. Id. at 134.
88. Id. at 133.
89. Baltimore Sun, 340 Md. at 460, 667 A.2d at 177.
90. Id. at 447, 667 A.2d at 171.
91. Id. at 449, 667 A.2d at 172. The court did not consider whether the juvenile court had the authority to close the proceedings because neither party challenged the closure. Id. at 447, 667 A.2d at 171.
92. Id. See supra notes 71-88 and accompanying text for a discussion of the other states' treatment of the publication of information concerning juvenile proceedings.
93. Baltimore Sun, 340 Md. at 447, 667 A.2d at 171.
94. Id. at 460, 667 A.2d at 177.
The Court of Appeals examined the juvenile court's January 17 order and the January 26 proposed order to determine if they justified the February 6 order barring *The Sun* from the proceedings. In reviewing the January 17 order, the Court of Appeals acknowledged that the order never specified that the media could not publish Maurice's picture. Therefore, the juvenile court wrongfully treated *The Sun*'s publication of Maurice's picture as a violation of the January 17 order.

The juvenile court's restriction that the media refer to the child as "Maurice" or "Maurice M." also exceeded the permissible restrictions that a court may set. The court proclaimed that the judiciary may not force the media to print specific material as a condition of access to court proceedings unless it is necessary to protect the anonymity of a juvenile and the interest in anonymity outweighs the competing interests of the free flow of information and the media's unfettered editorial control. In so concluding, the court relied on *Miami Herald Publishing Co. v. Tornillo*, which held a state statute unconstitutional because it forced newspapers to print replies from political candidates who responded to editorials published by the newspaper. As in *Tornillo*, the *Baltimore Sun* court determined that the State's interest in protecting Maurice's identity did not justify interference with the newspaper's editorial process by forcing the newspaper to use a specific name to identify the child. According to the court, both prior restraints and government-mandated publication of specific information violate editorial autonomy, and the Supreme Court has never distinguished between the two.

Furthermore, because Maurice Bouknight was not the child's legal name, *The Sun* did not violate that aspect of the order prohibiting the use of his legal name. The Court of Appeals acknowledged, however, that *The Sun* technically violated the January 17 order when

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95. *Id.* at 454, 667 A.2d at 174-75.
96. *Id.* at 455, 667 A.2d at 175.
97. *Id.* The State argued that publication of the photograph violated the "spirit" of the court order, but the Court of Appeals confirmed that the media is entitled to rely on the actual wording of the order. *Id.* Furthermore, if the juvenile court intended to prohibit the publication of pictures, it should have explicitly addressed this condition. *Id.*
98. *Id.*; see *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that the government may not compel the media to publish information).
101. *Id.* at 243.
102. *Baltimore Sun*, 340 Md. at 455, 667 A.2d at 177.
103. *Id.* at 453, 667 A.2d at 174.
104. *Id.* at 455, 667 A.2d at 175.
it captioned Maurice's photograph "Maurice Bouknight" instead of "Maurice" or "Maurice M." as the order required. Even though that provision of the January 17 order was unconstitutional, The Sun should have sought judicial review of the order instead of violating it. Consequently, the Court of Appeals approved of the juvenile court's consideration of the technical violation of the January 17 order in later deliberations over The Sun's continued access to the proceedings.

The Court of Appeals next considered the juvenile court's January 26 proposed order. It would have been unconstitutional for the juvenile court to condition access on publication of the proposed order if The Sun had not violated the January 17 order. Because The Sun technically violated the January 17 order, however, the juvenile court could have required The Sun to publish a subsequent court order if publication would protect the juvenile's anonymity and the State's interest in anonymity outweighed the competing interests of the free flow of information and the media's editorial freedom. The Court of Appeals could not envision how the publication of the proposed order would have helped to protect Maurice's anonymity, and, therefore, the juvenile court could not condition further access to the proceedings based on The Sun's publication of the proposed order.

After careful review of the preceding order and proposed order, the Court of Appeals determined that the newspaper's violation of the January 17 order did not justify the juvenile court's February 6 order barring The Sun from the proceedings. Consequently, the court va-

105. Id.
106. Id. at 456, 667 A.2d at 175.
107. Id.
108. Id. at 457, 667 A.2d at 176.
109. Id.
110. Id.
111. Id.
112. Id. at 456, 667 A.2d at 175. The court declared that although referring to the child as "Maurice Bouknight" constituted a technical violation of the order, it did not justify banning The Sun from all future proceedings. Id. at 459, 667 A.2d at 177. The court reasoned that The Sun's reference to Maurice as "Maurice Bouknight" was "relatively insignificant" and did not "impair Maurice M.'s anonymity." Id. It was public knowledge that Jacqueline Bouknight was Maurice's mother, and anyone could have reached the logical assumption that Maurice's last name was also Bouknight. Id. The court noted that "to the extent that The Sun's caption convinced anyone that Maurice M. was named Maurice Bouknight, that person would be even farther from knowing Maurice M.'s true name than before the publication of the article." Id. Finally, both the Baltimore City Police Department and the attorney representing Maurice stressed that publicity was in the child's best interest because it could help to find him. Id.
cated the February 6 order and required the juvenile court to treat The Sun the same as all other media representatives when granting access to the proceedings.113

4. Analysis.—The Supreme Court’s decisions in Oklahoma Publishing and Smith required the Court of Appeals to find the juvenile court’s orders unconstitutional insofar as the orders prohibited publication of information obtained from nonjudicial sources.114 The critical issue in this case, therefore, was whether the court may prohibit the media from publishing material revealed during a juvenile proceeding that was open to the media but lawfully could have been closed.115

The court’s decision in Baltimore Sun allows the media to attend juvenile court proceedings, but still gives judges control over the media by permitting judges to restrict what the media publish, so long as the information is taken from court proceedings.116 At first glance, the court’s ruling appears to be a good compromise to the problem of media access to juvenile courts because it allows dissemination of information to the public without jeopardizing the juvenile’s privacy.117 The holding in Baltimore Sun, however, blurs the line between a free press and government-controlled access to information. Media restrictions encourage “timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.”118 Allowing partial disclosure of information revealed at juvenile proceedings risks distorting the truth because missing facts may warp the public’s perception of the case.119

Moreover, the court’s decision to allow a juvenile court to restrict media publication imposes a prior restraint because the media receive information from the proceedings and then are forbidden to publish it.120 The First and Fourteenth Amendments will not allow a state to

113. Id. at 458, 667 A.2d at 176.
114. Id. at 448-49, 667 A.2d at 171-72.
115. Id.
116. See supra note 89 and accompanying text.
120. See In re Minor, 595 N.E.2d 1052, 1057 (Ill. 1989) (Miller, J., dissenting) (stating that a circuit court order prohibiting the press from publishing the name of a minor of-
restrict the publication of information obtained through attendance at open court proceedings because to do so would constitute a prior restraint. 121 Even though a juvenile proceeding could have been closed, once the media gain access, the proceeding should be considered open. 122 The Supreme Court has recognized that the judiciary has no special privilege to "suppress, edit, or censor events which transpire in proceedings before it." 123 Consequently, courts may not impose a prior restraint upon the media under the justification that the judiciary holds a privileged place in government. If the media acquire information as a result of lawful access to court proceedings, the judiciary should not censor that information. 124

Yet a court order imposing a prior restraint can overcome the heavy presumption against prior restraints if the "evil" associated with publication justifies such a serious measure and restricting publication is necessary to avoid the danger. 125 Nevertheless, the possibility still exists that the media will publish information concerning a juvenile, despite a prior restraint, because the media may have obtained the information from nonjudicial sources. 126 The prior restraint will not pass constitutional scrutiny if it will not avert the harm it seeks to prevent. 127

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121. See Oklahoma Publ'g Co. v. District Ct., 430 U.S. 308, 310 (1977).
122. See In re Minor, 595 N.E.2d at 1059 (Miller, J., dissenting) (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568 (1976), for the proposition that once a proceeding is open to the media, the information presented there is publicly revealed); In re Minor, 563 N.E.2d 1069, 1079 (Ill. App. Ct. 1990) (Steigmann, J., dissenting) (stating that because the court allowed the media to be present at a juvenile hearing, any information disclosed at that hearing was obtained by lawful means), aff'd, 595 N.E.2d 1052 (Ill. 1992).
124. See In re Minor, 595 N.E.2d at 1059 (Miller, J., dissenting).
125. See United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
126. See supra notes 70-88 and accompanying text.
127. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976) ("Nor can we conclude that the restraining order actually entered would serve its intended purpose.").
A prior restraint cannot be justified in juvenile court proceedings simply because the juvenile court system has historically rested on principles of confidentiality. Commentators expound at length on the necessity for confidentiality in the juvenile court system. The juvenile proceeding at issue in Baltimore Sun concerned the abuse of a minor. Arguably, of all the youths involved in the juvenile court system, minor victims of abuse need the most protection from publicity because they find themselves in court through no fault of their own. The Supreme Court, however, has not recognized a prevailing privacy interest for victims. The Supreme Court ruled in Cox that an adult rape victim's interest in anonymity does not outweigh the constitutional interest in preserving a free press. Moreover, in Globe Newspaper Co. v. Superior Court, the Supreme Court held that despite the state's interest in protecting juvenile rape victims from embarrassment and the harm attendant to media publication, that interest does not weigh heavily enough to justify a mandatory closure rule of adult criminal trials during testimony of juvenile victims. Consequently, while shielding victims from public scrutiny is desirable, the

128. See Kathleen M. Laubenstein, Comment, Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?, 68 TEMP. L. REV. 1897, 1901 (1995) ("Confidentiality has been a hallmark of our juvenile justice system.").

129. See Greenebaum, supra note 22, at 142-43 (listing justifications for confidentiality within the juvenile court system); Jonas, supra note 22, at 296-97 (exploring arguments in favor of confidentiality for juvenile delinquents); Laubenstein, supra note 128. (identifying the beneficial effects confidentiality has on juvenile delinquents).

The Maryland legislature recently has rejected the arguments for confidentiality when it comes to juvenile offenders charged with serious crimes. See supra note 6.

130. Baltimore Sun, 340 Md. at 443-44, 667 A.2d at 169. Specifically, the proceeding sought to determine the whereabouts of a minor placed under protective services by DSS.

131. While juvenile delinquents enter the court system because of their wrongful deeds, minor victims have done nothing wrong. Juvenile victims come to the system as a result of the wrongful deeds of others.

132. See, e.g., Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 610-11 (1982) (holding that a state statute that required a closed courtroom in every proceeding while minor victims testify in sex-offense trials violated the First Amendment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding that a rape victim's name can lawfully be reported when the news outlet obtained the information from the public record).

133. Cox, 420 U.S. at 494-95 ("Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.").


135. Id. at 607-08. Although the Court recognized that protecting the juvenile victim is a compelling interest, the Court stated that closing the courtroom must be handled on a case-by-case basis because the interest is not great enough to warrant a closure in every case. Id.
Cox Court clearly indicated that that laudable goal is not to be attained at the expense of the First Amendment.\textsuperscript{136} furthermore, even though anonymity for juvenile victims may constitute a compelling state interest, the extent to which modern juvenile courts can preserve anonymity is questionable, even when the court excludes the press from the hearings.\textsuperscript{137} Conditional media access to juvenile courtrooms is a method some believe will help keep juvenile names confidential,\textsuperscript{138} but after Oklahoma Publishing and Smith, the press can lawfully print any information obtained through “routine reportorial techniques.”\textsuperscript{139} In Baltimore Sun, the newspaper could have lawfully reported Maurice’s name and the circumstances surrounding the case if it had obtained the information from witnesses, hospital personnel, DSS employees, the police, or anyone else having information. The Sun likely knew about the history and surrounding circumstances of the case from the related decisions rendered in the Court of Appeals and the United States Supreme Court.\textsuperscript{140} It is doubtful that The Sun’s reporters needed to be at the proceedings to acquire basic information surrounding the case. Indeed, The Sun obtained the photograph of Maurice from the police department, not the juvenile proceedings.\textsuperscript{141} Restricting the media’s ability to publish information obtained from attending juvenile pro-

\textsuperscript{136} Cox, 420 U.S. at 494-95.
\textsuperscript{137} In San Bernardino Department of Public Social Services v. Superior Court, 283 Cal. Rptr. 382 (Ct. App. 1991), the trial judge admitted that even if he prevented the press from attending a juvenile proceeding, the publicity surrounding the case would continue. \textit{Id.} at 344. He further stated that “[t]he only control I can gain is by allowing the press in.” \textit{Id.} (internal quotations omitted).

Even if the media maintain a minor’s anonymity, the details of a juvenile’s record may be disclosed in other ways. Police departments sometimes have the discretion to disclose a minor’s record and often disclose the information to the FBI, the armed services, and social services agencies upon request. \textit{See In re Gault}, 387 U.S. 1, 24-25 (1967). In addition, many employers design their employment application forms with the intent to elicit information regarding past juvenile arrests. \textit{See id.}

\textsuperscript{138} See Jonas, \textit{supra} note 22, at 329; Laubenstein, \textit{supra} note 128, at 1898.
\textsuperscript{139} Smith v. Daily Mail Publ’g Co., 443 U.S. 97 (1979). In Smith, the Supreme Court considered whether a state can prohibit the publication of an alleged juvenile delinquent’s name if the newspaper learned the minor’s identity through “routine reportorial techniques.” \textit{Id.} at 103-05. Although the Court did not define “routine reportorial techniques,” it sided with the newspaper in Smith, which learned the youth’s name by monitoring police radio frequencies, sending reporters to the crime scene, and interviewing witnesses, police, and the assistant prosecuting attorney. \textit{Id.} at 99.

\textsuperscript{140} \textit{See In re Maurice M.}, 314 Md. 391, 393, 550 A.2d 1135, 1136 (1988) (considering whether a mother may invoke the Fifth Amendment privilege against self-incrimination when ordered by the juvenile court to disclose the whereabouts of a minor child under the protective services of the state), \textit{rev’d sub nom. Baltimore City Dep’t of Soc. Servs. v. Bouknight}, 493 U.S. 549 (1990).

\textsuperscript{141} \textit{Baltimore Sun}, 340 Md. at 460, 667 A.2d at 177.
ceedings has a minimal effect on shielding the juvenile from public scrutiny because the most basic aspects concerning the juvenile and the nature of the proceeding are often matters that can be learned from extra-judicial sources. Because the interest in anonymity cannot be preserved by conditional media access, the interest in protecting the media’s First Amendment rights should weigh heavier in the analysis.

Furthermore, unfettered press access to juvenile proceedings may foster positive outcomes. The press can help the public understand the methods and deficiencies of the system. In the past, the system has been reticent to ensure that juvenile delinquents receive the procedural safeguards that adults receive. The sometimes harsh reality of the juvenile justice system has caused concern that the original intentions of the system have been defeated. Even though, historically, juvenile proceedings have been informal attempts to rehabilitate young offenders, the modern juvenile court system does not comport with the original plan because the proceedings have become more formalized and confidentiality is no longer assured.

142. See San Bernardino, 283 Cal. Rptr. at 336 (“We believe the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs.” (internal quotations omitted)).

143. See In re Gault, 387 U.S. 1, 35-57 (1967) (extending due process requirements to juvenile court proceedings—specifically, written notice of charges, the right to counsel, the constitutional privilege against self-incrimination, and the right of confrontation and sworn testimony of witnesses available for cross-examination).

144. The Supreme Court has noted that the juvenile court system has not always provided children with “careful, compassionate, individualized treatment” and that “[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.” Id. at 18.

145. See supra notes 31-33 and accompanying text.

146. The juvenile court system began as an informal system with few characteristics of the adult court system. See In re Gault, 387 U.S. at 15-16. In that case, the Court observed that under the juvenile justice system “[t]he rules of criminal procedure were . . . altogether inapplicable. The apparent rigidities, technicalities, and harshness . . . were therefore to be discarded.” Id. Since its inception, however, the system has accepted more procedural safeguards that bring it more in line with adult courts, as evidenced by the Court’s holding that Arizona’s Juvenile Code violated due process requirements. See id. at 3. Likewise, the Supreme Court compromised the confidentiality traditionally associated with the system when it affirmed the media’s right to publish information concerning minors involved in cases before the juvenile court if the press obtained the information lawfully. See Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 105-06 (1979) (holding that the state may not prohibit a newspaper from publishing the name of a juvenile delinquent if the name was lawfully obtained); Oklahoma Publ’g Co. v. District Ct., 430 U.S. 308, 310 (1977) (per curiam) (holding that the court cannot prohibit publication of information obtained at an open juvenile court proceeding).

The confidentiality traditionally associated with the juvenile court system has further eroded in Maryland with the passage of Senate Bill 560, which requires open court pro-
Of course, if courts cannot compromise between juvenile anonymity and the free flow of information, the danger exists that juvenile courts will deny media access to proceedings like the South Dakota court did in *In re Hughes County Action No. JUV 90-3*.147 Although this appears to be a possible result, denying media access to juvenile proceedings will not prevent all publicity surrounding juvenile proceedings because the media can lawfully publish any information obtained from extra-judicial sources.148 By allowing the media to attend juvenile proceedings, at least the courts can be assured that the information obtained in court is accurate and reliable. Unfortunately, the same cannot always be said for information obtained elsewhere. The accuracy of the information the media publish should be a strong incentive for juvenile courts to allow media attendance at juvenile proceedings instead of denying access.

5. Conclusion.—The court held in *Baltimore Sun* that juvenile courts may prevent the media from publishing information obtained solely from attending juvenile proceedings. At first glance, this appears to be a good compromise to the alternative of closing juvenile proceedings to the media, but closer inspection of this alternative reveals significant shortcomings. If a trial judge opens juvenile proceedings to the media, no restrictions should be placed upon what the press may publish. Allowing the media to attend juvenile proceedings but restricting publication amounts to a prior restraint, even if the proceedings could have lawfully been closed to the media. Although protecting the identity of a juvenile victim is a compelling state interest, it cannot justify the imposition of a prior restraint. Consequently, the *Baltimore Sun* court's compromise between the interests of anonymity and the free flow of information results in more problems than solutions.

**Heather A. Doherty**

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147. 452 N.W.2d 128 (S.D. 1990); see *supra* notes 81-88 and accompanying text.

148. See *supra* notes 60-69 and accompanying text.
B. Extending to White Potential Jurors the Equal Protection Right to a Racially Neutral Jury Selection Process

In *Gilchrist v. State*, the Court of Appeals held that the reasons proffered for a criminal defendant's peremptory strikes of white venirepersons constituted a pretext for racial discrimination and, thus, violated both Article 24 of the Maryland Declaration of Rights and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In so holding, the court extended to white potential jurors the constitutional right to a racially neutral jury selection process.

This Note will analyze two aspects of the court's holding: (1) the extension of equal protection precedent to cover white venirepersons as constituents of a "cognizable racial group" and (2) the application of the relevant equal protection test. Given the current state of constitutional jurisprudence, the Court of Appeals correctly extended the right to a racially neutral jury selection process to white venirepersons. Because the court misapplied the applicable constitutional test, however, future courts may treat this case as an exception rather than the rule.

1. The Case.—The State charged Gary Gilchrist on two counts: the distribution of cocaine and the possession of cocaine with the intent to distribute. During jury selection in the Circuit Court for Baltimore City, the State raised an objection to alleged attempts by the defense to strike peremptorily all white venirepersons from the jury pool. The trial court found that the defense had exercised seven peremptory strikes and that all of the stricken venirepersons had been

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2. *Id.* at 623-25, 667 A.2d at 884-85. Article 24 states: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of RTS. art. 24. The Equal Protection Clause of the Fourteenth Amendment states: "[N]or shall any State... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. For an explanation of the interpretative relationship between Article 24 and the Fourteenth Amendment, see infra notes 81-82, 109 and accompanying text.
4. *Id.* at 611, 667 A.2d at 878.
5. *Id.* at 612, 667 A.2d at 878-79.
Upon this finding, the trial judge ordered the defense to explain its reasons for striking each of the seven potential jurors.

The defense explained that it struck two of the venirepersons because they had been victims of crime and another because he had stared at the defendant, making the defendant uncomfortable. The trial judge found these reasons acceptable, but she found the reasons for striking the four other jurors unsatisfactory. The defense could not remember the basis for striking one of the venirepersons, but struck a second venireperson because she reminded the defense counsel of her Catholic school teacher. The defense struck a third venireperson because of his youth, his apparent inability to fit in with the others on the panel, and because he did not seem to "[relate] to anything in the room." Finally, the defense struck a fourth potential juror on the grounds that his apparel, education, and manner suggested that he would be unable to relate to the defendant.

One by one, the trial judge rejected each of these explanations. Concluding that the defense had not rebutted the presumption of racial motivation by offering satisfactory explanations for four of the seven peremptory strikes, the trial court dismissed the entire jury pool and began a second jury selection with a different venire. After finally impaneling a jury, the court asked the defense whether the new

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6. Id., 667 A.2d at 879.
7. Id., 667 A.2d at 878-79. Referring to the stricken jurors, the judge stated, "Let's go through them one by one and give me the reasons you struck them." Id., 667 A.2d at 879 (internal quotations omitted).
8. Id. at 612 n.1, 667 A.2d at 879 n.1.
9. Id.
10. Id. at 612, 667 A.2d at 879.
11. Id. at 613-16, 667 A.2d at 879-80.
12. Id. at 615-16, 667 A.2d at 880.
13. Id. at 612-13, 667 A.2d at 879.
14. Id. at 613, 667 A.2d at 879 (internal quotations omitted). The defense stated that this potential juror did not look at the defendant and acted like he did not want to be in court. Id.
15. Id. at 613-15, 667 A.2d at 879-80. This potential juror wore a navy blazer and khaki slacks, had apparently finished college, and seemed rather "studious." Id.
16. Id. at 612-16, 667 A.2d at 879-80.
17. Id. at 615-16, 667 A.2d at 880. Explaining this presumption, the trial judge stated, "The Court is saying you have to, when you have struck seven jurors, potential jurors, . . . and they are all white and they all have different profiles, you're going to have to come up with a satisfactory explanation that persuades me that your reason for striking [them] was not racial." Id. at 615, 667 A.2d at 880 (internal quotations omitted).
18. Id. at 616, 667 A.2d at 880.
jury was acceptable, and the defense affirmed.19 Trial commenced, and the jury convicted Gilchrist of both charges.20

On appeal, the defense made two arguments. First, the defense contended that it could use peremptory strikes in a racially discriminatory fashion so long as the venirepersons were white. Alternatively, the defense argued that the State had failed to make a prima facie showing of racially discriminatory peremptory strikes.21 The State argued that the defense's affirmance of the jury as acceptable precluded appellate review of the dismissal of the first venire.22

The Court of Special Appeals rejected the State's assertion that the defense had essentially waived its right to allege error in the dismissal of the initial venire.23 Reaching the merits of the case, the court dismissed both of the defendant's arguments, holding that the State had established a prima facie case of racial discrimination24 and that the Equal Protection Clause "applie[d] with equal force to the exercise of peremptory challenges in a manner discriminatory to blacks or whites."25 The Court of Appeals granted certiorari on cross-petitions from both parties.26

2. Legal Background.—By definition, a peremptory challenge requires no explanation.27 Thus, requiring a party to produce an explanation for its use of the challenge is fundamentally at odds with policy implications favoring the strike. As the Supreme Court duly noted:

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice. . . .'"

19. Id.
20. Id.
23. Id., 627 A.2d at 51-52.
24. Id. at 76, 627 A.2d at 54.
25. Id. at 75-76, 627 A.2d at 54. The Court of Special Appeals noted that even if the defendant prevailed on appeal, "the relief available would be a new trial . . . which was essentially what [the defense] received when the court dismissed the first panel and began jury selection anew." Id. at 77, 627 A.2d at 55.
The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. Nonetheless, courts have come to control the use of peremptory challenges, at least when opposing parties allege racially discriminatory abuses of the strike.

a. The Question of Right.—

(i) Racially Neutral Peremptory Strikes as Required by the Supreme Court of the United States.—

(1) The Defendant's Right to a Racially Neutral Jury Selection Process.—In 1879, the Supreme Court of the United States addressed the issue of whether, in light of the Fourteenth Amendment to the Constitution, a criminal defendant had a right to a trial by a jury impaneled from a venire whose members were selected in a racially nondiscriminatory manner. In *Strauder v. West Virginia*, an African-American defendant challenged a state statute that allowed only white males to serve as jurors. Expounding upon the history and policy behind the Fourteenth Amendment and the significance of a jury of one's "peers or equals," the Court struck down the statute as violative of the Constitution. In so ruling, the Court began to sow the seeds for the recognition of a defendant's right to a racially neutral jury selection process.


29. 100 U.S. 303 (1879).

30. Id. at 305. The Court did not address the issue of gender. However, in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court held that civil litigants may not discriminate on the basis of gender when exercising peremptory strikes. See id. at 143-46. The states did not ratify the Nineteenth Amendment, which gave women the right to vote, until 1920. See U.S. CONST. amend. XIX.

31. *Strauder*, 100 U.S. at 306-07. The Court emphasized the central purpose of the Fourteenth Amendment: ""No one can fail to be impressed with the one pervading purpose found in all the [post-Civil War] amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race . . . ."" Id. at 307 (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)).

32. Id. at 308-09. The Court insisted that ""the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure."" Id. at 308.

33. Id. at 309-10. The Court noted that ""[i]t is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former."" Id. at 309.
In 1965, however, the Court temporarily delayed the germination of this right. In *Swain v. Alabama*, the Supreme Court considered whether the State's purposeful use of peremptory challenges to strike African Americans from a criminal case against an African-American defendant constituted a denial of that defendant's right to the equal protection of the laws. While acknowledging that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors . . . violates the Equal Protection Clause," the Supreme Court nevertheless extolled the virtues of the peremptory system and refused to hold that "the striking of Negroes in a particular case is a denial of equal protection of the laws."

Twenty-one years later, in *Batson v. Kentucky*, the Court proved to be more fertile ground for cultivating a defendant's right to a racially neutral jury selection process. In *Batson*, the Court reconsidered whether the purposeful use of peremptory challenges to strike African Americans on the venire from a criminal case involving an African-American defendant constituted a violation of that defendant's right to equal protection of the laws. The Court carefully maneuvered around its holding in *Swain* and held that "[p]urposeful racial dis-

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34. 380 U.S. 202 (1965).
35. See id. at 204-05. The State contended that the peremptory system provided "justification for striking any group of otherwise qualified jurors . . . whether they be Negroes, Catholics, accountants or those with blue eyes." Id. at 212.
36. Id. at 203-04.
37. Id. at 219. The Court asserted that "[t]he persistence of peremptories and their extensive use demonstrate . . . that [the] peremptory challenge is a necessary part of trial by jury." Id.
38. Id. at 221 (emphasis added). The Court added:

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

Id. at 222 (emphasis added). Note the Court's deference to the policy implications favoring the unencumbered use of the peremptory strike. See also *supra* note 28 and accompanying text. It is also interesting that the Court referred to a "presumption" of fair use of racially motivated peremptory challenges without explaining how and whether the presumption was rebuttable. Note too that the State had argued that it could strike any group of potential jurors without explaining why. See *supra* note 35. With its holding in *Swain*, the Supreme Court essentially accepted the State's argument.
40. Id. at 82.
crimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." From a judicial policy perspective, the Court was also concerned that race-based exclusion of potential jurors denied those jurors equal protection and that the harm of such action undermined the community's confidence in the judicial system.

The Court developed a three-step process for determining whether the equal protection right of a criminal defendant to a racially neutral jury selection process had been violated. First, *Batson* required the opponent of a peremptory challenge to make out a prima facie case of purposeful discrimination. Second, once the opponent made out a prima facie case, the burden would shift to the State to demonstrate that "'permissible racially neutral selection criteria and procedures . . . produced the monochromatic result.'" Finally, the trial court had to make the ultimate determination of whether the defense established purposeful discrimination.

In *Purkett v. Elem*, the Supreme Court revisited the judicial analysis under this three-step process. In *Purkett*, the prosecution exercised its peremptory challenges to strike two African Americans. The defense objected, but the prosecution was adamant that it did not care for jurors with facial hair and that the stricken African Americans were the only two individuals on the venire with any type of whiskers.

41. Id. at 86 (emphasis added). In a footnote, the Court stated, "To the extent that anything in *Swain* . . . is contrary to the principles we articulate today, that decision is overruled." Id. at 100 n.25 (citation omitted).
42. Id. at 79, 87-88.
43. Id. at 93-97. The Court further subdivided this first step:
   [First,] the defendant . . . must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
   Id. at 96 (citations omitted).
44. Id. at 94 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)). In this step, the state "must articulate a [racially] neutral explanation related to the particular case to be tried" and "must give a 'clear and reasonably specific' explanation of [its] 'legitimate reasons.'" Id. at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). Further, the state cannot "rebut the defendant's case merely by denying that [it] had a discriminatory motive." Id. at 98.
45. Id. at 98.
47. Id. at 1770-71.
48. Id. at 1770.
Without explanation, the state trial court overruled the objection. On appeal, however, the United States Court of Appeals for the Eighth Circuit held that the explanations proffered by the prosecution were "'pretextual,' and that the state trial court had 'clearly erred' in finding that . . . [there] had not been intentional discrimination." The Supreme Court reversed the Eighth Circuit's holding on the grounds that it "erred by combining Batson's second and third steps into one." Specifically, the Supreme Court criticized the Eighth Circuit's requirement "that the justification tendered at the second step be not just neutral but also . . . a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected." The Supreme Court explained that the Eighth Circuit, by making such a requirement, misconstrued the language in Batson that "the proponent of a strike 'must give a "clear and reasonably specific" explanation of his "legitimate reasons for exercising the challenges."' This language, the Court stated, was merely a "warning . . . meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." The Court concluded that as the prosecutor had offered racially neutral explanations at step two of the Batson inquiry, the trial court had not erred in accepting these explanations at this step. Accordingly, the Court reversed the judgment of the Eighth Circuit and remanded the case for a final determination.

(2) From the Undergrowth: The Burgeoning Right of the Potential Juror.—From Batson, a parallel equal protection right developed. Not only did Batson hold that racially motivated peremptory strikes denied
defendants their equal protection rights, it also held that such challenges affected the rights of excluded jurors and harmed the community at large as well. In 1991, the right of the potential juror to a racially neutral jury selection process took root in two significant Supreme Court decisions.

In Powers v. Ohio, the prosecution used its peremptory strikes to remove six African Americans from the venire in a criminal trial. The defendant, a white male, objected to these strikes, but the trial court overruled the objection. Reversing the lower court's ruling, the Supreme Court noted that "Batson was designed "to serve multiple ends[ ]" and held that the Equal Protection Clause prohibited the State from exercising race-based peremptory challenges. The Court further held that a defendant had standing to raise an equal protection challenge on behalf of excluded jurors. Thus, while the defendant prevailed in Powers, the Court's reasoning focused entirely on the venireperson's, rather than the defendant's, equal protection rights.

Seizing upon its holding in Powers, the Supreme Court next extended the right of the potential juror in the civil context. In Edmonds v. Leesville Concrete Co., the Court easily concluded that private litigants in a civil trial essentially fulfilled a governmental function in impaneling a jury; therefore, the peremptory challenge, as an essential part of this process, also constituted state action. Following this line of reasoning, the Court held that the use of peremptories had to

57. See supra note 42 and accompanying text.
59. Id. at 402-03.
60. Id.
62. Id. at 409. In so holding, the Court also relied on the Civil Rights Act of 1875. Id. at 402, 408-09. This Act provides, in pertinent part:
No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.
63. Powers, 499 U.S. at 415. In its analysis, the Court adopted the theory of third-party standing. See id. at 410-15.
65. See id. at 621-28.
66. See id. at 621-22. The Court made three specific inquiries in reaching its conclusion: "the extent to which the actor relies on governmental assistance and benefits[,] . . . whether the actor is performing a traditional governmental function[,] . . . and
conform with the provisions of the Equal Protection Clause in that they could only be exercised in a racially nondiscriminatory manner.\textsuperscript{67}

Thus far, the Court had foreclosed the exercise of racially motivated peremptory strikes in both the civil context and on the part of the state in a criminal trial. In \textit{Georgia v. McCollum},\textsuperscript{68} the Court considered the inevitable question of whether the Fourteenth Amendment also precluded a criminal defendant from using racially motivated peremptory challenges.\textsuperscript{69} In \textit{McCollum}, the trial court denied the State's pre-jury-selection motion to prohibit the white defendants from peremptorily striking African-American venirepersons on the basis of race.\textsuperscript{70} In considering the difficult issue at bar, the Supreme Court addressed four questions in its analysis: (1) "whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by \textit{Batson}";\textsuperscript{71} (2) "whether the exercise of peremptory challenges by a criminal defendant constitutes state action";\textsuperscript{72} (3) "whether prosecutors have standing to raise this constitutional challenge";\textsuperscript{73} and (4) "whether the constitutional rights of a criminal defendant nonetheless preclude the extension of [the Court's] precedents to this case."\textsuperscript{74} The Court answered the first three in the affirmative and the last in the negative, holding that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."\textsuperscript{75}

With respect to the last question, the Court addressed head-on the competing rights of the defendant and those of the potential juror. The Court first reiterated the notion that the Constitution guaranteed no right to peremptory challenges and added that "'if race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of

\begin{itemize}
\item \textsuperscript{67} \textit{Id.} at 628. The Court concluded that either side of a civil dispute would have standing to raise equal protection claims on the behalf of excluded venirepersons. \textit{Id.}
\item \textsuperscript{68} 505 U.S. 42 (1992).
\item \textsuperscript{69} \textit{Id.} at 44.
\item \textsuperscript{70} \textit{Id.} at 44-45.
\item \textsuperscript{71} \textit{Id.} at 48; see also supra notes 41-42 and accompanying text.
\item \textsuperscript{72} \textit{McCollum}, 505 U.S. at 48; see also supra note 66 and accompanying text.
\item \textsuperscript{73} \textit{McCollum}, 505 U.S. at 48; see also supra note 63 and accompanying text.
\item \textsuperscript{74} \textit{McCollum}, 505 U.S. at 48.
\item \textsuperscript{75} \textit{Id.} at 59. The Court concluded that the defense harmed the excluded jurors and the community at large, that the defendant's use of peremptories constituted state action, and that the State had standing to raise the equal protection rights of the excluded jurors. \textit{Id.}
\end{itemize}
the Constitution." It is important to note that the competing rights at issue in *McCollum* were not identical, for the defendant had no equal protection claim against the State. Rather, the potential jurors' rights to a racially neutral jury selection process came to parallel that same right of the criminal defendant.

(ii) Racially Neutral Peremptories as Required by the Maryland Court of Appeals.—In order to circumvent *Swain*, many state courts sought relief for criminal defendants via their own state constitutions. Although the Maryland Court of Appeals declined to go this far, it did entertain the idea. In *Lawrence v. State*, an African-American defendant challenged the prosecution's striking of the only three African Americans on the venire. The Court of Appeals discussed the relationship between the Equal Protection Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights and explained that, although the two were jurisprudentially related, "a violation of one [was] not necessarily a violation of the other." The court stated that it agreed that "peremptory challenges [sic] may not be exercised to exclude individuals from the jury solely on the basis of race," but the court refused to abandon *Swain* and held that the defendant failed to prove purposeful racial discrimination.

On the eve of *Batson*, the Court of Appeals once again considered the issue. In *Evans v. State*, the prosecution used eight of its ten peremptories to strike African Americans from the venire for a trial of an African-American defendant. The court assumed, arguendo, that the defendant had made out a prima facie case of a constitutional violation. In the final analysis, however, the court concluded that other evidence rebutted the inference of racial discrimination.
Hence, the court effectively declined the invitation to go beyond the standards enunciated in Swain.

In the wake of Batson, however, the Court of Appeals more aggressively disregarded Swain. In Stanley v. State,87 the State used its peremptory challenges to strike all or most of the African-American venirepersons from jury service in two criminal trials involving African-American defendants.88 Eager "to tell the trial court 'how to do it,'"89 the Court of Appeals fully expounded upon the Supreme Court's holding in Batson,90 adopted the three-step process announced in that case,91 and remanded the cases at bar for a final determination.92 Thus, the right of a defendant to a racially neutral jury selection process took root in Maryland. The state would have to wait, however, for a final determination of the right of the potential juror.

b. The Question of Race.—

(i) "Cognizable Racial Groups" in the United States Supreme Court.—As discussed, Batson articulated a three-step process for determining the merits of a Batson challenge.93 Batson further subdivided the first step of this process—making out a prima facie case of racial discrimination—to require a defendant to show that she was a member of a "racial group capable of being singled out for differential treatment."94 Given the Supreme Court's holding in McCollum95 and the burgeoning right of the excluded juror, the defendant's race would not necessarily be determinative. At a minimum, however, the race of the venireperson would be.

In Batson, as in most of the cases discussed above, African Americans raised the equal protection claims. In Hernandez v. New York,96 however, the Supreme Court implied that the Batson analysis should not be limited to this group alone.97 Although the Hernandez Court ultimately rejected the Batson challenge at bar, it acknowledged that

87. 313 Md. 50, 542 A.2d 1267 (1988).
88. Id. at 54-55, 542 A.2d at 1269.
89. Id. at 68, 542 A.2d at 1276.
90. See id. at 55-63, 542 A.2d at 1269-73.
91. See id. at 64-76, 80-88, 542 A.2d at 1273-79, 1282-85; see supra notes 43-45 and accompanying text.
92. Stanley, 313 Md. at 76, 88, 542 A.2d at 1279, 1285.
93. See supra notes 43-45 and accompanying text.
95. See supra notes 68-76 and accompanying text.
97. Id. at 371.
proficiency in the Spanish language would be an acceptable characteristic for establishing one as a member of the Latino racial group.\footnote{98}

(ii) "Cognizable Racial Groups" in the Court of Appeals of Maryland.—In Mejia v. State\footnote{99} the Court of Appeals, following the Supreme Court's lead in Hernandez, concluded that "[b]lacks are not the only cognizable group to which the Batson rule applies."\footnote{100} Applying Batson's criteria, the court held that the prosecution's strike of the only Hispanic on the venire made out a prima facie case of racially discriminatory peremptory challenges.\footnote{101}

Although other courts have recognized additional cognizable groups,\footnote{102} neither the Supreme Court nor the Maryland Court of Appeals has established any bright-line rules identifying such groups. Hence, courts have addressed the issue in a case-by-case fashion.

3. The Court's Reasoning.—In Gilchrist v. State, the defense maintained that white persons did not constitute a cognizable racial group for the purposes of Batson, and, in the alternative, that the State failed to make out a prima facie case of racial discrimination.\footnote{103} The court rejected both of these assertions. With respect to the first contention, the defense argued that the Supreme Court intended Batson to function as a remedial measure "to address historical discrimination in jury selection."\footnote{104} Because whites traditionally had not been the target of race discrimination in jury selection, the defense argued, whites

\footnotesize{98. Id. at 355, 363-64. The Court did not distinguish "Latino" and "Hispanic." See id. at 355.}
\footnotesize{99. 328 Md. 522, 616 A.2d 356 (1992).}
\footnotesize{100. Id. at 530, 616 A.2d at 358.}
\footnotesize{101. Id. at 539, 616 A.2d at 364.}
\footnotesize{102. See, e.g., United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (asserting that Italian Americans are a cognizable racial group); Roman v. Abrams, 822 F.2d 214, 227-28 (2d Cir. 1987) (conceding that white venirepersons constitute a cognizable racial group); United States v. Chalan, 812 F.2d 1302, 1312-14 (10th Cir. 1987) (holding Native Americans to be a cognizable racial group); State v. Jordan, 828 P.2d 786, 790 (Ariz. Ct. App. 1992) (holding Asian Americans to be a cognizable racial group). But see United States v. Bucci, 839 F.2d 825, 835 (1st Cir. 1988) (refusing to deem Italian Americans a cognizable racial group on the ground that the prosecution failed to show that this group historically suffered from racial discrimination).}
\footnotesize{103. Gilchrist, 340 Md. at 619, 625-27, 667 A.2d at 882, 885-86. The State contended that the defendant waived his right to allege error in the jury selection process because he affirmed that the ultimate jury and trier of fact was "acceptable." Id. at 617, 667 A.2d at 881. The Court of Appeals noted that by affirming the acceptability of a particular jury, a party usually waives its right to allege error on appeal. Id. at 618, 667 A.2d at 881-82. Because the defendant in this case affirmed the acceptability of a jury which ultimately came from the second venire, however, the court held that the defense had not waived its right to allege error regarding the dismissal of the first venire. Id.}
\footnotesize{104. Id. at 619, 667 A.2d at 882.}
could not avail themselves of the holding in *Batson.* In rejecting this argument, the court invoked *McCollum,* detailed the policy considerations of *Batson,* and noted that "[t]he Supreme Court's recent cases considering *Batson*'s reach indicate the great importance that the Court places on the equal protection rights of the excluded jurors." The Court of Appeals looked to the Equal Protection Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights and held that the protections they guarantee "cannot mean one thing when applied to one individual and something else when applied to a person of another color." The Court of Appeals also reiterated its finding in *Mejia* that "blacks are not the only cognizable [racial] group to which *Batson* applies" and held that *Batson* applied "equally to white persons and black persons." Thus, the court affirmed the right of the potential juror to a racially neutral jury selection process and added whites to the list of "cognizable racial groups" in Maryland.

As mentioned earlier, the defense also contended that even if *Batson* did apply to peremptory strikes against white venirepersons, the State failed to establish a prima facie case of racial discrimination. The Court of Appeals detailed the steps of the *Batson* process and explained that the trial court's ultimate determination of racial discrimination could not be overturned unless it was clearly erroneous. The court further noted that "the issue of whether a prima facie case was properly made before the trial court has been treated as moot once the party making the peremptory challenges has offered explanations for the discriminatory challenges, and the trial court has

105. *Id.*; see *supra* note 21 and *infra* note 126 and accompanying text.
106. See *supra* notes 68-76 and accompanying text.
107. See *supra* note 42 and accompanying text.
108. *Gilchrist,* 340 Md. at 622, 667 A.2d at 884.
109. *Id.* at 623, 667 A.2d at 884 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978)). The court explained that "[a]lthough the Maryland Constitution does not contain an express guarantee of equal protection, it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Id.* at 623 n.3, 667 A.2d at 884 n.3 (quoting Verzi v. Baltimore County, 333 Md. 411, 417, 635 A.2d 967, 969-70 (1994)); see also *supra* notes 81-82 and accompanying text.
110. *Gilchrist,* 340 Md. at 624, 667 A.2d at 885 (alteration in original) (quoting Mejia v. State, 928 Md. 522, 530, 616 A.2d 356, 359 (1992)).
111. *Id.* The court also concluded that *Batson* "is not limited to the exclusion from juries of historically oppressed minorities." *Id.*, 667 A.2d at 884 (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)).
112. *Id.* at 625, 667 A.2d at 885.
113. See *supra* notes 43-45 and accompanying text.
114. *Gilchrist,* 340 Md. at 627, 667 A.2d at 886.
ruled on the ultimate question of intentional discrimination."\textsuperscript{115} As the trial court in \textit{Gilchrist} had ruled on the ultimate question, the Court of Appeals rendered moot the defense's contention that the State failed to make out a prima facie case of racial discrimination and that the trial court thereby improperly shifted the burden to the defense.\textsuperscript{116} The Court of Appeals further evaluated the trial court's ultimate determination and held that it was not clearly erroneous.\textsuperscript{117} The defense argued that "the trial court erred in finding a \textit{Batson} violation because the court merely disagreed with defense counsel's reasons."\textsuperscript{118} Dismissing this assertion, the Court of Appeals explained that the second step of the \textit{Batson} process required the alleged violator to put forth an explanation that is "neutral, related to the case to be tried, clear and reasonably specific, and legitimate."\textsuperscript{119} Further, the court held, during the third step, "[w]hile the complaining party has the ultimate burden of proving unlawful discrimination . . . the court may find that the reasons offered were pretexts for discrimination without such demonstration from the complainant."\textsuperscript{120} Therefore, the court found that the trial judge correctly applied the three-step process and declined to find reversible error.\textsuperscript{121}

4. \textit{Analysis}.—The \textit{Gilchrist} court took \textit{McCollum}\textsuperscript{122} to its logical conclusion.\textsuperscript{123} In the context of jury selection, there is no support for the proposition that only certain races should be able to avail themselves of equal protection, while others should not.\textsuperscript{124} Given \textit{McCollum}\textsuperscript{115} \textit{Id.} at 628, 667 A.2d at 886 (quoting Hernandez v. New York, 500 U.S. 352, 359 (1991)).

\textsuperscript{116} \textit{Id.} at 627-28, 667 A.2d at 886. The Court of Appeals was also satisfied that the trial court had properly concluded that the State had made out a prima facie case of racial discrimination. \textit{Id.} Specifically, the Court of Appeals evaluated the findings of the trial court along with the dialogue between the trial judge and the defense counsel. \textit{Id.; see supra notes 6-7, 17 and accompanying text.} Being satisfied that the State had properly established a prima facie case of racial discrimination, the Court of Appeals retorted that the trial "court was neither required to make more detailed findings nor to use the precise words 'prima facie.'" \textit{Gilchrist}, 340 Md. at 628, 667 A.2d at 886.

\textsuperscript{117} \textit{Gilchrist}, 340 Md. at 628, 667 A.2d at 887.

\textsuperscript{118} \textit{Id.} at 625, 667 A.2d at 885.

\textsuperscript{119} \textit{Id.} at 626, 667 A.2d at 885 (quoting Stanley v. State, 313 Md. 50, 78, 542 A.2d 1267, 1280 (1988)).

\textsuperscript{120} \textit{Id.} at 626-27, 667 A.2d at 886 (citation omitted).

\textsuperscript{121} \textit{Id.} at 627-28, 667 A.2d at 886-87.

\textsuperscript{122} \textit{See supra} notes 68-76 and accompanying text.

\textsuperscript{123} In his concurring opinion, Justice Thomas predicted that "[e]ventually, we will have to decide whether black defendants may strike white veniremen." \textit{Georgia v. McCollum}, 505 U.S. 42, 62 (1992) (Thomas, J., concurring in the judgment).

\textsuperscript{124} \textit{Cf.} \textit{Strauder v. West Virginia}, 100 U.S. 303, 308 (1879) (asserting that if a state were to enact a law excluding whites from jury service, "no one would be heard to claim that it would not be a denial . . . of equal protection").
and the current state of constitutional jurisprudence, the court correctly recognized white prospective jurors as constituents of a "cognizable racial group." Nevertheless, because the Court of Appeals misapplied the Batson test, this case lends itself to being an exception rather than the rule.

a. The Court Correctly Recognized Whites as a Cognizable Racial Group.—The defense in Gilchrist asserted that Batson constituted a remedial measure and, as such, should not apply to whites, who historically, as a group, have not been subject to racial discrimination.

125. Note that with McCollum and the other cases discussed, there are strong currents and undercurrents regarding the utility of peremptory challenges. Compare Gilchrist v. State, 97 Md. App. 55, 78, 627 A.2d 44, 55 (1993) (Wilner, C.J., concurring) (proposing that, because courts are finding it difficult to reconcile the peremptory strike with Batson and its progeny, they should reevaluate the "continued viability of peremptory challenges"); aff'd, 340 Md. 606, 667 A.2d 876 (1995), and Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 209 (1989) ("[Peremptory] challenges are not worth saving.... The gains would include substantial economic savings, the effective control of racial and other widely condemned forms of group discrimination, and the control of countless other, less frequently employed, less generalized classifications that insult and diminish human beings." (footnote omitted)), with Batson v. Kentucky, 476 U.S. 79, 118-31 (1986) (Burger, C.J., and Rehnquist, J., dissenting) (extolling the virtues of the peremptory strike and discussing its legal history and policy implications), and McCollum, 505 U.S. at 60 (Thomas, J., concurring in the judgment) ("I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.").

There are also contentions regarding the rights of potential jurors versus those of criminal defendants. Compare Powers v. Ohio, 499 U.S. 400, 410 (1991) (discussing juror competence and insisting that the Court cannot "accept as a defense to racial discrimination the very stereotype the law condemns"), and Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 727-50 (1992) (arguing that two factors support the proposition that the juror's right to a racially neutral jury selection process, as opposed to that of the defendant, better explains the unconstitutionality of race-based jury selection: (1) the victim of the discrimination is the excluded juror and (2) the theories supporting the defendant's right fail to provide satisfactory, non-racist answers as to the discrimination suffered by the defendant), with McCollum, 505 U.S. at 63-68 (O'Connor, J., dissenting) (maintaining that in a criminal trial a defendant's tactics are not state actions, and that as such, potential jurors have no discrimination claims against the state for a criminal defendant's use of race-based peremptory strikes), and Tanya E. Coke, Note, Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries, 69 N.Y.U. L. Rev. 327, 343-48, 351-56 (1994) (arguing that protection of the juror's right to a racially neutral jury selection process actually leads to fewer minorities being able to sit on petit juries and asserting that social scientific research and opinion polls indicate that race is a factor in jury deliberations and verdicts, and thus poses a threat to a criminal defendant's right to an impartial trial).

126. See supra notes 21, 103-111 and accompanying text. The defense argued:

[C]ourts have declined to extend Batson to groups which may be arguably identifiable but have not made the showing required to entitle them to protection from discrimination in jury selection.... [W]hite persons are not entitled to the application of Batson since they are clearly not a group that has been "subjected to
The court properly dismissed this assertion, because there exists a fundamental difference between receiving a preference, as a remedial measure, with respect to the distribution of a state benefit and the equal protection right not to be denied a state benefit. The right to a racially neutral jury selection process is best characterized as a right to serve as a juror irrespective of race, rather than a racial preference as a remedial measure in the distribution of jury seats.\textsuperscript{127}

Several authorities support this characterization. First, a plain reading of the Equal Protection Clause reveals that it forbids state action that denies \textit{individuals} equal protection of the law.\textsuperscript{128} It does not, however, mandate that state action must make preferences for certain racial groups.\textsuperscript{129} It is one thing to refrain from discriminating against a person on the basis of race, but quite another to favor a person on that same basis. The former levels the playing field by disallowing both race-based favoritism and racially motivated prejudice, while the latter ultimately results in the denial of equal protection. Hence, state action, which includes a criminal defendant’s exercise of a peremptory challenge,\textsuperscript{130} should not deny any individual the opportunity to fulfill her civic duty on the basis of race.

Second, although courts have made exceptions to this plain reading of the Equal Protection Clause and allowed racial preferences in certain circumstances, the current jurisprudential trend limits such

\begin{itemize}
\item discriminatory treatment.” . . . The courts which have extended the equal protection principles in \textit{Batson} to the discriminatory use of peremptories against white jurors have either ignored the requirement that the juror be a member of a cognizable group or have found that \textit{Powers} eliminated that requirement altogether.
\item \textsuperscript{127} Cf. \textit{Powers} v. Ohio, 499 U.S. 400, 409 (1991) (“An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.”).
\item \textsuperscript{128} See \textit{supra} note 2; see also \textit{Adarand Constructors, Inc. v. Pena}, 115 S. Ct. 2097, 2112 (1995) (observing that the “Fourteenth Amendment\textsuperscript{[ ]} to the Constitution protect\textsuperscript{[s]} \textit{persons}, not groups”); \textit{Shaw v. Reno}, 509 U.S. 630, 642 (1993) (the Equal Protection Clause “prevent\textsuperscript{[s]} the States from purposefully discriminating between \textit{individuals} on the basis of race” (emphasis added)); \textit{Regents of Univ. of Cal. v. Bakke}, 438 U.S. 265, 289-90 (1978) (“The guarantee of equal protection cannot mean one thing when applied to one \textit{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.” (emphasis added)); \textit{Shelley v. Kraemer}, 334 U.S. 1, 22 (1948) (“\textit{R}ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the \textit{individual}. The rights established are \textit{personal} rights.” (emphasis added)).
\item \textsuperscript{129} See \textit{supra} note 128.
\item \textsuperscript{130} See \textit{supra} notes 66, 72 and accompanying text.
\end{itemize}
preferences to remedial settings. The urgencies undergirding the application of a remedial program are absent, however, from the jury-selection context. Courts uphold remedial programs favoring racial groups only if the programs are necessary to dismantle racially discriminatory systems in which there are lingering effects of past de jure discrimination. In the context of jury selection, *Batson* and its progeny have already dismantled the historically racially discriminatory system; by enforcing the parallel equal protection rights of criminal defendants and prospective jurors, courts have quickly remedied the past wrongs of racial discrimination in the courtroom. The appeals process ensures that these remedies will not be abridged in the future and that the general underrepresentation of minorities on jury panels will not recur.

Third, although there is no doubt that individuals have historically suffered racial discrimination during jury selection processes, righting this wrong with a remedial application of *Batson* would only frustrate another important policy goal, namely “public confidence in the fairness of our system of justice.” Should the courts accord special protection to certain racial groups in the process of jury selection, individual members of excluded groups would undoubtedly cry foul. This is all the more true for criminal trials.

131. See, e.g., Adarand, 115 S. Ct. at 2108-14 (explaining that remedial programs are necessary but not sufficient to pass the constitutional mandates required for governmental race-based favoritism); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (“Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); Hopwood v. Texas, 78 F.3d 932, 941-48 (5th Cir. 1996) (holding unconstitutional a law school’s affirmative-action admissions policy on the ground that the school failed to justify the policy on remedial grounds), *cert. denied*, 116 S. Ct. 2581 (1996).

132. See, e.g., *Adarand*, 115 S. Ct. at 2108-14 (requiring a showing of past discrimination before a federal program favoring minorities could be sustained and holding that the program had to pass strict scrutiny); *Croson*, 488 U.S. at 492 (“[I]f a governmental unit can show that it ha[s] essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the [private sector], we think it clear that the [governmental unit] could take affirmative steps to dismantle such a system.”); cf. Missouri v. Jenkins, 115 S. Ct. 2038, 2055 (1995) (“The basic task of the District Court is to decide whether the [effects] attributable to prior de jure segregation ha[ve] been remedied to the extent practicable.”).

133. Batson v. Kentucky, 476 U.S. 79, 87 (1986); *see also supra* note 42 and accompanying text.

134. See, e.g., Respondent’s and Cross-Petitioner’s Brief at 4 n.1, Gilchrist v. State, 340 Md. 606, 667 A.2d 876 (1995) (No. 111) (arguing that “there can be no dispute that the issue of race often has been an issue in criminal trials”). Indicators of this include the great disparities between white and African-American perceptions regarding the O.J. Simpson trial. Between two-thirds and three-fourths of whites believed Mr. Simpson to be guilty, while the same proportion of African Americans believed him to be innocent. *Simpson Trial Reopens Old Racial Disputes in America* (CBS Evening News television broadcast, Sept. 30, 1995), available in 1995 WL 3029589; Poll: *O.J. Simpson Murder Trial Opinion in America*...
Finally, as jury service is a fundamental tenet of American democracy, it would be undemocratic to afford racial preferences in jury selection. Juror competence ultimately hinges on one's ability to consider impartially the evidence presented at trial; simply put, one's race "is unrelated to his fitness as a juror." Given this, race-based juror preferences would result in unjustifiable denials of opportunities to serve in the democratic process. In light of all these reasons, it is clear that the right to a racially neutral jury selection process should cut across all races and extend to all individuals, irrespective of their skin color.

b. The Court Improperly Applied the Batson Test.—In elaborating upon the Batson test, the Gilchrist court gave cursory treatment to the Supreme Court's recent decision in Purkett, but it eluded the holding in that case. The Purkett Court was unequivocal:

The second step of [the Batson] process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the . . . explanation. Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral."

Nevertheless, the Gilchrist court, relying on language in Batson, concluded that the "explanation must be [racially] neutral, related to the case to be tried, clear and reasonably specific, and legitimate." Although this language is not necessarily irreconcilable with that employed in Purkett above, the Purkett Court assailed the Eighth Circuit


135. See Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." (citation omitted)). As Alexander Hamilton observed:

The friends and adversaries of the . . . [Constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.


137. See supra notes 46-52 and accompanying text. The Gilchrist court cited and quoted Purkett, but it never discussed the case. See Gilchrist, 340 Md. at 625-27, 667 A.2d at 885-86.


139. Gilchrist, 340 Md. at 625, 667 A.2d at 885 (quoting Stanley v. State, 313 Md. 50, 78, 542 A.2d 1267, 1280 (1988)). This language comes from Batson. See supra note 44.
for its strict reading of this very language. Judge Chasanow in his concurrence in *Gilchrist* was quick to chide the majority for making this same mistake. The *Purkett* Court explained that this language was a "warning," in that proponents of peremptory strikes could not merely deny "discriminatory motive[s]" or assert their "good faith" in order to satisfy the requirements of the second step.

The purpose of the second step of the *Batson* test is to force the proponent of a peremptory strike to produce a reason that is racially neutral on its face. Thus, it is a burden of production, not of persuasion. The production-persuasion distinction is key. In the first step, both the burden of persuasion and the burden of production rest upon the opponent of a peremptory challenge, requiring her to establish a prima facie case of racial discrimination. In the second step, the burden of production, not persuasion, shifts to the proponent of the challenge to rebut the prima facie case with a racially neu-

140. *Purkett*, 115 S. Ct. at 1771. The Court observed: The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and that the reason must be "related to the particular case to be tried." *Id.* (quoting Texas Dept' of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) and *Batson*, 476 U.S. at 98 (citations omitted); see also supra notes 53-54 and accompanying text.

141. See *Gilchrist*, 340 Md. at 630, 667 A.2d at 888 (Chasanow, J., concurring) ("The majority may be perpetuating errors based on too literal a reading of *Batson v. Kentucky*."). Judge Chasanow's concurrence explains the *Batson* process in detail; providing guidelines for each step. See *id.* at 633-45, 667 A.2d at 889-95. Indeed, Maryland courts are already relying on his opinion as an authoritative statement of the law. See infra note 156 and accompanying text.

142. *Purkett*, 115 S. Ct. at 1771. Judge Chasanow, in his concurring opinion in *Gilchrist*, contrasts this rule in *Purkett* with a line of Maryland cases that require satisfactory nondiscriminatory reasons at step two of the *Batson* test. See *Gilchrist*, 340 Md. at 640-43, 667 A.2d at 892-94 (Chasanow, J., concurring) (citing *Stanley* v. State, 313 Md. 50, 542 A.2d 1267 (1988), *Tolbert* v. State, 315 Md. 13, 553 A.2d 228 (1989), *Chew* v. State, 317 Md. 233, 562 A.2d 1270 (1989)). Judge Chasanow condemns the majority for following this line of cases: "The majority's second step analysis is taken from several of our prior cases including *Chew*, ... *Tolbert*, ... [and] *Stanley*... This analysis is similar to what the Supreme Court condemned in *Purkett*..." *Id.* at 640-41, 667 A.2d at 892-93.

143. See *Purkett*, 115 S. Ct. at 1770-71 ("[T]he burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation... '[T]he issue is the facial validity of the [proponent's] explanation.'" (quoting *Hernandez* v. New York, 500 U.S. 352, 360 (1991)); *Batson*, 476 U.S. at 94 ("[T]he burden shifts to the [proponent] to explain adequately the racial exclusion.").

144. See *Purkett*, 115 S. Ct. at 1770 ("[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2).")

tral, though possibly "silly" or "superstitious," explanation. In the final step, the ultimate burden of persuasion, which never shifts from the opponent of the strike, is dispositive—the trial court assesses the evidence proffered by both parties and makes a final determination. It is during this last step—and not during the second step—that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."

There are at least three reasons that make the distinction between the second and third steps significant. First, because courts cannot overturn third-step findings unless there is "clear error," there is effectively no appellate review of these determinations. Second, if a trial court takes Batson's "warning" too literally and focuses on whether the proponent's prima facie rebuttal is "related to the case to be tried," "clear and reasonably specific," and "legitimate," then it mistakenly shifts the burden of persuasion, which should always lie with the opponent of the strike. Finally, if the case is in equipoise, the complainant's ultimate burden of persuasion requires

146. See supra note 138 and infra note 154 and accompanying text.

147. See Stanley, 313 Md. at 61, 542 A.2d at 1272 (asserting that the proponent "has the ultimate burden of persuading the court [that] there has been intentional racial discrimination"); cf. Purkett, 115 S. Ct. at 1771 ("It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."); Hernandez, 500 U.S. at 359 (stating that in the third step, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination"); Batson, 476 U.S. at 98 (explaining that after the proponent of the strike comes forward with a racially neutral explanation, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination"); Mejia, 328 Md. at 533, 616 A.2d at 361 (explaining that after the second step of the analysis, "[t]he ultimate burden of proof is always on the moving party and it is to persuade the court that there has been intentional racial discrimination").

148. Purkett, 115 S. Ct. at 1771.

149. See Hernandez, 500 U.S. at 369 (declining to overturn the trial court's finding on the issue of discriminatory intent unless its determination was clearly erroneous); Stanley, 313 Md. at 83-84, 542 A.2d at 1283 (same); Gilchrist, 340 Md. at 627, 667 A.2d at 886 (same); see also supra note 114 and accompanying text. Judge Chasanow, in his concurring opinion in Gilchrist, noted that the majority opinion in that case implicitly overruled prior Maryland holdings in which the Court of Appeals required "independent constitutional appraisal[s] concerning the existence of neutral, non-racial reasons for the striking of a juror." Id. at 647 n.3, 667 A.2d at 896 n.3 (Chasanow, J., concurring) (quoting Chew v. State, 317 Md. 233, 245, 562 A.2d 1270, 1276 (1989)).

150. Hernandez, 500 U.S. at 369; Gilchrist, 340 Md. at 641, 667 A.2d at 893 (Chasanow, J., concurring).

151. Cf. Gilchrist, 340 Md. at 643, 667 A.2d at 894 (Chasanow, J., concurring) ("[A]lthough the step one prima facie finding still remains in step three as a permissible inference, it does not shift the burden of proof to the striking party by creating a presumption that must be rebutted.").
the trial court to overrule any allegation of racially discriminatory peremptory strikes.\textsuperscript{152}

In \textit{Gilchrist}, the facts are at odds with the requirements of the second step. The trial court immediately and repeatedly rejected the explanations proffered by the defense, even though each explanation was racially neutral on its face.\textsuperscript{153} Thus, the court deemed these racially neutral explanations unacceptable at the second step of the \textit{Batson} process, rather than the third step. This flies in the face of the \textit{Purkett} decision. Instead of shooting down the explanations as immediately as the defense proffered them, it would have been more appropriate for the trial court to consider all of the explanations together in light of all of the evidence.\textsuperscript{154} As Judge Chasanow's concurrence implies, however, because the jury selection in \textit{Gilchrist} occurred prior to the decision in \textit{Purkett}, the Court of Appeals properly upheld the trial court's findings.\textsuperscript{155} The \textit{Gilchrist} court should have limited its holding to the case at hand. Instead, by upholding the trial court's findings and, more particularly, by giving the \textit{Batson} "warning" too literal a reading, the Court of Appeals is perpetuating the same \textit{Batson} error made by the Eighth Circuit in \textit{Purkett}. Indeed, the Court of Special Appeals is already side-stepping the majority opinion in \textit{Gilchrist} and adopting its concurring opinion in order to avoid this error.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 643, 667 A.2d at 894 ("[I]f the judge is in equipoise, the objection to the strike must be overruled.").
\item \textsuperscript{153} \textit{See id.} at 645, 667 A.2d at 895 ("After finding a prima facie case of discrimination, [the trial judge] seemed to focus on the legal sufficiency of defense counsel's explanations, rather than their truthfulness."); \textit{see also supra} notes 12-17 and accompanying text. Note, however, that the defense may have failed to satisfy its burden of production with at least one of its proffered explanations. \textit{See supra} note 12 and accompanying text.
\item \textsuperscript{154} \textit{Cf. Purkett}, 115 S. Ct. at 1771. The \textit{Purkett} Court stated:
\begin{quote}
[T]o say that a trial judge \textit{may choose to disbelieve} a silly or superstitious reason at step 3 is quite different from saying that a trial judge \textit{must terminate} the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
\end{quote}
\textit{Id.}
\item \textsuperscript{155} \textit{See Gilchrist}, 340 Md. at 645-47, 667 A.2d at 895-96 (Chasanow, J., concurring).
\item \textsuperscript{156} \textit{See, e.g., Ball} v. \textit{Martin}, 108 Md. App. 435, 450-52, 672 A.2d 143, 150-51 (considering a \textit{Batson} challenge in the context of a civil trial), \textit{cert. denied}, 342 Md. 472, 677 A.2d 565 (1996). The \textit{Ball} court stated:
\begin{quote}
\textit{Purkett} is discussed in the concurrence... wherein it is suggested that the majority failed to afford \textit{Purkett} the full range of its holding relating to the second step of the \textit{Batson} inquiry. As we perceive it, that reluctance (if it existed) may have been occasioned by reason of the \textit{Gilchrist} majority's review of the grant of a \textit{Batson} challenge, not a denial. \textit{Purkett}... appear[s] to... limit seriously the power of appellate courts to address the findings of trial courts in respect to the second step when that court is confronted with, and accepts, facially neutral reasons for the strikes... [W]e shall borrow liberally from the [concurrence].
\end{quote}
\end{itemize}
5. Conclusion.—On the one hand, Gilchrist is a landmark case for the right of a potential juror to a racially neutral jury selection process; so too is it a milestone for according white venirepersons this equal protection right. Voir dire in Maryland now rests upon a firm equal protection foundation, which is supported by the parallel rights of the prospective juror and the criminal defendant. On the other hand, Gilchrist provides faulty judicial guidance by misapplying the Batson process. The policy interests served by Gilchrist may compensate for its shortcomings, but its shortcomings—analytically fundamental as they are—pose serious threats to the interests served.

ROBERT D. FRIZE

C. Prison Checkpoints and the Fourth Amendment: Balancing Compelling State Interests with the Individual’s Reasonable Expectation to Privacy

In Gadson v. State,1 the Court of Appeals held that, absent an articulable suspicion of criminal activity, it is unreasonable under the Fourth Amendment to the United States Constitution2 and Article 26 of the Maryland Declaration of Rights3 to detain a prison visitor, who, prior to entering a prison, indicates a preference to leave rather than

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2. 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.

3. Article 26 provides:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not be granted.

MARYLAND LAW REVIEW

submit to detention. The court's holding is consistent with search and seizure jurisprudence.

Using a balancing test, the Court of Appeals weighed the state's interest in preventing drugs from entering the prison against the privacy interest of the individual in being free from unreasonable searches and seizures. This Note argues that the court's holding is justified because the state achieved its goal of keeping drugs out of the prison when the visitor chose to leave the prison property. Accordingly, the continued detention of the visitor was unreasonable, as it did not further the state's articulated interest.

1. The Case.—At the governor's request, the Maryland State Police established a drug detection checkpoint outside the House of Correction in Jessup, Maryland. Three signs along an access road leading to the House of Correction advised visitors that they may be subject to a search by drug detection dogs before entering the prison.

4. Gadson, 341 Md. at 5-6, 668 A.2d at 25. Gadson implicates not only protections guaranteed by the Fourth Amendment to the United States Constitution, but also Article 26 of the Maryland Declaration of Rights. The Court of Appeals has repeatedly stated that decisions by "the Supreme Court interpreting the Fourth Amendment are entitled to great respect in construing Article 26" of the Maryland Declaration of Rights. Id. at 8 n.3, 668 A.2d at 26 n.3; see also Little v. State, 300 Md. 485, 493 n.3, 479 A.2d 903, 907 n.3 (1984) (stating that "[Article] 26 is in pari materia with its federal counterpart and that decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect").

5. See Florida v. Royer, 460 U.S. 491, 498 (1983) (stating that "[a person] may not be detained even momentarily without reasonable, objective grounds for doing so"); Brown v. Texas, 443 U.S. 47, 51 (1979) (stating that in order to justify detention of an individual, officers must have "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"); Terry v. Ohio, 392 U.S. 1, 21 (1968) (stating that even limited seizures must be justified by "specific and articulable facts"); United States v. Moore, 817 F.2d 1105, 1107 (4th Cir. 1987) (an investigatory detention must be justified by a reasonable suspicion that a crime has been or is about to be committed); Little, 300 Md. at 494 n.4, 479 A.2d at 907 n.4 (noting the need for an articulable suspicion of criminal activity in order to temporarily detain an individual); see also United States v. Sokolow, 490 U.S. 1, 7-8 (1989) (explaining that reasonable suspicion is a less demanding standard than probable cause).

6. A balancing test "gives full recognition to the competing public and private interests... at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy." Camara v. Municipal Court, 387 U.S. 523, 539 (1967); see also infra notes 36-38 and accompanying text.

7. Gadson, 341 Md. at 11, 668 A.2d at 27.
8. Id. at 12, 668 A.2d at 28.
9. Id. at 11, 668 A.2d at 27.
facility. On September 13, 1992, Tyrone Gadson (Gadson) and a friend drove along this access road and stopped at the guard booth outside the prison facility. As Gadson spoke to the guard on duty, who screened all potential visitors as to the nature of their visit, Trooper Charles Prince of the Maryland State Police approached and ordered Gadson to turn off the vehicle and remove the keys from the ignition to allow for a canine sniff of the truck to check for narcotics. Gadson immediately expressed his opposition to the canine sniff and requested to leave the prison's property. Trooper Prince denied Gadson's request to leave and again ordered Gadson to turn off the truck while the officer retrieved the drug detection dog. Gadson followed Trooper Prince's orders. During the canine sniff of Gadson's truck, the dog indicated the presence of drugs. Gadson then admitted to Trooper Prince that he possessed marijuana. A search of Gadson's truck resulted in the seizure of illegal drugs.

At a suppression hearing, Gadson moved to suppress the evidence as the fruit of an illegal seizure. The circuit court denied Gadson's motion, and Gadson was convicted. The Court of Special Appeals affirmed the conviction, and the Court of Appeals

11. Gadson, 341 Md. at 6, 668 A.2d at 25. The first sign, located approximately 150 yards from the point where the road turned away from Maryland Route 175, read: "WARNING. ALL VISITORS INCLUDING ALL VEHICLES AND OCCUPANTS ARE SUBJECT TO BEING SEARCHED UPON ENTERING OR EXITING THE PREMISES." Id. at 6 n.1, 668 A.2d at 25 n.1. The second sign read: "WARNING: DRUG DETECTION DOGS BEING UTILIZED ON INSTITUTIONAL PROPERTY." Id. A final sign read: "STOP. ALL VEHICLES SUBJECT TO INSPECTION." Id.

12. Id. at 6, 668 A.2d at 25.
13. Id. at 7, 668 A.2d at 25.
14. Id. at 6-7, 668 A.2d at 25.
15. Id. at 7, 668 A.2d at 25.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
22. Gadson, 341 Md. at 6, 663 A.2d at 25.
23. Id. at 7, 668 A.2d at 25.
24. Id. at 6, 668 A.2d at 25.
25. Gadson, 102 Md. App. at 571, 650 A.2d at 1362. The Court of Special Appeals reasoned that the state's interest in reducing the "scourge of narcotics in the State's prison system is a compelling one." Id. at 569, 650 A.2d at 1361. The court opined that because dogs were not always on duty, a motorist who transported drugs should not be allowed to travel to the entrance of the prison and "get a lay of the land" to see if dogs were present. Id.
granted certiorari\textsuperscript{26} to determine whether a state trooper can constitutionally detain a visitor to a prison after the visitor tells the state trooper that he wishes to leave rather than submit to a canine search.\textsuperscript{27}

2. Legal Background.—

\hspace{1em} a. The Reasonableness Standard.—The Fourth Amendment guarantees individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."\textsuperscript{28} In \textit{Mapp v. Ohio},\textsuperscript{29} the United States Supreme Court held that the dictates of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{30}

A seminal search-and-seizure case is \textit{Katz v. United States}.\textsuperscript{31} In \textit{Katz}, federal law enforcement officers arrested Katz for transmitting betting information after the officers placed an electronic listening device on a public telephone booth and recorded Katz's conversations.\textsuperscript{32} The Court held that the officers' actions "violated the privacy upon which [Katz] justifiably relied while using the telephone booth."\textsuperscript{33} The Court proclaimed that "the Fourth Amendment pro-

\begin{itemize}
\item \textsuperscript{26} Gadson v. State, 338 Md. 252, 657 A.2d 1182 (1995).
\item \textsuperscript{27} Gadson, 341 Md. at 7, 668 A.2d at 26.
\item \textsuperscript{28} U.S. CONST. amend. IV. Beginning with \textit{Boyd v. United States}, 116 U.S. 616 (1886), the Supreme Court sought to define the meaning of unreasonable searches and seizures. \textit{See id.} at 622. \textit{Boyd} involved a court that mandated production of an invoice to be used as evidence to prove alleged revenue fraud involving illegal imported glass. \textit{Id.} at 617-18. The Court held that the Fourth Amendment did not allow the government to compel a person to produce evidence against himself because it constituted an unreasonable intrusion and was an "invasion of his indefeasible right of personal security, personal liberty and private property." \textit{Id.} at 630 (citing \textit{Entick v. Carrington} and Three Other King's Messengers, 19 Howell's St. Tr. 1029 (1765)).
\item \textsuperscript{29} 367 U.S. 643 (1961).
\item \textsuperscript{30} \textit{Id.} at 655. The Due Process clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Specifically, the \textit{Mapp} Court held that the exclusionary rule was applicable to state actions in violation of the Fourth Amendment. \textit{Mapp}, 367 U.S. at 655.
\item \textsuperscript{31} 389 U.S. 347 (1967).
\item \textsuperscript{32} \textit{Id.} at 348.
\item \textsuperscript{33} \textit{Id.} at 353. The Government argued that Katz could not have expected any degree of privacy while in the telephone booth because the booth was made of glass, and Katz remained completely visible for anyone to see inside. \textit{Id.} at 352. The Court rejected the Government's argument and stated: "[W]hat [Katz] sought to exclude . . . was not the intruding eye—it was the uninvited ear." \textit{Id.}.
\end{itemize}
tects people, not places." Hence, the underlying command of the Fourth Amendment is reasonableness.

In *Camara v. Municipal Court*, the Court developed a balancing test to determine the appropriate standard of reasonableness to apply to a particular search. Under this test, a court weighs society's need for the police activity at issue against the intrusion on the individual's protected interests.

The Supreme Court applied this balancing test to the police practice of investigative detentions of persons on the street in *Terry v. Ohio*. The *Terry* Court held that a police officer need not have probable cause to perform a limited search of a person's outer clothing if that police officer "reasonably" believes that criminal activity may be imminent. The Court reasoned that the government's need to promote crime control and to ensure the officer's safety outweighed the slight and minimal intrusion of Terry's brief detention.

34. *Id.* at 351. Both Katz's and the Government's respective arguments focused on whether the phone booth was a "constitutionally protected area." *Id.* The Court, emphasizing the parties' mischaracterization of the issue, stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).

35. See New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (stating that the Fourth Amendment is about reasonableness, and "what is reasonable depends on the context within which a search takes place").


37. *Id.* at 536-37.

38. *Id.* The Court stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* Moreover, the Court identified that "[i]n determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.* at 535.


40. *Id.* at 30. Under the Supreme Court's definition of "reasonable," the stop must be based on specific inferences of criminal activity and not merely on unparticularized suspicion. *Id.* at 27; see also *Sibron v. New York*, 392 U.S. 40, 64 (1968) ("The police officer is not entitled to seize and search every person whom he sees on the street.... [H]e must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."); cf. *Adams v. Williams*, 407 U.S. 143, 147 (1972) (recognizing that the officer's reasonable inferences may be drawn from an informant that is considered reliable).

41. *Terry*, 392 U.S. at 27. According to Justice Douglas, in his dissenting opinion in *Terry*, the decisions in *Terry* and *Camara* lead ineluctably to the conclusion that application of the reasonableness clause is less stringent, more flexible, and allows intrusions on a standard of proof less than that required by application of the warrant clause with its concomitant probable cause. See *id.* at 37 (Douglas, J., dissenting).
b. The Reasonableness Standard Applied in Maryland.—Against the backdrop of the previous Supreme Court decisions, in *Little v. State*, the Court of Appeals held that sobriety checkpoints do not violate the Fourth Amendment's reasonableness standard. In so concluding, the court weighed the intrusions of privacy imposed by the checkpoints against the interests of the state in keeping drunk drivers off the road. Espousing the views articulated in *Delaware v. Prouse*, the Court of Appeals emphasized the comprehensive regulations that govern the operation of the sobriety checkpoint program and determined that the manner in which police officers perform the stop is minimally intrusive compared to the state's compelling interest in deterring drunk motorists from driving.

Maryland courts have made clear, however, that unless a police officer has some reasonable, articulable suspicion of criminal activity, limited seizures of motorists may not extend beyond their articulated purpose. In *Snow v. State*, the Court of Special Appeals held that once a police officer issues a traffic citation, the officer must have a reasonable and articulable suspicion of criminal activity to further detain the vehicle's occupants. Absent such suspicion, the continued detention of the driver and passengers constitutes an unreasonable seizure.

Similarly, in *Munafo v. State*, the Court of Special Appeals stated that the dictates of *Snow* may not be averted by waiting to issue a traffic citation until after a search of the vehicle is conducted. In *Munafo*, a

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43. *Id.* at 504, 479 A.2d at 912.
44. *Id.* at 503-06, 479 A.2d at 912-14.
45. 440 U.S. 648, 654 (1979) (stating that reasonableness is determined "by balancing [the] intrusion on the individual’s Fourth Amendment interests against promotion of legitimate government interests").
46. *Little*, 300 Md. at 490, 479 A.2d at 905.
48. *Id.* at 246, 578 A.2d at 817.
49. *Id.* at 267, 578 A.2d at 827. In *Snow*, a state trooper stopped Snow for speeding. *Id.* at 246, 578 A.2d at 817. Snow appeared "nervous" to the trooper and did not make any eye contact. *Id.* at 247, 578 A.2d at 818. After issuing Snow a citation for speeding, the state trooper ordered both Snow and his passenger out of the vehicle and conducted a scan of the vehicle's exterior using a trained drug detection dog. *Id.* The trooper subsequently discovered heroin. *Id.* at 248, 578 A.2d at 818. The court held that the circumstances did not amount to reasonable and articulable suspicion that Snow and his passenger were involved in criminal activity, and thus Snow's continued detention during the dog scan constituted an unreasonable seizure. *Id.* at 267, 578 A.2d at 828.
51. *Id.* at 672, 660 A.2d at 1072-73. "We find it more than slightly illogical to allow officers to circumvent *Snow* merely by waiting to issue a citation until after conducting a search of the detained vehicle." *Id.*
police officer stopped the appellant for a traffic violation. The officer recognized the appellant as someone who previously had been involved with illegal drugs. Rather than issue a traffic citation after learning that the appellant's driver's license and vehicle registration were in order, the police officer waited for back-up to arrive. The back-up officer shined his flashlight into the appellant's vehicle and noticed marijuana and crack cocaine in the vehicle. The Munaflo court averred that once the officer learned that the appellant's information was in order, the purpose of the initial stop was achieved, and the officer either had to issue a citation or release the appellant.

Consequently, the continued detention of the appellant was a second seizure that was not independently justified by reasonable suspicion of criminal activity. The officer only had a "hunch" that criminal activity was afoot, but a "hunch, without more, does not rise to the level of reasonable suspicion."

c. Regulatory Searches and Seizures.—The "reasonableness" framework of balancing interests has been applied in numerous cases involving regulatory searches and seizures.

52. Id. at 666, 660 A.2d at 1070.
53. Id. at 667, 660 A.2d at 1070.
54. Id.
55. Id.
56. Id. at 673, 660 A.2d at 1073.
57. Id. at 676, 660 A.2d at 1074-75.
58. Id., 660 A.2d at 1075.
59. Regulatory searches are directed toward problems unlike those ordinarily confronted by police during their routine law enforcement activities. See United States v. Bistwell, 406 U.S. 311, 311-12, 317 (1972) (allowing search of firearms dealer's storeroom as part of inspection procedures authorized by the Gun Control Act of 1968); Wyman v. James, 400 U.S. 309, 326 (1971) (upholding the conditioning of receipt of future welfare benefits on the recipient's consent to periodic home visits by caseworkers in accord with New York statutes and regulations); Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (holding that unconsented safety inspections of housing could be conducted pursuant to a warrant issued upon less than the usual quantum of probable cause); See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (applying the holding of Camara to a regulatory search of a business and holding that such a search may be made only when a warrant has been issued); United States v. Schafer, 461 F.2d 856, 858 (9th Cir. 1972) (allowing search of all baggage and personal effects without a warrant as part of a screening inspection of aircraft passengers leaving Hawaii to prevent exportation of plant pests and diseases); see also Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972) (upholding the search of a briefcase for weapons and explosives pursuant to a rule conditioning entry into a federal building upon submission to such a search). See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.9(a) (2d ed. 1992) (describing routine regulatory and administrative practices).

Regulatory search practices entail the use of warrantless administrative searches that are designed to effectuate a vital state interest. See, e.g., Klarfeld v. United States, 944 F.2d 583, 586 (9th Cir. 1991) (allowing courthouse security procedures to ensure safety as a
In United States v. Biswell, a Bureau of Alcohol, Tobacco and Firearms agent discovered two sawed-off rifles in the defendant pawnbroker's storeroom during a regulatory inspection. The government charged the defendant with violations of the firearms laws. The Supreme Court held that the evidence seized was admissible, despite the absence of a warrant, because the regulatory search was a credible deterrent that furthered urgent federal interests and was authorized by statute.

Similarly, in Wyman v. James, a woman who refused to allow home visits by New York City Department of Social Services caseworkers sued the Department over termination of her federal benefits. The Court held that the home visits were not searches for purposes of the Fourth Amendment, and as such, a Fourth Amendment analysis was unnecessary. Thus, if a regulatory state action does not constitute a search, then no Fourth Amendment protections are implicated.

In Camara v. Municipal Court, however, the Supreme Court held that an individual may refuse entry into his apartment by a city housing inspector who desires to conduct a routine and statutorily re-

result of the threats of violence directed at courthouses); McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978) (allowing limited searches of persons seeking to enter sensitive facilities).

Other types of regulatory practices include sobriety checkpoints to prevent drunk driving, such as those performed in Little v. State, 300 Md. 485, 494, 479 A.2d 903, 907 (1984), and canine searches at prisons to stop the flow of drugs from entering the prisons. See Gadson v. State, 341 Md. 1, 10, 668 A.2d 22, 27 (1995), cert. denied, 116 S. Ct. 1704 (1996). 60. 406 U.S. 311 (1972).
61. Id. at 311-12.
62. Id. at 312.
63. Id. at 317.
64. 400 U.S. 309 (1971).
65. Id. at 314-15. Specifically, the government sought to terminate the woman's Aid to Families with Dependent Children benefits. Id. at 314.
66. Id. at 326. In reaching its decision, the Supreme Court stated that the visits did not "descend to the level of unreasonableness." Id. at 318. The Court then listed a number of reasons why Social Service home visits did not fall within Fourth Amendment protections. Id. at 318-24. The Court stated: "The public's interest . . . is protection and aid for the dependent child" and that because the "dependent child's needs are paramount . . . only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." Id. at 318. The Court opined further that "the [home] visit is 'the heart of welfare administration'; that it affords 'a personal, rehabilitative orientation, unlike that of most federal programs.'" Id. at 319-20 (quoting Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L.J. 746, 748 (1970)).
67. Id. at 317.
68. Id. at 326.
quired housing code inspection.\textsuperscript{70} The Court held that such an intrusion is a search and requires a search warrant, regardless of its administrative character.\textsuperscript{71} The Camara Court concluded that the invasion of privacy from regulatory inspections was limited because such inspections are neither personal in nature nor aimed at the discovery of evidence of crime.\textsuperscript{72}

In \textit{Michigan Department of State Police v. Sitz},\textsuperscript{73} the Supreme Court upheld an administrative seizure that involved a sobriety checkpoint.\textsuperscript{74} The Court held that the state's interest in preventing drunk driving outweighed the minimal intrusion upon motorists to such an extent that the absence of individualized suspicion of criminal activity would not prevent police from detaining motorists at checkpoints.\textsuperscript{75}

The primary focus of decisions involving regulatory searches and seizures is that searches conducted as part of a general regulatory scheme to further some specific administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, are permissive under the Fourth Amendment. Yet for an administrative search to pass constitutional muster, it still must meet the Fourth Amendment's standard of reasonableness.\textsuperscript{76}

3. \textit{The Court’s Reasoning}.—In \textit{Gadson v. State}, the Court of Appeals held that it is unconstitutional for a police officer to detain an individual, absent some “articulable reason” that the person so detained is or has been engaged in criminal activity.\textsuperscript{77} According to the court, Gadson's detention was indisputably a “seizure” under the

\begin{itemize}
\item \textsuperscript{70} \textit{Id}. at 540.
\item \textsuperscript{71} \textit{Id}. at 584. The Court noted, however, that “[u]nfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.” \textit{Id}. at 536-37.
\item \textsuperscript{72} \textit{Id}. at 537; \textit{see also Wyman}, 400 U.S. at 323 (“The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding.”); \textit{Abel v. United States}, 362 U.S. 217, 230 (1960) (emphasizing that if administrative warrants were employed as an instrument of criminal law enforcement, rather than as a bona fide preliminary step in a deportation proceeding, evidence seized would be inadmissible); \textit{United States v. $124,570 U.S. Currency}, 873 F.2d 1240, 1243 (9th Cir. 1989) (“To the extent that administrative searches are used for purposes other than those contemplated by the regulatory scheme, they may fall outside the rationale by virtue of which we have approved them.”).
\item \textsuperscript{73} 496 U.S. 444 (1990).
\item \textsuperscript{74} \textit{Id}. at 455.
\item \textsuperscript{75} \textit{Id}.
\item \textsuperscript{76} \textit{See supra} note 59 and accompanying text.
\item \textsuperscript{77} \textit{Gadson}, 341 Md. at 9, 668 A.2d at 26.
\end{itemize}
Fourth Amendment. Thus, the only issue before the court was the reasonableness of that seizure.

Pursuant to the balancing test set forth in *Camara*, the court judged the reasonableness of Gadson's detention by balancing the intrusion on Gadson's Fourth Amendment privacy interests against the societal need served by the seizure. The court reasoned that "the State has a strong interest in keeping drugs out of its correctional facilities," and a canine sniff effectuates this interest. The court concluded, however, that once Gadson asked permission to leave the premises, thereby opting to forego the visit, the state achieved its goal. The court further reasoned that because Trooper Prince continued to detain Gadson, rather than allow him to leave, the state's true interest appeared to be the detection and seizure of illegal narcotics generally, rather than its articulated interest of keeping drugs out of the prison. Although the general detection and seizure of narcotics is clearly an appropriate governmental interest, the court concluded that this interest is "beyond the scope of the articulated purpose of the prison checkpoint." Consequently, because the purpose behind Gadson's seizure exceeded the scope of the state's articulated interest, the seizure was unreasonable.

In essence, the state sought to expand its authority by allowing state troopers to detain motorists beyond the articulated goal of the checkpoint detention. The court declined to expand the state's authority in this way. Instead, the court concluded that the facts in *Gadson* were more analogous to cases such as *Munafo* and *Snow*. The *Gadson* court concluded that unless a reasonable, articulable suspicion of criminal activity is established, detentions of the kind at issue may not be extended beyond the point of their original purpose.

Chief Judge Murphy, joined by Judge Rodowsky, dissented and argued that the facts in *Gadson* were more analogous to cases such as *Sitz* and *Little*, in which no particularized suspicion of wrongdoing is
required when the state has a compelling interest that outweighs a motorist's privacy interest. Judge Murphy predicated his reasoning on the fact that the danger of drugs does not end once drugs are prevented or diverted from entering the prison system, and thus, the state's interest should outweigh the minimal intrusion experienced by motorists.

4. Analysis.—In Gadson v. State, the Court of Appeals correctly concluded that, prior to entering a prison, once an individual expresses his opposition to a canine sniff of his vehicle and states that he prefers to leave rather than submit to detention, the goal of preventing drugs from entering the prison is accomplished. Thus, further detention of the individual is justified only if a reasonable, articulable suspicion exists that the individual is engaged in criminal activity.

a. The State's Interest.—The public concern served by the prison checkpoint is the prevention of narcotics-smuggling into the prison. As such, the initial stop of Gadson's truck was reasonable because it furthered the purpose of the checkpoint. The institutional security of a prison is unquestionably a matter of significant public concern. The Court of Appeals did not dispute the weight or strength of the state's interest in keeping drugs out of the correctional facilities and thus found the initial stop and seizure reasonable.

b. The Second Seizure.—Arguably, however, a second seizure occurred that was not reasonable. In United States v. Mendenhall, the Supreme Court held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." In Mendenhall, the Supreme

91. Id. at 21, 668 A.2d at 32 (Murphy, C.J., dissenting); see also supra notes 42-46 and 73-75 and accompanying text.
92. Gadson, 341 Md. at 22, 668 A.2d at 92-93.
93. Id. at 20-21, 668 A.2d at 32.
94. Id.
95. Id. at 11, 668 A.2d at 27.
96. Id.
97. See Bell v. Wolfish, 441 U.S. 520, 546 (1979) (stating that "maintaining institutional security and preserving internal order and discipline are essential goals" of prison administration); see also Romo v. Champion, 46 F.3d 1013, 1016 (10th Cir. 1995) (finding a significant public interest in the state's conducting a stop and canine drug sniff of prison visitors).
98. Gadson, 341 Md. at 11, 668 A.2d at 27.
100. Id. at 554 (Op. of Stewart, J.).
Court stated that there was no seizure until the police officer in some way demonstrably curtailed the defendant's liberty.\textsuperscript{101}

Trooper Prince impeded Gadson's liberty by both refusing to let Gadson leave as requested and ordering Gadson to turn off his vehicle.\textsuperscript{102} It is this restraint on Gadson's movement that constituted a second seizure and provided the foundation for invoking Fourth Amendment protections.\textsuperscript{103}

c. \textit{The Expectation of Privacy}.—The question which then emerges is whether Gadson's detention violated his subjective expectation of privacy.\textsuperscript{104} Clearly, the purpose of Gadson's detention was no longer the prevention of drugs from entering the prison.\textsuperscript{105} Thus, the continued detention and seizure of Gadson no longer amounted to a seizure that was administrative in nature.\textsuperscript{106} Gadson's detention was a criminal investigatory stop that was outside the scope of the articulated governmental interest.\textsuperscript{107}

A compelled search of a person who has decided not to visit a prison would do nothing to contribute to the prevention of drugs from entering that prison.\textsuperscript{108} Such a search would constitute a criminal investigation, which is subject to warrant and probable cause requirements of the Fourth Amendment.\textsuperscript{109} Courts have consistently emphasized the requirement that administrative searches may not be used for purely criminal investigatory motives.\textsuperscript{110} In order to pass the reasonableness test, "an administrative screening must be as limited in its intrusiveness as is consistent with satisfaction of the administrative

\textsuperscript{101} \textit{Id.} at 553 ("We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained.").

\textsuperscript{102} \textit{Gadson}, 341 Md. at 6-7, 668 A.2d at 25.

\textsuperscript{103} \textit{Id.} at 16, 668 A.2d at 40.

\textsuperscript{104} See \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating a two-pronged test for expectations of privacy); see supra notes 31-35 and accompanying text.

\textsuperscript{105} \textit{Gadson}, 341 Md. at 12, 668 A.2d at 28.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} See \textit{United States v. Davis}, 482 F.2d 893, 908-12 (9th Cir. 1973). The \textit{Davis} court considered the constitutionality of screening passengers and luggage at airports. \textit{Id.} at 904. The court cautioned that such screening, without probable cause, might be subverted into a general search for evidence of crime, and thereby become unreasonable. See \textit{id.} at 909. The court stated that "airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft." \textit{Id.} at 910-11.

\textsuperscript{110} See, e.g., \textit{United States v. $124,570 U.S. Currency}, 873 F.2d 1240, 1243 (9th Cir. 1989) (stating criminal investigations are outside the scope of the regulatory scheme of administrative searches).
need that justifies it." Stated differently: "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered [the search's] initiation permissible." Investigatory detentions must be justified by a reasonable suspicion that a crime has been or is about to be committed. As Chief Justice Burger explained in Brown v. Texas, when even a limited seizure "is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." In Gadson, it is difficult to see how the need to prevent drugs from being smuggled into the prison could justify searching a person who elected not to enter the prison. It follows that there is no reasonable relationship between the continued detention of Gadson and the state's interest in preventing drugs from entering the prison. Trooper Prince admitted that when Gadson indicated he did not want the canine sniff to proceed, the officer's suspicion that drugs were in the vehicle was heightened. Nevertheless, suspicion raised by an individual's refusal to consent to a search may not be considered in determining whether the police had a reasonable, articulable suspicion of criminal activity to justify continued detention.

The State argued that Gadson's situation fell within an exception to the articulable suspicion requirement and was analogous to other cases in which no articulable suspicion of criminal activity existed.

111. Davis, 482 F.2d at 910.
113. See, e.g., United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994) (holding that continued detention after a traffic stop for a seatbelt violation was unreasonable after the occupants produced valid drivers licenses, and there was no objective reason to raise suspicion of criminal activity); United States v. Walker, 933 F.2d 812, 816 (10th Cir. 1991) (holding that once a police officer has fully investigated the basis for a traffic stop, it is unreasonable under the Fourth Amendment to extend the duration of the stop without reasonable suspicion of other criminal activity); Munafo v. State, 105 Md. App. 662, 673, 660 A.2d 1068, 1073 (1995) (holding that once the purpose of an initial traffic stop for speeding and reckless driving had been fulfilled, continued detention of the driver was unreasonable without articulable suspicion of criminal activity).
115. Id. at 52.
116. Gadson, 341 Md. at 16 n.7, 668 A.2d at 30 n.7.
117. United States v. Torres, 65 F.3d 1241, 1247 (4th Cir. 1995) (holding that refusal to consent to a search of duffle bag did not give rise to reasonable suspicion); Snow v. State, 84 Md. App. 243, 262, 578 A.2d 816, 825 (1990) ("A citizen's exercise of the Fourth Amendment right to be free from unwarranted searches does not trigger a reasonable suspicion that he or she is carrying narcotics.").
118. Gadson, 341 Md. at 10, 668 A.2d at 27; see Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (allowing temporary detentions at sobriety checkpoints); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (upholding a required stop at a check-
The cases to which the State referred, however, are distinguishable from *Gadson*. For instance, cases that involve the use of sobriety checkpoints differ in that the state’s interest is to get drunk drivers off the road, and a sobriety checkpoint furthers this interest.\(^\text{119}\) If a drunk driver were permitted to turn around and escape a sobriety check, the state’s interest would not be achieved because the drunk driver would continue to present a danger.\(^\text{120}\) Conversely, allowing a prospective visitor to a prison to forego entry into the prison does accomplish the state’s articulated goal of preventing drugs from entering the prison.\(^\text{121}\)

Dissenting from the majority’s opinion, Chief Judge Murphy argued that the state’s interest in keeping drugs out of the prison outweighed the minimal intrusion that Gadson endured during his brief detention and thereby satisfied the Fourth Amendment’s reasonableness standard.\(^\text{122}\) In support of his contention, Chief Judge Murphy stated that “[t]he privacy interests in this case are far more attenuated than even the minimal interests at issue [in the sobriety cases]” because in those cases “every driver travelling on a public highway was stopped and subjected to a temporary seizure.”\(^\text{123}\) This reasoning confuses the issue, for it suggests that because only those persons travelling down the prison access road are subject to search, the temporary detention is reasonable. Sobriety checkpoint cases, however, turn on the weight of the state’s interest compared to the intrusion upon the individual’s right to be free from unreasonable searches and seizures.\(^\text{124}\) They do not rely on the number of drivers affected by the state’s action.

Chief Judge Murphy also contended that the danger of drugs entering a prison does not end when a prospective visitor decides to forego his visit.\(^\text{125}\) This argument is based on the fact that drug detection dogs are not used at every gate, on every day, and thus, a visitor

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\(^{120}\) See *Sitz*, 496 U.S. at 456; *Little*, 300 Md. at 504-06, 479 A.2d at 912-14.

\(^{121}\) This was precisely the rationale of the *Gadson* court. See *Gadson*, 341 Md. at 12-13, 668 A.2d at 21, 668 A.2d at 12-13, 668 A.2d at 21-22, 668 A.2d at 32-33.

\(^{122}\) *Id.* at 21, 668 A.2d at 32 (Murphy, C.J., dissenting).

\(^{123}\) *Id.* at 21-22, 668 A.2d at 32-33.

\(^{124}\) See *Sitz*, 496 U.S. at 455; *Little*, 300 Md. at 494, 479 A.2d at 907. Both of these cases upheld limited seizures of motorists to prevent drunk driving, reasoning that if a drunk driver were permitted to turn back and avoid a sobriety check, the state’s interest would not be served because the intoxicated motorists would remain a threat to the public. See *Sitz*, 496 U.S. at 452; *Little*, 300 Md. at 492, 479 A.2d at 906.

\(^{125}\) *Gadson*, 341 Md. at 22, 668 A.2d at 33 (Murphy, C.J., dissenting).
has a "risk-free opportunity to determine whether drug dogs are in use on any particular day." 126 Similarly, Chief Judge Murphy asserted that "[i]n every Fourth Amendment decision, a citizen's privacy interest could have been more fully protected had the state adopted a more expensive alternative." 127

This reasoning, however, cannot support the unreasonable search or seizure of an individual. Chief Judge Murphy's analysis attempts to curtail an individual's fundamental Fourth Amendment protections because of inadequate state resources. 128 To announce a rule that allows the state to insulate itself from liability under the guise of inadequate resources would, in effect, abolish Fourth Amendment protections. The state, whether motivated by a lack of resources or an overzealous police force, could always cloak its actions under the guise of inadequate resources. 129 Hence, no challenge could defeat the systematic, intrusive nature of some searches and seizures that police might impose in the routine administration of their duties. The very protections that the Fourth Amendment seeks to ensure would become thwarted by claims of inadequate resources. Therefore, regulatory searches and seizures should be subject to more scrutinizing and probing judicial review.

5. Conclusion.—The appropriate inquiry in Gadson was whether the state's goal of preventing drugs from entering the prison outweighed Gadson's privacy interest in being free from unreasonable searches and seizures. Trooper Prince had no articulable suspicion or basis for the seizure of Gadson. Moreover, Trooper Prince had no specific and articulable facts that would justify the belief that Gadson was about to commit a crime. The seizure exceeded the scope necessary to ensure that Gadson would not bring drugs into the prison. Therefore, after balancing the intrusiveness of Trooper Prince's actions with the interest of the state in maintaining prison security, it is clear that the Court of Appeals was correct in concluding that Gadson's detention constituted an unreasonable seizure under the Fourth

126. Id.
127. Id. at 23, 668 A.2d at 33.
128. For purposes of this discussion, the inadequacy of state resources is the functional equivalent of the state choosing a less expensive alternative to carry out its objective.
129. Chief Judge Murphy later acknowledges, however, that "[t]he alternatives available to the state are not before [the court]," and, therefore, the court "must balance the means actually chosen to protect the state's interest against the privacy interest asserted by the defendant." Gadson, 341 Md. at 23, 668 A.2d at 33 (Murphy, C.J., dissenting) (emphasis added).
Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights.

BARRY M. JOHNSON
II. CONTRACTS

A. A New Construction of Promissory Estoppel

In Pavel Enterprises v. A.S. Johnson Co., the Maryland Court of Appeals adopted the promissory estoppel test of the Restatement (Second) of Contracts to apply to construction bidding disputes. In so doing, Maryland joined numerous other jurisdictions that apply the doctrine to construction bidding cases. Unlike other jurisdictions, however, the Pavel court altered the test, somewhat, by refusing to consider a general contractor's mere use of a subcontractor's bid as sufficient evidence of reliance. The court justified this departure by distinguishing Pavel from typical construction bidding cases because of a two-month delay between bid opening and the award of the job to the general contractor. This distinction, however, runs contrary to both Maryland precedent and the holdings of other jurisdictions. By disregarding precedent and inappropriately applying the Restatement test, the Court of Appeals incorrectly decided this important case.

1. The Case.—Pavel Enterprises, Inc. (PEI), a general contractor from Vienna, Virginia, submitted a bid to the National Institutes of Health (NIH) for a renovation project. In computing its bid, PEI relied on the bids it received from subcontractors, one of which came from A.S. Johnson Company (Johnson), a mechanical subcontractor based in Clinton, Maryland. On July 27, 1993, Johnson submitted a written scope proposal to PEI that described the work Johnson proposed to perform, but omitted the price for its services. Johnson did not quote a price to PEI until August 5, 1993, the same day that PEI forwarded its bid to NIH. Based on Johnson's verbal price quote of

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3. Pavel, 342 Md. at 164, 674 A.2d at 531.
4. Id. at 167, 674 A.2d at 533.
5. See infra note 36 and accompanying text.
6. See infra note 121 and accompanying text.
7. Pavel, 342 Md. at 147, 674 A.2d at 523.
8. Id.
9. Id. The court observed that omitting the price term is standard practice in the construction industry. Id. This omission allows the subcontractor to withhold the price until shortly before the general contractor submits its own bid to the owner or letting party. Id. at 147 n.2, 674 A.2d at 523 n.2.
10. Id.
$898,000. \textsuperscript{11} PEI submitted a bid of $1,585,000 for the entire NIH project. \textsuperscript{12}

When NIH opened its bids on the afternoon of August 5, 1993, PEI’s proposal ranked second lowest. \textsuperscript{13} NIH disqualified the lowest bidder in mid-August and notified PEI that it would receive the contract. \textsuperscript{14}

On August 26, 1993, Thomas Pavel, president of PEI, met with Johnson’s chief estimator, James Kick, to discuss Johnson’s proposal. \textsuperscript{15} In that meeting, the two men discussed restructuring Johnson’s bid to allow PEI to contract directly with Johnson’s sub-subcontractor, Landis and Gyr Powers (Powers). \textsuperscript{16} Johnson did not object. \textsuperscript{17} After the meeting, PEI faxed to all prospective subcontractors, including Johnson, a memorandum requesting a “break out” of the Powers cost section of their respective bids. \textsuperscript{18} This request reflected PEI’s intent to contract directly with Powers. \textsuperscript{19} In the memorandum, PEI requested revised quotes from the subcontractors “in an effort to allow all prospective bidders to compete on an even playing field.” \textsuperscript{20}

A few days later, PEI verbally informed Johnson that it intended to use Johnson as its mechanical subcontractor. \textsuperscript{21} On September 1, 1993, PEI sent Johnson a memorandum formally awarding Johnson the subcontract. \textsuperscript{22} Upon receipt of the written award, however, Johnson informed PEI that its original bid contained an error and that,

11. At trial, PEI alleged that Johnson’s quote contained a fixed cost of $355,000, reflecting the cost of a sub-sub-contract with Landis and Gyr Powers, the sole supplier of electric controls for Johnson and all subcontractors bidding on the mechanical section of the NIH contract. See id. at 147 n.3, 674 A.2d at 523 n.3.

12. Id. at 147, 674 A.2d at 523.

13. Id. J.J. Kirlin, Inc. submitted the low bid. Id.

14. NIH disqualified Kirlin from the contract because Kirlin did not constitute a small business. Id. at 147 n.4, 674 A.2d at 523 n.4. The record did not indicate whether PEI immediately notified Johnson in mid-August that, due to Kirlin’s disqualification, PEI would be awarded the job. Record Extract at E41-42, Pavel Enters., Inc. v. A.S. Johnson Co., 342 Md. 143, 674 A.2d 521 (1996) (No. 62).

15. Pavel, 342 Md. at 147, 674 A.2d at 523.

16. Id. at 148, 674 A.2d at 524. Pavel testified at trial that contracting directly with Powers would have reduced the price of the bond that PEI needed to obtain, but would not have affected Johnson’s profit. Id. at 148 n.5, 674 A.2d at 524 n.5. See Record Extract at E36, Pavel (No. 62). Thomas Pavel testified that Johnson’s cost for controls was “basically a pass-through” to Powers. Id.

17. Pavel, 342 Md. at 148, 674 A.2d at 524; see also Record Extract at E65, Pavel (No. 62). James Kick testified that breaking out the controls “wasn’t a problem.” Id.

18. Pavel, 342 Md. at 148-49, 674 A.2d at 524.

19. Id.

20. Id. at 149, 674 A.2d at 524.

21. Id.

22. Id.

23. Id. at 150, 674 A.2d at 524.
as a result, Johnson's bid to PEI was too low.24 Johnson had discovered the mistake in its bid in mid-August, but failed to notify PEI at that time.25 Johnson attempted to withdraw its bid, both by telephone and by letter dated September 2, 1993.26 Nevertheless, PEI refused to permit Johnson to withdraw from the project.27 When Johnson refused to perform for the price it submitted on August 5, 1993, PEI secured a replacement subcontractor at a cost of $930,000,28 including the Powers component.29 On September 28, 1993, NIH formally awarded PEI the contract, and PEI performed the contract using the services of the replacement mechanical subcontractor.30

On December 13, 1993, PEI brought suit against Johnson in the Circuit Court for Prince George's County for damages in the amount of $32,000.31 PEI based its lawsuit on both traditional breach of contract and promissory estoppel theories.32 The trial judge, sitting without a jury, held that a contract had not been formed under either of these theories.33 The trial court predicated its refusal to find a bilateral contract on two findings of fact: (1) that no meeting of the minds had occurred between the parties and (2) that prior to NIH's acceptance of PEI's bid, Johnson had withdrawn its offer.34 As a result of these findings, the trial judge held for Johnson. PEI appealed to the Court of Special Appeals, but the Court of Appeals issued a writ of certiorari on its own motion before the intermediate court could consider the case.35

2. Legal Background.—Maryland law permits a general contractor to conditionally accept a subcontractor's proposal before the general contractor is awarded the contract by the letting party.36

24. Id.; see also Record Extract at E62-63, Pavel (No. 62) (testimony of James Kick).
25. Pavel, 342 Md. at 167, 674 A.2d at 533; see also Record Extract at E62-63, Pavel (No. 62). Johnson's chief estimator, James Kick, testified that he did not make PEI aware of the company's mistake back in mid-August because he believed that the project would be awarded to Kirlin. Id.
26. Pavel, 342 Md. at 150, 674 A.2d at 524-25.
27. Id. at 151, 674 A.2d at 525.
28. Id.
29. See supra notes 10, 16-17 and accompanying text.
30. Pavel, 342 Md. at 151 & n.6, 674 A.2d at 525 & n.6.
31. See supra text accompanying note 11. The difference between PEI's original bid and its latter bid with the replacement subcontractor was $32,000. See Pavel, 342 Md. at 151, 674 A.2d at 525.
32. Record Extract at E5-7, Pavel (No. 62).
33. Pavel, 342 Md. at 151, 674 A.2d at 525.
34. Id. at 162 n.22, 674 A.2d at 530 n.22.
36. See Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 540-41, 369 A.2d 1017, 1024-25 (1977) (finding a valid acceptance by the general contractor of a subcontractor's
Maryland courts had not addressed, however, the "precise point[] on the timeline" that a subcontractor's offer and a general contractor's acceptance form a binding contract. Numerous other jurisdictions have entertained this issue, but these jurisdictions disagree as to when a binding contract exists between a general contractor and a subcontractor. Most jurisdictions have decided this issue on either the traditional contract theory advanced in James Baird Co. v. Gimbel Bros., or promissory estoppel theory applied in Drennan v. Star Paving Co.

In Baird, the United States Court of Appeals for the Second Circuit, applying New York law, considered the claim of a general contractor bidding on a state government building. Gimbel, the subcontractor, submitted a linoleum supply proposal to Baird and to other general contractors bidding on the same job. Based on Gimbel's bid, Baird submitted a proposal to the government. Later that afternoon, Gimbel informed Baird that it had made an error in computing its bid and wished to withdraw its proposal. Two days later, the government awarded the project to Baird, which, in turn, formally accepted the Gimbel proposal. Upon Gimbel's refusal to perform under the original bid proposal, Baird sued for the additional cost of hiring a replacement subcontractor.
The Second Circuit reviewed the case under traditional contract law and, in an opinion written by Judge Learned Hand, held that, by submitting a bid, Gimbel merely made an offer to contract with Baird. The court found that Gimbel could withdraw the offer at any time before Baird accepted the offer. The court found in favor of Gimbel, ruling that, because Baird did not accept the offer until after Gimbel withdrew its bid, no contract existed between the parties. The court also refused to recognize a binding contract based on the theory of promissory estoppel, reasoning that promissory estoppel only applied to cases enforcing charitable pledges. By allowing the subcontractor to withdraw its bid after the general contractor relied upon it to formulate its own bid, however, the Baird decision exposed general contractors to significant risks. While the general is bound by the numbers submitted by the subcontractor, the subcontractor is not similarly bound until after formal acceptance by the general contractor, leaving the general contractor in a vulnerable position.

47. Id.
48. Id.
49. Id.
50. Id. at 346. It is likely that the Maryland Court of Appeals would have reached the same result. See Pavel, 342 Md. at 164, 674 A.2d at 531-32 (stating that the doctrine of promissory estoppel has developed in Maryland similarly to its development nationwide). Significantly, the Pavel court cited the landmark case of Maryland National Bank v. United Jewish Appeal Federation, 286 Md. 274, 407 A.2d 1130 (1979), a case involving a charitable pledge. Given the year of decision of that case, it is not unreasonable to believe that had Maryland considered the Pavel case some 40 years earlier, it would have reached the conclusion that promissory estoppel applies only to cases involving charitable pledges.

51. See Pavel, 342 Md. at 153-54, 674 A.2d at 526. The Baird decision has received much criticism. Even the Pavel court stated: "If the subcontractor revokes his bid before it is accepted by the general, any loss which results is a deduction from the general's profit and conceivably may transform overnight a profitable contract into a losing deal." Id. (quoting Franklin M. Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237, 239 (1952)); see also F.B. Reynolds v. Texarkana Constr. Co., 374 S.W.2d 818, 820 (Ark. 1964) (noting severe criticism of the Baird rule and that, in all fairness, the party who commits the mistake should bear any resulting loss).

52. The Pavel court observed that even though the general contractor is bound to the owner, it is not bound to any given subcontractor. Pavel, 342 Md. at 153 n.8, 674 A.2d at 526 n.8 (citing Michael L. Closen & Donald G. Weiland, The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories to the Relations Between General Contractors and Subcontractors, 13 J. Marshall L. Rev. 565, 583 (1980)). This encourages the general contractor to "bid shop," before having to commit to a particular subcontractor. Id. The Pavel court observed, however, that this system may create a "necessary symmetry," insofar as the general contractor is free to "bid shop," and the subcontractor is free to withdraw its submission. Id. Bid shopping occurs when a general contractor uses a low bid from a subcontractor to pressure other subcontractors to submit even lower bids, thus reducing costs to the general contractor. See id. at 156 n.13, 674 A.2d at 528 n.13.
Twenty years later, in *Drennan v. Star Paving Co.*, the California Supreme Court addressed the obvious unfairness created by the *Baird* decision. In *Drennan*, the subcontractor refused to perform for the price set out in its original bid because of a mistake it made in the bid. Applying the test from the *Restatement (First) of Contracts*, the court reasoned that the general contractor's reliance on the subcontractor's bid rendered the bid irrevocable. In so ruling, Justice Traynor observed that subcontractors are fully aware of the injustice faced by general contractors that are bound by bids, while subcontractors are not.

A number of courts found Justice Traynor's reasoning persuasive and adopted it. *Drennan* has also drawn criticism, however.

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54. Id. at 761.
55. Restatement (First) of Contracts § 90 (1932). Section 90 stated that "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Id.
56. *Drennan*, 333 P.2d at 759. The *Drennan* court viewed the general contractor's reliance as consideration for the subcontractor's underlying promise to keep the bid open for a reasonable time. Id. at 760.
57. Justice Traynor wrote:

> When [the general contractor] used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid.... [I]t is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

Id. at 760.
Drennan and similar decisions, general contractors are free to "bid shop,"60 "bid chop,"61 or encourage "bid peddling."62 These practices have led scholars to disapprove of Drennan.63 Additionally, scholars have reproached the Drennan decision for creating a lack of symmetry between the parties, in that the subcontractor is bound to the general, while the general is not bound to the individual subcontractor.64 Nevertheless, the American Law Institute incorporated Justice Traynor's reasoning in Drennan65 and applies promissory estoppel specifically to construction bidding cases.66 Only a few jurisdictions have actually adopted the approach of the Second Restatement.67

One alternative to the Restatement approach is to use the firm offer provisions of the Uniform Commercial Code.68 This provision would


60. Pavel, 342 Md. at 156 n.13, 674 A.2d at 528 n.13. The court defined "bid shopping" as "a tool in negotiating lower bids from other subcontractors post-award." Id.

61. Id. at 156-57, 674 A.2d at 527-28. "Bid chopping" is defined as pressuring successful subcontractors to lower their bids by threatening to bid shop. Id. at 156-57 n.14, 674 A.2d at 528 n.14.

62. Id. at 156-57, 674 A.2d at 527-28. The Court of Appeals defined "bid peddling" as the practice of submitting an initial uncompetitive bid, only to resubmit a lower bid after the general contractor has been awarded the project. Id. at 157 n.15, 674 A.2d at 528 n.15. By waiting until the award, the subcontractor can learn the price of the lowest sub-bid and beat it, thus saving the administrative cost of preparing an estimate. Id.


64. See, e.g., Williams v. Favret, 161 F.2d 822, 825 (5th Cir. 1947) (McCord, J., dissenting) (stating that the law of contracts cannot apply so one-sidedly as to bind one party to the other, yet leave the other "free to do as he please[s]". An interesting twist took place in Electrical Construction & Maintenance Co. v. Maeda Pacific Corp., 764 F.2d 619 (9th Cir. 1985), in which the Ninth Circuit applied the theory of promissory estoppel to force the general contractor to contract with the subcontractor after the general had used the subcontractor's bid to win the project. Id. at 622-23.

65. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979). This section provides, inter alia, that "[a]n offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice." Id.

66. Pavel, 342 Md. at 158, 674 A.2d at 529.


68. MD. CODE ANN., COM. LAW I § 2-205 (1992). The code provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no
hold open as irrevocable subcontractor's written bids, if those bids give some assurance that they will remain open.

Two other alternatives, rooted in traditional contract theories, have been discussed by the Massachusetts Supreme Court. Under a conditional bilateral contract analysis, if the general contractor and subcontractor exchange promises before bid opening, their agreement could be upheld as valid, but conditional upon the general contractor being awarded the project. Such conditional or contingent contracts have been recognized in Maryland. The reasoning underlying such recognition was observed by the Pavel court to be in direct conflict with Judge Hand's Baird v. Gimbel analysis. Under a unilateral contract analysis, the sub-bid would be regarded as an offer to a unilateral contract, so that use by the general contractor would constitute acceptance by way of performance. As observed by the Pavel court, this theory also contrasts with Judge Hand's analysis.

3. The Court's Reasoning.—

a. Traditional Bilateral Contract.—At the outset, the Court of Appeals addressed whether a traditional bilateral contract existed between the parties. First, the court reviewed the trial court's finding that no meeting of the minds had taken place between the parties. The fact that PEI sent its letter of August 26, 1993, to all subcontractors requesting resubmissions of quotes, the court held, reflected that PEI and Johnson lacked "a definite, certain meeting of the minds on a certain price for a certain quantity of goods." Thus, the Court of Appeals held, substantial evidence supported the trial court's finding that no meeting of the minds had taken place, and, therefore, the court's finding was not "clearly erroneous."
Second, the Court of Appeals reviewed the trial court's determination that Johnson had withdrawn its offer to PEI before PEI had accepted.\textsuperscript{79} Again, the Court of Appeals found substantial evidence in the report to support the conclusion of the trial court. Although Johnson's withdrawal had not arrived until after PEI's acceptance, the trial court held that PEI could not bind Johnson to the terms of its offer.\textsuperscript{80} The Court of Appeals found that the trial judge's remark that "'before there was ever a final agreement reached with the contract awarding authorities . . . Johnson made it clear to [PEI] that they were not going to continue to rely on their earlier submitted bid,'"\textsuperscript{81} demonstrated that the trial judge had considered Johnson's offer inherently contingent upon PEI winning the contract from NIH prior to final acceptance.\textsuperscript{82} Because Johnson did not lose the power to revoke its offer until after NIH awarded the project to PEI, PEI did not make a "final" acceptance of Johnson's offer on September 1, 1993.\textsuperscript{83} By revoking its offer on September 2, 1993,\textsuperscript{84} Johnson beat the deadline for withdrawing its offer by twenty-six days. Therefore, the court found the trial court's ruling that Johnson had withdrawn its offer before acceptance not clearly erroneous\textsuperscript{85} and affirmed the finding of the trial court that the parties failed to form a bilateral contract.\textsuperscript{86}

\textit{b. Promissory Estoppel.}—The Court of Appeals recognized that no Maryland court had ever applied "detrimental reliance," or "promissory estoppel," theory to a construction bidding case.\textsuperscript{87} According to the court, the doctrine of promissory estoppel originated in Maryland primarily to enforce pledges to charitable organizations.\textsuperscript{88} In \textit{Maryland National Bank v. United Jewish Appeal Federation},\textsuperscript{89} and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous.

\textsuperscript{79} \textit{Pavel}, 342 Md. at 163, 674 A.2d at 531.
\textsuperscript{80} Id.
\textsuperscript{81} Id. (quoting Record Extract at E76, \textit{Pavel} (No. 62)).
\textsuperscript{82} Id.
\textsuperscript{83} Id. Although NIH initially awarded the contract to PEI in mid-August, NIH did not formally accept PEI's offer until September 28, 1993. \textit{Id.} at 151, 674 A.2d at 525; \textit{see supra} notes 14 & 28 and accompanying text.
\textsuperscript{84} \textit{Pavel}, 342 Md. at 151, 674 A.2d at 525.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 164, 674 A.2d at 531. It is more accurate to refer to the doctrine as "promissory estoppel," rather than "detrimental reliance," because detrimental reliance is only one of several elements necessary for recovery under the theory of promissory estoppel. \textit{See infra} note 100 and accompanying text.
\textsuperscript{88} \textit{Pavel}, 342 Md. at 164, 674 A.2d at 531-32. The court mentioned that it first considered the issue, albeit in another context, in 1854 in \textit{Gittings v. Mayhew}, 6 Md. 113 (1854). \textit{Pavel}, 342 Md. at 164, 674 A.2d at 531.
the leading Maryland case on promissory estoppel, the court refused to enforce the promise because the promisee had failed to act in a "definite or substantial" way in reliance on the promisor as required by the Restatement (First) of Contracts.\textsuperscript{90}

After that case, the doctrine evolved and expanded to areas other than charitable pledges.\textsuperscript{92} Maryland courts, however, have expressed confusion about when and how to apply the doctrine.\textsuperscript{93} For example, the court pointed out that, in Snyder v. Snyder,\textsuperscript{94} the Court of Special Appeals erroneously held that promissory estoppel requires a finding of fraudulent conduct on the part of the promisor.\textsuperscript{95}

Further, in Kiley v. First National Bank,\textsuperscript{96} the court stated that "[i]t is unclear whether Maryland continues to adhere to the more stringent formulation of promissory estoppel, as set forth in the original Restatement of Contracts, or now follows the more flexible view found in the Restatement (Second) of Contracts."\textsuperscript{97}

In an attempt to resolve this confusion, and because "[t]he benefits of binding subcontractors outweigh the possible detriments of the doctrine,"\textsuperscript{98} the Court of Appeals in Pavel adopted the test of the Restatement (Second) of Contracts for construction bidding cases.\textsuperscript{99} The court then enunciated the following four requirements for applying promissory estoppel, regardless of context:

89. 286 Md. 274, 288, 407 A.2d 1130, 1137 (1979) (holding that a charitable pledge lacks legal consideration and, thus, is legally unenforceable).
90. Id. at 289-90, 407 A.2d at 1138-39.
91. Restatement (First) of Contracts § 90 (1932).
92. See Pavel, 342 Md. at 165, 674 A.2d at 532.
93. See id.
94. 79 Md. App. 448, 558 A.2d 412 (1989). In that case, a wife detrimentally relied on her husband's false promise to transfer property. \textit{Id.} at 450-51, 558 A.2d at 414.
95. Pavel, 342 Md. at 165-66, 674 A.2d at 532. The "fraudulent conduct" component of the Snyder holding is not a part of the test adopted in Pavel. See id. at 166, 674 A.2d at 532 (setting out the elements of the Restatement test). To the Pavel court, inclusion of such an element clearly reflects confusion in the lower appellate court. See id.
97. Id. at 336, 649 A.2d at 1154. The Restatement (Second) of Contracts deletes the requirement that the action of the offeree be "definite and substantial." Pavel, 342 Md. at 166 n.29, 674 A.2d at 532-33 n.29.
98. Pavel, 342 Md. at 164, 674 A.2d at 531. In a footnote to this statement, the court cautioned future litigants that the court's willingness to consider the doctrine does not carry with it the implication that Maryland will necessarily agree with the holdings of sister jurisdictions on the issue. Id. at 164 n.22, 674 A.2d at 531 n.22 (citing N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963)).
99. Id. at 166, 674 A.2d at 532 (citing Restatement (Second) of Contracts § 90(1) (1979)). The Court of Appeals adopted the second Restatement's formulation with little discussion, except to note that the court desired to "resolve... confusion." \textit{Id.}
1. a clear and definite promise;
2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;
3. which does induce actual and reasonable action or forbearance by the promisee; and
4. causes a detriment which can only be avoided by the enforcement of the promise.\textsuperscript{100}

To the extent that Snyder, and the later case of Friedman & Fuller v. Funkhouser,\textsuperscript{101} required a showing of fraud, they were disapproved by the Pavel court.\textsuperscript{102}

The Court of Appeals then applied the four-factor test to the facts of the Pavel case. First, for the general contractor to successfully bind the subcontractor to its promise, the general contractor must be able to establish a "clear and definite" offer to perform the job at a given price.\textsuperscript{103} Observing that this determination requires a case-by-case factual analysis, the court held that the trial judge had properly concluded that Johnson had made a sub-bid "sufficiently clear and definite to constitute an offer," satisfying the first element of the Restatement test.\textsuperscript{104} Second, the court held that the trial court had properly concluded that Johnson had no reasonable expectation that PEI would rely on its bid.\textsuperscript{105} As to the reasonableness of a sub-contractor's expectation, the Court of Appeals noted that evidence of "course of

\textsuperscript{100} Id. The Court of Appeals noted that this formulation is in agreement with the requirements stated in Union Trust Co. v. Charter Medical Corp., 663 F. Supp. 175, 178 (D. Md. 1986), aff'd, 823 F.2d 548 (4th Cir. 1987). In that case the district court observed that "it is not necessary to reach here the question of whether the more stringent standard of the original Restatement—requiring action or forbearance 'of a substantial and definite character'—is still the law of Maryland." Id. at 178 n.4 (quoting \textsc{Restatement (First) of Contracts} § 90 (1932)). Cf. Maryland Nat'l Bank v. United Jewish Appeal Fed'n, 286 Md. 274, 286, 407 A.2d 1130, 1136-37 (1979) (comparing the first \textsc{Restatement} to a tentative draft of the second).

\textsuperscript{101} 107 Md. App. 91, 111, 666 A.2d 1298, 1308 (1995) (applying the \textsc{Restatement} rule from Snyder).

\textsuperscript{102} See Pavel, 342 Md. at 166 n.29, 674 A.2d at 532 n.29.

\textsuperscript{103} Id. at 167, 674 A.2d at 533.

\textsuperscript{104} Id.

\textsuperscript{105} Id. As the Court of Appeals observed, the trial court came to this conclusion for four separate reasons: (1) Johnson believed that the bidding process remained open; (2) "it would be unreasonable for offers to continue" for a lengthy period between the date of bid opening and final award; (3) Johnson believed that Kirlin was the lowest bidder; and (4) Johnson's reasonable expectation of reliance had dissipated in the span of one month. Id.
"dealing" and "usage of trade" should operate as "strong incidies of reasonableness."\(^{106}\)

Third, the Restatement test calls for actual and reasonable reliance by the general contractor on the bid of the subcontractor.\(^{107}\) The Court of Appeals observed that, although the trial court made no mention of the existence or absence of such reliance,\(^{108}\) it may be assumed that the trial judge concluded that no actual reasonable reliance existed "based on his statement that 'the parties did not have a definite, certain meeting of the minds on a certain price for a certain quantity of goods and wanted to renegotiate.'"\(^{109}\) The Court of Appeals concluded that the fact that PEI sent the memorandum of August 26, 1993,\(^{110}\) to all prospective mechanical subcontractors, and not Johnson only, supported the trial court's ruling.\(^{111}\) The Court of Appeals noted that prompt notice by the general that it intends to use a subcontractor's bid would be "weighty evidence," absent here, that the general did in fact rely on it.\(^{112}\) By not producing any weighty evidence of reliance, PEI failed to satisfy the third element of the Restatement test.\(^{113}\)

Finally, because the trial judge did not address the issue directly, the Court of Appeals inferred that the lower court "did not find [the Pavel] case to merit an equitable remedy."\(^{114}\) Only a judge may determine whether the application of principles of common law equity should be invoked to prevent injustice, the court held. Further, the general contractor must come before the court with "clean hands"—having not engaged in practices such as bid shopping,\(^{115}\) bid chopping,\(^{116}\) or bid peddling\(^{117}\)—and the court must determine that "justice compels" an equitable remedy.\(^{118}\) The Court of Appeals found no error in the trial court's apparent conclusion that an equitable remedy was unwarranted.

\(^{106}\) Id. at 167 n.30, 674 A.2d at 533 n.30 (citing Restatement (Second) of Contracts §§ 219-223 (1979)).

\(^{107}\) Id. at 167, 674 A.2d at 533.

\(^{108}\) Id. at 168, 674 A.2d at 533.

\(^{109}\) Id. (quoting Record Extract at E76-1, Pavel (No. 62)).

\(^{110}\) See supra notes 19-21 and accompanying text.

\(^{111}\) Pavel, 342 Md. at 168, 674 A.2d at 533 ("[T]hat the general contractor engaged in 'bid shopping' . . . is strong evidence that the general did not rely on the sub-bid.").

\(^{112}\) Id. The court also observed that jury might infer that a given sub-bid was so low that no reasonable general contractor would rely on it. Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) See supra note 52 and accompanying text.

\(^{116}\) See supra note 60 and accompanying text.

\(^{117}\) See supra note 61 and accompanying text.

\(^{118}\) Pavel, 342 Md. at 168, 674 A.2d at 533-34.
Based on its analysis of the four factors of the promissory estoppel test, the Court of Appeals affirmed the ruling of the lower court that PEI had failed to establish its case based on either a traditional contract or detrimental reliance theory.\textsuperscript{119}

4. Analysis.—In Pavel, the Court of Appeals purported to adopt the promissory estoppel test developed by the Restatement (Second) of Contracts.\textsuperscript{120} In fact, however, the Pavel court departed from the trend of other jurisdictions by applying a different interpretation of the Restatement test to the fact situation at issue.\textsuperscript{121}

\textit{a. Promisor's Reasonable Expectation of Reliance.}—The Court of Appeals erred when it affirmed the trial court's finding that PEI failed to show a reasonable expectation of reliance on the part of Johnson.\textsuperscript{122} Although the court may reasonably have concluded that Johnson's expectation of reliance had dissipated over time, the fact remains that a reasonable expectation nevertheless did. A finding that Johnson's expectation had dissipated admits the existence of a reasonable expectation of reliance at one time, and this is all that the Restatement test requires.\textsuperscript{123} The Court of Appeals, however, imposed an additional requirement—an expectation of continued reliance.\textsuperscript{124} Because "it would be unreasonable for offers to continue," over time, the court held, Johnson did not have an expectation of reliance.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119} Id. at 168-69, 674 A.2d at 534.
\item \textsuperscript{120} See id. at 166, 674 A.2d at 532.
\item \textsuperscript{121} Evidence existed that would have supported a trial court determination that a traditional bilateral contract existed between the parties. See id. at 162, 674 A.2d at 531; see also supra note 34 and accompanying text. Evidence also existed that the parties had a meeting of the minds about the terms of the agreement notwithstanding the Powers negotiation. See supra notes 17-18. At least one jurisdiction binds a subcontractor to a contract for the period before the general contractor is awarded the project. See Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co., 688 P.2d 576, 580-81 (Alaska 1984) (stating that a subcontractor is contingently bound to the general contractor before the project is awarded).
\item \textsuperscript{122} Pavel, 342 Md. at 162, 674 A.2d at 531. The lower court asserted that "it would be unreasonable for offers to continue" under the circumstances of the instant case. Record Extract at E76, Pavel (No. 62).
\item \textsuperscript{123} See Pavel, 342 Md. at 166, 674 A.2d at 532. Clearly, there was a substantial likelihood that PEI would rely on Johnson's bid if it turned out to be low and that this would result in PEI winning the project. Moreover, not only was Johnson aware that PEI would rely on the bid, but applying Justice Traynor's reasoning from Drennan, Johnson hoped PEI would use it. See supra note 57 and accompanying text for a discussion of subcontractor's expectations. This kind of interest carries a necessary implication that the subcontractor had a reasonable expectation that the general would rely on its submission.
\item \textsuperscript{124} Pavel, 342 Md. at 167, 674 A.2d at 533.
\item \textsuperscript{125} Id.
\end{itemize}
There are two flaws to this holding. First, the notion of continued reliance is not required by the Restatement test; the Restatement requires only an initial expectation of reliance. In other jurisdictions, it is well settled that the "reasonable expectation" requirement of promissory estoppel is satisfied by the mere use of the subcontractor's bid by the general contractor. As early as 1964, courts observed that such reliance gives rise to a cause of action for the general contractor's additional costs of replacing the subcontractor that had supplied figures for the general's bid. In affirming the trial court's finding, the Pavel court cited no authority for its conclusion that anything other than use of the subcontractor's bid by the general is required to constitute reliance. By failing to cite any authority and neglecting to discuss the basis for determining that the test required continued reliance, the Court of Appeals departed from the rule of other jurisdictions that mere use of the subcontractor's bid by the general contractor in submitting the prime bid constitutes reliance.

Second, whether Johnson actually expected continued reliance by PEI should not serve as conclusive evidence of whether that expectation was "reasonable." The Court of Appeals noted that courts should consider course of dealing and usage of the trade when determining the reasonableness of the subcontractor's expectations. The trial court made no findings of fact regarding either of these issues. It is not reasonable that a subcontractor would submit a bid to a general in contemplation of an impending project without the expectation that the general might rely on the subcontractor's bid, not only to compute the general's bid but also to procure materials and to deal with the other subcontractors and the letting party. The Drennan opinion discusses this initial proposition, which, accordingly, serves as the basis for applying promissory estoppel to construction bidding cases. By adopting the Restatement test, the Court of Appeals implicitly adopted the requirement that use of a subcontractor's bid equals reliance. Given the trial court's finding that PEI relied on Johnson's

126. See supra note 58 for cases following Drennan.
127. See F.B. Reynolds v. Texarkana Constr. Co., 374 S.W.2d 818, 820 (Ark. 1964) ("Justice demands that the loss resulting from the subcontractor's carelessness should fall upon him who was guilty of the error rather than upon the principal contractor who relied in good faith upon the offer that he received.").
128. See supra note 58 for authority that use by general contract or of a subcontractor's bid is "reliance."
129. Pavel, 342 Md. at 167 n.30, 674 A.2d at 533 n.30 (citing Restatement (Second) of Contracts §§ 219-223 (1979)).
131. See supra notes 55-59 and accompanying text.
bid, the Court of Appeals had no choice but to reverse the lower court's holding on this issue. The Court of Appeals should have determined that as a matter of law a subcontractor will be deemed to have a reasonable expectation of reliance.

b. Actual Reliance by the Promisee.—The Court of Appeals noted that the lower court did not expressly address the third factor of the Restatement test. Rather, based on the statement that "the parties did not have a definite, certain meeting of the minds on a certain price for a certain quantity of goods and wanted to renegotiate," the Court of Appeals inferred that the trial court had found that PEI had not actually relied on Johnson's bid. The Court of Appeals also concluded that the trial court's finding was not clearly erroneous. In so ruling, however, the Court of Appeals erred in two significant ways.

First, the context of the quote upon which the Court of Appeals's affirmation is based strongly suggests that the lower court was referring to the PEI's traditional bilateral contract claim, not the promissory estoppel claim. In the first full paragraph, the discussion of promissory estoppel seems to draw the "continuing promise" finding from the previous line, while the "meeting of the minds" comment modifies the court's discussion of the traditional contract claim. The court's repetition of the "meeting of the minds" language in the following paragraph, by way of summary, strongly implies that the phrase continued to apply to the contract claim only. Moreover, the Court of Appeals itself used the same "meeting of the minds" lan-

132. Pavel, 342 Md. at 168, 674 A.2d at 533 ("[T]he trial judge did not make a specific finding that PEI failed to prove its reasonable reliance upon Johnson's sub-bid.").

133. Id. (quoting Record Extract at E76-1, Pavel (No. 62)).

134. Id. The lower court, having previously discussed the contours of promissory estoppel, continued by stating:

I would be unpersuaded by the evidence that there was a continuing promise that existed that [PEI] was entitled to rely on.

And, so, accordingly I would render on promissory estoppel in favor of the defendant and judgment on the contract issue for the defendant as well, there being no meeting of the minds prior to the actual award of the contract [on] 9/28.

The only interpretation, I think, that is reasonable to put on the August 26th request for new information is that the parties did not have a definite, certain meeting of the minds on a certain price for a certain quantity of goods and wanted to renegotiate whatever that was.

So, for all of those reasons, judgment will be entered for the defendant on both counts.

Record Extract at E76-E76-1, Pavel (No. 62).

135. Record Extract at E76-1, Pavel (No. 62).

136. Id.
language to support its affirmation of the trial court’s holding for the traditional contract claim.

Second, use of the subcontractor’s bid, rather than continued reliance by the general contractor, should satisfy the reliance requirement.\textsuperscript{137} If the expectation that the general contractor will use the subcontractor’s bid in its own computation is sufficient to satisfy the “reasonable expectation of reliance” factor, then certainly the actual use by the general contractor will satisfy the reliance prong. As discussed above, many jurisdictions find that the mere use of the bid by the general contractor constitutes reliance.\textsuperscript{138} Assuming use of the bid constituted reliance, the Court of Appeals needed to look no further than the following finding of fact: “PEI relied upon Johnson’s sub-bid in making its bid for the entire project.”\textsuperscript{139} By using Johnson’s bid, PEI bound itself to NIH to provide the services for the quoted amount, even though NIH had not yet awarded the contract.\textsuperscript{140}

The Court of Appeals mentioned that evidence of bid shopping strongly suggests a lack of reliance by the general on the subcontractor’s bid.\textsuperscript{141} This may be relevant in consideration of whether justice demands enforcement of the promise, but is not helpful to the discussion of whether the general relied on the subcontractor’s bid in computing its own bid. Although bid shopping may be discouraged in the industry, it is not the practice sought to be remedied by promissory estoppel. The Court of Appeals noted that this practice and others were common in the construction industry prior to \textit{Baird} and continue to be common today.\textsuperscript{142} Although one commentator has suggested that promissory estoppel could be used as a remedy to bind the general contractor to the subcontractor,\textsuperscript{143} the problem of bid shop-

\begin{itemize}
\item \textsuperscript{137} See supra notes 57-58 and accompanying text.
\item \textsuperscript{138} For cases holding that use of a bid by the prime contractor satisfies the reliance requirement, see supra note 58.
\item \textsuperscript{139} Pavel, 342 Md. at 151, 674 A.2d at 525. This was precisely the argument proposed by PEI on appeal. Brief for Appellant at 12-13, Pavel (No. 62) (arguing that by submitting a bid to the owner, the prime contractor had already relied on the subcontractor).
\item \textsuperscript{140} See Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co., 688 P.2d 576, 580-81 (Alaska 1984) (using promissory estoppel to bind the subcontractor to the general, because the general was bound to the letting party even before the owner accepted the bid).
\item \textsuperscript{141} Pavel, 342 Md. at 168, 674 A.2d at 533.
\item \textsuperscript{142} Id. at 153-54 & n.8, 674 A.2d at 526 & n.8 (noting that under Baird, the general remained free to bid shop, but a necessary symmetry developed in that neither party was bound to the other); see also id. at 156-57, 674 A.2d at 527-28 (noting that Drennan’s reasoning has come under criticism because it allows bid shopping, bid chopping, and bid peddling).
\item \textsuperscript{143} See Lambert, supra note 63, at 405-09 (suggesting that promissory estoppel could be used to bind the general to the subcontractor as a way of dissuading bid shopping).
\end{itemize}
ping does not affect the general contractor's reliance on the subcontractor's bid. Therefore, the trial court's determination that PEI did not rely on Johnson's bid was clearly erroneous.

c. Demands of Justice.—The trial court did not discuss the fourth element of the promissory estoppel test. The Court of Appeals concluded that justice did not compel equitable action by the court. It seems more reasonable to conclude that the lack of discussion below indicates that the trial court failed to consider the issue. Because the trial court determined that the other factors of the Restatement test were unsatisfied, it did not entertain the fourth factor. Because the Court of Appeals had not yet adopted the Restatement test for detrimental reliance, the trial court did not make separate findings regarding each of the factors. Accordingly, the appellate court was left to speculate about the reasons for the trial court's holding. The lower court's finding cannot satisfy the "not clearly erroneous" standard because it was not even discussed. The Court of Appeals stated that a finding of "clean hands" on the part of the general contractor would be required to satisfy the fourth factor. Because the trial court made no findings on this issue, the Court of Appeals had no basis on which to affirm the judgment. Accordingly, the case should have been remanded on this issue.

5. Conclusion.—In affirming the trial court's decision and adopting the promissory estoppel test of the second Restatement, the Court of Appeals seems to favor the general contractor. In the majority of jurisdictions applying the Restatement's formulation of promissory estoppel in contractor-subcontractor bidding disputes, the general contractor can recover so long as there is detrimental reliance. In this case, however, PEI lost because the court discerned no such reliance. It is here that the Court of Appeals erred. Given the trial court's finding that PEI relied on Johnson's bid in preparing its own submission to NIH, the court should have found that PEI satisfied the third prong of the Restatement test. Additionally, because the Drennan reasoning persuaded the court to adopt promissory estoppel in construction bidding cases, the court should have maintained Drennan's reasoning regarding Johnson's expectations for PEI's use of its bid in calculating the prime bid as satisfying the "reasonable expectation" factor. To

144. Pavel, 342 Md. at 168, 674 A.2d at 534; see supra note 100 and accompanying text.
145. Pavel, 342 Md. at 168, 674 A.2d at 534.
146. Id., 674 A.2d at 533-34.
147. Id., 674 A.2d at 534.
stay in line with the modern application of promissory estoppel to construction bidding cases, the Court of Appeals should have reversed the trial court's holding on the second and third factors of the Restatement test and remanded the case for determination of the fourth: whether justice compelled equitable action.

JASON R. SCHERR
III. CRIMINAL LAW

A. A "Commonsenseical" Approach to Statutory Interpretation

In Spitzinger v. State, the Court of Appeals held that a defendant convicted of felony theft under the consolidated theft statute but acquitted of robbery arising from the same act may be sentenced up to the legislatively created fifteen-year maximum penalty for felony theft and may not take advantage of the maximum ten-year cap for robbery. In reaching this conclusion, the court invoked the Supreme Court's admonition to give "commonsenseical" meaning to statutes and thereby avoided creating an anomaly in the criminal law.

1. The Case.—A grand jury in Prince George's County indicted Stephen Lane Spitzinger (Spitzinger) for armed robbery, robbery, felony theft, and misdemeanor theft. The victim claimed that he was driving his employer's Pontiac Sunbird, and when he was stopped at a red light, a man approached. The man allegedly produced a small pistol and instructed the victim to get out of the car. Within minutes, the victim attracted the attention of an approaching police officer and reported the robbery. Three days later, the police found Spitzinger in possession of the car. The victim identified a photograph of Spitzinger as the person who approached him with a gun, but the victim failed to identify Spitzinger at trial.

At trial, Spitzinger admitted to theft of the vehicle, but denied that he was the armed robber. Spitzinger claimed that he took the car after finding it unattended at a gas station with the keys in the ignition and the motor running. The court asked the jury to return verdicts on the charges of armed robbery, robbery, felony theft, and

3. Spitzinger, 340 Md. at 130, 665 A.2d at 692.
4. Theft of property valued at three hundred dollars or greater constitutes felony theft. See MD. ANN. CODE art. 27, § 342(f)(1). Theft of property valued under three hundred dollars constitutes misdemeanor theft. See id. § 342(f)(2).
5. Spitzinger, 340 Md. at 117, 665 A.2d at 686.
6. Id. at 117-18, 665 A.2d at 686.
7. Id. at 118, 665 A.2d at 686.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id., 665 A.2d at 687.
13. Id.
misdemeanor theft. The trial judge instructed the jury that, if it found Spitzinger guilty of armed robbery, the robbery charge would merge into the armed robbery count. Further, the judge instructed that, if the jury found Spitzinger guilty of felony theft, the misdemeanor theft count would merge into the felony theft count.

The jury found Spitzinger not guilty of armed robbery and robbery, but convicted him of felony theft. The trial judge sentenced Spitzinger to twelve years imprisonment. Spitzinger appealed to the Court of Special Appeals, arguing that, under the doctrine of merger, his sentence for the felony theft conviction should have been limited to a maximum of ten years—the maximum sentence for robbery—because he had also been charged with robbery. The Court of Special Appeals affirmed the conviction and the sentence in a per curiam opinion. The Court of Appeals granted certiorari to resolve the issue of whether "the legislatively established maximum penalty for felony theft should be lowered to the maximum penalty for robbery when the defendant is convicted of theft but acquitted of robbery involving the same property."20

2. Legal Background.—

a. Merger of Offenses.—The doctrine of merger of offenses is rooted in the classification of criminal offenses as felonies and misdemeanors at common law. Felonies were those crimes punishable by forfeiture of the offender's land or goods. Additionally, felonies could be punished by death, although forfeiture served as the primary punishment. The common law felonies included murder, manslaughter, rape, sodomy, robbery, larceny, arson, and burglary. The Supreme Court recognized this distinction in Bannon v. United States: "The word 'felony' was used at common law to denote offenses which occasioned a forfeiture of the land or goods of the offender, to which capital or other punishment might be superadded according to the

14. Id.
15. Id.
16. Id. at 119, 665 A.2d at 687.
17. Id.
18. Id.
19. Id.
20. Id. at 117, 665 A.2d at 686.
22. See 1 CLARK & MARSHALL, supra note 21, at 110-11.
23. Id. at 111.
degree of guilt." 25 Misdemeanors, on the other hand, were all crimes not classified as felonies. 26 The doctrine of merger applied when a person was charged with several crimes arising out of the same act. 27 As Professor Perkins notes, merger specifically resolved the problem that arose when a person was charged with both a misdemeanor and a felony:

Under the English common law the procedure for the trial of a misdemeanor was so different from that for the trial of a felony as to preclude a joinder of the two in the same indictment. And the rule developed that if the same act resulted in both a misdemeanor and a felony the former was merged in the latter. 28

Thus, at common law, misdemeanors merged into felonies, but felonies did not merge into other felonies. 29

In the modern context, merger of offenses arises when a person is charged with more than one offense arising from a single act or transaction. In Gavieres v. United States, 30 the defendant was charged with violating two statutes. 31 One prohibited public drunkenness and the second prohibited certain speech directed at public officials. The Supreme Court held that, although the charges stemmed from a single transaction, the offenses were distinct because each required proof of an element different from the other. 32 The Court, quoting the Supreme Court of Massachusetts in Morey v. Commonwealth, 33 stated:

A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt

25. Id. at 467.
27. See id.
29. 1 CLARK & MARSHALL, supra note 21, at 119.
30. 220 U.S. 338 (1911).
31. Id. at 341.
32. Id.
33. 108 Mass. 433 (1871).
the defendant from prosecution and punishment under the other.\textsuperscript{34}

Thus the Court recognized that the critical question of the modern doctrine of merger is whether the accused has been punished more than once for the same crime in violation of the constitutional prohibition against double jeopardy.\textsuperscript{35} The Court also acknowledged that it is possible for a defendant to be convicted of more than one crime arising out of a single transaction, so long as each offense requires proof of an element not required by the other offenses.\textsuperscript{36}

The Court more clearly articulated this test in \textit{Blockburger v. United States},\textsuperscript{37} when it stated: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."\textsuperscript{38} The \textit{Blockburger} test, also known as the required evidence test, is the prevailing test applied by the Court to determine whether a person has been punished more than once for the same offense.\textsuperscript{39} Application of the test usually yields the result that statutes define the "same offense" because one is a lesser included offense of the other. One offense is deemed a lesser included offense of another if all of the elements of the first charge are present in the offense of the second charge.\textsuperscript{40} Thus, multiple punishments are precluded if one offense is a lesser included offense of another.

Maryland courts have adopted the required evidence test as the predominant test to determine whether one offense merges into another. The Court of Appeals has been inconsistent, however, in determining the weight the required evidence test should be accorded. In some cases, the court has classified the \textit{Blockburger} test as a tool of statutory construction that remains subordinate to clear and contrary

\textsuperscript{34} \textit{Gavieres}, 220 U.S. at 342 (quoting Morey v. Commonwealth, 108 Mass. 433 (1871)).

\textsuperscript{35} U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .")

\textsuperscript{36} \textit{Gavieres}, 220 U.S. at 343.

\textsuperscript{37} 284 U.S. 299 (1932).

\textsuperscript{38} \textit{Id.} at 304.

\textsuperscript{39} See Rutledge v. United States, 116 S. Ct. 1241 (1996) ("For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in Blockburger v. United States.").

\textsuperscript{40} See, e.g., Simms v. State, 288 Md. 712, 718-19, 421 A.2d 957, 960-61 (1980) ("Since all of the elements of simple assault are present in the offense of assault with intent to rob . . . and both charges are based on the same acts, simple assault is a lesser included offense of assault with intent to rob.").
evidence of legislative intent. In a more recent decision, *State v. Lancaster*, the court took a much firmer stand on the required evidence test, declaring it a "long-standing rule of law." This formulation elevates the required evidence test to a threshold test; once it is met, "merger follows as a matter of course" unless the legislature specifically authorized multiple punishments for a single transaction. Maryland courts have uniformly applied the test when presented with the problem of multiple offenses arising from a single act. When merger is based on the required evidence test, the included offense merges into the offense with the distinct element, regardless of the maximum sentence that each offense carries.

*b. Merger of Penalties.*—Even if offenses do not merge by application of the required evidence test, the Supreme Court has held that there should be a merger of penalties if Congress did not intend to impose multiple or consecutive punishments for offenses arising

41. See, e.g., Randall Book Corp. v. State, 316 Md. 315, 324, 558 A.2d 715, 720 (1989) (characterizing the required evidence test as "helpful in such cases as an aid in determining legislative intent, but . . . not dispositive").


43. Id. at 409, 631 A.2d at 466 ("Under this Court's decisions, the required evidence test is not simply another rule of statutory construction. Instead, it is a long-standing rule of law to determine whether one offense is included within another when both are based on the same act or acts.").

44. Id. at 394, 631 A.2d at 458 (quoting *In re Montrail M.*, 325 Md. 527, 533, 601 A.2d 1102, 1104 (1992)); see also supra notes 27-30 and accompanying text.

45. See, e.g., Eldridge v. State, 329 Md. 307, 319, 619 A.2d 531, 537 (1993) (applying the required evidence test to hold that defendant could not be convicted of both carrying a deadly weapon concealed and carrying the same weapon openly with intent to injure arising out of same incident); Biggus v. State, 323 Md. 393, 350, 593 A.2d 1060, 1065 (1991) (noting that holding that common law assault or battery merges into a sexual offense conviction is consistent with Maryland case law); Williams v. State, 323 Md. 312, 316, 593 A.2d 671, 673 (1991) (applying the required evidence test to hold that defendant could not be convicted of both attempted second degree murder and assault with intent to murder arising out of the same incident); Snowden v. State, 321 Md. 612, 616, 583 A.2d 1056, 1059 (1991) (applying the required evidence test to determine that defendant cannot be convicted of assault, battery, and robbery arising out of the same offense).

46. See Hardy v. State, 301 Md. 124, 134, 482 A.2d 474, 480 (1984) ("[I]n Maryland a defendant charged with a greater offense (that carries a lighter penalty) and a lesser included offense (that carries a heavier penalty) is only subject to the maximum penalty of the greater offense upon conviction."); Johnson v. State, 283 Md. 196, 203-04, 388 A.2d 926, 930 (1978) (holding that, because false pretenses was an included offense in welfare fraud, it must merge into the conviction for welfare fraud even though welfare fraud carries only a three-year maximum penalty while the maximum penalty for false pretenses was ten years imprisonment); Flannigan v. State, 232 Md. 13, 19, 191 A.2d 591, 593-94 (1963) (holding false pretenses conviction merged into conviction for violation of the Worthless Check Act).
out of the same act.\textsuperscript{47} The Court of Appeals has also noted that there are instances in which a merger of penalties should occur because of legislative intent.\textsuperscript{48} In these cases, if two offenses arising from the same transaction are not found to merge under the required evidence test, the court must engage in statutory interpretation to determine whether the legislature intended multiple punishments.\textsuperscript{49} If merger of penalties is required, the penalty for the lesser included offense merges into the penalty for the greater offense.\textsuperscript{50}

c. Statutory Interpretation.—When a statute is ambiguous or silent on the issue of merger, a court must engage in statutory interpretation to ascertain legislative intent. The rule of lenity is a principle of statutory construction that is particularly applicable in merger cases. The rule of lenity provides that ambiguity as to whether the legislature intended that there be multiple punishments for the same criminal act “will be resolved against turning a single transaction into multiple offenses.”\textsuperscript{51} The Court of Appeals applied the rule of lenity in \textit{Williams v. State},\textsuperscript{52} when it considered whether a conviction for assault with intent to murder should merge into a conviction for attempted murder in the first degree when both charges arose out of the same acts. Although the court determined that attempted first degree murder and assault with intent to murder do not merge under

\textsuperscript{47} \textit{See, e.g.}, Simpson v. United States, 435 U.S. 6, 13-16 (1978) (holding that Congress did not authorize an additional penalty for the commission of a bank robbery with firearms, already subject to enhanced punishment, and finding it unnecessary to apply the \textit{Blockburger} test); Ladner v. United States, 358 U.S. 169, 173-78 (1958) (holding that a single discharge of a firearm that injured more than one federal agent in violation of federal statute that prohibited interference with any federal agent acting in his official capacity constituted only one violation of the statute).

\textsuperscript{48} \textit{See State v. Burroughs, 333 Md. 614, 624-25, 636 A.2d 1009, 1015 (1994)} (holding that the defendant was entitled to have convictions and sentences for embezzlement vacated under the doctrine of merger by legislative intent because the embezzlement charge merged into the charge of theft by deception); \textit{State v. Jenkins, 307 Md. 501, 519, 515 A.2d 465 (1986)} (holding that for penalty purposes assault with intent to maim should merge into assault with intent to murder); \textit{Brooks v. State, 284 Md. 416, 423, 397 A.2d 596 (1979)} (noting that there may be situations in which the required evidence test may not be the sole test for determining the appropriateness of merger, but holding that the instant case was not such a situation).

\textsuperscript{49} \textit{See supra note 27.}

\textsuperscript{50} \textit{See Burroughs, 333 Md. at 626, 636 A.2d at 1015; see also Jenkins, 307 Md. at 521, 515 A.2d at 475 (“[W]here there is merger by legislative intent, the offense carrying the lesser maximum penalty merges into the offense carrying the greater penalty.”).}


\textsuperscript{52} \textit{323 Md. 312, 593 A.2d 671 (1991).}
the required evidence test, the court concluded that merger was appropriate under the rule of lenity.\textsuperscript{53}

The rule of lenity is a rule of statutory construction that courts employ when determining questions of merger of offenses in cases in which the offenses do not satisfy the required evidence test. The Court of Appeals has emphasized that the rule of lenity must be used only in cases of ambiguity and may not be applied simply as a means to promote leniency in criminal punishment.\textsuperscript{54}

3. The Court's Reasoning.—Spitzinger offered two arguments as to why the fifteen-year maximum penalty for felony theft should be reduced to the ten-year maximum sentence for robbery.\textsuperscript{55} First, Spitzinger contended that the two offenses must merge.\textsuperscript{56} Specifically, he asserted that the offense of felony theft merges into the offense of robbery.\textsuperscript{57} Second, Spitzinger argued that, even if the offenses do not merge, the penalties should merge because the legislature did not intend to impose cumulative or successive sentences.\textsuperscript{58} Based on this second contention, Spitzinger argued that the court should reduce his sentence for felony theft to the penalty for the crime of robbery—ten years—of which he was acquitted.\textsuperscript{59}

The majority began by declaring that legislative intent "controls the court's determination of the validity of Spitzinger's sentence because it is for the legislature to define criminal offenses and their punishments."\textsuperscript{60} The court concluded that the Blockburger test was critical to the determination of whether merger of offenses was required.\textsuperscript{61} The court further noted that the Supreme Court has directed lower courts to give "commonsensical" meaning to statutes when engaging in statutory construction: "[T]he method for resolving the statutory construction issue of whether there is a merger of statutory crimes and/or statutory penalties is a common sense search for legislative

\textsuperscript{53} Id. at 322-23, 593 A.2d at 676.
\textsuperscript{54} See, e.g., Dillsworth v. State, 308 Md. 354, 365, 519 A.2d 1269, 1274 (1987) ("Lenity... serves only as an aid for resolving an ambiguity; it is not to be used to beget one." (alteration in original) (quoting Albernaz v. United States, 450 U.S. 333, 342 (1981))).
\textsuperscript{55} Spitzinger, 340 Md. at 120, 665 A.2d at 688.
\textsuperscript{56} Id.
\textsuperscript{57} Id. Although Spitzinger's precise argument is not clear from the opinion, the gist of his contention appears to have been that the felony theft offense must merge into the robbery offense, thereby reducing the fifteen-year maximum sentence for felony theft to the ten-year maximum sentence for robbery. See id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 119, 665 A.2d at 687.
\textsuperscript{61} Id. at 120, 665 A.2d at 687.
The court ultimately concluded that a legislature exercising common sense could not have intended the result urged by Spitzinger. As part of its inquiry into legislative intent, the majority considered robbery and felony theft within the larger context of the criminal and penal scheme created by the legislature. The court determined that it would “not lack rational basis” for the legislature to determine that felony theft should carry a greater penalty than robbery based upon the value of the property stolen.

The majority rejected the dissent’s contention that the there should be a merger of felony theft into robbery based on historical practice. The majority stated that, regardless of whether larceny merged into robbery at common law (a claim that the court found debatable), the fact that the legislature enacted the consolidated theft statute, which eliminated the crime of common law larceny, rendered the issue irrelevant.

The majority rejected Spitzinger’s first contention that the felony theft charge should merge into the robbery charge. First, the majority held that the two offenses did not merge under the required evidence test because each required proof of an element not required by the other. More generally, the court held that “[t]he statutory offense of felony theft does not merge into robbery under the required evidence test or under any other test of legislative intent.”

Turning to Spitzinger’s second contention—that even if the offenses do not merge, the penalties should merge based on legislative

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62. Id. at 129-30, 665 A.2d at 692.
63. Id. at 150, 665 A.2d at 692. The court stated:
A “commonsensical” legislature could not have intended that felony theft of property valued at $300 or more carries a maximum penalty of up to 15 years if committed by stealth, but if committed by violence or threat of violence then the maximum penalty for felony theft is reduced to only 10 years. At the very least, a “commonsensical” legislature would have intended that all felony thefts be punishable by a maximum of 15 years and that 15-year maximum penalty should not be reduced by one-third just because the felony theft might have been committed during a robbery.
Id.
64. Id. at 121, 665 A.2d at 688.
65. Id.
66. Id. at 122, 665 A.2d at 689.
67. Id. at 123, 665 A.2d at 689.
68. Id. at 121, 665 A.2d at 688.
69. Id. The court noted that robbery requires proof of violence or putting a victim in a state of fear, which is not required for felony theft. See id. Felony theft, on the other hand, requires proof that the property stolen was valued at three hundred dollars or more. There is no value requirement for robbery. See id.
70. Id. at 123, 665 A.2d at 689.
intent—the court agreed that Maryland case law indicates that penalties should merge if a defendant is charged with both larceny and robbery. With respect to this point, the court stated: "We... have some doubts, in light of our prior cases and the history of common law robbery and common law larceny, as to whether the legislature intended to authorize successive or cumulative punishment for felony theft and robbery." Basing its decision on the rule of lenity, the court concluded that the legislature did not intend cumulative or successive punishments for robbery and felony theft.

Although the majority accepted Spitzinger's contention that there should be a merger of penalties based on legislative intent, the majority refused to accept his argument that felony theft should merge into robbery for sentencing purposes. Rather, the court concluded: "Where there is a merger of penalties as distinguished from offenses, on some ground, such as the rule of lenity, the lesser penalty generally merges into the greater penalty." In addition to citing prior cases that have followed the same rule, the court discussed the sentencing hierarchy created by the legislature. The majority noted that the hierarchy is based on a gradation of severity, with carjacking ranking as the most severe crime, carrying a maximum penalty of thirty years imprisonment consecutive to underlying offenses, followed by armed robbery, which carries a maximum penalty of twenty years imprisonment. Felony theft of property valued at greater than three hundred dollars ranks the next most severe, carrying a maximum penalty of fifteen years imprisonment, followed by unarmed robbery, with a maximum penalty of ten years. Finally, misdemeanor theft carries a maximum penalty of eighteen months. The court deferred to legislative judgment in the face of this sentencing hierarchy, stating: "This Court should not proclaim that robbery is per se a more serious crime than felony theft in spite of the fact that the legislature, in setting the punishment for both crimes, has dictated precisely the

71. Id. at 124, 665 A.2d at 690.
72. Id. (citing Tolbert v. State, 315 Md. 13, 553 A.2d 228 (1989); West v. State, 312 Md. 197, 539 A.2d 231 (1988)).
73. Id.
74. Id. at 125, 665 A.2d at 690.
75. Id.
76. Id.
77. Id. (citing State v. Burroughs, 333 Md. 614, 626, 636 A.2d 1009, 1015 (1994); State v. Owens, 320 Md. 682, 688, 579 A.2d 766, 768-69 (1990)).
78. Id. at 127, 665 A.2d at 691.
79. Id.
80. Id.
Based on this reasoning, the court held that the trial court properly sentenced Spitzinger under the felony theft statute despite his acquittal on the robbery charge.82

Writing for the dissent, Judge Raker, joined by Judges Bell and Eldridge, disputed the majority's assertion that legislative intent controlled the case.83 Asserting, in accordance with State v. Lancaster,84 that the required evidence test is a "long-standing rule of law," the dissent took issue with the majority's characterization of the required evidence test as "simply another rule of statutory interpretation."85 The dissent also argued, however, that other relevant factors must be considered in addition to the required evidence test, such as the position taken by other jurisdictions, historical factors surrounding multiple punishments, and the fairness of multiple punishments within certain circumstances.86

The dissent argued that the offense of felony theft should merge into robbery based on historical practice.87 The dissent based its argument on "the historical understanding . . . that theft was included within robbery, and that robbery was more severe."88 Although the dissent cited no cases in which larceny merged into robbery, it relied upon the principle that statutes displace the common law only where expressly declared, and concluded that the legislature did not intend to abrogate the merger of larceny into robbery when it enacted the consolidated theft statute.89 In support of this assertion, the dissent pointed to a statement in the legislative history surrounding the passage of the consolidated theft statute that the purpose of the statute was to eliminate "these technical and absurd distinctions that have plagued the larceny related offenses."90

Furthermore, the dissent cited to the Maryland carjacking statute91 as support for this position, arguing that the carjacking statute

81. Id.
82. Id. at 130, 665 A.2d at 692.
83. Id., 665 A.2d at 693 (Raker, J., dissenting).
84. See supra note 42 and accompanying text.
85. Spitzinger, 340 Md. at 131, 665 A.2d at 693 (Raker, J., dissenting) (quoting State v. Lancaster, 332 Md. 385, 409, 631 A.2d 453, 466 (1993)).
86. Id.
87. Id. at 133, 665 A.2d 694.
88. Id.
89. Id.
90. Id. at 134, 665 A.2d at 694 (quoting SUBCOMMTEE ON THEFT RELATED OFFENSES, MARYLAND GENERAL ASSEMBLY, REVISION OF MARYLAND THEFT LAWS AND BAD CHECK LAWS 2 (1978)).
91. MD. ANN. CODE art. 27, § 348(A)(d) (1994). Section (A)(d) of Article 27 states in pertinent part: "The sentence imposed under this section may be imposed separate from
specifically includes a cumulative sentencing provision. The dissent reasoned that this fact indicated that the legislature anticipated that the underlying offenses of carjacking would merge. According to Judge Raker, had the legislature wished to abrogate merger with regard to the theft offenses, it could have included such a provision in the consolidated theft statute. Underlying the dissent's argument is the principle articulated in *Richwind Joint Venture 4 v. Brunson* that """"statutes are not presumed to make any alterations in the common law further than is expressly declared."""" Thus, the dissent argued, because the legislature did not specifically abrogate the common law doctrine of merger with regard to larceny and robbery, the practice must continue based on historical practice.

Finally, the dissent argued that practices in other jurisdictions also rebut the majority's decision. Citing three states that do not permit separate punishments for grand theft and robbery—California, Utah, and Florida—the dissent found the fact that these three states allow merger to be persuasive.

4. Analysis.—

a. The Status of the Blockburger Test.—The Spitzinger majority and dissent disagreed about the status of the Blockburger test. A significant decision in *Spitzinger*, although perhaps not emphasized by the court, is that the Blockburger test is "simply an aid in determining whether the legislature may have intended to preclude cumulative

and consecutive to a sentence for any other offense arising from the conduct underlying the offenses of carjacking or armed carjacking." *Id.*
punishment.” This stance regarding the weight of the Blockburger test stands in direct contrast to the court’s statement in Lancaster that the Blockburger test is “not simply another rule of statutory construction. Instead, it is a long-standing rule of law.” Lancaster, decided in 1993, is a more recent decision than those cases cited as support for the majority’s ruling on the decreased significance of the Blockburger test in this case. The Spitzinger court diluted the importance of the Blockburger test in favor of more deference to the legislature. Thus, the court’s position demonstrates a clear change in its view of the test, which will significantly affect subsequent merger cases. If the Blockburger required evidence test is employed simply as a tool for statutory interpretation, then it is no longer a threshold test to definitively decide whether merger should follow. Rather, the test is relegated to the same importance as other factors such as the canons of statutory construction and historical practice.

b. Statutory Interpretation.—Both the majority and the dissent agreed that strict application of the Blockburger test to the facts of this case permits no merger of offenses. The key difference between the positions taken by the majority and the dissent, however, is their approach to interpreting the consolidated theft statute. The majority relied on the statutory language in concluding that the legislature intended a fifteen-year maximum sentence for a felony theft conviction, regardless of whether the defendant was acquitted of robbery. The court reached this conclusion because it found the statute unambiguous. Conversely, the dissent concluded that the legislature intended the penalty for felony theft to merge into the penalty for robbery because the statute is silent on merger and, thus ambiguous. Spitzinger provides a classic demonstration of the difficulty of statutory interpretation. The majority’s holding, however, properly acknowledges the Supreme Court’s warning to reach “commonsensical” conclusions when interpreting statutes.

104. Spitzinger, 340 Md. at 121, 665 A.2d at 688.
106. See supra notes 21-23 and accompanying text.
107. Spitzinger, 340 Md. at 121, 665 A.2d at 688.
108. Id. at 132 n.2, 665 A.2d at 693 n.2 (Raker, J., dissenting).
109. See Spitzinger, 340 Md. at 126, 665 A.2d at 691 (“We should presume that, when the legislature sets a statutory maximum penalty, it intends it to be the maximum penalty for all defendants convicted of that crime.”).
110. See id. at 133, 665 A.2d at 694 (Raker, J., dissenting).
111. See supra notes 60-65 and accompanying text.
The dissent's reasoning and conclusion are strained and overly academic. Although Judge Raker employed long-recognized and well-respected canons of statutory interpretation to reach a plausible result, it strains the imagination to call her result "commonsensical." It would have been inappropriate for the court to read an exception into a statute that created a clear and deliberate sentencing hierarchy.

c. Maintaining the Balance of Powers.—The legislature enacted the consolidated theft statute to embrace the amalgam of common law theft offenses, such as larceny, larceny under false pretenses, larceny by trick, and receiving stolen goods. By enacting the statute and prescribing penalties for the included offenses, the legislature established a sentencing hierarchy. The prescriptions for maximum penalties are the direct result of legislative consideration and debate. The great challenge for courts in interpreting statutes is to avoid infringing legislative territory. Both Maryland and Supreme Court case law indicate that the determination of the appropriateness of criminal acts and punishments falls squarely within the realm of the legislature. The majority correctly observed that reading Spitzinger's desired exception into a legislatively created maximum sentence would disrupt the legislature's sentencing hierarchy and, in so doing, would usurp legislative power.

d. Application of the Factors Announced in White v. State.—The dissent's argument that the majority erred by disregarding factors such as historical practice, legislative history, and the decisions of other jurisdictions rested on a perceived ambiguity in the consolidated theft statute. Because the dissent considered the statute ambiguous, it insisted on using the interpretive tools noted in White v. State. As the court in White made clear, however, the factors only

112. See Spitzinger, 340 Md. at 131-35, 665 A.2d at 693-95 (Raker, J., dissenting); see also supra notes 25-33 and accompanying text.
114. See Spitzinger, 340 Md. at 127, 665 A.2d at 691.
115. See Thomas v. State, 333 Md. 84, 92, 634 A.2d 1, 4 (1993) (stating that the creation of a "binding hierarchy of offenses and sentences" is "a task that is truly a legislative one"); Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . .").
116. See Spitzinger, 340 Md. at 127, 665 A.2d at 691.
117. See id. at 132, 665 A.2d at 699 (Raker, J., dissenting).
118. 318 Md. 740, 569 A.2d 1271 (1990). The Spitzinger dissent quotes the following passage from White: "'[I]n deciding merger questions, we have examined the position taken in other jurisdictions. We have also looked to whether the type of act has historically resulted in multiple punishment. The fairness of multiple punishments in a particular
apply in the case of an ambiguous statute. In White, the defendant was convicted of both child abuse and murder. The Court of Appeals determined that the child abuse statute was ambiguous with regard to whether separate punishments were permitted. In the Spitzinger case, however, the language was unambiguous. The consolidated theft statute states that the maximum penalty for theft of property valued at three hundred dollars or more is fifteen years imprisonment. The language of the statute leaves no room for ambiguity—the legislature determined that a fifteen-year maximum penalty was appropriate for felony theft. The majority properly concluded its analysis at this point.

Nevertheless, even assuming that the language of the statute was ambiguous, an analysis of the factors enumerated in White would not necessarily have yielded the conclusion sought by Spitzinger. The strongest White-based argument the dissent mustered in favor of limiting Spitzinger's penalty to ten years rested on historical practice. Although the references in Maryland case law to robbery as "larceny from the person, accompanied by violence or putting in fear" are evidence that the two crimes merged at common law, the remaining criteria established in White—fairness, the practice of other jurisdictions, and legislative intent—did not clearly require the court to reduce Spitzinger's penalty to the maximum allowed under the robbery charge because of his acquittal on that charge.

Although the dissent did not explicitly argue that fairness militated against the imposition of consecutive sentences, this issue served as an important concern in the case of Simms v. State, and it seems to have been an underlying concern in the Spitzinger dissent. The situation is obviously important." Spitzinger, 340 Md. at 132, 665 A.2d at 693 (Raker, J., dissenting) (alteration in original) (quoting White, 318 Md. at 745, 569 A.2d at 1274).

119. See White, 318 Md. at 745, 569 A.2d at 1273.
120. Id. at 741, 569 A.2d at 1272.
121. Id. at 748, 569 A.2d at 1275. The court, in White, stated:
There is nothing in the language of the Child Abuse Statute, or in its legislative history, indicating whether the General Assembly intended that a parent or one having custody should be sentenced for both child abuse and murder where the malicious act causing physical injury ultimately led to the death of the child. Clearly, in this regard the statute is ambiguous as to whether separate punishment is in order.

Id.
123. See White, 318 Md. at 746, 569 A.2d at 1274 (noting factors to be considered in determining whether merger of offenses is appropriate, even if the required evidence test does not apply).
125. 288 Md. 712, 421 A.2d 957 (1980).
Simms court stated that "it is unfair to permit the State to exact a more severe and unanticipated penalty than that which could have been imposed if the prosecution had been wholly successful." The Simms court explained that had the defendants known they were defending against the possibility of a much greater sentence in connection with the common law assault charge—one that was not subject to a legislatively created penalty cap—"their tactics might well have been different." Fairness considerations such as these, however, do not apply in the Spitzinger case. Spitzinger knew the maximum penalties prescribed for each count against him at the outset of the trial. Because each of the four counts he faced was subject to a legislatively mandated maximum penalty, he necessarily was aware that a conviction for felony theft could carry a fifteen year sentence regardless of the verdict on any other count.

The court in Simms attempted to avoid an "extreme anomaly in the criminal law" in which defendants are punished more severely following acquittal on a more serious charge than they would have been if convicted of that charge. In the Spitzinger case, however, no such anomaly existed because the legislature created a place for both robbery and felony theft within an overall sentencing scheme. Further, the conclusion sought by Spitzinger and the dissent would have created another unacceptable anomaly in the criminal law: permitting a defendant to escape the maximum penalty adopted by the legislature for a theft conviction merely because the State opted to charge the defendant with robbery in addition to theft.

Second, the dissent argued that other jurisdictions prohibit multiple punishments for theft and robbery. Noting specifically that California, Florida, and Utah "do not permit separate punishments for grand theft and robbery," the dissent ignored the inescapable fact that in none of the cited cases was a theft sentence with a greater penalty merged into a robbery sentence with a lower penalty.

Although the dissent made a thoughtful argument against the majority's interpretation of the statute, the majority adhered correctly to the Supreme Court's "admonition" that "statutes be given a 'com-

126. Id. at 724, 421 A.2d at 964.
127. Id.
128. Id. at 723, 421 A.2d at 963.
129. See supra notes 4-6 and accompanying text.
130. Spitzinger, 340 Md. at 142, 665 A.2d at 198-99 (Raker, J., dissenting).
131. Id.
132. Spitzinger, 340 Md. at 129, 665 A.2d at 692.
monsensical meaning.’’133 By holding that the legislatively imposed maximum penalty for felony theft should be enforced regardless of any other charges the State decides to bring against the defendant, the court not only avoided creating a sentencing rule contrary to legislative intent, but also contrary to common sense.

5. Conclusion.—In Spitzinger v. State, the Court of Appeals concluded that the legislature did not intend to reduce the maximum penalty for felony theft to the maximum penalty for robbery when a defendant is convicted of felony theft but acquitted of robbery involving the same property.134 The majority reached the proper result and refused to engage in overly complex and under-illuminating statutory interpretation to reach a result that would have interfered with the clearly established sentencing hierarchy established by the Maryland General Assembly.

Kirsten Andrews

B. Confusing the Doctrine of Transferred Intent

In Poe v. State,1 the Court of Appeals, applying the doctrine of transferred intent, affirmed the conviction of a criminal defendant for both the attempted murder of his intended victim and for the first degree murder of a bystander.2 The court reasoned that the defendant’s intent to kill his intended victim transferred to the unintended victim, making the defendant guilty of first degree murder.3

Although the result in this particular case is in accord with notions of fairness and justice, the reasoning employed by the court to reach this result is problematic. The court not only confused the policy behind the doctrine of transferred intent with its operation, but also announced a standard that will surely lead to sentencing that is disproportionate to a criminal defendant’s culpability. Further, the court’s continued application of the transferred intent doctrine is unnecessary. Maryland courts should explore available alternatives to the doctrine that do not require courts to walk across a minefield of faulty reasoning and result-oriented jurisprudence.

133. Id. at 128, 665 A.2d at 691 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)).
134. Id. at 130, 651 A.2d at 692 (“Merely because Spitzinger was acquitted of an armed robbery and lesser included robbery does not justify reducing to 10 years the 15-year maximum penalty for the felony theft for which Spitzinger was found guilty.”).
2. Id. at 528-30, 671 A.2d at 509-04.
3. Id. at 530, 671 A.2d at 504.
1. **The Case.**—On August 10, 1993, James Allen Poe (Poe) drove to the house of his estranged wife, Karen Poe (Ms. Poe), in order to visit their four children. Ms. Poe had heard that day that Poe intended to take the children to Florida with his new girlfriend, and an argument ensued. Ms. Poe began to return to the house to call the police for help. As she walked into the house, Ms. Poe and two other witnesses saw Poe remove a 12-gauge shotgun from the trunk of his car. According to the testimony of one witness, Ms. Poe yelled from inside the house, “I don’t have to take this anymore.” According to several witnesses, Poe responded by pointing the gun toward the house and yelling, “Take this, bitch.”

Poe fired at least one shot into the house. The shot passed through the front screen door, hit Ms. Poe in the arm, and then hit six-year-old Kimberly Rice (Kimberly), the daughter of Ms. Poe’s boyfriend, in the head. Ms. Poe suffered a nonfatal wound to her arm, but the shot killed Kimberly instantly.

After the shooting, Poe drove away from the house and threw the shotgun out of the car to the side of the road. He then proceeded to drive to Pennsylvania, where the Pennsylvania State Police stopped him after recognizing Poe’s car from a description given over a police radio broadcast. While being placed in handcuffs, Poe told police that “what he had done was an accident and that he loved kids.” While in the police vehicle, Poe stated, “[I]t was an accident, [I] didn’t mean to do it. [I] was holding the gun in the air and the gun went off.” In a later statement to the Pennsylvania State Police, Poe explained that he “went to [his] car and got out [his] 12-gauge shotgun and . . . accidentally fired it into the house.” Poe stated that, at the time, he did not know what he had hit. Two hours later,
however, Poe changed his story. Poe stated that "he retrieved the gun from his vehicle to dispose of it so that ‘he [would not] be caught with a shotgun.’ He changed his mind, however, and was about to return the gun to the vehicle when he ‘tripped over his feet and the shotgun [discharged]."' When asked about the differences in his statements, Poe answered, "Whatever. She wasn’t going to let me see the kids and what’s the use of living if you can’t see your kids." The trial judge instructed the jury that “if they believed that the defendant willfully, deliberately and with premeditation intended to kill Ms. Poe, then they could find Mr. Poe guilty of first degree murder of Kimberly.” The jury found Poe guilty of the first degree murder of Kimberly and guilty of attempted first degree murder of Ms. Poe. The judge sentenced Poe to life imprisonment without the possibility of parole for the murder of Kimberly and a consecutive thirty-year sentence for the attempted murder of Ms. Poe.

On appeal to the Court of Special Appeals, Poe challenged his conviction for the first degree murder of Kimberly on the ground that the trial judge had improperly instructed the jury on the doctrine of transferred intent. Specifically, Poe argued that, in accordance with the Court of Appeals in *Ford v. State*, the doctrine of transferred intent “is not properly applied in any case of attempted murder.” The Court of Special Appeals disagreed, however, affirming Poe’s convictions. The Court of Special Appeals found that Poe had “misinterpreted the Court’s holding in *Ford*” and explained that, “where the crime committed against the intended victim is less serious than the greatest level of culpability that could be achieved by transferring the intent to the unintended victim, intent must be transferred, otherwise the greater crime committed against the unintended victim would be

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20. Id., 652 A.2d at 1166-67 (alterations in original).
21. Id., 652 A.2d at 1167.
22. Poe, 341 Md. at 527, 671 A.2d at 502. Specifically, the trial judge instructed the jury, in pertinent part, as follows:

If I intend to kill... Karen in this case, and my mark’s not good, or bullet goes through, and I kill somebody else, and they die instead of Karen, that’s still first degree murder on the second one because the law does not protect a person who has bad aim or is unfortunate enough to have the bullet go through the first.

That is called transferred intent. The intent follows the bullet.

Id. at 528, 671 A.2d at 503 (alteration in original).
23. Id.
24. Id.
27. Poe, 103 Md. App. at 151, 652 A.2d at 1171.
28. Id. at 159, 652 A.2d at 1175.
29. Id. at 151, 652 A.2d at 1171.
Applying this standard to Poe's actions, the Court of Special Appeals stated, "If [Poe's] intent to kill Ms. Poe is not paired with the actual harm caused to Kimberly . . . the death of [Kimberly] would be inadequately punished."  

The Court of Appeals granted certiorari to determine whether the transferred intent doctrine should apply in the case of a criminal defendant who, "intending to kill one person, shoots and wounds that person, but the shot passes through the intended victim and kills an unintended victim."  

2. **Legal Background.**—The transferred intent doctrine "had its earliest roots firmly embedded in the English Common Law." In the

30. *Id.* at 152, 652 A.2d at 1171.
31. *Id.* at 153-54, 652 A.2d at 1172.
32. Poe, 541 Md. at 525, 671 A.2d at 502. The Court of Appeals also considered, as a secondary issue, whether the trial court properly sentenced Poe. *Id.* Poe challenged the sentence on the ground that the trial judge had impermissibly injected his own personal religious and moral beliefs into the decision-making process. *Id.* at 581, 671 A.2d at 505. In support of this contention, Poe pointed to a number of factors—such as the lack of a criminal record and evidence of good character and remorse—that Poe argued should have mitigated against such a harsh sentence. *Id.* at 531-32, 671 A.2d at 505. Poe also pointed to the following remarks made by the judge during sentencing:

I'm still old-fashioned. Maybe my time is gone, maybe. I still believe in good old-fashioned law and order, the Bible, and a lot of things that people say I shouldn't believe anymore. Perhaps I am a dinosaur sitting here, but I'm not going to change. Maybe one day they will say you should not sit here anymore because you are too much of a dinosaur. You are too conservative in criminal law. You believe too much in the Bible and law and order.  

*Id.* at 533, 671 A.2d at 505-06. The court held, however, that the judge's remarks did not warrant reversal. *Id.* at 534, 671 A.2d at 506. The court stated:

In recognizing a trial judge's very broad discretion in sentencing, we by no means express approval of the remarks made by [the judge] pertaining to his own personal religious and moral beliefs. Nonetheless, we find that the sentence imposed upon the defendant was not motivated by ill-will, prejudice, or other impermissible considerations.

*Id.*

33. Gladden v. State, 273 Md. 383, 390, 330 A.2d 176, 180 (1974). In tracing the history of the doctrine, the Gladden court noted the following passage from a 1576 case:

"For if a man of malice prepense shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offense in him as if he had killed the person he aimed at, for the end of the act shall be construed by the beginning of it, and the last part shall taste of the first, and as the beginning of the act had malice prepense in it, and consequently imported murder, so the end of the act, viz. the killing of another shall be in the same degree, and therefore it shall be murder, and not homicide only."

*Id.* at 390-91, 330 A.2d at 180 (quoting Reg. v. Saunders, 2 Plowd. 473, 474a, 75 Eng. Rep. 706, 708 (1576)).
"classic" case of transferred intent, the doctrine operates so that "if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other."\textsuperscript{34} Transferred intent has often been described by the simple phrase, "the intent follows the bullet."\textsuperscript{35}

The doctrine of transferred intent has been adopted in criminal cases in some form in a majority of jurisdictions.\textsuperscript{36} Maryland first recognized the "continuing viability" of the transferred intent doctrine in \textit{Gladden v. State}.\textsuperscript{37} In that case, the defendant fired four or five gun-shots at his intended victim.\textsuperscript{38} Although none of the shots hit the intended victim, one inadvertently entered a nearby home and killed a twelve-year-old boy.\textsuperscript{39} The Court of Appeals affirmed Gladden's conviction of first degree murder, reasoning that

"if one intends injury to the person of another under circumstances in which such a mental element constitutes \textit{mens rea}, and in the effort to accomplish this end he inflicts harm upon a person other than the one intended, he is guilty of

\textsuperscript{34} Id. at 391, 330 A.2d at 181 (quoting 4 \textsc{William Blackstone}, \textsc{Commentaries} *201).

\textsuperscript{35} 40 Am. Jur. 2d \textit{Homicide} § 11 (1968).


\textsuperscript{37} 273 Md. 383, 405, 330 A.2d 176, 189 (1974). Although the issue of transferred intent had first been raised in \textit{Jones v. State}, 188 Md. 263, 52 A.2d 484 (1947), the Court of Appeals did not address the applicability of the doctrine at that time. \textit{See Gladden}, 273 Md. at 405, 330 A.2d at 188-89.

\textsuperscript{38} \textit{Gladden}, 273 Md. at 385, 330 A.2d at 177.

\textsuperscript{39} Id.
the same kind of crime as if his aim had been more accurate."  

Fourteen years later, in State v. Wilson, the court took a second look at the doctrine of transferred intent and applied it to a crime requiring a specific intent—attempted murder. That case involved two brothers, Lawrence and Timothy Wilson, who became involved in a dispute with a third party, Marvin Brown. The dispute culminated with the Wilson brothers firing multiple shots at Brown. Though none of the shots hit Brown, one shot did hit a bystander, causing him "paralysis on one side and brain damage that left him unable to walk or speak."

A jury convicted the Wilson brothers for both the attempted first degree murder of Brown and the attempted first degree murder of the bystander. Timothy Wilson appealed, arguing that "the doctrine of transferred intent was inapplicable to the crime of attempted murder." The Court of Special Appeals agreed and reversed the conviction for the attempted first degree murder of the injured bystander. The Court of Appeals reversed, however, holding that the transferred intent doctrine does apply to the specific intent crime of attempted first degree murder. The court disagreed with the holding of the Court of Special Appeals that "the crime of attempted murder requires a specific intent to kill the victim named in the indictment."

The Court of Appeals reasoned that "[t]o be sure, attempted murder is a specific intent crime. However, the intent required is merely the intent to kill someone." More recently, however, in Ford v. State, the Court of Appeals signaled a possible retreat from the position it took in Wilson. In Ford, the defendant and three other individuals threw large rocks at cars

40. Id. at 404, 330 A.2d at 188 (quoting ROLLIN M. PERKINS, CRIMINAL LAW 825 (2d ed. 1969)). The court further noted that "Gladden's culpability under the law and the resultant harm to society is the same as if he had accomplished the result he intended when he caused the death of the innocent youngster." Id. at 405, 330 A.2d at 188.

41. 313 Md. 600, 546 A.2d 1041 (1988).
42. Id. at 609, 546 A.2d at 1045.
43. Id. at 601, 546 A.2d at 1042.
44. Id.
45. Id. at 602, 546 A.2d at 1042.
46. Id.
47. Id.
48. Id.
49. Id. at 609, 546 A.2d at 1045-46.
50. Id. at 605, 546 A.2d at 1043.
51. Id.
traveling on a highway, causing extensive property damage and personal injuries.\textsuperscript{58} The defendant challenged the State's position that one of the crimes of which he was convicted—assault with intent to disable—could transfer from the drivers of the cars to the cars' passengers.\textsuperscript{54} Although the court declined to address the issue, the Ford court made several important declarations in dicta with respect to the operation of the transferred intent doctrine.\textsuperscript{55} The court noted that "the doctrine was intended to enable conviction of a defendant of the crime he intended to commit only when the crime was not committed upon the intended victim."\textsuperscript{56}

The Ford court recognized the inconsistency of its conclusion with the conclusion reached in Wilson and noted that the Wilson court "should not have applied transferred intent to attempted murder."\textsuperscript{57} Because, in Wilson, the attempted first degree murder was completed on the intended victim as soon as the bullets were fired, the Ford court reasoned: "The completed crime has been committed on the intended victim, and the fiction of transferred intent would not so much transfer the intent as replicate it and apply it to another victim, thus making multiple specific intent crimes from one single act intended to injure one person."\textsuperscript{58}

\textsuperscript{53.} Id. at 689, 625 A.2d at 987.
\textsuperscript{54.} Id. at 708-09, 625 A.2d at 997. At trial, the judge had instructed the jury that "if it found Ford assaulted with intent to disable the drivers, this intent could be transferred to the passengers." Id. The Court of Special Appeals concluded that the doctrine of transferred intent could not apply to such an offense. See id. at 709, 625 A.2d at 997.
\textsuperscript{55.} The court declined to address the transferred intent doctrine because Ford failed to object to the trial court's instruction on transferred intent and because, the court concluded, "the evidence sufficiently supported a jury determination that Ford intended to disable both drivers and passengers in the vehicles." Id. at 709, 625 A.2d at 997. Nevertheless, in dicta, the court agreed with the Court of Special Appeals that the doctrine should not have been applied to the offense in question. See id.
\textsuperscript{56.} Id. at 711, 625 A.2d at 998.
\textsuperscript{57.} Id. at 713-14, 625 A.2d at 999.
\textsuperscript{58.} Id. Although the Ford court disagreed with the application of the transferred intent doctrine in Wilson, the court observed that the trier of fact could have found that Wilson intended to kill the bystander based on the nature of his attack, reasoning that "[w]here the Wilsons specifically intended to kill Brown, and attempted to do so by firing multiple bullets from two handguns, they could have intended a 'kill zone' around Brown . . . . Therefore,] the fact finder could conclude that the Wilsons intended to kill everyone in the direct path of their bullets." Id. at 717-18, 625 A.2d at 1001. Thus, the Ford court noted that the court had at least reached the correct result in Wilson. Id. at 718, 625 A.2d at 1001. Nonetheless, "the sufficiency of the evidence [to support conviction] should [have been] based . . . on the inference of a concurrent intent to murder the bystander . . . that could be drawn from multiple shots fired towards both victims," but not "via transferred intent theory." Id.
Judge McAuliffe concurred in the result, yet declined to join the court's dicta pertaining to transferred intent. In particular, Judge McAuliffe rejected the majority's statement that the doctrine of transferred intent could not be applied "where the crime intended has actually been committed against the intended victim." Judge McAuliffe pointed out potential problems with the majority's approach through a hypothetical situation, the facts of which were similar to those in Poe:

Assume, for example, that the defendant, intending to kill A, shoots and wounds him, but the bullet passes through A and kills B. Under the court's theory, I assume the defendant would be guilty of the murder of B, although also guilty of attempted murder or assault with intent to murder A. If A had also died, the court would hold that the defendant could not be convicted of the murder of B, but only of battery, or perhaps manslaughter. What happens, then, if the defendant is convicted of the murder of B while A is still alive, but A dies of wounds received in the assault within a year and a day of the shooting.

Thus, prior to Poe, the court had adopted the doctrine of transferred intent to convict a defendant of first degree murder where the defendant missed an intended victim and killed an unintended victim. The court, in dicta, had rejected applying the doctrine to convict a defendant of attempted murder where both the intended victim and an unintended victim were injured. Until Poe, however, the court had not yet considered a situation in which a defendant shoots and wounds his intended victim, and the bullet, having passed through the intended victim, also kills an unintended victim.

59. Id. at 723, 625 A.2d at 1004 (1993) (McAuliffe, J., concurring in result). Judge McAuliffe was joined by Judges Rodowsky and Karwacki. Id. at 726, 625 A.2d at 1005.
60. Id. at 724, 625 A.2d at 1004.
61. Id. at 726, 625 A.2d at 1005.
62. See supra notes 37-40 and accompanying text.
63. See supra notes 51-57 and accompanying text.
64. Other jurisdictions have addressed factual situations similar to the one reached in Poe. For a case addressing the situation in which the intended victim was injured and the unintended victim killed, see People v. Scott, 927 P.2d 288, 289 (Cal. 1996) (upholding the use of transferred intent to convict defendant of both attempted murder and murder where defendant shot at and missed his intended victim and killed his unintended victim). For cases addressing the situation in which both the intended and unintended victims were killed, see State v. Hinton, 630 A.2d 593, 599 (Conn. 1993) (upholding the doctrine of transferred intent although the intended victim is killed); State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990) ("reject[ing] defendant's argument that the successful killing of the intended victim prevents the "transfer" of that intent to an unintended victim"). But see People v. Birreuta, 208 Cal. Rptr. 635, 639 (Ct. App. 1984) (refusing to apply transferred intent
3. The Court's Reasoning.—To the Court of Appeals, Poe argued that the intent to kill had been “used up” on his targeted victim; therefore, he could not be charged with the first degree murder of his unintended victim. Poe argued that “because he intended to and did shoot Ms. Poe and was convicted of her attempted murder, there is no intent left to transfer to Kimberly, the unintended victim.” In support of his contention, Poe cited the Ford decision as standing for the proposition that the transferred intent doctrine is simply inapplicable to the crime of attempted murder.

The court, however, rejected Poe’s argument and held that Poe could be convicted of both the attempted murder of Ms. Poe and the first degree murder of Kimberly. While recognizing that “the crime of attempted murder . . . was complete when [Poe] fired the shotgun at [Ms. Poe],” the court noted that “[Poe’s] intent was to murder, not to attempt to murder.” Because Poe intended to murder Ms. Poe, and Poe killed Kimberly, “his intent to murder was ‘transferred’ from Ms. Poe to Kimberly.” The court labeled the situation “a classic case of transferred intent.”

where both the intended victim and unintended victim are killed, for “[w]hen the intended victim is killed . . . there is no need for such an artificial doctrine”). For cases addressing the situation in which both the intended and unintended victims are endangered due to the defendant’s intent to kill, see State v. Gillette, 699 P.2d 626, 636 (N.M. Ct. App. 1985) (upholding three attempted murder convictions in a poisoning case where the defendant only intended to kill one person). But see People v. Czahara, 250 Cal. Rptr. 836, 839 (Ct. App. 1988) (“The purpose of the transferred intent rule—to ensure that prosecution and punishment accord with culpability—would not be served by convicting a defendant of two or more attempted murders for a single act by which he intended to kill only one person.”).

65. 341 Md. at 528, 671 A.2d at 503.
66. Id. Specifically, Poe argued:

[W]hat is clear is that the [defendant] was charged with, and convicted of, attempted murder (first degree) of Karen Poe. The crime of attempted murder was complete.

As the State presented the evidence against the [defendant], and as the jury so found in its decision, the [defendant] deliberately, with pre-meditation, intended to kill his wife when he fired a shotgun shell at her. Indeed, the shell hit her; she was lucky to have survived. The same mens rea was involved whether Karen Poe lived or died. The [defendant] had accomplished the intended physical result of shooting his wife . . . . There was no intent left to transfer from Karen Poe to Kimberly . . . .

67. Id. at 529, 671 A.2d at 504.
68. Id. at 530-31, 671 A.2d at 504-05.
69. Id. at 528, 671 A.2d at 503.
70. Id. at 528, 671 A.2d at 503.
71. Id. at 529, 671 A.2d at 503.
Relying on Ford, the court explained that "transferred intent links a defendant's mens rea as to the intended victim, with the killing of an unintended victim, and, in effect, 'makes a whole crime out of two component halves.'" The court further stated that "[t]he obvious purpose behind this doctrine is to prevent a defendant from escaping liability for a murder in which every element has been committed, but there is an unintended victim."

The court then explained how the Poe holding could be reconciled with dicta in Ford, which stated that transferred intent does not apply to attempted murder. The court clarified that Ford was limited to a situation in which "there is no death." The court likened the doctrine of transferred intent to that of felony murder, insofar as "[b]oth doctrines are used to impose criminal liability for unintended deaths." Just as there is no application of the felony murder rule if no death occurs in the course of a felony, there is no application of the transferred intent doctrine to attempted murder if no death occurs.

The court explained that "[i]n Ford, we made clear that if a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply." In contrast, if an unintended victim is killed, "transferred intent applies because there is a death and the doctrine is necessary to impose criminal liability for the murder of the unintended victim in addition to the attempted murder of the intended victim."

The court concluded that "the doctrine is used when the defendant fails to commit the crime intended upon the targeted victim and completes it upon another. Thus, the doctrine should be applied to the instant case." The court held that "[t]he relevant inquiry in determining the applicability of transferred intent is limited to what could the defendant have been convicted of had he accomplished his

73. Id., 671 A.2d at 503-04 (quoting Ford v. State, 330 Md. 682, 710, 625 A.2d 984, 997 (1993)).
74. Id., 671 A.2d at 504.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id. at 530, 671 A.2d at 504.
80. Id.
81. Id. (citation omitted).
intended act?" Thus, because Poe could have been convicted of first degree murder of Ms. Poe if she had died, the trial court, in instructing the jury on the doctrine of transferred intent for the killing of Kimberly, acted properly. Judge Raker authored a separate concurrence. Judge Raker argued that "neither history nor policy supports the majority's limitation of transferred intent to cases resulting in death." Judge Raker explained that both American and English courts have used the doctrine in situations in which third parties were injured, but no deaths resulted. As an example, Judge Raker pointed to the case of Ruffin v. United States, in which the District of Columbia Court of Appeals, relying in part on Ford and Wilson, held that, "although neither the intended victim nor the unintended victim was killed, transferred intent could be applied to permit conviction for assault with intent to kill the unintended victim." Judge Raker then propounded a policy argument for applying the transferred intent doctrine when a third party is injured but not killed. Judge Raker explained that the policy behind transferred intent is "to ensure proportionate punishment of criminal offenses, and to prevent criminals from escaping culpability due to 'poor aim' or mistaken identity." This rationale applies "regardless of whether the resulting injury to a bystander is fatal or non-fatal." Finally, Judge Raker believed that "if the majority's opinion is interpreted to preclude any use of the doctrine of transferred intent in attempted murder prosecutions, the effect of the decision will be to substantially increase the difficulty of prosecuting criminals for the harm inflicted on innocent bystanders."

4. Analysis.—In Poe, the court continues a tradition of illogical application of the transferred intent doctrine. Such a course will certainly lead to the disproportionate sentencing of criminal defendants. Society may view this problem as acceptable when balanced against the importance of holding defendants responsible for their criminal
acts. Continued adherence to the doctrine becomes less defensible, however, in light of existing solutions that would eliminate need for the doctrine without eliminating punishment proportionate to culpability.

a. Equal Culpability, Unequal Treatment.—The Poe court's primary rationale for imposing the transferred intent doctrine is that it is necessary to hold Poe liable for the death resulting from Poe's attempt to murder.\(^9\) Yet application of this doctrine results in situations in which culpability does not match legal responsibility. This problem is best illustrated by comparing a situation in which the doctrine would be applied under a Poe analysis to one in which it would not.

The court in Poe quoted Ford for the proposition that the doctrine of transferred intent only applies "when the defendant fails to commit the crime intended upon the targeted victim and completes it upon another."\(^9^3\) Thus, where \(D\) attempts to kill \(A\), succeeds in killing \(A\), but also hits and injures \(B\), \(D\) is liable for the first degree murder of \(A\) and \textit{not} for the attempted murder of \(B\).\(^9^4\) Applying the Ford court's reasoning, because \(D\) was already held liable for the first degree murder of \(A\)—the act she intended to commit—there is no need to transfer the intent to kill to the act against \(B\).\(^9^5\)

In a situation similar to that in Poe, in which the defendant injures the intended victim and kills a bystander, \(D\) is guilty of both the attempted murder of the intended victim, \(A\), and first degree murder of the bystander, \(B\).\(^9^6\) Under Poe, it is necessary, as matter of policy, to transfer the intent to \(B\) to hold \(D\) liable for the crime she intended to commit—first degree murder.\(^9^7\)

Thus, depending on which of the intended and unintended victims are killed or injured, the defendant will be charged with different crimes. This is true despite the fact that \(D\) had the same intention and caused the same harm in both situations. The Poe court's rationale is that transferred intent is used only when necessary to charge \(D\) with

\(^{92}\) Poe, 341 Md. at 529, 671 A.2d at 504; \textit{see supra} notes 68-68 and accompanying text.

\(^{93}\) Poe, 341 Md. at 530, 671 A.2d at 504 (quoting Ford v. State, 330 Md. 682, 711, 625 A.2d 984, 998 (1993)).

\(^{94}\) \(D\) would likely be liable for a lesser charge for injuring \(B\), such as criminal battery. \textit{See Ford}, 330 Md. at 716 n.14, 625 A.2d at 1000 n.14. The Ford court stated: "We note that refusal to apply transferred intent to attempted murder by no means relieves a defendant of criminal liability for the harm caused to unintended victims. The defendant clearly can be convicted of... some other crime, such as criminal battery, as to other victims." \textit{Id.}

\(^{95}\) \textit{See id.} at 712-13, 625 A.2d at 998-99.

\(^{96}\) \textit{See Poe}, 341 Md. at 525-31, 671 A.2d at 502-05.

\(^{97}\) \textit{See id.} at 529-31, 671 A.2d at 504-05; \textit{see supra} notes 68-68 and accompanying text.
the crime she intended to commit. But does holding a person accountable for the crime she intended to commit account for the disparity in sentencing when the culpability is the same? D's charges are different in each case, although her culpability and the resultant harm is the same. In both cases she intended to kill one person and another person was struck. There is no logical justification for the difference in results. Instead, the difference can only be attributable to luck, which surely should be minimized in a rational system of criminal justice.

b. Multiplication of Intent.—Poe also raised the difficult problem of distinguishing between transfer of intent and multiplication of intent. In dicta, the Ford court refused to use transferred intent to hold the defendant liable for assault with intent to disable unintended victims, if the defendant could be held liable for assault with intent to disable his intended victims. The Ford court reasoned:

[T]he purpose of transferred intent is not to multiply criminal liability, but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime. If the defendant charged with attempted murder, shot at but missed the intended victim, the defendant may still be convicted of attempted murder of that victim. The completed crime has been committed on the intended victim, and the fiction of transferred intent would not so much transfer the intent as replicate it and apply it to another victim, thus making multiple specific intent crimes from one single act intended to injure one person.

98. See Poe, 341 Md. at 530, 671 A.2d at 504.
99. It is clear that "luck" or "chance" plays a role in many areas of criminal law. See Kimberly D. Kessler, Comment, The Role of Luck in Criminal Law, 142 U. Pa. L. Rev. 2183 (1994). For example, a defendant that shoots a person with intent to kill may be charged either with murder or attempted murder, depending solely on whether the victim lives or dies. See id. at 2211. In this situation, however, society has determined that the resultant harm factors into the extent of the punishment. See id. at 2212-23. Thus, an attempt to commit a crime is treated less severely than a completed crime. See id. at 2212.

By contrast, in the situations described in this section, both the mental culpability and the resultant harm to society are the same. The only difference is which of the intended and unintended victims happens to be injured and which is killed. Thus, the disparity in charges is less defensible.
100. Ford v. State, 330 Md. 682, 709, 625 A.2d 984, 997 (1993); see supra notes 51-57 and accompanying text.
101. Ford, 330 Md. at 714, 625 A.2d at 999.
The *Poe* court transferred Poe's intent to kill from Ms. Poe to Kimberly, making a "whole" crime of first degree murder. The policy reason behind this is clear: Transferred intent is necessary to hold Poe liable for the crime he intended to commit. Yet the *Poe* court also left the specific intent to kill where it started, with the attempted murder of Ms. Poe. In effect, the intent is not transferred, but replicated.

In a case involving one bullet that kills both the intended and an unintended victim, one scholar noted:

If a single bullet is fired, the theorist might be forced to choose whether the intention that accompanies this act does or does not transfer; he cannot have it both ways. If the intention transfers, the first victim is killed unintentionally; if the intention does not transfer, the second victim is killed unintentionally. A doctrine to hold the defendant guilty of multiple murders when his single bullet kills both an intended and an unintended victim might be named *reproduced* or *duplicated intent* rather than transferred intent. The scholar extends this hypothetical to a case identical to the instant one. The author asks, "Is the defendant then guilty of two intentional crimes? . . . If a defendant performs a single intentional act, his intention must be reproduced or duplicated rather than transferred in order to convict him of more than one intentional crime."

The *Poe* court justified its result by stating that it is necessary to "transfer" intent to hold Poe liable for first degree murder, the crime that he intended to commit. This policy justification goes to the heart of the doctrine. The court confused policy, however, with the operation of the doctrine. Under the doctrine, intent is transferred to hold a defendant guilty of the intended crime, not replicated. As one judge has stated: "The fiction of transferring intent to an unintended target should be joined by a fictional relieving of intent from the intended victim for the doctrine to remain consistent. The contrary

102. *See supra* notes 68-72 and accompanying text.
103. *See supra* notes 74-69 and accompanying text.
105. *See id.*
106. *Id.* As to the instant case, there can be no question that there existed a multiplication—rather than a transfer—of intent. Poe’s intent to kill Ms. Poe was used to charge Poe both with the attempted murder of his intended victim and the murder of Kimberly. The court, in effect, both transferred the intent to "match up" the crime and simultaneously left the intent where it started. Because the "intended" crime was on the unintended victim, it was necessary to use the intent twice.
outcome makes as much sense as holding the defendant liable for two assaults even if his aim was true."\(^{108}\)

To replicate intent and convict a defendant of two crimes is to ignore the difference in culpability between one defendant, who commits one act intending to kill one person, and a second defendant, who commits two acts intending to kill two people.\(^{109}\) To replicate intent is to hold these two defendants equally culpable. Thus, a defendant such as Poe is treated as equally culpable to a defendant who fires multiple shots, intending to kill two people but succeeds in killing only one.\(^{110}\) This is simply unjust.

The court does not address the difficulty of holding the defendant liable for two intentional crimes when clearly the defendant had a single intent to kill.\(^{111}\) This illustrates the fundamental problem with the legal fiction of transferred intent. The court can apply the doc-

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\(^{110}\) Often, when a defendant is charged with both a crime against the intended victim and the murder of the unintended victim, the defendant argues only that transferred intent acted to improperly convict the defendant of the murder of the unintended victim. See, e.g., Ruffin v. United States, 642 A.2d 1288, 1294 n.10 (D.C. 1994); Poe, 341 Md. at 528 n.1, 671 A.2d at 508 n.1. A court can then easily ignore the issue of whether the transferred intent doctrine serves to transfer or replicate criminal liability, as it is only the murder conviction that is being appealed and not the crime against the intended victim. See id.

In Poe, the State appeared to anticipate this problem in its own brief. See Brief and Appendix of Respondent at 11 n.3, Poe v. State, 341 Md. 523, 671 A.2d 501 (1996) (No. 52). In its brief, the State discussed Ruffin, in which the defendant was charged with both assault against his intended victim and first degree murder against an unintended victim. The State noted the observations of the D.C. Court of Appeals in Ruffin that "while Ford might be read to suggest that Ruffin's conviction of the first-degree murder of Williams might require reversal of the assault conviction against the intended victim, Ruffin was not arguing for such an interpretation." Id. (citing Ruffin, 642 A.2d at 1294 n.10). Applying this reasoning to Poe, the State argued: "Likewise in the instant case, Poe argues only that his conviction for the first-degree murder of Kimberly... should be reversed. He raises no issue with respect to the conviction for the attempted murder of Karen Poe." Id.

The Poe court accepted the State's position that it need not address the attempted murder charge against Ms. Poe. Poe, 341 Md. at 528 n.1, 671 A.2d at 508 n.1. The court observed, "We note that the defendant argues only that his conviction for the first degree murder of Kimberly should be reversed. He has not asked this Court to vacate his sentence for the attempted murder of [Ms]. Poe." Id. The Poe court thus avoided potential problems with Poe's attempted murder conviction against his intended victim.

\(^{111}\) The Court of Special Appeals attempted to explain this apparent dilemma of transfer vs. replication in the more recent case of Harvey v. State, 111 Md. App. 401, 681 A.2d 628, cert. denied, 344 Md. 930, 686 A.2d 635 (1996):

Suppose, in addition to the death of the unintended victim, the intended victim had also been killed or, at least, wounded by the bullet in its flight. If the *mens rea* had to be used to prove the crime against the intended victim, what was then left to be "transferred" to the case involving the unintended victim?... If the *mens rea*
trine to reach the end the court seeks, with the justification that the purpose of the doctrine is to reach this end. As one scholar states: "The fiction operates as a substitute for careful thought; it is nothing

were in limited supply, to which of two crimes should it be allocated? How could a single *mens rea* be made to do double duty?

*Id.* at 418, 681 A.2d at 637.

The court resolved this "dilemma" by reasoning:

By thinking of the *mens rea* in such finite terms—as some discrete unit that must be either here or there—we have created a linguistic problem for ourselves where no real-life problem existed. Criminal *acts*, consummated or inchoate, are discrete events that can be both pinpointed and counted. A *mens rea*, by contrast, is an elastic thing of unlimited supply. . . . Once we stopped conceptualizing a defendant's *mens rea* as a single finite unit that might be "transferred" from one *actus reus* to another, we were free to view it as a pervasive state of moral fault or criminal purpose, of unlimited supply, that could influence any number of expected or unexpected consequences that might flow from it.

*Id.* at 419-20, 681 A.2d at 637. The court treats the intent of the defendant as a "pervasive state of moral fault or criminal purpose." *Id.* at 420, 681 A.2d at 637. This analysis fails to address problems of equivalent culpability discussed in this section. Further, consider "the specter of the single shot over Times Square giving rise to 100,000 assault charges." People *v.* Washington, 547 N.W.2d 661, 662 (Mich. 1996) (Levin, J., dissenting from denial of leave to appeal).

112. This problem is pervasive in the Court of Special Appeals's attempt to clarify the transferred intent doctrine. The court, seemingly ignoring guidance from the Court of Appeals, held:

In a nutshell:


*Harvey*, 111 Md. App. at 433, 681 A.2d at 644. Thus, the court would apply transferred intent if both an intended and unintended victim are killed. *See id.* Although there is a split of authority as to the application of the doctrine if both intended and unintended victims are killed, *see supra* note 64, this is precisely the scenario in which Maryland had rejected the application of transferred intent. *See Ford v.* State, 330 Md. 682, 711-12, 625 A.2d 984, 998 (1993). The Court of Appeals in *Ford* stated:

[T]ransferred intent should apply only when, without the doctrine, the defendant could not be convicted of the crime at issue because the mental and physical elements do not concur as to either the intended or the actual victim. . . . Where the crime intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims.

*Id.* The *Ford* court concluded: "When the intended victim is killed . . . there is no need for such an artificial doctrine." *Id.* at 712, 625 A.2d at 998 (quoting People *v.* Birreuta, 208 Cal. Rptr. 635, 639 (Ct. App. 1984)).

The *Harvey* court disregarded this and articulated yet another standard for the operation of the doctrine. The court in fact stated that "[t]here is no doubt that the guilt of the defendant for the death of the unintended victim would be precisely the same in the Poe scenario, regardless of whether the intended victim 1) was hit and only wounded or 2) was hit and killed." *Harvey*, 111 Md. App. at 422, 681 A.2d at 638. Again, the court demonstrates a dangerous "flexibility" in the application of transferred intent.
more than a label to which persons appeal to reach judgments that they accept intuitively.\textsuperscript{113}

c. Alternative Possibilities.—The Court of Appeals correctly held Poe accountable for both the harm inflicted on Ms. Poe and the death of Kimberly. Most would agree that it is fair and just that Poe suffer punishment for the harm resulting from his intention to kill in these circumstances. It is the means by which the court arrives at its conclusion that warrants criticism. The transferred intent doctrine, as applied in Maryland, is inconsistent and shaped to achieve the ends that the court seeks. The doctrine thus "has the vice of being a misleading half-truth, often given as an improper reason for a correct result, but incapable of strict application."\textsuperscript{114} It is thus important to examine alternatives that may accomplish the same end, without being subject to the same shortcomings.\textsuperscript{115}

First, courts could address the problem at sentencing under the "principle of proportionate sentences."\textsuperscript{116} This principle "requires parity in sentences when two defendants commit equally serious crimes."\textsuperscript{117} Thus, if two defendants "act with the same culpability, and proximately cause the same harm, then they must have committed equally serious crimes."\textsuperscript{118} Consider the following example. If one defendant (D1) intends to kill B, but merely injures her and instead kills C, D1 will be sentenced proportionally to a second defendant (D2), who, under the same circumstances, kills B and injures C. The culpability and the harm is the same in both cases—thus, the two defendants would receive proportionate sentences.

Second, a defendant, under certain circumstances, may be convicted under a theory of concurrent intent. As explained by the Court of Appeals in Ford: "The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity."\textsuperscript{119} If for

\begin{itemize}
  \item 113. Husak, supra note 104, at 87. For further academic criticism of the doctrine, see ROOLLIN M. PERKINS, CRIMINAL LAW 822 (2d ed. 1969). Perkins argues that transferred intent "has no proper place in criminal law." \textit{Id.}; see also Kenneth W. Simons, Rethinking Mental States, 72 B.U. L. Rev. 463, 474 (calling the transferred intent doctrine "dubious to begin with").
  \item 114. Perkins, supra note 113, at 822.
  \item 115. "Fictions should be created only if they are \textit{required} to avoid injustice . . . ." Husak, supra note 104, at 88 (emphasis added).
  \item 116. \textit{Id.} at 92.
  \item 117. \textit{Id.}
  \item 118. \textit{Id.}
\end{itemize}
example, a defendant places a bomb or fires a hail of bullets into a crowded place with intent to kill his victim, "[t]he defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim." Thus, "[t]he defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A."

Another possibility involves application of a depraved heart analysis. The depraved heart doctrine "treats certain homicides as murder although the perpetrator does not intend to kill or know that death will result." Under this doctrine, "[t]he perpetrator must [or reasonably should] realize the risk his behavior has created" and "the conduct must contain an element of viciousness or contemptuous disregard for the value of human life."

5. Conclusion.—The transferred intent doctrine is used to punish a defendant when a death results from his intention to commit murder, regardless of whether the person killed was the intended victim. This is certainly the desired result. Nevertheless, the doctrine of transferred intent leads to problems of logic and policy, including disproportionate sentencing and the multiplication of intent. The Court of Appeals's latest application of the transferred intent doctrine in Poe v. State illustrates these problems. These problems are unnecessary in light of alternatives that could allow a court to reach the same end without the use of an easily manipulated and somewhat illogical legal fiction.

ELIZABETH F. HARRIS

120. Id. at 717, 625 A.2d at 1001.
121. Id.
123. Both this theory and concurrent intent, unlike transferred intent, do not require that a fact finder impute an absent state of mind to a defendant. They may, however, suffer from a similar problem as transferred intent in that they may be easily manipulated to reach a certain result. For example, the Poe court, without transferred intent, could have held that Poe, by firing into a house where he knew others may be present, either displayed extreme indifference to the value of human life or had a concurrent intent to kill all those inside the house through a "kill zone." These doctrines may, like transferred intent, serve as devices to hold a defendant responsible for what many intuitively see as "right"; like transferred intent, they become tools of result-oriented jurisprudence.
C. Rejecting Inference of Intent to Murder for Knowingly Exposing Another to a Risk of HIV Transmission

Since the early 1980s, human immunodeficiency virus (HIV) infection has exploded into epidemic proportions, touching millions of American lives and sparking intense social and legal debate.1 Recently, in Smallwood v. State,2 the Court of Appeals addressed the controversial issue of what, if any, legal inferences may be drawn when an HIV-positive individual "knowingly exposes another to the risk of HIV-infection, and the resulting risk of death" by Acquired Immune Deficiency Syndrome (AIDS).3 In this case of first impression, the Court of Appeals held that a trier of fact may not infer an intent to murder from the mere fact that an individual has HIV and is aware of the modes of HIV transmission.4 Although the court reached the correct decision, its reasoning may have the dangerous effect of promoting the increasing criminalization of HIV transmission.

1. The Case.—In August 1991, while incarcerated in the Prince George's County Detention Center, Dwight Smallwood tested positive for HIV.5 By late September of that same year, Smallwood received notification that he had in fact tested HIV-positive.6 Health care providers at the detention center repeatedly warned Smallwood that he could transmit HIV to others through unprotected sex and advised Smallwood to take precautions to minimize the risk of transmission.7 Smallwood assured a detention center psychiatrist that, from that time


HIV disease refers to the broad spectrum of HIV infection, ranging from the primary infection stage to the asymptomatic stage to the advanced disease state. See Kurt J. Isselbacher, M.D., et al., Harrison's Principles of Internal Medicine 1567, 1586 (13th ed. 1994).

3. Id. at 103, 680 A.2d at 515.
4. Id. at 109, 680 A.2d at 518.
6. Smallwood, 343 Md. at 100, 680 A.2d at 513.
7. Smallwood, 106 Md. App. at 5, 661 A.2d at 749.
forward, he would inform future sexual partners, prior to intercourse, that he had tested HIV-positive. After his release, Smallwood received additional warnings about the dangers of unprotected sex. In February 1992, a social worker told Smallwood that he must practice "safe sex" to avoid transmitting HIV to his sexual partners. In July 1993, Smallwood informed health care providers at Children’s Hospital in Washington, D.C., where Smallwood received HIV-related medical treatment, that he had only one sexual partner and that he always used a condom during sex.

Nevertheless, in three separate incidents in late September 1993, Smallwood and an accomplice robbed, abducted, and raped three women at gunpoint. During all three incidents, Smallwood threatened to shoot his victim if she refused to cooperate or if she called the police. Smallwood took no steps to protect his victims from the risk of HIV transmission by wearing a condom.

In three separate indictments, the State charged Smallwood with the attempted second degree murder of all three victims. Additionally, based upon his attack against the second victim, the State charged Smallwood with attempted "first-degree rape, robbery with a deadly weapon, assault with intent to murder, and reckless endangerment." The Circuit Court for Prince George’s County tried and convicted Smallwood of assault with intent to murder, reckless endangerment, and all three counts of attempted second degree murder.

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8. Id. at 3, 661 A.2d at 748.
9. Smallwood, 343 Md. at 100, 680 A.2d at 513.
10. Smallwood, 106 Md. App. at 3-4, 661 A.2d at 748.
11. Smallwood, 343 Md. at 100, 680 A.2d at 513. On September 26, 1993, Smallwood and his accomplice robbed a woman, forced her into a grove of trees, and then raped her while holding a gun to her head. Id. Two days later, Smallwood and his accomplice robbed a second woman, took her to a secluded location, and raped her. Id. Finally, on September 30, Smallwood and his accomplice robbed a third woman, forced her to perform oral sex on Smallwood, and then raped her. Id.
12. Id.
13. Id.
14. Id. at 101, 680 A.2d at 513.
15. Id. Smallwood pleaded guilty to attempted first degree rape and robbery with a deadly weapon. Id. at 101 & n.1, 680 A.2d at 513 & n.1.
16. Id. at 101, 680 A.2d at 513-14. Smallwood moved for judgment of acquittal on the charges of attempted second degree murder, assault with intent to murder, and reckless endangerment. Smallwood, 106 Md. App. at 4, 661 A.2d at 748. The circuit court denied Smallwood’s motion. Id. Smallwood received concurrent life sentences for attempted rape, 20 years for robbery with a deadly weapon, 30 years for assault with intent to murder, 5 years for reckless endangerment, and 30 years for each count of attempted second degree murder to be served concurrently. Smallwood, 343 Md. at 101, 680 A.2d at 514.
Smallwood appealed his convictions of attempted second degree murder and assault with intent to murder to the Court of Special Appeals on the ground that "one cannot be convicted of those crimes simply because one knowingly engages in sexual behavior that places his partner at risk of being infected with HIV." The Court of Special Appeals analyzed Smallwood’s conviction in light of the requisite elements for attempted second degree murder: (1) a specific intent to commit murder coupled with (2) "some overt act in furtherance of the intent that goes beyond mere preparation." With respect to the first element, Smallwood contended that the evidence failed to support the circuit court’s finding that he possessed the requisite specific intent to murder. Smallwood argued that because a reasonable doubt existed about his intent—whether it was intent to murder or something less—Maryland law required that the circuit court “give him the benefit of the conclusion that would mitigate his guilt.”

The Court of Special Appeals rejected this contention, stating that because the circuit court merely applied the law to an agreed upon statement of facts, the rule requiring a trial court to mitigate the degree of a defendant’s guilt when a factual dispute exists did not apply.

The Court of Special Appeals noted that “‘intent must be determined by a consideration of the accused’s acts, conduct, and words,’ and that, under the proper circumstances, ‘an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body.’” The circuit court had found that when Smallwood

Circuit Court Judge Nichols made the following findings with regard to the attempted second degree murder charge:

I believe his requisite intent to kill can be found from inferring from the Defendant’s knowledge as to his HIV positive status, his knowledge of the transmission of the disease, and the steps necessary to avoid the transmission of the disease. I believe that he also had sufficient time to consider the consequences of his act.


17. Smallwood, 106 Md. App. at 4, 661 A.2d at 748.

18. Id. at 6, 661 A.2d at 749 (quoting State v. Earp, 319 Md. 156, 162, 571 A.2d 1227, 1230 (1990)). With regard to the second element, the Court of Special Appeals affirmed the circuit court’s finding that Smallwood’s “insertion of his penis into his victim’s vagina, with slight penetration, constituted an overt act in furtherance of the intent that went beyond mere preparation.” Id. at 10, 661 A.2d at 751.

19. Id. at 4-5, 661 A.2d at 748-49.

20. Id. at 10-11, 661 A.2d at 751-52 (citations omitted).

21. Id. at 13-14, 661 A.2d at 753. In this case, the parties provided the trial court with an undisputed statement of facts from which the court could determine Smallwood’s innocence or guilt. Therefore, “the trial court did not need to weigh the credibility of the evidence to determine the ultimate facts of the case.” Id. at 13, 661 A.2d at 753.

22. Id. at 14, 661 A.2d at 753 (quoting State v. Raines, 326 Md. 582, 591, 606 A.2d 265, 269 (1992)).
raped his victims, he knew that he was HIV-positive, that HIV could be transmitted through unprotected sex, and the fatal consequences of transmitting HIV to another person. Based upon this knowledge and the reasonable inference that "one intends the natural and probable consequences of his act," the Court of Special Appeals held that the circuit court could have reasonably concluded that Smallwood possessed an intent to murder. Accordingly, the court affirmed all of the challenged convictions. The Court of Appeals subsequently issued a writ of certiorari.

2. Legal Background.—

   a. Inferring an Intent to Murder.—The crimes of attempted murder and assault with intent to murder are both specific intent offenses, requiring a specific intent to murder. An individual harbors a specific intent to murder when he has a specific intent to kill "under circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter if death should result."

   Often, a criminal defendant will not readily concede his intent or state of mind. Thus, his intent can only be deduced through circumstantial evidence. This can pose a difficult problem because a defendant's intent or state of mind "is as much a fact as the state of his digestion." Hence, it has been said that "[w]e know what a person thinks not when he tells us what he thinks, but by his actions." The

23. Id. at 14-15, 661 A.2d at 753-54.
24. Id. at 15, 661 A.2d at 754 (quoting Ford v. State, 330 Md. 682, 704, 625 A.2d 984, 994 (1993)). The Court of Special Appeals drew an analogy between Smallwood and Ford, which held that "[i]t is a reasonable inference that a "natural and probable consequence" of throwing a large rock through the windshield of a fast moving vehicle is permanent injury of various forms to the vehicle's occupants." Id. at 14, 661 A.2d at 753 (alteration in original) (quoting Ford, 330 Md. at 704, 625 A.2d at 994).
25. Id. at 15, 661 A.2d at 754. The Court of Special Appeals held that, for sentencing purposes, Smallwood's conviction for assault with intent to murder should merge into his conviction for attempted second degree murder. Id. at 16, 661 A.2d at 754. On review, the Court of Appeals reversed his convictions, and, therefore, the merger issue became moot. Smallwood, 343 Md. at 101 n.2, 680 A.2d at 514 n.2
28. Earp, 319 Md. at 164, 571 A.2d at 1231; accord Jenkins, 307 Md. at 515, 515 A.2d at 472.
29. Smallwood, 106 Md. App. at 17, 661 A.2d at 755 (Bloom, J., dissenting) (quoting Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885)).
existence of the required intent may be inferred from the surrounding circumstances, including a defendant's acts, conduct, and words.\textsuperscript{31}

In certain circumstances, the use of a deadly weapon directed at a vital part of the human body gives rise to an inference of an intent to murder. As the Court of Appeals explained over four decades ago:

Since intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence. Malice and, so intent to murder, may be inferred from all the facts and circumstances of the occurrence. The deliberate selection and use of a deadly weapon directed at a vital part of the body is a circumstance which indicates a design to kill, since in the absence of evidence to the contrary, the law presumes that one intends the natural and probable consequences of his act.\textsuperscript{32}

Thus, because an individual is understood to intend the natural and probable consequences of his actions, directing a deadly weapon at a vital part of the human body creates a permissible inference that the individual harbored an intent to murder.

\textit{b. HIV and the Intent to Murder.}—Although Smallwood presented an issue of first impression in Maryland,\textsuperscript{33} courts in other jurisdictions have found an intent to murder based upon somewhat similar facts.\textsuperscript{34} In each of these cases, the court inferred an intent to murder from the defendant's knowledge that he had HIV and from his verbal or physical expressions of intent.\textsuperscript{35}

\textsuperscript{31} See State v. Raines, 326 Md. 582, 591, 606 A.2d 265, 269 (1992); Earp, 319 Md. at 167, 571 A.2d at 1232-33.

\textsuperscript{32} Davis v. State, 204 Md. 44, 51, 102 A.2d 816, 819-20 (1954).

\textsuperscript{33} See Smallwood, 106 Md. App. at 1, 661 A.2d at 747.

\textsuperscript{34} See infra note 87. There have been several cases of HIV-transmission prosecutions under military law. See Jody B. Gabel, Comment, \textit{Liability for "Knowing" Transmission of HIV: The Evolution of a Duty to Disclose,} 21 FLA. ST. U. L. REV. 981, 988-98 (1994) (examining unique military prosecutions for the knowing transmission of HIV).

In State v. Haines, for example, an Indiana jury convicted an HIV-positive defendant of three counts of attempted murder after he made several threats to police officers and health care providers stating his wish to transmit AIDS to them and attempted to spit, bite, scratch, and throw blood on the officers. Although a jury found Haines guilty of attempted murder, the trial court set aside the verdict and entered judgment on three counts of battery. The State appealed, arguing that the evidence sufficiently supported the jury's verdict. The Indiana Court of Appeals agreed and reinstated Haines's conviction for attempted murder. The court concluded that, taken together, Haines's knowledge of his HIV-positive status in conjunction with his verbal threats and conduct amounted to "biological warfare" and sufficiently established that he specifically intended to kill the officers.

In 1989, a Georgia court convicted an HIV-positive defendant of aggravated assault with intent to murder. Two months after the defendant, Gregory Scroggins, tested positive for HIV, a police officer apprehended him after breaking up an altercation between Scroggins and another man. Scroggins then scratched, bit, and spat at the officer and struck the officer in the face with a blood-soaked wig. The court stated:

From the evidence in the record before us we can only conclude that Haines had knowledge of his disease and that he unrelentingly and unequivocally sought to kill the persons helping him by infecting them with AIDS, and that he took a substantial step towards killing them by his conduct believing that he could do so, all of which was more than a mere tenuous, theoretical, or speculative "chance" of transmitting the disease.

and a third party. During the time when the officer had Scroggins in custody, Scroggins bit and spat at the officer and laughed when the officer asked if he had AIDS.

Scroggins appealed to the Georgia Court of Appeals, contending that the evidence did not support his conviction for aggravated assault with intent to murder because HIV cannot be transmitted via human saliva and, therefore, biting the officer could not constitute the use of a deadly weapon. The Georgia Court of Appeals ruled that a conviction for aggravated assault with intent to murder could stand so long as Scroggins harbored an intent to murder. The court further held that "[t]he jury's finding of 'intent to murder,' . . . [was] supported by the evidence that [Scroggins] sucked up excess sputum before biting [the] officer, this being evidence of a deliberate, thinking act rather than purely spontaneous; and that [Scroggins] laughed when the officer asked him if he had AIDS." Accordingly, the Georgia Court of Appeals affirmed Scroggins's conviction for aggravated assault with intent to murder.

In *Weeks v. State*, a Texas court convicted an HIV-positive defendant, Curtis Weeks, of attempted murder for spitting on a prison guard. While being transferred between prison units, Weeks ver-

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45. *Id.*
46. *Id.* The police officer placed flexicuffs on Scroggins, who then proceeded to assault the officer. *Id.* Scroggins was heard "making noises with his mouth as if to bring up spittle" and then bit the officer on the forearm with such force that he tore the officer's uniform and left a full-mouthed bite wound, which reportedly took ten months to heal. *Id.* Later, when Scroggins told a hospital worker that he was infected with HIV, the police officer approached Scroggins and asked whether he had AIDS. *Id.* Scroggins responded by laughing at the officer. *Id.*
47. *Id.* at 16. Scroggins argued that transmitting HIV via human saliva was only a "theoretical possibility." *Id.*
48. *Id.* The Georgia Code states: "A person commits the offense of aggravated assault when he or she assaults: (1) With intent to murder, to rape, or to rob; (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." GA. CODE ANN. § 16-5-21(a) (1996).
49. *Scroggins*, 401 S.E.2d at 18. The *Scroggins* court held:
Evidence of an intent to murder, coupled with the assault, exists beyond a reasonable doubt in this case. . . . [T]he peculiar circumstances of this case . . . support a finding that, by his deliberately biting another and injecting saliva into the blood stream while knowing he was infected with the AIDS virus, appellant's assault amounted to such wanton and reckless disregard as to whether he might transmit the disease, that the jury could infer a malicious intent, i.e., to murder. *Id.* at 18-19. Georgia law does not require a specific intent to kill. *Id.* at 19 ("A wanton and reckless state of mind is sometimes the equivalent of a specific intent to kill.").
50. *Id.* at 23.
52. *Id.* at 560-61.
bally threatened that he would transmit HIV to the prison guards and twice spat in the face of one guard—covering the guard's glasses, lips, and nose to the point of penetrating his nasal cavity and possibly his mouth. Weeks appealed his conviction to the Texas Court of Appeals, arguing that, because HIV cannot be transmitted through human saliva, he did not commit an act amounting to more than mere preparation of the intended offense. Although not an issue on appeal, the court noted that Weeks's knowledge that he had HIV, coupled with his actions, sufficiently established his specific intent to kill. Accordingly, the Texas Court of Appeals affirmed his conviction for attempted murder.

In *State v. Smith*, a New Jersey jury convicted an HIV-positive defendant, Gregory Dean Smith, of attempted murder, aggravated assault, and terrorist threats after biting a corrections officer during an altercation in a hospital emergency room. Smith threatened to "take out" and kill the officers and went "out of control," exclaiming: "I'm going to give you AIDS." Smith snapped his teeth at corrections officers and then bit one officer, telling him that he hoped the officer died from AIDS. Smith appealed his conviction, arguing that HIV could not be transmitted via a human bite and that he knew this could not be transmitted via a human bite and that he knew this

53. *Id.* at 561. Weeks threatened that he was "going to take somebody with him when he went," that he was "medical now," and that he had "HIV." *Id.*

54. *Id.* Texas law states: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Tex. Penal Code Ann.* § 15.01(a) (West 1994).

55. The Texas Court of Appeals primarily addressed the issue of whether HIV could, in fact, be transferred through spitting. See *Weeks*, 834 S.W.2d at 562. The court held that there was sufficient evidence in the record, albeit controversial, that the defendant could have transmitted HIV by spitting. *Id.* at 565.

56. *Id.* at 562 ("It is undisputed that [Weeks] spit twice on the officer and that [Weeks] was infected with HIV at the time. The record reflects that [Weeks] believed he could kill [the prison guard] by spitting his HIV infected saliva on him.").

57. *Id.* at 566.


59. *Id.* at 495-96.

60. *Id.* at 497.

61. *Id.* at 497-98. Smith exclaimed: "I hope you die, you pig" and "now die, you pig, die from what I have." *Id.* at 498. The State also introduced testimony concerning two later incidents that demonstrated Smith's intent to murder. In one incident, Smith resisted being hauled into the shower when he said to a corrections officer: "You know what I have and I'll give it to you if you... attempt to come in here and cuff and shackle me." *Id.* at 498 (alteration in original). The corrections officer believed Smith was referring to AIDS. *Id.* In another incident, Smith threatened a corrections officer and reportedly stated that he "had AIDS, that [Smith] would bite [the corrections officer], [and that the corrections officer] will die with [Smith]." *Id.*
fact when he bit the corrections officer. The Superior Court of New Jersey declined to address whether HIV could be transmitted through a human bite and focused instead on whether Smith "purposely intended to cause the particular result that is the necessary element of the underlying offense—death." The Superior Court found that Smith's violent conduct and verbal threats constituted sufficient "evidence to support the jury's finding of [the] defendant's criminal purpose to kill the correction officer," and affirmed Smith's conviction.

A Louisiana jury convicted an HIV-positive defendant of attempted second degree murder. The defendant, Donald Caine, robbed a convenience store and threatened a store clerk that he would "GIVE [HER] AIDS" and then stuck the clerk with a hypodermic needle filled with a clear liquid. The needle penetrated the clerk's skin and caused some bleeding. Caine appealed his conviction, arguing that the evidence did not sufficiently demonstrate that he harbored a specific intent to kill. The Louisiana Court of Appeals believed that Caine's specific intent to kill was apparent from his verbal threats. Affirming Caine's conviction, the court stated: "When telling the victim that he would give her AIDS, it could only mean that [Caine] had the specific intent to kill her."

Most recently, in State v. Hinkhouse, the Oregon Court of Appeals affirmed the attempted murder conviction of an HIV-positive defendant for repeatedly and intentionally engaging in sexual activity, consistently concealing or lying about his HIV status, refusing to wear

62. Id. at 495.
63. Id. at 502 (quoting State v. Rhett, 601 A.2d 689, 692 (N.J. 1992)). The subjective test for attempted murder does not require a finding that HIV could have indeed been transferred through a human bite; it only requires that the defendant harbored a purposeful intent to cause death. See N.J. STAT. ANN. § 2C:5-1 (West 1995).
64. Smith, 621 A.2d at 502.
65. Id. at 516.
67. Id. at 613.
68. Id.
69. Id. at 615. In Louisiana, the crime of attempted murder requires a specific intent to kill: "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." LA. REV. STAT. ANN. § 14:27(A) (West 1986).
70. Caine, 652 So. 2d at 617.
71. Id.
or pretending to wear condoms, and telling at least one person that he intended to spread HIV to his sexual partners. Hinkhouse appealed, arguing that the evidence did not support the finding that he intended to murder his sexual partners. In affirming Hinkhouse's conviction, the Oregon Court of Appeals concluded that because Hinkhouse knew he was HIV-positive, knew that HIV could be transmitted through unprotected sex, demonstrated a "pattern of [sexual] exploitation," and expressed his verbal disregard for the welfare of his partners, Hinkhouse intended to murder his sexual partners.

3. The Court's Reasoning.—In Smallwood v. State, the Court of Appeals reversed Smallwood's convictions for attempted second degree murder and assault with intent to murder because the evidence failed

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73. Id. at 925. Hinkhouse tested positive for HIV in 1989 and learned a year later that wearing condoms during sex significantly lessened the likelihood of transmitting HIV to his sexual partner. Id. at 922-23. At that time, Hinkhouse learned that transmitting HIV "would be killing someone." Id. Between 1989 and 1993, Hinkhouse became sexually involved with several women. Id. Hinkhouse concealed his HIV status from all three women and refused or pretended to wear condoms while engaging in intercourse with them. Id. In the fall of 1993, Hinkhouse became romantically involved with a fourth woman, whom he reportedly hoped to marry. Id. Hinkhouse always wore a condom when having sex with this woman. Id.

74. Id. at 922. Under Oregon law, "A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." OR. REV. STAT. § 161.405(1) (1990). In addition, "'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described." Id. § 161.085(7).

75. Hinkhouse, 912 P.2d at 925. The Oregon Court of Appeals stated that Hinkhouse "knew that he was HIV positive and that his condition was terminal." Id. at 924. He knew that if he transmitted the virus to another person, that person would eventually die. Id. at 924-25. He understood that having unprotected sex would expose his partners to the virus and that a single sexual encounter could transmit the virus. Id. at 925. He had been told, and he acknowledged, that having unprotected sex and transmitting the disease was "murder." Id. He even signed an agreement that he would refrain from any unsupervised contact with women without the approval of his probation officer. Id. Nonetheless, the Court of Appeals noted:

[Hinkhouse] engaged in a persistent pattern of recruiting sexual partners over a period of many months. He consistently concealed or lied about his HIV status. He refused to wear condoms, or pretended to wear them, penetrating women without protection and against their protestations. He engaged in unprotected sex, including rough and violent intercourse, which increased the chances of passing the virus to his partners. He bragged about his sexual prowess, even after acknowledging his HIV status, and told at least one person that he intended to spread the disease to others by such conduct . . . . When he engaged in sexual intercourse with the woman he hoped to marry, he consistently wore condoms and made no attempt to conceal his HIV status.

Id. at 925.
to establish beyond a reasonable doubt a specific intent to murder. The Court of Appeals noted that a specific intent to murder is required for the crimes of attempted murder and assault with intent to murder. This intent may be proved through circumstantial evidence, including the defendant's actions and statements.

The State argued that inferring Smallwood's intent was analogous to the situation in State v. Raines, in which the Court of Appeals inferred the intent to murder "from the use of a deadly weapon directed at a vital part of the human body." The State contended that the Raines analysis hinged upon two factors: (1) Raines knew that his weapon was deadly, and (2) Raines knew that he was firing [the weapon] at someone's head. Similarly, the State argued that Smallwood knew that HIV ultimately leads to death and knew that he was exposing his victims to a risk of HIV transmission. Consequently, the State argued, Smallwood's intent can be inferred through his use of a deadly weapon—HIV—directed at a vital part of the human body—bodily fluids.

The Court of Appeals rejected the State's approach, noting that the State's use of Raines ignored the requirement that "[b]efore an intent to kill may be inferred based solely upon the defendant's exposure of a victim to a risk of death, it must be shown that the victim's death would have been a natural and probable result of the defendant's conduct." The Court of Appeals stated that in Raines, when the defendant fired the gun at the victim's head, "the risk of killing the

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76. Smallwood, 343 Md. at 109, 680 A.2d at 518. The court reviewed whether the trial court had sufficient evidence to support the inference that Smallwood possessed a specific intent to kill. Id. at 100, 680 A.2d at 513.
77. Id. at 103, 680 A.2d at 515.
78. Id. at 104, 680 A.2d at 515.
80. Id. at 591, 606 A.2d at 269; see Smallwood, 343 Md. at 104, 680 A.2d at 515. In Raines, the defendant and a friend were driving on the highway when Raines fired a gun into the driver's side window of a truck in the adjacent lane and killed the driver of the truck. Raines, 326 Md. at 585, 606 A.2d at 266. Evidence at trial established that Raines fired the gun at the driver's window knowing that the driver was immediately behind the window. Id. at 590, 606 A.2d at 268-69. The Court of Appeals concluded that "Raines's actions in directing the gun at the window, and therefore at the driver's head on the other side of the window, permitted an inference that Raines shot the gun with the intent to kill." Id. at 592-93, 606 A.2d at 270.
81. Smallwood, 343 Md. at 105, 680 A.2d at 516.
82. Id.
83. Id.
84. Id. at 105-06, 680 A.2d at 516. In Raines, the Court of Appeals found that the probability of death occurring after a defendant fires a bullet at his victim's head is so high that it sufficiently permits a reasonable inference of an intent to murder. Raines, 326 Md. at 592-93, 606 A.2d at 270.
victim [was] so high that it [became] reasonable to assume that the defendant intended the victim to die as a natural and probable consequence of the defendant's actions." 85 In contrast to firing a bullet at a person's head, however, "[i]t is less clear that death by AIDS from that single exposure is a sufficiently probable result to provide the sole support for an inference that the person causing the exposure intended to kill the person who was exposed." 86

The Court of Appeals then reviewed the cases from other jurisdictions in which HIV-positive defendants were found to have harbored an intent to murder. 87 The court posited that in each of those cases the court's finding of the defendant's intent to murder rested on more than mere knowledge that he had HIV disease and of how HIV could be transmitted. 88 Rather, those defendants "either made explicit statements demonstrating an intent to infect their victims or [took] specific actions demonstrating such an intent and tending to exclude other possible intents." 89 The court concluded that, because Smallwood neither made statements nor took comparable action demonstrating an intent to murder, he did not harbor an intent to murder. 90 Accordingly, the Court of Appeals reversed Smallwood's convictions for attempted murder and assault with intent to murder. 91

4. Analysis.—

a. Intent and the Knowing Exposure of Another to a Risk of Infection.—The Court of Appeals correctly observed that—in contrast with the cases decided in other jurisdictions 92 —Smallwood did not exhibit words or conduct that indicated an intent to murder his victims. 93 In those contrasted cases, either the defendant conceded his intent to

85. Smallwood, 343 Md. at 106, 680 A.2d at 516.
86. Id. The court noted: "Death by AIDS is clearly one natural possible consequence of exposing someone to a risk of HIV infection, even on a single occasion." Id.
88. See id. at 107-08, 680 A.2d at 516-17.
89. Id. at 107, 680 A.2d at 516-17.
90. Id. at 107, 109, 680 A.2d at 516, 518.
91. Id. at 109, 680 A.2d at 518.
92. See supra note 87.
93. See Smallwood, 343 Md. at 109, 680 A.2d at 518. It is important to divorce the rape offenses when considering Smallwood's requisite state of mind. According to the Court of Special Appeals, Smallwood's attempted first degree rape of the women extended only so far as to "satisf[y] the furthering overt act, beyond mere preparation prong of the crime of..."
murder, or the court inferred intent based upon the accused's express actions or conduct manifesting an intent to murder. Had Smallwood stated that he wished to kill his victims with "AIDS" or had he laughed menacingly when asked if he was HIV-positive, the trier of fact could have reasonably inferred that Smallwood harbored an intent to murder. Inferring an intent to murder without any outward manifestation of intent would require the trier of fact to perform impermissible legal gymnastics.

Moreover, criminalizing the knowing exposure of another to a risk of HIV transmission compromises public health efforts to curb the spread of HIV disease. Criminalizing HIV transmission may seem attractive at first, especially when one considers the deadliness of HIV disease. If an individual "knows" that he is infected with a deadly virus, should he not take responsibility if he transmits the virus to attempted second degree murder." Smallwood, 106 Md. App. at 10, 661 A.2d at 751 (internal quotations omitted).


97. In his dissent in Smallwood, Judge Bloom, of the Court of Special Appeals, remarked that because Smallwood threatened his victims at gunpoint when he raped them, it seemed more likely that if he intended to kill his victims he would have used his gun, rather than "by the transmission of the disease, which is far from a sure and certain method of killing someone." Smallwood, 106 Md. App. at 20, 661 A.2d at 756 (Bloom, J., dissenting). According to one commentator: "Having sex or sharing needles . . . is a highly indirect modus operandi for the person whose purpose is to kill." Martha A. Field & Kathleen M. Sullivan, AIDS and the Criminal Law, 15 LAW, MED. & HEALTH CARE, Summer 1987, 46, 47.

98. Some commentators, however, support criminalization of HIV transmission. See REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130, 130 (June 24, 1988) ("Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behavior, HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions."); David Robinson, Jr., AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal, 14 HOFSTRA L. REV. 91, 105 (1985) ("[T]he efficacy of the criminal law in the effort to stem the rate of AIDS virus transmission is likely to be relatively limited . . . . Nevertheless, we must do what we can, for each AIDS case prevented will not only avoid much private misery and public expense, but it will also save human life."); Stefanie S. Wepner, Note, The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape, 26 J. MARSHALL L. REV. 941, 971-73 (1993) (arguing for capital punishment in "AIDS rape" cases).

99. Every HIV-positive individual in Maryland knows, actually or constructively, how HIV can be transmitted because Maryland law requires that all persons who test positive for HIV be educated about HIV disease, the modes of HIV transmission, and the methods of preventing HIV transmission. See MD. CODE ANN., HEALTH-GEN. I § 18-336(b)(2) (1996) (requiring health care providers to provide pre-test counseling and education about HIV);
another person and effectively sentences that person to death? Is not this the same, so the argument goes, as purposefully injecting a deadly poison into another person?\textsuperscript{100}

Unfortunately, though, the criminalization of HIV transmission may create more social and legal problems than it solves. Criminalization, for example, may divert limited resources away from testing, treatment, and educational programs in order to pay lawyers fees, court costs, and prison expenses. Furthermore, criminalization threatens to discourage voluntary HIV testing, which would significantly frustrate prevention and education objectives.\textsuperscript{101}

Recent experience in combatting infectious disease teaches that conduct that knowingly places another at a risk of HIV transmission, while reprehensible, may be better addressed as a public health concern. As one commentator eloquently framed the issue:

Any attempt to press the criminal law into service for the purpose of furthering the public health goal of reducing the spread of the AIDS virus will be expensive, ineffective, and counterproductive. That is not to say that there will be no cases where the transmission, or risked transmission, of the AIDS virus would merit prosecution. One of the principal purposes of the criminal law is to prevent injury to people. Where the evidence is solid that the actor intended to transmit the virus and chose an effective way to do so, or knowingly created a high risk of transmission, prosecution may be justified. However, public health interests are best served by encouraging those at risk to come forward to be tested, counseled, and otherwise helped in this very difficult time. Education has been shown to be an effective means of slowing the spread of AIDS. Voluntary programs and guaranteed protection from discriminatory practices such as unjustified loss of employment, health care, insurance, and housing can compliment [sic] and reinforce educational programs. If

\textsuperscript{100} See Field \& Sullivan, supra note 97, at 46, 47 & n.16. In Smallwood, the State argued that "[i]t is beyond cavil that the intent to kill fairly can be inferred from evidence that a defendant used small doses of poison over the course of many months in the hope, however vain it might be, that his victim will die." Brief of Respondent at 10, Smallwood (No. 122).

\textsuperscript{101} See Field \& Sullivan, supra note 97, at 46 ("The social costs of criminalizing AIDS transmission would far outweigh the benefits of deterrence such a law might have. Serious and well-funded public education about AIDS prevention is a far preferable means of influencing behavior.").
history is any indication, resisting the unwise use of coercion generally, and the criminal law in particular, will not be easy.\textsuperscript{102}

Indeed, approaching the spread of an infectious disease as a public health concern rather than as a criminal problem has not been easy, but history has shown that criminalization as a response to the spread of infectious disease has failed in the past precisely because the various underlying factors related to the disease were not adequately addressed.\textsuperscript{103}

This is not to say, however, that criminal sanctions have no place in addressing conduct such as Smallwood’s.\textsuperscript{104} Although courts should not infer an intent to murder based upon the knowing risk of transmission alone, the facts in \textit{Smallwood} might permit an inference that Smallwood acted with reckless disregard for his victim.\textsuperscript{105}

\begin{footnotes}
\item[103] In the early to mid-1900s, coercive measures designed to curb the spread of syphilis through criminal sanctions were ineffective, largely due to problems in enforcement of syphilis transmission laws. \textit{See} Stephen V. Kenney, Comment, Criminalizing HIV Transmission: Lessons from History and a Model for the Future, 8 J. Contemp. Health L. & Pol'y 245, 252-57 (1992). Other coercive approaches, including closing houses of prostitution, quarantining of prostitutes, and punitive treatment of World War I servicemen, failed to decrease the spread of the disease. \textit{See id.} at 255. A comprehensive plan by the Public Health Service of reporting, testing, and education sparked the public to change its attitude about syphilis “from an affliction of the immoral to a disease of grave public health consequence,” thereby leading to a massive federal venereal disease control program that resulted in a “significant reduction in the incidence of syphilis over the next decade.” \textit{Id.} at 256-57.
\item[104] Compare the comments of Professor Schultz, \textit{supra} text accompanying note 102, with those of Professor Gostin. Gostin states:

There is an understandable outrage when any citizen acts maliciously to place another’s life in jeopardy. But apart from those rare cases where a person consciously decides to use the virus to kill, there would be little public support for retribution for transmission of a virus. Persons who transmit HIV are also infected themselves and will probably die from AIDS. Thus, if punishment were to be sought, it would be directed against a terminally ill patient.


\item[105] Note that Smallwood was convicted of reckless endangerment. \textit{Smallwood}, 343 Md. at 101, 680 A.2d at 514. Some commentators have suggested that conduct such as Smallwood’s might satisfy a “depraved heart” theory of murder. \textit{See} Linda K. Burd & Robert S. Caldwell, \textit{Note, The Real Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS}, 37 Drake L. Rev. 657, 689 (1987-88) (using by example the indifference of an HIV positive prostitute, who is aware of his status and fails to take precautions, as evidence of a “depraved heart which is equivalent to an intent to murder”); Thomas Fitting, \textit{Note, Criminal Liability for Transmission of AIDS: Some Evidentiary Problems}, 10 Crim. Just. J. 69, 78 (1987) (asserting that if a carrier or rapist knew of his HIV status and chose to ignore its dangers, his “acts may have the requisite intent to qualify for murder if malice aforethought is satisfied by reckless disregard for human safety”). That theory would re-
Limiting the criminal liability for individuals who knowingly expose others to a risk of HIV infection has become acceptable in the past decade. Since the late 1980s, a large number of states have adopted HIV-specific statutes. These statutes generally approach HIV transmission as a public health concern, rather than as a criminal problem, by narrowly prescribing criminal punishment for conduct such as Smallwood's in order to discourage risky behavior and thereby curb HIV transmission.

b. Seroconversion Probability Problems.—A troubling aspect of the court’s reasoning deals with its treatment of the requisite probability of death when inferring an intent to kill. In Smallwood, the Court of Appeals held that because the probability that death will require, however, that the victim actually die from AIDS, presenting causation problems, and still leaving unresolved the problems associated with criminalization. See generally Donald E. Walther, Comment, Taming a Phoenix: The Year-and-a-day Rule in Federal Prosecutions for Murder, 59 U. CHI. L. REV. 1337 (1992) (suggesting that the year-and-a-day rule should serve only as a rebuttable presumption in homicide cases involving intentional infliction of HIV).

106. At least 25 states have adopted HIV-specific statutes. See, e.g., GA. CODE ANN. § 16-5-60(c) (1996) (criminalizing the knowing engagement of behavior likely to transmit HIV without proper disclosure); LA. REV. STAT. ANN. § 14:43.5 (West 1996) (criminalizing the intentional, unconsented exposure of another to HIV). The nationwide adoption of HIV-specific statutes occurred in response to a federal requirement that, before states may receive federal assistance for health care programs serving HIV-infected persons, a state must certify that its criminal statutes can sufficiently prosecute an individual who, knowing that he or she is HIV-positive, donates blood, semen, or breast milk, engages in sexual activity, or shares hypodermic needles with the intention of spreading HIV infection. See Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 576 (codified at 42 U.S.C. §§ 300ff-i, 300ff-47 (1994)). A state is not required to pass an HIV-specific statute if its traditional criminal statutes are sufficient for this purpose. See 42 U.S.C. § 300ff-47(a).

The Maryland General Assembly enacted an HIV-specific statute in 1989 which states: "An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual." Md. CODE ANN., HEALTH-GEN. I § 18-601.1 (1994). A violation of this provision constitutes a misdemeanor offense punishable by a fine not exceeding $2500 or three years of imprisonment or both. Id. Smallwood made the interesting argument that this statute preempts a traditional criminal conviction for an individual who knowingly exposes another to a risk of HIV infection. See Petitioner's Brief and Appendix at 14-19, Smallwood (No. 122) (citing State v. Gibson, 4 Md. App. 236, 246-47, 242 A.2d 575, 581-82 (1968), aff'd, 254 Md. 399, 254 A.2d 691 (1969)). Unfortunately, the court did not address whether section 18-601.1 preempts Smallwood's prosecution under traditional criminal statutes. See Smallwood, 343 Md. at 102 n.3, 680 A.2d at 514 n.3.

suit following a single, vaginal HIV-exposure incident is low, the court could not infer beyond a reasonable doubt an intent to murder. The court suggests that if the probability that death will result following a single exposure to HIV were greater, as would be true in instances in which the probability of transmission is higher, then the State may prove a reasonable inference of intent based solely upon the knowing exposure of another to a risk of HIV transmission. Unfortunately, the court leaves unanswered precisely how probable the risk of HIV transmission must be.

If the probability that death will result were based upon the probability of infection or seroconversion, then scientific data can provide a gauge as to what modes of transmission would best result in a reasonable inference of intent. The probability of seroconversion for a single, unprotected vaginal exposure to HIV is cited at about 1:1000, or 0.1%. Some other modes of HIV transmission have higher seroconversion rates. Perinatal transmission, for example, has a seroconversion rate of about 25%. If a higher probability of infection is all that the court requires to infer an intent to murder, it may, although perhaps unwittingly, have opened the door to subjecting HIV-infected mothers who knowingly expose their fetuses to a risk of HIV infection to criminal liability.

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108. Smallwood, 343 Md. at 106, 680 A.2d at 516.
109. See id.
110. "Seroconversion" refers to the development of detectable specific antibodies in the serum as a result of infection. STEDMAN'S MEDICAL DICTIONARY 1602 (26th ed. 1995).
111. See Gostin, supra note 104, at 1022 (infected male to uninfected female seroconversion rate, vaginal exposure). Although the infection rate was not discussed in the Court of Appeals's opinion, Smallwood's brief cited the male-to-female vaginal exposure seroconversion rate as 1:500. Petitioner's Brief and Appendix at 9, Smallwood (No. 122). See Norman Hearst & Stephen B. Hulley, Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?, 259 JAMA 2428, 2429 (1988) (enumerating various estimated male-to-female HIV seroconversion rates).
112. Centers for Disease Control & Prevention, U.S. Dep't of Health and Human Services, U.S. Public Health Service Recommendations for Human Immunodeficiency Virus Counseling and Voluntary Testing for Pregnant Women, 44 MORBIDITY & MORTALITY Wkly. REP. 1, 3 (1995). "Perinatal transmission" refers to seroconversion occurring between a pregnant woman and her fetus or newborn during, or pertaining to, the periods before, during, or after the time of birth. See STEDMAN'S MEDICAL DICTIONARY, supra note 110, at 1329.
113. While classifying a fetus as a person may present some difficulties, as the fetus is not yet a person under the law, women have been recently prosecuted under statutes prohibiting the supply of controlled substances to minors for using illegal drugs during pregnancy. See Suzanne Sangree, Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies, 41 BUFF. L. REV. 309, 345-46 (1993). Extending the criminalization of substance-abusing pregnant women to HIV-infected pregnant women would not be difficult. See id. at 345-47. For example, "[a] creative prosecutor might attempt to proceed on the theory that during the moments directly after birth before the neonate has had the birthing blood washed off, there is a person to whom the risk of HIV transmission is im-
One commentator has pointed out that, in an era of increasing public support for mandatory testing and counseling of HIV-infected pregnant women, choosing to "remain pregnant when [her] child has a 30% chance of becoming infected with HIV might be considered a conscious act risking transmission." Similarly, in light of recent legislative efforts to require that all HIV-infected pregnant women receive information that perinatal AZT therapy reduces the probability of perinatal HIV transmission from 25% to about 8%, a pregnant woman who chooses not to undergo AZT therapy could be found to consciously place her fetus at a risk of transmission. Such ominous possibilities call into question the goals of criminalization. Indeed, criminalizing perinatal HIV transmission to any extent, including deducing that HIV-infected mothers intend to murder their children, presents a host of ethical, practical, and constitutional concerns, and has already unlawfully coerced some women into having unwanted abortions or undergoing sterilization.

5. Conclusion.—In refusing to permit an inference that a rapist intended to murder his victims whom he exposed to a risk of HIV infection, the Court of Appeals probably did not contemplate that Smallwood's reasoning might extend criminalization to perinatal HIV transmission. Nevertheless, the court suggests that when an individual knowingly exposes another to a risk of HIV infection, so long as the probability of HIV transmission is likely to establish guilt beyond a reasonable doubt, the individual could be prosecuted for attempted murder.

The court more properly should have held that the facts in Smallwood in no way support an inference of an intent to murder.

posed." Id. at 355. Nonetheless, "the fact that science cannot accurately determine at what point perinatal transmission occurs—at conception, during gestation, during birth, or immediately after birth-[may] mitigate against such [an assertion]." Id. (footnote omitted).

114. Id. at 356.

115. AZT is the common term used to describe the drug zidovudine (ZDV). See Centers for Disease Control & Prevention, supra note 112, at 1.

116. Id. at 4.

Criminalizing HIV transmission is a desperate reaction by a society trying to curtail the spread of HIV. While this is understandable on an emotional level, in reality criminalization arrests efforts to educate and treat those infected. Unfortunately, in view of the possible future applications of the Court of Appeals's reasoning, Smallwood stands as a crippled step toward effectively dealing with the epidemic of HIV disease.

SCOTT A. MCCABE

D. Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution

In Jennings v. State, the Court of Appeals held that a sentencing judge may consider a criminal defendant's failure to show remorse at allocation for the crime for which he has been convicted. The court concluded that a sentencing judge may consider lack of remorse on the issue of a defendant's prospects for rehabilitation. Specifically, the court found that a remorseful defendant, having taken the first step toward rehabilitation by accepting responsibility for his crime, may receive a reduced sentence. Conversely, the court determined that a sentencing judge may deny leniency to a defendant who has not exhibited contrition. Thus, a defendant who remains silent at allocation may face a longer period of incarceration.

Although Jennings is consistent with Maryland precedent and comports with rulings in other jurisdictions, the question arises as to whether this practice compromises a defendant's Fifth Amendment right against self-in-

2. Id. at 688, 664 A.2d at 910.
3. Id.
4. Id.
5. See id.
6. See id., 664 A.2d at 909.
8. See, e.g., State v. Sachs, 526 So. 2d 48, 51 (Fla. 1988) (concluding that a trial judge may mitigate a sentence when clear evidence exists that the defendant is remorseful); State v. Manzanares, 866 P.2d 1083, 1092 (Kan. Ct. App. 1994) ("[T]he court did not abuse its discretion by considering [the defendant's] failure to accept responsibility for his actions."); State v. VanZee, 547 N.W.2d 387, 392-93 (Minn. Ct. App. 1996) (holding that a trial court properly considered a defendant's lack of remorse as an aggravating factor at sentencing); State v. Baldwin, 304 N.W.2d 742, 752 (Wis. 1981) (holding that a trial judge did not abuse his discretion by taking into account an offender's lack of remorse at sentencing).
The Supreme Court has yet to resolve the issue. Thus, at least for now, criminal defendants in Maryland may spend more time in jail should they choose to exercise a fundamental constitutional right.

1. The Case.—On the evening of February 29, 1992, two men robbed a Baltimore area restaurant at gunpoint. During the robbery, one of the men pointed a machine gun at the restaurant's owner. The other pointed a handgun at the only two customers in the restaurant at the time. Upon demand, the owner handed over cash from the register, and the customers turned over their wallets. As soon as the two gunmen left the store, the restaurant owner contacted the police.

Several hours later, and less than a mile from the restaurant, the police attempted to stop three men who fit the description of the robbers. One of the men, Arnold Jerome Jennings, Jr., ran off into a wooded area and across a stream before being taken into custody. The police followed Jennings into the woods and apprehended him. Shortly thereafter, two of the three robbery victims came to the scene of Jennings's arrest to identify the suspects. The restaurant owner failed to make a positive identification, but one of the customers identified Jennings as a gunman. Although Jennings was unarmed at the time of his arrest, the witness identified him as the man who wielded the machine gun during the robbery. One month after Jen-

9. See, e.g., United States v. Clemons, 999 F.2d 154, 157-61 (6th Cir. 1993) (holding that consideration of a defendant's acceptance of responsibility is consistent with the Fifth Amendment); United States v. Frazier, 971 F.2d 1076, 1080-87 (4th Cir. 1992) (concluding that a sentence reduction for acceptance of responsibility does not offend the Fifth Amendment). The Fifth Amendment states, in pertinent part, that "[n]o person shall... be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V.


11. Id.

12. Id.

13. Id.

14. Id.


16. Petitioner's Brief at 4, Jennings (No. 116).

17. Id.

18. Jennings, No. 1474, slip op. at 2.

19. Petitioner's Brief at 3, Jennings (No. 116).


21. Id.
nings's arrest, two boys found a loaded machine gun in the stream through which Jennings had run while trying to evade the police.  

A jury in the Circuit Court for Baltimore County convicted Jennings of three counts of armed robbery and one count of use of a handgun in the commission of a felony. Following the conviction, the court sentenced Jennings to serve a total of twenty years in prison out of a maximum penalty of eighty years. At sentencing, the court invited Jennings to make a statement on his own behalf. The following exchange between Jennings and the court ensued:

THE DEFENDANT: Your Honor, jury found me guilty. You have got to sentence me. But when you do, can you make it as least as possible? I'd like to be there with my kid.

THE COURT: Anything further?

THE DEFENDANT: No.

THE COURT: This court doesn't treat lightly the use of handguns in the commission of crimes and more, especially, the type of handgun that was used in this crime.

I cautioned you just before you spoke, Mr. Jennings, that what you had to say to the court was very important because, according to the PSI [Pre-Sentencing Investigation], according to the statement from your attorney, the jury found the wrong guy guilty. And until you can face up to your problem of your implication in this little event you haven't learned a thing. For me to give you a minimum sentence just doesn't fit my role.

... . . .

Nothing is going to be suspended because this gentleman does not have any remorse, none whatsoever.

... . . .

All I wanted to hear from you is, you know, what implication you had this, in this, because you're an innocent. In your mind you're an innocent man.

Well, I'm sorry. But take your appeal and let's see what happens there.  

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22. Id.
23. Jennings, 339 Md. at 680, 664 A.2d at 905.
24. Id. at 678, 664 A.2d at 904.
25. Id. at 680, 684 n.2, 664 A.2d 905, 907 n.2.
26. Id. at 678, 664 A.2d at 904-05.
27. Id. at 678-79, 664 A.2d at 905 (emphasis added).
Subsequently, Jennings filed an application for review of the imposed sentence. A three-judge circuit court panel modified the sentence, suspending all but twelve years of Jennings's sentence and requiring that he be placed on probation upon his release from prison. Contending that the circuit court judge based his sentence on an impermissible consideration, Jennings filed an appeal to the Court of Special Appeals. Specifically, Jennings argued that the trial court improperly considered his failure to admit guilt after conviction in violation of his right against self-incrimination. The Court of Special Appeals rejected Jennings's argument and held that remorse is a valid sentencing consideration. The Court of Appeals granted certiorari "to address whether a sentencing court may consider, in imposing sentence, a defendant's refusal to accept responsibility, or exhibit remorse, for the crimes for which that defendant has been convicted."

2. Legal Background.—

a. Maryland Law.—In Maryland, a sentencing judge is "vested with virtually boundless discretion." The judge is accorded this broad latitude to best accomplish the objectives of sentencing—punishment, deterrence and rehabilitation." Although a sentencing judge may take into account a wide range of information about both the defendant and the crime to achieve these objectives, Maryland law places some limitations on the types of information that a judge may consider. In Johnson v. State, for instance, the Court of Appeals determined that a criminal defendant's choice to stand trial may not

28. Id. at 679, 664 A.2d at 905.
29. Id.
31. Jennings, 339 Md. at 681, 664 A.2d at 906.
32. Jennings, No. 1474, slip op. at 10.
33. Jennings, 339 Md. at 677, 664 A.2d at 904. As a threshold issue, the Court of Appeals considered whether the case was moot. Id. at 681-82, 664 A.2d at 906-07. The court acknowledged that the case was arguably moot because the 20-year sentence imposed by the trial court was later modified by a three-judge panel. Id. The court, however, decided to review the sentence originally imposed by the trial court, finding that how "lack of remorse is to be treated for sentencing purposes . . . is a matter of important public concern." Id. at 682, 664 A.2d at 907.
35. See Johnson v. State, 274 Md. 536, 542, 336 A.2d 113, 116-17 (1975) (noting that sentencing judges are "confined only by unwarranted and impermissible information").
36. 274 Md. 536, 336 A.2d 113 (1975).
negatively impact sentencing. The court reasoned that a defendant's fundamental rights must be protected in the sentencing process. Thus, "a price may not be exacted nor a penalty imposed for exercising the fundamental and constitutional right of requiring the State to prove, at trial, the guilt of the petitioner as charged."

One year after Johnson, in Herbert v. State, the Court of Special Appeals further restricted a judge's discretion in the area of sentencing. The court held that a judge may not consider a defendant's protestations of innocence throughout trial when determining an appropriate sentence. The defendant in Herbert refused to admit involvement in the charged criminal conduct. Recognizing his predicament at allocution, Herbert complained "I really feel I am in a position where I can rehabilitate myself some if I'm allowed to go out on the street, and also in a position if I admit that I am guilty it may affect any appeal I might have." The sentencing judge acknowledged this dilemma, but nevertheless took into account Herbert's claim of innocence at trial in fashioning his sentence. The Court of Special Appeals reversed, holding that "[t]he mandate of Johnson is clear. The protestations of innocence throughout the trial must not influence sentencing 'in any way.'"

37. Id. at 544, 336 A.2d at 118.
38. Id. at 542, 336 A.2d at 116-17.
39. Id. at 543, 336 A.2d at 117. The Johnson court also recognized in dicta that the assertion of other constitutional rights cannot be penalized, including the Fifth Amendment right against self-incrimination. Id. at 543 n.5, 336 A.2d at 117 n.5.
41. Id. at 55, 354 A.2d at 453.
42. Id. at 56, 354 A.2d at 453.
43. Id.
44. Id.
45. Id. at 56, 354 A.2d at 453 (quoting Johnson v. State, 274 Md. 536, 543, 336 A.2d 113, 117 (1975)). In the years following Johnson and Herbert, Maryland appellate courts continued to address the issue of sentencing considerations. In Colesanti v. State, 60 Md. App. 185, 481 A.2d 1143 (1984), the sentencing judge reflected that "when somebody comes into court and they admit their guilt to me, it shows they are remorseful for what they have done. And I take that into consideration." Id. at 193, 481 A.2d at 1148. The Court of Special Appeals identified both Johnson and Herbert as controlling and concluded that the sentencing judge had impermissibly penalized the defendant for maintaining his innocence and choosing to stand trial. Id. at 195, 481 A.2d at 1149.

In Hurley v. State, 60 Md. App. 539, 483 A.2d 1298 (1984), the defendant argued that his constitutional right to remain silent was offended at sentencing when a judge took into account the defendant's refusal to disclose, both at trial and at his sentencing hearing, the location of the missing victim's body. Id. at 560-63, 483 A.2d at 1309-10. On appeal, the Court of Special Appeals found that the trial judge had not taken into account an improper sentencing consideration because "[t]he defendant's conduct continues to cause the victims of his crime to suffer." Id., 483 A.2d at 1311-12. Notably, the court acknowl-
In 1993, the Court of Special Appeals expressly held that a judge may take into account a convicted defendant’s “present absence of remorse” in fashioning a sentence. In *Saenz v. State*, the court determined that both *Johnson* and *Herbert* prohibit the consideration of “a defendant’s exercise of certain rights at trial, and his trial attitude based upon those rights.” The court concluded, however, that “neither case forbids a sentencing judge to consider a defendant’s attitude when no presumption of innocence remains.”

**b. Other Jurisdictions.**—The U.S. Sentencing Guidelines, in section 3E1.1, provide for a sentence reduction when a criminal defendant accepts responsibility for his offense. A number of criminal defendants have challenged this section of the Guidelines on the ground that the acceptance of responsibility provision violates the Fifth Amendment right against self-incrimination. These efforts, however, have largely been unsuccessful. Most federal courts, including the United States Court of Appeals for the Fourth Circuit,
have concluded that section 3E1.1 "does not penalize the defendant for assertion of his right against self-incrimination in violation of the Fifth Amendment."\textsuperscript{54}

Although not bound by the Federal Guidelines, state courts have consistently held that sentencing judges may consider a defendant's failure to express remorse.\textsuperscript{55} For example, in \textit{State v. Baldwin},\textsuperscript{56} the Supreme Court of Wisconsin determined that a defendant's lack of remorse may be considered by a judge in imposing a sentence.\textsuperscript{57} The court reasoned that a defendant's remorse, or lack thereof, is relevant to "his need for rehabilitation, and the extent to which the public might be endangered by his being at large."\textsuperscript{58} In upholding the decision of the lower court, Wisconsin's highest court emphasized that remorse was just one of a variety of factors taken into account by the sentencing judge.\textsuperscript{59} Similarly, in \textit{State v. Sachs},\textsuperscript{60} the Florida Supreme Court held that remorse is a valid factor to consider at sentencing.\textsuperscript{61} The court did recognize, however, that "lack of remorse cannot con-

\textsuperscript{54} United States v. Frazier, 971 F.2d 1076, 1087 (4th Cir. 1992). A few federal courts, however, have determined that it is unconstitutional to deny a section 3E1.1 reduction because the defendant did not accept responsibility for uncharged criminal conduct. See, \textit{e.g.}, United States v. Frierson, 945 F.2d 650, 659-60 (3d Cir. 1991) (holding that a denied reduction under section 3E1.1 was a penalty); United States v. Piper, 918 F.2d 839, 840-41 (9th Cir. 1990) (per curiam) (determining that a denied reduction for failure to admit guilt for criminal conduct other than the offense of conviction violates the Fifth Amendment); United States v. Oliveras, 905 F.2d 623, 626-28 (2d Cir. 1990) (per curiam) (criticizing the penalty-benefit distinction and holding that a defendant cannot be denied a sentence reduction simply because he refused to accept responsibility for charges that were dismissed as part of a plea bargain); United States v. Perez-Franco, 873 F.2d 455, 461-63 (1st Cir. 1989) (concluding that a court may not require acceptance of responsibility for uncharged criminal conduct).

\textsuperscript{55} See \textit{supra} note 8 and cases cited therein. Some states, however, do not allow sentencing judges to consider lack of remorse as an aggravating factor. See, \textit{e.g.}, State v. Hardwick, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995) ("A convicted defendant's decision not to publicly admit guilt is irrelevant to a sentencing determination, and the trial court's use of this decision to aggravate a [d]efendant's sentence offends the Fifth Amendment privilege against self-incrimination."); State v. Imlay, 813 P.2d 979, 985 (Mont. 1991) (holding that a judge may not augment a defendant's sentence because he invokes his Fifth Amendment rights).

\textsuperscript{56} 304 N.W.2d 742 (Wis. 1981).

\textsuperscript{57} \textit{Id.} at 752 ("[W]hile it is evident that the defendant's failure to admit his guilt and his lack of remorse were factors in the sentencing decision, we do not believe it was improper or an abuse of discretion.").

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} 526 So. 2d 48 (Fla. 1988).

\textsuperscript{61} \textit{Id.} at 51 (concluding that a trial judge may mitigate a sentence when clear and convincing evidence exists that the defendant is remorseful).
stitute a valid reason for an upward departure" or an increased sentence, because of the constitutional implications.62

c. Supreme Court Precedent.—To date, the Supreme Court has not addressed the issue presented in Jennings. The Court has repeatedly held, however, that a state may not coerce a criminal defendant into relinquishing a fundamental constitutional right by threatening punitive action.63 Thus, a state "'may not impose substantial penalties because [a defendant] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.'"64

On the other hand, the Court has recognized that not every government-imposed choice that discourages the exercise of a constitutional right is forbidden.65 The Court observed that "'[t]he criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow.'"66 For example, a state may encourage a defendant to relinquish his constitutional right to trial by promising a more lenient sentence in return.67

3. The Court's Reasoning.—In Jennings, the Court of Appeals held that a sentencing judge may deny sentencing leniency to a defendant

62. Id.

63. See Jon M. Sands & Cynthia A. Coates, The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines, 23 Ariz. St. L.J. 61, 100 (1991) (discussing whether a court may require a defendant to accept responsibility for criminal conduct for which the defendant has not been charged); see also Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding that a state improperly forced two police officers to choose between incriminating themselves during an investigation or being fired).

64. Minnesota v. Murphy, 465 U.S. 420, 434 (1984) (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)) (holding that incriminating statements made by an offender to his probation officer were admissible); see also Estelle v. Smith, 451 U.S. 454, 468 (1981) ("[T]he privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964))). The Supreme Court has also refused to "distinguish between the guilt and penalty phases of [a trial] so far as the protection of the Fifth Amendment privilege is concerned." Id. at 462-63. As a result, convicted offenders retain this protection at the time of sentencing. See Murphy, 465 U.S. at 426 ("A defendant does not lose [his Fifth Amendment] protection by reason of his conviction of a crime . . . .").

65. See Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973) ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." (quoting Crampton v. Ohio, 402 U.S. 183, 213 (1971))).

66. Id. (quoting Crampton, 402 U.S. at 213).

who has refused to express remorse at allocution for the crime for which he has been convicted. In so ruling, the court recognized that "a sentencing court is 'vested with virtually boundless discretion' in deciding what factors to consider on the issue of punishment." In an effort to meet the sentencing objectives of punishment, deterrence, and rehabilitation, sentencing courts are permitted to consider a wide range of information.

The Jennings court, nonetheless, recognized a few limitations on a judge's discretion in the area of sentencing. Certain factors, the court explained, may not be considered when imposing a sentence. For example, the court acknowledged that "'[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" Thus, a judge may not punish a defendant with a harsher sentence for invoking his right to stand trial. On the other hand, the court specified that a defendant's demeanor and veracity are proper sentencing considerations.

At the outset, the court recognized that the Jennings case presented an issue of first impression for the Court of Appeals. The court contemplated, however, that it may have "implicitly" addressed the issue of remorse at sentencing in Johnson. In Johnson, the sen-

68. Jennings, 339 Md. at 688, 664 A.2d at 909-10.
69. Id. at 683, 664 A.2d at 907 (quoting State v. Dopkowski, 325 Md. 671, 679, 602 A.2d 1185, 1189 (1992)).
70. See id. at 682, 664 A.2d at 907. Elsewhere in the opinion the court stated that "sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders." Id. at 684, 664 A.2d at 907 (alteration in original) (quoting United States v. Grayson, 438 U.S. 41, 45 (1978) (quoting Williams v. New York, 337 U.S. 241, 248 (1949))).
71. Id. at 683, 664 A.2d at 907.
72. See id. ("The sentencing court's broad discretion does not permit, however, imposition of sentences that are cruel and unusual; violative of constitutional requirements; motivated by ill-will, prejudice, or other impermissible considerations; or that exceed statutory limitations.").
73. Id.
74. Id. at 684, 664 A.2d at 908 (alteration in original) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).
75. See id. The court also recognized that a sentencing judge may not consider the fact that a defendant continuously protested his innocence throughout the trial. Id. at 688, 664 A.2d at 909.
76. Id. at 685, 664 A.2d at 908.
77. Id. at 686, 664 A.2d at 908.
78. Id. The court acknowledged that in Johnson it had vacated the defendant's sentence, but determined that it would not have considered the sentence flawed "absent the explicit reference to the defendant's failure to plead guilty." Id. at 687, 664 A.2d at 909. As a result, the Jennings court looked to Johnson for guidance. See id. at 686-87, 664 A.2d at 908-09 (excerpting and discussing the colloquy between the trial judge and the defendant at allocution in Johnson).
tencing judge did not directly mention the defendant's lack of remorse. Nevertheless, the *Jennings* court determined that sentencing leniency was denied in *Johnson* "because of [the judge's] perception of the defendant's present attitude." The Court of Appeals in *Johnson* did not find fault with this portion of the record upon review. As a result, the *Jennings* court reasoned that remorse, as evidence of a defendant's present attitude, may be considered at sentencing. The court bolstered its determination, in part, by examining court decisions on point in other jurisdictions. Each of those courts held that a defendant's "lack of remorse is an appropriate sentencing consideration inasmuch as acceptance of responsibility is the first step in rehabilitation."

Finally, the *Jennings* court critically examined the trial judge's remarks. The court found that the sentencing judge had not considered the defendant's decision to stand trial or his protestations of innocence throughout trial, either of which would have constituted impermissible sentencing considerations. Instead, the court determined that the sentencing judge denied leniency because of Jennings's "present tense refusal to accept responsibility, or show remorse, for his actions." The court reflected that "[w]hat comes through in this case is the sense that the trial judge was searching for the proper sentence."

The court also emphasized that the trial judge did not enhance Jennings's sentence, but instead opted against suspending any portion in mitigation. The court found that the judge's remarks "reflect a refusal to grant [Jennings] the benefit of a lesser sentence . . . rather than the intentional imposition of a greater one [as] punishment." Concluding that a defendant's present remorse may be considered in mitigating a defendant's sentence, the Court of Appeals refused to vacate the sentence imposed by the trial court.

79. See id. at 686-87, 664 A.2d at 908-09.
80. Id. at 687, 664 A.2d at 909.
81. Id. The *Johnson* court found only that the trial court's specific comments regarding the defendant's decision to plead guilty were in error. *Id.*
82. Id. at 688, 664 A.2d at 910.
83. Id. at 685, 664 A.2d at 908 (citations omitted).
84. See id. at 687-88, 664 A.2d at 909.
85. Id. at 688, 664 A.2d at 909-10.
86. Id., 664 A.2d at 910.
87. Id. at 687-88, 664 A.2d at 909.
88. Id. at 688, 664 A.2d at 909.
89. Id.
90. Id., 664 A.2d at 910.
Judge Raker, dissenting, criticized the majority for side-stepping the constitutional dilemma presented in *Jennings*. Judge Raker found disturbing the fact that the sentencing judge would have treated Jennings better at allocution had he abandoned his right to remain silent and admitted guilt. The denial of sentencing leniency, Judge Raker concluded, constituted "‘a judicially imposed penalty [on Jennings] for exercising his constitutionally guaranteed rights.’" Thus, Judge Raker maintained that the defendant’s constitutional right against self-incrimination was infringed when the trial court considered Jennings’s lack of remorse in fashioning a sentence.

4. Analysis.—The court’s ruling in *Jennings*, although controversial, is by no means unprecedented. The *Jennings* decision comports with both Maryland law and rulings in other jurisdictions. Yet despite this precedence, the court’s holding is problematic. The court condones what is, in effect, a harsher treatment at sentencing of defendants that fail to exhibit contrition after conviction—a practice that is inconsistent with their Fifth Amendment right to remain silent.

The Supreme Court has held repeatedly that a state may not threaten punitive action to coerce a criminal defendant into relinquishing his Fifth Amendment rights. The Court particularly expressed “its interest in ensuring that constitutionally protected conduct should not be considered against a defendant during the sentencing process.”

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91. *Id.* at 688-91, 664 A.2d at 910-11 (Raker, J., dissenting). Judge Eldridge joined Judge Raker’s dissenting opinion. *Id.* at 688, 664 A.2d at 910.

92. *Id.* at 690, 664 A.2d at 911.

93. *Id.* at 689, 664 A.2d at 910 (quoting *Scales v. State*, 219 N.W.2d 286, 293 (Wis. 1974)) (quoting *Thomas v. United States*, 368 F.2d 941, 946 (5th Cir. 1966)).

94. *Id.*


96. See supra note 8.


tion remains viable throughout the penalty phase, even a convicted offender may not be penalized for asserting his Fifth Amendment right at allocution. The *Jennings* court upheld the sentencing judge's action in part due to its characterization of the harsher sentence as nonpunitive. The court reasoned that the trial judge did not enhance the defendant's sentence in punishment, but instead denied him the benefit of a lesser sentence.

Although widely accepted, the penalty-benefit distinction forwarded by the majority is unsound. The distinction may make "sense theoretically but [it] is meaningless from the practical perspective of defendants. Depriving a defendant of the benefit of a sentence reduction has the same effect as penalizing him—he spends more time in jail." Thus, from a defendant's standpoint, the denial of a benefit is indistinguishable from the imposition of a penalty. Recognizing this reality, "the Supreme Court has held that the conditioning of a benefit upon relinquishment of the Fifth Amendment right to remain silent constitute[s] an impermissible penalty on assertion of

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99. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime . . . ."); Ellison v. State, 310 Md. 244, 259, 528 A.2d 1271, 1278 (1987) (determining that a convicted defendant is entitled to invoke the right against self-incrimination until the time period for seeking appellate review ends or, if an appeal is filed, until the appellate proceedings conclude); State v. Manzanares, 866 P.2d 1083, 1093 (Kan. Ct. App. 1994) ("The vitality of the Fifth Amendment privilege against self-incrimination extends at least through sentencing because the risk of incrimination ends no earlier than that.").

100. See *Jennings*, 339 Md. at 688, 664 A.2d at 909.

101. *Id.* Concededly, a sentence suspension is a privilege and not a right. See *Manzanares*, 866 P.2d at 109.

102. See United States v. Frazier, 971 F.2d 1076, 1081 n.8 (4th Cir. 1992) ("[I]t is a commonly held position that the conditioning of the receipt of a benefit upon the relinquishment of a constitutional right can never constitute compulsion within the meaning of the Fifth Amendment."); see also Bryant, *supra* note 98, at 1303-05 (arguing that a denial of reduction in sentence is not equivalent to a penalty).

103. In *United States v. Frierson*, 945 F.2d 650 (3d Cir. 1991), for example, the court observed that "[t]he characterization of a denied reduction in sentence as a 'denied benefit' as opposed to a 'penalty' cannot be squared with the reality of the sentencing calculation.

that right."105 In Jennings, it is clear that the trial court would have suspended a portion of Jennings's sentence had he abandoned his Fifth Amendment right.106 The trial court, therefore, conditioned the benefit of a reduced sentence upon relinquishment of Jennings's constitutional right to remain silent, a practice considered improper by the Supreme Court.

The consideration of remorse at sentencing is troublesome for other reasons as well. This practice forces defendants to make a Hobson's choice.107 On the one hand, a defendant may choose to express remorse and receive a lesser sentence for doing so. The state, however, may be able to use any incriminating statements against the defendant in future court proceedings.108 For example, should the defendant prevail on appeal and receive a new trial, an admission made at sentencing may come back to haunt him.109 On the other hand, a defendant may opt to remain silent but could spend consider-ably more time in jail as a result.

Placing defendants in such an untenable situation is unnecessary.110 Some have argued that the burden placed upon a defendant's Fifth Amendment right is justified by the sentencing objective of rehabilitation.111 Concededly, the government has a vital interest in rehabilitating offenders. Nonetheless, the consideration of remorse at sentencing is unnecessary to achieving this goal. The judicial system may assess an offender's rehabilitative potential and preserve his constitutional right to remain silent. Sentencing judges should look to other important factors—such as the type of crime and the defend-


106. See supra notes 26-27 and accompanying text.

107. See Sands & Coates, supra note 63, at 101 ("The choice is between the lesser of two evils, and the temptation to limit [the defendant's] present imprisonment ... likely will prove irresistible.").

108. See Scott M. Solkoff, Note, Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs, 17 NOVA L. REV. 1441, 1455-56 (1993) (discussing the constitutionality of ordering a defendant to admit guilt during therapy as a probation condition); see also Christian v. State, 513 P.2d 664, 670 n.6 (Alaska 1973) ("[I]t may be unreasonable to expect an offender to admit guilt when his case is on appeal. In such circumstances we think the denial of guilt should not be considered . . . .").

109. See supra note 108.

110. The government may not "needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." United States v. Jackson, 390 U.S. 570, 582 (1968) (citations omitted).

111. See Solkoff, supra note 108, at 1482 (weighing the goal of rehabilitating offenders against the offender's "constitutional privilege against self-incrimination").
ant's criminal history, cooperation in subsequent criminal investigations, and post-offense rehabilitative efforts (for example, participation in counseling, drug treatment programs, or community service)—to assess the likelihood of rehabilitation. Moreover, a few words of remorse expressed at the eleventh hour offer little insight into an offender's rehabilitative potential. Because of the prospect of a reduced sentence, expressions of remorse at allocution are often insincere. When freedom is on the line, "[t]he incentive to lie is great." 

5. Conclusion.—The holding of the Court of Appeals in Jenningsthat a sentencing judge may consider a defendant's present lack of remorse when fashioning a sentence—is inconsistent with a criminal defendant's constitutional right against self-incrimination. Because of the profound constitutional implications in decisions such as Jennings, the Supreme Court ought to settle the issue in the near future. Ultimately, the Court will need to strike an appropriate balance between a criminal defendant's constitutional right to remain silent and the goal of rehabilitating convicted offenders. Until then, criminal defendants in Maryland must face a senseless choice between reduced sentencing and exercising their constitutional rights.

Lisa F. Orenstein

E. Restricting the Right to Cross-Examine Witnesses for Bias

In Ebb v. State, the Court of Appeals considered whether a circuit court judge erred by precluding the cross-examination of two State witnesses about criminal charges pending against them. The Court of Appeals held that the trial judge did not abuse his discretion by limiting the scope of the cross-examination. The Supreme Court and

113. Even those who unreasonably refuse to admit guilt or express remorse may be disposed toward rehabilitation without serving the maximum possible sentence. See Christian, 513 P.2d at 670 ("[I]t may still be possible to bring about a reformation of [the defendant's] conduct in the future through probation. The very fact that [the defendant] is on probationary status, and that incarceration is an ever present potentiality, may be enough to make a critical difference."). But see Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 867 (1995) (arguing that remorseful defendants "may need less rehabilitation and deserve less punishment in the sentencing process").
114. Solkoff, supra note 108, at 1447.
2. Id. at 581, 671 A.2d at 975.
3. Id.
the majority of other courts that have considered the issue addressed in *Ebb*, however, have ruled in favor of allowing the cross-examination of witnesses about pending criminal charges. This view is consistent with the requirements of the Confrontation Clause of the United States Constitution and the well-settled rule that a jury, not a judge, should determine the credibility of witnesses. The Court of Appeals should have followed the dominant, well-reasoned trend of the Supreme Court, as well as other state courts and found that the trial judge abused his discretion in precluding such cross-examination.

1. **The Case.**—On November 28, 1992, James Brodie, owner of Brodie’s Barbershop, and Michael Peters, a customer, died from gunshot wounds during an attempted robbery of the barbershop. In an effort to secure the conviction of Jeffrey Ebb (Ebb) for these murders, the State relied, in part, on the testimony of three witnesses: Todd Timmons, Lawrence Allen, and Jerome House-Bowman. Timmons, who was found in possession of the murder weapon, testified that he had purchased the gun from Ebb. Allen testified that Ebb asked him for money to “get out of town” on November 28, 1992. House-Bowman testified that Ebb told him that he was involved in the “barbershop murder” and that he robbed the place because he knew where the money was kept. Each of these witnesses had criminal charges pending against them and were incarcerated at the time of Ebb’s trial.

Ebb’s attorney sought to cross-examine each of the three witnesses on their pending criminal charges in order to show that each had a motive to falsify their testimony—to curry favor with the State by helping the prosecution secure Ebb’s conviction in a capital murder trial. The trial judge held hearings outside the presence of the jury to determine if the witnesses expected something in return for their

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4. U.S. Const. amend. VI.
5. See infra note 38 and accompanying text.
7. *Id.* at 582, 671 A.2d at 976.
8. *Id.* at 592, 671 A.2d at 981 (Bell, J., dissenting). Timmons first testified that he purchased a gun from Ebb in September or October of 1992 and that he was arrested in November 1992 for possession of that same gun. *Id.* at 592 n.1, 671 A.2d at 981 n.1. Upon further questioning, however, Timmons changed his testimony to reflect that he had purchased the gun in November 1992 and, thus, had the gun for only several days, instead of several months. *Id.*
9. *Id.*
10. *Id.* at 592-93, 671 A.2d at 981.
11. *Id.* at 593, 671 A.2d at 981.
12. *Ebb*, 341 Md. at 583, 671 A.2d at 976.
testimony.\textsuperscript{13} Timmons testified that he had a pending charge for violation of probation that carried a possible one-year sentence and a pending motion for reconsideration of a sentence.\textsuperscript{14} Allen testified that he had charges pending against him for a handgun violation and for theft.\textsuperscript{15} House-Bowman testified that he had a pending charge for violation of probation relating to two convictions for armed robbery.\textsuperscript{16} Only House-Bowman stated that he hoped his testimony would help him achieve “a favorable disposition” on his pending charge.\textsuperscript{17} Neither Timmons nor Allen admitted that they expected or hoped for favorable treatment from the State.\textsuperscript{18}

Because House-Bowman admitted having hoped for “favorable treatment,” the trial judge allowed defense counsel to cross-examine him in front of the jury about his potential bias against Ebb.\textsuperscript{19} Because neither Timmons nor Allen admitted to having expectations that the State would assist them with their pending charges, however, the trial judge denied defense counsel the right to cross-examine them about their pending charges in front of the jury.\textsuperscript{20} The judge ruled that, in order to cross-examine Timmons and Allen about their pending charges, defense counsel must first “lay a foundation” that the witnesses had some hope or expectation of lenience.\textsuperscript{21} In response, defense counsel asserted that, in his experience, whether or not any explicit promises were made or expected, many witnesses still consider it in their best interest to testify when given the opportunity.\textsuperscript{22} Defense counsel argued that the jury—as sole determiners of credibility of witnesses—ought to be allowed to determine whether Timmons and Allen testified truthfully.\textsuperscript{23} The trial judge, however, did not modify his ruling.

Obeying the court’s directive, defense counsel limited cross-examination of Allen and Timmons to their prior relevant criminal convictions, but cross-examined House-Bowman about his pending

\begin{footnotesize}
\begin{enumerate}
\item Timmons, 341 Md. at 588-85, 671 A.2d at 976-77.
\item Allen, 341 Md. at 585, 671 A.2d at 977.
\item Id.
\item Id.
\item Id.
\item The trial court explained to the defense, “You may ask [the witness] whatever questions you want that would get a threshold foundation that would suggest that he expects any kind of lenience.” Joint Record Extract, vol. II at 44, Ebb v. State, 341 Md. 578, 671 A.2d 974 (1996) (No. 117).
\item Joint Record Extract, vol. II at 44-45, Ebb (No. 117).
\item Ebb, 341 Md. at 595, 671 A.2d at 982 (Bell, J., dissenting).
\end{enumerate}
\end{footnotesize}
criminal charges and his motive to testify for the State. Following its deliberations, the jury convicted Ebb of two counts of felony murder.

On appeal, Ebb challenged the trial court's restriction of his cross-examination of Timmons and Allen. In an unreported opinion, the Court of Special Appeals affirmed Ebb's conviction, concluding that the trial judge did not abuse his discretion by denying the petitioner the right to cross-examine Allen and Timmons concerning their pending criminal charges. Ebb petitioned the Court of Appeals, arguing that decisions about a witness's credibility are within the province of the jury and that the trial judge abused his discretion by denying Ebb the right to cross-examine witnesses. The Court of Appeals granted certiorari to "determine whether the trial court properly limited the scope of the cross-examination of witnesses Timmons and Allen."

2. Legal Background.—

a. Cross-Examination for Bias and Issues of Credibility.—Both the Confrontation Clause of the Sixth Amendment, as well as Article 21 of the Maryland Declaration of Rights, guarantee a criminal defendant the right to confront witnesses testifying against him. The Supreme Court has interpreted this guarantee as affording a criminal defendant the right to cross-examine witnesses about matters relating to each witness's biases, interests, or motives to make false or misleading statements.

24. Id. at 594, 671 A.2d at 982.
25. Id. In addition to the two murder charges, the jury also convicted Ebb of attempted second degree murder, attempted robbery with a deadly weapon, use of a handgun in commission of a felony, use of a handgun in the commission of a crime of violence, and three counts of assault. Id. at 594-95, 671 A.2d at 982.
26. Ebb, 341 Md. at 585, 671 A.2d at 977.
27. Id. at 586, 671 A.2d at 978.
28. Id.
30. Ebb, 341 Md. at 581-82, 671 A.2d at 976.
31. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").
32. MD. CONST. DECL. OF RTS. art. 21 ("[I]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath.").
33. Ebb, 341 Md. at 587, 671 A.2d at 978.
In Smallwood v. State, the Court of Appeals established a framework for cross-examination. The Court of Appeals held that although trial judges retain the latitude to reasonably limit cross-examination, limitation should not occur until the defendant reaches the basic threshold of inquiry that is allowed by constitutional mandate. The Court of Appeals cited a line of federal authority suggesting that this threshold is met only after the trial judge is satisfied that the jury has sufficient information to make a discriminating appraisal of the possible biases and motivations of the witness.

Maryland courts have also consistently recognized that the jury, not the judge, is the final arbiter of the credibility of witnesses and their testimony. After outlining the authority of a judge presiding over a jury trial, the Court of Appeals, in Dykes v. State, explained that "what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury, not the judge, to determine." The Court of Appeals went on to note: "When the trial judge resolves conflicts in the evidence, in the face of the 'some' evidence requirement, and refuses to instruct [the jury] because he believes that the evidence supporting the request is incredible or too weak or overwhelmed by other evidence, he improperly assumes the jury's role as fact-finder."

b. Supreme Court Decisions on the Right to Cross-Examine for Bias.—The Supreme Court considered a defendant's right to cross-examine prosecution witnesses regarding their potential for bias in Alford v. United States. In Alford, the trial court did not permit the defense to cross-examine a witness about whether his detention by federal authorities might influence his testimony. In reversing the trial court's decision, the Supreme Court emphasized the importance

36. Id. at 307, 577 A.2d at 359.
37. Id.
38. See, e.g., Dykes v. State, 319 Md. 206, 224, 571 A.2d 1251, 1260 (1990) ([W]hat evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury, not the judge, to determine."); Bohnert v. State, 312 Md. 266, 278-79, 539 A.2d 657, 663 (1988) (noting that the credibility of a witness and the weight to be accorded the witness's testimony are solely in the province of the jury); Gore v. State, 309 Md. 203, 210, 219, 522 A.2d 1388, 1341 (1987) (stating that the jury is the exclusive judge of the facts); Dempsey v. State, 277 Md. 134, 150, 355 A.2d 455, 463 (1976) (stating that the jury makes final decisions about whether a confession is voluntary).
40. Id. at 224, 571 A.2d at 1260.
41. Id.
42. 282 U.S. 687 (1931).
43. Id. at 688-90.
of allowing a defendant to "place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." In Alford, the Supreme Court held that requiring a defendant to establish that cross-examination for bias would, in fact, have yielded facts that may have discredited the witness's testimony is a violation of a defendant's rights.

More recently, in Davis v. Alaska, the Supreme Court held that refusing to allow a defendant to cross-examine a prosecution witness about his probationary status constituted a violation of the defendant's right to confront witnesses under the Sixth Amendment. The Court noted that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." The Davis Court expanded the information available for cross-examination by holding that simply allowing counsel to ask a witness on cross-examination about bias without allowing counsel to go further "to make a record from which to argue why [the witness] might have been biased" prevents effective cross-examination and can constitute ""constitutional error of the first magnitude."

The Supreme Court continued this trend of allowing expansive cross-examination for bias in Delaware v. Van Arsdall. In Van Arsdall, the Court acknowledged that trial judges have "wide latitude" to impose "reasonable limits" on cross-examination for bias, but drew the line when the trial court prohibited all inquiry into the possibility of bias on behalf of a prosecution witness regarding dismissal of a pending charge. The Court wrote: "By thus cutting off all questioning about an event... that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the

44. Id. at 692.
45. Id. The Alford Court wrote, "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Id.
47. Id. at 320. In Davis, the State's key eyewitness was on probation for burglary. Id. at 311. Because the stolen goods that the defendant was accused of taking were also found near the witness, the defendant argued that the witness might also have been motivated to testify for the State in order to focus attention away from himself. Id.
48. Id. at 316-17.
49. Id. at 318.
52. Id. at 679.
[trial] court’s ruling violated respondent’s rights secured by the Confrontation Clause."\footnote{53}

c. Maryland’s Interpretation of Supreme Court Precedent.—Despite the broad language used by the Supreme Court to establish that evidence of the probationary status of a prosecution witness is admissible, the Court of Appeals has interpreted Supreme Court precedent narrowly. In \textit{Watkins v. State},\footnote{54} the Court of Appeals addressed whether a trial judge may refuse to allow the defense to elicit from a State witness the fact that the witness was on probation.\footnote{55} In \textit{Watkins}, the defendant was convicted of two counts of shooting with intent to disable.\footnote{56} At trial, the victims, Melvin and Kelvin Brown, testified against Watkins.\footnote{57} The defendant sought to show through cross-examination that both witnesses were on probation and, therefore, their testimony may be tainted.\footnote{58} Following a discussion with the attorneys, the trial judge ruled the evidence inadmissible.\footnote{59} Upholding the decision of the trial court, the Court of Appeals distinguished \textit{Watkins} from \textit{Davis} on the ground that, unlike in \textit{Davis}, Watkins had not suggested that the witnesses may have been guilty of the offense for which the defendant was charged.\footnote{60} The court also noted that, in \textit{Watkins}, the defense had evidence available for cross-examination that tended to show that the prosecution’s witness already had a strong motive to testify favorably for the State.\footnote{61} In \textit{Watkins}, the defendant claimed

\footnote{53. \textit{Id.} The Court further wrote: \begin{quote} We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby “to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness.” Respondent has met that burden here: A reasonable jury might have received a significantly different impression of [the witness’s] credibility had respondent’s counsel been permitted to pursue his proposed line of cross-examination. \end{quote} \textit{Id.} at 680 (first alteration in original) (citation omitted) (quoting \textit{Davis}, 415 U.S. at 318).}
that the altercation that gave rise to the charges against him began over a disputed drug deal. Melvin and Kelvin Brown, who were both on probation, denied on the stand that drugs were involved in the dispute. As the majority noted in Watkins, the jury would understand that the Browns had a clear motive to deny the existence of a drug deal "because of the danger of being prosecuted for [their] involvement." Therefore, the issue of bias—the witnesses' bias to lie about the drug issue to avoid prosecution—was already in front of the jury. Thus, Watkins appears to stand for the proposition that when defense counsel already has evidence available to support the defense's claim that a particular witness may be biased, the trial judge has the discretion to permit or prohibit questions on cross-examination relating to either probation or pending charges.

d. Other States.—Of the states that have addressed the issue of cross-examining witnesses about their pending criminal charges, most have ruled that such questioning is fair game for a defense attorney. At least seven states have explicitly held that a trial court may not use its discretion to exclude facts that tend to show bias. North

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62. Id.
63. Id.
64. Id.
65. Id.
66. See id. (holding that allowing cross-examination regarding the probationary status of the witness is tolerable because the jury would already understand the witness's motive to lie).
67. See People v. Richmond, 406 N.E.2d 135, 136 (Ill. App. Ct. 1980) (remanding for a new trial because the trial court did not allow the defense to cross-examine the prosecution's witness about possible bias stemming from hopes for leniency in return for testifying); Spears v. Commonwealth, 558 S.W.2d 641, 642 (Ky. Ct. App. 1977) (holding that the lower court erred in excluding from the jury evidence of a pending indictment against the witness); Commonwealth v. Hogan, 396 N.E.2d 978, 979 (Mass. 1979) ("Where [criminal] charges are pending, there is a possibility of bias in favor of the government, and normally it is for the jury, and not the judge, to determine the effect, if any, of those pending charges on the witness's testimony."); State v. Baker, 336 A.2d 760, 761 (N.J. Super. Ct. App. Div. 1975) (holding that the defendant was entitled to cross-examine the prosecution's witness about the promise of lenient treatment on the indictments pending against him in return for testifying against the defendant); State v. Roberson, 39 S.E.2d 277, 280 (N.C. 1939) (finding that because the jury may have found that the witness testified with the "reasonable expectation" of leniency, it constituted error to preclude cross-examination on the pending charges); Commonwealth v. Evans, 512 A.2d 626, 631 (Pa. 1986) ("[W]henever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges . . . that possible bias, in fairness, must be made known to the jury."); Koehler v. State, 679 S.W.2d 6, 9 (Tex. Crim. App. 1984) (en banc) (arguing that "any question asked of a witness on cross-examination, which might have a tendency to affect the witness' credibility, is always a proper question"); Spain v. State, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979) (holding that it was error for defense counsel to be denied the opportunity to ask the prosecution witnesses whether they received the benefit of a plea
Carolina led the way by ruling on the issue in 1939, over thirty-five years before the Supreme Court's decision in *Davis*. In *State v. Robertson*, the Supreme Court of North Carolina reversed the trial court's ruling that excluded evidence of a pending criminal charge against a prosecution witness despite the fact that the witness denied receiving any "deal" on his sentence from the prosecutor and that the prosecutor denied making a "deal." The court noted:

Although the testimony does not constitute direct evidence of any agreement . . . the jury might well find that the facts and circumstances were such that the witness testified in the reasonable expectation that he would receive leniency in return for having turned State's evidence . . . and that his testimony, by reason thereof, was unworthy of belief.

In the years after the Supreme Court's decision in *Davis*, several states moved to extend protection under the Confrontation Clause by allowing cross-examination of witnesses about their pending criminal charges. In Kentucky, Massachusetts, Illinois, New Jersey, and New York, courts reversed trial court rulings to preclude cross-examination regarding pending criminal charges. Most recently, in *Commonwealth v. Evans*, the Supreme Court of Pennsylvania ruled that a jury should be allowed to hear about unrelated charges pending against a prosecution witness during cross-examination. Employing

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68. 3 S.E.2d 277 (N.C. 1939).
69. Id. at 279.
70. Id. at 280.
71. Spears v. Commonwealth, 558 S.W.2d 641, 642 (Ky. Ct. App. 1977). Although the witness denied being promised leniency, the Kentucky Court of Appeals wrote, "In weighing the testimony the jury should be in possession of all facts calculated to exert influence on a witness." Id.
72. Commonwealth v. Hogan, 396 N.E.2d 978, 979 (Mass. 1979) (observing that when criminal charges are pending against a witness, a possibility of bias exists, and it is normally for a jury, not a judge, to consider those charges as weighing on the witness's credibility).
75. People v. Leonard, 396 N.Y.S.2d 956, 957 (App. Div. 1977) (concluding that even if the trial court found that there was no "deal," it constituted reversible error to preclude the defendant from cross-examining the prosecution witness in front of the jury about the charges pending against the witness).
76. 512 A.2d 626 (Pa. 1986).
77. Id. at 632.
the same reasoning as found in the aforementioned state decisions, the *Evans* court found that, regardless of whether actual promises of leniency have been made or are expected by the witness, "the defendant . . . must have the opportunity at least to raise a doubt in the mind of the jury as to whether the prosecution witness is biased."8

States not adopting this view include Louisiana79 and Texas.80 Courts in these states prevented cross-examination about pending criminal charges after the witnesses in question denied cutting deals with the State for their testimony.81

3. The Court's Reasoning.—In *Ebb*, a divided Court of Appeals, applying the abuse of discretion standard, affirmed the trial judge's decision to preclude cross-examination of witnesses about their pending charges.82 After briefly reviewing the facts, the majority highlighted the "considerable discretion" afforded trial courts and stated the general rule that "the extent to which a witness may be cross-examined for the purpose of showing bias rests with the sound discretion of the trial judge."83 The court noted, however, that "[t]he cross-examiner must . . . be given wide latitude to establish bias or motive of a witness."84

Addressing the cross-examination of prosecution witnesses for bias by asking about their pending criminal charges, the majority stated that "pending criminal charges are not admissible to impeach a witness [except when] offered to show bias, prejudice or motive of the witness in testifying."85 In cases of bias, prejudice, or motive, the majority in *Ebb* stated that the proper role for the trial judge is to apply "a balancing test giving wide latitude to cross-examine for bias or prejudice but not permitting the questioning 'to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion.'86

78. *Id.*

79. See *State v. Grace*, 643 So. 2d 1306, 1307-09 (La. Ct. App. 1994) (finding no error where the trial judge held a hearing outside the presence of the jury and denied the defendant the right to cross-examine a prosecution witness about pending charges after the witness denied any "deal" with the state).

80. See *Gutierrez v. State*, 681 S.W.2d 698, 706-07 (Tex. App. 1984) (denying the defendant the right to cross-examine a prosecution witness about a pending misdemeanor charge after voir dire questioning failed to expose any evidence of "self-interest, ill will, or animus").

81. See *supra* notes 78-79 and accompanying text.

82. *Ebb*, 341 Md. at 581, 671 A.2d at 975.

83. *Id.* at 587, 671 A.2d at 978.

84. *Id.*

85. *Id.* at 588, 671 A.2d at 979.

86. *Id.* (quoting *Smallwood v. State*, 320 Md. 300, 308, 577 A.2d 356, 359 (1990)).
In reviewing relevant precedent, the majority held that Watkins stood for the proposition that the decision to allow cross-examination of a witness regarding the witness's probationary status, "rests within the sound discretion of the trial judge."\textsuperscript{87} The court read Davis as limited to cases in which the witness in question was potentially a suspect in the currently litigated event.\textsuperscript{88} In conclusion, the court wrote, "[P]articularly because the witnesses testified unequivocally that they expected no benefit from their testimony, . . . the trial judge did not abuse his discretion in excluding the evidence."\textsuperscript{89}

Judge Eldridge joined Judge Bell in dissenting from the majority's decision in Ebb.\textsuperscript{90} Although Judge Bell recognized the wide discretion properly afforded the trial judge in deciding how far an attorney can go on cross-examination, he argued that this discretion applies only after the cross-examiner has been allowed to establish a threshold level of inquiry into potential bias.\textsuperscript{91}

The dissent in Ebb disagreed with the majority's reading of Watkins.\textsuperscript{92} Furthermore, the dissent argued that evidence of a witness's pending charges is far more probative than the majority acknowledged.\textsuperscript{93} The dissent noted that there was no indication from the facts of the case of an attempt by the defense to use cross-examination to either harass or embarrass the witnesses. Rather, the inquiry about pending charges went to the "'very heart' of the witnesses' bias."\textsuperscript{94} According to the dissent, the trial judge erred by impermissibly making a credibility determination that should have been left to the jury.

\textsuperscript{87} Id. at 589, 671 A.2d at 979; see supra notes 54-66 and accompanying text for a discussion of Watkins.

\textsuperscript{88} Ebb, 341 Md. at 589, 671 A.2d at 979. The majority argued that the Watkins court distinguished Watkins from Davis on the grounds that "Watkins did not suggest that the State's witnesses had committed any offense for which the defendant was charged." Id. The court's reasoning suggests that the Supreme Court's ruling in Davis should be limited by this fact. See supra notes 46-50 and accompanying text for a discussion of Davis.

\textsuperscript{89} Ebb, 341 Md. at 591, 671 A.2d at 980.

\textsuperscript{90} Id. (Bell, J., dissenting).

\textsuperscript{91} Id. at 599, 671 A.2d at 984. For an explanation of the phrase "threshold level of inquiry," see infra note 114.

\textsuperscript{92} Ebb, 341 Md. at 600, 671 A.2d at 985 (Bell, J., dissenting). The dissent argued that, even if one accepts the majority's reading of Watkins, it still does not support the court's decision in this case. Id.; see infra notes 127-131 and accompanying text. The dissent identified the extent of the charges against Timmons and Allen, along with their incarceration at the time of the trial, as facts distinguishing Ebb from Watkins. See Ebb, 341 Md. at 600, 671 A.2d at 985 (Bell, J., dissenting). Further, the dissent reasoned, Timmons and Allen served as important witnesses in a capital murder trial, not as "essentially complaining witnesses against the party who assaulted them." Id.

\textsuperscript{93} Ebb, 341 Md. at 601, 671 A.2d at 985 (Bell, J., dissenting).

\textsuperscript{94} Id. (quoting Smallwood v. State, 320 Md. 300, 310, 577 A.2d 356, 360-61 (1990) (quoting State v. Cox, 298 Md. 173, 184, 468 A.2d 319, 324 (1983))).
and by inappropriately burdening the defendant with the task of proving the witnesses' states of mind by direct evidence before allowing the issue of bias to go to the jury.\textsuperscript{95}

Addressing the majority's reliance on \textit{State v. Grace}\textsuperscript{96} and \textit{Gutierrez v. State}\textsuperscript{97} to support its position,\textsuperscript{98} the dissent noted that the two decisions were "not persuasive authority for resolution of the case."\textsuperscript{99} Further, the dissent cited at least seven other state court decisions, as well as Supreme Court precedent, that authorize cross-examination relating to a witness's pending charges.\textsuperscript{100}

4. \textit{Analysis}.—In holding that the trial court did not abuse its discretion by precluding cross-examination of witnesses about their pending charges, the Court of Appeals approved an impermissible intrusion into the province of the jury, allowing the trial judge to determine the credibility of the prosecution's witnesses against Ebb.\textsuperscript{101} In so holding, the majority failed to follow the Supreme Court's limited guidance in this area and, instead, made a ruling contrary to almost every state court that has addressed this issue.\textsuperscript{102} The Court of Appeals should not have affirmed the trial judge's decision to limit cross-examination before Ebb had the opportunity to "place the witness in his proper setting and put the weight of his testimony and his credibility to a test."\textsuperscript{103} To achieve this level of inquiry, a defendant may need, and should be able, to cross-examine a witness about any pending charges.

\textbf{a. An Inappropriate Application of the Balancing Test}.—The Ebb court correctly acknowledged that, in Maryland, the trial judge is afforded considerable discretion in determining what evidence is relevant.\textsuperscript{104} The majority also correctly observed that in making this decision about the relevance and materiality of a particular piece of evidence, the trial judge should "engage in a balancing test" in which the "wide latitude to cross-examine for bias or prejudice" is weighed against the court's interest in preventing questions from straying into

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 603, 671 A.2d at 986.
\item \textsuperscript{96} 643 So. 2d 1306 (La. Ct. App. 1994).
\item \textsuperscript{97} 681 S.W.2d 698 (Tex. App. 1984).
\item \textsuperscript{98} See \textit{supra} notes 79-80.
\item \textsuperscript{99} \textit{Ebb}, 341 Md. at 602, 671 A.2d at 985-86 (Bell, J., dissenting).
\item \textsuperscript{100} \textit{Id.}, 671 A.2d at 986. For relevant state court cases see \textit{supra} notes 68-78 and accompanying text.
\item \textsuperscript{101} See \textit{Ebb}, 341 Md. at 602, 671 A.2d at 986 (Bell, J., dissenting).
\item \textsuperscript{102} \textit{Id.} at 603, 671 A.2d at 986.
\item \textsuperscript{103} \textit{Alford v. United States}, 282 U.S. 687, 692 (1931).
\item \textsuperscript{104} See \textit{Ebb}, 341 Md. at 587, 671 A.2d at 978.
\end{itemize}
The Court of Appeals erred, however, by applying this balancing test to evidence of charges pending against Timmons and Allen because no other evidence of bias relating to Timmons or Allen had been introduced or was allowed to be introduced. The balancing test that judges employ is designed to assist in determining whether or not a particular piece of evidence is so collateral to the issue at hand that its introduction would lead to confusion on the part of the fact finder. The cross-examination of Timmons and Allen regarding their pending charges, however, was not a collateral matter. Inquiry on cross-examination concerning these charges went directly to the heart of whether or not the witnesses were biased in favor of the State. As noted earlier, the Supreme Court has stated unequivocally that bias is "always relevant as discrediting the witness and affecting the weight of his testimony." As the Supreme Court stated in Van Arsdall, by "cutting off all questioning about an event . . . that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the [trial] court's ruling violated [the defendant's] rights secured by the Confrontation Clause." Ebb was denied his right of confrontation when the trial court refused to allow the jury to hear any evidence of potential bias.

In Brown v. State, the Court of Special Appeals recognized that a trial judge may not exercise his discretion to control the limits of cross-examination until a basic, constitutionally mandated level of inquiry has been afforded the defendant. Yet this is what happened

105. Id. at 588, 671 A.2d at 979 (quoting Smallwood v. State, 320 Md. 300, 308, 577 A.2d 356, 359 (1990)).
106. See id. at 604, 671 A.2d at 987 (Bell, J., dissenting).
107. Ebb, 341 Md. at 588, 671 A.2d at 979.
108. See id. at 601, 671 A.2d at 985 (Bell, J., dissenting) (arguing that the defendant's proposed inquiry on cross-examination would have gone "to the very heart" of the matter in question).
109. See id.
112. See Ebb, 341 Md. at 604, 671 A.2d at 987 (Bell, J., dissenting) (arguing that Ebb was denied his "constitutionally required threshold level of inquiry").
114. Id. at 419, 538 A.2d at 319. To date, Maryland courts have not provided a working definition of what exactly constitutes a "constitutionally required threshold level of inquiry." Id. The Court of Appeals cited to Brown, which referred to a line of federal authority that seems to suggest that this threshold is satisfied if the jury has "sufficient other information before it, without the excluded evidence, to make a discriminating appraisal of the possible biases and motivations of the witness." United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982), cited in Brown, 74 Md. App. at 419, 538 A.2d at 319. Citing this
in *Ebb*. In *Ebb*, although the judge allowed the defense to cross-examine Timmons and Allen regarding their credibility, the judge prevented the defense from raising the issue of potential bias or the motive of these witnesses to testify favorably for the State.115 By preventing *Ebb* from exposing the witnesses' pending charges to the jury, the jury was left unaware that both Allen and Timmons each had a powerful incentive to provide testimony that was favorable to the State.116 The jury may or may not have found these witnesses believable, but the dissent correctly concluded that "being precluded from pursuing the bias inquiry certainly could have influenced the verdict and, consequently, is not harmless beyond a reasonable doubt."117

**b. Infringing on the Jury's Role As Final Arbiter of the Facts.**—In Maryland, it is well settled that in a jury trial, it is the function of the jury, not the judge, to determine the credibility of the witnesses, to weigh their testimony, and to resolve contested facts.118 The Court of Appeals has clearly established that a jury's determination of credibility is "entitled to great deference."119 In *Dykes v. State*,120 the Court of Appeals wrote unequivocally, "[o]f course, what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury, not the judge, to determine."121 The majority in *Ebb* apparently ignored this principle when it found that the trial judge did

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115. *Ebb*, 341 Md. at 604, 671 A.2d at 987 (Bell, J., dissenting).
116. *Id.* at 602, 671 A.2d at 986.
117. *Id.* at 604, 671 A.2d at 987.
119. *Ebb*, 341 Md. at 597, 671 A.2d at 983 (Bell, J., dissenting); see also *Dykes v. State*, 319 Md. 206, 222, 224, 571 A.2d 1251, 1259-60 (1990) (stating that if there is some evidence supporting a defense, the judge must instruct the jury about that defense); *Bohnert*, 312 Md. at 278-79, 539 A.2d at 663 (remanding case because a witness's opinion that the victim was telling the truth invaded the jury's function of judging the credibility of witnesses); *Gore*, 309 Md. at 214, 522 A.2d at 1343 (remanding case because the jury instruction that there was sufficient evidence to convict improperly influenced the jury); *Branch v. State*, 303 Md. 177, 184, 502 A.2d 496, 499 (1986) (upholding jury's conviction of the defendant even though the victim's description of the robber differed substantially from the description of the defendant); *Dempsey v. State*, 277 Md. 134, 150, 355 A.2d 455, 469 (1976) (remanding case after finding that the trial judge's comment to the jury that the defendant's confession was voluntary violated the jury's role as finder of fact).
120. *Dykes*, 319 Md. at 206, 571 A.2d at 1251.
121. *Id.* at 224, 571 A.2d at 1260.
not abuse his discretion. In *Ebb*, the trial court determined that the defendant did not lay the proper foundation to entitle him to cross-examine two important witnesses in front of the jury. In reaching this determination, the trial judge clearly made a personal judgment about the credibility of the witnesses by deciding to believe their statements that they did not expect a reward or favorable treatment for their testimony.

The Supreme Court has identified cross-examination as the "principal means by which the believability of a witness and the truth of his testimony are tested." By making a credibility determination about the witnesses outside the presence of the jury, the trial judge impermissibly infringed on the jury's role. Instead of weighing the relevance of the particular piece of evidence, the trial judge weighed the credibility of the witnesses. In light of its own precedent concerning the jury's role as the sole judge of a witness's credibility, the Court of Appeals should have ordered a reversal.

c. Disregarding Supreme Court Guidance and the Majority of Other States Addressing This Issue.—In reaching the conclusion that the trial judge did not abuse his discretion, the majority relied on the Maryland case of *Watkins v. State* as well as two cases from other states. As the dissent in *Ebb* clarified, however, even if one accepts that *Watkins* was decided correctly, its facts are distinguishable from the present case.

In *Watkins*, the witnesses' motive to lie on the stand was clearly established without pursuing information about their pending charges. The defense simply sought to extend cross-examination of these witnesses, hoping to establish that their probationary status "gave them some additional reason to deny any involvement with drugs." Although the trial judge's determination limited the jury's access to some evidence of motive or bias on the part of these two witnesses, it did not entirely prohibit all evidence relating to bias. In *Ebb*, however, the trial court prevented the defendant from presenting any evidence of Timmons's and Allen's potential bias in favor of

122. *Ebb*, 341 Md. at 585, 671 A.2d at 977.
123. *Id.* at 603, 671 A.2d at 986 (Bell, J., dissenting).
125. *Ebb*, 341 Md. at 603, 671 A.2d at 986 (Bell, J., dissenting).
126. See *id.* at 601, 671 A.2d at 985; see supra notes 79-81 and accompanying text.
127. *Ebb*, 341 Md. at 600, 671 A.2d at 985 (Bell, J., dissenting).
129. *Id.*
the State. In Watkins, the question of potential for bias was obvious to the jury because the witnesses in question testified against the party who assaulted them. In Ebb, Timmons and Allen did not possess such clear motives. Thus, logically, the jury would not perceive bias in favor of the State unless the court permitted the defendant to elicit evidence of their pending charges through cross-examination.

Although the majority found two cases to support the holding in Ebb, these cases are at odds with the majority around the country, which support the rule that evidence of pending criminal charges should be placed in front of the jury so that the jury can accurately and completely assess the value of the witness's testimony. The majority mentioned none of this case law in Ebb. The Court of Appeals was in no way bound by precedent to follow the minority of states and should have followed the better-reasoned and dominant national trend—resolving such conflicts in favor of giving the jury all evidence necessary to conduct a complete and fair evaluation as fact finder.

The rule in the majority of states is superior for several reasons. First, Supreme Court decisions since Davis indicate that the Court is heading in a direction opposite to that of the majority in Ebb. In Van Arsdall, the Supreme Court found the trial court erred because it "prohibited all inquiry into the possibility that [the witness] would be biased." Despite this precedent, the Court of Appeals cut off any attempt to present evidence of a particular bias in favor of the State. Although the defendant in Ebb was allowed to mount a generalized attack on both witnesses' credibility, the trial court's decision prevented the defendant from making a more specialized attack on their potential biases. The decision in Ebb—that a defendant cannot present evidence of pending charges unless he first meets some

130. Ebb, 341 Md. at 602, 671 A.2d at 986 (Bell, J., dissenting).
131. See id. at 600, 671 A.2d at 985.
132. See id. at 601-02, 671 A.2d at 985-86.
133. See id. at 602-03, 671 A.2d at 986 (arguing that the Gutierrez and Grace decisions are "not persuasive authority" and that giving the jury the opportunity to hear the evidence is "consistent with the result reached by courts which have considered this issue").
134. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (arguing that the Confrontation Clause of the Constitution demands that an "otherwise appropriate cross-examination designed to show a prototypical form of bias" shall be exposed to the jury).
135. Id. at 679.
136. See Ebb, 341 Md. at 602, 671 A.2d at 986 (Bell, J., dissenting).
137. See id. at 604, 671 A.2d at 987. The dissent in Ebb wrote, "Evidence of a more particular reason for challenging the credibility of a witness is more effective than a general attack on credibility." Id.
"threshold foundation"—contradicts the message of both Davis and Van Arsdall.\footnote{Van Arsdall appears to indicate that if a trial judge limited cross-examination in this manner, it would be a violation of the Confrontation Clause. See Van Arsdall, 475 U.S. at 679.}

Second, the state court precedent cited to support the majority's position in Ebb does not provide a strong foundation for the court's decision. Most important, Gutierrez v. State\footnote{Gutierrez was decided two years before Van Arsdall. See supra notes 40 & 80.} was handed down before the Supreme Court decision in Van Arsdall.\footnote{See Koehler v. State, 679 S.W.2d 6, 9 (Tex. Crim. App. 1984) (en banc) ("Any question asked of a witness on cross-examination, which might have a tendency to affect the witness' credibility, is always a proper question."); Parker v. State, 657 S.W.2d 137, 141 (Tex. Crim. App. 1983) (en banc) (holding that it was reversible error to limit the cross-examination of a witness about a plea bargain between the State and the witness which had evolved shortly before trial); Spain v. State, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979) (holding that it was error for defense counsel to be denied the opportunity to ask prosecution witnesses whether they received the benefit of a plea bargain in exchange for their testimony, even though no plea bargain was revealed during an examination outside of the jury's presence).} Further, other cases decided by the same court that decided Gutierrez tend to support the Ebb dissent, not the majority opinion.\footnote{See generally Grace, 643 So. 2d at 1306 (La. Ct. App. 1994).} Gutierrez did not overrule these decisions. The only other state court case that the majority used to support its position, State v. Grace,\footnote{See La. Code Evid. Ann. art. 607 (West 1989) ("Except as otherwise provided by legislation: extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.").} cited no Supreme Court precedent whatsoever. Although the decision appears to comport with the Louisiana Code of Evidence,\footnote{See supra notes 118-123 and accompanying text.} the court provides no explanation of how its decision is consistent with Supreme Court precedent.\footnote{See Dykes v. State, 319 Md. 206, 222, 571 A.2d 1251, 1259 (1990).}

Finally, the Court of Appeals's decision in Ebb is inconsistent with the great deference it generally affords juries in evaluating the credibility of witnesses.\footnote{Dykes v. State, 319 Md. 206, 222, 571 A.2d 1251, 1259 (1990).} In Dykes v. State, the trial court had refused to instruct the jury on the defendant's claims of self-defense and imperfect self-defense because the judge found them unpersuasive under the applicable law.\footnote{Id. at 222-23, 571 A.2d at 1259-60.} In reversing the Court of Special Appeals, the Court of Appeals agreed that the defendant's version of the facts was "difficult to accept," but found that the trial court had committed error by determining the credibility of the defense prematurely.\footnote{Id. at 222-23, 571 A.2d at 1259-60.}
DeLilly v. State, the Court of Special Appeals noted, "[t]hat a witness may be cross-examined on such matters and facts as are likely to affect his credibility, test his memory or knowledge or the like, is a fundamental concept in our system of jurisprudence." Clearly, allowing Ebb to let the jury know that Timmons and Allen both had a potent reason to provide testimony favorable to the State would have been more consistent with Maryland precedent.

5. Conclusion.—The Court of Appeals should not have endorsed the balancing test as applied by the trial judge. Instead, the court should have restricted the trial judge's use of a balancing test until after the defendant had reached his "constitutionally required threshold level of inquiry." The Court of Special Appeals has recognized that cross-examination for bias is a "fundamental concept in our system of jurisprudence." The pending charges against three of the prosecution's main witnesses were the only pieces of evidence that the defendant could use to argue his theory of bias to the jury. In a jury trial in Maryland, the jury, not the judge, evaluates the credibility of the witnesses, weighs their testimony, and resolves contested facts. Jeffrey Ebb was on trial for two murders, and the State was seeking the death penalty. When the stakes are this high, the Court of Appeals should tread less heavily on the domain of the jury.

Booth M. Ripke

F. Crediting Time Spent in Pretrial Home Detention Toward Subsequent Sentences

In Dedo v. State, the Court of Appeals held that trial courts must credit defendants' sentences for time they have spent in certain pretrial or pre-sentence home detention programs. The Court of Appeals based its decision on one particular condition of the defendant's confinement—the State's ability to charge him with escape for any

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149. Id. at 681, 276 A.2d at 419.
150. Ebb, 341 Md. at 604, 671 A.2d at 987 (Bell, J., dissenting).
151. See id.
152. DeLilly, 11 Md. App. at 681, 276 A.2d at 419.
153. See Ebb, 341 Md. at 602, 671 A.2d at 986 (Bell, J., dissenting) (arguing that "the trial court's ruling prevented the jury from ever considering whether the witnesses were biased or otherwise interested in the case").
154. See supra notes 119-121 and accompanying text.
155. Ebb, 341 Md. at 581 n.1, 671 A.2d at 975 n.1.
2. Id. at 11, 680 A.2d at 469.
unauthorized absence. Because this holding should encourage more defendants to seek alternative means of preadjudication detention, the Court of Appeals reached the correct result. The court, however, failed to thoroughly develop and clarify the law in this area enough to distinguish precedent adverse to its holding. The court also failed to support its holding with adequate policy justifications. Thus, the court failed to provide the guidance that Maryland trial courts will need to address future alternative detention cases.

1. The Case.—Robert Dedo (Dedo) was arrested and charged with possession with intent to distribute a controlled dangerous substance (LSD) on August 15, 1993. The Circuit Court for Wicomico County later indicted and convicted Dedo of the charge. After his trial, Dedo requested a deferral of his sentence until the end of August 1994, promising to abide by whatever terms the court set to ensure his return. The court placed Dedo under home detention and granted the State's request that he be electronically monitored within his home. The Wicomico County Department of Corrections (WCDOC) supervised Dedo's home detention. Dedo signed a home detention contract which stated that, while Dedo was "incarcerated" in his home, he could be charged with escape for any "unexcused and unexplained absence during curfew hours." As part of his home detention, Dedo agreed to the following conditions: random electronic monitoring by a video camera connected to his telephone; random entrances by WCDOC employees to install or inspect the camera equipment; abstention from alcoholic beverages; random drug and breath alcohol testing; and punishment for tardiness or failure to maintain contact with the WCDOC.
On September 2, 1994, the circuit court sentenced Dedo to two years of incarceration in the Department of Corrections.\(^\text{11}\) Citing Article 27, section 638C(a),\(^\text{12}\) of the Maryland Code, Dedo requested credit toward his sentence for the time he spent in home detention.\(^\text{13}\) The State objected, arguing that because home detention was the equivalent of pretrial release, the time Dedo spent in home detention should not be credited toward his sentence.\(^\text{14}\) The circuit court agreed, noting that home detention was not the same as jail.\(^\text{15}\)

The Court of Special Appeals affirmed the judgment of the circuit court,\(^\text{16}\) finding that Article 27, section 638C(a), did not require trial courts to provide credit for time spent under home detention between conviction and sentencing.\(^\text{17}\) In addition, the court held that home detention could not be considered “custody” under section 638C(a).\(^\text{18}\) The court reasoned that Dedo had specifically requested home detention because “it [was] not the equivalent of custody, i.e., he could tend to his medical and insurance needs.”\(^\text{19}\) Further, the court noted that the majority of other state courts which had considered the issue had reached the same conclusion under their respective state codes.\(^\text{20}\) Dedo argued that Article 27, section 645-II, mandated credit for home detention because it allowed the WCDOC to revoke that credit for “violations of trust or conditions prescribed by the court” or the WCDOC.\(^\text{21}\) The court rejected this interpreta-

\(^{11}\) Id.

\(^{12}\) Md. Ann. Code art. 27, § 638C(a) (1992). This section provides, in pertinent part:

Any person who is convicted and sentenced shall receive credit against the term of a definite or life sentence or credit against the minimum and maximum terms of an indeterminate sentence for all time spent in the custody of any state, county or city jail, correctional institution, hospital, mental hospital or other agency as a result of the charge for which sentence is imposed or as a result of the conduct on which the charge is based, and the term of a definite or life sentence or the minimum and maximum terms of an indeterminate sentence shall be diminished thereby.

\(^{13}\) Dedo, 343 Md. at 6, 680 A.2d at 466.

\(^{14}\) Id. at 6-7, 680 A.2d at 466.

\(^{15}\) Id. at 7, 680 A.2d at 466.


\(^{17}\) Id. at 453, 660 A.2d at 965-66.

\(^{18}\) Id. at 454, 660 A.2d at 966.

\(^{19}\) Id. (footnote omitted).

\(^{20}\) Id. at 454-55, 660 A.2d at 966-67.

\(^{21}\) Id. at 459-60, 660 A.2d at 969 (quoting Md. Ann. Code art. 27, § 645-II(c)(1) (1992)). Section 645-II(a)(1) of Maryland’s Annotated Code authorizes the WCDOC to establish home detention as a correctional program. Md. Ann. Code art. 27, § 645-II(a)(1). Section 645-II(c)(1) concerns violations of the conditions of an alternative correctional program and states:
tion, however, indicating that section 645-II applied only during incarceration or after sentencing. Judge Murphy wrote a separate concurrence and remarked that the court's decision in Dedo should not prevent trial courts from using their discretion to grant credit for pre-sentence home detention on a case-by-case basis. The Court of Appeals granted certiorari to specifically address whether the Maryland Code "requires that a defendant be granted credit toward his sentence for the time he spent in home detention between his conviction and sentencing."25

2. Legal Background.—Article 27, section 638C, of the Maryland Code was derived from standards promulgated by the American Bar Association Advisory Committee on Sentencing and Review. In creating section 638C, the General Assembly intended, in part, to eliminate "dead" time—the time a defendant spends in custody pending an adjudicative outcome. Thus, the General Assembly sought to provide criminal defendants with "as much credit as possible for time spent in custody as is consistent with constitutional and practical concerns."28

In the event of any violation of trust or conditions prescribed by the court or the Wicomico County Department of Corrections for participation in [home detention], a prisoner may be removed from [home detention] and any earned diminution of the period of the prisoner's confinement may be canceled. Failure of a prisoner to comply with the terms of his authorization for leave shall be considered a violation . . . .

Id. § 645-II(e)(1).

22. Dedo, 115 Md. App. at 460, 660 A.2d at 969.
23. Id. at 462, 660 A.2d at 970 (Murphy, J., concurring).
25. Dedo, 343 Md. at 4, 680 A.2d at 465.
26. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.6 (American Bar Association Special Committee on Minimum Standards for the Administration of Criminal Justice, Draft Approved by House of Delegates 1968) [hereinafter ABA Standard § 3.6]. ABA Standard section 3.6(a) states:

Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This should specifically include credit for time spent in custody . . . pending sentence . . . .

Id.

27. Fleeger v. State, 301 Md. 155, 165, 482 A.2d 490, 495 (1984). Another purpose was to prevent defendants from "banking" time which they could apply to sentences handed down after future illegal conduct. Id. at 163, 482 A.2d at 494-95. This would eliminate any punishment for the crime and, therefore, any deterrent effect jail time might have on the offender. Id. at 164, 482 A.2d at 495.
28. Id. at 165, 482 A.2d at 495.
The Court of Appeals first applied section 638C to a sentence, other than incarceration, in Maus v. State.\textsuperscript{29} In Maus, the trial court suspended the defendant's five-year sentence in exchange for five years' probation on the condition that he successfully complete a drug rehabilitation program.\textsuperscript{30} A few months after Maus had completed a two-year residential drug treatment program, Prince George's County Police arrested Maus for drunk driving.\textsuperscript{31} After his conviction of the drunk driving charge, the trial court revoked Maus's probation and reimposed the original five-year sentence it had suspended.\textsuperscript{32} The trial court refused to credit the time Maus had spent at the treatment center, however, toward his period of incarceration.\textsuperscript{33}

The Court of Appeals affirmed this ruling, holding that the treatment center did not constitute an "other agency"\textsuperscript{34} under section 638C(a).\textsuperscript{35} The court noted that, although the legislative history of section 638C did not specifically address the issue,\textsuperscript{36} ABA Standards did help distinguish between time spent in a rehabilitation program under civil commitment and time spent as a condition of probation.\textsuperscript{37} The court observed that a court could civilly commit a defendant to a treatment program to evaluate her before making a ruling.\textsuperscript{38} This involuntary commitment constitutes "custody," the court held, and ABA Standard section 3.6 mandated that this time be credited toward the resulting sentence, if any.\textsuperscript{39} Probation, by definition, does not involve any form of confinement; therefore, the court reasoned, probation can never constitute custody.\textsuperscript{40} Contrary to the civil commitment scheme, Maus had requested the treatment as part of his probation.\textsuperscript{41} Further, the Court of Appeals interpreted the language of section

\textsuperscript{29} 311 Md. 85, 532 A.2d 1066 (1987).
\textsuperscript{30} Id. at 95-96, 532 A.2d at 1071. Maus was convicted of storehouse breaking. \textit{Id.} at 95, 532 A.2d at 1071.
\textsuperscript{31} Id. at 96, 532 A.2d at 1071. Maus was also charged with and convicted of a second count of storehouse breaking in Baltimore City. \textit{Id.}
\textsuperscript{32} Id., 532 A.2d at 1071-72.
\textsuperscript{33} Id. at 97, 532 A.2d at 1072.
\textsuperscript{34} Id. at 104, 532 A.2d at 1076.
\textsuperscript{35} See supra note 12.
\textsuperscript{36} Maus, 311 Md. at 101, 532 A.2d at 1074 ("A mere reading of the statute does not make clear whether a legislative purpose was to allow credit for time spent in a private, tightly controlled facility . . . .").
\textsuperscript{37} Id. at 102-04, 532 A.2d at 1075-76 (construing ABA Standard § 3.6 cmt. b).
\textsuperscript{38} Id. at 103, 532 A.2d at 1075.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 104-05, 532 A.2d at 1076.
\textsuperscript{41} Id.
638C to require a court to confine a defendant within a public institution before it could grant credit toward a subsequent sentence.\footnote{Id. at 105 n.9, 532 A.2d at 1076 n.9.}

In \textit{Balderston v. State},\footnote{93 Md. App. 364, 612 A.2d 335 (1992).} the Court of Special Appeals first applied Article 27, section 638C, to home detention. Balderston, convicted of driving while under the influence of alcohol, requested and received a suspended sentence in favor of a two-year probationary term that included forty-five days of mandatory home confinement.\footnote{Id. at 366, 612 A.2d at 336.} The detention program included close monitoring of Balderston's movements—Balderston wore a bracelet that would set off an alarm if he moved more than 700 feet from his home telephone.\footnote{Id. at 366 n.2, 612 A.2d at 336 n.2.} Balderston served his forty-five days in home confinement, but was later found to have violated his probation.\footnote{Id. at 367, 612 A.2d at 336-37. Balderston had failed to attend mandatory treatment programs for alcoholism. \textit{Id.}} As a result, the court revoked Balderston's probation and reinstated the remainder of his sentence.\footnote{Id., 612 A.2d at 337.} Balderston argued on appeal that "home confinement is tantamount to imprisonment, or at least custodial confinement, and that he [was] entitled to credit against the remainder of his sentence . . . for the 45 days he spent in home confinement."\footnote{Id. (citation omitted).}

Looking to \textit{Maus}, the Court of Special Appeals held that section 638C provided credit for time spent in incarceration, "not mere supervision."\footnote{Id. at 368, 612 A.2d at 337 (citing \textit{Maus v. State}, 311 Md. 85, 101, 532 A.2d 1066, 1074 (1987)).} Further, like the defendant in \textit{Maus}, Balderston had requested the alternative sentencing scheme precisely because it was "not the equivalent of custody."\footnote{Id. at 370, 612 A.2d at 338.} Balderston could leave home to go to work or to take care of familial responsibilities.\footnote{Id. at 370, 612 A.2d at 338.} The court, therefore, refused to classify Balderston's home confinement as "custody."\footnote{Id. at 370, 612 A.2d at 338.}

3. \textit{The Court's Reasoning}.—In determining whether courts should credit time spent in home detention toward a criminal defendant's sentence, the Court of Appeals noted the intent of the General Assembly when it enacted section 638C: to prevent defendants from...
losing "dead time" spent in jail while awaiting trial or sentencing.\textsuperscript{53} The court concluded the General Assembly intended to grant as much credit as possible for each day a defendant remained in custody before his final sentencing.\textsuperscript{54} To gain credit for preadjudication home detention under section 638C(a), however, the court held that a defendant must demonstrate "that he [was] (1) "in custody" and (2) in a jail, correctional institution, hospital, mental hospital or other agency."\textsuperscript{55}

The court reasoned that when the structure of any home detention requires punishing a defendant for escape for any "unauthorized departure from the place of confinement," the defendant is per se "in custody."\textsuperscript{56} Such a provision renders the defendant's participation in the program involuntary.\textsuperscript{57} If the home detention does not "impose substantial restrictions on the defendant's freedom of association, activity and movement" so that the defendant cannot be charged with escape, then the defendant is not "in custody."\textsuperscript{58} In Dedo, the home detention contract specifically placed Dedo in the custody of the Wicomico County Detention Center.\textsuperscript{59} The court concluded that the conditions placed on Dedo throughout his confinement, particularly the power of the WCDOC to charge him with escape, indicated that his freedom had been restricted enough to equate his confinement to jail time.\textsuperscript{60}

Finally, the Court of Appeals examined whether home detention could constitute an "other agency" under section 638C(a).\textsuperscript{61} The trial court had ordered Dedo to remain "incarcerated" at his home.\textsuperscript{62} Because Dedo remained under the supervision of the WCDOC, the court held that he had been placed within the "constructive custody of a public institution."\textsuperscript{63} Two advisory opinions by the Attorney General

\begin{itemize}
\item \textsuperscript{53} \textit{Dedo}, 343 Md. at 9, 680 A.2d at 467-68.
\item \textsuperscript{54} \textit{Id.}, 680 A.2d at 468.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 11, 680 A.2d at 469.
\item \textsuperscript{57} \textit{Id.} at 13, 680 A.2d at 470.
\item \textsuperscript{58} \textit{Id.} at 11, 680 A.2d at 469.
\item \textsuperscript{59} \textit{Id.} at 12, 680 A.2d at 469; \textit{see also} Corrections—Entitlement to Sentence Credit for Time Served on Pre-Trial Home Detention, 79 Op. Att'y Gen. 279, 284 (1994) ("The determinative factor is not that the defendant is allowed to escape the regimentation of penal institutions and enjoy comparative freedom of activity, movement, or association, but that the defendant has been remanded to the custody of the jailor and is subject to the jailor's immediate control.").
\item \textsuperscript{60} \textit{Dedo}, 343 Md. at 12-13, 680 A.2d at 469-70.
\item \textsuperscript{61} \textit{Id.} at 13, 680 A.2d at 470.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\end{itemize}
of Maryland further persuaded the court on this point. A 1991 opinion stated that "the prisoner's home can be said to be an extension of the local detention center." A 1994 opinion stated that "[a]n inmate on post-conviction home detention is in the custody of the Division of Corrections pursuant to a court order, and, upon violation of a condition of home detention, may be remanded to prison." Based on these opinions, the court found that Dedo's detention at home qualified as an "other agency" under Article 27, section 638C(a). Consequently, the Court of Appeals held that the trial court must credit the time Dedo spent in home detention toward his sentence.

4. Analysis.—The Dedo opinion expands the right of criminal defendants to credit time spent in pretrial custody under a home detention program toward their subsequent sentences. With respect to this issue, the court reached the correct conclusion. Nevertheless, the court's opinion contains a number of deficiencies. First, the opinion should have further clarified the law by expanding the list of situations in which trial courts could credit time spent in home detention under section 638C. Second, the court should have distinguished adverse precedent under Maryland law and the persuasive authority of other states, including People v. Ramos, an Illinois case cited by the Court of Special Appeals. Finally, the court could have strengthened its holding by providing policy reasons for allowing credit for time spent in home detention and other forms of alternative confinement.

a. Expanding the List of "Custodial" Home Detention Programs.—Most state courts perform a fact-based examination of the conditions of a defendant's confinement under an alternative pretrial detention program to determine whether the defendant was "within custody."
Trial courts have the discretion to perform this type of examination on a case-by-case basis and should use it. A list of set criteria, however, would provide guidance to Maryland trial courts on when to apply section 638C to a particular case. The court's holding in *Dedo* accomplished this, in part, when the court ruled that the ability to prosecute a defendant for escape establishes custody. Furthermore, the *Dedo* court noted that the defendant's home detention contract placed him under the custody and control of the WCDOC, and any violation of the contract would render it void and result in *Dedo* being placed in jail.

The manner by which the state monitors each defendant, however, should also influence a trial court's determination of whether a defendant is in custody. For example, in Washington State, courts follow a per se rule that electronic monitoring establishes custody over a defendant. Likewise, a California court has ruled that the state penal statute requires that a home detention program include electronic monitoring before credit can be granted. Clearly, electronic monitoring resembles incarceration because "especially if electronic monitoring is used, long [periods of home confinement] can lead to 'cabin fever'" and "can be excruciatingly boring—a form of solitary confinement."

Trial courts should also examine other aspects of a defendant's home detention when determining if a defendant was in custody. For example, courts should consider the curfew hours imposed on the de-

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29 A.L.R.4th 240, 241 (1984) (finding that courts often focus on the "degree to which the defendant's freedom was restricted" by the home detention program).

72. See supra text accompanying note 29.

73. See State v. Platt, 610 A.2d 139, 144 (Vt. 1992) (finding that state pretrial release statute requires a "case-by-case factual determination").

74. See infra notes 77-82 and accompanying text.

75. *Dedo*, 343 Md. at 11, 680 A.2d at 469; see also supra text accompanying note 56.

76. *Dedo*, 343 Md. at 12, 680 A.2d at 469; see also supra note 59 and accompanying text.

77. Compare *State v. Vasquez*, 881 P.2d 1058 (Wash. Ct. App. 1994), review denied, 891 P.2d 38 (Wash. 1995), *with State v. Speaks*, 829 P.2d 1096 (Wash. 1992) (en banc). In *Speaks*, the Supreme Court of Washington granted credit to the defendant because a state statute specifically defined home detention as being placed in a private home under electronic supervision. See *Speaks*, 829 P.2d at 1098. In *Vasquez*, on the other hand, the court denied credit to the defendant because his detention at home did not include electronic monitoring. See *Vasquez*, 881 P.2d at 1059. This distinction, however, was clearly worded in the state code provision. See id.

78. *People v. LaPaille*, 19 Cal. Rptr. 2d 390, 395 (Cl. App. 1993) (construing Cal. Penal Code § 2900.5 (West Supp. 1997)). The court observed that "throughout the bill legislators were referring only to electronic home detention programs authorized by [statute]." *Id.*

fendant, the number of random visits and phone calls by correctional employees to which the defendant is subjected, the frequency of drug and alcohol testing, and whether other types of monitoring devices were used. For example, one federal study has noted:

[Home detention] including a curfew condition, though the least severe in terms of the hours the offender is required to be at home, can still be made highly punishing if the curfew is strictly enforced by electronic monitoring for many months and if the [confinement] includes random mandatory drug testing [and fees].

Indeed, some defendants have chosen jail time over home detention because they felt "it would be easier to spend the time in jail" than to obey the stringent rules of alternative confinement.

b. Distinguishing Balderston and Maus.—The Court of Appeals faced a difficult task in writing the Dedo opinion because both the Balderston and Maus courts had ruled against defendants seeking credit for time spent in alternative detention settings. The Dedo court did attempt to distinguish these cases, but only insofar as they did not involve alternative confinement programs that subjected the defendants to prosecution for escape. But the court might also have distinguished Balderston and Maus on a different and more important ground—both defendants in those cases served their alternative detention while on probation. Courts in other jurisdictions have recognized this distinction. For example, the Court of Appeals of Indiana noted:

80. See Garrett v. McDonagh, 796 S.W.2d 582, 583-(Ark. 1990) (“In allowing jail-time credit for time spent outside a usual prison setting, states have focused on the degree to which a defendant’s freedom is restricted.”); see also supra note 71. Although the Court of Appeals did not mandate review of these various conditions in Dedo, it did examine the various provisions of the defendant’s contract with the WCDOC in ruling that his confinement paralleled custody. See supra notes 9, 58-59 and accompanying text.

81. HOFER & MEIERHOEFER, supra note 79, at 13.

82. Id. at 46; see also id. at 9 (finding similar results in one California-based study).

83. See supra notes 29-33, 43-50 and accompanying text.

84. Dedo, 343 Md. at 11, 680 A.2d at 469. The Court of Appeals also noted that the Maus court, while reviewing ABA Standard § 3.6, made a similar argument that escape should be a determining factor in whether the defendant receives credit. Id. at 11-12, 680 A.2d at 469; see Maus v. State, 311 Md. 85, 103, 532 A.2d 1066, 1075 (1987).

85. See Balderston v. State, 93 Md. App. 364, 367, 612 A.2d 335, 336 (1992) (“As [a] special condition[ ] of probation, appellant was ordered to spend 45 days in a home confinement program . . . .”); Maus, 311 Md. at 96, 532 A.2d at 1071 (“One condition of probation was that Maus enroll in and complete [a] drug rehabilitation program.”).

86. See, e.g., Greer v. State, 669 N.E.2d 751, 758 (Ind. Ct. App. 1996) (upholding state statute that does not allow credit for time spent in home incarceration while on parole or probation); Collins v. State, 639 N.E.2d 653, 655 (Ind. Ct. App. 1994) (noting that the state
If a person serving pretrial home detention was not given credit for time served, he would serve a longer sentence than a person who posted bond. However, probation is a conditional liberty during which time the defendant is to be concerned with rehabilitation. The legislature's decision to deny a probationer the ability to accrue credit time is rationally related to the goal of deterring criminal behavior while on probation.87

In formulating pretrial home detention, courts need not consider the goals of deterrence, retribution, or rehabilitation, but only "how much surveillance is necessary to counteract the predicted threat of flight."88 Because defendants waiting for trial are presumed innocent (unlike defendants on probation), the trial court should seek the least restrictive means of ensuring their appearance and avoid the "public scorn" that pretrial detention places on them.89

c. Distinguishing People v. Ramos.—The Court of Special Appeals cited several cases standing for the proposition that "the majority of courts interpreting whether home confinement constitutes being 'in custody' have held that it does not."90 The Court of Appeals failed to distinguish these cases, except to the extent that a defendant subject to prosecution for escape is under custody.91

The Court of Special Appeals focused on one case in particular, People v. Ramos,92 in which the Supreme Court of Illinois held that custody did not include home detention while a defendant was released on bond.93 In the crux of its analysis, the Illinois Supreme Court noted:

An offender who is detained at home is not subject to the regimentation of penal institutions and, once inside the residence, enjoys unrestricted freedom of activity, movement, and association. Furthermore, a defendant confined to his residence does not suffer the same surveillance and lack of

statute in question mandated that defendant could not receive credit for home incarceration while under probation or parole, but failed to preempt earlier court decision that allowed credit for pretrial home detention).

87. Greer, 669 N.E.2d at 758.
89. See id. at 405-06.
91. Dedo, 343 Md. at 11, 680 A.2d at 469.
93. Id. at 647.
privacy associated with becoming a member of an incarcerated population.94

In general, the Ramos court's analysis may be true—home detention often does not invade a defendant's freedom the way that incarceration does, but courts must examine each case on an individual basis.95 When a particular case involves electronic monitoring, especially on a continued basis for long periods of time, the amount of surveillance may invade a defendant's privacy enough to equate the detention to custody.96 Likewise, monitoring in conjunction with strict curfews may restrict a defendant's freedom enough to classify his detention as the equivalent of custody.97

d. Policy Implications.—Granting Dedo credit for time spent in home detention should encourage future defendants in similar situations to follow the same course. Greater use of home detention, in turn, could have a positive impact on Maryland's entire detention and correctional system.98 Thus, the Court of Appeals should have addressed specific policy justifications—such as lower costs to correctional institutions, reductions in prison overcrowding, and lower recidivism rates—to encourage courts to use home detention.

The court should have reviewed the impact home detention would have on the cost of operating state and local correctional facilities. One advisory opinion issued by the Office of the Attorney General recognized that "[a] home detention program requires outlays for equipment and personnel, but it is much cheaper than housing an inmate in a facility."99 The opinion noted that, in one jurisdiction, home detention cost fifty percent less than incarceration, while, in another jurisdiction, home detention cost "roughly six times" less.100

Statistics released by one research study found electronic monitoring much cheaper than jail and work release programs. Monitor-

94. Id. Ramos had been confined at home with his mother and stepfather and could not leave without the permission of a probation officer. Id. at 644. Ramos received permission to leave home on only three occasions—twice for legal matters and once for the birth of his child. Id.

95. Most courts do scrutinize cases individually. See supra notes 71-73 and accompanying text.

96. See supra notes 79-82 and accompanying text.

97. See supra text accompanying notes 81-82.

98. See infra notes 99-102, 107, 110-116 and accompanying text.


100. Id. The costs in the first jurisdiction were $40 per diem for an incarcerated prisoner compared to $20 per diem for home detention. Id. In the second jurisdiction, incarceration cost $31 per diem compared to under $5. Id.
ing costs between $1,460 and $7,300 per inmate, while work release
costs between $10,200 and $20,075. A second study ascertained the
cost of keeping an offender in jail as $40 to $56 per day, while elec-
tronic monitoring costs only $7 to $14 per day.

These savings occur only after a correctional agency has paid the
initial costs of acquiring monitoring equipment. Thus, agencies must
make frequent use of correctional alternatives, which, in turn, will re-
duce jail or prison expenses. Only “significant use” of home deten-
tion will make it pay off. In Contra Costa County, California,
officials found home detention too costly because it had reduced the
daily inmate population by only fifteen percent.

The court also should have considered the impact of home de-
tention on prison overcrowding, although impact on prison popu-
lations has proven less certain than the impact of home detention on
costs. The Contra Costa County study found that home detention had
not reduced jail populations enough to warrant a reduction in the size
of correctional staffing. The State of Florida, however, found that it
conducted “180 fewer commitments to prison per month . . . resulting
in a 16% reduction in prison intake.” In practice, success in reduc-
ing jail populations by diverting prisoners into alternative forms of
detention depends upon the ability of the detention program “to en-
sure the availability of an adequate pool of eligible [defendants].”

101. See HOFER & MEIERHOEFER, supra note 79, at 54-55.
102. See ENOS ET AL., supra note 7, at 50. The Rand Corporation found similar results
when comparing the cost of home confinement with the cost of other correctional pro-
grams. The figures listed the annual costs per offender as follows:

<table>
<thead>
<tr>
<th></th>
<th>Without electronics</th>
<th>$2,000-$7,000</th>
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<tr>
<td></td>
<td>With telephone callback</td>
<td>$2,500-$5,500</td>
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<td></td>
<td>With passive monitoring</td>
<td>$2,500-$6,500</td>
</tr>
<tr>
<td></td>
<td>With active monitoring</td>
<td>$4,500-$8,500</td>
</tr>
<tr>
<td></td>
<td>Local jail</td>
<td>$8,000-$12,000</td>
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<tr>
<td></td>
<td>Local detention center</td>
<td>$5,000-$15,000</td>
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<td></td>
<td>State prison</td>
<td>$9,000-$20,000</td>
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See HOFER & MEIERHOEFER, supra note 79, at 54.
103. See HOFER & MEIERHOEFER, supra note 79, at 54 (“[T]he longer the equipment is
used, the greater the jurisdiction’s return on the initial investment.”).
104. Id. at 9.
105. See id. at 9-10. Among the reasons cited for poor performance were (1) “Judges
remain reluctant to take risks with an innovative sentence” and (2) “[o]ffenders decline to
apply to programs that may keep them under surveillance for more time than they would
serve in prison.” Id. at 9.
107. Id.
108. Id.
To do this in the pretrial and pre-sentence situation, trial courts must promote the idea of home detention to criminal defendants.  

Finally, the Court of Appeals should have reviewed the potential of home detention to reduce recidivism. By keeping defendants at home during preadjudication detention, courts remove the opportunity for defendants to adjust to jail conditions and “develop a criminal outlook and life-style.” Home detention fosters lower recidivism because defendants can continue to hold a steady job, receive education, or seek drug and alcohol treatment. Furthermore, defendants confined to the home are more likely to be performing necessary repairs or getting to know their families.

Early statistics have shown slightly positive results. The Contra Costa County, California, study noted lower recidivism rates as a result of the home detention program. After seventeen months, only 8.5% of home confinement detainees violated the conditions of their programs and only 2% were subsequently arrested. This contrasts sharply with the number of probationers who recidivate—in Los Angeles and Alameda Counties, 65% were re-arrested, 51% were convicted on new charges, and 34% were incarcerated. Another study

109. See Richard A. Ball et al., House Arrest and Correctional Policy: Doing Time at Home 84 (1988) (“Depopulating the jail depended upon judges employing home incarceration as a sentencing alternative. . . . According to the jailer, the judges were too conservative in their use of home incarceration. Nevertheless, the jailer liked home incarceration and wished to use it . . . without the approval of a judge.”); see also supra note 105 and accompanying text.

110. Hofer & Meierhoefer, supra note 79, at 51.

111. See id. at 50. The authors note, however, that incarceration presumably has a recidivism rate of zero. See id. For a comparison of home detention and other correctional programs, see infra notes 114-116 and accompanying text.

112. See Hofer & Meierhoefer, supra note 79, at 51. But see Enos et al., supra note 7, at 158-59 (noting that electronic monitoring may cause problems when the defendant has a history of intra-family violence or neglect and that family members may serve “the sentence along with the offender” because of invasions of privacy and restrictions on telephone use).

113. Most of these statistics review the success of home confinement as a post-sentence measure. They should be applicable, however, to defendants under preadjudication detention because the conditions under both are typically the same and produce similar results. See Rush, supra note 88, at 406-07 (“Courts can employ home detention in the pretrial setting with a good prognosis for success. It provides a method of intensive supervision that . . . can make inroads into borderline cases and provide an alternative to the present choice between conditional bail and jail.” (footnote omitted)).

114. See Hurwitz, supra note 106, at 787 & n.100. The participants making up this 2% had been arrested for minor offenses. See id. at n.100. A survey of 76 probationers coming out of the home detention program revealed that 91% had not committed another offense. See id.

115. See id. at 787-88. Eighteen percent of these probationers were convicted of committing a violent crime. See id. at 788.
in Kenton County, Kentucky, also found a sharp difference in recidivism rates. Twenty percent of the "control group" offenders under normal sentences committed another crime, while only 5.1% of offenders confined at home did.\textsuperscript{116}

Alternative sentencing programs, including home detention, have proven useful in alleviating problems within our modern correctional system.\textsuperscript{117} The Court of Appeals may have recognized these benefits when it held that Dedo deserved credit toward his sentence for the time he spent in home detention.\textsuperscript{118} Including these policy concerns in the \textit{Dedo} opinion, however, would have guided trial courts toward using section 638C more frequently and uniformly to credit time served under alternative detention toward sentences.\textsuperscript{119}

5. \textit{Conclusion}.—By granting Dedo credit toward his sentence, the Court of Appeals recognized that, in some instances, home detention can prove as burdensome on a defendant as incarceration.\textsuperscript{120} The court, however, left unclear under what circumstances home detention would be considered "custody." Increased use of home detention could provide numerous benefits to the state correctional system. To encourage more frequent use of home detention, however, trial courts must possess both broad discretion to define individual cases of confinement as custody and the desire to do so. The Court of Appeals can only grant broader discretion by expanding the definition of custody into other fields of alternative detention and encouraging their use by citing policy justifications for doing so.

\textbf{Michael A. Simpson}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{116} See Ball et al., \textit{supra} note 109, at 87. The researchers felt, however, that they did not study enough offenders under home incarceration in order to make any definite conclusions. See id. at 88.
\item \textsuperscript{117} See \textit{supra} notes 99-102, 107, 110-116 and accompanying text.
\item \textsuperscript{118} \textit{Dedo}, 343 Md. at 14, 680 A.2d at 470.
\item \textsuperscript{119} See \textit{supra} notes 105, 109 and accompanying text.
\item \textsuperscript{120} \textit{Dedo}, 343 Md. at 12, 680 A.2d at 469 ("[T]he restraints placed upon Dedo while in home detention clearly were sufficiently incarcerative to satisfy the custody requirement of Art. 27, § 638C(a)."").
\end{enumerate}
\end{footnotesize}
IV. EMPLOYMENT LAW

A. Applying the Tort of Wrongful Discharge to Small Businesses

In *Molesworth v. Brandon*, the Court of Appeals unanimously held that Maryland's Fair Employment Practices Act constitutes a sufficiently clear mandate of public policy against sex discrimination to support a tort claim for wrongful discharge against small employers excluded from the remedial provisions of the Act. In so ruling, the court furthers the state's goal of ending sex discrimination in employment. The court's holding will have sweeping implications for small businesses, which enjoy an exemption from the Act's administrative process and, until now, were widely thought to be immune from liability for discriminatory practices prohibited by state law.

1. The Case.—On July 1, 1988, Dr. Linda Molesworth (Molesworth), a licensed veterinarian, began employment with a small veterinary practice group in Maryland. The practice group, headed by Dr. Randall Brandon (Brandon), specialized in the care of thoroughbred racehorses and consisted of four full-time veterinarians and several part-time employees. Overall, the group totalled fewer than fifteen employees. Molesworth was the group's first female, full-time veterinarian.

During the course of Molesworth's employment, Brandon indicated that he was pleased with her work. He relayed compliments from clients and awarded her merit-based bonuses on four separate occasions. In July 1989, Brandon renewed Molesworth's contract and increased her salary.

3. *Molesworth*, 341 Md. at 637, 672 A.2d at 616.
4. See id.
5. Id. at 624, 672 A.2d at 610.
6. Id.
8. Id.
9. *Molesworth*, 341 Md. at 624, 672 A.2d at 610.
10. Id.
11. Id. at 624-25, 672 A.2d at 610. Molesworth received bonuses in December 1988 and in March, August, and December 1989. Id. When Molesworth received her bonuses in 1989, she also received notes from Brandon that read, in part, "Linda, you are doing a very good job and I appreciate your efforts" and "you are doing very well in the practice and the clients are quite happy with you." Id. at 625, 672 A.2d at 610.
12. Id. at 625, 672 A.2d at 610.
During this same time, however, Molesworth began to experience some hostility from coworkers. This hostility clearly stemmed from the fact that Molesworth was a woman. For example, Dennis Manning, a horse trainer with whom Molesworth worked, openly expressed his dissatisfaction over having to work with a female veterinarian. In April 1990, a trainer, not in Brandon’s employ, hosted a going-away party for a veterinarian leaving the practice group. Molesworth was not invited. When Molesworth asked why the group had excluded her, Brandon “laughed and said she would have been the only woman there.” During this same discussion, Brandon also informed Molesworth that he had received complaints from trainers about her work. Nevertheless, Brandon reassured Molesworth that her performance was “fine” and that the trainers simply needed to adjust to working with a female veterinarian.

As the most junior member of the practice group, Molesworth had assumed primary responsibility for a number of the group’s least desired tasks, such as administering “Lasix shots to horses, approving medications, and performing other miscellaneous tasks.” Brandon hired a new veterinarian, Dr. Gregg Fox (Fox), in May 1990. When Molesworth observed that she and Fox were performing an equal amount of Lasix administration, Molesworth told Brandon that Fox, as the new junior employee, should take on primary responsibility for the Lasix work. Brandon refused to re-delegate the job duty, however, and explained that he wanted Fox to engage in client contact.

During the next two months, Molesworth received no negative feedback about her performance, and in fact, Brandon awarded her another salary increase on July 1, 1990. Only twelve days after the salary increase, however, Brandon told Molesworth that a number of trainers had complained about her work and that he would not renew

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. at 624, 672 A.2d at 610 (footnote omitted). Prior to racing, horses are sometimes injected with Lasix, a drug that prevents lung hemorrhaging. Id. at 625 n.1, 672 A.2d at 610 n.1.
20. Id. at 625, 672 A.2d at 610.
21. Id.
22. Id.
23. Id.
her contract.\textsuperscript{24} Molesworth asked Dr. Jeffrey Palmer, a more senior veterinarian in the group, if she was being fired because of her gender.\textsuperscript{25} According to Molesworth, Palmer replied, "Yes, that's part of it."\textsuperscript{26} Molesworth also claimed that Brandon nodded in agreement and looked away.\textsuperscript{27}

On September 20, 1991, Molesworth filed suit for wrongful discharge in the Circuit Court for Anne Arundel County, alleging that Brandon had fired her because of her sex.\textsuperscript{28} Specifically, Molesworth alleged that Brandon's motivation for her discharge contravened a clear mandate of public policy as set forth in section 14 of Article 49B of the Maryland Code, which prohibits discrimination on the basis of sex.\textsuperscript{29} Molesworth did not bring her claim under the remedial provisions of Article 49B because the Act exempts from coverage businesses with fewer than fifteen employees.\textsuperscript{30} She sought $150,000 in compensatory damages, including $28,496.41 in lost wages, and $150,000 in punitive damages.\textsuperscript{31}

The circuit court denied Brandon's motion for summary judgment, and the case proceeded to trial.\textsuperscript{32} The jury rendered a verdict in favor of Molesworth and awarded her $39,198 in damages.\textsuperscript{33}

After the circuit court denied Brandon's motions for judgment notwithstanding the verdict, for a new trial, and for revision of the judgment, Brandon appealed to the Court of Special Appeals, arguing that because Article 49B exempts from coverage employers with fewer than fifteen employees, "the public policy announced in § 14 does not apply to those employers."\textsuperscript{34} The Court of Special Appeals held that

\begin{itemize}
\item \textsuperscript{24} Id. at 625-26, 672 A.2d at 610. At trial, several horse trainers testified on behalf of Brandon that their complaints concerned Molesworth's failure to take necessary measures to prevent a horse's ankles from swelling and her failure to properly administer shots. Brandon v. Molesworth, 104 Md. App. 167, 177 nn.4-5, 655 A.2d 1292, 1298 nn.4-5 (1995), aff'd in part and rev'd in part, 341 Md. 621, 672 A.2d 608 (1996).
\item \textsuperscript{25} Id., 341 Md. at 626, 672 A.2d at 610.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. At trial, both Palmer and Brandon testified that they had responded in the negative to Molesworth's question. \textit{Id.}, 672 A.2d at 611.
\item \textsuperscript{28} Id., 672 A.2d at 610-11.
\item \textsuperscript{29} Id. at 628, 672 A.2d at 611; \textit{see infra} note 47 and accompanying text.
\item \textsuperscript{30} Section 15 of Article 49B defines a covered employer as "a person engaged in an industry or business who has fifteen or more employees for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." Md. \textit{Ann. Code} art. 49B, § 15 (1994).
\item \textsuperscript{31} Molesworth, 341 Md. at 627, 672 A.2d at 611.
\item \textsuperscript{32} Id. at 626, 672 A.2d at 611.
\item \textsuperscript{33} Id. at 627, 672 A.2d at 611. The jury did not award Molesworth noneconomic damages. \textit{Id.}
\item \textsuperscript{34} Id. at 628, 672 A.2d at 612.
\end{itemize}
Molesworth could bring the common law wrongful discharge claim and that she had presented sufficient evidence to survive Brandon's motions. Nevertheless, the Court of Special Appeals reversed and remanded on the ground that the circuit court had improperly instructed the jury. Both Brandon and Molesworth petitioned for certiorari, which the Court of Appeals granted.

2. Legal Background.—

a. The Common Law Employment-At-Will Doctrine.—According to the common law doctrine of employment-at-will, in the absence of a contract setting forth the express terms of employment, an employer may discharge an employee for no reason or any reason whatsoever. The doctrine originated in the latter part of the nineteenth century with the birth of a laissez faire economy and the premium value placed on the freedom to contract. In 1908, in Adair v. United States, the Supreme Court conferred constitutional legitimacy on the doctrine, holding that an employer's right to discharge an employee constituted a property right and, therefore, struck down a federal law prohibiting discharge on the basis of union membership. In 1937, in the landmark case of National Labor Relations Board v. Jones & Laughlin Steel Corp., however, the Supreme Court made a dramatic shift toward protecting employees from an employer's unfettered discretion to discharge. Acknowledging the power inequities between employer and employee, the Court upheld the constitutionality of the National Labor Relations Act, a federal statute that prohibits employ-

36. Id. at 173, 655 A.2d at 1295; see infra note 94 and accompanying text.
38. The Court of Appeals explicitly adopted the employment at-will doctrine in 1887. See McCullough Iron Co. v. Carpenter, 67 Md. 554, 557, 11 A. 176, 178 (1887) (holding that an indefinite hiring is prima facie a hiring at will); see also STANLEY MAZAROFF, MARYLAND EMPLOYMENT LAW 50-60 (1990) (providing historical perspective of Maryland's adoption of employment-at-will doctrine); Christopher L. Pennington, The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application, 68 Tul. L. Rev. 1583, 1584 (1994) (describing the prevalence of the employment-at-will doctrine in the United States at the turn of the twentieth century).
40. 208 U.S. 161 (1908).
41. Id. at 174-75. A few years later, the Supreme Court declared a similar state statute unconstitutional on the same grounds. See Coppage v. Kansas, 236 U.S. 1, 26 (1915).
42. 301 U.S. 1 (1937).
43. During the 1930s, the United States faced severe social and economic ills caused by the Great Depression. See GERALD GUNTHER, CONSTITUTIONAL LAW 115 (12th ed. 1991).
ers from considering a person's union involvement when making employment decisions.\textsuperscript{44}

Today, although the at-will doctrine still provides the backbone of employment law in the United States,\textsuperscript{45} most states have enacted fair employment practice laws, prohibiting discrimination on a variety of bases. For example, most states have enacted comprehensive civil rights statutes that prohibit employment discrimination on the basis of gender, race, and national origin.\textsuperscript{46} Maryland's Fair Employment Practices Act is codified in Article 49B of the Maryland Code. Section 14 of Article 49B states, in pertinent part:

It is hereby declared to be the policy of the State of Maryland . . . to assure all persons equal opportunity in receiving employment . . . regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap . . . and to that end to prohibit discrimination in

\textsuperscript{44} Jones, 301 U.S. at 30, 33-34. Congress enacted the challenged statute as part of the New Deal legislation, which was intended to remedy the severe economic crisis caused by the Great Depression. See GUNThER, supra note 43, at 115.

\textsuperscript{45} See LIONEL J. POSTIC, WRONGFUL TERMINATION: A STATE-BY-STATE SURVEY at xix (1994). The State of Montana has replaced the at-will employment doctrine with a "just-cause termination" statute. See id. In every other state, except California and Georgia, at-will employment applies and remains a common law doctrine. See id. California and Georgia have enacted "at-will" employment statutes. See id.; see also Kenneth A. Sprang, Beware the Toothless Tiger: A Critique of the Model Employment Termination Act, 43 Am. U. L. Rev. 849, 872 (1994) ("The employment-at-will doctrine is a lumbering dinosaur that can no longer be rationally defended.").

\textsuperscript{46} Alabama is the only state that has not yet enacted such a statute. Both Georgia and Mississippi have statutes prohibiting discrimination in employment against specified protected classes, but they apply only to public employers. See GA. CODE ANN. § 45-19-21-22 & 45-19-29 (1990 & Supp. 1996); MISS. CODE ANN. § 25-9-149 (1972).

employment by any person, group, labor organization, or-
ganization or any employer or his agents.  

The Act prohibits employers of fifteen persons or more from discharg-
ing an employee because of sex (among other enumerated classes),
prescribes administrative procedures for handling discrimination
complaints, and makes remedies available to employees subjected to
discriminatory practices. The Maryland Human Relations Com-
mission enforces the Act. This Agency investigates complaints of discrimi-
nation and prescribes specific remedies to victims of discrimination.  

The judiciary has also created exceptions to the at-will doctrine.
One judicially created exception, recognized in many states, is the
public policy exception. This exception typically provides an em-
ployee who is fired for a reason that contravenes public policy with a
claim for wrongful discharge. Although many states recognize the
exception, no uniformity exists among states concerning recognized
sources of public policy or how broadly or narrowly to apply the ex-
ception. Violations of public policy may occur when an employee is
discharged for refusing to violate a law, performing civic or statutory

48. Id. §§ 15, 16.
49. Id. §§ 10, 11.
50. The public policy exception to the at-will doctrine has its genesis in Petermann v.
the court held that an employer who had fired an employee for refusing to commit perjury
committed an act of wrongful discharge in violation of public policy. Id. at 27. The court
reasoned that because a criminal statute existed that made perjury unlawful:
To hold that one's continued employment could be made contingent upon his
commission of a felonious act at the instance of his employer would be to en-
courage criminal conduct upon the part of both the employee and employer and
would serve to contaminate the honest administration of public affairs. This is
patently contrary to the public welfare. Id.
51. JOHN C. McCARTHY, RECOVERY OF DAMAGES FOR WRONGFUL DISCHARGE § 1.27 (2d
ed. 1990 & Supp. 1996); Pennington, supra note 38, at 1594 n.62 & 1627; see also Leonard,
supra note 39, at 658 (“A major difficulty in applying a public exception arises when courts
seek to identify public policy. Who makes public policy for this purpose, and where is it to be found?”).

As a means to encourage uniformity among states, the National Conference of Com-
missoners on Uniform State Laws drafted and approved the Model Employment Termina-
tion Act. See Postig, supra note 45, app. A at 799. The Act defines an "employer" as a
business employing at least five persons and provides procedures and remedies for an em-
ployment discharge that is not for good cause. See id. at 799, 804, 808, 810-11. Remedies
include reinstatement, backpay, lump-sum severance pay, and reasonable attorney's fees
and costs. See id. at 810-11. Although the Act preempts state tort actions, it expressly states
that an employee not covered by the statute "retains all common law rights and claims." Id.
at 802.
duties, asserting a legal right or privilege, or for other socially reprehensible reasons.\textsuperscript{52}

b. Wrongful Discharge Claim in Maryland.—In Adler v. American Standard Corp.,\textsuperscript{53} the Court of Appeals first announced that a cause of action for wrongful discharge may lie in cases in which a termination is motivated by reasons that contravene public policy.\textsuperscript{54} The court acknowledged that "modern economic conditions differ significantly from those that existed when the at-will rule was first advanced"\textsuperscript{55} and recognized the importance of balancing what are often competing interests—an employee's need for job security, an employer's need to make sound business decisions, and society's need to ensure adherence to public policy.\textsuperscript{56} Yet the court also emphasized the need for "clarity" when determining whether a pronouncement of public policy should serve as the basis of a claim.\textsuperscript{57} The court identified legislative enactments, statutes, administrative regulations, and judicial decisions as valid sources of public policy.\textsuperscript{58}

In Makovi v. Sherwin-Williams Co.,\textsuperscript{59} the court restricted the availability of the public policy wrongful discharge claim if the plaintiff could have sought a statutory remedy for the harm alleged.\textsuperscript{60} In Makovi, a former employee sued Sherwin-Williams for wrongful discharge because Sherwin-Williams allegedly forced the employee to take a leave of absence without pay or medical benefits when she be-

\textsuperscript{53} 291 Md. 31, 432 A.2d 464 (1981).
\textsuperscript{54} Id. at 43, 432 A.2d at 471.
\textsuperscript{55} Id. at 41-42, 432 A.2d at 470.
\textsuperscript{56} Id. at 42, 432 A.2d at 470.
\textsuperscript{57} Id., 432 A.2d at 470-71. The court observed:
Where courts differ is in determining where the line is to be drawn that separates a wrongful from a legally permissible discharge. This determination depends in large part on whether the public policy allegedly violated is sufficiently clear to provide the basis for a tort or contract action for wrongful discharge.
\textsuperscript{Id.}
\textsuperscript{58} Id. at 45, 432 A.2d at 472. Although the court adopted the public policy exception, it ultimately denied Adler's claim. See id. at 43-44, 432 A.2d at 471. Adler had alleged that his employer discharged him after he took issue with a number of improprieties occurring within the company—including the payment of commercial bribes and the falsification of corporate records. Id. at 34, 43, 432 A.2d at 466, 471. Adler relied on a criminal statute that prohibited corporate employees from engaging in fraudulent activities as the source of public policy to challenge his discharge. Id. at 43, 432 A.2d at 471. The court held that Adler made allegations too conclusory and too general in nature to constitute a prima facie showing that the criminal statute has been violated. See id. at 44, 432 A.2d at 471.
\textsuperscript{59} 316 Md. 603, 561 A.2d 179 (1989).
\textsuperscript{60} Id. at 626, 561 A.2d at 190.
came pregnant.\textsuperscript{61} Before filing her wrongful discharge claim, Makovi had first filed a charge of sex discrimination, pursuant to Title VII of the Civil Rights Act of 1964 (Title VII),\textsuperscript{62} with the Equal Employment Opportunity Commission (EEOC)—the administrative agency charged with the enforcement of Title VII.\textsuperscript{63} The EEOC eventually rendered a finding in favor of Sherwin-Williams.\textsuperscript{64} Having exhausted her administrative remedies under Title VII, Makovi could have filed a Title VII suit in federal district court.\textsuperscript{65} She chose not to, however, instead initiating a tort claim for wrongful discharge in the Circuit Court for Baltimore City.\textsuperscript{66} Makovi’s wrongful discharge claim alleged that Sherwin-Williams had violated Maryland’s public policy against sex discrimination as announced in both Title VII and Article 49B.\textsuperscript{67} The Court of Appeals refused to allow Makovi’s claim of wrongful discharge to proceed, however, on the grounds that Makovi could have sought statutory relief for the alleged discrimination.\textsuperscript{68} The court held that because Makovi had a statutory remedy, “the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation, does not apply.”\textsuperscript{69}

\begin{thebibliography}{99}
\bibitem{61} Id. at 605, 561 A.2d at 180.
\bibitem{62} Title VII states, in pertinent part, that it is an unlawful discriminatory practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII defines an “employer” as a person with fifteen or more employees. Id. § 2000e(b).
\bibitem{63} Id. § 2000e-5.
\bibitem{64} Makovi, 316 Md. at 605, 561 A.2d at 180.
\bibitem{65} Id.
\bibitem{66} Recovery for wrongful discharge offered Makovi the prospect of a greater monetary award than the statutory remedies available under Title VII. Id. at 639, 561 A.2d at 197. A plaintiff may recover both compensatory and punitive damages under the wrongful discharge tort. Id. at 626, 561 A.2d at 190. At the time of Makovi’s lawsuit, Title VII did not permit a plaintiff to recover such damages. See id. at 621, 561 A.2d at 180. In 1991, however, Congress amended Title VII to include both compensatory and punitive damages. See 42 U.S.C. § 1981(a) (1994); see also infra note 145 and accompanying text.
\bibitem{67} Makovi, 316 Md. at 605, 561 A.2d at 180.
\bibitem{68} Id. at 609, 561 A.2d at 182.
\bibitem{69} Id. at 626, 561 A.2d at 190. Judge Adkins, joined by Judges Eldridge and Cole, vigorously dissented. They argued that Adler articulated only one prerequisite for a wrongful discharge claim—the violation of a clear mandate of public policy. Id. at 627-28, 561 A.2d at 191 (Adkins, J., dissenting). The availability of limited administrative remedies in Maryland’s antidiscrimination statute should not, the dissent argued, preclude an employee from bringing a wrongful discharge action. Id. at 628, 561 A.2d at 191. Judge Adkins identified three statutory sources—Title VII, Article 49B, and the Maryland Declaration of Rights—as offering clear mandates of public policy against sex discrimination in employment. Id. at 629-30, 561 A.2d at 192. The dissent reasoned that, because Title VII does not “mark the outer boundaries of relief for one who has been harmed by gender bias in employment,” neither should Article 49B. Id. at 631, 561 A.2d 192-93.
\end{thebibliography}
Since *Makovi*, the Court of Appeals has applied this reasoning in other discrimination contexts.\(^70\)

Thus far, two courts have interpreted Maryland law as providing a private cause of action for wrongful discharge based on sex discrimination if the plaintiff has no alternative statutory remedy. In *Williamson v. Provident State Bank*,\(^71\) a case decided in 1981 by the Circuit Court for Caroline County, a woman sued her employer, a small business with fewer than fifteen employees, for wrongful discharge based on gender discrimination.\(^72\) Pursuant to the Court of Appeals's decision in *Adler*, the court acknowledged that the State of Maryland recognizes a wrongful discharge claim for a discharge allegedly motivated by a reason that contravenes public policy.\(^73\) After identifying legislative enactments as one source of public policy, the court cited both the Maryland Equal Rights Amendment\(^74\) and section 14 of Article 49B as sufficiently clear statements of public policy against discriminatory employment practices to support an employee's tort claim of wrongful discharge.\(^75\)

More recently, in *Kerrigan v. Magnum Entertainment, Inc.*,\(^76\) the United States District Court for the District of Maryland interpreted Maryland law so as to permit "a common law claim for wrongful discharge based upon alleged sex discrimination when the plaintiff has no available statutory remedies."\(^77\) The court held that a wrongful discharge action for sex discrimination could be brought against an employer exempt from statutory liability under Title VII and Article 49B...
because it employed fewer than fifteen persons. The court distinguished the case from *Makovi* and its progeny on the basis that the plaintiff lacked a statutory remedy.

The court also addressed whether Maryland law recognized a wrongful discharge action based on sex discrimination. The court found that section 14 of Article 49B constituted a clear statement of Maryland's public policy against sex discrimination in employment. Citing *Williamson* and *National Asphalt Pavement Ass'n v. Prince George's County*, the federal district court judge stated that Maryland courts have rejected an interpretation of Article 49B as granting "small businesses a charter to discriminate," and instead "have held that while art. 49B exempts small business from its burdensome administrative requirements, there is no reason to construe art. 49B as exempting small business from its anti-discrimination policy." The *Kerrigan* court rejected the employer's argument that the legislature, in enacting Article 49B, sought to avoid burdening small businesses with having to defend against discrimination suits. The judge reasoned that the policy statement contained in Article 49B stated a clear mandate of Maryland public policy prohibiting discrimination by all employers, regardless of coverage.

c. Preemption.—Critical to the examination of the issues in *Molesworth* is whether the General Assembly intended Article 49B to occupy the field of employment discrimination, thereby preempting all other related causes of action. The Court of Appeals has answered this question in the negative. In *National Asphalt*, the Court of Appeals held that Article 49B does not preempt local ordinances prohibiting discrimination on the same bases. In that case, a discharged employee filed a complaint with the Prince George's Human Relations Commission, alleging that her employer had violated the Prince George's County antidiscrimination ordinance by terminating her employment because of her sex. Four days before the county's scheduled administrative hearing, the employer instituted an action in circuit court seeking a declaratory judgment that Article 49B ren-

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78. *Id.* at 736.
79. *Id.* at 735.
80. *Id.*
81. 292 Md. 75, 437 A.2d 651 (1981); see *infra* notes 85-93 and accompanying text.
83. *Id.*
84. *Id.*
85. *National Asphalt*, 292 Md. at 80-81, 437 A.2d at 654.
86. *Id.* at 77, 437 A.2d at 652.
dered the county ordinance invalid.87 Unlike Article 49B, the ordinance applied to employers with fewer than fifteen employees.88 The plaintiff’s employer had fewer than fifteen employees.89 On review, the Court of Appeals rejected the employer’s implied preemption argument.90 In so ruling, the court found the absence in Article 49B of any reference to already existing local legislation concerning employment discrimination persuasive evidence that the General Assembly did not intend Article 49B to preempt the field of employment discrimination law.91 Further, the court noted that the Human Relations Commission—the agency charged with the administration and enforcement of Article 49B—had consistently construed the state statute as non-preemptive.92 Significantly, the court concluded: “Employers with less than fifteen employees are not permitted by the state statute to discriminate in their employment practices; they simply are not covered.”93

3. The Court’s Reasoning.—Writing for the court, Chief Judge Murphy concluded that although the General Assembly excluded small businesses from the administrative processes of Article 49B, it did not intend to exclude small businesses from the statewide public policy prohibiting sex discrimination.94 To hold otherwise would

87. Id.
88. Id. at 76-77, 437 A.2d at 651-52.
89. Id.
90. Id. at 79 n.3, 437 A.2d at 653 n.3. The employer conceded that the legislature had not expressly preempted the area of employment discrimination. See id. at 78, 437 A.2d at 652. Implied preemption exists if “the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied.” County Council v. Montgomery Ass’n, 274 Md. 52, 59, 333 A.2d 596, 600 (1975).
92. Id. at 80, 437 A.2d at 653-54.
93. Id. at 79, 437 A.2d at 653. Similarly, in Coalition for Open Doors v. Annapolis Lodge No. 622, 333 Md. 359, 635 A.2d 412 (1994), the Court of Appeals reversed a lower court’s holding that a city ordinance prohibiting sex discrimination in a private club was preempted by the state’s public accommodation law, which exempted private clubs from coverage. See id. at 383, 635 A.2d at 424. Harkening back to its decision in National Asphalt, the court emphasized the “distinction between a state law which is intended to permit or authorize a particular matter and a state law which is simply intended to exempt the particular matter from its coverage.” Id. at 380, 635 A.2d at 422. The court determined that Maryland’s public accommodation law was intended to do the latter. See id. at 383, 635 A.2d at 423.
94. Molesworth, 341 Md. at 628, 672 A.2d at 612. The court also reviewed the decision of the Court of Special Appeals to reverse and remand the Molesworth case on the ground that the trial court erred when it refused to give what is commonly referred to as the “same actor” instruction to the jury. See id. at 637-46, 672 A.2d at 616-21. The “same actor” instruction would have required the Molesworth jury to infer that, if the person who hired the employee also fired the employee, the discharge could not have been motivated by sex
amount to a conclusion that the legislature intended to permit employers of fewer than fifteen persons to discriminate—a position the court found untenable.\textsuperscript{95} The court based its decision on the plain language of section 14, the legislative history of Article 49B, and state and federal court precedent.\textsuperscript{96}

The court first analyzed the plain language of section 14, applying the rule of statutory interpretation that every word should be given its full effect.\textsuperscript{97} The court concluded that the use of the word "any" to modify "employer" in section 14's prohibition against discrim-

discrimination. See \textit{id.} at 646, 672 A.2d at 620-21. The rationale underlying the instruction is that if the same person that fires the employee also originally hired her, an "obvious inference" exists that the employee's discharge was not motivated by discrimination. See \textit{Brandon v. Molesworth}, 104 Md. App. 167, 202, 655 A.2d 1292, 1310 (1995), \textit{aff'd in part and rev'd in part}, 341 Md. 621, 672 A.2d 608 (1996). On this issue, the court reversed the Court of Special Appeals, limiting the "same actor" inference to only those wrongful discharge claims that lack direct evidence of discrimination. See \textit{Molesworth}, 341 Md. at 640-46, 672 A.2d at 618-20.

In so ruling, the court pointed to numerous federal court decisions interpreting Title VII that have applied the "same actor" instruction only in cases following the burden-of-proof scheme enunciated in \textit{McDonnell-Douglas Corp. v. Green}, 411 U.S. 792 (1973). \textit{Molesworth}, 341 Md. at 640-46, 672 A.2d at 618-20. The \textit{McDonnell-Douglas} proof scheme, the court observed, "is inapplicable where the plaintiff presents direct evidence of discrimination." \textit{Id.} at 642, 672 A.2d at 618. The court found no decisions in which a court applied the instruction when the plaintiff had offered direct evidence of discrimination. See \textit{id.}, 672 A.2d at 619. Applying this rule to the facts in \textit{Molesworth}, the Court of Appeals found that the trial court properly denied the employer's requested "same actor" jury instruction because \textit{Molesworth} presented direct evidence of discrimination—specifically, \textit{Molesworth}'s testimony that Brandon nodded in agreement to Palmer's statement that \textit{Molesworth} was being fired, in part, because of her gender. See \textit{id.} at 641, 646, 672 A.2d at 618, 620-21.

The court further held that "Maryland law of evidence also dictates that the 'same actor inference' is not applicable" in \textit{Molesworth}. \textit{Id.} at 642, 672 A.2d at 619. The court reasoned that the instruction actually creates a presumption of nondiscrimination, rather than an inference, because it shifts the burden to the plaintiff to produce additional evidence of discrimination. See \textit{id.} at 642-43, 672 A.2d at 619. The presumption becomes "inapplicable under Maryland law . . . because \textit{Molesworth} presented direct evidence of discrimination." \textit{Id.} at 643, 672 A.2d at 619. The court drew an analogy between the same actor presumption and the doctrine of res ipsa loquitur. \textit{Id.} The court reasoned that, just as res ipsa loquitur does not apply if the plaintiff is able to produce evidence sufficient to show negligence, the same actor presumption is unnecessary to show the absence of discriminatory intent when the plaintiff presents direct evidence proving otherwise. See \textit{id.} The court also held that the case did "not warrant the creation of a presumption." \textit{Id.}

Finally, the court noted that the trial court's refusal to grant the instruction did not preclude the employer from arguing to the jury that it may infer from the fact that Brandon had both hired and fired \textit{Molesworth} "that the discharge was not motivated by discrimination." \textit{Id.} at 645, 672 A.2d at 620. The court simply refused to elevate such evidence to the status of a presumption. See \textit{id.} at 644, 672 A.2d at 620.

95. \textit{Molesworth}, 341 Md. at 637, 672 A.2d at 616.

96. \textit{Id.} at 628, 672 A.2d at 612.

97. \textit{Id.} at 632, 672 A.2d at 613.
ination in employment by "any employer" would have been unnec-
essary if the legislature had intended to restrict the policy's application only to an "employer" as defined in section 15(b). Judge Murphy also reasoned that, if the legislature had intended to shield small em-
ployers from liability for common law wrongful discharge actions, it would have limited the policy statement to reach only "employers as defined in Section 15." Additionally, the court noted the absence of language indicating that the legislature intended to "abrogate the common law" and reiterated its holding in National Asphalt that Article 49B does not preempt the field of employment discrimination law.

Because the General Assembly modeled Article 49B after Title VII, the court also reviewed federal legislative history to discern the legislative intent behind the exemption for employers with fewer than fifteen employees. While the court conceded that federal legisla-
tive history reflected concern about subjecting small businesses to "expensive lawsuits and potential bankruptcy," the court also noted Congress's concern over the increased administrative workload that would result from an expansion of coverage. The court found that the desire not to overburden Maryland's Human Relations Commis-

98. Id.

99. Id. at 634, 672 A.2d at 614 (internal quotations omitted).

100. Id. at 632-34, 672 A.2d at 613-14. The court also cited to its decision in Coalition for Open Doors v. Annapolis Lodge No. 622, 333 Md. 359, 635 A.2d 412 (1994). The court stated that Brandon's position ran contrary to the prior holdings in Coalition for Open Doors and National Asphalt that the General Assembly did not intend to authorize small businesses to discriminate when it exempted them from the administrative process prescribed by Art. 49B. See Molesworth, 341 Md. at 636, 672 A.2d at 615-16.

101. Molesworth, 341 Md. at 632-34, 672 A.2d at 614-15. Like Title VII, Article 49B, as originally enacted, defined "employer" as a business having twenty-five or more employees. See id. at 632, 672 A.2d at 614. In 1972, the legislature expanded Title VII coverage to include employers of fifteen or more employees. See id. at 632-33, 672 A.2d at 614. In 1973, the Maryland General Assembly amended Article 49B's definition of "employer" to conform to the federal statute. See id.

The Molesworth court reasoned that, because Article 49B parallels Title VII, "in the absence of contrary legislative pronouncements on the Maryland law, we may turn to the legislative history of the federal law to discern the legislative intent behind the § 15(b) exemption." Id. at 633, 672 A.2d at 614.

102. Id. at 633, 672 A.2d at 614.

103. Id. In reviewing the legislative history of Title VII, the Court of Appeals identified Congress's concern with overburdening the EEOC. See id. at 633-34, 672 A.2d at 614 ("'Additionally, we fear that, in view of the estimated 18-month to two-year backlog that currently exists at the EEOC. . . . to expand the EEOC's jurisdiction will serve only to retard and frustrate the purposes and objectives of the Equal Employment Opportunity Act [and] will thrust the EEOC into an administrative quagmire which can only delay the attainment of a reasonable standard of operational efficiency . . . .'" (quoting H.R. REP. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2167)).
sion served as the General Assembly’s primary motivation to exclude small businesses from the administrative processes of the Act.  

Further, the Molesworth court bolstered its holding by pointing to the ruling of the United States District Court for the District of Maryland in Kerrigan:  

"[W]hile art. 49B exempts small businesses from its burdensome administrative requirements, there is no reason to construe art. 49B as exempting small businesses from its anti-discrimination policy."  

The Molesworth court found further support for its holding in the case law of other jurisdictions—such as Ohio and Washington state—where courts have upheld wrongful discharge claims for discriminatory employment practices as violative of state public policy, when the employee had no statutory remedy.

104. Id. at 634, 672 A.2d at 614 ("[T]he intent of at least some of the [federal] legislators was to exempt small employers from the administrative process under the Act to avoid overburdening the EEOC. It is this intent that is reflected in the language of §§ 14 and 15(b)").

105. See supra notes 76-80 and 82-84 and accompanying text.


107. Id. at 634-35, 672 A.2d at 615. First, the Court of Appeals cited Collins v. Riskana, 652 N.E.2d 653 (Ohio 1995). In Collins, the Supreme Court of Ohio upheld a wrongful discharge claim in which an employer with fewer employees than statutorily required for coverage violated state public policy prohibiting employment discrimination. See id. at 660. The court reasoned that the Ohio legislature intended to exempt small businesses only from the administrative burden of the statute, not from its antidiscrimination policy. See id. at 660-61.

Second, the Court of Appeals cited Bennett v. Hardy, 784 P.2d 1258 (Wash. 1990) (en banc), in which the Supreme Court of Washington recognized a cause of action for wrongful discharge where the plaintiffs alleged that they were discharged in retaliation for having complained of unlawful age discrimination. Id. at 1264. See Molesworth, 341 Md. at 634-35, 672 A.2d at 615.

Because the Bennett court found that the plaintiffs had an implied cause of action deriving from a state antidiscrimination statute, which would address the plaintiffs' allegations of age discrimination, the court did not decide whether the employer's conduct also provided the plaintiffs with a wrongful discharge claim based on the state's public policy against age discrimination. See Bennett, 784 P.2d at 1263. This same state statute, however, did not expressly prohibit retaliatory conduct by employers. See id. Likening the employer's conduct to retaliation against "whistleblowers," which Washington public policy did prohibit, the court upheld the plaintiff's retaliation claim as similarly violative of state public policy. See id. at 1263-64.

Although the statute defined an employer as a person who employs eight or more employees, the court rejected the employer's argument that the plaintiffs' claims were barred because the employer had fewer than eight employees. See id. at 1265. The court reasoned that there was nothing within the statute's stated purpose to suggest that the legislature intended to limit the state's overarching policy against age discrimination to employers having eight or more employees. See id. Finally, the Bennett court also concluded that the purposes of the small business exemption from regulation would not be impeded by permitting private causes of action against them. See id. at 1266. The court
Finally, the court distinguished *Makovi* and the subsequent case of *Chappell v. Southern Maryland Hospital Inc.* as involving aggrieved employees who, unlike Molesworth, had statutory remedies available to them.

4. Analysis.—In *Molesworth v. Brandon*, the Court of Appeals held that the prohibition against sex discrimination enunciated in section 14 of Article 49B applies to all employers, regardless of whether they are covered by the administrative processes set forth in the statute. This holding is consistent with both the legislature’s intent and prior Maryland decisions regarding the public policy exception to the at-will employment doctrine. Furthermore, the court’s decision promotes the state’s laudable goal of ending sex discrimination by affording protection to employees of businesses of all sizes. Concededly, though, this ruling places small businesses at a higher risk for large compensatory and punitive damage awards—much greater damage awards than those faced by larger employers. This inequity makes little sense and demands the attention of the Maryland General Assembly.

a. Consistency with Prior Case Law.—The court’s holding in *Molesworth* comports with Maryland precedent on the applicability of the tort of wrongful discharge. In *Adler*, the Court of Appeals adopted the public policy exception to the at-will doctrine, but limited this tort to cases involving violations of clear mandates of public policy. The court identified legislative enactments as the most reliable source of public policy. The *Molesworth* court properly recognized Article 49B as a clear mandate of Maryland public policy prohibiting sex discrimination. Further, the Court of Appeals correctly rejected arguments that *Makovi* compelled the preclusion of Molesworth’s wrongful discharge claim. Although the *Makovi* court cautioned against “upset[ting] the balance between right and remedy struck by the Legislature,” the court also emphasized that the wrongful discharge tort

stated that “permitting private actions by individual plaintiffs can only assist the Commission in furthering the goal of preventing and eliminating employment discrimination.” *Id.* 1997] 839

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108. 320 Md. 483, 578 A.2d 766 (1990); see supra note 70 and accompanying text.


110. *Id.* at 637, 672 A.2d at 616.


112. *Id.* at 45, 432 A.2d at 472 (“[D]eclaration of public policy is normally the function of the legislative branch.”).

113. *Molesworth*, 341 Md. at 636-37, 672 A.2d at 616.

served to avoid "the prospect of a remediless employee . . . under-
cut[ting] the policies and goals that other laws sought to further."115

Since 1981, no court has interpreted Maryland law to mean that
the exclusion of small businesses from the definition of "employer" in
Article 49B represents legislative authorization for small businesses to
engage in discriminatory practices.116 As the Molesworth court stated,
to interpret Article 49B in this way would be "patently ludicrous."117

b. Legislative Intent.—The legislature did not intend Article
49B to preempt the entire field of employment discrimination.118 Nota-
ably, the statute contains no express language indicating that the leg-
islature intended employees with no statutory protection to suffer
discrimination without recourse. As the court stated in National
Asphalt: “Unlike the extensive and comprehensive provisions of the
election, education or taxation articles of the Maryland Code, the mat-
ter of employment discrimination is dealt with by five relatively brief
sections in Article 49B which do not comprehensively cover the
field.”119

There are several reasons underlying the legislature's exclusion
of small businesses from the administrative procedures established in
Article 49B. First, the legislature, concerned about over-burdening
the Maryland Human Relations Commission, sought to limit the
agency's reach.120 If the Commission assumed responsibility for inves-
tigating all claims of employment discrimination in the state, an un-
manageable caseload would result.121 This would lead to less effective
law enforcement and more delays in the administrative process. As it
stands now, that agency is already overloaded with cases.122

115. Id. at 612, 561 A.2d at 183.
National Asphalt Pavement Ass'n v. Prince George's County, 292 Md. 75, 79, 437 A.2d 651,
653 (1981); Williams v. Provident State Bank, 38 Fair Empl. Prac. Cas. (BNA) 1335 (Md.
118. See Makovi, 316 Md. at 608, 561 A.2d at 181 ("Art. 49B does not preempt, by occupy-
ing the field, local prohibitions against employment discrimination.").
120. See Molesworth, 341 Md. at 633, 672 A.2d at 614.
121. See Brandon v. Molesworth, 104 Md. App. 167, 185 n.14, 655 A.2d 1292, 1301 n.14
26, 1989, at 1A (describing the plight of a Jewish man in bringing a discrimination claim
before the Maryland Human Rights Commission); Justice Denied, BALT. SUN, Mar. 30, 1989,
at 12A ("Discrimination in the workplace has gone unpunished as thousands of Mary-
landers who turned to the state for help received only a frustrating run-around.").
Second, the legislative history of Title VII suggests that another reason for the small business exemption was a desire to protect small businesses from the burdens of complex administrative oversight. Senator Stennis, expressing this concern, explained that small businesses do not have the "assets or capability to cope with the legal and administrative tangle that can be thrust upon them arbitrarily by the Commission." Further, the Senator argued, to force small businesses to comply with restrictions on employment decisions and deprive them of the opportunity to "take the case to court . . . [is] downright ridiculous." Similarly, Senator Ervin stated that the small businessman is "in no financial condition to contest his Government with all its wealth arrayed against him on the side of his adversary."

c. Economic Impact on Small Businesses.—The National Federation of Independent Business (NFIB) and the Maryland Chamber of Commerce filed a joint brief as amicus curiae, expressing concerns that small businesses will suffer severe economic hardship if exposed to tort liability for wrongful discharge. Specifically, these groups raise concerns that the Molesworth decision will produce a flood of lawsuits and large verdicts that will force many small businesses into bankruptcy.

123. Senator Stennis, during legislative debates over Title VII, stated:

[T]he large companies, with their capital, with adequate funds with which to employ talent in the legal profession, for instance, and in management, and so forth, have a much better chance to meet obligations which might be imposed on them by a law like this . . . . We have illustrations all over the country of little shops closing up and going out of business due to harassment, because of the requirements and demands made on them which they cannot meet. They cannot put up with a running battle with the Federal Government all the time.


124. Id. at 2389.

125. Id.

126. Id. at 1977 (statement of Sen. Ervin).

127. The National Federation of Independent Business (NFIB) is a nationwide agency that promotes small businesses. See Molesworth, 341 Md. at 627, 672 A.2d at 611.


129. See Catherine Brennan, Small Businesses Fear Bloom of Wrongful Discharge Claims: Court of Appeals Decision Endorses Award Based on Sex-Discrimination in Case of Veterinarian Who Brought Suit Against Four-Vet Practice, DAILY REc., Mar. 6, 1996, at 9; Angela Zimm, Business Groups Join Forces to Limit Discrimination Suits: State Chamber of Commerce, National Independents' Federation Asking High Court for Narrow Read of Md. Fair Employment Practices Act, DAILY REc., Jan. 3, 1996, at 4 (reporting statement of lobbyist for the NFIB that "the legislature left out businesses with fewer than 15 employees in order to protect them from 'million-dollar lawsuits' they would not be able to afford").
with the fact that small businesses will be subject to compensatory and punitive damages while large businesses are not. As discussed below, small businesses are neither likely to be bombarded with wrongful discharge actions nor likely to face damage awards large enough to bankrupt them. Nevertheless, because small businesses may now be potentially liable for greater damage awards than larger businesses, the legislature should take steps to remedy this inequity.

Just as small businesses are concerned with the expense of litigating employment discrimination suits, so are employees. Employers can be sure that these costs will prevent many employees from ever filing wrongful discharge claims in the first place. Workers who do not earn an annual salary of at least $30,000 will most likely be unable to retain an attorney on a contingency-fee basis because, even if they prevailed, the amount of money recovered in lost wages would not be enough to compensate an attorney. That employees must find attorneys willing to undertake this costly litigation on a contingency basis will certainly limit the number of claims filed.

Moreover, the costs of employment litigation often match, if not exceed, the amount of compensation a wrongfully discharged plaintiff eventually recovers. In addition to attorney's fees, litigation often involves expenditures for travel, depositions, and photocopying—costs that can add up to tens of thousands of dollars. These costs usually are not recoverable at common law and, consequently, are de-

130. See Brief of the Maryland Chamber of Commerce and the National Federation of Independent Business as Amicus Curiae at 33-34, Molesworth (No. 83) ("[i]t is irrational to subject a small employer that is not statutorily prohibited from discriminating in its employment decisions to full tort remedies (compensatory and punitive damages) ... when an employer who is statutorily prohibited from such discriminatory practices is only liable to equitable damages for back pay . . . ").

131. See Brennan, supra note 129. Counsel for the Human Relations Commission, Glendora Hughes, rejected small business claims that the Molesworth decision would create a flood of wrongful discharge suits, stating, "No one should be panicking in the business community because if they check the statistics, there just are not a lot of wrongful discharge employment cases." Id. Hughes pointed out, "It's expensive to bring these suits, and a person fired from their job is usually more concerned with getting another job than with filing a lawsuit." Id.

132. Makovi v. Sherwin-Williams Co., 316 Md. 603, 644, 561 A.2d 179, 199 (1989) (Adkins, J., dissenting) ("The remedy available through the administrative process may be more desirable because it sometimes is more expedient and less expensive . . . "); see also Ollove, supra note 122 (quoting discrimination complainant as saying "If I could have afforded it, I probably would have gone through federal court, and it would have been done by now").

133. See Sprang, supra note 45, at 887-88.

134. See id. at 888.

135. See id.
ducted from the plaintiff’s award. In the absence of either a sizeable savings account or the willingness of a plaintiff’s attorney to advance these costs, litigation becomes impossible for many wrongfully discharged employees.

Large verdicts are sometimes awarded in wrongful discharge cases, particularly because of the availability of punitive damages. It is estimated, however, that the majority of plaintiffs who recover such verdicts are “middle- or upper-level management, professionals, or other highly paid personnel.” It seems logical that not many businesses with fewer than fifteen persons would need large numbers of middle- and upper-level managers. Furthermore, “[r]ank-and-file workers prevail only infrequently.”

Judicial review of jury awards also provides a check against inappropriate awards. The plaintiff must establish by clear and convincing evidence the basis for any award of punitive damages. Should a court find an award of punitive damages improper, the judge may reduce the award, or vacate and remand for trial on the issue of damages. In determining the amount of punitive damages to award, a jury must consider a defendant’s financial status and is prohibited from awarding an amount that would effectively bankrupt the defendant.

136. See id.
137. See id.
138. Postic, supra note 45, app. A at 795; see also Clyde W. Summers, Labor Law As the Century Turns: A Changing of the Guard, 67 Neb. L. Rev. 7, 25-26 (1988) (noting that occasional recovery of large awards by plaintiffs in wrongful discharge suits conceals the fact that “most wrongfully discharged workers are unsuccessful in litigation, so the law becomes a lottery with a few big winners and many losers”).
139. Postic, supra note 45, app. A at 795.
140. See Montgomery Ward v. Wilson, 339 Md. 701, 735, 664 A.2d 916, 917 (1995). Punitive damages may only be awarded in a case in which the plaintiff has proven the defendant acted with malice. See Mazaroff, supra note 38, at 313. Malice is “unlawful conduct that is without legal justification or excuse and undertaken with an evil motive influenced by hate for the purpose of deliberately and willfully injuring the plaintiff.” Id.; see also Montgomery Ward, 339 Md. at 735, 666 A.2d at 933 (“[P]unitive damages should only be awarded where there exists heinous conduct, characterized by fraud, ill will, spite, evil motive, conscious wrongdoing, or intent to injure.”).
142. Id. at 242, 652 A.2d at 1129-30 (“Upon request, a jury should be instructed that punitive damages should not be disproportionate to . . . the defendant’s ability to pay. Moreover, like any award of damages in a tort case, the amount of punitive damages awarded by a jury is reviewable by the trial court for excessiveness.”); see also Fraidin v. Weitzman, 93 Md. App. 168, 217, 611 A.2d 1046, 1070 (1992) (vacating the jury’s verdict and remanding the case for reconsideration of grant of remittitur or new trial after finding that the trial court had not considered appellants’ net worth during its review of the jury’s punitive damage award). In Weitzman, the Court of Special Appeals explained that, in
Although an award of punitive damages against a small business found liable for wrongful discharge may be rare, that prospect nevertheless remains reality for small businesses as a consequence of the Molesworth decision. Small businesses are liable for compensatory and punitive damages because, as with other torts, such damages may be awarded in a wrongful discharge action.\textsuperscript{143} By contrast, employers subject to Article 49B's administrative processes are shielded from punitive and compensatory damages because Article 49B limits monetary relief to a maximum of three years of backpay.\textsuperscript{144} Plaintiffs may win compensatory and punitive damage awards from large employers by bringing a claim under Title VII,\textsuperscript{145} but large employers are still, to a great extent, shielded under federal law as well. Title VII caps the total amount of damages that may be awarded to a plaintiff according to the size of the employer.\textsuperscript{146} The statute sets the maximum amount allowable for combined future and nonpecuniary compensatory and punitive damages at $50,000 for employers with between 15 and 100 employees, $100,000 for employers with between 101 and 200 employees, $200,000 for employers with between 201 and 500 employees, and $300,000 for employers with more than 500 employees.\textsuperscript{147}
To hold small businesses liable for damages from which large businesses are statutorily protected defies reason. The legislature needs to craft a solution that will correct the current disparity without interfering with the state's strong stance against discrimination in employment. The General Assembly recently rejected legislation (HB 602),\textsuperscript{148} proposed by the Maryland Chamber of Commerce, to limit remedies for wrongful discharge to backpay only.\textsuperscript{149} A more effective solution would be to amend Article 49B to include compensatory and punitive damages that would be capped according to the size of the employer, thereby paralleling Title VII, and to pass legislation setting an appropriate cap for damages awarded in a wrongful discharge action.

The Court of Appeals will also have to resolve the question of whether plaintiffs that have a remedy under local antidiscrimination ordinances are precluded from recovering under the tort of wrongful discharge. The \textit{Molesworth} court did not reach this issue, finding that the employer had not properly raised it at the trial level.\textsuperscript{150} The issue must be addressed because several Maryland counties have enacted such ordinances.\textsuperscript{151} At least one circuit court judge in Maryland has already rejected an employer's argument that a plaintiff who had a remedy under a local ordinance could not bring an action under wrongful discharge.\textsuperscript{152}

d. \textit{Fairness}.—Termination from employment due to unlawful discrimination is perhaps the greatest restriction on personal freedom that an employee can suffer. As the Supreme Court of Virginia recently noted, "gender discrimination practiced in the work place is

\textsuperscript{148} Md. H.B. 602, 1997 Sess.

\textsuperscript{149} Catherine M. Brennan, \textit{Damage Limit for Discrimination Suits Fails: House Vote Kills Bill to Level Field Between Different-Sized Companies}, \textit{Daily Rec.}, Mar. 18, 1997, at 1A. The Maryland Chamber of Commerce is likely to reintroduce the legislation next year. \textit{See id.} at 15A; \textit{see also} Catherine M. Brennan, \textit{Wrongful Discharge Bill Hits Floor: Black Caucus Decries Limits on Workers' Rights}, \textit{Daily Rec.}, Mar. 14, 1997, at 8A (discussing the strong opposition of the Legislative Black Caucus to the proposed legislation because passage of the bill would give small businesses permission to discriminate).

\textsuperscript{150} \textit{Molesworth}, 341 Md. at 637 n.5, 672 A.2d at 616 n.5.

\textsuperscript{151} \textit{See, e.g.,} \textit{Baltimore County, Md., Code §§ 19-91} (Supp. 1997) (prohibiting employers of five or more employees from employment discrimination based on sex); \textit{Montgomery County, Md., Code §§ 27-17} (1994 & Supp. 1996) (prohibiting employers of six or more persons from employment discrimination based on sex); \textit{Prince George's County, Md., Code §§ 2-185} (1995) (prohibiting employers of one or more employees from employment discrimination based on sex).

\textsuperscript{152} \textit{See Medland, supra} note 142 (reporting that the judge denied employer's motion for partial summary judgment on this issue, rejecting the argument that because plaintiff had a remedy under the Prince George's County ordinance she could not recover at common law).
not only an invidious violation of the rights of the individual, but such
discrimination also affects the property rights, personal freedoms, and
welfare of the people in general."\(^{153}\) An employer should not be per-
mitted to wield its power in ways that undermine these personal rights
and freedoms. It would be inherently unfair, absent an explicit legis-
late pronouncement preemping the common law, to permit an em-
ployer with fourteen employees to discharge an employee on the basis
of sex discrimination, while protecting another employee from such
discrimination because the employer happens to employ fifteen
persons.\(^{154}\)

As Chief Judge Murphy noted, "the legislature did not intend to
abrogate the common law, absent a clear statement to the con-
trary."\(^{155}\) The court properly found that Article 49B contained no
such contrary pronouncements.\(^{156}\) Had the legislature intended the
statute to preempt the entire field of employment discrimination, it
would have so stated.\(^{157}\) If the General Assembly decides that the
Court of Appeals has incorrectly interpreted the meaning of the small
employer exemption of Article 49B, it could amend the statute.\(^{158}\)

e. Unresolved Questions.—The Court of Appeals is unclear
about whether the policy statement against sex discrimination in Arti-
cle 49B serves as an independent mandate of public policy or whether
it must be supported by other sources.\(^{159}\) The court will soon need to
clarify this issue because Article 49B includes several other protected
classes in addition to gender, including race, color, ancestry or na-

ognizing race and gender discrimination as narrow exceptions to the employment-at-will
devine applicable in Virginia).

\(^{154}\) See Peck, supra note 52, at 772 ("Society has an interest in ensuring that all employ-
ees are protected from abuse of employer power . . . ").

\(^{155}\) Molesworth, 341 Md. at 632, 672 A.2d at 614.

\(^{156}\) Id. at 634, 672 A.2d at 614.

\(^{157}\) Id.

\(^{158}\) The General Assembly could amend Article 49B in a number of ways. For example,
it could include a provision that precludes wrongful discharge claims, similar to language
that the State of Utah uses in its antidiscrimination statute, which states, "the procedures
contained in this section are the exclusive remedy under state law for employment discrim-
ination based upon race, color, sex, retaliation . . . ." UTAH CODE ANN. § 34-35-7.1(15)
(1994 & Supp. 1996). The legislature might also then reduce the size of businesses cov-
ered by the statute from the current minimum of 15 employees to balance the preemptory
effect of the statute created by such an amendment. See supra note 46.

\(^{159}\) The Molesworth court described the public policy of Maryland against sex discrimi-
nation as "ubiquitous" and observed that "Section 14 is one of at least thirty-four statutes,
one executive order, and one constitutional amendment in Maryland that prohibits dis-
crimination based on sex in certain circumstances." Molesworth, 341 Md. at 632, 672 A.2d
at 613.
tional origin, age, marital status, religion, and disability. The Court of Appeals needs to provide clear guidance as to the discriminatory practices that will give rise to a wrongful discharge tort. For example, the issue of whether a wrongful discharge action based on age discrimination may be brought against an employer is likely to become an important one over the next few years. At least one state court has determined that the tort will lie for sex discrimination, but not for age discrimination.

5. Conclusion.—In Molesworth v. Brandon, the Court of Appeals properly made available the common law tort of wrongful discharge to an employee terminated because of gender, a discriminatory practice clearly violative of Maryland public policy. The court's decision is consistent with Maryland precedent and the legislative intent underlying the small business exemption from the administrative process set forth in Article 49B. Nevertheless, the current disparity in liability between small businesses and those large enough to be covered by Article 49B needs to be remedied.

The court also needs to clarify what effect, if any, local antidiscrimination ordinances would have on a former employee's ability to recover under a wrongful discharge tort. Finally, the court needs to clarify whether the policy statement contained in section 14 of Article 49B is independently sufficient to support a wrongful discharge claim for discriminatory practices against the other protected classes enumerated in the statute. Despite the need for further clarification, the

162. The Supreme Court of California, in Jennings v. Marralle, 876 P.2d 1074 (Cal. 1994), held that the wrongful discharge tort was unavailable to a discharge based on age discrimination by an employer too small to be covered by the administrative remedies provided in California's Fair Employment and Housing Act (FEHA). See id. at 1082-83. The court distinguished "the age-related rights created by the FEHA from the fundamental rights against discrimination on other bases, rights which predate the FEHA and have their origin in the Constitution, other statutes, or common law." Id.
In Badih v. Myers, 43 Cal. Rptr. 2d 229 (Ct. App. 1995), a lower California court held that sufficient public policy existed against sex discrimination to uphold a wrongful discharge claim based on sex discrimination. See id. at 233. The court identified the state constitution as a source of public policy against sex discrimination. See id.
163. Molesworth, 341 Md. at 637, 672 A.2d at 616.
Molesworth decision moves Maryland one step closer to eradicating discriminatory employment practices on the basis of sex.

Deborah M. Shelton
V. Evidence

A. Judicial Discretion in the Admission of "In Life" Victim Photographs

A deceased victim's "in life" photograph represents a "silent witness" to the past. This type of photographic evidence communicates a powerful message with the "vital, mirror-like appearance of a photograph... capable of inciting [the] passions and prejudices of a jury." In State v. Broberg, the Court of Appeals addressed whether a victim's in life photographs are admissible during a criminal trial. Holding that it is within a trial judge's discretion whether to allow the display of a victim's in life photographs to the jury, the court declined to adopt a per se rule enabling all juries to become acquainted with a homicide victim through the display of in life photographs. The court rejected an interpretation of Maryland's constitutional and statutory provisions that would have prevented a trial judge from exercising discretion over the admission of a victim's in life photographs.

With American society's increasing concern for the rights of crime victims, many states have adopted legislation to bring victims and their rights fully and visibly back into the courtroom. The Maryland Legislature's enactment of a constitutional amendment on victims' rights signaled a dismissal of the traditional notion that victims and their families should be kept outside the legal system because they might be too biased to participate in the prosecution. The Broberg decision continues the national trend towards increasing a victim's presence during criminal trials.

1. The Case.—During an early April evening in 1993, Paul Broberg (Broberg) became involved in a tragic automobile accident.

2. 2 CHARLES C. SCOTT, PHOTOGRAPHIC EVIDENCE: PREPARATION AND PRESENTATION § 1001, at 296 (2d ed. 1969).
4. Id. at 562-65, 677 A.2d at 610-12.
5. Id. at 565, 677 A.2d at 612.
7. Article 47 of the Maryland Declaration of Rights states, in pertinent part: "[I]n a case [arising] in a circuit court, a victim of crime shall have the right... upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding." MD. CONST. DECL. OF RTS. art. 47.
8. See generally GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS (1994).
9. Broberg, 342 Md. at 549, 677 A.2d at 604.
Broberg was driving his truck along New Design Road, a two-lane rural road in Frederick County with a posted speed limit of fifty miles per hour. At the same time, eleven-year-old Thomas Blank, Jr. (Blank), operating a lawn tractor, crossed the road. When Broberg drove over the crest of a hill, he struck and killed Blank. The police estimated Broberg’s speed at approximately sixty-four miles per hour. Following the accident, police took Broberg to the hospital, where his blood alcohol level was measured at 0.17.

Subsequently, the State indicted Broberg on thirteen charges, including manslaughter by automobile, homicide by motor vehicle while intoxicated, and driving while intoxicated. He was tried before a jury in the Circuit Court for Frederick County. Prior to trial, Broberg stipulated to the identity of the victim. During its opening argument, the State displayed to the jury two in life photographs of the victim—one a sixth-grade school portrait of Blank and another of Blank in a little league uniform. In response to the State’s display of these photographs, the defense made a timely objec-
tion\textsuperscript{20} and moved for a mistrial.\textsuperscript{21} The trial judge overruled the defense's objection and denied the motion for mistrial.\textsuperscript{22}

Later, when the victim's father testified, the State again showed the photographs of the victim.\textsuperscript{23} Blank's father cried when asked to look at the photographs and identify his son.\textsuperscript{24} At this point, the defense made another objection and moved a second time for a mistrial.\textsuperscript{25} The defense argued that the photographs were not relevant because both parties had stipulated to the victim's identity.\textsuperscript{26} The State responded by disputing the scope of the stipulation, stating "that's not what [the defense] stipulated to, your honor, for the record."\textsuperscript{27} Again, the trial judge overruled the objection and allowed the State to display the photographs to the jury.\textsuperscript{28} Following its deliberations, the jury convicted Broberg of homicide by motor vehicle, driving while intoxicated, and several lessor related offenses.\textsuperscript{29} In a motion for a new trial, Broberg's attorney argued that the trial judge erred by allowing the State to display in life photographs of the victim because its sole purpose was "to evoke [jury] sympathy."\textsuperscript{30}

\begin{enumerate}
\item Id. Broberg's defense counsel objected to the State's showing of the photographs to the jury on the basis that they had not been admitted into evidence. \textit{Id.} The only mention in the trial transcripts that the court admitted the victim's photographs into evidence was when defense counsel, in his initial motion for a mistrial, asked that the photographs be admitted for the "purpose of protecting the record in . . . [his] motion for a mistrial." Record Extract at 219, \textit{Broberg} (No. 22).
\item \textit{Broberg}, 342 Md. at 549, 677 A.2d at 604.
\item See id.
\item Id. at 550, 677 A.2d at 604.
\item \textit{Id.; see also} Dennis O'Brien, \textit{Md. High Court to Rule on Photos: Some Believe Victims' Pictures Can Lead Juries to Convict}, \textit{BALT. SUN}, Oct. 30, 1995, at 1B (reporting that Thomas Blank, Sr. broke down in tears when prosecutors showed him photos of his 11-year-old son). Following the father's testimony, Broberg's attorney renewed his motion for a mistrial, stating that when the State "showed the photographs of Tommy Blank to his father, his father began to cry and the jury saw that . . . and I want the record to reflect that." Record Extract at 34, \textit{Broberg} (No. 22).
\item \textit{Broberg}, 342 Md. at 550, 677 A.2d at 604.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. Broberg, in his brief to the Court of Appeals, stated that the jury was permitted to see the victim's in life photographs in the jury room during deliberation. Brief of Respondent at 16, \textit{Broberg v. State}, 342 Md. 554, 677 A.2d 602 (1996) (No. 22). The State, in its reply brief, did not refute this contention, but, rather, argued that it was defense counsel's responsibility to alert the trial court to the fact "that because the photographs had not been admitted into evidence, they should not accompany the jury into the jury room." Reply Brief of Petitioner at 8 n.1, \textit{Broberg v. State}, 342 Md. 554, 677 A.2d 602 (1996) (No. 22).
\item Record Extract at 57, \textit{Broberg} (No. 22). The State argued that the trial court properly allowed the display of photographs because a trial is "not some sterile hearing where
After considering both arguments, the trial judge concluded that allowing the jury to see in life photographs of the victim did not constitute error, "at least [to] the extent [that] a picture can acquaint someone with the victim." Thus, the trial judge denied Broberg's motion for a new trial. Broberg appealed.

Broberg argued to the Court of Special Appeals that, because he had stipulated to the victim's identity, the trial court committed reversible error by repeatedly allowing the prosecution to display in life photographs of the victim to the jury. Broberg contended that the photographs had no probative value and were shown "purely to arouse the passion and sympathy of the jury." In an unreported opinion, the Court of Special Appeals agreed. The court held that, although "[p]ictures of a homicide victim taken before his or her death, will sometimes be relevant to the issue of identity," the photographs in Broberg were inadmissible because "the parties stipulated to the victim's identity prior to trial." The court further held that the error was not harmless.

Concluding that the State displayed the photographs of the victim "simply to arouse the passions of the jury," the Court of Special Appeals reversed the trial court's verdict and ordered a new trial. The State filed a petition for certiorari, and the Court of Appeals granted certiorari on the question of whether it is permissible to "al-

31. Id. at 160.
32. Id. at 161.
33. Broberg, 342 Md. at 550, 677 A.2d at 604.
35. Id. at 3.
36. Id. at 6. The Court of Special Appeals observed: "'As a general rule a photograph that is "entirely irrelevant and immaterial to any issue in the cause and which is of such a character as to divert the minds of the jury to improper or irrelevant considerations should be excluded from evidence."'" Id. (quoting Evansville School Corp. v. Price, 208 N.E.2d 689, 691 (Ind. App. 1965) (quoting Kiefer v. State, 153 N.E.2d 899, 900 (Ind. 1958))).
37. Id.
38. Id. at 7.
39. Id. at 6.
40. Id. at 4.
41. The State challenged the Court of Special Appeals decision primarily because of the recent passage of victims' rights legislation by the Maryland General Assembly. See O'Brien, supra note 24. According to Gary Bair, chief of the Attorney General's criminal appeals division, "the state has [an interest] in this case, because the legislature has specifically spoken out on victims' rights." Id.
low[ ] the jury to become acquainted with the homicide victim through a display of ‘in life’ photographs of the victim. 42

2. Legal Background.—

a. General Admissibility of Photographic Evidence.—Maryland courts consistently have held that the admissibility of photographs is subject to the same standards of admission as other forms of evidence. 43 Maryland courts utilize a two-pronged test to evaluate the admissibility of photographic evidence. 44 First, photographs, like other forms of evidence, are inadmissible if irrelevant under Maryland Rule 5-402. 45 Second, under Maryland Rule 5-403, 46 photographs are subject to exclusion if the trial judge determines that their probative value is substantially outweighed by their unfairly prejudicial effect on the jury. 47

Maryland law dictates that a photograph must be relevant if it is to be admitted into evidence. 48 In Johnson v. State, 49 the Court of Appeals discussed the types of photographs that have been found relevant in Maryland:

[W]e have permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased, the position of the victim's

42. Broberg, 342 Md. at 567, 677 A.2d at 613 (Eldridge, J., dissenting) (internal quotations omitted).

43. See Mills v. State, 310 Md. 33, 48, 527 A.2d 3, 8 (1987), vacated on other grounds, 486 U.S. 867 (1988). In Mills, the Court of Appeals stated that "the admissibility of photographs turns upon a balancing of their probative value against their potential for prejudice." Id., 527 A.2d at 7; accord Johnson v. State, 303 Md. 487, 502, 495 A.2d 1, 8 (1985); see also Bedford v. State, 317 Md. 659, 676, 566 A.2d 111, 119 (1989) (holding that admissibility of photographs is determined by a balancing of the probative value against the potential for improper prejudice to the defendant); Harris v. State, 312 Md. 225, 245, 539 A.2d 637, 647 (1988) (quoting the balancing test announced in Mills).

44. See Joseph F. Murphy, Jr., Maryland Evidence Handbook § 1102, at 58 (2d ed. Supp. 1996) (discussing the admissibility of photographic evidence).

45. See Md. R. 5-402 ("Evidence that is not relevant is not admissible."); see also Md. R. 5-401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

46. Rule 5-403 states: "Although 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." Md. R. 5-403.

47. See Mills, 310 Md. at 43, 527 A.2d at 7; see also Evans v. State, 333 Md. 660, 692, 637 A.2d 117, 133 (1994) (stating that the trial judge has the discretion to decide whether a photograph has practical value to a particular case and is therefore admissible).

48. See supra notes 44-45 and accompanying text.

49. 303 Md. 487, 495 A.2d 1 (1985).
body at the murder site, and the wounds of the victim. On certain occasions, photographs have also been admitted to allow the jury to visualize the atrociousness of the crime—a circumstance of much import where the factfinder must determine the degree of murder.\textsuperscript{50}

The Court of Appeals repeatedly has acknowledged that most photographic evidence is cumulative, even though it still may be relevant and possess probative value.\textsuperscript{51} Although the court has given broad discretion to trial courts with regard to the admission of photographic evidence, the court has stated that the trial judge's discretion does not extend to admission of irrelevant evidence.\textsuperscript{52} In \textit{Buch v. Hulcher},\textsuperscript{53} the court, in an action for alienation of affections,\textsuperscript{54} found that photographs of a wife surrounded by her children were irrelevant because of the wife's presence in court.\textsuperscript{55} In most evidentiary decisions, however, the Court of Appeals tends to give deference to the trial court's decision as to whether evidence is relevant.\textsuperscript{56} The court's

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\footnotesize
\textsuperscript{50} \textit{Id.} at 502, 495 A.2d at 8-9 (citations omitted); \textit{see also} Clarke v. State, 238 Md. 11, 21-22, 207 A.2d 456, 461-62 (1965) (stating that crime scene and autopsy photographs of homicide victims were relevant to a broad range of issues).

\textsuperscript{51} \textit{See Johnson}, 303 Md. at 503-04, 495 A.2d at 9. The Court of Appeals stated that "all photographic evidence is in some sense cumulative. The very purpose of photographic evidence is to clarify and communicate facts to the tribunal [or jury] more accurately than by mere words. . . . [I]t is for the trial judge, in his discretion, to determine if the pictures are probative and admissible." \textit{Id.} (citation omitted); \textit{see also} Grandison v. State, 305 Md. 685, 730, 506 A.2d 580, 602 (1986) (stating that admitting photographs that represent undisputed facts already in evidence is not improper); \textit{Murphy, supra} note 44, at 386 (stating that, although photographic evidence is usually cumulative, it seldom should be excluded from admission).


\textsuperscript{53} 180 Md. 309, 23 A.2d 829 (1942).

\textsuperscript{54} The tort of alienation of affections is premised on willful and malicious interference with the marital relationship by a third party without justification. \textit{See} Donnell v. Donnell, 415 S.W.2d 127, 132 (Tenn. 1967).

\textsuperscript{55} \textit{Buch}, 180 Md. at 313, 23 A.2d at 831.

\textsuperscript{56} The United States Court of Appeals for the Ninth Circuit, discussing why a trial judge's evidentiary rulings should be given great deference, stated: "We give wide latitude to the trial judge in determining the admissibility of evidence because he is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceeding of a trial, while we can only review a cold record." United States v. Ford, 692 F.2d 1554, 1577 (9th Cir. 1980). As one judge described it:

\begin{quote}
On the appellate court, nearly all of what the judges see is a rerun of what has first played live and in color in the trial court. But the reruns are condensed, edited, and produced in black-and-white. The difference between trying a case on the district level court and merely reading the briefs on appeal is only a little less marked than the difference between watching \textit{Gone with the Wind} and reading the \textit{TV Guide} description of it.
\end{quote}

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rationale for giving such deference is that a trial judge’s decision is based on the circumstances surrounding the entire trial, whereas an appellate decision is premised primarily on a sterile reading of the trial transcript.\textsuperscript{57}

\textit{b. Admissibility of “In Life” Photographs.—}In \textit{Grandison v. State},\textsuperscript{58} the Court of Appeals applied the standard two-pronged evidentiary test to evaluate the admissibility of a victim’s in life photographs.\textsuperscript{59} Concluding that the trial court’s decision to admit a victim’s in life photographs was not “plainly arbitrary,” the court refused to disturb the trial court’s ruling.\textsuperscript{60} The Court of Appeals found that a victim’s photographs were relevant to an issue of mistaken identity\textsuperscript{61} and, therefore, were admissible. Further, the court held that the trial judge did not commit prejudicial error, “since the photographs are mere graphic representations of undisputed facts already in evidence”; therefore, “their introduction could not be held to have injured the accused.”\textsuperscript{62}

In other jurisdictions, there is a split of authority on the admissibility of a victim’s in life photographs. Courts in California, New York, Pennsylvania, Arkansas, Oklahoma, and Texas, for example, have held the admission of in life photographs to be erroneous, without providing an evidentiary basis.\textsuperscript{63} In fact, the Pennsylvania Supreme Court reversed a murder conviction based on the admission of in life photo-

\textsuperscript{57} See Victor J. Gold, \textit{Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence}, 58 WASH. L. REV. 497, 499 (1983) ("Implicit in the creation of this discretionary power is the assumption that truth and justice cannot be captured by mere language, but require the intervention of human sensibilities.").

\textsuperscript{58} 305 Md. 685, 506 A.2d 580 (1986).

\textsuperscript{59} \textit{Id.} at 729, 506 A.2d at 602.

\textsuperscript{60} \textit{Id.} at 729-30, 506 A.2d at 602.

\textsuperscript{61} \textit{Id.} at 729, 506 A.2d at 602.

\textsuperscript{62} \textit{Id.} at 730, 506 A.2d at 602.

\textsuperscript{63} \textit{See} Parker v. State, 731 S.W.2d 756, 763 (Ark. 1987) (holding that the "photograph of the victims while alive had . . . no probative value, and it should not be admitted on retrial"); People v. Kimble, 749 P.2d 803, 814 (Cal. 1988) (reasoning that in life photographs of a victim "probably should be excluded" where they are irrelevant to any material issue of the case); People v. Esdaille, 554 N.Y.S.2d 258, 259 (App. Div. 1990) ("We agree with the defendant’s contention that the photograph of the . . . victim had no probative value and was inadmissible."); Franks v. State, 636 P.2d 361, 366 (Okla. Crim. App. 1981) (stating that admission of an in life photograph of a child victim constituted an abuse of the trial court’s discretion because “it provided no proof and was prejudicial”); Richie v. State, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981) (holding that an in life photograph of a deceased child victim had "questionable" probative value and "could be highly prejudicial"); Avirett v. State, 84 S.W.2d 482, 484 (Tex. Crim. App. 1935) (stating that if no issue as to the "identity of [the] deceased" exists, the State should not be allowed to introduce an in life photograph of the victim).
graphs of the victim. Other states, however, such as Washington, Alabama, Georgia, Iowa, Kansas, Massachusetts, Michigan, Nebraska, North Carolina, Rhode Island, and Oregon, have held that in life victim photographs are either always admissible or that their admissibility is within the discretion of the trial court.

The United States Supreme Court first addressed the constitutional implications of using in life photographs in the landmark case of *Payne v. Tennessee*, in which the State had introduced in life photographs to show the homicide victim as a "uniquely individual human

64. See Commonwealth v. Story, 388 A.2d 155, 157 (Pa. 1978). The Commonwealth argued that the jury was entitled to know that the victim was "more than a body" and should be allowed "to get some feel for . . . [the victim's] life." *Id.* at 159. Nevertheless, the Pennsylvania Supreme Court found the photographs "totally irrelevant to the determination of the appellant's guilt or innocence." *Id.* at 160. In response to the trial judge's decision that the photographs were not prejudicial, the Pennsylvania Supreme Court stated that to "hold such evidence not prejudicial to the defendant is to disregard the realities of trial atmosphere and the emotional frailties of human nature." *Id.* (quoting Knight v. State, 142 So. 2d 899, 910 (Ala. 1962)).

65. See Or. Rev. Stat. § 41.415 (Supp. 1996) ("In a prosecution for any criminal homicide, a photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive."); State v. Williams, 828 P.2d 1006, 1012-13 (Or. 1992) (en banc) (concluding that the Oregon statute, in effect, declares in life victim photographs as relevant per se and not subject to a balancing analysis); Williams v. State, 451 So. 2d 411, 421 (Ala. Crim. App. 1984) (stating that an in life photograph of a victim standing by a Christmas tree was not subject to a balancing test because the photograph was used to help a witness identify the victim); Drane v. State, 455 S.E.2d 27, 32-33 (Ga. 1995) (holding that an in life photograph of a victim was relevant to prove identity); State v. Aswegan, 331 N.W.2d 93, 97 (Iowa 1983) (concluding that the admission of victim's in life photographs was within the trial court's discretion); People v. Sullivan, 296 N.W.2d 81, 89 (Mich. Ct. App. 1980) (stating that the trial court did not abuse its discretion when it admitted for the purpose of identification a photograph showing the victim posing with his wife and small child); Bullock v. State, 391 So. 2d 601, 609 (Miss. 1980) (holding that it was not an abuse of discretion for the trial judge to admit high school portrait of the victim); State v. Bertram, 591 A.2d 14, 23 (R.I. 1991) (concluding that a victim's in life photograph is relevant to establish identity); State v. Rice, 757 P.2d 889, 902 (Wash. 1988) (en banc) (holding that admission of a victim's in life photograph was not an abuse of discretion). But see State v. Furman, 858 P.2d 1092, 1100 (Wash. 1993) (en banc) (stating that the trial court properly did not allow the State to present in life photographs where the victim's identity was not at issue and the photographs were not tied to any other issue).

66. 501 U.S. 808 (1991). The Supreme Court first considered the admissibility of victim impact evidence in *Booth v. Maryland*, 482 U.S. 496 (1987). The Court held unconstitutional the use of victim impact statements during capital sentencing proceedings. *Id.* at 509. Again, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court extended the holding of *Booth*, prohibiting a prosecutor from including victim impact statements in closing argument to the jury in a capital murder case. *Id.* at 810. In *Payne*, however, the Court explicitly overturned both *Booth* and *Gathers*, holding that victim impact evidence enables a "jury to assess meaningfully the defendant's moral culpability." *Payne*, 501 U.S. at 825. The *Booth* decision, the *Payne* Court held, "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment." *Id.* But see *id.* at 831 (O'Connor, J., concurring) ("We
The trial court had admitted photographs of the victim during the sentencing phase of the trial. The Supreme Court affirmed the trial judge's decision and stated that photographs could be used during sentencing hearings to humanize the victim for the jury.

c. Effect of Stipulations on the Admission of Evidence.—Maryland's case law defines a stipulation as an agreement between opposing counsel—much like a contract. Courts interpret stipulations that are based on mutual assent to effectuate the intent of the parties. Generally, parties are bound by their stipulations. Although a stipulation is based on mutual assent, opposing counsel often dispute the scope of the stipulation and the extent to which it precludes a party from offering evidence of the stipulated fact.

In determining whether to admit evidence to a stipulated fact, courts in other jurisdictions have sought to balance the competing interests of the parties. The parties to a stipulation are usually entitled to the benefit of their bargain. This broad rule is subject to the discretion of the trial judge, however, who must balance one party's interest in excluding inflammatory evidence with the other party's interest in the "legitimate moral force of his evidence." Although Maryland case law does not address admission of evidence in light of a prior stipulation, the Court of Appeals stated in Grandison that photo-

67. Payne, 501 U.S. at 822 (alteration in original) (citations omitted).

68. Id. at 814-16. Payne was a capital murder case. Id. The defendant was convicted in Shelby Criminal Court of first degree murder, and was sentenced to death. Id. at 816. The Supreme Court granted review to determine whether the Eighth Amendment prohibits a jury from considering victim impact evidence during a capital sentencing hearing. Id. at 817.

69. Id. at 830.

70. See Burke v. Burke, 204 Md. 637, 645, 106 A.2d 59, 63 (1954).

71. See id.


73. See Stephen A. Saltzburg, Stipulations by the Defense to Remove Other Act Evidence, 9 CRIM. JUS. 35, 39 (1995) (stating that in many cases a stipulation does not always make clear to a trial judge exactly what is being conceded or what is being disputed).

74. See, e.g., State v. Gilmore, 332 So. 2d 789, 795-96 (La. 1976) (stating if the State's proof has been rendered unnecessary by a stipulation, the prejudicial nature of the evidence assumes added significance and reduces the State's legitimate interest in the admission of the particular evidence).

75. Id.

76. 9 JOHN HENRY WIGMORE, EVIDENCE § 2591, at 824 (James H. Chadbourn rev., 1981).
graphs do not lack probative value simply because they depict an uncontested issue.\textsuperscript{77}

d. Harmless Error in the Admission of Evidence.—The modern source of the harmless error rule is found in rule 52(a) of the Federal Rules of Criminal Procedure, which directs that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."\textsuperscript{78} In \textit{State v. Enriquez},\textsuperscript{79} the Maryland Court of Appeals held that harmless error occurs only if the error played no role in the fact finder's verdict.\textsuperscript{80} Further, in \textit{Bruno v. State},\textsuperscript{81} Judge Bell, writing in dissent, stated that appellate review of harmless error "is supposed to be strict, [and] that it 'has been and should be carefully circumscribed.'"\textsuperscript{82} In analyzing the application of the harmless error rule, a majority of the court stated that trial errors should be examined in light of whether other evidence presented at the trial amounts to overwhelming evidence.\textsuperscript{83} Because the trial judge is in the best position to evaluate factual evidence in each particular case, Maryland case law holds a trial court's determination will not be disturbed unless it is "plainly arbitrary."\textsuperscript{84} Additionally, in \textit{Dorsey v. State}\textsuperscript{85} the Court of Appeals stated:

\begin{itemize}
\item \textsuperscript{77} See \textit{supra} notes 51, 58-62 and accompanying text.
\item \textsuperscript{78} FED. R. CRIM. P. 52(a); see also Arizona v. Fulminante, 499 U.S. 279 (1991). In \textit{Fulminante}, the Court stated that "the harmless-error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and [it] promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." \textit{Id.} at 308 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).
\item \textsuperscript{79} 327 Md. 365, 609 A.2d 343 (1992).
\item \textsuperscript{80} \textit{Id.} at 374, 609 A.2d at 347; see also Md. R. 8-131(b) ("[T]he Court of Appeals may consider whether [an] . . . error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition.").
\item \textsuperscript{81} 332 Md. 673, 632 A.2d 1192 (1999).
\item \textsuperscript{82} \textit{Id.} at 697, 632 A.2d at 1204 (Bell, J., dissenting) (quoting Younie v. State, 272 Md. 233, 248, 322 A.2d 211, 219 (1974)). In \textit{Younie}, the Court of Appeals stated:

"Continued expansion of the harmless error rule will merely encourage prosecutors to attempt to get such testimony in, since they know that, if they have a strong case, such testimony will not be considered to be reversible error, yet if they have a weak case, they will use such testimony to buttress the case to gain a conviction and then hope that the issue is not raised on appeal."

\item \textsuperscript{83} \textit{Id.} at 248, 322 A.2d at 219 (quoting People v. Jablonski, 195 N.W.2d 777, 780 (Mich. Ct. App. 1972)).
\item \textsuperscript{84} See \textit{Bruno}, 332 Md. at 694-95, 632 A.2d at 1202-03 (holding that error was harmless where admitted evidence did not have any influence on the verdict).
\item \textsuperscript{85} Johnson v. State, 303 Md. 487, 502, 495 A.2d 1, 8 (1985).
\item \textsuperscript{85} 276 Md. 638, 350 A.2d 665 (1976).
\end{itemize}
[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. . . . [A] reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendering of the guilty verdict.86

3. The Court’s Reasoning.—In State v. Broberg, the Court of Appeals held that it is within a trial judge’s discretion whether to allow the display of in life photographs of a victim to the jury.87 In so ruling, the court considered several important issues, such as (1) the probative value of the photographs versus their prejudicial effect,88 (2) the relevance of the photographs in light of the parties’ stipulation to identity,89 and (3) a victim’s right to be present at trial under the Victims’ Bill of Rights.90

Initially, the court focused on whether the probative value of the in life photographs of the victim outweighed their potential prejudicial effect.91 In Maryland, the State must establish the identity of the victim. Photographs of the victim, either in life or postmortem, may be used for this purpose.92 The Broberg court reasoned that the in life photographs “were probative of the deceased victim’s identity because his father’s testimony connected the [photographs of his son] . . . to the person killed in the accident.”93 The court concluded that, although display of the photographs to the jury did prejudice the defendant’s case, the display was not unfairly prejudicial.94 Because the State did not use the photographs as part of a “before and after” comparison with autopsy photographs, the court found that the photographs were no more prejudicial than autopsy photographs, which courts routinely admit in homicide cases. Thus, the court held, the

86. Id. at 659, 350 A.2d at 678.
87. 342 Md. at 562-65, 677 A.2d at 610-12.
88. Id. at 561, 677 A.2d at 610.
89. Id. at 562-65, 677 A.2d at 610-12.
90. Id. at 565-66, 677 A.2d at 612.
91. Id. at 561, 677 A.2d at 610.
92. Id. Prior to Broberg, the Court of Appeals had held that the prosecution in a homicide case must establish the death of the person for which the case is being tried. See Jones v. State, 188 Md. 263, 272, 52 A.2d 484, 488 (1947). In Grandison v. State, 305 Md. 685, 506 A.2d 580 (1986), the Court of Appeals held that either in life photographs or photographs taken after death may be used to establish the victim’s identity. Id. at 729, 506 A.2d at 602.
93. Broberg, 342 Md. at 561, 677 A.2d at 610.
94. Id.
trial court did not abuse its discretion by admitting the in life photographs.95

Next, the court examined the relevancy of the photographs in light of the defendant's stipulation to the victim's identity prior to the beginning of trial.96 Citing the trial transcript, the court ruled that, because there was conflicting information regarding the scope of the stipulation, the decision to admit the photographs was within the discretion of the trial judge.97 In addition, the court explained that even with a clear stipulation as to the victim's identity, a stipulation does not deprive the photographs of all relevance.98 Past decisions by the Court of Appeals indicate that photographs need not possess "'essential evidentiary value' to be admissible."99 In fact, photographs used during trial generally do not provide new information, but instead provide the jury or judge with an "alternative form" of information.100

Finally, although the court found that the in life photographs in the Broberg case were admissible, it declined to adopt a per se rule that would make in life photographs admissible in every criminal case.101 The court did not interpret Maryland's constitutional and statutory protections of victims' rights to include a requirement that in life photographs automatically be admitted.102 Alternatively, the court emphasized that Maryland's victims' rights provisions do not preclude a trial judge from exercising discretion when deciding whether to admit in life photographs into evidence.103

4. Analysis.—Continuing the current trend in Maryland evidence law, the Broberg decision provides wide discretionary power to trial courts in deciding whether to admit or exclude evidence. In Broberg, the Court of Appeals held that a trial judge has the ultimate discretion to determine whether in life photographs are admissible to establish the identity of a crime victim.104 The decision reflects the

95. Id.
96. Id. at 562, 677 A.2d at 610.
97. Id. at 562-65, 677 A.2d at 610-12.
98. Id. at 565, 677 A.2d at 612 (citing Grandison v. State, 305 Md. 685, 729, 506 A.2d 580, 602 (1986)).
100. Id.
101. Id.
102. Id.; see supra note 6 and accompanying text.
103. Broberg, 342 Md. at 565-66, 677 A.2d at 612.
104. Id. at 552, 677 A.2d at 605-06. The court stated that all photographic evidence will be evaluated using the standard two-prong assessment: (1) the court must decide if the photograph is relevant, and (2) the court must balance the evidence's probative value against its prejudicial impact. Id. at 552-53, 677 A.2d at 605-06.
Court of Appeals's traditional reluctance to disturb trial court rulings on evidentiary questions. Initially, the court granted certiorari in *Broberg* to consider whether a victim's in life photographs could be displayed to the jury so it could become acquainted with the homicide victim; nevertheless, the court declined to adopt a rule making these types of photographs per se admissible.

The *Broberg* decision is problematic for several reasons. First, the court's holding does not enhance the predictability of Maryland's law of evidence. Rather, the decision leaves practitioners less certain about what photographic evidence is admissible under Maryland Rule 5-403. Evidentiary rulings made by trial judges will remain inconsistent throughout the Maryland Circuits.

Second, the *Broberg* court's ad hoc approach adds to the difficulty of predicting how trial judges will determine whether photographic evidence is unfairly prejudicial. Without adopting an objective test for what is unfairly prejudicial, the court has further complicated the task for practitioners and judges to determine the discretionary limits for admission of disputed evidence.

a. Relevancy of a Victim's In Life Victim Photographs in Light of a Prior Stipulation to Identity.—For evidence to be admissible in a criminal prosecution it must be relevant. The relevance of a piece of evidence is measured by its propensity to establish or disprove a fact that is at issue in the case. In *State v. Joynes*, the court articulated:

There are two important components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. The second aspect of relevance is probative value, which is the tendency of evidence to establish the proposition that it is offered to prove.
These principles are embodied in Chapter 4 of the Maryland Rules of Evidence.112

Although the court in Broberg correctly applied principles of relevancy and concluded that in life photographs of the victim were relevant to establish identity, it failed to address the photographs' relevance in light of a prior stipulation to the victim's identity. This is, perhaps, the most glaring problem in Broberg because, in this instance, the court ignored the clear stipulation to the victim's identity prior to trial. In a homicide case, the State has the burden to prove the identity of the victim.113 The trial transcript of Broberg indicates, however, that no dispute existed over the identity of the victim.114 In fact, on at least two occasions, the defense stipulated to the victim's identity.115

The Court of Appeals stated that the trial judge had the discretion to admit the photographs, even though the victim's identity was not at issue.116 The court justified this incomprehensible conclusion by contending that (1) "photographs need not possess 'essential evidentiary value' to be admissible" and (2) that even though a photograph "does not provide the factfinder with new information ... [it does provide] an alternative form of information."117 Clearly, without a dispute over identity, the in life photographs of the victim had slight relevance. Consequently, in future cases when the defense clearly stipulates to the victim's identity, the State will still be allowed to present photographic evidence of identity, subject, of course, to the trial judge's discretion.

b. The Effect of Maryland Evidence Rule 5-403 on the Admission of In Life Victim Photographs.—Maryland Evidence Rule 5-403, modeled after its federal counterpart, is the most important exclusionary rule in the rules of evidence.118 The most fundamental policy underlying the Maryland and Federal Rules of Evidence is the advancement of

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113. See supra note 92 and accompanying text.
114. See supra note 17 and accompanying text.
115. See supra note 17 and accompanying text.
116. See Broberg, 342 Md. at 565, 677 A.2d at 612.
117. Id. (quoting Bedford v. State, 317 Md. 659, 677, 566 A.2d 111, 120 (1989)).
118. Maryland Rule 5-403 is analogous to Federal Rule of Evidence 403. See Hornstein, supra note 112, at 1036-37. Maryland Rule 5-403 is an important exclusionary rule because "[i]t establishes the basic formula for the admission and exclusion of evidence, a formula embodied in other [Maryland] rules' applications to particular situations." Id. The other Chapter 4 rules "combine the underlying principle of Rule 5-403 with a number of policy overlays." Id. at 1037.
accurate fact-finding and the promotion of fairness.\textsuperscript{119} Accordingly, Maryland Rule 5-403 grants trial judges the ultimate discretion to exclude evidence even if it is admissible under other evidence rules. Underlying this formulation is the assumption that justice cannot be captured by sterile application of the rules, but, instead, requires interpretation by reasonable judges. By providing flexibility, Rule 5-403 endeavors to advance fairness in the trial process.\textsuperscript{120}

Under Maryland law, if the probative value of proffered evidence is "substantially outweighed" by the needless presentation of cumulative evidence, Maryland Rule 5-403 grants the trial court discretion to exclude such evidence. The language of Rule 5-403 clearly establishes a judge's discretion to exclude relevant evidence if the balance between probative value and unfair prejudice is uncertain.\textsuperscript{121} For exclusion of relevant evidence, however, there must be a substantial tipping of the scales against the evidence's probative worth.

One guide that courts have used to evaluate the admissibility of potentially prejudicial evidence is to ask whether the same fact can be proven with less provocative evidence.\textsuperscript{122} The United States Court of Appeals for the Third Circuit has set forth a test that other courts may use in this balancing process: "Although sensational and shocking evidence may be relevant, it has an objectionable tendency to prejudice the jury. It is, therefore, incompetent unless the exigencies of proof make it necessary or important that the case be proved that way."\textsuperscript{123}

In Broberg, the trial court faced the question of whether the probative value of the photographs outweighed the danger of unfair prejudice to the defendant. Given the factual circumstances of the case, the trial court's decision that the photographs were not unfairly prejudicial is especially troubling in light of the Court of Appeals's holding

\textsuperscript{119} See Fed. R. Evid. 102; Md. R. 5-102. But see D. Craig Lewis, Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases, 64 Wash. L. Rev. 289 (1989). Lewis contends that Federal Rule of Evidence 403 "substantially increases the risk of erroneous decisionmaking and prescribes a balancing test that unconstitutionally places the major risk of decisionmaking error on the defendant." Id. at 289.

\textsuperscript{120} See United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979) (stating that the primary purpose of Rule 403 is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect").

\textsuperscript{121} The analogous Federal Rule of Evidence 403 has been portrayed as "the major rule explicitly recognizing the broad discretionary power of the judge in controlling the introduction of evidence." 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 403[01] (1994).


\textsuperscript{123} United States v. 88 Cases, 187 F.2d 967, 975 (3d Cir. 1951) (setting forth a test for balancing probative value versus unfair prejudicial effect).
that such decisions are within the seemingly limitless discretion of the trial judge. Although the trial judge's discretion should continue to play an important role on issues of evidence, it should not be without boundaries. The Court of Appeals should have held that the admission of in life photographs to prove identity is at the discretion of the trial court, but such discretion is subject to limitations—namely, that trial judges must clearly articulate and justify their evidentiary rulings.

5. Conclusion.—The Court of Appeals in Broberg incorrectly decided that a victim's in life photographs were admissible. The decision contains a detailed and accurate discussion of how a trial judge should resolve a photographic evidence issue when the opposing party objects on the basis of unfair prejudice. Nevertheless, the court's well-reasoned discussion does not correspond with the "astounding, and erroneous" decision that the display of in life victim photographs did not unfairly prejudice the defendant's case and in no way influenced the jury's verdict. Given the factual context of the Broberg decision, it is likely that in future trials judges will admit in life victim photographs without hesitation or justification for their decisions.

Although the court declined to interpret the broad provisions of victims' rights statutes as providing for the admission of in life photographs in every case, the court achieved the functional equivalent. Without requiring a trial judge to justify an evidentiary ruling, particularly for the admission of in life victim photographs, the court has moved away from the original intent of Rule 5-403 to provide fairness and justice in the trial process. It is difficult to imagine a set of facts that would make a victim's in life photographs inadmissible.

In effect, the Broberg decision implicitly grants a trial judge the ability to admit these types of photographs. In future trials, judges will neither have to provide a careful explanation of a photograph's prejudicial effect nor will judges fear a possible reversal of their decision on appeal. If Maryland trial judges are not required to articulate clearly their underlying reasons for evidentiary decisions, and if the Maryland Court of Appeals continues to uphold these decisions on the basis of judicial discretion, the courts will continue to further an age-old maxim: "The discretion of a Judge is the law of tyrants.... In the best

124. See Murphy, supra note 44, § 1102, at 58 (Supp. 1996).
125. Id. at 58-59 (Supp. 1996).
it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable."

SEAN W. BAKER

B. Eliminating the Middle Ground of Discretion

In Armstead v. State, the Court of Appeals held that, under section 10-915 of the Courts and Judicial Proceedings Article of the Maryland Code, the admissibility of deoxyribonucleic acid (DNA) profile evidence cannot be challenged on the basis of its general reliability. The court also held that this statute eliminates the trial judge's discretion to weigh the probative value of the evidence against its prejudicial effect, that the statute renders "random match probability statistics" admissible, and that case-specific challenges to the manner in which tests are conducted generally go to the weight of the evidence rather than its admissibility.

126. The King v. Almon, 5 Geo. 3 (Hilary Term 1765), reprinted in 8 St. Tr. (Howell) 54, 57 (1810) (quoting Hindson v. Kersey, (C.P. 1765) (Lord Camden, C.J.)).
2. MD. CODE ANN., CTS. & JUD. PROC. § 10-915 (1995). This section provides:
(a) Definitions.—(1) In this section the following words have the meanings indicated.
(2) "Deoxyribonucleic acid (DNA)" means the molecules in all cellular forms that contain genetic information in a patterned chemical structure of each individual.
(3) "DNA profile" means an analysis that utilizes the restriction fragment length polymorphism analysis of DNA resulting in the identification of an individual's patterned chemical structure of genetic information.
(b) Purposes.—In any criminal proceeding, the evidence of a DNA profile is admissible to prove or disprove the identity of any person, if the party seeking to introduce the evidence of a DNA profile:
(1) Notifies in writing the other party or parties by mail at least 45 days before any criminal proceeding; and
(2) Provides, if requested in writing, the other party or parties at least 30 days before any criminal proceeding with:
(i) Duplicates of the actual autoradiographs generated;
(ii) The laboratory protocols and procedures;
(iii) The identification of each probe utilized;
(iv) A statement describing the methodology of measuring fragment size and match criteria; and
(v) A statement setting forth the allele frequency and genotype data for the appropriate data base utilized.
(c) Prerequisites.—If a party is unable to provide the information required under subsection (b) of this section at least 30 days prior to the criminal proceedings, the court may grant a continuance to permit such timely disclosures.

3. Armstead, 342 Md. at 66, 673 A.2d at 235.
4. Id.
5. Id. at 81, 673 A.2d at 242.
than to its admissibility. The Note argues that the court’s holding both ignores the legislative history of section 10-915 and neglects to apply commonly accepted rules of evidence.

I. The Case.—On January 29, 1991, an assailant broke into the home of a Howard County woman while she was home alone. During the break-in, the assailant demanded that the woman turn over her valuables, raped her, and then fled the scene. Based upon the description given by the victim, the police arrested Michael Devon Armstead (Armstead).

Using physical evidence (semen) collected from the victim, the state conducted a standard blood group test and a DNA profile analysis. The blood group test showed that Armstead was within the 4.7% of the population that could have been the source of the semen. The testing laboratory then created the DNA profile using the restriction fragment length polymorphism (RFLP) method. The lab declared the existence of a “match” between Armstead’s DNA and the sample taken from the victim.

6. Id. at 66, 673 A.2d at 235.
7. Id. at 44, 673 A.2d at 223.
8. Id.
9. Id.
10. The standard blood group test is the test commonly used to determine a person’s blood “type.” See COMMITTEE ON DNA TECHNOLOGY IN FORENSIC SCIENCE, NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 27 (1992) [hereinafter NRC REPORT].
11. Armstead, 342 Md. at 44, 673 A.2d at 224. The DNA profile analysis in Armstead was conducted using the restriction fragment length polymorphism (RFLP) method. Id. The RFLP method of DNA profile analysis has been the most commonly used method to create profiles used as evidence in court. See NRC REPORT, supra note 10, at 131. The RFLP method uses enzymes to “cut” DNA sequences into pieces (restriction fragments). Id. at 36. Each enzyme specifically targets a particular DNA sequence. Id. at 35. Due to natural variation, each fragment will be a different length. Id. at 37. After the fragments have been cut, they are separated according to size by placing them into a gel through which an electric current is passed (electrophoresis). Id. Due to the differing sizes of the fragments, each migrates through the gel at different rates. Id. After binding to a radiolabeled probe, the fragments are then photographed using autoradiography. Id. at 37-38. The autoradiograph shows a band where one or more fragments migrated. Id. at 38. The series of bands can be compared with another sample to determine variations. Id.
12. Armstead, 342 Md. at 44, 673 A.2d at 224.
13. Section 10-915 of the Courts and Judicial Proceedings Article defines a DNA profile as “an analysis that utilizes the restriction fragment length polymorphism analysis of DNA resulting in the identification of an individual’s patterned chemical structure of genetic information.” Md. CODE ANN., CTS. & JUD. PROC. § 10-915 (1995). Thus, Armstead’s “DNA profile” is the autoradiograph that resulted from the procedures outlined in supra note 11.
14. Armstead, 342 Md. at 44, 673 A.2d at 224.
15. Id.
Prior to trial, Armstead filed a motion in limine to exclude the DNA evidence. Armstead argued that recent scientific developments called into question the reliability of RFLP testing. The Circuit Court for Howard County rejected Armstead's motion, however, holding that the court did not possess the discretion to exclude DNA evidence under section 10-915 of the Courts and Judicial Proceedings Article.

At trial, the State presented both DNA profile evidence and expert testimony. Prosecution experts offered statistics showing the likelihood of a random match. The State proffered two sets of probability statistics—probability based upon the product rule and

16. Id. at 45, 673 A.2d at 224.
17. Id. Additionally, Armstead argued that (1) section 10-915 was unconstitutionally vague, (2) the use of the DNA evidence violated his right to due process under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights, (3) section 10-915 of the Courts and Judicial Proceedings Article denied him his right to confrontation of those who conducted the DNA tests, and (4) section 10-915 violated separation of powers. Id.
18. Armstead, 342 Md. at 46, 673 A.2d at 224. The circuit court held a five-day evidentiary hearing to decide if the evidence was so unreliable that its admission would violate due process. Id. at 45-46, 673 A.2d at 224. The court rejected the due process challenge. Id. at 46, 673 A.2d at 224.
19. Id. at 46, 673 A.2d at 224.
20. Id. at 47, 673 A.2d at 225. A random match is a false positive and would occur when the DNA sample taken from the crime scene did not come from the defendant, but DNA profile results nevertheless show a match between the defendant and the sample taken at the crime scene. Id. at 52, 673 A.2d at 228. Assuming no procedural or analytical error, this would occur when the two samples were taken from different people "whose DNA patterns in the target regions investigated are the same." NRC REPORT, supra note 10, at 44.
21. Armstead, 342 Md. at 46, 673 A.2d at 225. Scientists agree that no two people, with the exception of identical twins, have exactly the same DNA sequence. See NRC REPORT, supra note 10, at 9. Current typing systems, however, do not allow for the comparison of entire DNA sequences. See id. Current methods only compare between three and five sites, or loci, between two samples. Id. There is a chance that two randomly selected people will have matching DNA at those sites. See id. Thus, it is necessary to calculate the probability of such "random matching" in order to give the results of a "match" any meaning. See id. The probability statistics generally used in DNA forensics are based upon theoretical models premised upon principles of population genetics. See id. at 10. The frequency of a particular DNA sequence at any tested site is population specific and is determined by testing samples from the appropriate population. See id. at 9-10. The National Research Council recommends that three major racial populations, such as Caucasians, African Americans, and Western Hispanics, should be used in this analysis. See id. at 15.
22. The product or "multiplication" rule is a methodology used to calculate the probability of a random match. See NRC REPORT, supra note 10, at 10-11. The method multiplies the frequency of the DNA sequence found at each individual locus tested to achieve the frequency of a member of the relevant population having the same DNA sequence at all loci tested. See id. Thus, if three loci are tested and each had a frequency of 10%, the frequency of a random match containing all three loci would be .10 times .10
probability calculated according to the ceiling principle.23 The State also presented the jury with the testing laboratory's error rates.24 Although Armstead did not use expert testimony to challenge the State's DNA evidence, he did cross-examine the State's experts on the controversy over DNA probability statistics.25

At the conclusion of the trial, the jury convicted Armstead of "first degree rape, first degree sexual offense, perverted practices, assault, burglary, and attempted robbery."26 He received a sentence of two consecutive life terms plus twenty years in prison.27 Armstead filed a timely appeal to the Court of Special Appeals.28 On appeal, Armstead argued that the trial court should have excluded the prosecution's DNA evidence.29 Further, Armstead claimed that the court erred when it refused to conduct a hearing to determine the reliability of the evidence and that the use of outmoded methods of DNA analysis rendered the evidence so unreliable that the use of such evidence violated his constitutional right to due process.30 The Court of Spe-

23. The ceiling principle is a conservative methodology for calculating the probability of a random match. See id. at 82-83. The method is designed to account for population substructuring, i.e., differences in allele frequencies between segments of a sample population. See id. The product rule assumes a homogenous population. See id. Subpopulations do tend to mate within themselves, however, which possibly renders statistics gained from the population as a whole inaccurate within any given subpopulation. See id. The ceiling principle accounts for such substructuring by using "an upper bound for the allele frequency that is independent of the ethnic background of a subject" and then applying the product rule method to determine the frequency of the genotype. Id.

24. Armstead, 342 Md. at 47, 673 A.2d at 225. Proficiency testing conducted by Cellmark Laboratories through 1991 revealed a 0.7% error rate. See Petitioner's Brief at 9, Armstead v. State, 342 Md. 38, 673 A.2d 221 (1996) (No. 133). The error rate resulted from two instances in which the lab declared that samples from two different sources came from the same source. See id.

25. Armstead, 342 Md. at 47, 673 A.2d at 225. During cross-examination of the prosecution's experts, Armstead revealed disagreement within the scientific community on which methodologies should be used to determine the probability of a random match. Armstead v. State, No. 1958, slip op. at 7 (Md. Ct. Spec. App. Sept. 22, 1993), aff'd, 342 Md. 38, 673 A.2d 221 (1996). Also through cross-examination, Armstead demonstrated that the probability of a random match was much lower under the ceiling principle than the product rule and that the laboratory error rate was 0.7%. Id. at 7-8.

26. Armstead, 342 Md. at 47, 673 A.2d at 225.

27. Id.

28. Id.

29. Id.

30. Id. Armstead argued that the disagreement within the scientific community concerning the use of the unmodified product rule showed that the conclusion given to the jury that there was 1 chance in 480,000,000 that another African American would have his same DNA profile was erroneous. Armstead, No. 1958, slip op. at 7. He argued that "[a] part of the due process guarantee is that an individual not suffer punitive action as a result
cial Appeals, however, affirmed Armstead's convictions. Specifically, the Court of Special Appeals held that (1) the trial court did not err in its refusal to conduct a preliminary hearing on the RFLP technique because "the DNA profile's admissibility is incontestable," (2) the court did not err in its refusal to exclude the proffered statistical analysis because such evidence is admissible under section 10-915, and (3) the court's admission of the DNA evidence did not violate Armstead's right to due process. The Court of Appeals granted certiorari to consider whether (1) section 10-915 impacts the "gatekeeping" function of the trial court in screening DNA evidence; (2) section 10-915 encompasses population genetics statistics, in addition to the "raw" evidence of a DNA match; and (3) the application of the product rule calculation, the rate of laboratory error, or the specific laboratory procedures used in the case rendered the resulting data so unreliable as to violate Armstead's due process rights.

2. Legal Background.—

a. Admissibility of Novel Scientific Evidence.—The issues in Armstead center on the admissibility of novel scientific evidence. Frye v. United States set forth the prevailing standard by which courts measured novel scientific evidence for nearly seventy years. In Frye, the
United States Court of Appeals for the District of Columbia held that scientific evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Federal and state courts widely adopted this "general acceptance" standard and used it to determine the threshold question of whether the theory or principle underlying a particular scientific technique is adequately reliable to allow evidence to be admitted. This reliability is gauged by whether the "relevant" scientific community accepts the theory or principle.

The Court of Appeals adopted the Frye standard in Reed v. State. The Court of Appeals reasoned that fairness dictates that a litigant is entitled to "a scientific judgment on the reliability of [a scientific process]" before that process can be used against him. According to the court, the Frye standard "assures that the most qualified people to assess the general validity of a scientific method will have the determinative voice."

In 1993, the Supreme Court held in Daubert v. Merrell Dow Pharmaceuticals, Inc. that the Federal Rules of Evidence displaced the Frye test. The Supreme Court identified Federal Rules 702, 703.

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41. Frye, 293 F. at 1014.
45. 283 Md. 374, 389, 391 A.2d 364, 372 (1978) (holding that "voiceprint" technology had not reached the level of general acceptance and was, thus, inadmissible). Although the court expressly adopted the Frye standard, it noted that an earlier case, Shanks v. State, 185 Md. 437, 45 A.2d 85 (1945), "recognized the standard of general scientific acceptance in connection with the admissibility of blood test evidence." Reed, 283 Md. at 389-84, 391 A.2d at 369.
46. Reed, 283 Md. at 385, 391 A.2d at 370.
47. Id. (quoting United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974)). The court also expressed concerns that the Frye standard is necessary to prevent the admission of "junk science" because "lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials. We have acknowledged the existence of a... 'misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature.'" Id. at 386, 391 A.2d at 370 (quoting Huntington v. Crowley, 414 P.2d 382, 390 (Cal. 1966)).
49. Id. at 589. The Court premised its holding upon its decision in United States v. Abel, 469 U.S. 45 (1984), in which it recognized that, in principle, a common law of evidence no
Many state rules of evidence, including Maryland's, are based upon the federal rules. Therefore, many of those states subsequently adopted *Daubert* as the controlling standard for admissibility of novel scientific evidence. Maryland, however, did not. Eight days following the *Daubert* decision, the Court of Special Appeals held that the *Frye-Reed* standard would remain the law in Maryland. Since *Reed*, Maryland courts have consistently applied the *Frye* standard. Although most of the Maryland Rules of Evidence are longer exists under the Federal Rules. *Id.* at 51. See generally, G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939 (1996) (discussing the implications of the *Daubert* holding).

50. Rule 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *FED. R. EVID.* 702.

51. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. *FED. R. EVID.* 703.

52. Rule 706 provides in pertinent part: “The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses . . . of its own selection.” *FED. R. EVID.* 706.

53. Rule 403 provides: “Although 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.” *FED. R. EVID.* 403.

54. *Daubert*, 509 U.S. at 594. Professor Fenner summarizes the holding of *Daubert* as follows:

[T]he test for admissibility of expert evidence is . . . whether the evidence is “scientific knowledge,” whether it will assist the trier of fact, and whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial judge must assess the reliability and the relevance of the theory and methodology. This involves assessing each of them both in general and as applied by these particular witnesses to this particular case.


55. *See* Graham, *supra* note 42, at 250 n.120 (citing examples of states adopting the *Daubert* decision, including Delaware, Iowa, Louisiana, New Mexico, North Dakota, South Dakota, and Washington).


57. *See*, e.g., Sabatier v. State Farm Mut. Auto. Ins. Co., 323 Md. 232, 249, 592 A.2d 1098, 1106 (1991) (explaining that "*Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence in criminal cases based upon new
based upon the federal rules, the committee note to Maryland Rule 5-702 makes clear that Reed and "other cases adopting the principles enunciated in Frye" are controlling law on the issue of novel scientific techniques or principles. Moreover, the committee note states explicitly that Rule 5-702 does not overrule Reed or its adoption of the Frye standard. Rather, the admission of novel scientific techniques is left to develop through case law. In Maryland, expert testimony must meet the Frye standard only if an essential element of the expert's opinion is a scientific test result "controlled by inexorable, physical laws." The Frye requirement may also be satisfied by judicial notice of the test's reliability, or by legislative codification of the admissibility of certain evidence.

58. Rule 5-702 provides:

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, 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.

59. Md. R. 5-702 committee note. Although the rule is not intended to mirror Fed. R. Evid. 702, the two rules are substantially similar. Compare Md. R. 5-702, supra note 58, with Fed. R. Evid. 702, supra note 50. The Maryland rule and the federal rule both incorporate the first prong of the Maryland rule. Although the language of the federal rule does not include the second two prongs enumerated under the Maryland rule, federal courts have construed these requirements in the federal rule. See Carroll, supra note 57, at 1090-91 (discussing federal cases that support the second two prongs of the Maryland test).

60. Md. R. 5-702 committee note.

61. Id.


b. Admissibility of DNA Evidence in Maryland.—DNA profiling evidence was first used in the United States in 198765 and was heralded as a foolproof scientific breakthrough that could identify criminals with near certainty.66 Not long after its first introduction, courts across the country began to confront the issue of admitting DNA profile evidence.67 Today, most courts permit the admission of the RFLP technique.68

Maryland appellate courts first considered the admissibility of DNA profile evidence in Cobey v. State, in 1989.69 In that case, the defendant faced charges of rape and sodomy, and the State presented DNA profile evidence to the jury.70 The evidence consisted of an RFLP-derived "match" between the defendant's DNA and DNA recovered from the crime scene.71 On appeal to the Court of Special Appeals, Cobey claimed that laboratory methods used to analyze the DNA failed to meet the general acceptance standard of Frye-Reed.72 The Court of Special Appeals disagreed, however, and affirmed the trial court's holding.73 Yet the Cobey court limited its holding, stating that its decision should not be interpreted to mean that "DNA fingerprinting is now admissible willy-nilly in all criminal trials."74 Rather, the court held, the trial judge in Cobey properly admitted the evidence


66. See NRC Report, supra note 10, at 28 (noting that after the introduction of forensic DNA usage, "the term 'DNA fingerprint' carried the connotation of absolute identification" and was fixed in the public's mind as having such capabilities). But see Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222, 222 (1993) (emphasizing that "[t]here is now an increased awareness that DNA analyses are subject to error and more deserving of careful scrutiny").


68. See Developments in the Law—Confronting the New Challenges of Scientific Evidence, 108 Harv. L. Rev. 1481, 1557-58 (1994) (noting the widespread acceptance of DNA evidence); NRC Report, supra note 10, at 135 (noting that under the Frye standard "[t]he overwhelming majority of trial courts ruled that such evidence was admissible").


70. Id. at 34, 559 A.2d at 392.

71. Id. Although the Cobey court noted that the defendant had challenged the database used by the laboratory, the court gave no details on the statistical probability analysis presented at trial. See id. at 43, 559 A.2d at 398.

72. Id. at 34, 559 A.2d at 392.

73. Id. at 43, 559 A.2d at 398.

74. Id.
because the defendant had presented no evidence to contradict the finding.\textsuperscript{75}

That same year, the Maryland General Assembly enacted section 10-915.\textsuperscript{76} This legislation declared that a DNA profile is admissible at a criminal proceeding to prove or disprove a defendant's identity.\textsuperscript{77} In 1991, the General Assembly amended the statute to its present form.\textsuperscript{78} The legislature intended the statute "to eliminate the necessity of holding a [preliminary] 'Frye-Reed' hearing to prove that the [DNA profiling] technique has gained general acceptance in the relevant scientific community."\textsuperscript{79}

A few appellate cases have directly interpreted section 10-915.\textsuperscript{80} It is well established that the statute conclusively resolved the issue of whether RFLP profiling satisfies the \textit{Frye-Reed} standard.\textsuperscript{81} The statute, by its terms and legislative history, reflects the General Assembly's determination that the scientific community has generally accepted DNA testing using the RFLP technique and, therefore, that the technique is reliable. Maryland courts have clearly recognized this legislative determination. In \textit{Jackson v. State},\textsuperscript{82} a defendant convicted of sexual assault and rape\textsuperscript{83} argued on appeal to the Court of Special Appeals that the trial court had erred when it refused to compel discovery of all past testing procedures implemented by the testing laboratory.\textsuperscript{84} In affirming the trial court, the Court of Special Appeals declared that "[a] defendant may attack the reliability of the DNA testing in his particular case but, unless he is challenging the validity of the statute, he is not entitled to require the production of the underlying testresults."\textsuperscript{85} This approach is consistent with both the legislative history of the statute and the court's prior recognition of the statute's legislative determination that the scientific community has generally accepted DNA testing using the RFLP technique to be a reliable method for establishing a defendant's identity.

\textsuperscript{75} Id.
\textsuperscript{78} For the full text of section 10-915, see supra note 2.
\textsuperscript{80} See, e.g., Jackson v. State, 92 Md. App. 304, 323-25, 608 A.2d 782, 791-92 (1992) (holding that, under section 10-915, a defendant may not challenge the admissibility of DNA testing in general, but only the reliability of the DNA testing in his own particular case and that probability statistics were not necessary to support the evidence of a DNA profile "match"); Wheeler v. State, 88 Md. App. 512, 524, 596 A.2d 78, 85 (1991) (holding that the defendant was not prejudiced by a trial delay during the enactment of section 10-915 because the statute merely codified the \textit{Frye-Reed} test for admissibility of novel scientific evidence).
\textsuperscript{81} See Wheeler, 88 Md. App. at 524, 596 A.2d at 84 (noting that the statute determines the same standard as the \textit{Frye-Reed} test); Jackson, 92 Md. App. at 323, 608 A.2d at 791 (finding that the statute determined the general reliability of DNA testing).
\textsuperscript{82} 92 Md. App. 304, 608 A.2d 782 (1992).
\textsuperscript{83} Id. at 308-9, 608 A.2d at 783-84.
\textsuperscript{84} Id. at 321, 608 A.2d at 790.
§ 10-915 itself, he may not challenge the admissibility of evidence regarding DNA testing in general. 85

Three years later, the Court of Special Appeals again considered probability statistics under section 10-915 in Keirsey v. State. 86 In Keirsey, a Worcester County jury convicted the defendant of rape. 87 At trial, the prosecution presented evidence of a DNA profile "match" supported by probability statistics calculated using the product rule. 88 On appeal, Keirsey claimed that the court should not have admitted statistics based on the product rule on the ground that the scientific community had accepted the ceiling principle as more accurate. 89 Thus, Keirsey argued, the product rule did not meet the Frye-Reed standard. 90 Affirming Keirsey's conviction, the Court of Special Appeals held that the admissibility of probability statistics is not predicated on the Frye-Reed standard. 91 The court reasoned that the Frye-Reed test applies only to testimony that is based on a "scientific test result 'controlled by inexorable, physical laws,'" 92 and that probability statistics do not meet this criteria. 93

3. The Court's Reasoning.—In Armstead v. State, the Court of Appeals concluded that section 10-915 eliminates the discretion of trial courts to hold either Frye-Reed hearings or "inverse Frye-Reed" hearings on the admissibility of DNA evidence 94 and eliminates judicial discretion with respect to weighing the probative value of DNA evidence

85. Id. at 323, 608 A.2d at 791. Jackson marked the first time that a Maryland court addressed the relationship between DNA profile evidence and probability statistics. At trial, the prosecution presented no probability statistics showing the likelihood of a random match. Id. at 324, 608 A.2d at 791. Jackson claimed that "without proper evidence regarding the probability of a match, evidence that a match was declared has no relevance" and, thus, "does not tend to make it more or less likely that [Jackson] was the assailant." Id. (alteration in original) (internal quotations omitted). Although the court held that Jackson had waived this argument, it also stated that because the General Assembly determined that DNA testing is reliable, "[t]here was simply no need for the State to offer additional evidence, such as probability calculations, to establish that the testing procedures employed were reliable." Id., 608 A.2d at 792.

86. 106 Md. App. 551, 665 A.2d 700 (1995), vacated, 342 Md. 120, 674 A.2d 510 (1996). 87. Id. at 554, 665 A.2d at 701. 88. Id. at 573, 665 A.2d at 711. 89. Id. at 574-75, 665 A.2d at 711. 90. Id. 91. Id. at 575, 665 A.2d at 712. 92. Id. (quoting State v. Allewalt, 308 Md. 89, 98, 517 A.2d 741, 745 (1986)). 93. Id. 94. Armstead, 342 Md. at 60, 673 A.2d at 232.
against its prejudicial effect. The *Armstead* decision also renders probability statistics admissible.

**a. Frye-Reed Hearings Precluded.**—The court, implementing canons of statutory interpretation, noted several aspects of section 10-915 in concluding that this section precluded *Frye-Reed* hearings. First, the court determined that the language of section 10-915 "strongly suggests that the Legislature intended DNA profile evidence to be admitted without reevaluation of the technique's general reliability." The court emphasized that the language of the statute is compulsory, rather than permissive. Second, the court noted that the Senate Judicial Proceedings Committee's report explicitly stated that "the intent of the bill is to eliminate the necessity of holding a 'Frye-Reed' hearing to prove that the technique has gained general acceptance in the relevant scientific community." Third, the court looked to the General Assembly's 1991 amendment to section 10-915—particularly provisions imposing new discovery procedures—as evidence that the legislature intended to eliminate *Frye-Reed* hearings. Specifically, the amendment modified notice requirements, permitting the admission of DNA evidence only if the party offering the evidence notifies the opposing party within forty-five days of trial of his intent to use such evidence and delivers certain specified documents to the opposing party within thirty days of trial. From these provisions, the Court of Appeals reasoned that the General Assembly intended "to establish the general reliability and admissibility of the evidence, permitting the opponent to attack the weight of the evidence through

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95. *Id.* at 62, 673 A.2d at 232.

96. *Id.* at 83, 673 A.2d at 243.

97. The court noted that "the cardinal rule in statutory construction is to effectuate the Legislature's broad goal or purpose." *Id.* at 56, 673 A.2d at 229. The court also noted that "[t]he primary source of legislative intent is the language of the statute itself." *Id.* The court opined that, in reading statutory language, common sense should be used "to avoid illogical or unreasonable constructions" and that words should be given their "common meanings" unless the legislative intent is otherwise. *Id.* If the language of the statute is unclear or ambiguous, then the court should look to other sources to "discern the Legislature's purpose." *Id.*

98. *Id.* at 57, 673 A.2d at 230.

99. *Id.* The court stated that "the plain language of the statute explicitly states that DNA evidence 'is admissible to prove . . . identity,' rather than using conditional language such as 'may be admissible.'" *Id.* (alteration in original) (quoting Md. Code Ann., Cts. & Jud. Proc. § 10-915 (1995)).


102. *Id.*
cross-examination" by requiring early disclosure. Finally, the court noted that the statute's preamble itself reflects the General Assembly's confidence in DNA testing procedures by noting the impressive accuracy of such procedures.

b. Trial Court's Discretion to Weigh Probative Value and Prejudicial Effect.—The court next considered whether a trial court should weigh the probative value of DNA evidence against its prejudicial effect. The court concluded that, under section 10-915, a trial court cannot conduct such a balancing test. The court's rationale for this conclusion is simple. The court reasoned that "the Frye test was designed to serve the same purpose as the trial judge's discretionary balancing of probative value against prejudice." Thus, because the statute eliminates the Frye-Reed hearing, the General Assembly implicitly "determined that the probative value of DNA evidence outweighs any prejudicial effect."

The court also emphasized that the trial judge has discretion to exclude DNA evidence only when laboratory errors "render it so unreliable that it would not be helpful to the trier of fact." The court stated that "individualized errors in application of the DNA technique [should generally be treated] as matters of weight," not admissibility.

103. Armstead, 342 Md. at 60, 673 A.2d at 231.
104. Id. at 59, 673 A.2d at 231-32. The preamble states, in pertinent part: "'[M]eans of identifying that unique DNA structure have been refined far beyond any previous means of human tissue analysis, to a level of scientific accuracy that approaches an infinitesimal margin of error."
106. Armstead, 342 Md. at 62, 673 A.2d at 232.
107. Id. at 61, 673 A.2d at 232.
108. Id. Although the court held that section 10-915 precludes all general attacks on DNA evidence, the trial court must still determine that the evidence is logically relevant before it may be admitted. Id. at 62, 673 A.2d at 233.
109. Id. at 63, 673 A.2d at 233.
110. Id. at 64, 673 A.2d at 234. The court implied that measurement errors do not generally require that evidence be excluded, but that errors from testing procedure deviations may. Id. The court stated that "[i]n determining whether an alleged error in DNA testing constitutes the type of error that warrants exclusion of DNA evidence, trial courts must distinguish mere measurement error . . . from deviations from accepted testing procedures." Id. at 65 n.18, 673 A.2d at 234 n.18.
Thus, in determining if a party has the right to a hearing on a motion in limine, a trial court must distinguish between general attacks on DNA testing and particularized challenges to the procedures used.\(^\text{111}\) If the court determines that the motion is based upon particularized challenges, then the trial court must determine if the party claims an error of measurement or deviations from accepted testing procedures.\(^\text{112}\)

The Court of Appeals concluded that Armstead’s arguments concerning the use of the product rule and the rate of laboratory error were “general challenges” and thus precluded.\(^\text{113}\) As such, the court concluded that “the trial judge did not abuse his discretion in declining to conduct an ‘inverse Frye-Reed hearing’ and in refusing to balance the probative value of DNA evidence against its prejudicial effect.”\(^\text{114}\)

c. Section 10-915 Admissibility Provision Includes Probability Statistics.—The decision of the Court of Appeals in Armstead also established that population genetics statistics\(^\text{115}\) fall within the purview of section 10-915.\(^\text{116}\) In so ruling, the court conducted a detailed review of the two population statistic methodologies used at trial and the debate surrounding their use\(^\text{117}\) and concluded that both the product rule and ceiling principle were generally accepted methodologies.\(^\text{118}\)

\(^{111}\) Id. at 65, 673 A.2d at 234.

\(^{112}\) Id.

\(^{113}\) Id. The court also noted Armstead’s challenge to the test results based upon the presence of “shadow bands” on the autoradiograph. Id. at 65-66, 673 A.2d at 234-35. The court dismissed this challenge as unpreserved because, although Armstead raised the issue before the trial court, “he did not argue that the trial court retained its discretion under the statute to exclude the DNA evidence due to the shadow banding.” Id. at 66, 673 A.2d at 235.

\(^{114}\) Id. at 67, 673 A.2d at 235.

\(^{115}\) Population statistics are used to indicate the probability that an analysis of a randomly chosen person would match the DNA sample tested. See NRC REPORT, supra note 10, at 74-75. There is much controversy surrounding the statistical methodologies used to calculate these probabilities. See id. at 75.

\(^{116}\) Armstead, 342 Md. at 77-83, 673 A.2d at 240-43.

\(^{117}\) See id. at 67-77, 673 A.2d at 235-40.

\(^{118}\) The court rejected and distinguished the holding of the Court of Special Appeals in Keirsey v. State, 106 Md. App. 551, 575, 665 A.2d 700, 712 (1995), vacated, 342 Md. 120, 674 A.2d 510 (1996), that probability statistics in DNA analyses are not subject to the Frye-Reed test. Armstead, 342 Md. at 80 n.33, 673 A.2d at 242 n.33. The Court of Appeals reasoned that the Keirsey analysis was too narrow because it improperly analyzed the nature of the statistical techniques under consideration. See id. The court stated that, although there are circumstances in which the choice between statistical techniques is “merely a choice between equally valid methods of describing the same underlying scientific data,” the choice between statistical analyses involved in DNA analysis is “dependent on an underlying scientific phenomenon or principle.” Id. The court concluded its analysis by holding
The court determined that the language of section 10-915 demonstrated that "the Legislature ... intended the supporting statistics to be routinely admitted along with the DNA match evidence."\textsuperscript{119} Thus, "the statute render[ed] Frye-Reed analysis unnecessary."\textsuperscript{120} Although section 10-915 does not expressly state that supporting statistics are admissible, nor does it specifically address the issue, the Court of Appeals reasoned that the statute "encompasses both the evidence of a DNA match and the supporting statistics."\textsuperscript{121} The court dismissed as unimportant the statute's lack of specificity as to which statistical methods should be recognized as admissible\textsuperscript{122} and gave several reasons why a lack of specificity is preferable. In fact, the court went so far as to impute an intent by the legislature to "carefully [refrain] from adopting any specific tests."\textsuperscript{123} Thus, according to the court's holding, the admissibility of population genetics statistics may only be attacked on due process grounds "if scientific opinion shifts so dramatically that previously accepted methods are considered unreliable."\textsuperscript{124} The court found that both statistical methods presented at Armstead's trial were both reliable and accepted in the scientific com-

\textsuperscript{119} Armstead, 342 Md. at 77, 673 A.2d at 240.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 81, 673 A.2d at 242. The court based this conclusion on "several indications in the statute." Id. at 77, 673 A.2d 240. These indications include: (1) the statute itself, which by requiring disclosure of the allele frequency and genotype data, "clearly indicates that the [l]egislature was aware that population genetics were used in support of DNA evidence" and that such information would probably be offered at trial; (2) language in the statute's preamble referring to an "'infinitesimal margin of error'" which indicates that the legislature was aware that "statistical calculations were routinely applied to gauge the accuracy of DNA profile evidence"; (3) the fact that the legislature deleted the words "uniquely" and "unique" from the statute's preamble indicates that it was aware of the possibility of random matches and that, thus, the issue would be at issue in a trial; and (4) language in the statute "stating that DNA profile evidence is admissible 'to prove or disprove . . . identity,'" which "indicates that the [l]egislature viewed population genetics statistics as a necessary component of DNA evidence." Id. at 77-78, 673 A.2d at 240-41.

The court concluded that probability statistics are an essential component of DNA evidence. Id. at 79, 673 A.2d at 741. This reasoning is in direct opposition to the holding of the Court of Special Appeals in Jackson v. State, 92 Md. App. 304, 608 A.2d 782 (1992). There, the court denied the appellant's claim that the trial court had erred by allowing evidence of a DNA match without supporting statistics to be admitted. Id. at 324-25, 608 A.2d at 792. The Armstead court averred that "[t]o the extent that [Jackson] is inconsistent with this holding, it is hereby disapproved." Armstead, 342 Md. at 79 n.32, 673 A.2d at 241 n.32 (citation omitted).

\textsuperscript{122} Armstead, 342 Md. at 81, 673 A.2d at 242.
\textsuperscript{123} Id. at 82, 673 A.2d at 242 (quoting Haines v. Shan Holtz, 57 Md. App. 92, 96, 468 A.2d 1365, 1367 (1984)).
\textsuperscript{124} Id., 673 A.2d at 243.
munity and, as such, did not raise due process concerns. Therefore, the court held, "the trial court did not abuse its discretion in admitting the statistical evidence regarding the probability of a random DNA match calculated using the product rule."  

\[ \textit{d. Due Process Rights Were Not Violated.} \] Finally, Armstead asserted that the DNA evidence presented at trial was so unreliable "that its use violate[d] his due process rights." He challenged the use of DNA evidence generally and claimed specific defects in the testing procedures used in his case. Armstead's general attacks concerned the use of the product rule to determine random match frequency and laboratory error rates that he claimed rendered the statistical evidence unreliable. 

The court opined that "a part of the due process guarantee is that an individual not suffer punitive action as a result of an inaccurate scientific procedure." The court also recognized, however, that scientific test results "need not be infallible to meet the standard for due process." The court noted that due process only bars the admission of evidence that is "so extremely unfair that its admission violates "fundamental conceptions of justice."" For evidence to violate this standard because of its unreliability, the acts complained of must "be of such quality as necessarily prevent a fair trial." Although recognizing that "fundamental fairness" is a case-specific inquiry, the court articulated a standard that trial courts should apply when the reliability of scientific evidence is questioned. The court stated that "the essence of the due process 'fundamental fairness' inquiry is whether there was a balanced, fully explored presentation of the evidence. This balance in turn depends on the jury's ability to weigh the evidence, and the defendant's opportunity to challenge the

\[ \text{\textit{125. Id. at 83, 673 A.2d at 243.}} \]
\[ \text{\textit{126. Id.}} \]
\[ \text{\textit{127. Id.}} \]
\[ \text{\textit{128. Id.}} \]
\[ \text{\textit{129. Id. Armstead's case-specific attacks included the claim that the laboratory used excessively large "match windows" and that the statistical method used failed to account for genetic similarities between Armstead and his siblings. Id. at 83-84, 673 A.2d at 243-44.}} \]
\[ \text{\textit{130. Id. at 84, 673 A.2d at 244 (quoting Higgs v. Wilson, 616 F. Supp. 226, 230 (W.D. Ky. 1985), aff'd in part, vacated and remanded in part on other grounds sub nom. Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989)).}} \]
\[ \text{\textit{131. Id.}} \]
\[ \text{\textit{133. Id. at 85, 673 A.2d at 244 (quoting Crawford v. State, 285 Md. 431, 452, 404 A.2d 244, 255 (1979) (citing Lisenba v. California, 314 U.S. 219, 236 (1941))).}} \]
\[ \text{\textit{134. Id. at 87, 673 A.2d at 245.}} \]
Prior to Armstead, the Maryland judiciary had not considered a due process challenge to the reliability of scientific evidence. The court formulated the due process standard from its decision in Maryland Department of Human Resources v. Bo Peep Day Nursery, as well as from the decision of the Court of Special Appeals in Kammer v. Young.

Applying the new due process standard, the court found that Armstead's due process rights were not violated. The court noted that because Armstead "had the opportunity to challenge the DNA evidence" and the jury was fully informed of the possible error, Armstead's due process rights were not violated.

Judge Bell filed a dissenting opinion in which he took issue with most of the majority's holdings. Judge Bell concurred with the majority's holding that section 10-915 precludes the trial court from conducting a Frye-Reed or "inverse" Frye-Reed hearing, but disagreed with the rest of the opinion.

4. Analysis.—In Armstead v. State, the Court of Appeals broadly interpreted section 10-915 to create a strong presumption of admissibility for DNA evidence. According to the court, the statute renders both the DNA profile and probability statistics related to the profile presumptively admissible. This interpretation misinterprets the statute and ignores traditional rules of admissibility.

a. Elimination of Frye-Reed Hearings.—The Floor Report of the Senate Judicial Proceedings Committee on House Bill 711 stated that the purpose of section 10-915 was "to eliminate the necessity of

135. *Id.*
136. *Id.* at 86, 673 A.2d at 245.
137. 317 Md. 573, 600, 565 A.2d 1015, 1028 (1989) (holding that the exclusive use of hearsay evidence in an administrative hearing did not violate the petitioner's due process rights in part because the petitioner had the opportunity to cross-examine the witnesses).
138. 73 Md. App. 565, 535 A.2d 936 (1988). The Court of Special Appeals rejected the claim of the appellant that calculations of the probability of his paternity were so unreliable as to violate due process. *Id.* at 576-77, 535 A.2d at 941. The court held that because the appellant offered non-genetic evidence, which both disputed his paternity and attacked the probability figure, his due process rights were not violated. *Id.* at 577, 535 A.2d at 942. Thus, the appellant's ability to counterbalance the questionable scientific evidence "served to protect his due process rights." *Id.*
139. Armstead, 342 Md. at 88, 673 A.2d at 246.
140. *Id.*
141. *Id.* at 89, 673 A.2d at 246 (Bell, J., dissenting).
142. See *id.*
143. Armstead, 342 Md. at 83, 673 A.2d at 243.
144. *Id.*
holding a ‘Frye-Reed’ hearing to prove that the [DNA profiling] technique has gained general acceptance in the relevant scientific community.”145 The General Assembly defined a DNA profile as “an analysis that utilizes the restriction fragment length polymorphism analysis of DNA resulting in the identification of an individual’s patterned chemical structure of genetic information.”146 This “patterned chemical structure” described by the committee is the arrangement of DNA sequences resulting from the RFLP procedure.147 Thus, section 10-915 should logically be interpreted as eliminating the need for trial courts to conduct Frye-Reed hearings to determine whether the RFLP process resulting in the arrangement of DNA sequences has gained general acceptance in the scientific community. Yet the Armstead court gave a much broader interpretation to the statute than is warranted. The court held that the General Assembly intended for section 10-915 not only to apply to DNA profile evidence, but also to the underlying population statistics.148 The court also held that the statute eliminates much of a trial court’s discretionary gatekeeping functions.149

Because the General Assembly defined the scope of its Act, interpretation of the Act should be limited to that scope. The Frye standard of general acceptance determines the threshold issue of the reliability of the underlying scientific theory of proffered novel scientific evidence.150 The Court of Appeals recognized this aspect of the Frye test in Reed v. State151 when it stated the following:

Our adoption of the Frye standard does not, of course, disturb the traditional discretion of the trial judge with respect to the admissibility of expert testimony. Frye sets forth only a legal standard which governs the trial judge’s determination of a threshold issue. Testimony based on a technique which is found to have gained “general acceptance in the scientific community” may be admitted into evidence, but only if a trial judge also determines in the exercise of his discretion, as he must in all other instances of expert testimony, that the proposed testimony will be helpful to the jury, that the expert is properly qualified, etc. Obviously, however, if a technique

147. See NRC REPORT, supra note 10, at 57-59 (describing the identification of DNA patterns).
148. Armstead, 342 Md. at 79, 673 A.2d at 241.
149. Id. at 66, 673 A.2d at 235.
151. Id.
does not meet the *Frye* standard, a trial judge will have no occasion to reach these further issues.\footnote{152}{Id. (citation omitted).}

Although the standard is cited as the *Frye* standard of *admissibility*, it is applied in Maryland as a standard of *exclusion*.\footnote{153}{The satisfaction of the *Frye-Reed* test does not automatically render scientific evidence admissible in Maryland. After the test is satisfied, evidence may be admitted only after it is shown that the person using the technique was qualified and proper procedures were followed. See *5 McLain*, supra note 64, at § 401.4 (Supp. 1995) (discussing prerequisites for admissibility of scientific evidence in Maryland).}

The court interprets section 10-915 as predetermining the acceptance of DNA evidence in every case unless the evidence is either “not . . . helpful to the fact finder” or violates due process.\footnote{154}{*Armstead*, 342 Md. at 66, 673 A.2d at 235.}

At trial, Armstead claimed the right to a pretrial evidentiary hearing to determine the admissibility of the DNA evidence offered against him.\footnote{155}{Id. at 45, 673 A.2d at 224.}

The trial court held that section 10-915 precluded challenges to the admissibility of the DNA evidence and that Armstead's “constitutional arguments lacked merit.”\footnote{156}{Id. at 46, 673 A.2d at 225.}

Although the holding of the Court of Appeals goes a long way toward correcting the interpretive error of the trial court on this issue, its discussion leaves the issue somewhat clouded.

The appellate court agreed with Armstead's argument that the trial court retains some discretion to exclude DNA evidence if the procedures used do not measure up to procedural standards.\footnote{157}{Id. at 63, 673 A.2d at 233. The court emphasized that “trial courts still exercise an important function in determining whether DNA evidence is logically relevant to the case at hand.” Id. at 62, 673 A.2d at 233.}

According to the Court of Appeals, the trial court retains the discretion to exclude DNA evidence if it is found either not relevant or not “helpful to the factfinder.”\footnote{158}{Id. at 64, 673 A.2d at 234.}

Both standards find meaning in the Maryland Rules of Evidence.\footnote{159}{See Md. R. 5-702 and Md. R. 5-401.}

Pursuant to Maryland Rule 5-702, a trial court must make three findings when determining if proffered evidence will assist the trier of fact: (1) “the witness is qualified as an expert by knowledge, skill, experience, training, or education”; (2) expert testimony is appropriate on the particular subject under consideration; and (3) the expert testimony is supported by a sufficient factual basis.\footnote{160}{Md. R. 5-702; see Alan D. Hornstein, The New Maryland Rules of Evidence: Survey, Analysis and Critique, 54 Md. L. Rev. 1032, 1063 (1995) (discussing similarities between Maryland Rule 5-702 and Federal Rule 702).} The third prong of this “helpfulness” determination was at is-
The court wisely recognized that errors in the testing process may warrant the exclusion of DNA evidence. The court drew a distinction, however, between "procedural" errors and errors that it labeled as "measurement" errors.

b. Measurement Errors vs. Deviations from Accepted Testing Procedures.—The court implied that measurement errors do not warrant the exclusion of evidence. The presence of any errors, measurement or procedural, calls into question the foundational adequacy of proffered evidence. Regardless of whether the cited error may be categorized as measurement or procedural, the errors affect the reliability of the final expert opinion. The defendant should have the right to a hearing to determine if the proffered DNA test fully comports to the RFLP process, which was deemed by the legislature as generally accepted in the scientific community. The Armstead court held that such questions will ordinarily go to the weight of the evidence rather than its admissibility. In Evans v. State, however, the court rejected the proposition that "the adequacy of the basis for the opinion goes only to the weight to be given the testimony." Addi—

161. Armstead challenged the procedures used in the testing of the DNA used against him at trial, claiming that errors in the testing rendered the results of the test unreliable. Armstead, 342 Md. at 48-49, 673 A.2d at 225-26. Thus, Armstead questioned the adequacy of the foundation upon which prosecution experts declared a "match."

162. Id. at 64 n.18, 673 A.2d at 234 n.18 ("In determining whether an alleged error in DNA testing constitutes the type of error that warrants exclusion of DNA evidence, trial courts must distinguish mere measurement error, which is inherent in any scientific procedure, from deviations from accepted testing procedures.").

163. Id.
164. Id.
165. See Developments in the Law—Confronting the New Challenges of Scientific Evidence, 108 HArv. L. Rev. 1481, 1521 (1995) (commenting that judges should have the flexibility to weigh both the "facts" and the "methodology" of a procedure in order to determine its reliability).

166. See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994). In the Paoli case, the Third Circuit recognized that both types of errors affect the reliability of the expert's opinion. The court stated:

[It] is extremely elusive to attempt to ascertain which of an expert's steps constitutes part of a "basic" methodology and which constitute changes from that methodology. If a laboratory consistently fails to use certain quality controls so that its results are rendered unreliable, attempting to ascertain whether the lack of quality controls constitutes a failure of methodology or a failure of application of methodology may be an exercise in metaphysics.

Id. at 745.

167. See supra note 79 and accompanying text.
168. Armstead, 342 Md. at 66, 673 A.2d at 294.
170. Id. at 35, 585 A.2d at 209 (holding that if a party fails to provide an adequate basis for an expert's opinion, the opinion should not be admitted).
tionally, the trial court has the discretion to exclude expert testimony if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or waste of time.171

c. Weighing Probative Value and Unfair Prejudice.—The Court of Appeals, in upholding the trial court's finding that section 10-915 eliminates judicial discretion to exclude DNA evidence if its probative value is substantially outweighed by unfair prejudice,172 failed to consider the limited role of the Frye-Reed test. As noted earlier, the Frye-Reed test determines a threshold issue on which case-specific facts have no bearing.173 Central to the court's holding in Armstead was its conclusion that the legislature determined that the risk of unfair prejudice from DNA evidence does not outweigh its probative value.174 If this is true, it can only be valid in an abstract, theoretical sense. The probative value of DNA evidence is directly affected by the quality of the specific test performed.175 This quality can only be determined on a case-by-case basis.176 Curiously, the Court of Appeals noted in dictum that the Frye-Reed test serves the same purpose as weighing the probative value of scientific evidence against unfair prejudice.177 Thus, the court reasoned that, by making the Frye-Reed determination through section 10-915, the General Assembly also determined that

171. See Md. R. 5-403; see also State v. Allewalt, 308 Md. 89, 110, 517 A.2d 741, 752 (1986). The Allewalt court cautioned that a trial judge, after determining the Frye-Reed issue, but before admitting expert testimony concerning post-traumatic stress disorder, should "weigh the benefit of the evidence not only against potential unfair prejudice, but also against the complexity of possibly accompanying issues and against the time required properly to try the expanded case." Id.

172. Armstead, 342 Md. at 61-62, 673 A.2d at 232.

173. See supra note 44 and accompanying text.

174. Armstead, 342 Md. at 61-62, 673 A.2d at 232. The Armstead court stated that "by enacting § 10-915 and thereby eliminating Frye-Reed hearings, the General Assembly legislatively determined that the probative value of DNA outweighs any prejudicial effect." Id. at 61, 673 A.2d at 232.

175. Id. at 64 n.18, 673 A.2d at 234 n.18. The Court of Appeals quotes the National Research Council as stating:

The validity of [the] assumption ... that the analytical work done for a particular trial comports with proper procedure ... can be resolved only case by case and is always open to question, even if the general reliability of DNA typing is fully accepted in the scientific community. The DNA evidence should not be admissible if the proper procedures were not followed. Moreover, even if a court finds DNA evidence admissible because proper procedures were not [sic] followed, the probative force of the evidence will depend on the quality of the laboratory work. Id.; see also NRC REPORT, supra note 10 at 149 ("The adequacy of the method used to acquire and analyze samples in a given case bears on the admissibility of the evidence and should, unless stipulated, be adjudicated case by case.").

176. Armstead, 342 Md. at 64 n.18, 673 A.2d at 234 n.18.

177. Id. at 61, 673 A.2d at 232.
the probative value of DNA profile evidence is not outweighed by unfair prejudice. Through this line of reasoning, the court held that section 10-915 leaves the trial court no discretion to conduct such a weighing. United States v. Yee is the only support that the court cited for its conclusion that the trial court has no discretion to balance the probative value of DNA evidence against its prejudicial effect.

The court relied on a passage from Yee that was taken from a magistrate's recommendation to the district court in which the magistrate made a Frye-based recommendation. When taken out of context, the passage appears to stand for the proposition that the Frye doctrine serves the same purpose as Rule 403 of the Federal Rules of Evidence. The magistrate did conclude that the proffered evidence met the Frye general acceptance standard, but he refused to render an opinion on the weight of probative value against the prejudicial effect.

According to the magistrate, "the record is not ready for a Rule 403 analysis, which would appear of necessity to be case- and fact-specific." Thus, if the passage stands for anything, it stands for the exact opposite proposition from the Armstead court's holding. The question of weighing probative value against prejudicial effect is necessarily a case-specific inquiry. Such an inquiry cannot be pre-determined by the legislature.

178. Id.
179. Id. at 62, 673 A.2d at 232.
181. Armstead, 342 Md. at 61, 673 A.2d at 233.
182. Id. at 61, 673 A.2d at 232. The majority quoted the following passage: "The Frye doctrine developed . . . out of the same concerns that led to the adoption of Rule 403 [providing the authority to weigh probative value against prejudicial effect]: namely, the concern that lay jurors might be misled by testimony that was unfairly prejudicial, confusing, or misleading." Id. (quoting Yee, 134 F.R.D. at 212).
183. Yee, 134 F.R.D. at 162-63. Rule 403, see supra note 53, provides an exception to the admissibility of relevant evidence if a trial judge determines that its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay, waste of time, or the presentation of cumulative evidence.
184. See Yee, 134 F.R.D. at 213.
185. Id.
186. See Armstead, 342 Md. at 92, 673 A.2d at 248 (Bell, J., dissenting). In his dissent, Judge Bell noted the position of the Nebraska Supreme Court in State v. Houser, 490 N.W.2d 168 (Neb. 1992):

"The trial court, in determining admissibility of DNA evidence, must first be satisfied, and find, as to the general acceptance of relevant DNA theories in the scientific community and must be satisfied as to the acceptance and validity of the methodology of testing DNA used. The trial court then determines if specific procedures were properly followed in the case before the court. Id. at 181; see also United States v. Two Bulls, 918 F.2d 56, 61 (8th Cir. 1990) ("Although several courts have found DNA evidence to be admissible because it is reliable and generally accepted, many cases state that DNA evidence remains subject to attack based on preju-
Maryland Rule of Evidence 5-403 codified the common law rule that probative evidence may be excluded in the interest of avoiding unfair prejudice, waste of time, or confusion of the issues.187 These concerns apply no less to DNA evidence. In fact, due to the "conclusive" aura that surrounds the results, concerns of unfair prejudice and confusion of the issues should weigh more strongly when a court considers DNA evidence.188 The court overlooked two important points when it held that if errors in the testing procedures exist, the evidence should be admitted and the fact finder given the opportunity to weigh the evidence.189 First, the testing and determination of a DNA match require precision. Second, the DNA match is presented to the jury as nearly conclusive in terms of infinitesimally small probabilities of a false match. Even when errors occur in the process, the jury will likely only remember the one-in-a-billion odds of a random match.

d. Probability Statistics Are Necessary and Subject to Frye-Reed Analysis.—The court held that section 10-915 renders supporting probability statistics admissible as part of a DNA profile.190 The court premised this holding upon the conclusion that probability statistics are necessary in order to give a DNA profile meaning.191 The latter
conclusion directly opposes the position of the Court of Special Appeals in *Jackson v. State*\(^{192}\) that "[t]here was simply no need for the State to offer additional evidence, such as probability calculations, to establish that the testing procedures were reliable."\(^{193}\) In *Jackson*, the appellant argued that the trial court erred in allowing the admission of DNA profile evidence without supporting probability statistics.\(^{194}\) He claimed that "without proper evidence regarding the probability of a match, evidence that a match was declared has no relevance."\(^{195}\)

The Court of Appeals, in *Armstead*, reasoned that because probability statistics are necessary to give evidence of a DNA match meaning, the legislature must have intended section 10-915 to encompass the supporting probability statistics.\(^{196}\)

The court’s conclusion that evidence of a DNA match requires supporting probability statistics to be probative of a person’s identity is well founded. The additional conclusion that section 10-915 renders probability statistics admissible, however, is not. In a somewhat self-defeating move, the Court of Appeals rejected the holding of *Keirsey v. State*,\(^ {197}\) in which the Court of Special Appeals held that probability statistics are not subject to the *Frye-Reed* standard.\(^{198}\) Thus, in order for the legislature to have intended statistical evidence to be admissible under section 10-915, it would have had to determine the reliability of such statistics under the *Frye-Reed* standard. The statute refers only to “DNA profile” evidence, specifically naming the RFLP technique.\(^{199}\) There is no evidence in the language of the statute or legislative history indicating that the General Assembly contemplated the reliability of probability statistic methodologies.

Despite the fact that the *Armstead* court held that probability statistics are admissible under section 10-915, it nevertheless undertook a detailed analysis of the two methodologies challenged in the case—the “product rule” and the “ceiling principle.”\(^{200}\) The court, although holding that section 10-915 renders statistical evidence admissible, conducted a *Frye*-type analysis on the general acceptance of the prod-


\(^ {193}\) Id. at 324, 608 A.2d at 792.

\(^ {194}\) Id., 608 A.2d at 791.

\(^ {195}\) Id.

\(^ {196}\) *Armstead*, 342 Md. at 79, 673 A.2d at 241.


\(^ {198}\) *Armstead*, 342 Md. at 81 n.33, 673 A.2d at 242.


\(^ {200}\) *Armstead*, 342 Md. at 67-76, 673 A.2d at 235-40.
uct rule and declared the product rule generally accepted in the scientific community.\textsuperscript{201} This determination is not outside the province of the Court of Appeals. It is odd, however, that the court imputes this intention to the legislature. The question remains—what is the trial court to do when statistical evidence is proffered that is premised neither on the product rule nor the ceiling principle? The statute fails to mention probability statistics at all, much less statistics premised on any particular methodology. The court, in ruling that section 10-915 renders such evidence admissible, has left open the admissibility of statistical probability evidence that is premised upon theories that are not generally accepted.\textsuperscript{202}

The Court of Appeals's holding essentially renders probability statistics admissible per se.\textsuperscript{203} This holding incorrectly interprets the language and intent of the statute, as well as the current controversy over the methodology of deriving probability statistics. A review of the legislative history and the language of section 10-915 shows that the legislature was not considering probability statistics when it enacted the statute.\textsuperscript{204} Although the legislature chose not to make a Frye-type determination regarding probability statistics, the court made a detailed analysis of the level of "general acceptance" of the two methodologies used in \textit{Armstead}.\textsuperscript{205} The court determined that both methodologies

\textsuperscript{201} \textit{Id.} at 76, 673 A.2d at 240.

\textsuperscript{202} There exists a strong argument that the product rule currently is not generally accepted in the scientific community. \textit{See} NRC \textit{REPORT, supra} note 10, at 12. As noted earlier, the product rule is premised upon two assumptions, neither of which has been proven. \textit{See supra} notes 22-23. Thus, there remains strong opposition within the scientific community to its use. It is not a situation in which the results have been shown to be inaccurate, but more similar to the situation encountered by the Massachusetts court in \textit{Commonwealth v. Lykus, 327 N.E.2d 671 (Mass. 1975)}. There, the court admitted evidence testimony based upon voiceprint analysis, and Justice Kaplan, in his dissent, noted that "the decisions thus reflected less a consensus in the relevant scientific community [that the scientific method was reliable] than an absence of study on which an informed opinion could be based one way or the other." \textit{Id.} at 680 (Kaplan, J., dissenting).

The National Research Council has warned that the unmodified product rule may yield probability estimates that are inaccurate. \textit{See} NRC \textit{REPORT, supra} note 10, at 12-15 (discussing the need for the use of the conservative ceiling principle). The Court of Appeals dismissed the Council's finding, ignoring the warnings the court gave in \textit{Reed v. State, 283 Md. 374, 391 A.2d 364 (1978)}.

\textsuperscript{203} \textit{Id.} at 67-77, 673 A.2d at 235-40.


\textsuperscript{205} \textit{See} \textit{Armstead}, 342 Md. at 81, 673 A.2d at 242.
pass muster under Frye.\textsuperscript{206} The primary concern arising from this holding is that both statistical methodologies used by the Armstead court have not achieved "general acceptance" in the scientific community.\textsuperscript{207} The majority dismisses the persuasive authority that questions the reliability of such statistics.\textsuperscript{208}

5. Conclusion.—In Armstead, the Court of Appeals attempted to resolve the controversy regarding DNA evidence in Maryland courts. It did so by placing several pertinent issues under the umbrella of section 10-915. Unfortunately, though, the umbrella is not that broad. By concluding that the General Assembly intended to render probability statistics admissible, the court has left a decision-making void within its jurisprudence. Moreover, by holding that the trial court lacks discretion to apply Maryland Rule 5-403 to such cases, the Court of Appeals has left a void in the evidentiary safeguards that have long protected the rights of the accused in Maryland.

One cannot seriously dispute the general reliability of DNA evidence derived from the RFLP method, nor can the probative strength of such evidence in determining identity be contested. Yet no two cases are alike, nor are generally accepted methodologies always applied properly. When a trial court is confronted with DNA evidence about which there is a serious question of reliability, the evidence must now go to the jury unless the flaws are so extreme as to violate due process. There no longer exists any middle ground for the trial court to prevent possible unfair prejudice.

The issue on the reliability of probability statistics is unique. It is unique because the court has held that a concept was rendered "generally accepted" by the scientific community. As noted, section 10-915 deals with DNA evidence satisfying the Frye-Reed test. Premises and theories on population genetics are constantly changing. The General Assembly, having addressed none of the theories, has not determined the reliability of any population theory. Thus, despite the court's holding, it will remain incumbent upon trial courts to monitor the evolution of such theories and to evaluate critically the reliability

\textsuperscript{206} The majority held that section 10-915 renders probability statistics admissible, although it was the court's taking judicial notice of the reliability, not the legislature's. See \textit{id.} at 82, 673 A.2d at 242.

\textsuperscript{207} See NRC REPORT, \textit{supra} note 10, at 74-75.

\textsuperscript{208} Armstead, 342 Md. at 70-73, 673 A.2d at 237-38.
of new or mutated forms of DNA population genetics offered as the foundational basis for random match probabilities.

Kevin J. O'Connor
VI. FAMILY LAW

A. Resignation of Guardianship: The Applicable Standard and Its Implications

In In re Adoption/Guardianship No. 10935, the Court of Appeals held that the “best interests of the child” standard applies to petitions for resignation of guardianship. The court determined that resignation of guardianship is a separate issue from whether the guardian has assumed a duty of support. Thus the resolution of one issue does not influence the outcome of the other; the resignation of a guardian does not terminate a duty of support, if a duty of support has been assumed by the guardian.

The issue raised in In re Adoption/Guardianship No. 10935 was one of first impression in Maryland. This Note will argue that the court’s approval of the guardian’s petition for resignation was in the best interests of the children involved. Further, this Note will argue that there are few instances in which a court should reject a petition for resignation of guardianship. In granting the petition in this case, the court also guaranteed that the public policy of encouraging voluntary guardianship would not be adversely affected.

1. The Case.—In 1989, Carl and Mavis Bauer (the Bauers) petitioned the Circuit Court for Montgomery County for guardianship of three minor children, James, Charles, and Daniel. Ms. Bauer’s son, and Mr. Bauer’s stepson, Steven Fountain, had been the guardian of the three children since 1985. Steven had fathered both James and Daniel, while Charles was the child of Steven’s ex-wife, Annie Marie Geiger. Although Steven Fountain served as the court-appointed

2. Id. at 630, 679 A.2d at 537. The best interests standard is applied to all proceedings related to the guardianship of a child. Id. at 625, 679 A.2d at 534; see infra notes 51-54 and accompanying text.
3. In re Adoption/Guardianship No. 10935, 342 Md. at 629-30, 679 A.2d at 537.
4. Id. at 629, 679 A.2d at 536.
5. Id. at 618-19, 679 A.2d at 531. The Bauers had obtained the consent of the children’s natural parents before petitioning the court for guardianship and custody of the children. Id.
6. Id.
7. Id.
8. Id. Steven and Annie Marie married in 1979, and this marriage produced James. Id. Steven and Annie Marie divorced in 1982, and Annie Marie married John Geiger later that year. Id. While married to John Geiger, Annie Marie gave birth to Charles. Id. Thereafter, Annie Marie and John separated. Id. Steven and Annie Marie reunited and Daniel was born. Id. Annie Marie and Steven broke up shortly after Daniel’s birth, and following the break-up, Annie Marie moved to North Carolina, leaving all three children with Steven. Id.
guardian of the three minor children, the children lived primarily with Carl and Mavis Bauer. The petitions for guardianship filed by the Bauers stated that they sought guardianship so that they could cover the children under their "health insurance policy, provide schooling . . . and perform all other acts necessary to the raising of the [children]." Each petition also stated that the Bauers were "fully able to support the minor child," and that Steven Fountain had agreed to pay the Bauers one hundred dollars per month per child as child support. Annie Marie and John Geiger, the biological parents of Charles, consented to the appointment of the Bauers as guardians. The circuit court granted the petition for guardianship of the person of the three minor children on June 16, 1989.

In October 1994, Mr. Bauer petitioned the Circuit Court for Montgomery County to resign as co-guardian of the three children. Mr. Bauer had moved out of the family home in May of 1994, and Ms. Bauer filed for divorce, seeking alimony and child support. Mr. Bauer petitioned for resignation pursuant to sections 220 and 221 of the Estates and Trusts Article of the Maryland Code and Maryland Rule V81. Ms. Bauer opposed Mr. Bauer's petition for resignation as

9. Id. at 619, 679 A.2d at 531. Mavis Bauer asserted that the three children had lived with the Bauers most of their lives. Brief of Appellant at 3-5, In re Guardianship/Adoption No. 10935, 342 Md. 615, 679 A.2d 530 (1996) (No. 48). Carl Bauer asserted, however, that Steven Fountain lived with Carl and Mavis while Steven had custody and guardianship of the children and that Steven raised the children until he was incarcerated in 1993. In re Adoption/Guardianship No. 10935, 342 Md. at 620-21 & n.2, 679 A.2d at 532 & n.2.
10. Id. at 619, 679 A.2d at 531.
11. Id.
12. Id.
13. Id. at 618, 679 A.2d at 531. By that time, Annie Marie had remarried and still resided in North Carolina. Id. at 619, 679 A.2d at 531. John Geiger had moved to Pennsylvania. Id.
15. In re Adoption/Guardianship No. 10935, 342 Md. at 619, 679 A.2d at 531.
16. Id., 679 A.2d at 532.
17. Id., 679 A.2d at 531-32. Ms. Bauer sought a limited divorce on the ground of abandonment. Id. She also sought alimony and child support. Id. The divorce action was still pending in circuit court when the Court of Appeals decided this case. Id., 679 A.2d at 532.
18. Id. As the court pointed out, these sections of the Estates and Trusts Article apply to the resignation of a guardian of property and not to the resignation of a guardian of the person, and are thus not directly applicable to this matter. Id. at 623, 679 A.2d at 533. The court interpreted the petitions under the applicable sections of the Maryland Code dealing with guardianship of the person. See infra note 62 and accompanying text. Maryland Rule V81 applies to the resignation of a fiduciary. Md. R. V81.
co-guardian, arguing that Mr. Bauer had a duty to support the children. Ms. Bauer based her argument on equitable estoppel and contract theories. Further, Ms. Bauer asserted that it would not be in the best interests of the children to allow Mr. Bauer to resign as co-guardian and thereby shirk his duty to support them.

Mr. Bauer, on the other hand, denied having a duty to support the children. Mr. Bauer argued that "severe depression," caused by the demands placed upon him by Ms. Bauer to support her, her children, and her grandchildren, rendered him unable to function as a co-guardian. Mr. Bauer also argued that because he no longer resided in the family home and had to avoid the home due to Ms. Bauer's "aggressive behavior and emotional abuse," it was difficult to perform his duties as co-guardian.

At trial, counsel for Ms. Bauer agreed with the court that guardianship usually does not carry with it a duty of support. Her counsel also stated that, except for the duty of support, Ms. Bauer did not object to the resignation of Mr. Bauer as co-guardian. Having determined that the issue before the court was whether Mr. Bauer had a duty to support the minor children, the trial court found that "there was . . . no legal basis" to require support. Thus, the trial court granted Mr. Bauer's petition to resign as co-guardian without imposing a duty to support. Ms. Bauer appealed to the Maryland Court of Special Appeals. The Court of Appeals issued a writ of certiorari before the Court of Special Appeals commenced proceedings.

19. In re Adoption/Guardianship No. 10935, 342 Md. at 619, 679 A.2d at 532.
20. Id. at 620, 679 A.2d at 532. Ms. Bauer contended that Mr. Bauer had induced her, the children, and the children's parents to rely upon his "representations" that he would support the children, and, therefore, he should be estopped to resigning as guardian and denying his duty to support the children. Id. Mr. Bauer countered that he had never assumed the role of a father to the children, arguing that Steven Fountain had performed the role until his incarceration in 1993. Id. at 620-21, 679 A.2d at 532. Consequently, Mr. Bauer argued, he had no contractual or equitable duty to support the three children. Id. at 621, 679 A.2d at 532.
21. Id. at 620, 679 A.2d at 532.
22. Id. at 620-21, 679 A.2d at 532.
23. Id. at 621, 679 A.2d at 532. Mr. Bauer also attributed his condition to trauma resulting from Steven Fountain's having murdered his girlfriend. Id.
24. Id.
25. Id. at 621-22, 679 A.2d at 533.
26. Id. at 622, 679 A.2d at 533.
27. Id.
28. Id.
29. Id.
30. Id.
2. Legal Background.—A great number of cases have addressed termination of guardianship,31 but few cases have involved the resignation of a guardian. Due to the limited number of cases focusing on the resignation of a guardian, it is helpful to examine cases from both the early English common law and jurisdictions throughout the United States to fully understand the development of the law in this area.

   a. Early English Common Law.—In eighteenth-century England, a guardian generally could not resign or assign his guardianship. In Spencer v. Chesterfield,32 for example, although the court permitted the resignation of a testamentary guardian, the court pointed out that special circumstances justified its decision.33 The court specifically warned that courts should not regard the case as precedent for allowing guardians to resign in the future.34 Although in Spencer, the court permitted the guardian's resignation, in Shaftsbury v. Shaftsbury,35 the court held that a guardian in socage36 could never assign his guardianship.37 The court found that "the Guardian in Socage has no Interest of Profit; it is an Interest of Honour and for the Honour of the Family committed to his next of Kin, and therefore is inherent to the Blood, and can't be assignable."38

   b. United States.—In the late-nineteenth and early-twentieth centuries, courts in the United States held that a guardian did not have a common law right to resign.39 In Wackerle v. People,40 an Illinois
court held that a guardian could not resign at common law and that even pursuant to a statute authorizing resignation the guardian's right to resign was subject to the court's discretion and was not absolute.\textsuperscript{41} Similarly, in \textit{Young v. Lorain},\textsuperscript{42} the court observed that prior to a statute authorizing the resignation of a guardian for good cause a guardian had no right to resign.\textsuperscript{43}

Although a guardian did not have an absolute right to resign at common law, courts in many states eventually began to allow the resignation or termination of guardianships, either at the request of the guardian or at the request of a third party.\textsuperscript{44} These courts have exercised wide discretion in the granting of resignations or terminations.\textsuperscript{45} For example, in \textit{Young}, the court noted that although "the court of probate had power to remove the guardian, for good and sufficient reason, . . . the statute does not specify any particular reasons, but leaves the sufficiency of the cause with [the probate] court."\textsuperscript{46}

There are a number of cases in which the termination of a guardianship is at issue.\textsuperscript{47} At present, courts in most states permit the termination of a guardianship when it is in the best interests of the child or when there is good cause to do so.\textsuperscript{48} Few cases have arisen, however,
in which the guardian himself petitions the court for his resignation, and there are few if any reported cases that involve the resignation of a guardian when the ward is a child.

c. Maryland.—Prior to In re Adoption/Guardianship No. 10935, Maryland courts had not confronted a case involving the resignation of a guardian. Similarly, few Maryland cases exist that involve the termination of guardianship. Therefore, to determine if a guardian may resign, one must look to Maryland cases involving the appointment of guardians and to Maryland statutory law.

Maryland courts have made clear that the decision of whether to appoint an individual to the position of guardian depends upon the best interests of the ward. In Compton v. Compton, for example, the Court of Appeals stated that "[i]t is the duty of the Orphans court, in appointing his guardian, to consult the interests, rather than the wishes of the infant." In Sudler v. Sudler, the Court of Appeals

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See, e.g., In re Estate of Barth, 536 N.E.2d 973, 977 (Ill. App. Ct. 1989) (affirming the dismissal of a petition by a former guardian of property requesting that the resignation be vacated); State ex rel. McWilliams v. Armstrong, 9 S.W.2d 600, 602 (Mo. 1928) (en banc) (holding that the guardian of property did not resign and the probate court’s order to discharge him was void).


51. 2 Gill 241 (Md. 1844).

52. Id. at 253. The Court of Appeals dismissed an appeal from the Orphans Court contesting the appointment of someone other than the ward’s choice as guardian. Id.

53. 121 Md. 46, 88 A. 26 (1913).
noted that in controversies surrounding the appointment of a guardian, the best interests of the ward must be considered.\textsuperscript{54}

The statute governing guardianship in Maryland is found in section 13-702 (a) of the Estates and Trusts Article of the Maryland Code and reads as follows:

\textit{General rule}.—If neither parent is serving as guardian of the person and no testamentary appointment has been made, on petition by any person interested in the welfare of the minor, and after notice and hearing, the court may appoint a guardian of the person of an unmarried minor. If the minor has attained his 14th birthday, and if the person otherwise is qualified, the court shall appoint a person designated by the minor, unless the decision is not in the best interests of the minor. This section may not be construed to require court appointment of a guardian of the person of a minor if there is no good reason, such as dispute, for a court appointment.\textsuperscript{55}

Unfortunately, the statute does not clarify whether a guardian may resign, nor does it reveal the standard a court should apply to decide if resignation should be permissible. In \textit{Wentzel v. Montgomery General Hospital, Inc.},\textsuperscript{56} the court asserted that the Maryland legislature purposely did not define the duties and powers of a guardian in section 13-702 to afford courts the freedom to make decisions based on the minor's best interests.\textsuperscript{57} The \textit{Wentzel} court specifically stated:

In enacting § 13-702, expressly recognizing the authority of circuit courts to appoint a guardian of the person of a minor, but without delineating the guardian's powers and duties, the legislature intended that circuit courts would exercise their inherent equitable jurisdiction over guardianship matters pertaining to minors, adopting standards with respect thereto as would be consistent with and in furtherance of the incompetent ward's best interests.\textsuperscript{58}

\textsuperscript{54} \textit{Id.} at 56, 88 A. at 30. The Court of Appeals held that the Orphans Court located in the ward's domicile at the time of the death of the ward's mother had jurisdiction to appoint a guardian. \textit{Id.}

\textsuperscript{55} \textit{Md. Code Ann., Est. & Trusts} § 13-702(a) (1991). There is also a statute in the Family Law Article that pertains to the head of a child placement agency petitioning for guardianship and discusses the implications and rights of all parties involved. \textit{Md. Code Ann., Fam. Law} § 5-317 (1991). Because the children in this case were not taken from their parents by a child placement agency, this Note deals only with section 13-702 of the Estates and Trusts Article.

\textsuperscript{56} 293 Md. 685, 447 A.2d 1244 (1982).

\textsuperscript{57} \textit{Id.} at 701-02, 447 A.2d at 1252-53.

\textsuperscript{58} \textit{Id.} at 701, 447 A.2d at 1252.
Although *Wentzel* dealt with the appointment of a guardian for the sole purpose of consenting to a medical procedure for a mentally incompetent individual, the court's interpretation of section 13-702 is relevant to guardianship in general. It logically follows from the early cases and the interpretation of section 13-702 that any decision regarding guardianship should be governed by the "best interests" standard.

3. The Court's Reasoning.—The Court of Appeals affirmed the grant of Mr. Bauer's petition for resignation of guardianship and held that any duty to support the children constituted an entirely separate issue. Relying on *Wentzel*, the court found that the standard to apply in guardianship cases arising under section 13-702 was the best interests of the child standard.

The court recognized that the resignation of guardianship issue was one of first impression in Maryland. After examining the evolution of law in other states, however, the court concluded that the petition should be granted if it served the best interests of the children. The court first looked to English common law and found that, originally, a guardian did not have a right to resign. The court then examined the law of other jurisdictions in the United States and found that, although a guardian did not possess an absolute right to resign at common law, the authority suggested that a guardian should be allowed to resign if good cause exists or if resignation is in the best interests of the child. Further, the court stated that both common sense and the child's best interests would ordinarily lead to the conclusion that a court should grant a petition to resign as guard-

59. *Id.* at 701-02, 447 A.2d at 1252-53.
60. *In re Adoption/Guardianship No.* 10935, 342 Md. at 629-30, 679 A.2d at 537.
61. See *supra* note 58 and accompanying text for the quoted passage from *Wentzel* on which the Court of Appeals relied.
62. *In re Adoption/Guardianship No.* 10935, 342 Md. at 624-25, 679 A.2d at 534.
63. *Id.* at 625, 679 A.2d at 534.
64. *Id.* at 625-27, 679 A.2d at 534-35. The court distinguished the different types of guardianship and the rules that applied to the resignation of those guardians. *Id.*; see *supra* notes 32-38 and accompanying text.
65. *In re Adoption/Guardianship No.* 10935, 342 Md. at 627, 679 A.2d at 535 (relying on *Wackerle v. People*, 48 N.E. 123 (III. 1897); *Young v. Lorain*, 11 Ill. 625 (1850); *Evans v. Johnson*, 19 S.E. 623 (W. Va. 1894)); see *supra* note 39 and accompanying text.
66. *In re Adoption/Guardianship No.* 10935, 342 Md. at 627-28, 679 A.2d at 535-36 (relying on *Jain v. Priest*, 164 P. 364 (Idaho 1917); *Wackerle*, 48 N.E. at 123; *In re Guardianship of Huntsman*, 21 N.W. 555 (Minn. 1884); *Ex parte Crumb*, 2 Johns. Ch. 439 (N.Y. Ch. 1817); *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. 166 (N.Y. Ch. 1814); *In re Wachter*, 149 A. 315 (Pa. 1930) (per curiam); *In re Dixon's Estate*, 9 Pa. D. & C. 79 (1927)).
ian "when the guardian is unwilling to continue serving in that capacity."67

After deciding that the best interests of the child standard should apply to petitions for resignation of guardianship, the court considered whether Mr. Bauer had assumed a duty to support the three children and, if so, whether his resignation would terminate that duty.68 The court observed that, depending upon the circumstances, a guardian may or may not have assumed a duty of support.69 The court pointed out that Maryland courts have held that even an individual who is neither a parent nor a court-appointed guardian may in some instances acquire a duty to support a child.70 On the other hand, Maryland courts have also appointed guardians "simply for the purpose of making a particular type of decision for that minor."71 In such cases, the guardian has no duty to support.72 Thus, the mere appointment of an individual as guardian, the court held, does not create a presumption of a duty to support.73 The court found that the two issues are entirely separate.74 If Mr. Bauer had assumed a duty of support, his resignation as co-guardian would not relieve Mr. Bauer of that duty.75

The court determined that only the best interests of the child or good cause should be considered in granting or denying a guardian's petition to resign.76 Thus, the court found that the trial court erred when it considered the duty to support issue as a factor in determining whether to grant Mr. Bauer's petition to resign as co-guardian.77 Because the sole consideration in granting or denying such a petition is good cause or the best interests of the child, the court held that the support issue should be resolved in the parties' pending divorce proceedings.78 The court stated that although proper judicial procedure requires that the issue of guardianship be remanded to determine the

67. Id. at 627, 679 A.2d at 536.
68. Id. at 628, 679 A.2d at 536.
69. Id.
70. Id. (relying on Brown v. Brown, 287 Md. 273, 288, 412 A.2d 396, 404 (1980) (holding that a stepfather who contractually assumed the duty of support for a stepchild could not be incarcerated for failing to fulfill that obligation)).
71. Id. (relying on Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 447 A.2d 1244 (1982)).
72. Id.
73. Id. at 629-30, 679 A.2d at 537.
74. Id. at 629, 679 A.2d at 536.
75. Id.
76. Id.
77. Id. at 680, 679 A.2d at 537.
78. Id.
best interests of the children, in this instance the court would not do so because Ms. Bauer had agreed that the court should grant the petition so long as the support issue was not affected. The court found that due to Mr. Bauer’s wish to resign as co-guardian and Ms. Bauer’s desire to remain guardian, “good cause and best interests of the children required the granting of the petition.” The Court of Appeals then affirmed the circuit court’s order granting Mr. Bauer’s petition to resign as co-guardian while modifying the order so as to exclude the “duty to support issue.”

4. Analysis.—The court’s decision to allow an individual to resign as co-guardian invites several important questions. First, was the court correct to separate the issue of support from the issue of resignation? Second, what factors determine the best interests standard in a guardianship resignation case? Third, is it ever in a child’s best interests to force someone to remain a guardian? Finally, what implications will the court’s decision have with respect to children, voluntary guardianship, and future cases?

a. Separating the Resignation of a Guardian from the Duty to Support.—The court correctly held that a guardian does not assume the duty to support a minor simply by virtue of being appointed guardian. Individuals may assume a duty to support a child with or without being appointed guardian. The Maryland case law and the law

79. Id. at 630-31, 679 A.2d at 537. The court pointed out that normally it would remand a case when the trial court had applied an erroneous standard. Id. at 630, 679 A.2d at 537. Noting that usual practice dictates the affirmance of summary judgment based only on the grounds put forth by the trial court, the court held that the unusual circumstances of the case permitted the court’s making an exception. Id. at 630-31, 679 A.2d at 537.
80. Id. at 631, 679 A.2d at 537.
81. Id.
82. Id. at 628-29, 679 A.2d at 536.
83. Id. at 628, 679 A.2d at 536.
of other states agree on this point.\textsuperscript{84} No correlation exists between a duty to support and guardianship.\textsuperscript{85} Whether an individual has a legal duty to support a child depends on the relationship between the child and that individual. It is well established in Maryland that both parents are jointly and severally liable for, and have a legal and moral duty to support, their children.\textsuperscript{86} Section 1-205 of the Estates and Trusts Article defines a child to include “a legitimate child, an adopted child, and an illegitimate child to the extent provided in §§ 1-206 through 1-208 of this title. A child does not include a stepchild, a foster child, or a grandchild or more remote descendant.”\textsuperscript{87} The fact that an individual assumes guardianship of a child does not, under the Maryland statutory or case law, make the child a “legal child” for the purpose of creating a duty to support. Thus, if a guardian has a duty to support a child, it does not arise from his status as guardian, but arises under equitable estoppel or other contract theories. Resigning as guardian, therefore, will not terminate an assumed duty to support. The court was correct in separating the duty to support from the resignation of guardianship, as the duty to support should be resolved in the divorce proceedings, not in the proceeding to terminate guardianship.

\textbf{b. The “Best Interests” Standard.}—In all child custody cases, including petitions for sole custody, joint custody, and guardianship, Maryland courts apply the best interests standard.\textsuperscript{88} A court must con-

\textsuperscript{84} See, e.g., Knill v. Knill, 306 Md. 527, 538-39, 510 A.2d 546, 552 (1986) (refusing to equitably estop petitioner to denying support to a child who was not his own, even though the petitioner held the child out as such); Bledsoe v. Bledsoe, 294 Md. 183, 194, 448 A.2d 353, 359 (1982) (holding that petitioner’s wife was not entitled to use of the family home for petitioner’s stepchildren because stepchildren were not included within the scope of a statute permitting a spouse with custody of children to retain the family home to protect the best interests of natural or adopted children); Brown v. Brown, 287 Md. 273, 284, 412 A.2d 396, 402 (1980) (holding that a stepfather cannot be incarcerated for failing to honor a contract to support his stepchild because a contract to support is not the same as the duty of support owed by a parent to a “legal child”); Miller v. Miller, 478 A.2d 351, 357-58 (N.J. 1984) (holding that an obligation of support may arise for a stepchild on the basis of equitable estoppel if the stepparent’s conduct establishes “representation, reliance, and detriment”).

\textsuperscript{85} In re Adoption/Guardianship No. 10935, 342 Md. at 628, 679 A.2d at 536.


sider all relevant factors to determine what is in the best interests of the child. In Taylor v. Taylor, the court noted that "[f]ormula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made." In Ross v. Hoffman, the Court of Special Appeals commented that it would not create set criteria to judge child custody cases because custody determinations require case-by-case analysis. Although "[t]he definition of a child's best interest is an elusive one," the best interests standard appears to be whatever the court perceives would be the most beneficial and least detrimental situation for the child.

The best interests standard gives a trial court a great deal of discretion. Although in some cases this discretion may lead a court to decide a case based on prejudices and bias, adhering to an inflexible list of factors in child custody or guardianship cases would most likely cause greater injury. Because every custody case involves unique circumstances, the court must exercise broad discretion.

c. The "Best Interests" Standard and the Resignation of a Guardian.—In In re Adoption/Guardianship No. 10935, the Court of Appeals failed to list factors or set forth guidelines to aid future trial courts in determining when a guardian’s resignation would be in a child’s best interests. The court did not explain why it thought the granting of Mr. Bauer’s petition for resignation as co-guardian was in the best interests of the children involved, other than to comment that common sense required it. The lack of applicable statutory or case law (in

Md. 172, 175, 372 A.2d 582, 585 (1977) (stating that the best interests of the child standard controls in child custody disputes between the biological parents or between a biological parent and a third party); Skeens v. Paterno, 60 Md. App. 48, 61, 480 A.2d 820, 826 (1984) ("Under any circumstances, the ultimate test for custody and visitation is the best interests of the child.").

89. See Taylor, 306 Md. at 303, 508 A.2d at 970 ("The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.").
90. 306 Md. 290, 508 A.2d 964 (1986).
91. Id. at 303, 508 A.2d at 970.
93. Id. at 343, 364 A.2d at 602.
95. See In re Adoption/Guardianship No. 10935, 342 Md. at 627-29, 679 A.2d at 596. The court stated that "the authorities, as well as common sense, support the position that ordinarily it is in the best interests of the minor to permit a guardian to resign when the guardian is unwilling to continue serving in that capacity." Id. at 627, 679 A.2d at 596. In deciding that the case should not be remanded, the court further stated that because Mr. Bauer wished to resign as co-guardian and Ms. Bauer wished to remain a guardian of the
Maryland and in other states) concerning the resignation of a guardian is likely due to the infrequency with which guardians voluntarily resign. Thus, it is necessary to look to analogous cases to determine if it would ever be in the best interests of a child to require an individual to remain a guardian when that individual wishes to resign.

Joint custody, grandparental visitation, forced visitation, and abrogation of adoption cases offer some helpful insight to this difficult question. Had the court denied Mr. Bauer's petition, Mr. and Ms. Bauer would have remained co-guardians of the children—a situation bearing some resemblance to cases in which joint custody or grandparental visitation is awarded to an individual living outside the family home. Courts could apply the same factors used to determine the appropriateness of joint custody or grandparental visitation to decide if the resignation of a co-guardian would be in a child's best interests.

In deciding whether to award joint custody, the Taylor court declared that the most important factor is the "[c]apacity of the [p]arents to [c]ommunicate and to [r]each [s]hared [d]ecisions [a]ffecting the [c]hild's [w]elfare." The court cautioned that "[r]arely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child." Analogizing from the joint custody context, it is clear that communication problems between co-guardians would make it unlikely that continued guardianship involving a reluctant guardian would be in the best interests of a child. It is likely that the parties in In re Adoption/Guardianship No. 10935 would not have communicated effectively or conducted themselves on a mature level due to the deterioration of their marital relationship. Thus, without considering other factors enumerated by Maryland courts to determine whether joint custody is in a child's best interests, it appears that forcing Mr.

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96. Taylor, 306 Md. at 304, 508 A.2d at 971.
97. Id. Further, the Taylor court stated: "Only where the evidence is strong in support of a finding of the existence of a significant potential for compliance with this criterion [i.e., the capacity of the parents to communicate and reach shared decisions affecting the child's welfare,] should joint legal custody be granted." Id. at 307, 508 A.2d at 972.
98. See supra notes 17-24 and accompanying text.
99. The other factors listed by the Taylor court to be considered in joint custody cases are: (1) "willingness of parents to share custody"; (2) "fitness of parents"; (3) "relationship established between the child and each parent"; (4) "preference of the child"; (5) "potential disruption of child's social and school life"; (6) "geographic proximity of parental homes"; (7) "demands of parental employment"; (8) "age and number of children"; (9)
Bauer to remain co-guardian would not have been in the best interests of James, Charles, and Daniel.

Similarly, in grandparental visitation cases, the courts have enumerated factors to use in determining whether grandparental visitation would be in the best interests of a child. As in joint custody cases, courts consider factors such as the relationship between the person who has custody of the child and the person who has requested visitation with the child. In discussing the factors to be considered in grandparental visitation cases, the Court of Appeals has warned that "trial court[s] should also be alert to the psychological toll the visitation dispute itself might exact on a child in the midst of contesting adults." Employing this "potential for conflict" factor in the Bauers' situation would have been helpful in a best interests analysis. Although a trial court using this test would likely have reached the same result as the Court of Appeals, the articulation of relevant factors to consider would have assisted future determinations.

Just as a court is concerned in joint custody and grandparental visitation cases about the damage done to a child when the parties are incommunicative and hostile, courts are also concerned about the potential emotional trauma to a child in forced visitation situations. Thus, in guardianship resignation cases, a court must consider whether it would be in the child's best interests to force a guardian to remain a part of a child's life. In a situation such as this, the factors used to award joint custody or grandparental visitation are no longer adequate to determine what is in the child's best interests.

(i) Forced Visitation.—In co-guardianship situations, in which another party is caring for the child and able to make decisions for the child, the only logical explanation for the denial of a resignation

"sincerity of parent's request"; (10) "financial status of the parents"; (11) "impact on state or federal assistance"; (12) "benefit to parents"; and (13) "other [unenumerated] factors." Taylor, 306 Md. at 307-11, 508 A.2d at 972-74.

100. Fairbanks v. McCarter, 330 Md. 39, 50, 622 A.2d 121, 126-27 (1993). The other factors set out in Fairbanks are:

[1] the nature and stability of the child's relationships with its parents; [2] the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together; [3] the potential benefits and detriments to the child in granting the visitation order; [4] the effect, if any, grandparental visitation would have on the child's attachment to its nuclear family; [5] the physical and emotional health of the adults involved; and [6] the stability of the child's living and schooling arrangements.

Id., 622 A.2d at 126-27.

101. Id. at 50, 622 A.2d at 127.

102. See infra note 103 and accompanying text.
petition would be that the child's best interests require that the child have contact with that individual. This would be equivalent to ordering forced visitation between the guardian and the child. In joint custody and grandparental visitation cases, all of the parties want to be involved in the child's life—a vastly different situation than one in which a person no longer wants to be involved in the child's life.

Forced visitation cases are difficult for two reasons. First, courts are often concerned about the psychological effects of requiring visitation.\(^\text{103}\) Second, in some jurisdictions, it is unclear whether a court can enforce such an order.\(^\text{104}\)

Assuming that Maryland courts have the authority to force a guardian to visit a child, it is questionable whether doing so would ever be in the best interests of a child. There are obvious differences between a parent and a guardian, but it is hard to imagine how a child would benefit from visitation with someone who did not desire to see the child. The guardian might manifest resentment toward the child in the form of inadequate care or verbal or physical abuse. Common sense dictates that forcing someone to remain a part of a child's life is not in the best interests of that child.

\(^{103}\) See, e.g., In re J.C., 617 N.E.2d 1378, 1381 (Ill. App. Ct. 1993). In this case, an Illinois appeals court affirmed a trial court's decision to order a mother who wished to terminate her parental rights to visit her daughter. \textit{Id.} at 1380-81. Originally, the child had been in the custody of her father. \textit{Id.} at 1378. After learning that the father had physically abused the child and that the mother had neglected her, however, the trial court placed the child in the custody of a guardian. \textit{Id.} at 1379. Nevertheless, fearing that the child would blame herself for what had been done, the trial court held that the best interests of the child required that the mother visit her. \textit{Id.} at 1380-81; see also Lumpkin v. Gregory, 559 S.W.2d 151, 153 (Ark. 1977) (en banc) (holding that forced visitation would not serve the best interests of the child because the child feared her father). But see Stringfellow v. Stringfellow, 553 So. 2d 1161, 1162-63 (Ala. Civ. App. 1989) (holding that the children could be forced to visit with the father even though one of the children testified that she feared him).

\(^{104}\) See, e.g., Hamilton v. Hamilton, 667 N.E.2d 1256, 1258 (Ohio Ct. App. 1995) (per curiam), \textit{appeal denied}, 662 N.E.2d 27 (Ohio 1996). In \textit{Hamilton}, an Ohio appeals court reversed the decision of a trial court ordering a father to regularly visit his severely disabled daughter. \textit{Id.} at 1258. The mother of the child had sought an increase in child support, arguing that due to the child's need for around-the-clock care, the court should require that the child's father both pay additional support and help care for the child. \textit{Id.} The trial court ordered an increase in support and that the father take on additional caretaking responsibilities. \textit{Id.} at 1259. The appeals court upheld the increased support, but would not force a non-custodial parent to visit with the child on the ground that visitation was a right and not a duty. \textit{Id.} at 1260.
(ii) Abrogation of Adoption.—Perhaps the situation most similar to the resignation of guardianship is the abrogation of adoption. Although abrogation of adoption more closely resembles resignation of guardianship than joint custody or grandparental visitation, the difference between abrogation of adoption and resignation of guardianship cannot be overlooked. An adopted child becomes the "legal child" of the adoptive parent, and all of the duties that are owed to a biological child by biological parents are owed to an adopted child by an adoptive parent.\textsuperscript{105} Guardianship does not carry all of these duties and responsibilities. Thus, it is appropriate that courts make it more difficult to abrogate an adoption than to terminate a guardianship.

In cases in which only one adoptive parent wishes to abrogate the adoption, the adoptive parents have usually separated, and the non-custodial parent requests the abrogation.\textsuperscript{106} Courts have been reluctant to grant petitions for abrogation of adoption because, if the abrogation is granted, the duty to support the child also terminates.\textsuperscript{107} Although these cases resemble guardianship resignation cases, they differ in that an additional factor—the duty to support—is introduced into the best interests determination for abrogation cases. Thus, the decision to grant or deny a petition to abrogate does not rest solely on the determination that continued contact with the parent seeking abrogation would be in the child's best interests as it would in guardianship resignation cases. The duty to support issue, which significantly influences court decisions in abrogation cases, therefore renders a comparison of analysis between abrogation and guardianship virtually useless.

Although courts have held that abrogation of adoption should not be permitted unless some type of fraud or misrepresentation has taken place,\textsuperscript{108} abrogation of adoption has been permitted when the child has abandoned the adoptive parents or the child has seriously misbehaved.\textsuperscript{109} Courts have also allowed abrogation of adoption when it was in the best interests of the child.\textsuperscript{110} One New York court

\textsuperscript{105} See supra note 87 and accompanying text.
\textsuperscript{106} See \textit{In re Sherman's Adoption}, 78 N.Y.S.2d 794, 797 (Surr. Ct. 1948) (denying the petition by the adoptive father to abrogate the adoption).
\textsuperscript{107} Id. at 796.
\textsuperscript{108} See \textit{In re Adoption of L.}, 151 A.2d 435, 437 (N.J. Essex County Ct. 1959) (denying abrogation of adoption on grounds that it would not serve the best interests of the child and because there was no contention that there had been fraud or misrepresentation).
\textsuperscript{109} See, e.g., \textit{In re Souers}, 238 N.Y.S. 738, 744 (Surr. Ct. 1930) (approving the petition for abrogation of adoption due to the child's ill behavior and abandonment of his adoptive parents).
\textsuperscript{110} See \textit{M.L.B. v. Department of Health and Rehabilitative Servs.}, 559 So. 2d 87, 89 (Fla. Dist. Ct. App. 1990) (Nesbitt, J., concurring) (stating that the trial court must consider
has held that in deciding whether to grant a petition for abrogation of adoption, a court must consider the best interests of both the parents and the best interests of the child, but the best interests of the child are the primary concern. Courts have not enumerated factors to consider in determining when abrogation is in the best interests of a child, nor have they given any clear rules to follow. The court in In re Adoption of L. stated:

[C]ourts will not allow an abrogation of an adoption if it is premised on the desire of the foster parents to rid themselves of a "bad bargain" or a change in heart on the part of the natural parents. The courts have uniformly agreed that a mere change in attitude or regret does not of and in itself constitute proper grounds for annulment.

Although it is unclear when a court will abrogate an adoption, it is clear that a court will allow an adoption to be abrogated if it is in the best interests of the child. Because the courts have broad discretion in child custody cases, it is conceivable that a court could remove the child from the adoptive home and place the child with a guardian, but still deny the petition to abrogate the adoption, thereby continuing the duties of the adoptive parents while also ensuring proper care for the child. This option is not available in resignation of guardianship cases simply because the guardianship must be terminated to place a child with another guardian. The different legal obligations of adoptive parents could allow the court to require that adoptive parents support a child that may not be in their care. This possibility may make courts less likely to abrogate an adoption than to approve a guardianship resignation.

Adoptive parents, unlike guardians, make a lifelong commitment to a child, and they have the duty to support that child. Accordingly, the resignation of guardianship should be subject to a less scrutinizing inquiry than the abrogation of adoption. Courts have occasionally determined that abrogation of adoption is in the best interests of a child even when that meant terminating all duties that the adoptive parent

whether abrogating the adoption would be in the best interests of the child); In re Anonymous, 952 N.Y.S.2d 743, 745 (Surr. Ct. 1968) (holding that it would be in the best interests of the child to abrogate the adoption). Even in cases in which fraud or misrepresentation had been found on the part of the adoptive parents, courts have been reluctant to abrogate the adoption if it is not in the best interests of the child. See, e.g., In re Abrogation of Adoption of G.B.W., 345 N.Y.S.2d 888, 889 (Fam. Ct. 1973).

111. In re Buss, 254 N.Y.S. 852, 853 (App. Div. 1932) (holding that the adoption would not be abrogated because the child's behavior could not be considered ill behavior).

112. In re Adoption of L., 151 A.2d at 437.
owed to the child. If adoptive parents are adamant in their desire to abrogate an adoption, it is likely that a court would take the child from the parents and place the child with a guardian, citing concern for the child’s welfare. Any refusal to abrogate the adoption in such a case would have to rest on financial considerations, which are not relevant to resignation of guardianship. If the best interests of the child required the abrogation of adoption, then it certainly would require allowing a guardian to resign. Guardianship does not carry with it the duties and responsibilities that adoption carries. Thus a guardian should be permitted to resign to serve the best interests of the child.

d. Policy Considerations.—In determining that a guardian should be permitted to resign if the resignation is in the best interests of the child, or for good cause, the Court of Appeals avoided a severe blow to the institution of voluntary guardianship. Forbidding a guardian to resign would essentially make guardianship a compulsory, lifelong commitment. There is no doubt that if it were impossible or extremely difficult to resign as guardian, people would be less willing to become guardians. In addition, one has to question the quality of care a guardian would provide if forced to care for a child, against the guardian’s wishes. The child would undoubtedly suffer, if not from lack of care, then from possible resentment directed at the child.

To ensure the continuation of voluntary guardianship, and to protect the child, a petition for resignation of guardianship should be granted even if the child must become a ward of the state. The best interests of the child and the public policy of encouraging voluntary guardianship require the granting of a petition for resignation of guardianship.

5. Conclusion.—The Court of Appeals properly separated the issues of resignation of guardianship and the duty to support. The separation of these issues left little doubt that the petition for resignation should be granted. The best interests standard, which governs all situations dealing with child custody, requires that a petition for resignation be granted in almost any case. A decision to deny a petition for resignation of guardianship would have a chilling effect on voluntary guardianship, thus leaving little choice but to grant the petition. Furthermore, concern about the quality of care that a child would receive

113. See supra notes 108-109 and accompanying text.
from a "forced" guardian strongly suggests that a petition for resigna-
tion of guardianship be granted.

Tammy L. Griffin

B. Court-Imposed Grandparental Visitation of Children in Intact
Nuclear Families

In Maner v. Stephenson, the Court of Appeals held that grandpar-
ents have a statutory right to petition for visitation of grandchildren in
an intact nuclear family. The court specifically declined to recognize
a rebuttable presumption in favor of grandparents. Rather, the court
held that determinations concerning the propriety of grandparental
visitation are within the discretion of the trial court, which must ad-
minister rulings in accordance with the "best interests of the child"
standard. Maner represents the first time the Court of Appeals has
addressed whether parents of an intact nuclear family may bar contact
between their children and their children's grandparents. Because
the grandparents in Maner failed to show that visitation was in the best
interests of the children, the court properly denied the grandparents'
petition for visitation. This decision leaves unresolved, however, the
more fundamental issue of whether Maryland's grandparental visita-
tion statute is constitutional as applied to intact nuclear families.

1. The Case.—Kita and Jim Stephenson (the Stephensons) had
been married for thirteen years and were raising their two children,
Katie and Trey. The family lived together in Salisbury, Maryland, as

2. Id. at 467-68, 677 A.2d at 563 ("The plain language of [Section 9-102 of the Family
Law Article] ... clearly reflects the legislature's intent to allow courts to grant grandpar-
ents visitation, even where the parents' marriage is intact, if it is in the best interests of the
children.").
3. See id. at 470, 677 A.2d at 564 ("[C]ourts may not apply a rebuttable presumption in
favor of grandparent visitation. Nothing in the language of the statute or the legislative
history supports such a presumption.").
4. See id. at 469, 677 A.2d at 564 ("[D]eterminations concerning visitation are within
the sound discretion of the trial court as it is in the best position to assess the import of the
particular facts of the case and to observe the demeanor and credibility of the witnesses."
(quoting Beckman v. Boggs, 337 Md. 688, 703, 655 A.2d 901, 908 (1995))).
5. See Reporter's Official Transcript of Proceedings at 99-100, Maner v. Stephenson,
342 Md. 461, 677 A.2d 560 (Md. 1996) (No. 113). Herein, the term "intact nuclear family"
refers to a family consisting of a mother and father who are married, have a dependent
minor child or children, and are not separated or seeking separation or divorce. Excluded
from the scope of this Note are issues concerning visitation in non-intact marriages—mar-
rriages in which the spouses disagree about grandparental visitation, children's rights, fam-
ily definition, and issues concerning grandparents who are acting, or have acted in loco
parentis.
did Kita's parents, Arnold and Barbara Maner (the Maners). The children enjoyed "a loving and healthy relationship with their parents." By all accounts, however, Kita and her mother, Barbara, had suffered a strained relationship since Kita's childhood, and the relationship did not improve when Kita reached adulthood. The relationship between the Maners and the Stephensons deteriorated to such an extent in 1993 that the Stephensons eventually denied the Maners all regular visits with Katie and Trey beginning in October of that year. On July 14, 1994, the Maners filed a petition for visitation in the Circuit Court for Wicomico County. In their original answer, the Stephensons acknowledged the importance of maintaining the grandparent-grandchild relationship and, thus, allowed the Maners to visit with the children on five occasions after the Maners had filed the petition for visitation. The Stephensons later amended their answer and requested that the court deny the Maners' petition.

Because the case involved an intact nuclear family, the circuit court judge described it as "one of first impression, because former grandparent visitation cases did not involve intact nuclear families." The judge, nevertheless, found that the legislature intended the grandparental visitation statute "to permit grandparents to petition for visitation of grandchildren in both dissolved and intact nuclear families." The circuit court denied the grandparents' petition, noting that any decision concerning grandparental visitation of grandchildren "lies within the sound discretion of the trial court, guided solely by the best interests of the grandchild." Applying this standard, the court reasoned that "the children's relationship with their parents [was] substantial and stable," while the association with the grandparents had been "at best sporadic" and irregular. The court concluded that a grant of visitation under these circum-

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6. Mane, 342 Md. at 462-63, 677 A.2d at 560-61.
7. Id. at 463, 677 A.2d at 561.
8. See id. at 464, 677 A.2d at 561. The court found that the grandmother was critical of her daughter in front of the children, that the mother described the grandmother as a "relationship destroyer," that the mother felt dominated by the grandmother, and that the grandmother displayed favoritism toward Kita's brother and sister-in-law. Id.
9. Id.
10. Id. at 463, 677 A.2d at 561.
11. Id.
12. Id.
13. Id. at 464, 677 A.2d at 561.
14. Id. at 464-65, 677 A.2d at 561.
15. Id. at 466, 677 A.2d 562.
16. Id. at 465, 677 A.2d at 562.
17. Id.
18. Id.
stances "would have a deleterious effect on the nuclear family."\textsuperscript{19} The court also indicated concern for "the psychological toll [the] visitation dispute itself might exact on a child in the midst of contesting adults."\textsuperscript{20} The Maners appealed to the Court of Special Appeals, but before the Court of Special Appeals considered the case, the Court of Appeals issued a writ of certiorari\textsuperscript{21} to decide whether the trial court had erred in denying the grandparents' petition.\textsuperscript{22}

2. Legal Background.—

\textit{a. The Constitution and Parental Privacy Rights.—}The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."\textsuperscript{23} The federal courts have developed a strict scrutiny level of review for rights that fall within the first ten Amendments or are embraced within the Fourteenth.\textsuperscript{24} To survive strict scrutiny, any legislation infringing upon a fundamental right must be justified by a compelling state interest, and the relation between that objective and the means must be narrowly tailored.\textsuperscript{25} In a long line of cases, the Supreme Court has given substance to the liberty interest that parents traditionally have enjoyed. In \textit{Meyer v. Nebraska},\textsuperscript{26} the Court stated that a liberty interest "[w]ithout doubt . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."\textsuperscript{27} In \textit{Pierce v. Society of Sisters},\textsuperscript{28} the Court held that states may not enact legislation that "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children

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19. \textit{Id.} at 466, 677 A.2d at 562.
21. \textit{Id.} at 466, 677 A.2d at 562.
22. \textit{See id.} at 469, 677 A.2d at 564.
23. \textit{U.S. Const. amend. XIV,} \S\ 1.
25. \textit{See, e.g.,} \textit{Roe v. Wade,} 410 U.S. 113, 155 (1973) (concluding that abortion is a personal privacy right and that legislation imposing restrictions on the exercise of that right would be subject to exacting scrutiny).
26. 262 U.S. 390, 403 (1923) (striking down a state statute prohibiting the teaching of foreign languages to children before the ninth grade, on the grounds that it was an unconstitutional state intrusion into parental child-rearing).
27. \textit{Id.} at 399.
28. 268 U.S. 510, 534-35 (1925) (invalidating a state statute requiring all children to attend public schools).
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under their control." The Court noted: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court again examined and reaffirmed the fundamental right to parental child-rearing in *Wisconsin v. Yoder.* The Court observed: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

Since *Yoder,* the Court has reasserted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." In *Santosky v. Kramer,* the Court noted that parents do not lose their fundamental liberty interest "in the care, custody, and management of their child" simply because they are not ideal parents. Rather, the Court noted that parents have an even stronger need for procedural protections when they are faced with the possibility of the dissolution or disruption of their family unit.

By contrast, grandparents traditionally have not been accorded a liberty interest in the rearing of grandchildren. At common law, grandparents enjoyed no legal right to visit grandchildren without parental permission. In *L.F.M. v. Department of Social Services,* the

29. Id. at 534-35.
30. Id. at 535.
31. 406 U.S. 205 (1972). The *Yoder* Court held that a state statute compelling Amish parents to send their children to high school was unconstitutional. Id. at 234-35.
32. Id. at 232; see also *Lassiter v. Department of Soc. Servs.,* 452 U.S. 18, 37-38 (1981). The Court in *Lassiter* stated:

At stake here is the interest of a parent in the companionship, care, custody, and management of his or her children. This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. [F]ar more precious . . . than property rights, parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men.

Id. at 38 (internal quotations omitted).
33. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that, due to the fundamental rights involved, parental rights may be terminated only by clear and convincing evidence).
34. Id.
35. See id. at 753-54.
court refused to recognize a constitutionally protected liberty interest in grandparental visitation, stating:

In each of the cases we have examined . . . which extended the "family life" liberty interest beyond the marital or parent-child relationship, the petitioning party had had, at some point, either actual or legal custody of the child or children involved. . . . [W]e have found no authority to suggest that the visitation appellants enjoyed . . . was a constitutionally protected liberty interest.38

b. Parens Patriae and Maryland Law.—The state’s power to involve itself in child-rearing issues derives from the principle of parens patriae, which authorizes the state to care for "those who cannot take care of themselves, such as minors who lack proper care and custody from their parents."39 While acknowledging a parent’s fundamental right to child-rearing, the Supreme Court has cautioned that this right will be overcome by the state’s compelling interest in limiting the parental right “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”40 The principle of parens patriae has been codified in section 1-201 of the Maryland Family Law Article:

(a) In general.—An equity court has jurisdiction over:

(5) custody or guardianship of a child;
(6) visitation of a child;

(b) Custody, visitation, guardianship, or support of child.—In exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may:

37. 67 Md. App. 379, 507 A.2d 1151 (1986). The L.F.M. court held that grandparents hold no right to petition for visitation over the objection of the guardian when the natural parents’ rights have been terminated and the child has been placed in a prospective adoptive home. Id. at 396, 507 A.2d at 1160.
38. Id. at 387, 507 A.2d at 1155.
39. BLACK’S LAW DICTIONARY 1114 (6th ed. 1990); see also Ross v. Pick, 199 Md. 341, 86 A.2d 463 (1952). The Ross court observed:
This principle is based upon the theory that, while the law of nature gives to parents the right to the custody of their own children, a child from the time of birth owes allegiance to the State, and the State in return is obligated to regulate the custody of the child whenever necessary for its welfare.
Id. at 351, 86 A.2d at 468.
(2) determine who shall have visitation rights to a child . . . .

**c. Best Interests of the Child.**—When resolving visitation disputes, Maryland courts must apply "the best interests of the child" standard. This standard is deeply rooted in Maryland law and is deemed to be of paramount importance. As the Court of Appeals stated in *Ross v. Hoffman*:

"Even when father and mother are living together, a court has the power, if the best interest [sic] of the child require it, to take it away from both parents and commit the custody to a third person. In other words, a court of chancery stands as a guardian of all children and may interfere at any time and in any way to protect and advance their welfare and interests."

The standard for assessing mandatory visitation of grandchildren by grandparents remains the same: the best interests of the grandchild. Although "[t]he definition of a child's best interest is an elusive one," the court's determination is based on "all relevant factors and circumstances pertaining to the grandchild's best interests." In *Fairbanks v. McCarter*, the court outlined a non-exclusive list of factors to be evaluated in making the determination:

- The nature and stability of the child's relationships with its parents; the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together; the potential benefits and detriments to the child in granting the visitation order; the effect, if any,
grandparental visitation would have on the child's attachment to its nuclear family; the physical and emotional health of the adults involved; and the stability of the child's living and schooling arrangements.\textsuperscript{50}

The court also cautioned that children, caught in the middle of visitation battles between family members, may pay a psychological toll, and this may be a factor in the trial court's decision.\textsuperscript{51}

In determining the best interests of the child, courts have also been aware of the parents' constitutional liberty interest in child-rearing. In \textit{Ross v. Pick},\textsuperscript{52} the court stated that "there is a \textit{prima facie} presumption that the child's welfare will be best subserved in the care and custody of its parents rather than in the custody of others."\textsuperscript{53} In \textit{In re Adoption/Guardianship No. 10941},\textsuperscript{54} the court recognized that a parent's constitutional, common law, and statutory right to raise a child could not be taken away without clear justification.\textsuperscript{55} The court nevertheless determined that the best interests of the child outweighed the parent's interest in child-rearing.\textsuperscript{56} In other words, while there is a presumption that parents will make decisions in the best interests of their children, this presumption may be overcome, and custody will be denied in circumstances in which the parents are not serving the child's best interests.\textsuperscript{57}

d. \textit{Maryland's Grandparental Visitation Statute: Interpretation, Evolution}.—Almost all states have enacted some version of a grandparental visitation statute\textsuperscript{58} in response to a trend of politically active

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 50, 622 A.2d at 126-27.
\item \textsuperscript{51} \textit{See id.}, 622 A.2d at 127.
\item \textsuperscript{52} 199 Md. 341, 86 A.2d 463 (1952).
\item \textsuperscript{53} \textit{Id.} at 351, 86 A.2d at 468.
\item \textsuperscript{54} 335 Md. 99, 642 A.2d 201 (1994) (per curiam).
\item \textsuperscript{55} \textit{Id.} at 112, 642 A.2d at 208.
\item \textsuperscript{56} \textit{Id.} at 113, 642 A.2d at 208.
\item \textsuperscript{57} \textit{See Ross v. Hoffman}, 280 Md. 172, 178-79, 372 A.2d 582, 587 (1977). The \textit{Ross} court stated that "custody will be denied if (a) the parent is unfit to have custody, or (b) if there are such \textit{exceptional circumstances} as make such custody detrimental to the best interest of the child." \textit{Id.} (emphasis added). The rationale for this holding derives from \textit{Melton v. Connolly}, 219 Md. 184, 148 A.2d 387 (1959), in which the court observed:
\begin{quote}

Normally a parent is to be preferred to others in determining custody, largely because the affection of a parent for a child is as strong and potent as any that springs from human relations and leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display.
\end{quote}
\textit{Id.} at 188, 148 A.2d at 389.
\item \textsuperscript{58} \textit{See ALA. CODE} § 30-3-4 (Supp. 1996); \textit{ALASKA STAT.} § 25.24.150 (Michie 1995); \textit{ARIZ. REV. STAT. ANN.} § 25-337 (West 1991); \textit{ARK. CODE ANN.} § 9-13-103 (Michie Supp. 1995); \textit{CAL. FAM. CODE} §§ 3103-3104 (West 1994); \textit{COLO. REV. STAT. ANN.} § 19-1-117 (West 1990); \textit{CONN. GEN. STAT. ANN.} § 46b-59 (West 1995); \textit{DEL. CODE ANN. tit. 10, § 1031} (Supp. 1996);
\end{itemize}
grandparents, the legislative recognition of their power, as well as the legislative concern about increases in the divorce rate and family mobility. Several states allow grandparental visitation in intact nuclear families over the objection of the parents.

In 1981, Maryland adopted Senate Bill 333, which added the first grandparental visitation language to section 3-602(a)(4) of the Courts and Judicial Proceedings Article. It provided in pertinent part:

A court of equity has jurisdiction over the custody... [and] visitation... of a child. In exercising its jurisdiction, the court may:

(4) Determine who shall have visitation rights to a child. At any time following the termination of a marriage, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child of the parents whose marriage was dissolved.


59. See Anne Marie Jackson, Comment, The Coming of Age of Grandparent Visitation Rights, 43 Am. U. L. Rev. 563, 563-64 n.3 (1994) (noting additional changes to the traditional family structure such as “fractured extended families” and the increased lifespan and political activity of grandparents).

60. See state statutes for Alabama, Delaware, Connecticut, Kentucky, Missouri, Montana, New York, and North Dakota, supra note 58.

has been terminated, and may grant such visitation if the court believes it to be in the best interests of the child . . . .

In Skeens v. Paterno, the Court of Special Appeals held that the statute did not limit grandparental visitation only to those situations in which the parents' marriage had been terminated, but that visitation could be allowed under other circumstances. More notably, in dicta, the court also stated that "[i]t may well be . . . . that custody should be granted to a grandparent (as against a parent) only under exceptional circumstances. That may also be true as to grandparental visitation."

The following year, in Evans v. Evans, the court stated that it agreed with Skeens that the legislative history did not show that the purpose of the bill was to limit grandparental visitation. The court further noted that "it [is] clear that the 1981 amendment to § 3-602(a) (4) was not intended to affect the law in any context but that of grandparental visitation after the termination of a marriage."

The question left open in Skeens—whether grandparental visitation could be awarded only upon a showing of "exceptional circumstances"—was addressed by the court in Fairbanks v. McCarter. In Fairbanks, the court held that a demonstration of special circumstances for grandparental visitation is not required. In negating the presumption in favor of natural parents, the court reasoned that visitation awards are not as significant as matters of custody. Therefore, visitation should be measured solely by the best interests of the grandchild, rather than by the higher standard embodied in the exceptional circumstances test that is used for awards of custody.

In 1993, the legislature amended the grandparental visitation portion of the statute by enacting chapter 252 of the Acts of 1993.
The legislature withdrew the requirement that visitation petitions by grandparents may come only after termination of the parents’ marriage. This action left open the possibility that grandparents could seek visitation of grandchildren living in intact nuclear families when the parents oppose visitation.

3. The Court’s Reasoning.—In Maner, the court focused primarily on whether the trial court, in considering the best interests of the child, was presumptively deferential to the parents in an intact nuclear family. The court also looked at whether visitation by grandparents is presumptively in the best interests of the grandchild. Before addressing these issues, however, the court summarily put to rest any question as to whether the statute applied to intact families. Looking to the House Floor Report at the time of the most recent amendment to the statute, the court held that “[t]he plain language of the statute . . . clearly reflects the legislature’s intent to allow courts to grant grandparents visitation, even where the parents’ marriage is intact, if it is in the best interests of the children.”

In addressing the primary issue, the Court of Appeals extended the rationale of Fairbanks, concluding that grandparents need not show exceptional circumstances as a precondition to their petition, even in cases involving intact nuclear families. The court stated that the mere mention by the trial court that the case was one of first impression regarding intact nuclear families did not imply that the judge was deferring to the parents’ wishes or imposing an exceptional circumstances test on the grandparents. Thus, according to the court,

At any time after the termination of a marriage by divorce, annulment, or death, an equity court may:

1. consider a petition for reasonable visitation by a grandparent of a natural or adopted child of the parties whose marriage has been terminated; and

2. if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.

Md. Code Ann., Fam. Law § 9-102 (1991), to:

An equity court may:

1. consider a petition for reasonable visitation of a grandchild by a grandparent; and

2. if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.


76. Maner, 342 Md. at 470, 677 A.2d at 564.
77. Id. at 470-71, 677 A.2d at 564.
78. Id. at 467-68, 677 A.2d at 562-63.
79. Id., 677 A.2d at 563.
80. Id. at 468, 677 A.2d at 563.
81. Id. at 470, 677 A.2d at 564.
regardless of the fact that the grandchildren were being raised in an intact nuclear family, "'[t]he outcome of the grandparents' petition lies within the sound discretion of the trial court, guided solely by the best interests of the grandchild."

In concluding that the trial judge acted within his discretion, the Court of Appeals emphasized that the relationship between the parents and the grandparents may be a factor for consideration in determining the best interests of the child. The court looked to a decision by the Indiana Court of Appeals in \textit{Daugherty v. Ritter}, which stated: "While the [grandparent-grandchild] relationship may, in any given case, be sufficient to make grandparent visitation in the child's best interest, notwithstanding the dissension between the parent and grandparent, it may not be sufficient to overcome the effects of the discord on the child in another." The \textit{Maner} court also cited with approval the trial court's use of the factors outlined in \textit{Fairbanks} to be used when deciding the best interests of the child.

The Court of Appeals dismissed the grandparents' argument that there is a rebuttable presumption in favor of grandparental visitation. Looking at recent decisions by other courts with similar statutes, the court found that "[a] presumption that grandparent visitation is in the best interests of the child would undermine the trial court's discretion and conflict with the unambiguous language of the statute."

\textbf{4. Analysis.—In \textit{Maner v. Stephenson}, the Court of Appeals adhered to precedent.} The court held that grandparents have the right to seek visitation of grandchildren in intact nuclear families and that such visitation may be granted if the trial court determines that it is in the best interests of the child. Because "[i]t is an almost undeviating rule of the courts, both State and Federal, that a constitutional question will not be decided except when the necessity for such decision

\begin{itemize}
  \item 82. \textit{Id.} at 468, 677 A.2d at 563 (quoting \textit{Fairbanks v. McCarter}, 330 Md. 31, 49, 622 A.2d 121, 126 (1993)).
  \item 83. \textit{See id.} at 470, 677 A.2d at 564.
  \item 85. \textit{Id.} at 68; \textit{see Maner}, 342 Md. at 470, 677 A.2d at 564.
  \item 86. \textit{See supra} note 50.
  \item 87. \textit{Maner}, 342 Md. at 470-71, 677 A.2d at 564.
  \item 89. \textit{Id.} at 471, 677 A.2d at 564.
  \item 90. \textit{See id.} at 467-68, 677 A.2d at 563.
  \item 91. \textit{See id.} at 469-70, 677 A.2d at 563-64.
\end{itemize}
arises" and the grandparents had not even met the low best interests of the child standard, the court correctly decided the case. Nevertheless, the question remains whether judicially imposed grandparental visitation violates the constitutional rights of parents in an intact nuclear family.

The extent to which the state may involve itself in visitation disputes between grandparents and parents in an intact nuclear family is an emerging issue. In the relatively few states that statutorily grant grandparental visitation in intact nuclear families, those statutes have increasingly come under constitutional challenge. If the Maner court had decided that exceptional circumstances must exist in order for grandparents to seek visitation with grandchildren in an intact family, it would have been a clear acknowledgment of the parents' fundamental right to decide with whom their children may visit. Instead, the court aligned itself with those states that compel parents in intact families to allow grandparents contact with a grandchild if the court deems it to be in the grandchild's best interests. In this regard, the court incorrectly departed from precedent set forth in Ross, which gives parents a prima facie presumption of acting in the child's best interests.

In Fairbanks, the Court of Appeals stated: "Visitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections, embodied in the exceptional circumstances test, that attend custody awards." Although Fairbanks did not involve an intact, nuclear family, it closely followed the logic of the Supreme Court of Missouri in Herndon v. Tuhey, which upheld a Missouri statute against constitutional challenge. In Herndon, the court reasoned that because grandparental visitation did not amount

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92. Jeffers v. State, 203 Md. 227, 230, 100 A.2d 10, 11 (1953). The Supreme Court, also addressing this doctrine of judicial restraint, has stated: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable." Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).
93. See Jackson, supra note 59, at 565 n.2.
94. See generally id. at 578-81.
95. See supra note 53 and accompanying text.
97. 857 S.W.2d 203 (Mo. 1993) (en banc).
98. Mo. ANN. STAT. § 452.402 (West Supp. 1997). The statute states, in pertinent part:
1. The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparental visitation when:

(3) A grandparent is unreasonably denied visitation with the child for a period exceeding ninety days.
to a significant infringement of parental rights to child-rearing, there was no need to apply the rigorous strict scrutiny standard.100

The Maner court’s reference to “the special role grandparents may play in a child’s life”101 follows a second line of reasoning used to justify the constitutionality of grandparental visitation statutes—that of the compelling need to reinforce the bond between grandparents and grandchildren.102 The Kentucky Supreme Court used this reasoning in King v. King103 when it held that Kentucky’s grandparental visitation statute104 did not “constitute[ ] an unwarranted intrusion into the liberty interest of parents to rear their children as they see fit.”105 The King court justified its decision by finding “it . . . essential

2. The court shall determine if the visitation by the grandparent would be in the child’s best interest or if it would endanger the child’s physical health or impair his emotional development. Visitation may only be ordered when the court finds such visitation to be in the best interests of the child. The court may order reasonable conditions or restrictions on grandparent visitation.

Id. 99. Herndon, 857 S.W.2d at 209.
100. See id. at 208 (“‘Not every regulation that the State imposes must be measured against the State’s compelling interests and examined with strict scrutiny . . . .’ The requirement that state interference ‘infringe substantially’ or ‘heavily burden’ a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence . . . .” (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting), overruled by Planned Parenthood v. Casey, 505 U.S. 833 (1992))).
101. Maner, 342 Md. at 469, 677 A.2d at 563; see Beckman v. Boggs, 337 Md. 688, 702, 655 A.2d 901, 908 (1995) (“That grandparents play an entirely different role in a child’s life than parents is, we think, very clear; their love and affection for the child complements, rather than supplants, the position of the parent in the child’s life.”).
102. See Mark Moody, Note, Constitutional Questions Regarding Grandparent Visitation and Due Process Standards, 60 Mo. L. Rev. 195, 210 (1995) (“Rather than relying on the protection of the best interest of the child, the Kentucky Court found the ‘strengthening of family bonds’ to be the justification behind the [grandparental visitation] statute.” (quoting King v. King, 828 S.W.2d 630, 632 (Ky. 1992)); see also Jackson, supra note 59, at 582-83 (noting that courts generally agree that maintaining the relationship between grandparent and grandchild is the primary goal of grandparental visitation legislation); Shandling, supra note 36, at 124-25 (“[C]ourts have tended to rely on their own intuitive sense that the relationship between a grandparent and a grandchild is a special one.”).
103. 828 S.W.2d 630 (Ky. 1992).
104. Ky. REv. STAT. ANN. § 405.021 (Banks-Baldwin Supp. 1995). The statute states in pertinent part:

Reasonable Visitation Rights to Grandparents

1 The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
Id.
105. King, 828 S.W.2d at 631 (upholding visitation against an intact, nuclear family which had become estranged from the grandfather and finding no reason to disrupt the grandchild-grandparent bond because of “a trivial disagreement” between the grandfather and the father). But see id. at 639 (Lambert, J., dissenting) (explaining that evidence
that some semblance of family and generational contact be preserved.”

These justifications for the grandparental visitation statute, however, should not be applied to an intact nuclear family. The proposition that children in an intact family will be harmed if they are not permitted to form a grandparent-grandchild bond is far from certain. As Justice Lambert noted in his King dissent, it may be true in many cases that the lives of the grandchild and grandparent are enriched by their association, but “mere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights.” In fact, commentators have noted that the effect of such a lawsuit can be quite detrimental to the child.

While Maner has structurally safeguarded parental rights to some degree by placing emphasis on numerous factors that strongly favor the intact family, these factors alone do not provide parents adequate constitutional protection against state intrusion in child-rearing decisions. To determine the best interests of the grandchild—a standard that the court concedes eludes easy definition—a trial judge may consider the parents’ attitudes and feelings toward the grandparents, the potential disruption to the lives of the children by judicially imposed visitation, the health of the grandparents, and the effect of grandparental visitation on the child’s attachment to her parents.

clearly supported the father’s contention that the grandfather was “an overbearing individual who intruded with impunity upon [the parents’] family life demonstrating total indifference to their wishes”).

106. King, 828 S.W.2d at 632; see also Sketo v. Brown, 559 So. 2d 381, 382 (Fla. Dist. Ct. App. 1990) (upholding constitutionality of grandparental visitation statute against a challenge by widowed mother in a non-intact family); People ex rel. Sibley v. Sheppard, 429 N.E.2d 1049, 1049 (N.Y. 1981) (upholding grandparental visitation statute against the adoptive parents of child whose natural parents were deceased); Campbell v. Campbell, 896 P.2d 635, 643 (Utah Ct. App. 1995) (upholding the constitutionality of Utah’s grandparental visitation statute and stating that the “[i]legislature promulgated [the statute] to promote intergenerational contact and strengthen the bonds of the extended family”).

107. See Shandling, supra note 36, at 123 (noting that “[i]n fact, there is very little research on the effect of a grandparent-grandchild relationship on children’s development”).

108. King, 828 S.W.2d at 634 (Lambert, J., dissenting).

109. See Shandling, supra note 36, at 124 (“It is clear from the psychological literature that a lawsuit over visitation rights, with its accompanying intrusions by psychological experts and lawyers and its inevitable disruption of the nuclear family, often creates extreme anxiety and dislocation for a child.”).

110. See supra note 47 and accompanying text.

111. See Maner, 342 Md. at 470, 677 A.2d at 564.

112. See id.

113. See id. at 465 n.2, 677 A.2d at 562 n.2.
The court also emphasized that litigation to enforce maintenance of the grandparent-grandchild relationship over the parents' objection could have a deleterious effect on a child. In addition, the court should weigh the psychological toll that the family strife might play on the child. All of these factors weigh heavily in favor of the intact family that objects to visitation.

On the other hand, trial judges may also consider "the nature and substantiality of the relationship between the child and the grandparent, taking into account frequency of contact, regularity of contact, and amount of time spent together," as well as the potential benefit to the child of grandparental visits. These factors embody the notion addressed in King that the strengthening of the grandparent-grandchild relationship is a compelling state interest.

The best interests of the child standard, when applied to intact nuclear families, will significantly infringe on parental rights to child-rearing. For instance, parents may be forced to expose intimate reasons for objecting to visitation—reasons that might include past sexual or other misconduct by a grandparent, which a parent may not otherwise want to be exposed. Grandparents will have the ability to take the grandchildren to visit other people and places despite parents' objections. Additionally, under the Maryland statute, nothing would prevent the parents in an intact nuclear family from creating an environment hostile to the grandparents, then protesting to the court that the child must be protected from the "psychological toll" of grandparental visitation on the child.

114. See id.
115. Id. at 470, 677 A.2d at 564.
116. See id. at 465, 677 A.2d at 562.
118. See id., 622 A.2d at 127.
119. See supra note 106 and accompanying text.
120. See Hawk v. Hawk, 855 S.W.2d 573, 577 n.2 (Tenn. 1993).
121. See id.
122. See id. at 577 (recognizing that during visitation periods grandparents have total control over the children and have the ability to take them wherever they please); see also King v. King, 828 S.W.2d 630, 633 (Ky. 1992) (Lambert, J., dissenting) (expressing disapproval of the fact that the grandfather "openly cohabits with . . . a woman to whom he is not married, and that the trial court granted [her], a woman with no marriage or blood kinship to the infant child, a right to pick up the child for visitation").
123. See Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy," 18 FLA. ST. U. L. REV. 533, 554-55 (1991) (noting that "[a] parent might be so bitter about the situation that they refuse to encourage a good relationship between the child and the grandparent, while avoiding affirmatively sabotaging it" and that "[s]ome courts . . . have refused to allow parents to 'manipulate' the litigation by fostering hatred towards the grandparent, then using that hostility as basis [sic] for arguing against visitation").
By adhering to the best interests of the child standard for determining visitation in intact families, the greatest danger is that the court will impose its own opinion upon good and fit parents, which "represents a virtually unprecedented intrusion into a protected sphere of family life." Three states have invalidated their grandparental visitation statutes for this reason. For example, the Supreme Court of Tennessee invalidated that state's statute, holding that, "without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved." The court ruled that there must be a showing that parental decisions to disallow visitation would result in significant harm to the child before grandparents would be allowed visitation.

"When applied to married parents who have maintained continuous custody of their children and have acted as fit parents, [court-ordered grandparent visitation under the statute] constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution." Similarly, the Supreme Court of Florida stated that "a judge cannot impose grandparental visitation upon an intact family." The portion of the Florida statute pertaining to intact nuclear families was held unconstitutional under the state constitution because it amounted to undue government intervention upon the rights of parents to raise their children.

Another recent challenge to the constitutionality of a grandparental visitation statute was successful for similar reasons. In Brooks v.

124. Hawk, 855 S.W.2d at 577.
125. Id. at 579.
126. See id. at 580. The Hawk court stated that "[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." Id. "For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all." Id. (quoting Kathleen S. Bean, Grandparent Visitation: Can the Parent Refuse?, 24 J. Fam. L. 393, 441 (1985-86)).
127. Id. at 582.
129. Fla. Stat. Ann. § 752.01(1)(e) (West Supp. 1997). The pertinent part of the statute granted grandparental visitation if:

The minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.
130. Beagle, 678 So. 2d at 1272.
Parkerson, Georgia's highest court overturned its grandparental visitation statute on both federal and state constitutional grounds. In his concurrence, Justice Sears noted:

Our law has always recognized that the relationship between parents and their children is the most mutually beneficial relationship possible, in an imperfect world, and in this country parents' decisions concerning visitation with a grandparent or anyone else have always been constrained, if at all, by moral and religious forces rather than legal ones. Justice Sears further stated that he could "not believe in either the constitutionality or the political correctness of any law that allows a court . . . to pierce the delicate, complex and sacred unity of parent and child against the wishes of fit parents and without a showing of absolute necessity."

These cases indicate a strong trend toward recognizing parental autonomy as a protected liberty interest. Perhaps the Maner court was waiting for a better case, but it took the opportunity to clarify its position on the most crucial issue of grandparental visitation: who makes the decision? If the court is inferring by its decision that courts may grant grandparental visitation absent a compelling state interest, the court has ignored the emerging trend.

5. Conclusion.—In Maner v. Stephenson, the Court of Appeals made clear that grandparents can obtain visitation in an intact nuclear family by demonstrating that visitations would be in the best interests of the child. The court found that the grandparents in Maner could not meet this standard. The Court of Appeals has left open whether, in light of parents' well-established fundamental right to autonomously raise their children, the best interests of the child standard is too intrusive to pass constitutional muster. Given the explicit statutory requirement that the courts use the best interests of the

131. 454 S.E.2d 769 (Ga.), cert. denied, 116 S. Ct. 377 (1995). Brooks involved a petition by a maternal grandmother that was opposed by both child's parents in an intact nuclear family. Id. at 773.

132. GA. CODE ANN. § 19-7-3(c) (1991). The statute states that "the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child." Id.

133. Brooks, 454 S.E.2d at 774.

134. Id. at 775 (Sears, J., concurring).

135. Id. at 774.

136. See Maner, 342 Md. at 467-68, 677 A.2d at 563.

137. See id. at 470, 677 A.2d at 564.
child standard, only a clear constitutional challenge will resolve this issue.

EMILY A. KOSCIANSKI

C. Dismissing the Purpose and Public Policy Surrounding Spousal Support

In *Gordon v. Gordon*, the Court of Appeals held that the term “cohabitation,” for the purpose of terminating spousal support pursuant to a separation agreement, requires more than the mere sharing of a common residence or sexual intimacy. Rather, the court held that the term “connotes [a] mutual assumption of the duties and obligations associated with marriage.” Therefore, the court established a broad scope of inquiry regarding the establishment of cohabitation, directing courts to determine the nature of the relationship by looking at such factors as common residence, sexual relations, shared finances, and recognition by the community. By declining to make specific economic factors dispositive of cohabitation, however, the court failed to acknowledge the purpose of spousal support and the numerous ways in which a spouse can use it to exert unjust and inappropriate control over the recipient’s personal life. The court’s failure to apply these policy considerations to its interpretation of the term “cohabitation” will likely result in the disparate adjudication of future cases concerning the termination of spousal support.

1. The Case.—On December 26, 1990, the Circuit Court for Montgomery County entered a judgment of absolute divorce terminating the marriage of Sara (Mrs. Gordon) and Joel Gordon (Mr. Gordon). The judgment “incorporated but did not merge” the parties’ separation agreement, which provided for contractual spousal support. Specifically, the agreement provided, in pertinent part:

2. Id. at 308, 675 A.2d at 547.
3. Id.
4. Id. at 308-09, 675 A.2d at 547-48. The court noted that “no one factor is an absolute prerequisite for cohabitation.” Id. at 309 n.12, 675 A.2d at 548 n.12.
5. Id. at 309 n.12, 675 A.2d at 548 n.12. The court found it unhelpful to define a level of financial contribution that would constitute cohabitation.
6. Through this Note, all references to the genders of parties in separation agreements will mirror those of Mr. and Mrs. Gordon’s respective roles as support provider and recipient.
7. *Gordon*, 342 Md. at 296, 675 A.2d at 541.
8. Id. For a discussion of the relevance of incorporating a separation agreement into a divorce decree see *infra* notes 36-38 and accompanying text.
Husband shall pay to Wife as alimony the sum of $6,000 per month in advance, commencing on the first day of December, and continuing on the first day of each and every month thereafter. The said payments shall terminate upon the death of the Husband, the death of the Wife, the remarriage of the Wife, or at such time as the Wife reaches the age of 59 1/2, whichever first occurs. The said payments shall also terminate in the event the Wife resides with any unrelated man without the benefit of marriage for a period continuing for beyond sixty (60) consecutive days.

Mr. Gordon acted in compliance with the provisions of this support clause for over two years. Between February and July of 1993, however, Mr. Gordon learned that a man unrelated to Mrs. Gordon, William Shankland (Mr. Shankland), resided at Mrs. Gordon’s home. Consequently, on July 25, 1993, Mr. Gordon notified Mrs. Gordon that he would terminate alimony payments in accordance with the provisions of the separation agreement.

Mr. Gordon also petitioned the Circuit Court for Montgomery County to confirm the termination of his alimony payments and to order Mrs. Gordon to return all payments made in violation of the support clause of the separation agreement. The Circuit Court referred the matter to a Domestic Relations Master for an evidentiary hearing. During the hearing, Mr. Gordon introduced evidence to show that Mrs. Gordon’s home served as Mr. Shankland’s exclusive residence for more than sixty consecutive days. Mr. Gordon also presented evidence that Mr. Shankland used Mrs. Gordon’s phone number as his own on a community theater phone list. In addition, Mr. Gordon presented checks made out to Mrs. Gordon from Mr. Shankland amounting to approximately twelve thousand dollars.

In her defense, Mrs. Gordon testified that Mr. Shankland had consistently maintained a separate residence apart from her home and that she and Mr. Shankland did not share living expenses. Mrs. Gordon asserted that Mr. Shankland used her phone number to avoid

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9. Gordon, 342 Md. at 296-97, 675 A.2d at 541-42.
10. Id. at 297, 675 A.2d at 542.
11. Id. at 297-98, 675 A.2d at 542. Mr. Gordon came to this conclusion because of his own personal observations and through the use of professional surveillance services. Id.
12. Id. at 298, 675 A.2d at 542.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
receiving calls from his former spouse and that the checks from Mr. Shankland constituted loan repayments, including interest, and his share of expenses for joint vacations.19

In consideration of the evidence before her, the Domestic Relations Master concluded that Mr. Shankland used Mrs. Gordon’s home as his exclusive residence for the period in question and that, as a result, Mrs. Gordon had resided with an “unrelated man” for more than sixty days, thus violating the support clause of the separation agreement.20 Making no further findings regarding the relationship between Mrs. Gordon and Mr. Shankland, the Master recommended that the court confirm the termination of Mr. Gordon’s alimony payments to his former spouse.21 Mrs. Gordon filed several exceptions to the Master’s Report, which the Circuit Court for Montgomery County subsequently overruled.22 The court raised, sua sponte, the issue of whether public policy precluded enforcement of the agreement.23 Nevertheless, after a briefing and oral arguments regarding the preclusive effects of public policy on the enforcement of the agreement’s support clause, the circuit court ordered the termination of Mr. Gordon’s support obligation.24

Following Mrs. Gordon’s appeal to the Court of Special Appeals, the Court of Appeals issued a writ of certiorari25 on its own motion to clarify the scope of factual inquiry appropriate to establishing the existence of cohabitation for purposes of terminating spousal support.26

2. Legal Background.—Under Maryland law, “alimony” refers to spousal support that a court may both award and modify.27 Alternatively, “contractual spousal support” results from a private agreement between the parties.28 Thus, its modification is subject to the terms of the agreement itself.29 The provision of spousal support in the form of court-ordered alimony payments has been established by Maryland

19. Id.
20. Id. at 299, 675 A.2d at 542-43.
21. Id., 675 A.2d at 543.
22. Id.
23. Id.
24. Id.
26. See Gordon, 342 Md. at 305-09, 675 A.2d at 545-48 (discussing factors appropriate to determining cohabitation).
28. See id.
29. See id.; MD. CODE ANN., FAM. LAW § 8-103(b)-(c) (1991) (discussing judicial modification of separation agreements); see also infra notes 36-38 and accompanying text.
law for centuries.30 The legitimacy of separation agreements providing for support, however, has only a relatively recent history.31 Nevertheless, the general validity of these agreements is now well recognized and was first codified in Article 16, section 28 of the Maryland Code.32 Title 8 of the Family Law Article presently authorizes separation agreements, providing, in pertinent part, that "a husband and wife may make a valid and enforceable settlement of alimony, support, property rights, or personal rights."33

With the validity of separation agreements recognized by Maryland statute, it is axiomatic that such agreements are governed by contract principles.34 In other words, disputes arising out of the agreement must be settled according to the specific provisions set forth in the contract itself.35 When separation agreements are "merged" into divorce decrees, the decree of the court supersedes the agreement, and the court may therefore modify its provisions.36 When a separation agreement is "incorporated but not merged" into the divorce decree, however, the separation agreement survives "as a separate independent contractual arrangement between the parties,"37 and "[w]hether the court can modify it is a matter left to the

30. See McAlear v. McAlear, 298 Md. 320, 328, 469 A.2d 1256, 1260 (1984). The court observed:

By ch. 12, § 14 of the Acts of 1777, which remains virtually unchanged and is now found in Md. Code (1974, 1980 Repl. Vol.) § 8-603(a) of the Courts and Judicial Proceedings Article, the General Assembly authorized equity courts to hear and determine alimony causes in the same manner as they were heard and determined by English ecclesiastical courts under English law. Nevertheless, the 1777 statute was construed as merely confirming the previously existing inherent authority of Maryland equity courts over alimony.

Id. (footnote omitted).

31. The first Maryland case to recognize the validity of separation agreements providing for economic maintenance was Melson v. Melson, 115 Md. 196, 205, 134 A. 136, 139 (1926) (valuing agreement as the equivalent of the husband's future maintenance of the wife). See Md. Code Ann., Fam. Law § 8-101(a) ("A husband and wife may make a valid and enforceable deed or agreement that relates to alimony, support, property rights, or personal rights.")


35. See Mendelson, 75 Md. App. at 501, 541 A.2d at 1338-39 (stating that "particular questions related to the agreement must be resolved by reference to the particular language of the separation agreement").

36. See id. at 498, 541 A.2d at 1337.

37. Id. at 499, 541 A.2d at 1337.
agreement itself." Nevertheless, as a contract, separation agreements are subject to the limitations of public policy.

a. Alimony and Cohabitation.—In recent years, courts have witnessed an increase in litigation regarding the relationship between spousal support and its termination based upon the recipient's cohabiting with a third party. Traditionally, court-ordered alimony payments in Maryland could be terminated only if the wife remarried or if either party died. After 1980 and the passage of the new Alimony Act, however, the termination of alimony also became available if the court found termination necessary to avoid an inequitable result.

When presented with evidence that an alimony recipient is cohabiting with a third party, the majority of jurisdictions will only modify court-ordered payments upon a showing of changed economic circumstances. Specifically, these circumstances refer either to a sit-
uation in which the recipient financially supports the cohabitant or the cohabitant provides for the financial needs of the recipient. Maryland adopted this majority position in *Meyer v. Meyer*, holding that unchaste conduct does not warrant termination of alimony, but may "be considered where it is relevant to a change in financial condition." This focus on economic circumstances logically follows the determination that "the purpose of alimony is to provide for the support and maintenance of the wife. It is never of a punitive nature." Previously, however, the Court of Appeals had suggested that openly residing with another man or other "flagrant misconduct" could alone warrant the termination of alimony. Thus, the court's adherence in *Meyer* to the economic circumstances test marked a significant clarification of Maryland law regarding the purpose of alimony and justification for its modification.

b. *Spousal Support and Cohabitation.*—Although the majority of jurisdictions hold that cohabitation must result in changed financial circumstances to justify the termination of alimony, these same jurisdictions disagree substantially as to what type or amount of economic change would warrant the termination of support. In some states, economic considerations receive little or no mention in defin-
ing cohabitation. In others, economic support of either the third party by the recipient or of the recipient by the third party is considered significant, but not dispositive, in determining the nature of the relationship. Of those jurisdictions that consider financial conditions indicative of the existence of cohabitation, the weight these courts give such economic considerations varies. In all of these cases, however, the courts gave little or no consideration to policy concerns that weigh against modifying court-ordered alimony payments absent a change in financial circumstances. Thus, these jurisdictions failed to acknowledge and address the potential for abuse of economic power in the context of spousal support, despite their enlightened discussions of this issue in similar cases concerning alimony modification.

Trying to reconcile these divergent positions, the Oregon Court of Appeals offered some assistance in the case of In re Marriage of Edwards. Finding that a change in the economic circumstances of the supported spouse is not necessary to justify termination of contractual spousal support, the court stated:

51. See, e.g., Gertrude L.Q. v. Stephen P.Q., 466 A.2d 1213, 1217 (Del. 1983) ("The word 'cohabit' is not a term of art, but has a common and accepted meaning as an arrangement existing when two persons live together in a sexual relationship when not legally married."); Bell v. Bell, 468 N.E.2d 859, 861 (Mass. 1984) ("The plain language of the agreement cannot properly be ignored. The clause in question does not mention support or the plaintiff's continuing need for it in the absence of a new source.").


53. See supra note 52.

54. Compare Gottleben v. Gottleben, 492 N.E.2d 1133, 1138 (Mass. 1986) (rejecting the notion that a divorced spouse has a right to control a former spouse's life and further warning that "a court may not attempt to create such a right through the alimony provisions of a divorce judgment"), and Duhl v. Duhl, 507 A.2d 523, 525 (Conn. Ct. App. 1986) (requiring a change in the financial needs of the supported spouse as a result of cohabitation before terminating alimony), with Bell v. Bell, 468 N.E.2d 859, 861 (Mass. 1984) (interpreting a separation agreement terminating support upon cohabitation, the court declined to require a change in economic circumstances before modifying support and found it "clear that the parties did not intend by the noninterference provision to preclude the defendant from possibly influencing the plaintiff's choices by terminating alimony payments in the event she were to remarry or were to live with a man in the manner of a married couple"), and D'Ascanio v. D'Ascanio, 678 A.2d 469, 472 (Conn. 1996) (enforcing a separation agreement that provided for reduction of support by $350 upon the recipient's cohabitation with an unrelated male despite a finding that the living arrangement actually reduced her need for support by only $100).

Here, the provision for [the] termination of spousal support [based] on [the] wife's "cohabitation with a member of the opposite sex" was not imposed by the court, but was a part of the property settlement agreement of the parties. Although we might question the wisdom of including such a provision in a property settlement agreement, we conclude that, under the facts of this case, the provision is enforceable.\(^5\)

Thus, the court expressed a willingness to respect the freedom of individuals to contract among themselves over judicial policy concerns regarding the unfair and improper use of spousal support. Such deference, however, is not shared by all states.

New Jersey, for instance, applies the same policy rationale to decisions involving alimony as it does to decisions involving contractual spousal support.\(^5\)\(^7\) In that regard, New Jersey has recognized that whether spousal support results from a judicial decree or a contractual agreement, its main purpose is an economic one.\(^5\)\(^8\) Specifically, in *Melletz v. Melletz*,\(^5\)\(^9\) the court observed that a divorce "cuts the ties that permit one spouse to control the other's behavior where their respective economic rights and responsibilities or other matters of recognized mutual concern are not implicated."\(^6\)\(^0\) Thus, New Jersey has interpreted separation agreements providing for the termination of spousal support upon cohabitation to require a change in the financial circumstances of the recipient before termination is triggered.

To the extent that parties have attempted to circumvent this interpretation—for example, by expressly excluding from the agreement all

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56. Id. at 545.
57. See Gayet v. Gayet, 456 A.2d 102, 104 (N.J. 1983) (finding that with regard to court-ordered alimony payments, modification based solely on the change in economic circumstances "best balances the interests of personal freedom and economic support"); Pugh v. Pugh, 524 A.2d 410, 411 (N.J. Super. Ct. App. Div. 1987) (requiring a separation agreement's provision for termination of support upon the wife's living with an unrelated male to apply only when such an arrangement results in a change in her financial need). The Pugh court reasoned that "[w]e are disinclined to apply the contract language in a way which conflicts with our stated public policy to guarantee individual privacy, autonomy, and the right to develop personal relationships." Id.; see also Hurley v. Hurley, 553 A.2d 891, 891 (N.J. Super. Ct. App. Div. 1988) ("Generally, when analyzing modifiable issues such as alimony or child support, "consensual agreements and judicial decrees should be subject to the same standard of "changed circumstances."" (quoting Lepis v. Lepis, 416 A.2d 45, 49 (N.J. 1980))); Melletz v. Melletz, 638 A.2d 898, 903 (N.J. Super. Ct. App. Div. 1994) (stating that courts "are only required to enforce property settlement agreements to the extent that they are fair, equitable and just"). The Melletz court concluded that "[c]ohabitation clauses beyond the economic contribution standards of Gayet or other recognized matters of mutual concern fall short of this standard and will not be enforced." Id.
58. Pugh, 524 A.2d at 412.
60. Id. at 903.
economic standards from the definition of cohabitation—New Jersey has held such support clauses unenforceable.61

3. The Court's Reasoning.—In Gordon v. Gordon, the Court of Appeals held that the mere establishment of common residence between a former wife and an unrelated male does not warrant the termination of spousal support pursuant to a separation agreement.62 Further, the court held that "the ordinary definition of 'cohabitation,' describing a relationship of living together 'as man and wife,' connotes mutual assumption of the duties and obligations associated with marriage."63 Although the pertinent support clause at issue in Gordon did not use the term "cohabitation"—but instead provided for the termination of support if the wife "reside[d] with any unrelated man without the benefit of marriage for a period continuing for beyond sixty (60) consecutive days"64—the court found the words used in the agreement synonymous with the term "cohabitation."65 Having disposed of semantic obstructions, the court's opinion focused on defining cohabitation in the context of interpreting spousal support agreements.

Relying on basic principles of contract law, the court stated that, as a preliminary matter, it would attach common meaning to the words in the contract, absent any indication that the parties intended a different meaning.66 Furthermore, the court explained that "[t]he dictionary definition of 'cohabitation,' together with the factors that have been developed by the courts to explain the definition, constitute its ordinary meaning."67 Thus, beginning with a threshold assessment of the dictionary definition of cohabitation, specifically, "to live together as husband and wife usually without a legal marriage having

61. Id. (recognizing that additional consideration may have been paid for inclusion of such a clause).
62. Gordon, 342 Md. at 308, 675 A.2d at 547.
63. Id.
64. Id. at 311, 675 A.2d at 549.
65. Id. ("We shall read this provision so that no part of it is redundant or meaningless."). The Gordon court found that "[i]f the clause was intended to encompass all situations where Mrs. Gordon resided with an unrelated male, including, e.g., roommates and boarders, the phrase 'without the benefit of marriage' would be redundant with 'unrelated.'" Id.
66. Id. at 303-04, 675 A.2d at 545.
67. Id. at 304, 675 A.2d at 545.
been performed,” the court looked to other jurisdictions for additional characteristics commonly associated with such a relationship.

Based on a selective sample of case law from states such as Virginia, Utah, and Illinois, the court offered five factors to guide trial courts in their determination of the nature of a relationship. These factors included: “(1) [the] establishment of a common residence; (2) long-term intimate or romantic involvement; (3) shared assets or common bank accounts; (4) joint contribution to household expenses; and (5) recognition of the relationship by the community.” Emphasizing that no one factor should be dispositive, the Court of Appeals then directed courts to “review these factors and any other relevant evidence in determining whether parties have established a cohabitation relationship.” Upon mandating a broad scope of inquiry, the court posited its interpretation of cohabitation as a default definition. In other words, the court noted that “[p]arties may alter the definition of cohabitation if they choose, subject to the limitations of law and public policy.” In the Gordons’ case, the court found that the default definition of cohabitation governed, modified only by the parties insertion of the sixty-day time requirement.

Ultimately, the Court of Appeals adopted a balancing test, weighing the five factors and any other relevant evidence. Thus, the court declined to adopt either Mrs. Gordon’s argument that public policy required proof of changed economic circumstances prior to the termination of support or Mr. Gordon’s contention that “the language of the support provision [was] unambiguous” and did not require proof of changed economic circumstances. Instead, the court afforded significant weight to the financial evidence in the Gordons’ case based on the principles of contract interpretation and the specific provisions of the parties’ separation agreement. In that regard,

68. Id. (quoting Webster’s Third New International Dictionary 440 (P. Grove ed., 1963)). The court continued, “Similarly, Black’s Law Dictionary defines ‘cohabitation’ as ‘[t]o live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.’” Id. (alteration in original) (quoting Black’s Law Dictionary 260 (6th ed. 1990)).
69. Id. at 305-07, 675 A.2d at 546-47.
70. Id. at 308-09, 675 A.2d at 547-48 (footnotes omitted).
71. Id. at 309, 675 A.2d at 548.
72. Id. at 310, 675 A.2d at 548.
73. Id. at 312, 675 A.2d at 549.
74. Id. at 308, 675 A.2d at 547.
75. Id. at 300, 675 A.2d at 543.
76. Id.
77. Id. at 313, 675 A.2d at 549-50 (“Our interpretation of the parties’ cohabitation provision is also supported by the principle that we should read the contract as a whole.”).
the court reasoned that, aside from the cohabitation provision, all other provisions in the separation agreement that would trigger the termination of spousal support bore "a significant relationship to the parties' economic circumstances." Further, the court found the incorporation of a "separate lives" clause into the contract—preserving each party's personal freedom from interference by the other—inconsistent with a condition terminating support based upon the former wife's common residence with another man. That condition, the court held, inherently conflicted with the separate lives clause "because it would enable Mr. Gordon to exercise inappropriate control over Mrs. Gordon's post-divorce relationships and sexual conduct." Thus, rather than adopting a broad public policy rationale, the court concluded that a mere showing of common residence was insufficient to constitute cohabitation because "viewing the agreement in its entirety, . . . the parties appear[ed] to have structured the support payments to respond to changed economic conditions."

4. Analysis.—Interpreting the spousal support agreement in *Gordon v. Gordon*, the Court of Appeals held that cohabitation implies "mutual assumption of the duties and obligations associated with marriage" and not merely the establishment of a common residence. The significance of this holding, however, lies not in what the court did but, rather, in what it set out to do and where it failed. The court's granting of certiorari on its own motion, prior to review by the Court of Special Appeals, suggests that the court had a strong desire to establish clear and instructive precedent in Maryland on the interpretation of spousal support agreements providing for the termination of alimony. The court's lack of reasoned analysis and deficient discussion of policy concerns, however, will certainly result in more confusion than clarity.

a. Failure to Attend to Threshold Considerations.—As a preliminary matter, the court relied on weak precedent to determine the ordinary meaning of the term "cohabitation" as it applied to the parties' separation agreement. Several of the cases prominently featured in the opinion did not define cohabitation in the context of spousal sup-

78. *Id.* at 313-14, 675 A.2d at 550. In addition to "cohabitation" with an unrelated male, "[t]he agreement also provide[d] that support [would] terminate in the event of the death of either party, remarriage of the wife, or the wife's reaching retirement age." *Id.* at 313, 675 A.2d at 550.
79. *Id.* at 313, 675 A.2d at 550.
80. *Id.* at 314, 675 A.2d at 550.
81. *Id.* at 308, 675 A.2d at 547.
The Supreme Court of Utah has noted that this use of contextually broad case law is problematic:

[T]he term "cohabitation" does not lend itself to a universal definition that is applicable in all settings. As a legal concept, cohabitation has been the determinative issue in cases involving validity of marriage, legitimacy of offspring, criminal prosecution of cohabitants, and statutory and nonstatutory termination of alimony payments, as well as the enforcement of equitable liens . . . . To some extent, the meaning of the term depends upon the context in which it is used.83

Although many definitions of cohabitation used outside the context of spousal support agreements are consistent with cases involving postmarital contracts, the Gordon court's suggestion that these cases are interchangeable indicates a fundamental lack of understanding of the various purposes for which the concept of cohabitation is used in the law.84

In a rush to provide guidance to lower courts on the definition of cohabitation, the Court of Appeals failed to ask and answer some threshold questions that are essential to an instructive interpretation of the term. First, given that the term is used in the context of a spousal support clause, what is the purpose of spousal support? Second, what limitations do judicial concerns of fairness and efficiency place on separation agreements providing for spousal support? Had the court first answered these questions, it would have been better poised to interpret contractual agreements providing spousal support and better able to achieve an appropriate balance between freedom of contract and countervailing public policy considerations.

82. See, e.g., Beck v. Beck, 246 So. 2d 420, 428 (Ala. 1971) (determining whether a common law marriage existed when a former spouse sought to establish that she was the legal widow of her former husband upon his death); State v. Arroyo, 495 A.2d 967, 970 (Conn. 1980) (interpreting cohabitation as an element of an affirmative defense to statutory sexual assault); State v. Kellogg, 542 N.W.2d 514, 518 (Iowa 1996) (relating to the interpretation of a domestic assault statute).


84. The importance of understanding the contextual use of the term "cohabitation" has been acknowledged in other areas of law. See, e.g., Kellogg, 542 N.W.2d at 516 (observing that the domestic assault statute did not set out a definition of cohabiting and therefore to determine what the legislature meant by the term, "this court must consider both the evil sought to be remedied and the purpose behind the statute's enactment"). See also, e.g., People v. Hollifield, 252 Cal. Rptr. 729, 733 (Ct. App. 1988) (distinguishing the interpretation of "cohabitation" in a spousal support case from the domestic assault case at bar, noting the different purposes of the statutes in each case).
b. Public Policy and Spousal Support Contracts.—Courts have said that so long as the judiciary supervises settlement agreements to ensure that fair and informed negotiations take place between parties, "private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine."85 Some, however, still dispute the availability of appropriate standards to ensure fairness in marital contracts.86

In general, Maryland courts have refused to interpret or enforce contracts in such a way that would violate public policy.87 In addition, they have recognized "the unique opportunities for fraud and overreaching that exist between a husband and wife"88 and that "decisions about how resources are allocated at the time of divorce profoundly affect the economic opportunities and material well-being of both this generation and the next."89 Thus, Maryland courts should weigh policy concerns heavily when interpreting separation agreements.

Beginning its contractual interpretation of the term of "cohabitation," the Gordon court noted that "[t]he prevailing view is now that 'separation agreements . . . are generally favored by the courts as a peaceful means of terminating marital strife and discord so long as


86. See Sally Burnett Sharp, Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom, 132 U. Pa. L. Rev. 1399 (1984). Sharp contends "that the existence of contract standards necessary to ensure creation of the kind of arm's length agreements deserving 'any other contract' treatment, and of procedures adequate to provide relief from unconscionable or fraudulently procured contracts, has been too readily assumed." Id. at 1405. In that regard, she finds that "contract doctrines, even including unconscionability, have often failed to provide adequate safeguards in the family law setting against either unfair results or unfair procedures." Id.; see also Laura A. Ward, Comment, Duties of Fairness Between Separating Spouses: North Carolina Continues to Find That All Is Fair in Love and Divorce, Survey of Developments in North Carolina Law, 1988, 67 N.C. L. Rev. 1397 (1989). Noting significant differences in relationships between the parties of ordinary business contracts and those in the family law context, Ward explains that separation agreements "are negotiated under conditions of extraordinary stress and deal with issues of deep personal significance. The parties are uniquely positioned to exploit each other's psychological dependencies and weaknesses." Id. at 1408. Moreover, of significance to spousal support clauses is one suggestion "that treating separation agreements as arm's length transactions ignores the fact that many married women are still financially dependent upon their husbands and thus in need of state protection." Id.

87. See Pacific Indem. Co. v. Interstate Fire and Cas. Co., 302 Md. 583, 588, 488 A.2d 486, 488 (1985) ("An insurance contract, like any other contract, is measured by its terms unless a statute, a regulation, or public policy is violated thereby."); Shimp v. Huff, 315 Md. 624, 646, 556 A.2d 292, 263 (1989) ("Like the majority of other courts, we have recognized the well settled principle that contracts which discourage or restrain the right to marry are void as against public policy.").

88. Sharp, supra note 86, at 1403-04.

they are not contrary to public policy." Throughout the opinion, however, the court failed to discuss what these policy concerns might be. Further, there is no indication of how public policy considerations are consistent with the court's definition of cohabitation or with the factors it provided as guidance for trial courts. In the past, Maryland courts invoked policy concerns to prevent an economically dominant party from gaining an unfair advantage through a separate agreement. The Gordon court, however, failed to effectively address such concerns.

It is well established that "[t]he present social policy behind an award of alimony is the need to rehabilitate the dependent spouse so she or he may become economically self-sufficient." Thus, despite potential problems of fairness and economics in the "rehabilitative alimony model," it is clear that the purpose of alimony payments is a financial one. Although Maryland law distinguishes alimony from contractual

91. See supra notes 63-69 and accompanying text.
92. See supra note 70 and accompanying text.
93. See, e.g., Schneider v. Schneider, 335 Md. 500, 518, 644 A.2d 510, 519 (1994) ("[D]ismissal would be contrary to strong public policy, because dismissal would reward the perjury of economically superior spouses by neutering their contractual obligations of support to economically dependent spouses."); Brees v. Cramer, 322 Md. 214, 222, 586 A.2d 1284, 1288 (1991) ("More important is the effect of public policy on whether to construe covenants as interdependent. Where the welfare of children would be adversely affected if specific covenants in a separation agreement were held to be interdependent, we have refused so to construe the agreement."); Groves v. Alexander, 255 Md. 715, 721-22, 259 A.2d 285, 289 (1969) ("[A] contract made in consideration of the procurement of a divorce or requiring a divorce or waiving the right to defend against a divorce or requiring collusion, such as the fabrication of evidence, is against public policy and is illegal.").

Unlike reimbursement alimony, which is grounded in the partnership model, and human capital theory, which draws on both victim and equality images, rehabilitative alimony is a purely victim-oriented conceptualization of alimony's role. It views a woman who compromises her participation in the paid labor force as damaged, and it asks what sum of money is needed to repair the damage sufficiently to enable the woman to function.

Id.

"Alimony is neither a punishment for the payor nor a reward for the payee. Nor should it be a windfall for any party. It is a right arising out of the marriage relationship to continue to live according to the economic standard established during the marriage as far as economic circumstances will allow."

spousal support in modification and other procedural matters, the purpose of each is identical. The New Jersey Supreme Court best articulated the policy considerations of spousal support in Lepis v. Lepis: "The law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that provided women with security in exchange for economic dependence and discrimination." In other words, courts should not affirm contracts that allow men or women to control the personal interests and freedom of their former spouses through economic duress. Therefore, support-agreement provisions that allow for termination of financial support upon conditions unrelated to the economic circumstances should be declared invalid.

Conditioning the termination of spousal support to a cohabitating recipient on a change in the recipient's financial circumstances would prevent inequities in several ways. First, if the supported spouse is providing for the cohabitant's financial needs, modification or termination of spousal support protects the supporting spouse from having to subsidize the income of a third party. Further, if the supported spouse receives financial assistance from the cohabitant, terminating support would prevent the supported spouse from receiving payments unnecessary to the purpose of alimony. Moreover, conditioning the termination of alimony only on cohabitation that results in changed economic circumstances would more effectively protect the recipient's right to privacy and her freedom to form personal relationships. This is especially important given that the dissolution of a marriage not only affects an individual's economic standing but also her emotional well-being. A recently divorced individual might seek a cohabitation arrangement solely for the purpose of companionship until she has regained her emotional

97. See supra notes 30-33 and accompanying text.
99. Id. at 54.
100. See Melletz, 638 A.2d at 903. In Melletz, the court explained that it was "only required to enforce property settlement agreements to the extent that they are fair and equitable, and just." See supra notes 44-45 and accompanying text. Consequently, the Melletz court held that "cohabitation clauses beyond the economic contribution standards of Gayet or other recognized matters of mutual concern fall short of this standard and will not be enforced." Melletz, 638 A.2d at 903.
101. See Melletz, 638 A.2d at 903 ("The agreement leaves very little latitude for the defendant to engage in even a casual or social relationship without fear of losing her economic support." (internal quotation omitted)).
The Gordon decision puts these efforts in jeopardy. Thus, the recipient may forego opportunities to heal emotional or physical losses in order to protect against additional economic loss. Although there may have been support for such post-marital control of a former spouse's personal relationships throughout the development of alimony law, the advent of more equitable legal doctrines precludes such economic coercion today.

c. Failure to Provide Clear Guidance to Lower Courts.—In its interpretation of the term “cohabitation,” the Gordon court touched on the policy concerns that govern the court's jurisprudence on alimony modification. It did so, however, with little clarity. Although the court included financial conditions such as “shared assets or common bank accounts” and “joint contribution to household expenses” in its list of relevant considerations, it declined to make these factors dispositive. Yet throughout its opinion, the court gave various reasons why economic considerations are essential to a spousal-support clause. Further, although the Gordon court directed trial courts to look at noneconomic factors, it nonetheless reverted back to financial considerations as justifications for this inclusion. In short, an analysis of the court's opinion evidences significant attention to the financial circumstances of the spousal-support recipient.

102. See Bell v. Bell, 468 N.E.2d 859, 863 (Mass. 1984) (Abrams, J., dissenting) (“By interpreting and enforcing the clause at issue here so as to give judicial sanction to a termination of support, the court allies itself with alimony payors who exercise their economic power in a manner that unreasonably interferes with the private, autonomous lives of the spouse from whom they have been divorced.”).

103. See Langbein, supra note 40, at 656. Langbein indicates: the cruel effect such an inflexible law might have had in one case where the ex-wife began residing with a male companion because during the marriage she was severely beaten, causing brain damage and substantial medical expense; she was afraid she might pass out with no one around to assist her. Id. (citing Wight v. Wight, 284 S.E.2d 625 (W. Va. 1981)). Thus, with regard to marriages characterized by physical or emotional abuse, judicial sanction of separation agreements that use the personal activities of the recipient as a basis for termination of support may not only perpetuate such abuse, but legitimize it.

104. See Singer, supra note 89, at 1109-10 (“[A]limony was also used by ex-husbands and judges as a way of controlling a woman's behavior after the termination of her marriage . . . . An ex-wife who gambled or otherwise 'squandered' her alimony payments . . . risked forfeiting her right to support.”); see also Evan J. Langbein, Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life, 12 Nova L. Rev. 787, 788 (1988) (“Alimony was an outgrowth of the ecclesiastical courts. A husband held a ‘duty’ to support and maintain his wife which survived divorce from ‘bed to board.’ A concomitant ‘condition’ of this obligation to support was the notion that the wife maintain her ‘chastity.’” (footnote omitted)).

105. Gordon, 342 Md. at 308, 675 A.2d at 547.

106. See id. at 309-10, 675 A.2d at 548 (discussing the fifth factor: recognition by the community).
The court's justification for including the community's perception of the relationship as a factor to be considered in determining the nature of the relationship is especially problematic. The court reasoned that if the former spouse and an unrelated partner hold themselves out as married, the support recipient could use the support payments to provide for the financial needs of her cohabitant. Conversely, if the cohabitation arrangement financially benefits the supported spouse, then she is receiving support from two sources. The court determined: "In either situation, we believe it would be inequitable to require the spouse paying support to continue payment despite the cohabiting parties' de facto remarriage." Clearly, this presents a legitimate concern.

In Gordon, however, the court presents these financial considerations during its discussion of a factor indicative of the social, rather than economic, status of the cohabitation relationship. Thus, the court obscures whether the financial arrangement or the physical living arrangement and its perception by the community is the focus of the inquiry. If the court is attempting to prevent a supported spouse from collecting income from two sources, it should concern itself with actual changes in financial circumstances, regardless of whether the community saw the former spouse as the husband or wife of a third party.

Perhaps the court feared that the economic nature of a supported spouse's cohabitation would not be readily ascertainable by trial courts. This concern may have led it to employ the social appearance of the relationship as a proxy for the cohabitants' financial arrangement. If this in fact was the impetus for the court's failure to make changed economic circumstances dispositive, then Gordon represents a judicial decision to settle for circumstantial proof rather than fact. Courts should not allow the deficiencies and difficulties that may characterize the fact-finding process to dictate its declarations of legal principles.

Consider also that a supported spouse may receive additional financial assistance from a third party regardless of whether they reside together in the same house. Although "[t]he issue of lifestyle ... and the issue of reduced economic necessity are often difficult to separate," the distinction is crucial if appellate courts are to provide ef-

107. Id.
108. Id. at 309, 675 A.2d at 548.
109. Id. at 310, 675 A.2d at 548.
110. See supra text accompanying note 70.
111. Langbein, supra note 104, at 792.
ffective guidance to trial courts faced with spousal-support modification cases. To the extent that it directs Maryland trial courts to look to the existence of a common residence, sexual intimacy, and other noneconomic factors in addition to financial circumstances, the *Gordon* court fails to recognize the difference between personal and economic concerns and their relative importance to interpreting support agreements. Thus, *Gordon* offers trial courts little guidance for the future.

Although the court found that the Gordons had not changed the ordinary meaning of the term "cohabitation" in their separation agreement, except for adding a time requirement, the court suggested that its application of a broader definition of cohabitation was also "supported by the principle that [courts] should read the contract as a whole." To that effect, the court found it significant that the other provisions of the Gordons' agreement allowing for termination of support had a "significant relationship to the parties' economic circumstances." For instance, the court emphasized the parties' inclusion of a cost-of-living adjustment in the agreement to provide for anticipated inflation as evidence of their focus on economic circumstances. The court's economic interpretation of the agreement's cohabitation clause, however, conflicts with the court's earlier decision to downplay financial conditions, giving them equal status with other noneconomic factors. Thus, the court further obscured the extent to which economic considerations should play a role in the determination of the nature of a cohabiting relationship.

The *Gordon* decision also suggests reasons why courts should favor economic circumstances as the exclusive basis for terminating spousal support based on cohabitation, but falls short of establishing the case as clear authority for that principle. For example, the "separate lives" clause of the separation agreement led the court to conclude that defining as cohabitation Mrs. Gordon's common residence with an unrelated male would "enable Mr. Gordon to exercise inappropriate control over Mrs. Gordon's post-divorce relationships and sexual conduct." The court failed to explain, however, whether such postmarital control would be "inappropriate" only if a "separate lives" clause is present. If the court meant that a supporting spouse's interference in the personal life of the support recipient is inappropriate

113. Id.
114. Id. at 314, 675 A.2d at 550.
115. See supra notes 70-71 and accompanying text.
under any circumstances, then it is unclear why the court included factors such as sexual intimacy or romantic involvement between the recipient and a third party as relevant to the modification of spousal support.

Perhaps, however, *Gordon* created a broad scope of inquiry regarding the establishment of cohabitation in order to allow trial courts to give some factors more weight than others, depending on how the specific contract at issue is structured. For example, in the Gordons' case, their agreement's focus on economic considerations and its inclusion of the separate lives clause might direct the factfinder to conclude that factors such as shared assets or expenses are more significant to a determination of cohabitation than others. If this is the proper interpretation of *Gordon*, then the court would likely find the alimony payor's interference in the personal life of the recipient through economic coercion as inappropriate only when the parties structure their separation agreement to preclude such meddling.

If this latter interpretation of *Gordon* is accurate, then the logical inference from the court's decision is that post-marital control over the supported former spouse may be acceptable depending on the specifics of the separation agreement at issue. This implication is problematic:

By giving its imprimatur to an . . . agreement that hinges the plaintiff's entitlement to support on her conformity to lifestyle requirements imposed by the defendant, the court encourages economically-dominant husbands to meddle arbitrarily with the postdivorce lives of their wives, and thereby sends an unfortunate message to probate judges charged with scrutinizing such separation agreements to ensure that the agreements are "fair and reasonable."117

This is especially true in light of the court's notice to practitioners that "[p]arties may alter the definition of cohabitation if they choose, subject to the limitations of law and public policy."118 Thus, because the court gives little indication of what limitations might be in conjunction with its broad definition of cohabitation, *Gordon v. Gordon* offers little guidance to trial courts considering both the legitimacy and the meaning of separation agreements that terminate spousal support upon cohabitation.

118. *Gordon*, 342 Md. at 310, 675 A.2d at 548.
5. Conclusion.—In *Gordon v. Gordon*, the Court of Appeals concluded that the term “cohabitation,” as used in a separation agreement to trigger termination of spousal support, encompassed more than mere common residence or sexual intimacy. The court declined, however, to limit the term’s meaning to a financial arrangement that would alter the support recipient’s economic circumstances. In doing so, the court failed to acknowledge the purpose of support payments and the public policy limitations on postmarital contracts. Mr. and Mrs. Gordon, however, appeared to address these concerns in their agreement. Specifically, various provisions of the Gordons’ contract focused on the economic circumstances of the parties. Thus, the specific structure of the Gordons’ contract appeared to preclude a definition of cohabitation that would violate policy concerns regarding the economic subordination of dependent former spouses and operate contrary to the purpose of spousal support. Consequently, to the extent that the Gordons’ agreement was consistent with public policy, the court’s deficient attention to those concerns will likely effect little harm. The impact of this decision on future cases, however, is far less certain.

Sara Z. Moghadam
VII. INSURANCE

A. Requiring Security on Rental Vehicles Notwithstanding a Violation of the Rental Agreement

In *Enterprise Leasing Co. v. Allstate Insurance Co.*, the Court of Appeals held that a self-insured lessor of rental vehicles must provide primary liability coverage to the permittees of its lessee, regardless of whether the lessee violated the terms of the rental agreement by allowing another person to operate the rented vehicle. In so holding, the Court of Appeals concluded that restrictions imposed by section 18-106 of Maryland's Transportation Article on a lessee's authority to permit other drivers to operate a rental vehicle have no effect on the required security mandated under section 18-102(b) of that same Article. In deciding this case, the court, for the first time in Maryland's judicial history, directly addressed the conflicting relationship between section 18-102(b) and section 18-106. The court's decision to extend insurance coverage to drivers authorized to operate rental vehicles in violation of a rental agreement preserves the intent of the General Assembly to protect innocent victims of automobile accidents by guaranteeing them a means of financial redress for their injuries. In addition, the decision serves a greater public good by placing paramount interest on these innocent victims.

1. The Case.—On August 8, 1991, Grace Sonde (Ms. Sonde) rented a car from Enterprise Leasing Company (Enterprise), a self-insured car rental agency. Ms. Sonde specifically declined to add additional drivers to the rental agreement, indicating that she would be

2. The court stated that the term "permittee" refers to "all persons who operate rental vehicles with the permission of either the lessor or the lessee." *Id.* at 543 n.1, 671 A.2d at 510 n.1.
3. *Id.* at 543, 671 A.2d at 510-11.
4. *Id.* at 547, 671 A.2d at 513. Unless otherwise indicated, any reference to a statute in this Note shall refer to the Transportation Article of the Maryland Code.
5. *Id.* at 545, 671 A.2d at 512. As a self-insurer, Enterprise provided the following insurance coverage:

BODILY INJURY/PROPERTY DAMAGE RESPONSIBILITY TO THIRD PARTIES: If Renter or other authorized driver is in compliance with all provisions of this agreement, and is between 25 and 70 years old, Owner's financial responsibility extends to Renter and other drivers named on this agreement and approved by Owner for third party claims arising from the use of the car as required by Motor Vehicle Minimum Financial Responsibility Laws of the state where the car is operated, unless this agreement requires the Renter to provide such coverage. Renter is responsible for damage or loss to property transported by or in the car.

the sole operator of the vehicle.\textsuperscript{6} The rental agreement, signed by Ms. Sonde, expressly contained provisions prohibiting her from allowing the vehicle to be driven or operated under certain circumstances.\textsuperscript{7} Notably, the agreement prohibited any person under the age of twenty-one and anyone other than Ms. Sonde to operate the vehicle without Enterprise’s written permission.\textsuperscript{8}

Contrary to the terms of the rental agreement, Ms. Sonde permitted her seventeen-year-old son, David Sonde, to operate the rental vehicle on August 11, 1991.\textsuperscript{9} While driving the vehicle, David collided with another car.\textsuperscript{10} The accident, which occurred as a result of David Sonde’s alleged failure to maintain control of the vehicle,\textsuperscript{11} resulted in personal injuries to Stephany Witt (Ms. Witt), a passenger of the other car.\textsuperscript{12} Ms. Witt subsequently brought an action in the Circuit Court for Anne Arundel County against both David and Grace Sonde to recover damages for her injuries.\textsuperscript{13}

The Sondes submitted Ms. Witt’s claim to their personal insurance carrier, Allstate Insurance Company (Allstate).\textsuperscript{14} Allstate, in turn, submitted the claim to Enterprise, as self-insurer of the rented

\textsuperscript{6} Enterprise, 341 Md. at 545, 671 A.2d at 512.

\textsuperscript{7} Brief of Appellant at 4, Enterprise (No. 34). The rental agreement terms expressly stated that Ms. Sonde was not allowed to let the vehicle to be used or driven:

(a) In violation of any term or condition of this agreement.

(b) By any person under the age of 21 without Owner’s written permission, or by anyone who has given a fictitious name or false age or address.

(c) For any illegal purpose, in a race, speed contest, to tow a vehicle or trailer.

(d) By any person if there is reasonable evidence they were under the influence of narcotics, intoxicants or drugs.

(e) By any person other than Renter without written consent of Owner.

\ldots

(g) Under authority of any license other than his own. Renter warrants that the license shown to owner at time the car is rented is his own and fully valid.

\ldots

(j) In a reckless or imprudent manner or if the car is deliberately damaged.

(k) Or if renter misrepresents fact to owner pertaining to rental, use, or operation of the car.

\textit{Id.} at 4-5 (emphasis added).

\textsuperscript{8} Enterprise, 341 Md. at 545, 671 A.2d at 512.

\textsuperscript{9} Id.

\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Id. at 546, 671 A.2d at 512.

\textsuperscript{13} Id. at 545-46, 671 A.2d at 512. The circuit court stayed Ms. Witt’s lawsuit pending resolution of the instant case. See \textit{id.} at 546 n.6, 671 A.2d at 512 n.6.

\textsuperscript{14} Id. at 546, 671 A.2d at 512. The Sondes’ insurance policy with Allstate provided liability coverage for both Grace and David and had been in effect on the day of the accident. Id.
vehicle.\textsuperscript{15} Both Allstate and Enterprise denied responsibility for primary insurance coverage for the Witt lawsuit.\textsuperscript{16}

In response to Ms. Witt's claim against the Sondes, Allstate sought a declaratory judgment in circuit court\textsuperscript{17} that, as a self-insured lessor, Enterprise assumed responsibility for providing primary liability coverage to all persons operating the rental vehicle with Ms. Sonde's permission, even though such permission violated the express terms of the rental agreement.\textsuperscript{18} The circuit court granted summary judgment in favor of Allstate, basing its decision on section 18-102 of the Transportation Article\textsuperscript{19} and ordered Enterprise to provide primary liability coverage to Grace and David Sonde to the extent of the mandatory statutory minimum of $20,000 per person and $40,000 per occurrence.\textsuperscript{20}

\textsuperscript{15} Id.
\textsuperscript{16} Id. Allstate asserted that, because the operator of a rental vehicle has permission to operate the vehicle, the lessor must provide the operator with insurance coverage. Id. Enterprise argued that the security provided in the rental agreement did not extend to David Sonde because he was not an authorized driver under the terms of the rental agreement. Id.
\textsuperscript{17} Id. at 544, 671 A.2d at 511.
\textsuperscript{18} Id. at 544-45, 671 A.2d at 511. Initially, Allstate also sought a declaratory judgment action against Travelers Insurance Company (Travelers), claiming that, as the insurance carrier for Enterprise, it should assume responsibility for liability coverage. Id. at 544-45 n.5, 671 A.2d at 511 n.5. Travelers moved for summary judgment, denying that it ever provided such coverage to Enterprise. Id. Allstate never responded to the motion, and the court did not rule on it. Id. The Court of Appeals noted that it "appears that all parties agree that Travelers did not provide insurance coverage for the lessees of automobiles owned by Enterprise and that the responsibility for providing the security falls upon Enterprise, as self-insurer." Id.
\textsuperscript{19} Section 18-102 of the Transportation Article states:

\begin{itemize}
  \item \textit{In general.}-The [Motor Vehicle] Administration may not register any motor vehicle, trailer, or semitrailer to be rented until the owner of the vehicle certifies to the satisfaction of the Administration that he has security for the vehicle in the same form and providing for the same minimum benefits as the security required by Title 17 of this article for motor vehicles.
  
  \item \textit{Persons to be covered by security.}-Notwithstanding any provision of the rental agreement to the contrary, the security required under this section shall cover the owner of the vehicle and each person driving or using the vehicle with the permission of the owner or lessee.
  
  \item \textit{Suspension of registration.}-If the Administration finds that the vehicle owner has failed or is unable to maintain the required security, the Administration shall suspend the registration of the vehicle.
\end{itemize}


\textsuperscript{20} Enterprise, 341 Md. at 544-45, 671 A.2d at 511. The security required under section 17-103(b) must provide for at least the following:

\begin{enumerate}
  \item The payment of claims for bodily injury or death arising from an accident of up to $20,000 for any one person and up to $40,000 for any two or more persons, in addition to interest and costs;
\end{enumerate}
Relying on section 18-106 of the Transportation Article,\(^2\) which prohibits a lessee from permitting another person to operate a rented vehicle without the lessor's permission, Enterprise appealed the decision to the Court of Special Appeals.\(^2\) Before the case could be heard, however, the Court of Appeals issued a writ of certiorari on its own motion.\(^2\) The Court of Appeals considered whether the legislature intended to hold a self-insured lessor of a motor vehicle responsible for providing primary liability coverage to persons operating a rented vehicle with permission from the lessee, even though the lessee gave such permission in violation of the terms of the rental agreement.\(^2\)

2. Legal Background.—

a. Maryland's Compulsory Insurance Law.—Title 17 of the Transportation Article sets out the "required security" for motor vehicles in the State of Maryland.\(^2\) Under this statutory insurance scheme, all owners of registered motor vehicles must maintain security on the vehicle, usually in the form of a vehicle liability insurance policy.\(^2\) Section 17-103(b) of the Transportation Article mandates that all vehicle owners maintain a minimum required security for per-

\[\text{(2)} \text{ The payment of claims for property of others damaged or destroyed in an accident of up to } \$10,000, \text{ in addition to interest and costs; }\]

\[\text{(3)} \text{ Unless waived, the benefits described under Article 48A, § 539 of the Code as to basic required primary coverage; and }\]

\[\text{(4)} \text{ The benefits required under Article 48A, § 541 of the Code as to required additional coverage.}\]

\textbf{MD. CODE ANN., TRANSP. II § 17-103(b).}

21. Section 18-106 of the Transportation Article states: \textbf{Unauthorized use of rented motor vehicle.}

\begin{itemize}
  \item[(a)] \textit{Lessees permitting other persons to drive rented motor vehicles.—If a person rents a motor vehicle under an agreement not to permit another person to drive the vehicle the person may not permit any other person to drive the rented motor vehicle.}
  \item[(b)] \textit{Rental agreements prohibiting other persons from driving vehicles.—If a person rents a motor vehicle under an agreement not to permit another person to drive the vehicle no other person may drive the rented motor vehicle without the consent of the lessor or his agent.}
\end{itemize}

\textbf{MD. CODE ANN., TRANSP. II § 18-106.}

22. \textit{Enterprise}, 341 Md. at 545, 671 A.2d at 511.

23. \textit{Id.}

24. \textit{Id.} at 543, 671 A.2d at 510.

25. \textbf{MD. CODE ANN., TRANSP. II § 17-103.}

26. Section 17-103(a) provides, in pertinent part: \textbf{(a) Required form; annual assessment.—}

\begin{itemize}
  \item[(1)] Except as provided in paragraph (2) of this subsection, the form of security required under this subtitle is a vehicle liability insurance policy written by an insurer authorized to write these policies in this State.
sonal injury of "$20,000 for any one person, $40,000 for any accident, and $10,000 for property damage." The legislature enacted Maryland's compulsory insurance law to ensure that those who own and operate motor vehicles registered in the state are "financially able to pay compensation for damages resulting from motor vehicle accidents." The public policy behind Maryland's compulsory insurance law is well settled—"to give innocent third parties a source of private sector insurance funds from which to obtain compensation for their injuries."

Title 18 of the Transportation Article extends the minimum security requirement to owners of for-rent vehicles. Specifically, section 18-102 requires the owner of a for-rent vehicle to certify that it has provided the minimum security required under Title 17 before the Motor Vehicle Administration can register the vehicle with the state.

b. The Conflicting Relation Between Section 18-102(b) and Section 18-106.—Section 18-102(b) of the Transportation Article sets forth the persons covered by the required security with respect to for-rent vehicles. Section 18-102(b) states: "Notwithstanding any provision of the rental agreement to the contrary, the security required under this section shall cover the owner of the vehicle and each person driving or using the vehicle with the permission of the owner or lessee."

(2) The [Motor Vehicle] Administration may accept another form of security in place of a vehicle liability insurance policy if it finds that the other form of security adequately provides the benefits required by subsection (b) of this section.

MD. CODE ANN., TRANSPI. II § 17-103(a).
27. Id. § 17-103(b).
28. See Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Gartelman, 288 Md. 151, 154, 416 A.2d 734, 736 (1980) ("In Maryland, there is an established legislative policy designed to make certain that those who own and operate motor vehicles in this State are financially responsible.").
29. See Van Horn v. Atlantic Mut. Ins. Co., 334 Md. 669, 680, 641 A.2d 195, 200 (1994) (noting that significant changes in Maryland law regarding motor vehicle insurance were designed to ensure "that there would be continuous insurance policy coverage . . . applicable to injuries incurred in automobile accidents"); Larimore v. American Ins. Co., 314 Md. 617, 625, 552 A.2d 889, 892 (1989) (refusing to enforce a broad "fellow employee exclusion" because such exclusion is inconsistent with the purpose of compulsory automobile liability insurance to provide accident victims with a means of financial redress); Jennings v. Government Employees Ins. Co., 302 Md. 352, 357-58, 488 A.2d 166, 168 (1985) (finding a broad "household exclusion" inconsistent with Maryland's compulsory automobile insurance statute); National Grange Mut. Ins. Co. v. Pinkney, 284 Md. 694, 704, 399 A.2d 877, 882 (1979) (noting that "the public policy of this State as enunciated by the General Assembly" is to afford every injured person in Maryland the minimum liability coverage).
30. MD. CODE ANN., TRANSPI. II § 18-102.
31. Id. § 18-102(b) (emphasis added).
primary insurance coverage to persons operating the rental vehicle without the lessor's permission, so long as the lessee has granted the driver permission to operate the vehicle.\(^2\) Presumably, this reading would apply even if the lessee gave the driver permission in direct violation of the express terms of the rental agreement. This reading of section 18-102(b), however, conflicts with section 18-106 of that same Article. Section 18-106 permits lessors to place restrictions on whom a lessee may authorize to drive a rented vehicle.\(^3\) Moreover, a violation of section 18-106 constitutes a misdemeanor, subject to a fine of up to five hundred dollars, imprisonment for up to two months, or both.\(^4\)

Notwithstanding the conflicting language of sections 18-102(b) and 18-106, no Maryland court had ever addressed the interplay between the two sections. The contradictory relationship between sections 18-102(b) and 18-106 has been examined, however, by author Andrew Janquitto, in his treatise, Maryland Motor Vehicle Insurance.\(^5\)

Upon an in-depth review of the legislative history of the two sections, Janquitto concluded that the General Assembly "did not intend [section 18-106] to be used by an insurer or an owner as a means of circumventing the indemnification obligation inherent in the financial responsibility provision [of section 18-102]."\(^6\) Janquitto argues:

Clearly, the Legislature considered the requirement that the financial security extend to owners, lessees, and permissive users to be separate from the prohibition against allowing persons to use the rented vehicle without permission of the owner. . . . In this regard, the language of Section 18-102(b) cannot be ignored: it requires coverage for "each person driving or using the vehicle with permission of the owner or lessee." "Each person" is exactly that—each and every person. The public policy inherent in compulsory insurance demands such a conclusion.\(^7\)

According to Janquitto's analysis, the legislature intended the two sections to operate separately, and despite section 18-106's limitations on who may operate the rental vehicle, section 18-102(b)'s requirement of providing the required security to all persons driving the

\(^2\) Id.
\(^3\) Id. § 18-106.
\(^4\) Id. § 27-101(c).
\(^5\) ANDREW JANQUIrTO, MARYLAND MOTOR VEHICLE INSURANCE 53 (1992).
\(^6\) Id. at 105.
\(^7\) Id. (quoting Md. Code Ann., Transp. II § 18-102(b) (1992)).
rental vehicle with permission of either the owner or the lessee must be enforced.

c. Exclusions to Maryland's Compulsory Insurance Law.—Maryland courts have consistently adhered to the well-established principle that when the legislature has expressly authorized certain exclusions to a law, the judiciary may not proclaim its own limitations, exclusions, or exceptions.38 For example, in Pennsylvania National Mutual Casualty Insurance Co. v. Gartelman,39 the Court of Appeals declined to enforce an insurance policy's exclusion for an insured who was injured while occupying an uninsured motor vehicle owned by the named insured.40 The court stated that "[w]here a statute expressly provides for certain exclusions, others should not be inserted."41 Such an exclusion, the court explained, would frustrate the public policy behind the compulsory insurance law of ensuring financial compensation to victims of automobile accidents.42 In accordance with the reasoning in Gartelman, Maryland courts have consistently invalidated insurance policy exclusion clauses that are found to be inconsistent with the purpose and public policy behind Maryland's compulsory insurance law.43

In Jennings v. Government Employees Insurance Co.,44 the Court of Appeals invalidated an exclusion clause in an automobile liability policy that denied insurance coverage to family members of the insured living in his household.45 The court reasoned:

The exclusion of a large category of claimants, suffering bodily injury arising from accidents, is not consistent with [the required security mandated under section 17-103(b) of the Transportation Article]. Moreover, if any and all exclusions from this required liability coverage are valid as long as they are not expressly prohibited by statute, the purpose of com-

40. Id. at 156, 416 A.2d at 737.
41. Id.
42. Id.
43. See supra note 38 and accompanying text.
44. 302 Md. 352, 488 A.2d 166 (1985).
45. Id. at 362, 488 A.2d at 171. The household exclusion clause at issue provided: "Bodily injury to an insured or any family member of an insured residing in the insured's household is not covered." Id. at 354, 488 A.2d at 167.
Maryland Law Review

pulsory automobile liability insurance could be frustrated to a significant extent.\textsuperscript{46}

The court found that because such a household exclusion clause did not fall under the group of exclusions expressly authorized by the legislature,\textsuperscript{47} it contravened the purpose and public policy behind Maryland's compulsory insurance law.\textsuperscript{48}

Maryland courts have also repeatedly rejected similar attempts by insurance companies to avoid the statutory scheme of compulsory insurance. In \textit{Van Horn v. Atlantic Mutual Insurance Co.},\textsuperscript{49} the Court of Appeals went so far as to hold that Maryland's compulsory insurance law denies an insurer its common law contract right to void an insurance policy \textit{ab initio} because of a material misrepresentation made by the insured in his application.\textsuperscript{50} In that case, Raymond Van Horn was involved in an accident in which his automobile collided with a bicyclist.\textsuperscript{51} The police report indicated that Van Horn had taken medication for his epilepsy just prior to the accident.\textsuperscript{52} Although Van Horn had purchased personal injury liability insurance coverage from Atlantic Mutual Insurance Company (Atlantic) before the accident, he never informed Atlantic of his epileptic condition.\textsuperscript{53} In fact, Van Horn specifically denied in his application for insurance having any "physical impairment[s]."\textsuperscript{54} The court concluded that, notwithstanding Van Horn's false statement, Maryland's compulsory insurance law abrogated Atlantic's common law right to void \textit{ab initio} the insurance policy.\textsuperscript{55} Therefore, when the claims of innocent victims are at stake, Maryland courts have been reluctant to allow an insurer to exclude coverage, even when policyholders have violated the express terms of their contracts or have made material misrepresentations to obtain such contracts.

d. Other Jurisdictions.—Other states have addressed the issue of whether lessors should have to extend primary liability coverage to unauthorized permittees of lessees. Different jurisdictions have reached varying results. In order to further the public policy inherent

\textsuperscript{46} Id. at 360, 488 A.2d at 170.
\textsuperscript{47} The General Assembly expressly authorized specified exclusions from the required liability coverage. See, e.g., Md. Ann. Code art. 48A, §§ 240C-1; 541(c)(2); 545 (1994).
\textsuperscript{48} Jennings, 302 Md. at 357, 488 A.2d at 168.
\textsuperscript{49} 334 Md. 669, 641 A.2d 195 (1994).
\textsuperscript{50} Id. at 684-85, 641 A.2d at 202.
\textsuperscript{51} Id. at 672, 641 A.2d at 196.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 671, 641 A.2d at 196.
\textsuperscript{55} Id. at 679, 641 A.2d at 199-200.
in compulsory insurance laws, a number of courts have held lessors (or, if the lessors are not self-insured, their insurers) responsible for providing primary liability coverage, notwithstanding a violation of the rental agreement. For example, in *American Tours, Inc. v. Liberty Mutual Insurance Co.*, 56 the North Carolina Supreme Court held a car rental agency's insurer responsible for providing to the lessee's daughter the minimum security required under North Carolina law, 57 even though the lessee permitted her daughter to drive the car in violation of the rental agreement. 58 Emphasizing the interests of innocent victims in having a means of financial redress for their injuries, the court stated, "The public policy expressed in [North Carolina's compulsory insurance law for rental vehicles] is that even where automobile rental agreements are violated it is preferable to provide coverage for innocent motorists rather than to deny such coverage because of the violation." 59

Meanwhile, other courts have relieved lessors of financial responsibility for damages that resulted when persons other than those expressly authorized in the rental agreements operated their rental vehicles. These courts focused primarily on the contract rights of les-

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56. 338 S.E.2d 92 (N.C. 1986).
57. North Carolina's compulsory insurance law for rental vehicles provides in pertinent part:

LIABILITY INSURANCE PREREQUISITE TO ENGAGING IN BUSINESS; COVERAGE OF POLICY.

[I]t shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public . . . unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee . . . subject to the following minimum limits: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident.

59. *Id.; see also Atlantic Nat'l Ins. Co. v. Armstrong*, 416 P.2d 801, 810 (Cal. 1966) (en banc) (requiring a car rental agency's insurer to extend motor vehicle liability coverage to a driver who was originally excluded from coverage under the terms of the rental agreement); *Roth v. Old Republic Ins. Co.*, 269 So. 2d 3, 7 (Fla. 1972) (holding the car rental agency's insurer primarily liable for damages resulting from the negligent operation of the rental car by a person who was not authorized to drive under the terms of the rental agreement); *American Country Ins. Co. v. Wilcoxon*, 537 N.E.2d 284, 291 (Ill. 1989) (holding that a taxicab company's insurer must extend its required security to a cab driver who was driving the leased cab in violation of the rental agreement); *Motor Vehicle Accident Indem. Corp. v. Continental Nat'l Am. Group Co.*, 319 N.E.2d 182, 185 (N.Y. 1974) (holding the lessor's insurer responsible for defending and providing primary insurance coverage to a driver who was not a permitted user under the rental agreement).
sors to limit their liability by imposing reasonable restrictions on the use of their vehicles. 60

In recent years, Louisiana courts have addressed this issue on a number of occasions. 61 In *Hearty v. Harris*, 62 the Louisiana Supreme Court, in a plurality opinion, upheld a provision in a rental agreement that canceled and terminated insurance coverage when a person other than the renter or the additional driver identified in the agreement drove the car. 63 The court acknowledged Louisiana's compulsory insurance law, which requires owners of motor vehicles to maintain proof of financial responsibility. 64 Nevertheless, the court concluded:

[I]t is not the public policy of this state to protect and provide compensation to injured persons at all times. Consequently, we believe it is not against public policy for an automobile rental agency to restrict liability coverage to certain named drivers. The agency has an interest in protecting its property and the right, as the owner of the vehicle, to impose restrictions on the operation and use of the vehicle.

60. See infra notes 61-70.

61. See Dennison v. Liberty Mut. Ins. Co., 645 So. 2d 1227, 1232 (La. Ct. App. 1994) (enforcing a provision in the rental agreement that limited liability coverage to the lessee and those drivers specifically named in the agreement); Veillon v. Urban, 614 So. 2d 238, 241 (La. Ct. App. 1993) (enforcing the provisions in the rental agreement that restricted liability insurance coverage to only those persons authorized to operate the rental vehicle under the terms of the rental agreement).

62. 574 So. 2d 1234 (La. 1991).

63. Id. at 1242. The rental agreement contained a provision that provided:  

USE OF RENTED VEHICLE BY DRIVER OTHER THAN ONE SPECIFICALLY QUALIFIED AND IDENTIFIED ON THIS CONTRACT WILL CANCEL AND TERMINATE INSURANCE COVERAGE . . . .

Id. at 1235.

64. Id. at 1237. Louisiana's Compulsory Motor Vehicle Liability Security Act requires owners of motor vehicles to maintain proof of financial responsibility by one of four methods, depending on lessor's status. The statute provides:

§ 861. Security required

A. (1) Every self-propelled motor vehicle registered in this state . . . . shall be covered by an automobile liability policy with liability limits as defined by R.S. 32:900(B)(2), or a binder for same, or by a motor vehicle liability bond as defined by Subsection B hereof, or by a certificate of the state treasurer stating that cash or securities have been deposited with said treasurer as provided by Subsection C hereof, or by a certificate of self insurance as provided by R.S. 32:1042.

(2) It shall be the duty of the registered owner of a motor vehicle to maintain the security hereinabove required. Failure to maintain said security shall subject the registered owner to . . . . sanctions . . . .

LA. REV. STAT. ANN. § 32-861(A) (West 1987).
This comports with the freedom to contract and the constitutional protection against the impairment of contracts.65

In the State of Connecticut, the legislature enacted a statute that imposes liability on lessors of rental vehicles for damages caused by operators of the vehicle.66 That statute provides:

Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if he had also been the owner.67

Unfortunately, the legislature did not clarify in the statutory language who was to be included in the term “operator.” Connecticut courts have consistently construed that statute, nevertheless, as imposing liability on the lessor only if the person operating the rented vehicle is in “lawful possession of it pursuant to the terms of the contract of rental.”68 In Pedevillano v. Bryon69 the Connecticut Supreme Court relieved a lessor from financial responsibility for the tortious operation of the rental vehicle by a person who was not an “authorized driver” within the terms of the rental agreement.70 The court reconciled its decision with the statutory language by stating, “The statute does not, in its terms, preclude a lessor from imposing reasonable restrictions on the identity of those to whom it is willing to entrust its property and for whose conduct it is willing to assume risk.”71

65. Hearty, 574 So. 2d at 1242 (footnote omitted) (emphasis added). In its opinion, the court also acknowledged section 32:900(B)(2) of the Louisiana code, which requires every “Motor Vehicle Liability Policy” to include an omnibus clause that “insure[s] the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured.” Id. at 1238 (alteration in original) (quoting La. REV. STAT. ANN. § 32:900(B)(2) (West 1987)). The court held, however, that the insurance coverage extended to the lessee by the lessor in the rental agreement does not constitute a “motor vehicle liability policy.” Id. at 1239 (internal quotations omitted). Rather, the court concluded, the rental agreement constitutes a “voluntary automobile liability policy” which is not subject to the omnibus requirement of section 32:900(B)(2). Id. (internal quotations omitted).

66. CONN. GEN. STAT. ANN. § 14-154(a) (West 1987).

67. Id.


69. 648 A.2d 873 (Conn. 1994).

70. Id. at 874.

71. Id. at 875.
Evidently, different jurisdictions have taken different approaches to the issue of whether lessors should be held financially responsible for the negligent operation of their rented vehicles by persons who were not authorized drivers under the terms of the rental agreement. For the most part, the results depend on whether the courts choose to place greater importance on the interests of the injured victims or those of the lessors.

3. The Court's Reasoning.—In Enterprise, the court first addressed the contradictions inherent in the statutory language of sections 18-102(b) and 18-106 of the Transportation Article.²² On the one hand, in section 18-106, the legislature provided for the enforceability of rental agreements that either restrict the lessee from giving permission to others to operate the rental vehicle or prohibit persons other than the lessee from operating rented vehicles without the consent of the lessor.²³ On the other hand, section 18-102(b) requires an owner of a rental vehicle to provide the minimum insurance coverage required under Title 17 to all persons operating the rented vehicle "with the permission of the owner or lessee," notwithstanding "any provision of the rental agreement to the contrary."²⁴ As a result, the court faced the question of whether the legislature intended section 18-106 to have any effect on the coverage required by section 18-102(b).²⁶

In a unanimous decision, the Court of Appeals affirmed the decision of the trial court, holding that a self-insured lessor of rental vehicles must provide primary liability coverage to persons driving rented vehicles with permission of the lessee, regardless of whether the lessee gave such permission in violation of the rental agreement.²⁷ The Court of Appeals further determined that section 18-106 should not be viewed as an exclusion from the required security of section 18-102(b). To do so, the court reasoned, would be inconsistent with the intent of the General Assembly.²⁸

²² Enterprise, 341 Md. at 543-44, 671 A.2d at 511.
²⁴ Id. § 18-102(b).
²⁵ The Court of Appeals has recognized that "the primary goal of statutory construction is to determine and effectuate the Legislature's intentions." Department of Pub. Safety and Correctional Servs. v. Howard, 389 Md. 357, 369, 663 A.2d 74, 79 (1995).
²⁶ Enterprise, 341 Md. at 544, 671 A.2d at 511.
²⁷ Id. at 543, 671 A.2d at 510-11.
²⁸ Id. at 548-49, 671 A.2d at 513.
Maryland Court of Appeals

1997

a. Statutory Interpretation.—In determining the legislative intent behind sections 18-102(b) and 18-106, the court applied certain well-established principles of statutory interpretation. The court began by looking at the plain language of section 18-102(b), specifically focusing on two significant phrases therein. First, the court found that the initial phrase of section 18-102(b), which reads "notwithstanding any provision of the rental agreement to the contrary," suggests that "no term or condition of a private rental agreement may interfere with the coverage required by § 18-102(b)." Thus, according to the court, even though the rental agreement between Ms. Sonde and Enterprise contained a provision prohibiting additional drivers, the legislature intended, "for purposes of applying § 18-102(b), [to] read the rental agreement as if it did not include this provision."

Second, the court found that the final phrase in section 18-102(b), which reads "with the permission of the owner or lessee," suggests that "the permission of either the owner or lessee is sufficient to bring a permittee under the coverage of the required security." The court reasoned that "had the Legislature intended to exclude coverage for unauthorized permittees . . . it would have used the conjunctive ‘and’ rather than the disjunctive ‘or.’ The use of ‘and’ as the connector between the terms ‘owner’ and ‘lessee’ would have indicated that the permission of both would be required."

Furthermore, the court refused to hold that section 18-106 provides an exclusion from the coverage requirements of section 18-102(b), citing to the line of Maryland cases refusing to create new exclusions to statutes in which the legislature has mandated insurance

79. Courts have often stated that the cardinal rule of statutory construction is "to determine and effectuate the Legislature’s intention." Howard, 339 Md. at 369, 663 A.2d at 79. To identify the intent of the legislature, courts have generally focused on the plain language and purpose of the statute. See Tidewater/Havre de Grace, Inc. v. Mayor of Havre de Grace, 337 Md. 338, 345, 653 A.2d 468, 472 (1995) ("[T]here ordinarily is no need to look beyond the words of the statute to determine its meaning or scope.").

80. Enterprise, 341 Md. at 547-48, 671 A.2d at 513.


82. Enterprise, 341 Md. at 547, 671 A.2d at 513.

83. Id. at 548, 671 A.2d at 513. Note, however, that the provision in the rental agreement prohibiting additional drivers is not completely void because section 18-106 still enforces this provision outside of the required security context. See id.


85. Enterprise, 341 Md. at 548, 671 A.2d at 513 (emphasis added).

86. Id.

87. See supra note 38 and accompanying text for Maryland cases invalidating insurance policy exclusions not expressly authorized by the legislature.
coverage. Had the legislature intended to exclude coverage for unauthorized permittees, the court concluded, the General Assembly "would have made such an exclusion an explicit part of the law." The court also maintained that "Enterprise could not 'contract away its statutorily-imposed risk by inserting in its rental agreement restrictive clauses that narrow the statutory requirements.'" As a result, the court concluded that the legislature did not intend for section 18-106 to have any effect on the required security mandated under section 18-102(b).

b. Public Policy.—To further support its holding, the court concluded that the required security must be extended to unauthorized permittees in order to uphold both the purpose and the public policy behind the compulsory insurance law. The court found that excluding unauthorized permittees from insurance coverage would result in a large class of claimants—the entire public—for whom insurance coverage would be unavailable, as well as a large class of uninsured motorists—unauthorized permittees.

Specifically, the court recognized the likelihood that persons other than the lessee may operate the rented vehicle and get into accidents. Using valet parkers and filling-station personnel as examples, the court pointed out that such unauthorized permittees may not maintain liability insurance if they do not own motor vehicles. Accordingly, the court stated, "[i]f they are not covered by the required security, accidents in which they are involved could result in injured claimants who would have no recourse to compensation from a private insurance fund." Thus, in order to uphold the purpose of Maryland’s compulsory insurance laws, the court held Enterprise responsible for extending coverage to unauthorized permittees.

88. Enterprise, 341 Md. at 547, 671 A.2d at 513; see supra note 38 and accompanying text.
89. Enterprise, 341 Md. at 549, 671 A.2d at 514.
91. Id. at 548, 671 A.2d at 513.
92. See supra note 28 and accompanying text.
93. See supra note 29 and accompanying text.
94. Enterprise, 341 Md. at 551, 671 A.2d at 514.
95. Id.
96. Id.
97. Id., 671 A.2d at 515.
4. Analysis.—

a. Upholding the Intent of the Legislature.—The holding of the Court of Appeals—that section 18-102 “covers persons driving leased vehicles with the permission of the lessee, even when the lessee violated the terms of the rental agreement”—is consistent with the intent of the General Assembly in two respects. First, the decision separates section 18-106 from section 18-102(b). Second, it promotes the public interest of protecting innocent victims of automobile accidents by providing a means of financial redress for their injuries.

The Enterprise decision is especially significant because the court interpreted the relationship between sections 18-102(b) and 18-106 for the first time in Maryland’s judicial history. In determining the legislative intent behind these two statutes, the Enterprise court properly applied well-established canons of statutory interpretation. The court interpreted the language of section 18-102(b) by focusing primarily on its plain meaning. As the Court of Appeals explained in Pennsylvania National Mutual Casualty Insurance Co. v. Gartelman, if the “statutory language is plain and unambiguous, and expresses a definite meaning consonant with the statute’s purpose, courts must not insert or delete words to make a statute express an intention different from its clear meaning.” The language of section 18-102(b) is clear. Persons covered by the required security of for-rent vehicles are those persons operating vehicles “with the permission of the owner or lessee.” By using the disjunctive “or,” as opposed to the conjunctive “and,” the legislature clearly intended that permission from the lessee alone is sufficient to trigger the required security mandated by section 18-102(b).

More importantly, the legislature specifically included the language “[n]otwithstanding any provision of the rental agreement to the contrary” in section 18-102(b), clearly indicating the legislature’s intent that no provisions in a rental agreement may preclude section 18-102(b)’s mandate of required security. Furthermore, the legislative history of sections 18-102(b) and 18-106 strongly suggests that the legislature intended for these two statutes to be interpreted separately and independently. Section 18-106’s original predecessor, Article 27,
section 187-G of the 1927 Maryland Code, prohibited lessees from giving permission to others to operate the rented vehicle without first obtaining authorization from the owner. Under section 187-G, persons giving such unauthorized permission and persons operating rented vehicles without proper authorization from the vehicle owners were guilty of a misdemeanor. Over the years, the legislature often renumbered that statute, but made no major substantive changes to it. In 1977, the legislature repealed the original section 187-G (which, by that time, had evolved into section 208) and recodified it into what is now known as section 18-106 of the Transportation Article. Similar to the original section 187-G, the present section 18-106 prohibits the unauthorized permission and use of rented motor vehicles, and under section 27-101, a violation of section 18-106 constitutes a misdemeanor. Overall, the legislative history indicates that there have been no major substantive changes to section 18-106.

Section 18-102, however, underwent notable substantive changes throughout its legislative history. Its original predecessor was Article 661/2, section 108 of the 1943 Financial Responsibility Act. Sections 108(a) and (b) of that Act mandated that lessors of motor vehicles

104. Section 187-G provided:

Any person who, after hiring, leasing or renting a motor vehicle under an agreement not to permit another to operate or drive the same, shall permit some other person to operate or drive such motor vehicle, and any person who shall operate or drive such motor vehicle without the consent of the owner, or his duly authorized agent, shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than One Hundred ($100) Dollars, or imprisonment for not more than six months, or to both fine and imprisonment.

Act of April 26, 1927, ch. 533, 1927 Md. Laws 1100 (repealed).

105. Id.


109. Id. § 27-101.

110. Article 66 1/2, section 108 provided:

(a) It shall be unlawful for any person to engage in the business of renting to others, any motor vehicle without a driver, until such person shall first notify the Department [of Motor Vehicles] of his intention to engage in the aforesaid business.

(b) The Department shall not register any motor vehicle to be so rented, unless and until the person owning such motor vehicle shall give proof of financial responsibility as provided by this Article, and such proof has been accepted by the Department, and the Department shall revoke the registration of any such motor vehicle whenever the Department ascertains that such owner has failed, or is unable, to maintain such proof of financial responsibility.
first demonstrate proof of financial responsibility before registering their vehicles with the Department of Motor Vehicles. In subsection (c), the legislature provided that the required security shall extend to "every person . . . operating a motor vehicle under a rental agreement and . . . the person owning [the] motor vehicle." Though the legislature did not expressly deny such coverage to persons operating the vehicle in violation of the rental agreement, it did specifically include a provision, in subsection (d), that unambiguously made it unlawful for a lessee to allow others to operate the rented vehicle without first obtaining the owner's permission. The legislature subsequently renumbered that statute and made other minor changes. Thus, for a while, two statutes in different articles of the Maryland Code had parallel provisions deeming it unlawful for lessees to allow other drivers to operate the rented vehicles without first obtaining consent from the owners.

Then, in 1970, the legislature completely overhauled Article 66 1/2. In doing so, the legislature made the first important substantive change to that statute. In a newly created section, section 8-101, the legislature deleted the provision that made it unlawful for lessees to give permission to other drivers to operate the vehicle without the authorization of the vehicle owner. Meanwhile, the separate statute in Article 27 that prohibited the unauthorized permission and use of rented vehicles remained intact. The fact that the legislature omitted the unauthorized permission and use provision in Article 66 1/2 while

(c) Proof required under this section shall cover every person using or operating a motor vehicle under a rental agreement and shall also cover the person owning such motor vehicle.

(d) Whenever a person rents from another a motor vehicle without a driver, it shall be unlawful for the person so obtaining the use of said motor vehicle to permit another person to operate the said motor vehicle without first securing the permission of the person owning the said motor vehicle.

Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00).

Act of June 1, 1943, ch. 1007, 1943 Md. Laws 1870-71 (repealed).
111. Id. § 108(a), (b) (repealed).
112. Id. § 108(c) (repealed).
113. Id. § 108(d) (repealed).
114. Md. Ann. Code art. 66 1/2, § 115 (1951) (repealed) (renumbering section 108 into section 115); Act of June 1, 1955, ch. 494, 1955 Md. Laws 726-27 (repealed) (making a minor change to include "trailers" and "semi-trailers" as applicable rental vehicles); Md. Ann. Code art. 66 1/2, § 117 (1957) (repealed) (making the last paragraph of subsection (d) into a separate subsection (e)).
116. Id.
maintaining it in Article 27 strongly suggests that the legislature intended to keep the two statutes separate and independent.

In 1977, the legislature repealed Article 66 1/2 and recodified that Article’s statutes into the Transportation Article. The present language in section 18-102 replaced Article 66 1/2, section 8-101. Here, the legislature made a second important substantive change to the language of this statute. Whereas the original 1943 predecessor to section 18-102 (section 108) simply extended the required security to those “operating a motor vehicle under a rental agreement and [the owners of the vehicles],” the newly created section 18-102 specifically included the language: “Notwithstanding any provision of the rental agreement to the contrary, the security required under this section shall cover the owner of the vehicle and each person driving or using the vehicle with the permission of the owner or lessee.” Thus, this new language also suggests that the legislature did consider whether the required security should extend to persons operating the vehicle with only permission from the lessee, in violation of the rental agreement, and decided that it should.

Moreover, the Enterprise decision upholds the important public policy of protecting innocent victims of automobile accidents with a means of financial redress for their injuries. The legislature implemented its compulsory insurance law to promote this public policy by ensuring that those who own and operate motor vehicles registered in Maryland are financially able to pay compensation for damages resulting from these vehicles. In holding that Enterprise, a self-insured lessor, must assume responsibility for providing primary liability coverage to unauthorized permittees, the Court of Appeals protects innocent claimants like Ms. Witt.

Such protection is not only consistent with legislative intent, but it is also fair. In any automobile accident, there exists the issue of who should bear the financial burden. As the Enterprise court recognized, there is a high probability that someone other than the lessee or the additional driver(s) specifically listed in the rental agreement will have to operate the rented vehicle. One can imagine a number of other scenarios in which public policy would accept, if not encourage,

120. Enterprise, 341 Md. at 543, 671 A.2d at 511.
121. Id. at 551, 671 A.2d at 514 (using the examples of valet parking attendants and filling station personnel to demonstrate the likelihood that persons other than those authorized in the rental agreement may operate the vehicle).
a lessee’s permission to allow someone who is not specifically author-
ized under the terms of the rental agreement to operate the vehicle. For example, if a lessee were to feel tired or sick while driving, allowing someone else to drive may prevent a dangerous situation. The Court of Appeals of New York commented, “one could postulate many factual situations in which the [lessee’s] decision to allow another to drive would be totally consistent with the exercise of due care and would possibly even have diminished the chance of an accident.”

Yet often such permittees will not have the protection of their own personal liability insurance coverage because, according to Maryland’s compulsory insurance law, only those persons who own motor vehicles are required to maintain the minimum security. In such a situation, a court has the option of placing that burden on either the owner of the vehicle (or its insurance company) or the innocent victim. Clearly, it would be unjust to punish innocent victims like Ms. Witt by denying them a source of insurance funds for their injuries. Thus, the Enterprise court justly decided to extend the owner’s required security under section 18-102(b) to persons driving the rental vehicle with the permission of the lessee alone, notwithstanding a violation of the rental agreement.

b. Competing Interests.—In Enterprise, the court weighed various competing interests before ultimately deciding that the interest of the innocent victim should be paramount. Although the court rendered the appropriate decision in this case, it also disregarded other important interests in the process. For instance, this court did not determine what rights, if any, the owner may have against the lessee for the alleged violation of the rental agreement. Presumably, the owner will have a cause of action against the lessee for breach of contract. A lessee’s breach of the contract terms may give the owner a cause of action, and even a judgment, against the lessee. For most people, however, judgments are only good to the extent that they are collectible. A lessee is not required to maintain minimum insurance coverage unless she personally owns a motor vehicle. As a result, many lessees may be, in practical terms, judgment-proof. The lessor, who may decide that it is not worth the time, money, and effort to sue the lessee, may still be the one who ends up bearing the financial

122. Allstate Ins. Co. v. Travelers Ins. Co., 370 N.Y.S.2d 675, 677 (App. Div. 1975) (requiring the insurer of a lessor to insure and defend a business associate of the lessee who was operating the rented vehicle with permission of the lessee, but in violation of the terms of the rental agreement), modified on other grounds, 350 N.E.2d 616 (N.Y. 1976).

123. See supra note 26 and accompanying text (setting out Maryland’s compulsory insurance requirements under section 17-103 of the Transportation Article).
burden. Thus, by extending primary liability coverage to persons who operate rented vehicles in violation of rental agreements, the Enterprise decision may unjustly afford wrongdoers valuable benefits. The lessee who breaches the rental agreement and the negligent driver may walk away scott-free because they do not have personal insurance coverage. Meanwhile, the lessor must ultimately bear the financial burden simply because it has deeper pockets.

The decision to place the burden on the self-insured rental agency to provide primary liability coverage to anyone operating the rental car, without regard to whether the lessee violated the terms of the rental agreement, may seem unfair to the lessor. If, as the court held, the terms of the rental agreement have no effect on section 18-102(b), the insurance company has no means to protect itself from having to insure everyone. Judge McAuliffe raised this issue in his dissenting opinion in Van Horn v. Atlantic Mutual Insurance Co., a case in which the Court of Appeals required an insurance company to provide coverage to its insured even though the insured applicant lied on his application about his epileptic condition. Judge McAuliffe stated: “Prohibiting rescission is not fair, however, to the innocent insurer who has been induced to enter into the contract of insurance by fraud or material misrepresentation of an insured.”

In the wake of Enterprise, self-insured rental car agencies will likely raise their rental charges. Similarly, the insurance companies of rental car agencies that are not self-insured will likely raise their premiums, which in turn will cause the rental companies to shift the costs to consumers in the form of higher car rental fees. At first glance, this seems appropriate because the persons who initially caused the problem by allowing unauthorized drivers to operate rental vehicles will bear the costs. Unfortunately, the Enterprise decision also detrimentally affects renters who do comply with the terms of their rental agreements.

In addition, the Enterprise decision may harm the individual’s constitutional right to contract. As the Van Horn court stated: “Compulsory insurance statutory provisions, at the very least, would seem to abrogate any contract right.” In certain situations, requiring the

125. Id. at 679, 641 A.2d at 199-200.
126. Id. at 704, 641 A.2d at 212 (McAuliffe, J., dissenting) (footnote omitted).
lessor to provide minimum security on the rental vehicle regardless of a breach in the terms of the rental agreement may effectively render those terms meaningless. Following the decision in Enterprise, the financial responsibility first falls on the lessor (or if applicable, the lessor's insurer). Then, the lessor may choose to seek redress by bringing suit against the lessee for breach of contract. If it appears, however, that the lessee may not have enough assets to cover a judgment against her, the lessor will probably refrain from expending the resources to sue the lessee. Without any negative consequences to the lessee who breaches the contract, any provisions in the rental agreement restricting the use of the rental vehicle becomes irrelevant.

5. Conclusion.—The decision in Enterprise Leasing Co. v. Allstate Insurance Co. is significant because the court, for the first time, interpreted the interplay between sections 18-102(b) and 18-106 of Maryland's Transportation Article. Reconciling the two sections was a difficult task. The court's decision to view section 18-102(b) independent from section 18-106, in effect, resulted in a requirement that lessors of rental vehicles or, if not self-insured, their insurance companies extend primary insurance coverage to all persons operating the vehicle with permission from the lessee—even if the lessee gave such permission in violation of the terms of the rental agreement. The court's decision is grounded in a sound interpretation of the legislative history of Maryland's compulsory insurance law and upholds important public policy in this state intended to protect victims of motor vehicle accidents.

KAY K. LEE

B. Negligent Misrepresentation Can Constitute an "Accident" Under a Liability Insurance Policy

In Sheets v. Brethren Mutual Insurance Co.,¹ the Court of Appeals held that an insurer had a duty to defend its insured against a tort suit alleging negligent misrepresentation because the insurance policy potentially covered the suit.² In this case of first impression,³ the court treated negligent misrepresentation as a form of negligence and concluded that if a negligent act caused damage not expected or foreseen

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² Id. at 658, 679 A.2d at 551.
³ Id. at 654, 679 A.2d at 550 (“Whether negligent misrepresentation can constitute an accident is a question that has not yet been decided in Maryland . . . .”)
by the insured, then that negligent act constituted an "accident." Because the policy potentially covered negligent misrepresentation, the court determined that the insurer had a duty to defend its insured in a suit alleging, inter alia, negligent misrepresentation. In so ruling, the court upheld Maryland's traditional distinction between fraud and negligent misrepresentation.

1. The Case.—In 1991, Robert and Joyce Sheets (the Sheetses) sold their farm in Frederick County to Frits and Helene Christensen (the Christensens). Approximately three weeks after the Christensens moved into the farmhouse, the septic system began to leak, and its contents flowed onto the walkway. The Frederick County Health Department condemned the septic system, forcing the Christensens to purchase a new septic system at a cost in excess of twelve thousand dollars. The Christensens filed suit against the Sheetses in the Circuit Court for Frederick County, alleging that the Sheetses had intentionally and negligently misrepresented the condition of the septic system before selling the farm to the Christensens. The Christensens further alleged that the Sheetses knew or should have known that the septic system would not support the Christensens' large family. Finally, the Christensens alleged that, but for the Sheetses' statement that the septic system was in "good working condition," the Christensens would not have bought the property.

When the Sheetses made the alleged misrepresentation, they possessed a farm owner's general liability policy issued by the Brethren Mutual Insurance Company (Brethren). The Sheetses therefore re-

4. Id. at 657, 679 A.2d at 551.
5. Id. at 658, 679 A.2d at 551.
6. Id. at 656, 679 A.2d at 550-51 ("[W]e have 'repeatedly refused to expand the tort [of fraud] to encompass liability for negligent or grossly negligent representations.'" (alteration in original) (quoting Ellerin v. Fairfax Sav., F.S.B., 337 Md. 216, 238-39, 652 A.2d 1117, 1128 (1995))).
7. Id. at 637, 679 A.2d at 541.
8. Id.
9. Id.
10. Id.
11. Id. The Christensens had nine children. Id.
13. Sheets, 342 Md. at 638, 679 A.2d at 541-42. The policy provided, in pertinent part, that Brethren would "pay those sums that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence.'" Joint Record Extract at E88, Sheets (No. 47). The policy defined property damage as:
   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
quested that Brethren defend and indemnify them in the lawsuit brought by the Christensens. Brethren refused the request, claiming that the Sheetsees' policy did not cover intentional or negligent misrepresentation.

The Sheetsees then filed suit in the Circuit Court for Frederick County and sought a declaratory judgment to compel Brethren to defend and indemnify them in the tort suit. Brethren filed a motion for summary judgment, and the Sheetsees responded by filing a cross-motion for summary judgment. At the hearing on the motions, Brethren argued that (1) negligent misrepresentation did not constitute an occurrence or accident under the policy, (2) no causal connection existed between the alleged misrepresentation and the damage to the septic system, and (3) the Christensens suffered mere economic injury and not property damage under the policy. Judge Stepler granted Brethren's motion and denied the Sheetsees' motion. The Sheetsees appealed to the Court of Special Appeals. The Court of Appeals granted certiorari on its own motion before the appeal could be heard by the Court of Special Appeals.

2. Legal Background.—

a. When Negligent Acts Are Accidents.—Among the states, there is a split of authority as to whether liability policies covering accidents also cover acts of negligence. Some states have held that the natural and probable consequences of the insured's negligence are not covered under these policies, while other states have held
that damage or injury caused by the insured's negligence is covered, so long as the damage or injury was not intentional. 24

The jurisdictions which hold that the natural and probable consequences of negligence cannot be an "accident" follow a "constructive intent" theory of negligence. Specifically, this theory provides that "everyone is constructively held to intend the natural and probable consequences of his acts." 25 Thus, only the unforeseeable consequences of an insured's act of negligence can constitute an accident under a liability policy. 26 This is an objective test; 27 these courts do not ask whether the insured did, in fact, foresee or expect the damage or injury, but only whether it was reasonably foreseeable. 28

There is a logical inconsistency with the natural and probable consequences test in the liability insurance context. 29 If the damage was foreseeable, then the policy would not cover the damage because


25. Hutchinson, 250 F.2d at 894.

26. See, e.g., id. (holding that property damage caused by water company's negligent failure to provide adequate water pressure was not an accident because the damage was the natural and probable consequence of the insured's negligence); City of Aurora, 326 F.2d at 906 (holding that damage caused by negligent operation of a sewage pump was not an accident because the damage was the natural and probable consequence of the insured's negligence); Midland, 214 F.2d at 667 (holding that damage caused by negligent roof construction was not an accident because water leakage during an ordinary rainstorm was not an unusual or unexpected consequence); Neale, 199 F.2d at 593 (holding that damage caused by negligent wire spinning was not an accident because the damage was the "usual, ordinary, and expected result of such negligent construction").

27. See City of Aurora, 326 F.2d at 907 (observing that if negligently caused damage is "foreseeable by a prudent person," then it is not an accident).

28. See Neale, 199 F.2d at 593 ("When the means used and intended to be used produce results which are their natural and probable consequences, there has been no accident although such results may not have been intended or anticipated.").

29. See, e.g., Hutchinson, 250 F.2d at 894. The Tenth Circuit noted:
no accident took place. If the damage was an unforeseeable consequence of the insured's negligence (an accident), then the insured will most likely not be liable for the damage under traditional tort principles. Thus, the insurance policy would only provide coverage when the insured is not liable and, therefore, does not need the coverage.

Taking an alternate approach, some jurisdictions have held that an act of negligence is an accident under a liability insurance policy if the insured did not actually intend the resulting damage. These courts employ two rationales for this rule. First, if liability insurance policies did not cover any results of negligence, then the policies would provide no coverage. Second, the rule of "reasonable expectation"...
tations" provides that words and phrases in the policy will be interpreted as they would be understood by the average policyholder.\textsuperscript{35} The average policyholder expects that any unintentional acts, including her own acts of negligence, will be covered under a liability policy.\textsuperscript{36}

Maryland courts have had several opportunities to determine whether liability insurance policies cover negligent acts. In Haynes v. American Casualty Co.,\textsuperscript{37} the Court of Appeals found that the unforeseen result of the insured's negligence was an accident under a liability policy.\textsuperscript{38} The court limited its analysis, however, to the particular policy and incident at issue and recommended a case-by-case approach for future cases.\textsuperscript{39}

In Harleysville Mutual Casualty Co. v. Harris & Brooks, Inc.,\textsuperscript{40} the Court of Appeals adopted the definition of accident from Webster's Twentieth Century Dictionary, which defines the term as "‘a happening; an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect for which it could be held liable.'" (quoting Bundy Tubing Co., 298 F.2d at 153)). See also supra notes 29-31 and accompanying text.

35. See, e.g., City of Carter Lake v. Aetna Cas. & Sur. Co., 607 F.2d 1052, 1056 (8th Cir. 1979) ("[A] contract of insurance should not be construed through the magnifying eye of the technical lawyer but rather from the standpoint of what an ordinary man would believe it to mean."); Rex Roofing Co., 116 N.Y.S.2d at 878 ("[I]n construing a contract of this kind words should not be given a technical meaning but should be taken as they would be understood by an average man."); Penley v. Gulf Ins. Co., 414 P.2d 305, 309 (Okla. 1966) ("[T]he words, ‘accident’ and ‘accidental’ have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to common speech and common usage of people generally.").

36. See Rex Roofing Co., 116 N.Y.S.2d at 878 ("We have no doubt that the average man would consider the occurrence in question as an ‘accident’ in the common conception of that word."); Penley, 414 P.2d at 309-10 (holding that the unintended damage caused by the defendant's negligence would be considered an accident).

37. 228 Md. 394, 179 A.2d 900 (1962).

38. Id. at 398-400, 179 A.2d at 903-04. The insured had instructed his work crew to cut down trees on his employer's property. Id. at 395, 179 A.2d at 901. While the insured was away from the work site, the crew "encroached on adjacent property and cut down 48 trees." Id. The insurer argued that the work crew intended to cut the trees, and, therefore, the resulting damage was not an accident. Id. at 396, 179 A.2d at 902. The court held that limiting recovery "to those situations where not only the result was unintended, but also where the means used were accidental, would place too narrow an interpretation upon that phrase." Id. at 400, 179 A.2d at 904. However, the court carefully limited its holding by noting: "We do not intend to descend into the 'Serbonian bog' mentioned by Justice Cardozo by attempting a sweeping determination as to whether or not a valid distinction exists between 'accidental means' and 'accidental result' in all cases." Id. at 399-400, 179 A.2d at 904 (footnote omitted).

39. Id. at 399, 179 A.2d at 904.

of a known cause, and therefore not expected.” The Harleysville court distinguished the facts of that case from those of Haynes and held that the damage in Harleysville did not result from an accident because the insured “should be charged with the responsibility of foreseeing” the results of its actions. At first glance, it appears that the court concluded that the reasonably foreseeable consequences of an action could not constitute an accident. The court’s next statement, however—that the resulting damage was not the “‘injury to property . . . caused by accident’” covered by the policy—indicated that the court has merely applied the case-by-case approach suggested in Haynes.

In State Farm Mutual Auto Insurance Co. v. Treas, the Court of Appeals again relied on the dictionary definition of accident and held that “[u]nder the circumstances of this case the possibility of injury . . . could not be said to be unforeseen, unusual, or unexpected.” Because the court used “unforeseen” instead of “unforeseeable,” the Treas holding did not specify whether the resulting damage was unforeseeable or actually unforeseen by the insured. Thus, the court did not clarify whether Maryland followed the subjective or objective standard.

Thirteen years later, in Ed. Winkler & Son, Inc. v. Ohio Casualty Insurance Co., the Court of Special Appeals adopted the view that “an accident . . . does not mean the natural and ordinary consequence of a negligent act.” The court stated that there was no

41. Id. at 151, 235 A.2d at 557 (quoting WEBSTER'S TWENTIETH CENTURY DICTIONARY (1950)).
42. Id. at 154, 235 A.2d at 559. In Harleysville, the insured was a contractor hired to “clear, burn and smooth up” a wooded area. Id. at 149, 235 A.2d at 556. The contractor's employee placed the cleared trees in piles 10 to 12 feet high, added fuel oil and rubber tires to the piles, and set them on fire. Id. at 154, 235 A.2d at 559. The contractor allowed the piles to burn for 36 hours. Id. The court held that the contractor “should be charged with the responsibility of foreseeing that a pall of smoke and soot will result, which may damage adjacent properties.” Id.
43. Id. at 154, 235 A.2d at 559.
45. Id. at 620, 255 A.2d at 299.
47. Id. at 194-95, 441 A.2d at 1132 (quoting 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4499, at 17 (Walter F. Berdal ed., 1979)). In Ed. Winkler, Ed. Winkler & Son, Inc. alleged that its insurer had a duty to defend its insured in a suit alleging malicious prosecution of a customer in the insured’s jewelry store. Id. at 191, 441 A.2d at 1130. Judge Wilner found that the insurer did not have a duty to defend because the insured’s acts were alleged to have been committed “consciously and deliberately.” Id. at 195-96, 441 A.2d at 1132.
longer a need "to consider the [insured's] subjective state of mind" as to the foreseeability of the resulting damage.\textsuperscript{48}

In \textit{IA Construction Corp. v. T \& T Surveying, Inc.},\textsuperscript{49} the United States District Court for the District of Maryland relied on \textit{Ed. Winkler} in holding that the "'natural and ordinary consequences of a negligent act'" were not accidents under Maryland law.\textsuperscript{50} In so ruling, the District Court failed to cite earlier cases decided by the Maryland Court of Appeals.\textsuperscript{51}

b. \textit{Negligent Misrepresentation}.—Most states classify negligent misrepresentation as a form of negligence.\textsuperscript{52} In those states, courts may follow the same rule for negligent misrepresentation that they follow for negligence.\textsuperscript{53} However, a few states statutorily define negligent misrepresentation as a type of fraud.\textsuperscript{54} In these states, negligent

\begin{itemize}
\item \textsuperscript{48} Id. at 195, 441 A.2d at 1182.
\item \textsuperscript{49} 822 F. Supp. 1213 (D. Md. 1993).
\item \textsuperscript{50} Id. at 1215 (quoting \textit{Ed. Winkler}, 254 Md. at 195, 255 A.2d at 1182 (quoting \textit{Appleman, supra note 47, at 17}). In \textit{IA Construction}, general contractor IA Construction Corp. sued T \& T Surveying, Inc. because T \& T allegedly used erroneous data in its surveying work. \textit{Id.} at 1214. T \& T filed a third-party complaint against its insurer, claiming that any defective work was covered by its general liability policy. \textit{Id.} Judge Motz dismissed the third-party complaint, finding that T \& T's surveying error was not an "accident." \textit{Id.} at 1215.
\item \textsuperscript{51} See \textit{id.} at 1214-15.
\item \textsuperscript{52} See, e.g., Universal Underwriters Ins. Co. v. Youngblood, 549 So. 2d 76, 78-79 (Ala. 1989) ("'[A]ccident' does not exclude events that occur through negligence. ... Actions for innocent and reckless misrepresentation have been held to be covered under policy provisions [covering accidents]." (citation omitted)); First Newton Nat'l Bank v. General Cas. Co. of Wis., 426 N.W.2d 618, 625 (Iowa 1988) ("The very definition of 'negligent misrepresentation' connotes negligent rather than intentional conduct ...."); Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986) ("Fraud is distinguished from negligence by the element of scienter required."); SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266, 1276 (N.J. 1992) ("[T]he insurer must defend an insured who is accused of reckless, negligent, or innocent misrepresentations ...."); Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994) ("[N]egligent misrepresentation differs from intentional misrepresentation ...." (citing \textit{Restatement (Second) of Torts} § 552 (1965))); Green Spring Farms v. Kersten, 401 N.W.2d 816, 822 (Wis. 1987) ("[A] claim for negligent misrepresentation ... is based upon a failure of the speaker to exercise reasonable care in making the representation.").
\item \textsuperscript{53} See \textit{supra} note 52.
\item \textsuperscript{54} See, for example, a provision in the California Civil Code stating:
\begin{quote}
Actual fraud ... consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:
\begin{itemize}
\item \textit{...}.
\end{itemize}
\end{quote}
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.
\textsuperscript{CAL. CIV. CODE} § 1572 (West 1997); \textit{see also} \textit{MONT. CODE ANN.} § 28-2-405 (1997); \textit{N.D. CENT. CODE} § 9-03-08 (1995); \textit{OKLA. STAT. ANN. tit. 15, § 58} (1997); \textit{S.D. CODIFIED LAWS}
misrepresentation is an intentional tort and cannot be an accident under a liability policy. In Maryland, the common law provided no cause of action for negligent misrepresentation until 1938, when the Court of Appeals first recognized the tort in Virginia Dare Stores, Inc. v. Schuman. At first, Maryland courts limited the scope of recovery under the new tort action. Until 1982, Maryland permitted recovery for negligent misrepresentation only if there existed “some business or personal relationship between the plaintiff and the defendant which cause[d] the plaintiff to rely upon the defendant’s statement, and which by its nature, create[d] a duty on the part of the defendant to speak truthfully.” In Delmarva Drilling Co. v. Tuckahoe Shopping Center, it appeared as though the Court of Appeals may have even decided to eliminate the cause of action altogether. However, in 1982, the


Maryland does not define negligent misrepresentation as a form of fraud. See infra notes 64-65 and accompanying text.


58. 175 Md. 287, 1 A.2d 897 (1938); see Comment, supra note 57, at 661.

59. Comment, supra note 57, at 668.


61. Id. at 427, 302 A.2d at 42 (“Our predecessors held, in accordance with what continues to be the prevailing weight of authority, that there can be no recovery in an action for deceit on the ground of negligent misrepresentation.”). In Tuckahoe, the shopping center sued Delmarva Drilling Co. for negligently misrepresenting that it could and would drill
Court of Appeals reaffirmed the existence of the tort of negligent misrepresentation, in *Martens Chevrolet, Inc. v. Seney,* and extended its scope to arm's length commercial transactions. Several cases since *Martens Chevrolet* have relied on the existence of negligent misrepresentation as a tort separate from fraud. The Court of Appeals recently distinguished the two torts in *Ellerin v. Fairfax Savings, F.S.B.* Thus, Maryland courts recognized negligent wells to produce usable water. *Id.* The court held that an action for fraudulent misrepresentation must be based on representations of facts, not on statements which are "promissory in nature." *Id.,* 302 A.2d at 41-42. See Comment, *supra* note 57, at 671-73 (discussing Tuckahoe's refusal to acknowledge the tort of negligent misrepresentation).

62. 292 Md. 328, 336, 439 A.2d 534, 539 (1982) ("[T]o the extent that Tuckahoe . . . casts any doubts on the existence of negligent misrepresentation as an avenue for tort recovery in Maryland, we hereby overrule it."). In *Martens Chevrolet,* the Martenses purchased an automobile dealership from the defendants. *Id.* at 331, 439 A.2d at 536. The defendants neglected to inform the Martenses of a financial statement and an audit that showed heavy losses prior to the sale. *Id.* at 332, 439 A.2d at 537. The Martenses filed suit against the defendants, alleging negligent misrepresentation. *Id.*

63. See Susan F. Martielli, *Martens Chevrolet v. Seney—Extending the Tort of Negligent Misrepresentation,* 42 MD. L. REV. 596, 604-09 (1983) (arguing that the *Martens Chevrolet* court should not have extended the tort of negligent misrepresentation to cases other than those involving "the sale of information itself, or to relationships which impose a duty to use care in supplying information"). Cf. *Restatement (Second) of Torts §§ 311, 552* (1965) (stating that in arm's length transactions, recovery is more restricted when damage is limited to "pecuniary loss" than when damage includes "physical harm").

The *Martens Chevrolet* court enumerated the elements of the negligent misrepresentation tort as:

1. the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
2. the defendant intends that his statement will be acted upon by the plaintiff;
3. the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
4. the plaintiff, justifiably, takes action in reliance on the statement; and
5. the plaintiff suffers damage proximately caused by the defendant's negligence.

*Martens Chevrolet,* 292 Md. at 337, 439 A.2d at 539.


misrepresentation as a tort requiring less intent than fraud, but had not made clear exactly how much less.

3. The Court’s Reasoning.—In Sheets, the Court of Appeals held that an insurer had a duty to defend its insured against a tort suit alleging negligent misrepresentation. Under Maryland law, an insurer is obligated to defend its insured in a tort suit if the plaintiffs “allege a claim against an insured that is potentially covered by the insurance policy.” The Court of Appeals considered the following two factors to determine whether the claim was potentially covered: (1) what coverage and defenses the terms and requirements of the insurance policy provide; and (2) whether the plaintiff’s tort allegations potentially brought the claim within the policy’s coverage.

Using this formula, the court determined that Brethren’s policy covered “property damage caused by an occurrence.” Accordingly, Brethren would only have a duty to defend if the Christensens’ complaint alleged three independent elements: “(1) that there was ‘property damage’ as defined in the policy; (2) that the property damage was ‘caused’ by the negligent misrepresentation; and (3) that negligent misrepresentation is an ‘occurrence’ as that term is defined by the policy.” With respect to the first element, the court determined that the alleged damages to the septic system did constitute property damage under the policy. Although the policy did not cover mere “economic loss,” the court found that the Christensens also alleged a loss of the use of the septic system. As the court noted, “[l]oss of use of tangible property that is not physically injured” is included in the policy.

66. See Cross, 332 Md. at 260, 630 A.2d at 1162. The court observed that fraud requires “intent to deceive the other party,” but negligent misrepresentation “only requires conduct which falls below the standard of care which the maker of the statement owes to the person to whom it is made.” Id.
67. Sheets, 342 Md. at 658, 679 A.2d at 551.
68. Id. at 639, 679 A.2d at 542.
69. Id.
70. Id. at 641, 679 A.2d at 543.
71. Id. (footnote omitted). The court concluded that negligent misrepresentation was the only occurrence that was potentially covered by the Brethren policy because “[a]ny other potential causes of the septic system’s failure happened after the transfer of title in the property and are thus not covered by the Brethren policy.” Id. at 641 n.3, 679 A.2d at 543 n.3.
72. Id. at 645, 679 A.2d at 545.
73. Id.
icy’s definition of property damage. Therefore, the complaint alleged property damage potentially covered under the policy.

With respect to the second element, the court examined the “causal nexus” between the negligent misrepresentation and the property damage. In a duty-to-defend case, courts apply the standard that the “underlying tort suit need only allege action that is potentially covered by the policy.” Following that standard, the court found that the Christensens properly alleged that the Sheetses’ breach of duty caused the Christensens’ injury. The court held that once a proper allegation has been made the insurer has a duty to defend, “no matter how attenuated, frivolous, or illogical that allegation may be.” If Brethren believed that no causal nexus between the negligent misrepresentation and the damage to the septic tank in fact existed, then Brethren should have filed a motion to dismiss against the Christensens on the ground of lack of causal nexus.

As to the third element, the court examined whether negligent misrepresentation constituted an “occurrence” under the policy. Because the policy defined occurrence as “an accident,” the court posed the question as “whether the Sheetses’ alleged negligent misrepresentation concerning the working condition of the septic system was an ‘accident.’” The court proceeded first, however, from a much broader inquiry—whether negligence, in general, can constitute an accident.

The court first discussed the split of authority in other jurisdictions over the issue of whether “any form of negligence can be considered an accident under a liability insurance policy.” The minority view, exemplified by the United States Court of Appeals for the Tenth Circuit, holds that liability insurance policies “do not cover damages

74. Id. (alteration in original) (internal quotations omitted).
75. Id.
76. Id. at 643-45, 679 A.2d at 544-45.
77. Id. at 643, 679 A.2d at 544.
78. Id. at 643-44, 679 A.2d at 544.
79. Id. at 643, 679 A.2d at 544.
80. Id. The court reasoned that because the insurer “promised to relieve the insured of the burden of satisfying the tribunal where the suit is tried, that the claim as pleaded is ‘groundless,’” it is the insurer’s duty, and not the insured’s, to provide a defense. Id. at 645, 679 A.2d at 545 (quoting Brohawn v. Transamerica Ins. Co., 276 Md. 396, 408, 347 A.2d 842, 850 (1975) (quoting Lee v. Aetna Cas. & Sur. Co., 178 F.2d 750, 751-52 (2d Cir. 1949))).
81. Id. at 646, 679 A.2d at 545.
82. Id.
83. Id.
which are the natural and probable consequences of negligent acts."84 The Sheets court, however, noted that the Tenth Circuit expressed hesitation about this restrictive definition of the term "accident."85

An alternative line of authority rejects the restrictive interpretation of accident and, instead, holds that acts of negligence may be covered under such policies, so long as the damage is not intentional.86 This line of authority recognized that if insurance companies could deny coverage for all acts of negligence, then the liability policy would be useless to the insured.87

Having examined these two lines of authority, the Court of Appeals next looked to Maryland law.88 Reviewing the reasoning behind Haynes v. American Casualty Co.,89 the Court of Appeals noted that Haynes had relied on cases which held that unintended damage could be "caused by accident."90 The court noted, however, that Maryland's more recent cases "are somewhat ambiguous as to the standard used to determine whether the negligent act constituted an 'accident.'"91 Specifically, the Sheets court could not determine whether previous cases had considered "whether the damage caused by the negligence should have been foreseen or expected by the insured" or "whether the damage was actually expected or intended by the insured."92

In the final analysis, the Court of Appeals rejected the constructive intent theory of negligence espoused by the Tenth Circuit and chose instead to follow those courts that apply a less restrictive interpretation of the term "accident."93 The court reasoned that the constructive intent theory of negligence conflicted with the "reasonable expectations of the average purchaser of general liability insurance."94 Moreover, the court thought that adopting an objective standard—

84. Id. at 647, 679 A.2d at 546 (citing City of Aurora v. Trinity Universal Ins. Co., 326 F.2d 905, 906 (10th Cir. 1964)); see supra note 23.
87. See id. at 649, 679 A.2d at 547.
88. See id. at 650, 679 A.2d at 547-48.
89. 228 Md. 394, 179 A.2d 900 (1962).
90. Sheets, 342 Md. at 650, 679 A.2d at 548.
91. Id. at 651, 679 A.2d at 548.
92. Id.
93. Id. at 647-53, 679 A.2d at 546-49.
94. Id. at 652, 679 A.2d at 549.
excluding coverage for damage the insured should have foreseen or expected—would render liability insurance policies "all but meaningless."95 The court agreed with the reasoning of the Eighth Circuit:

"Under [the insurer's] construction of the policy language if the damage was foreseeable then the insured is liable, but there is no coverage, and if the damage is not foreseeable, there is coverage, but the insured is not liable. This is not the law. The function of an insurance company is more than that of a premium receiver."96

Therefore, the court chose a new standard: "[A]n act of negligence constitutes an 'accident' under a liability insurance policy when the resulting damage was 'an event that takes place without [the insured's] foresight or expectation.'"97

The court then considered the narrower inquiry of whether an act of negligent misrepresentation could constitute an accident under the liability insurance policy.98 The court noted that courts in other jurisdictions have also split on this issue,99 with some courts holding that insurers have a duty to defend in cases that allege negligent misrepresentation.100 These courts rely on the proposition that negligent misrepresentation constitutes a form of negligence and thus is not intentional.101

Other courts have held, however, that negligent misrepresentation cannot constitute an accident. The Court of Appeals cited to the decision of the United States Court of Appeals for the Ninth Circuit in Safeco Insurance Co. v. Andrews102 as the "leading case" holding that

95. Id. at 653, 679 A.2d at 549.
96. Id. at 653-54, 679 A.2d at 549 (quoting City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979)).
97. Id. at 652, 679 A.2d at 548 (quoting Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc., 248 Md. 148, 154, 235 A.2d 556, 559 (1967)). In so doing, the court "disapproved" Ed. Winkler & Son, Inc. v. Ohio Casualty Insurance Co., 51 Md. App. 190, 441 A.2d 1129 (1982), in which the Court of Special Appeals followed the Tenth Circuit's rule that an accident is not "the natural and ordinary consequences of a negligent act." Sheets, 342 Md. at 654, 679 A.2d at 549-50 (quoting Ed. Winkler, 51 Md. App. at 195, 441 A.2d at 1132). The Court of Appeals also noted that one case in the United States District Court had relied on Ed. Winkler for this point of law. Id. at 654 n.4, 679 A.2d at 550 n.4 (citing IA Constr. Corp. v. T & T Surveying, Inc., 822 F. Supp. 1213, 1215 (D. Md. 1993)).
98. Sheets, 342 Md. at 654, 679 A.2d at 550.
99. Id. at 654-55, 679 A.2d at 550.
101. See supra notes 52-53 and accompanying text.
102. 915 F.2d 500 (9th Cir. 1990) (applying California law).
negligent misrepresentation is not an accident. The Maryland Court of Appeals criticized the Safeco court, however, for "not explaining its reasoning or citing any authority" for its conclusion. Cases following Safeco hold that because negligent misrepresentation more closely resembles fraud than ordinary negligence, negligent misrepresentation cannot be considered an "accidental, unintended occurrence." The Court of Appeals observed that this rationale might not apply in Maryland because Maryland courts have "repeatedly refused to expand the tort [of fraud] to encompass liability for negligent or grossly negligent representations."

Alternatively, some jurisdictions which hold that negligent misrepresentation is not an accident follow the "insured's intent to induce reliance on the false statement" rationale. Maryland's criteria for negligent misrepresentation also include the intent to induce reliance. The Court of Appeals emphasized, however, that "the falsity in the statement and the resulting injury or damage may be accidental." Therefore, the Sheets court chose to treat negligent misrepresentation like other forms of negligence. Thus, the "ultimate inquiry" is "whether the resulting damage is 'an event that takes place without one's foresight or expectation.'"

Applying these standards to the facts in Sheets, the court found that, according to the allegations of the Christensens' complaint, "it is possible that the Sheetses did not foresee or expect the damage resulting from their alleged negligent or careless assertion that the septic system worked properly." Therefore, because the damage may have taken place without the Sheetses' foresight or expectation, the court found that the damage "fits within our definition of accident." Further...
thermore, the court noted that "any doubt as to whether the allegations in the complaint state a potentially covered cause of action is ordinarily resolved in favor of the insured." Thus, with all three elements of the test satisfied, the court held that Brethren had a duty to defend the Sheetses.

Judge Karwacki, joined by Judge Murphy, dissented from the court’s opinion in Sheets. The dissent argued that negligent misrepresentation could not constitute an “occurrence.” Examining the elements of negligent misrepresentation, Judge Karwacki reasoned that “[n]egligent misrepresentation clearly has elements sounding both in intentional tort and in negligence.” Judge Karwacki observed that the defendant must have “asserted” a false statement to be liable for negligent misrepresentation and that such an assertion “requires a degree of intentionality inconsistent with the term accident.” Similarly, Judge Karwacki pointed out that the second element of negligent misrepresentation requires that the defendant “intend” the plaintiff’s reliance on his false statement. Therefore, Judge Karwacki concluded, “the limited intentionality necessary for negligent misrepresentation is of a sufficient quality to not qualify as an accident.”

The dissent further bolstered its conclusion by relying on the “reasonable expectations of the insured” rule of insurance contract construction. Judge Karwacki concluded that “an ordinary layperson” would not “consider a negligent misrepresentation to be an accident.”

4. Analysis.—In Sheets v. Brethren Mutual Insurance Co., the Court of Appeals made an appropriate decision regarding an insurer’s duty to defend its insured in a suit alleging negligent misrepresentation. By following the approach taken by a majority of jurisdictions, the Court of Appeals based its decision on basic rules of insurance con-

114. Id.
115. Id., 679 A.2d at 551-52. Therefore, the court held that the trial judge “erred in granting summary judgment to Brethren and instead should have granted the Sheetses’ cross-motion for summary judgment with respect to the duty to defend.” Id.
116. Id. at 658-62, 679 A.2d at 552-54 (Karwacki, J., dissenting).
117. See id. at 659, 679 A.2d at 552.
118. Id. at 659-60, 679 A.2d at 552.
119. Id., 679 A.2d at 552-53.
120. Id. at 660-61, 679 A.2d at 553. See supra note 63 for the elements of negligent misrepresentation.
121. Sheets, 342 Md. at 661-62, 679 A.2d at 553 (Karwacki, J., dissenting).
122. Id. at 662, 679 A.2d at 553.
123. Id.
tract construction, common sense concerns, and Maryland's traditional treatment of the tort of negligent misrepresentation. Although the majority's opinion sufficiently supports its conclusions, additional arguments and a call for judicial restraint might have allayed the fears of the dissenting judges.

a. Basic Rules of Insurance Construction.—In reaching its conclusion, the Court of Appeals referred to two general rules of insurance contract construction. First, every insurance contract should be construed according to the reasonable expectations of the average insured.\textsuperscript{124} Second, when in doubt, insurance contracts should be construed against the insurance company and in favor of coverage for the insured.\textsuperscript{125}

Applying the first rule, both the majority and the dissent applied the "reasonable expectations" rule, but reached opposite conclusions. To determine what an average layperson's reasonable understanding of the term "accident" would be, the majority looked to the word's definition in Webster's Dictionary.\textsuperscript{126} In dissent, however, Judge Karwacki asked whether "an ordinary layperson would consider a negligent misrepresentation to be an accident," and responded: "For me, that answer is clearly no."\textsuperscript{127} Unfortunately, Judge Karwacki failed to explain his answer, beyond suggesting the "common sense understanding that a voluntary verbal statement cannot, by definition, constitute an accident, as that term is intended by the policy."\textsuperscript{128} Curiously, though, in searching for the "reasonable expectations" of the "ordinary layperson," Judge Karwacki used the definition of "assert" from Black's Law Dictionary\textsuperscript{129} and the definition of "accident" from a legal reference text on insurance.\textsuperscript{130} In contrast, the majority

\textsuperscript{124} Sheets, 342 Md. at 640, 679 A.2d at 543 ("A word's ordinary signification is tested by what meaning a reasonably prudent layperson would attach to the term." (quoting Sullins v. Allstate Ins. Co., 340 Md. 503, 508, 667 A.2d 617, 619 (1995))).

\textsuperscript{125} Id. at 658, 679 A.2d at 551 ("Any doubt as to whether the allegations in the complaint state a potentially covered cause of action is ordinarily resolved in favor of the insured." (citing Aetna Cas. & Sur. Co. v. Cochran, 337 Md. 98, 107, 651 A.2d 859, 863-64 (1995))).

\textsuperscript{126} Id. at 657, 679 A.2d at 551. "Accident" is defined as "an event that takes place without one's foresight or knowledge." Id. (quoting Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc., 248 Md. 148, 154, 235 A.2d 556, 559 (1967) (quoting WEBSTER'S TWENTIETH CENTURY DICTIONARY (1950))).

\textsuperscript{127} Id. at 662, 679 A.2d at 553 (Karwacki, J., dissenting).

\textsuperscript{128} Id. at 660, 679 A.2d at 553.

\textsuperscript{129} Id., 679 A.2d at 552 (citing BLACK'S LAW DICTIONARY 116 (6th ed. 1990)).

relied on Webser's Dictionary, an everyday reference tool. The dissent's reasoning more likely reflects the reasonable expectations of the average attorney purchasing insurance. The majority's approach, however, serves as a good indicator of the expectations of the average layperson who purchases insurance.

The second rule—that, when in doubt, courts should construe insurance contracts against the insurance company—takes on great importance in a duty-to-defend case, perhaps more than in other contexts. Understandably, an insurance company will want to hesitate before defending a case that is entirely against its own interest or presents a conflict of interest. Sheets is not such a case, however. In Sheets, Brethren and the Sheetoses shared identical interests: both wished to have the underlying tort suit dismissed for failure to state a claim. The Court of Appeals correctly admonished Brethren that it is better to file for summary judgment against the plaintiffs in the underlying tort action than to attack the insured in court. Decisions that encourage insurance companies to resist their duty to defend will only lead to an increase in litigation. In Maryland, the duty to defend has traditionally been broader than the duty to indemnify. Therefore, insurers must defend some cases that they would not expect to indemnify. Sheets provides adequate guidance to insurance companies as to the meaning of the phrase "potentially covered" in the duty-to-defend context. If a complaint in a tort suit alleges that a negligent misrepresentation caused property damage, then there is a duty to defend.

b. Logical and Practical Concerns.—The court properly rejected the Tenth Circuit's holding that only the unforeseeable results of negligent acts may constitute accidents under liability insurance poli-

131. Sheets, 342 Md. at 657, 679 A.2d at 551 (citing Webser's Twentieth Century Dictionary (1950)).

132. See Deborah M. Neyens, Comment, Expanding the Insurer's Duty to Defend in Iowa: First Newton National Bank v. General Casualty Company of Wisconsin, 74 Iowa L. Rev. 969, 978-85 (1989) (arguing that insurance companies should only be required to bear the defense costs of covered claims).

133. See Appellee's Brief at 6-10, Sheets (No. 47). Brethren argued that no causal link existed between the alleged occurrence and the alleged property damage, and, therefore, the policy could not possibly cover the Christensens' allegations. Id.

134. Sheets, 342 Md. at 644, 679 A.2d at 545.

135. See Brohawn v. Transamerica Ins. Co., 276 Md. 396, 408-09, 347 A.2d 842, 850 (1975) ("[T]he insurer will defend any suit stating a claim within the policy, even though 'the claim asserted against the insured cannot possibly succeed because either in law or in fact there is no basis for a plaintiff's judgment.'" (quoting Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 10 (N.J. 1970))).
cies. The Tenth Circuit's own reservations about the faulty logic of its rule should warn other courts not to follow this precedent. Because Maryland had not followed any variation of the Tenth Circuit's natural and probable consequences rule, the court enjoyed the freedom to consider the illogical consequences of adopting such a rule.

The logical inconsistency inherent in the Tenth Circuit's view is that the insured would only be covered under circumstances in which it would not be liable. Applying the "reasonable expectations" doctrine to this paradox, one must conclude that the average purchaser of insurance would expect some coverage as opposed to no coverage at all. Therefore, the Court of Appeals correctly rejected the Tenth Circuit's rule.

c. Negligent Misrepresentation in Maryland: Responding to Legislative Silence.—The court sharply criticized the Ninth Circuit's holding in Safeco Insurance Co. v. Andrews, which held that negligent misrepresentation cannot be an accident for the purposes of a liability policy. Indeed, the Safeco opinion is both brief and lacking copious citation to authority. The Safeco court did, however, cite to Allstate Insurance Co. v. Miller, whose facts paralleled those of Safeco. The

136. See supra notes 25-28 and accompanying text.
137. See Hutchinson Water Co. v. United States Fidelity & Guar. Co., 250 F.2d 892, 894 (10th Cir. 1957) ("Apparently we did not contemplate whether this logic would lead us."); see supra note 29 and accompanying text.
138. In his dissent, Judge Karwacki implied that the precedent of Ed. Winkler & Son, Inc. v. Ohio Casualty Insurance Co., 51 Md. App. 190, 195, 441 A.2d 1129, 1132 (1982), bound Maryland courts, for he cited no other Maryland case on the issue of whether a negligent act may constitute an accident. See Sheets, 342 Md. at 661, 679 A.2d at 553 (Karwacki, J., dissenting). When the Court of Special Appeals decided Ed. Winkler, it cited only one Court of Appeals decision—Harleysville Mutual Casualty Co. v. Harris & Brooks, Inc., 248 Md. 148, 151, 235 A.2d 556 (1967)—in defining "accident" in the context of liability insurance. See Ed. Winkler, 51 Md. App. at 194, 441 A.2d at 1132. However, instead of using the definition articulated in Harleysville, the Court of Special Appeals adopted a new rule formulated from a textbook by John Appleman—Insurance Law and Practice. Id. at 194-95, 441 A.2d at 1132 (citing 7A John Alan Appleman, Insurance Law and Practice § 4492, at 17 (Walter F. Berdal ed., 1979)). This new rule was not, however, consistent with Maryland law. See Sheets, 342 Md. at 654, 679 A.2d at 549 ("For the reasons we have explained, ... we decline to adopt this restrictive interpretation of the term accident.").
139. See supra notes 83-95 and accompanying text.
140. "The [Safeco] court ... did not explain its reasoning or cite any authority for [its] ... proposition." Sheets, 342 Md. at 656, 679 A.2d at 550 (criticizing Safeco Ins. Co. v. Andrews, 915 F.2d 500 (9th Cir. 1990)).
141. Safeco, 915 F.2d at 502.
142. See id. at 501-02. The entire opinion is less than two pages.
144. Both cases involved an insurer's duty to defend cases that allege damage caused by negligent misrepresentations made by the respective insureds in the course of selling real property. See Safeco, 915 F.2d at 501; Miller, 743 F. Supp. at 724.
Miller court provided detailed reasoning and citations to buttress its conclusion that, under California law, a liability policy covering accidents does not cover the tort of negligent misrepresentation. The California Civil Code provides that negligent misrepresentation is a form of fraud and provides an exclusive remedy for one who is defrauded in the purchase of real estate. Therefore, as the Miller court averred, a negligent misrepresentation made in the course of a sale of real estate could not possibly be covered by a liability insurance policy.

The facts of both Safeco and Miller are strikingly similar to those of Sheets. However, California law is immediately distinguishable from Maryland law because the Maryland legislature has not yet spoken on the definition of negligent misrepresentation. Until the Maryland legislature announces that negligent misrepresentation is a form of fraud, there is no reason for Maryland courts to follow the California court's rationale.

5. Conclusion.—In Sheets v. Brethren Mutual Insurance Co., the Court of Appeals correctly held that an insurer has a duty to defend its insured in a suit alleging negligent misrepresentation. The court could have more clearly distinguished Maryland's law of negligent misrepresentation from California law. Nevertheless, the opinion sufficiently supports its conclusions and is in harmony with Maryland's rules of insurance contract construction. It also prudently addresses important logical and practical concerns. Moreover, the court properly exercised judicial restraint in the absence of legislative action on this issue. Sheets provides purchasers of home owner's liability insurance with the protection they reasonably expect, and it guarantees that insurers will be more than premium receivers.

Jennifer Rohr
VIII. Procedure

A. Repressed Memory and the Discovery Rule

Memory repression has been described as "a protective device used by the brain to fend off the emotional ravages of experiences that are simply too overwhelming to be borne by the conscious mind." Arguments that a plaintiff's repressed memory of childhood sexual abuse should toll the statute of limitations in a suit against her alleged abuser have become increasingly prevalent since claims of repressed memory first entered the civil courts in 1986.

In *Doe v. Maskell*, two plaintiffs asked the Court of Appeals to hold that their repressed memories of childhood sexual abuse could trigger the application of Maryland's discovery rule and toll the statute of limitations. The court considered the scientific arguments for and against the existence of repressed memories under its strict standard for assessing scientific evidence. In a unanimous decision, the

4. The discovery rule states that "the statute [of limitations] must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it." *Restatement (Second) of Torts* § 899 cmt. e (1979). For a discussion of the development of the discovery rule in Maryland, see infra notes 37-55 and accompanying text.
5. Maskell, 342 Md. at 686, 679 A.2d at 1088.
6. See infra text accompanying notes 74-78.
court refused to apply the discovery rule to cases in which plaintiffs claim to have recovered repressed memories.\(^7\)

Based on the court's adherence to its own standard for evaluating scientific evidence, its decision not to apply the discovery rule in \textit{Maskell} was logical and correct. The court's decision strictly enforces the requirement that a plaintiff must verifiably lack actual knowledge of an alleged injury to trigger the discovery rule. The court's reasoning also indicates its determination not to base decisions on scientific theories that do not enjoy clear support in the scientific community. Nevertheless, under the court's decision, a plaintiff who claims to have recovered repressed memories of abuse is left without a civil remedy in Maryland. Such plaintiffs must now look to the legislature for a civil remedy against their alleged abusers.

1. \textit{The Case}.—Plaintiffs Jane Doe and Jane Roe attended Seton Keough High School in Baltimore City, where Father A. Joseph Maskell served as school chaplain and counselor for both girls.\(^8\) Both girls alleged in their complaints that Father Maskell repeatedly abused them by subjecting them to "vaginal intercourse, anal intercourse, cunnilingus, fellatio, vaginal penetration with a vibrator, administration of enemas, . . . hypnosis, threats of physical violence, coerced prostitution and other lewd acts."\(^9\) They also alleged that Father Maskell physically struck them, forced them to "perform sexual acts with a police officer," and threatened to punish them if they revealed the abuse.\(^10\) The abuse allegedly continued until the plaintiffs graduated from Keough in 1971 and 1972.\(^11\)

Although the record does not clearly indicate when the plaintiffs "ceased to recall the attacks,"\(^12\) the plaintiffs alleged that they began to recover their memories of the mistreatment in 1992.\(^13\) On August 24, 1994, the plaintiffs filed suit in the Circuit Court for Baltimore City against Father Maskell, the School Sisters of Notre Dame, Seton Keough High School, the Archdiocese of Baltimore, and Archbishop

\(^7\) \textit{Maskell}, 342 Md. at 695, 679 A.2d at 1092.
\(^8\) \textit{Id.} at 686, 679 A.2d at 1088. The girls attended Keough between the ages of 11 and
\(^15\) \textit{Id.} at 698, 679 A.2d at 1094.
\(^9\) \textit{Id.} at 686-87, 679 A.2d at 1088.
\(^10\) \textit{Id.} Doe's complaint also alleged that Father Maskell put a gun in her mouth. \textit{Id.} at 687 n.2, 679 A.2d at 1088 n.2. Roe alleged that Father Maskell subjected her to douches and pelvic examinations. \textit{Id.}
\(^11\) \textit{Id.} at 687, 679 A.2d at 1088.
\(^12\) \textit{Id.} at 687 n.3, 679 A.2d at 1088 n.3.
\(^13\) \textit{Id.} at 688, 679 A.2d at 1089.
William Keeler in his official capacity. The complaints alleged battery, negligent supervision, negligent misrepresentation, intentional infliction of emotional distress, and fraud. The two cases were consolidated and assigned to Judge Hilary D. Caplan for trial.

The defendants argued that the suits were time-barred and moved for summary judgment. At a hearing on the defendants’ motions, the plaintiffs argued that their repressed memories of the alleged abuse should toll the statute of limitations under Maryland’s discovery rule. They advanced two theories to support their argument. First, the plaintiffs argued that memory repression differs from mere forgetting. The plaintiffs reasoned that while the discovery rule does not toll the statute of limitations for memories that a plaintiff simply “remembers,” it should toll the statute of limitations until a plaintiff “recovers” memories that have been repressed. Second, the plaintiffs argued that repressed memory is a disability, which tolls the statute pursuant to section 5-201(a) of the Courts and Judicial Proceedings Article of the Maryland Code. The defendants countered that the scientific community has not validated the theory of repressed memory. Both sides presented expert testimony and scientific articles to support their positions. After the hearing, Judge Caplan entered summary judgment for the defendants. The plaintiffs appealed to the Court of Special Appeals and also petitioned the Court of Appeals for certiorari. Because of the importance of the issue raised in this case, the Court of Appeals agreed to hear the appeal directly.

14. Id. Jane Roe’s suit also included Christian Richter, M.D., as a defendant. Id. at 688 n.5, 679 A.2d at 1089 n.5.
15. Id. at 688, 679 A.2d at 1089. Jane Doe and her husband also alleged loss of consortium. Id. at 688 n.6, 679 A.2d at 1089 n.6.
16. Id. at 688, 679 A.2d at 1089.
17. Id.
18. Id. at 692, 679 A.2d at 1091; see supra note 4.
19. Maskell, 342 Md. at 692, 679 A.2d at 1091 (“Plaintiffs in this case . . . claim that in order to avoid the pain associated with recalling the abuse they suffered, their memories were ‘repressed,’ not merely ‘forgotten,’ and later ‘recovered,’ rather than ‘remembered.’”).
20. Id. at 696, 679 A.2d at 1092. Section 5-201(a) states: “When a cause of action subject to a limitation under Subtitle 1 of this title accrues in favor of a minor or mental incompetent, that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed.” Md. Code Ann., Cts. & Jud. Proc. § 5-201(a) (1995).
21. Maskell, 342 Md. at 693, 679 A.2d at 1091.
22. Id. at 692-93, 679 A.2d at 1091-92.
23. Id. at 688, 679 A.2d at 1089.
24. Id. at 688-89, 679 A.2d at 1089.
25. Id. at 689, 679 A.2d at 1089.
2. Legal Background.—Statutes of limitations provide a period within which a plaintiff must initiate a lawsuit or lose her cause of action. The time provided in a statute of limitations derives from a legislative policy decision that balances the interests of plaintiffs, defendants, and society.

Although affording plaintiffs what the legislature deems a reasonable time to present their claims, statutes of limitations protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Plaintiffs have an interest in having adequate time to investigate a potential cause of action and to file a complaint. Defendants have an interest in having the opportunity to mount an adequate defense without problems of lost evidence and to "plan for the future without the indefinite threat of potential liability." Finally, the public has an interest in fostering judicial economy—the efficient use of judicial resources.

a. The Statute of Limitations in Maryland.—Section 5-101 of the Courts and Judicial Proceedings Article of the Maryland Code states 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." The statute does not define the term "accrues," thus leaving to judicial interpretation the question of when the statute of limitations begins to run. Generally, Maryland courts have held that the statute of limitations begins to run from the time the alleged wrong occurs, not when it is discovered. Strict application of the

26. Id.
30. Id. at 335, 635 A.2d at 399.
34. Harig, 284 Md. at 75, 394 A.2d at 302 ("Absent [a] statutory definition, the question of when a cause of action accrues is left to judicial determination.").
statute of limitations, however, does not distinguish between a plain-
tiff who failed to pursue her cause of action diligently and one who
was unable to perceive the harm before the statute of limitations had
run. The judicially created discovery rule responds to this inherent
inequity.\footnote{36}

\textit{b. Maryland's Discovery Rule.}—In one common formulation,
the discovery rule states that "the statute [of limitations] must be con-
strued as not intended to start to run until the plaintiff has in fact
discovered the fact that he has suffered injury or by the exercise of
reasonable diligence should have discovered it."\footnote{37} In Maryland, the
discovery rule is an exception to "the principle that where the legisla-
ture has not expressly provided for an exception in a statute of limita-
tions, the court will not allow any implied or equitable exception to be
genrafted upon it."\footnote{38}

The Court of Appeals first articulated Maryland’s discovery rule
in \textit{Hahn v. Claybrook}.\footnote{39} In that case, Ms. Hahn brought a medical mal-
practice suit against Dr. Claybrook, alleging that he treated her indi-
gestion with such large doses of argentum oxide that she developed
argyria (silver poisoning), which discolored her skin.\footnote{40} She filed her
claim seven years after she noticed the discoloration.\footnote{41} Dr. Claybrook
defended on the ground that the statute of limitations had run.\footnote{42} The
trial court directed a verdict for Dr. Claybrook.\footnote{43} Ms. Hahn appealed,
and the Court of Appeals responded by enunciating the discovery
rule:

\begin{quote}
The ground of the cause of action in this case was the discol-
oration of the plaintiff’s skin by the use of the drug called
argentum oxide, and the statute began to run from the time
\end{quote}

\footnote{36. \textit{See infra} notes 51-54 and accompanying text.}
\footnote{37. \textit{Restatement (Second) of Torts} § 899 cmt. e (1979).}
\footnote{38. \textit{Booth Glass Co. v. Huntingfield Corp.}, 304 Md. 615, 623, 500 A.2d 641, 645 (1985).}
\footnote{39. 130 Md. 179, 100 A. 83 (1917), \textit{superseded by} \textit{Md. Code Ann., Cts. & Jud. Proc.} § 5-
109(a)(1); \textit{see infra} note 46. Maryland may have been the first state in the country to for-
mulate the discovery rule. \textit{See John E. Stanfield, Note, The Statute of Limitations in Actions for
Undiscovered Malpractice, 12 Wyoming L.J. 30, 34 (1957) (surveying applications of the dis-
covery rule in medical malpractice cases).}
\footnote{40. \textit{Hahn}, 130 Md. at 180, 100 A. at 84.}
\footnote{41. \textit{Id.}}
\footnote{42. \textit{Id.} at 181, 100 A. at 84.}
\footnote{43. \textit{Id.}}
of the discovery of the alleged injury therefrom. As stated by the court below, when she began to be discolored that showed an injury, and that was the injury of which she had a right to complain. Then was her cause of action, and that was the time when the alleged injury was apparent . . . .44

Applying the newly pronounced rule, the court barred Ms. Hahn's suit, reasoning that had she "exercised ordinary care and diligence"45 she could have discovered that the argentum oxide caused her injury. The Court of Appeals made it clear that the cause of action accrues upon discovery of the injury, not the discovery of the injury's cause.46

The court subsequently extended the discovery rule's application from medical malpractice to all suits for professional malpractice.47 In 1978, the court also extended the rule to cover tort actions for the development of latent diseases, reasoning that "[l]ike the victim of undiscoverable malpractice a person incurring disease years after exposure cannot have known of the existence of the tort until some injury manifests itself."48

Finally, in Poffenberger v. Risser,49 the Court of Appeals held that a court could apply the discovery rule in any type of civil action:

Having already broken the barrier confining the discovery principle to professional malpractice, and sensing no valid reason why that rule's sweep should not be applied to pre-

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44. Id. at 187, 100 A. at 86.
45. Id. at 186, 100 A. at 86.
46. Id. A statute now provides that the statute of limitations for medical malpractice cases is five years or three years after discovery, whichever is less. Md. Code Ann., Cts. & Jud. Proc. § 5-109(a) (1995). The five-year period begins with a health care provider's negligent act and runs whether or not the plaintiff discovered or reasonably should have discovered the injury. See Hill v. Fitzgerald, 304 Md. 689, 700, 501 A.2d 27, 32 (1985) (stating that the statute "contains no room for any implied exceptions"). The General Assembly enacted section 5-109(a) to reduce the "long-tail" effect, which leaves medical malpractice insurers uncertain as to what claims might eventually be filed, "by restricting, in absolute terms, the amount of time which could lapse between the allegedly negligent treatment of a patient and the filing of a malpractice claim related to that treatment." Edmonds v. Cytology Servs. of Md., Inc., 111 Md. App. 233, 245, 681 A.2d 546, 552 (1996) (quoting Hill, 304 Md. at 699-700, 501 A.2d at 32).
47. See, e.g., Steelworkers Holding Co. v. Menefee, 255 Md. 440, 443, 258 A.2d 177, 179 (1969) (ruling that a building owner's cause of action against an architect accrued when the owner discovered that the building was defective); Mumford v. Staton, Whaley & Price, 254 Md. 697, 704, 255 A.2d 359, 362 (1969) (holding that a professional malpractice claim against an attorney accrued when the client discovered the attorney's negligence); Mattingly v. Hopkins, 254 Md. 88, 92-94, 255 A.2d 904, 907 (1969) (holding that a landowner's malpractice action against a civil engineer accrued when the landowner discovered the misplacement of boundary markers).
vent an injustice in other types of cases, we now hold the
discovery rule to be applicable generally in all actions and
the cause of action accrues when the claimant in fact knew
or reasonably should have known of the wrong.\footnote{50}

The \textit{Poffenberger} court then focused on the sort of knowledge a
plaintiff must possess to trigger the statute of limitations under the
discovery rule.\footnote{51} The court reasoned that constructive knowledge of
an injury's cause would be insufficient to activate the limitations pe-
riod, because that requirement would not avert the unfairness to the
plaintiff that the discovery rule seeks to prevent.\footnote{52} Rather, the court
held, the discovery rule tolls the limitations period until the plaintiff
acquires actual knowledge of the wrong or of the circumstances sur-
rounding an injury that should lead her to investigate the injury's
cause.\footnote{53} From that point, the statutory limitations period of three
years provides sufficient time for a diligent plaintiff to make an in-
quiry and decide whether to pursue a potential cause of action.\footnote{54}

Although in theory \textit{Poffenberger} extended the discovery rule's
reach to all civil actions, the rule does not apply automatically. Courts
must determine whether the discovery rule applies on a case-by-case
basis.\footnote{55}

c. \textit{Childhood Sexual Abuse and the Discovery Rule}.—Many vic-
tims of childhood sexual abuse who have filed civil lawsuits against
their alleged abusers have argued that their repressed memories

\begin{itemize}
\item \textit{Id.} at 636, 431 A.2d at 680.
\item \textit{Id.} at 636-38, 431 A.2d at 680-81.
\item \textit{Id.}
\item \textit{Id.} at 637-38, 431 A.2d at 681.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{O'Hara v. Kovens, 305 Md. 280, 289, 503 A.2d 1313, 1317 (1986).}
\item \textit{See Pennwalt Corp. v. Nasios, 314 Md. 433, 452, 550 A.2d 1155, 1165 (1988) (“It is
. . . clear that this Court is empowered to define the operation of the discovery rule to
further its purposes under varying factual circumstances.”); \textit{Poffenberger, 290 Md. at 634,
431 A.2d at 679 (“Depending upon the nature of the assertions being made with respect to
the limitations plea, this determination may be solely one of law, solely one of fact or one
of law and fact.”); see also \textit{O'Hara, 305 Md. at 298, 503 A.2d at 1322 (“[H]ow the discovery
rule operates in different types of cases is for the court to determine.”).}
\item After \textit{Poffenberger}, the Court of Appeals applied the discovery rule in a variety of civil
actions. See, \textit{e.g.}, Hecht v. Resolution Trust Corp., 333 Md. 924, 935, 655 A.2d 394, 400
(1994) (action against the directors of insolvent savings and loan association); \textit{Pennwalt,
314 Md. at 452, 550 A.2d at 1165 (products liability action); \textit{O'Hara, 305 Md. at 280, 503
A.2d at 1313 (securities fraud action). On the other hand, the court has not applied the
discovery rule to wrongful death actions, because to do so would “violate[e] the legislatively
imposed time limitation on [a] legislatively created right of action.” \textit{Trimper v. Porter-
Hayden, 305 Md. 31, 36, 501 A.2d 446, 449 (1985).}
should toll the statute of limitations. In a number of jurisdictions, plaintiffs have tried to overcome a statute of limitations defense by arguing that their lack of actual knowledge of the alleged abuse precluded their filing suit within the applicable limitations period.

Courts have resolved the question of whether repressed memory should trigger the discovery rule in several ways. Courts in some jurisdictions have held that the discovery rule applies in cases in which the plaintiff’s repression of the alleged abuse is total. Other courts have applied the discovery rule when the plaintiff has independent corroborating evidence of the abuse. On the other hand, a number of courts have refused to toll the statute of limitations for claims of re-

56. See generally Gregory G. Sarno, Annotation, Emotional or Psychological “Blocking” or Repression As Tolling Running of Statute of Limitations, 11 A.L.R.5th 588 (1993) (reviewing cases in which plaintiffs claim that memory repression should toll the statute of limitations).

57. The first of these suits was Tyson v. Tyson, 727 P.2d 226 (Wash. 1986) (en banc). In Tyson, a twenty-six-year-old woman filed a complaint against her father alleging that he sexually abused her from the time she was three years old until the age of eleven. Id. at 227. She alleged that she repressed all memory of the abuse until she entered therapy at age twenty-four. Id. Tyson’s father moved for summary judgment, arguing that the statute of limitations barred his daughter’s claim. Id. Concerned with the lack of objective evidence that the abuse had actually occurred, the Supreme Court of Washington held that Tyson’s claim was time-barred and that Tyson could not invoke the discovery rule to toll the statute of limitations. Id. at 250. A statute has since superseded Tyson. See Wash. Rev. Code Ann. § 4.16.310 (West Supp. 1996) (permitting the discovery rule to toll the statute of limitations in cases of childhood sexual abuse); see also infra note 60.

58. See, e.g., Hoult v. Hoult, 792 F. Supp. 143, 145 (D. Mass. 1992) (holding that the discovery rule applies where the plaintiff had repressed memory of sexual abuse until after the limitations period had run); Johnson v. Johnson, 701 F. Supp. 1863, 1870 (N.D. Ill. 1988) (applying the discovery rule and tolling the statute of limitations for an adult incest survivor with no conscious memory of the events during the limitations period); Evans v. Eckelman, 265 Cal. Rptr. 605, 610 (Ct. App. 1990) (“[A]ccrual of a cause of action for child sexual abuse [is] delayed until the plaintiff knows or reasonably should know of the cause of action.”); Ault v. Jasko, 637 N.E.2d 870, 873 (Ohio 1994) (“[T]he discovery rule applies in Ohio to toll the statute of limitations where a victim of childhood sexual abuse represses memories of that abuse until a later time.”); Farris v. Compton, 652 A.2d 49, 59 (D.C. 1994) (“[W]here a plaintiff has alleged total repression of any recollection of sexual abuse which allegedly occurred during her childhood, her claim does not accrue until the date that she recovered her memory to the extent that she knows, or reasonably should know, of some injury, its cause, and related wrongdoing.” (internal quotations omitted)).

59. See, e.g., Petersen v. Bruen, 792 P.2d 18, 24-25 (Nev. 1990) (“[N]o existing statute of limitations applies to bar the action of an adult survivor of [childhood sexual abuse] when it is shown by clear and convincing evidence that the plaintiff has in fact been sexually abused during minority by the named defendant.” (footnote omitted)); Olsen v. Hooley, 865 P.2d 1345, 1350 (Utah 1993) (“[W]e think it necessary to require that a plaintiff who alleges repression of memory as a basis for tolling the statute of limitations produce corroborating evidence in support of the allegations of abuse.”). Utah now has a statute allowing memory repression in cases such as Olsen to toll the statute of limitations, but the plaintiff in Olsen filed her action before the statute’s enactment. See Utah Code Ann. § 78-12-25.1 (1996); see also infra note 61.
pressed memory altogether, although statutes have superseded some of these decisions.\(^6^0\)

Many states have passed legislation specifically applying the discovery rule to cases of alleged childhood sexual abuse.\(^6^1\) Still other

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60. Compare Lemmerman v. Fealk, 534 N.W.2d 695, 696 (Mich. 1995) ("[N]either the discovery rule nor the insanity disability statute addresses the exception claimed to extend the time allowable for bringing suit in... cases [of repressed memory]."), and Seto v. Willis, 638 A.2d 258, 259 (Pa. Super. Ct. 1994) (holding that the statute of limitations in Pennsylvania is not tolled "solely because a plaintiff is under a disability"), and Hunter v. Brown, No. 03A01-9504-CV-00127, 1996 Tenn. App. LEXIS 95, at *12 (Tenn. Ct. App. Feb. 13, 1996) (refusing to apply the discovery rule to toll the statute of limitations for claims of repressed memory), appeal granted, 1996 Tenn. LEXIS 458 (Tenn. July 1, 1996), and S.V. v. R.V., 933 S.W.2d 1, 25 (Tex. 1996) (holding that the discovery rule does not apply to cases of repressed memory of childhood sexual abuse), with Lindabury v. Lindabury, 552 So. 2d 1117, 1117 (Fla. Dist. Ct. App. 1989) (per curiam) ("[U]nder any conventional application of the statute of limitations, the appellant's cause of action accrued, and the statutory clock began running, no later than [when the appellant reached majority]."), cause dismissed by 560 So. 2d 233 (Fla. 1990), and superseded by Fla. Stat. Ann. § 95.11.17 (West 1996) (requiring that plaintiff bring her action within four years of discovering both the abuse and its causal relation to the injury), and Tyson v. Tyson, 727 P.2d 226, 230 (Wash. 1986) (en banc) ("[T]he discovery rule does not apply to an intentional tort claim where plaintiff has blocked the incident from her conscious memory during the period of the statute of limitations."), superseded by Wash. Rev. Code Ann. § 4.16.340 (West Supp. 1996) (requiring that plaintiff bring her action within three years of the date when plaintiff discovered or reasonably should have discovered the injury).


states have enacted statutes providing for extended periods of time in which to file suit against an alleged child sexual abuser, rather than specifically applying a discovery rule. Periodically, state legislators introduce bills that would toll the statute of limitations in cases of childhood sexual abuse.

Maryland has no statute permitting the discovery rule to toll the statute of limitations for plaintiffs alleging recovered memories of childhood sexual abuse. Maskell presented the Court of Appeals with its first opportunity to decide whether a claim of repressed memory of childhood sexual abuse can trigger Maryland's discovery rule.

3. The Court's Reasoning.—In Maskell, the Court of Appeals held that the discovery rule does not apply to a claim of repressed memory of past sexual abuse. The court first reviewed the history of the discovery rule and its purpose, emphasizing the need to apply the discovery rule flexibly in determining whether it applies in a particular context. The court went on to state that application of the discovery rule to a repressed memory case turned on "whether there is a difference between forgetting and repression." Therefore, as an initial matter, the court tried to "understand what repression is." Although

(interpreting S.C. Code Ann. § 15-3-535 (Law. Co-op. Supp. 1995) and refusing to apply the discovery rule in a case of alleged sexual abuse because such an exception must come from the legislature).


63. Several such bills are currently pending. See, e.g., S.B. 344, 80th Leg., Reg. Sess. (Minn. 1997) (providing that a civil action for injury caused by sexual abuse must be instituted within six years of either the last act of abuse or the time plaintiff knew or had reason to know an injury was caused by the abuse); H.B. 744, 89th Gen. Assembly, 1st Reg. Sess. (Mo. 1997) (providing that a suit for damages due to childhood sexual abuse must be filed within ten years after reaching majority or within three years from the time the victim reasonably discovers an injury caused by the abuse).

64. Maryland H.B. 326 would have allowed a plaintiff to file suit up to 12 years after discovering the abuse. See Md. H.B. 326, 1994 Sess. The bill failed in the House Judiciary Committee. See Maskell, 342 Md. at 695 n.10, 679 A.2d at 1092 n.10. Although it is possible that the bill's failure influenced the court's reasoning, the opinion does not suggest that the bill played any role in the court's decision.

65. Maskell, 342 Md. at 695, 679 A.2d at 1092.

66. Id. at 689-91, 679 A.2d at 1089-90.

67. Id. at 691, 679 A.2d at 1090.

68. Id. at 691-92, 679 A.2d at 1090.

69. Id. at 692, 679 A.2d at 1091.
the court noted that "[e]ven defining the term [repression] is not easy," the court appeared to adopt the following definition:

"[I]n its general use the concept of repression has three elements: (1) repression is the selective forgetting of materials that cause the individual pain; (2) repression is not under voluntary control; and (3) repressed material is not lost but instead stored in the unconscious and can be returned to consciousness if the anxiety that is associated with the memory is removed. The assertion that repression is not under voluntary control differentiates repression from suppression and denial, with which it is sometimes confused . . . ."

Next, the court considered journal articles and expert testimony offered by the plaintiffs to demonstrate that repressed memory is a scientifically valid and accepted phenomenon and considered the materials offered by the defendants to counter this argument. The court placed great emphasis on the defendants' scientific arguments and made little reference to those offered by the plaintiffs. The court then applied the standard adopted in Reed v. State—the Frye-Reed standard—for determining the admissibility of scientific evidence as the basis for its inquiry:

While the existence of consensus (or lack thereof) in the scientific community is a more familiar inquiry within the context of determining the admissibility of scientific evidence under the test enunciated in Reed v. State, it is also a useful measure for this Court to evaluate the acceptance, and acceptability of a scientific theory.

70. Id.
71. Id. (quoting David S. Holmes, The Evidence for Repression: An Examination of Sixty Years of Research, in Repression and Dissociation, supra note 2, at 85-86).
72. Id. at 693, 679 A.2d at 1091.
73. Id. at 693-95, 679 A.2d at 1091-92.
75. Maskell, 342 Md. at 694, 679 A.2d at 1092. In Reed, the court examined the admissibility of voiceprint identification in a criminal prosecution. Reed, 283 Md. at 375, 391 A.2d at 365. At the time, voiceprint identification was a relatively recent technique. See id. at 377, 391 A.2d at 366. The court expressly rejected the position advanced by the State that "'[a]ny relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion.'" Id. at 386, 391 A.2d at 370 (alteration in original) (quoting McCormick on Evidence § 203, at 491 (2d ed. 1972)). Under this view, "disagreement in the scientific community regarding the reliability of a scientific process should go to weight rather than the admissibility of scientific evidence." Id. at 387, 391 A.2d at 371. Rather, the court opined that "[w]hen the positions of the contending factions are fixed in the scientific community, it is evident that controversies will be resolved only by further scientific analysis, studies and experiments . . . . Thus, courts should be properly reluctant to resolve the disputes of science." Id. The court then accepted the "general acceptance" rule for admissibility of scientific evidence. Id. at 389, 391 A.2d at
The court found the defendants' scientific arguments persuasive, stating that "there is so far no empirical validation for the theory of repression" and no consensus in the mental health community about the existence of repressed memory. The court found unconvincing the studies presented by the plaintiffs, which asserted that "repression exists as a phenomenon separate and apart from the normal process of forgetting." The court concluded that "because we find these two processes to be indistinguishable scientifically, it follows that they should be treated the same legally." Therefore, the court held that the plaintiffs' claims of repressed memories could not activate the discovery rule. The court placed responsibility for rewriting the law with the General Assembly.

Next, the court analyzed the plaintiffs' second theory: that repressed memory is a form of mental incompetence sufficient to invoke the protections of section 5-201 of the Courts and Judicial Proceedings Article. The court considered the history and language of that statute and the legislative intent behind the 1973 codification of the Maryland Code, which created the Courts and Judicial Proceedings Article. The court concluded that the 1973 revision did not broaden the reach of section 5-201, which has been limited to "plaintiffs who are insane and 'unable to manage [their] business affairs or estate, or to comprehend [their] legal rights or liabilities.'" Because the plaintiffs in Maskel presented no evidence of inability to manage their affairs, the court concluded, they could not invoke the protection of section 5-201.

372. The general acceptance rule, enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), states that a scientific principle or discovery about which expert testimony is offered "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014.
376. Maskell, 342 Md. at 694, 679 A.2d at 1092.
377. Id.
378. Id. at 695, 679 A.2d at 1092.
379. Id.
380. Id.
381. Id.
383. Maskell, 342 Md. at 697-98, 679 A.2d at 1093.
384. Id. at 698, 679 A.2d at 1094 (alteration in original) (quoting Decker v. Fink, 47 Md. App. 202, 207, 422 A.2d 589, 592 (1980)).
385. Id. Plaintiffs in other jurisdictions have had some success arguing that the definition of "insanity" includes repressed memory of childhood sexual abuse. See, e.g., Meiers-Post v. Schafer, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988) (holding that the statute of limitations can be tolled under the insanity clause if the plaintiff suffered from repressed memory and has corroborating evidence of the abuse); Jones v. Jones, 576 A.2d 316, 321 (N.J. Super. Ct. App. Div. 1990) ("[M]ental trauma resulting from a pattern of incestuous
Having rejected all of the plaintiffs' arguments to lift the statute of limitations bar, the Court of Appeals affirmed the trial court's grant of summary judgment for the defendants, holding that the plaintiffs' claims of repressed memories did not toll the statute of limitations. 86

4. Analysis.—In Maskell, the court refused to apply the discovery rule and toll the statute of limitations for plaintiffs who claimed recovered memories of childhood sexual abuse. Although many plaintiffs and legislators have made compelling arguments in favor of the discovery rule's application in cases of this sort, 87 the Maskell court's decision not to apply the discovery rule is not without precedent. 88 The extent of the court's inquiry into the validity of repressed memory theory, however, is unusual. 89

The Maskell court reviewed a decision on the defendants' motion for summary judgment. 90 Both plaintiffs and defendants presented expert testimony about repressed memory theory and "numerous scientific journals" containing articles and studies about this phenomenon. 91 The court was therefore able to make its own judicial inquiry into the validity of repressed memory theory. It did so by reviewing the expert testimony and the journal articles under the same Frye-Reed standard it uses to evaluate the admissibility of such material as evidence. 92 The court concluded that the psychological community had not reached sufficient consensus on the validity of repressed memory theory for the phenomenon to be "generally accepted" under the court's test for admitting scientific information as evidence. 93 Therefore, the court concluded that the plaintiffs could not use the theory of sexual abuse as insanity... so as to toll the statute of limitations."). But see Smith v. Smith, 830 F.2d 11, 12 (2d Cir. 1987) (applying New York law and holding that daughter's repression of father's conceded sexual abuse did not constitute insanity so as to toll the statute of limitations); Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1524 (S.D. Ind. 1990) (applying Indiana law and ruling that plaintiff's post-traumatic stress disorder did not constitute a disability); Travis v. Ziter, 681 So. 2d 1348, 1355 (Ala. 1996) (holding that repressed memory may not be considered insanity for purposes of tolling the statute of limitations); Lovelace v. Keohane, 831 P.2d 624, 629 (Okla. 1992) (ruling that legal disability did not include plaintiff's multiple personality disorder).

86. Maskell, 342 Md. at 698, 679 A.2d at 1094.
87. See supra notes 56, 58, and 60.
88. See supra notes 56 and 57.
89. See supra text accompanying notes 68-78.
90. Maskell, 342 Md. at 686, 679 A.2d at 1088.
91. Id. at 692, 679 A.2d at 1091.
92. See supra note 75 and accompanying text.
93. See supra notes 76 and 77.
of repressed memory to demonstrate the lack of actual knowledge required to trigger the discovery rule.  

The Court of Appeals's approach to deciding whether the discovery rule should toll the statute of limitations when a plaintiff claims to have recovered repressed memories of an alleged wrong is unique. Most other courts, regardless of whether they decided to apply the discovery rule in similar cases, have approached their decisions largely by reviewing the relevant case law of other jurisdictions, rather than deciding first whether repressed memory theory itself was scientifically valid. In some cases, courts took this approach because they were reviewing motions to dismiss and could not look outside the pleadings. The courts that did review motions for summary judgment did not appear to have had available to them the amount of scientific information the Court of Appeals had in Maskell.

The court's focus on the lack of scientific proof of repressed memory indicates that the court intends to apply strict criteria to the sort of knowledge a plaintiff must lack in order to apply Maryland's discovery rule. This emphasis on requiring a scientifically reliable lack of knowledge before triggering the discovery rule favors the interests of potential defendants and judicial economy over the interests of plaintiffs who claim to have retrieved memories of childhood sexual abuse. The court clearly wished to guard the interests of defendants and of society, which the statute of limitations seeks to protect.

94. Maskell, 342 Md. at 695, 679 A.2d at 1092.

95. See, e.g., Farris v. Compton, 652 A.2d 49, 57 (D.C. 1994) (reviewing a motion to dismiss and stating "we express no opinion at this stage of the litigation as to the validity or lack thereof of the theories regarding repression and recovered memories").

96. See, e.g., Lindabury v. Lindabury, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (per curiam) (reviewing the trial court's dismissal of appellant's amended complaint and holding that the discovery rule does not apply), dismissed, 560 So. 2d 223 (Fla. 1990); Ault v. Jasko, 637 N.E.2d 870, 873 (Ohio 1994) (reviewing the trial court's dismissal of the action and holding that the discovery rule applies in cases of repressed memory).

97. See, e.g., Hoult v. Hoult, 792 F. Supp. 143, 145 (D. Mass. 1992) (considering deposition testimony of the plaintiff and her therapist and holding that the discovery rule applies); Lemmerman v. Fealk, 534 N.W.2d 695, 699-700, 703 (Mich. 1995) (reviewing case law and affirming the trial court's grant of summary judgment because the statute of limitations had run). The Texas Supreme Court conducted an extensive review of the scientific literature on repressed memory in S.Y. v. R.V., 933 S.W.2d 1, 15-20, 26-28 (Tex. 1996). A concurring opinion in that case discussed the admissibility of expert evidence regarding repressed memory, id. at 40-42 (Cornyn, J., concurring), although the majority opinion "intimate[d] no view on whether the evidence . . . was or was not admissible." S.Y., 933 S.W.2d at 25. Although the majority did not frame its inquiry into the literature of repressed memory in terms of its standards for admitting scientific evidence, it nonetheless decided that repressed memory theory was not sufficiently verifiable to justify extending the discovery rule. Id. at 19-20.

98. See supra text accompanying notes 23-31.
interests of plaintiffs, who may have legitimate claims against former abusers, seemed less important to the court.\(^9\)

Although the *Maskell* decision was logical and consistent with the *Frye-Reed* standard, the *Maskell* court did not need to approach its decision in this particular way. The court could have assumed, arguendo, that repressed memories exist and then allowed a jury to decide whether these particular plaintiffs had repressed memories of the alleged abuse. After all, judges are not necessarily more capable than juries in assessing scientific theories.\(^10\) Alternatively, the court could have required corroborating evidence of abuse in order for plaintiffs to claim the benefit of the discovery rule.\(^11\)

The court's motivation for its particular approach is not clear from its opinion. The court may have seen this case as an opportunity to take a stand against unreliable scientific theories. The opinion's cursory treatment of the plaintiffs' arguments supporting the existence of repressed memories and its emphasis on defendants' arguments against the validity of these memories is consistent with this interpretation.\(^12\)

Conclusions drawn on the basis of unsubstantiated scientific theories have recently plagued tort litigation.\(^13\) For example, news stories in the early 1990s suggested that silicone gel breast implants might cause connective tissue disease.\(^14\) Only anecdotal evidence sup-

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99. Courts that have applied the discovery rule to repressed memory cases typically express sympathy for the plaintiff's position and the difficulty of proving that the childhood sexual abuse occurred. See, e.g., *Ault*, 687 N.E.2d at 873 ("Plaintiffs with valid claims should not be denied the opportunity to prove that repression of memory precluded them from bringing their claims within the statute of limitations period.").

100. *But see* Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 Tex. L. Rev. 715, 788 (1994) (arguing that judges are more qualified than juries to decide questions of scientific reliability because "over time, most judges will probably develop at least some facility for understanding science beyond the typical juror's level of understanding").

101. *See supra* note 59 and accompanying text.

102. *See supra* text accompanying note 73. The court spent one paragraph listing the studies the plaintiffs provided "purporting to validate the diagnosis of repression." *Maskell*, 342 Md. 693, 679 A.2d 1091. The court devoted two full pages of text to describing the defendants' arguments "tending to discredit the concept of repression and its application in this setting." *Id.; see id.* at 693-95, 679 A.2d at 1091-92.


reported this possibility. Because the manufacturers had not collected data addressing a possible connection between connective tissue disease and silicone breast implants, the Food and Drug Administration removed the implants from the market. Without reliable scientific studies to support their claims, plaintiffs filed 16,000 lawsuits against the implant manufacturers, finally resulting in a $4.25 billion settlement and the bankruptcy of one implant manufacturer.

In 1994, the first scientific study was published examining the risk of connective tissue disease in women with silicone breast implants. The study found no increased risk for these women. Subsequent studies have confirmed this result. Had other courts taken the Court of Appeals's approach in Maskell and insisted upon rigorous scientific documentation of a connection between silicone breast implants and the plaintiffs' diseases, they could have conserved both judicial and private resources.

The court's decision has the effect not only of reinforcing a strict standard for the discovery rule's application, but also of guarding Maryland courts against the dangers of "junk science." By invoking the strict Frye-Reed standard for evaluating scientific information as evidence, the court was able to prevent the plaintiffs from establishing a claim based on a theory that has not yet been generally accepted in

105. See Marcia Angell, Do Breast Implants Cause Systemic Disease? Science in the Courtroom, 330 NEW ENG. J. MED. 1748, 1748 (1994) (pointing out the lack of reliable evidence that silicone breast implants cause connective tissue disease and questioning "the way scientific facts are established in the courtroom").


107. See Charen, supra note 104.

108. As a result of the pending lawsuits, Dow Corning Corporation filed for bankruptcy under Chapter 11 on May 15, 1995. See Dow Files Chapter 11 Bankruptcy, Blames Number of Breast Implant Suits, BNA PRODUCT LIABILITY DAILY, May 16, 1995.


110. See id. at 1702.

111. See Charen, supra note 104.

112. See supra note 108.

113. See Suzanne E. Riley, The End of an Era: Junk Science Departs Products Liability, 63 DEF. COUNS. J. 502, 502 (1996) ("'Junk science' is the label courts, counsel and expert witnesses have given to novel scientific theories that are not based on sound foundation."). Without necessarily labeling repressed memory theory as junk science, the theory is based on evidence that is subject to widely varying interpretations. See supra note 2. Further, because it would be unethical to instill traumatic memories in patients deliberately, the theory has little chance of empirical verification. See Taub, supra note 2, at 187 (noting that it would be unethical to conduct experiments involving the deliberate implantation of a false traumatic memory).
the psychiatric community and which could have the potential for working a grave injustice on many potential defendants.

If the court in *Maskell* sought to protect the Maryland judiciary against junk science, its decision was a good one. Unfortunately, if the court is wrong about the validity of repressed memory theory, *Maskell* will result in an injustice for plaintiffs who have legitimate claims of past sexual abuse. The court's decision precludes access to the civil courts for plaintiffs who claim to have retrieved memories of childhood sexual abuse after the limitations period has run. Victims who claim to have repressed memories of *nonsexual* physical abuse, too, will now have no access to a civil court. Furthermore, because the application of the discovery rule is a matter of substantive law and not procedure, under the *Erie* doctrine, the *Maskell* court's decision binds a federal court exercising diversity jurisdiction.

Because Maryland has no statute of limitations for felony prosecutions, the state may be able to prosecute an accused abuser. As a practical matter, however, convictions are difficult to obtain. Further, a plaintiff may not find a criminal conviction as satisfactory as a civil judgment against her abusers. While many plaintiffs file suits as part of their healing process, damage awards are often needed to cover the costs of the extensive psychological therapy these plaintiffs often require.

Plaintiffs claiming recovery of repressed memories of childhood sexual abuse may appeal to the legislature to apply the discovery rule to these cases. Although such legislation would erode statute of limi-

114. See supra note 55 and accompanying text.
115. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (stating that a federal court exercising diversity jurisdiction must apply state law).
116. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945) ("[I]f a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."). Analysis of the tension between state and federal law were a federal court to decide whether to apply the discovery rule in a repressed memory case is beyond the scope of this Note. I am grateful to Professors Alan D. Hornstein and Gordon G. Young, University of Maryland School of Law, and the Hon. Frederick N. Smalkin, United States District Court, Maryland, for interesting and helpful discussions on this point.
118. See *Hall*, supra note 2, at 43 (discussing the difficulty of obtaining a criminal conviction in childhood sexual abuse cases where "[t]here is generally little or no evidence except for the prosecuting witness' testimony").
ations protection for defendants, the legislature could include procedural safeguards to protect defendants' interests. For example, New Mexico's statute requires plaintiffs to show corroborating evidence "by competent medical or psychological testimony." A statute could also include other safeguards, such as fictitious names for all parties, limitations on evidence of the defendant's "prior bad acts," model jury instructions, and admission of expert testimony regarding repressed memory. While such legislation would guarantee no plaintiff a victory, it would at least provide her with the possibility of a trial.

5. Conclusion.—In Maskell, the Court of Appeals evaluated the validity of repressed memory theory under the strict Frye-Reed evidentiary standard. The court concluded that the phenomenon of repressed memory is not generally accepted in the relevant scientific community and should be treated as the legal equivalent of forgetting. This conclusion left the court no choice but to prohibit application of the discovery rule to claims of repressed memory. The court's decision reinforces its requirement that a plaintiff cannot enjoy the benefit of the discovery rule unless she verifiably lacks knowledge of the injury or circumstances surrounding it. The decision also protects the courts from claims based on scientific theories that are not presently verifiable. The court's decision in Maskell has limited the options for a plaintiff who claims to have recalled a repressed memory after the statute of limitations for civil actions has run. The court appears to have decided that "'preclusion of a legal remedy alone is not enough to justify a judicial exception to the statute [of limitations].""

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120. See supra text accompanying notes 24 and 30.
123. See Lazo, supra note 121, at 1411-12 (proposing judicial controls on expert testimony regarding repressed memory).
124. S.V. v. R.V., 933 S.W.2d 1, 15 (Tex. 1996) (quoting Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977)) (refusing to apply the discovery rule to cases of repressed memory of childhood sexual abuse).
A. Clarifying Maryland's Exception to the Economic Loss Rule

In *Morris v. Osmose Wood Preserving*, the Court of Appeals clarified the exception to the economic loss rule. The court provided a two-step approach, requiring courts to weigh both the probability of risk and the severity of potential harm resulting from a defective product, to determine whether a plaintiff can circumvent the economic loss rule. By emphasizing the serious nature of the risk required to fall within this exception, the Court of Appeals properly maintained the high standard that is needed to serve the polar interests underlying the doctrine. In upholding the exception, the court stressed the need to preserve a clear distinction between recovery in product liability and contract law while still providing a remedy in tort to plaintiffs that are exposed to an unreasonable risk of harm. In the final analysis, the Court of Appeals held that only through the strict application of this exception will the law serve both of these interests.

1. The Case.—The plaintiffs, Patty Morris, Richard Mills, Michael Karbeling, and Laura Herlihy, each alleged that they had purchased townhomes with roofs that were constructed with defective fire retardant treated plywood (FRT plywood). According to the plaintiffs, when the FRT plywood is exposed to high temperatures, an acidic reaction occurs, which is designed to prevent the spread of fire. Although "roofs can reach temperatures of 180 degrees fahrenheit without the presence of fire," the plaintiffs claimed that this chemical reaction occurred "at temperatures as low as 130 degrees fahrenheit" in the plywood manufactured and distributed by the defendants. The chemical reaction, the plaintiffs maintained, “weakens the wood and destroys the bonding between the plywood laminates, thereby causing the wood, among other things, to bow, darken, spot, warp, fracture and otherwise deteriorate and lose strength capacity.”

The deteriorating FRT plywood, the plaintiffs contended, created “an immediate threat of injury from walking on the roofs” as well as
"the threat of the roofs collapsing and injuring the occupants within." To illustrate the gravity of the danger, the plaintiffs argued that the roofs of their townhomes could no longer support "any weight, even a heavy snowfall." Consequently, the plaintiffs filed a class action suit to recover the cost of replacing roofs that contained the FRT plywood manufactured and distributed by the defendants, Osmose Wood Preserving, Hoover Universal, Inc., and Hoover Treated Wood Products. In addition, the plaintiffs alleged that each of the defendants inappropriately marketed its products as suitable for roof construction.

In their amended complaint, the plaintiffs included counts for strict liability, negligence, breach of implied warranties, negligent misrepresentation, and violations of the Maryland Consumer Protection Act. Following a hearing, the Circuit Court for Montgomery County dismissed the complaint in its entirety, having determined that the economic loss rule barred plaintiffs' strict liability and negligence claims. This rule precludes recovery "in tort for purely economic losses—losses that involve neither a clear danger of physical injury or death, nor damage to property other than the product itself." In addition, the circuit court ruled that the plaintiffs' claim did not fit within Maryland's limited exception to the rule, which permits plaintiffs to maintain a claim in tort solely for economic losses when the product is so defective that it presents a clear and present danger to the purchaser.

11. Id., 667 A.2d at 629.
12. Id.
13. Id. at 526, 667 A.2d at 628. The complaint described the class as: [a]ll present owners of roofs or buildings, including townhouses, in the State of Maryland and in the United States, where the roofs were at any time constructed with fire retardant treated plywood, manufactured, treated, produced, tested, inspected, marketed and/or sold by Osmose Wood Preserving, Inc, [sic] Hoover Universal, Inc. or Hoover Treated Wood Products, Inc., and prior owners of said buildings who have paid for the inspection, replacement or repair of said buildings' roofs.
14. Id. at n.1 (alteration in original).
15. Id. at 528, 667 A.2d at 629.
16. Id.
17. Id. at 529, 667 A.2d at 630.
18. Id.
19. Id. The circuit court dismissed the plaintiffs' implied warranty count on the ground that the statute of limitations had run and also dismissed the plaintiffs' negligent misrepresentation count because, according to the court, the plaintiffs failed to show that they had relied on specific statements made by the defendants. Id. After having found no reliance, the circuit court dismissed the plaintiffs' Consumer Protection Act count as well. Id. at 529-30, 667 A.2d at 630.
The Court of Special Appeals reversed the circuit court’s dismissal of the breach of implied warranty claim and affirmed the dismissals of all other counts. A unanimous three-judge panel of the Court of Special Appeals, upholding the dismissal of the plaintiffs’ tort claims, concluded that the tort claims did not fall within the limited exception to the economic loss rule. While the Court of Special Appeals recognized that a tort claim may be asserted for purely economic losses where “the risk is of death or personal injury,” it found that the plaintiffs’ claims in the instant case stemmed from damage “occurring through gradual deterioration of the plywood” rather than a threat of “serious physical injury or death.” The court concluded that the plaintiffs’ claims that an individual could sustain injuries by walking on the roof or that the roof could collapse due to heavy snowfall were “[m]ere possibilities . . . [that] do not meet the threshold of establishing a clear danger of death or personal injury.” The Court of Appeals granted certiorari primarily to determine whether the Court of Special Appeals correctly applied the Whiting-Turner exception to the economic loss rule.

2. Legal Background.—Economic loss has been defined as “the diminution in the value of the product because it is inferior in quality


21. Id. at 656, 658, 639 A.2d at 152, 153. In affirming the dismissal of the plaintiffs’ count alleging violations of the Maryland Consumer Protection Act, Md. Code Ann., Com. Law II §§ 13-101 to -501 (1990), the Court of Special Appeals held that “[b]ecause the matters about which appellants complained did not involve ‘consumers’ or ‘consumer goods,’ we are convinced that the dismissal of the . . . count was proper.” Morris, 99 Md. App. at 658, 639 A.2d at 153.

The Court of Special Appeals, however, reversed the dismissal of the plaintiffs’ implied warranty claims. Id. at 663-64, 639 A.2d at 156. The court determined that, contrary to the findings of the circuit court, plaintiffs Morris and Mills had filed their claims prior to the statute of limitations and that plaintiffs Herlihy and Karbeling had alleged facts sufficient to defeat a motion to dismiss. Id.


24. Morris, 99 Md. App. at 655, 639 A.2d at 152. The Court of Special Appeals found persuasive the fact that “[t]he four named appellants have owned their townhouses from six to ten years” and “not one of the four has replaced the roof from fear of personal injury.” Id.

25. Id. at 655-56, 639 A.2d at 152.


27. Morris, 340 Md. at 526, 667 A.2d at 628.
and does not work for the general purposes for which it was manufactured and sold." 28 In general, claims "brought to recover damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property"—fall within this definition. 29 The economic loss rule dictates that damages to the product itself are not recoverable under tort theories of negligence and strict products liability, but rather are only recoverable under contract law. 30 Adopted by a majority of American courts, 31 this doctrine developed in order to "keep products liability and contract law in separate spheres." 32 In East River Steamship Corp. v. Transamerica Delaval, Inc., 33 the Supreme Court had occasion to address the economic loss rule and noted that "[t]he intriguing question whether injury to a product itself may be brought in tort has spawned a variety of answers." 34 In its analysis, the Supreme Court observed that three primary approaches have developed to find a satisfactory answer to this problem. 35

Chief Justice Traynor of the California Supreme Court outlined the first approach in Seely v. White Motor Co. 36 In this seminal case, Chief Justice Traynor readily conceded that if a defect in a product leads to personal injury or damage to property, tort law should apply. 37 He maintained that consumers should certainly not bear the risk of physical injuries resulting from products purchased on the market. 38 By the same token, if a product simply does not meet economic expectations, the law should restrict consumers to the remedies available for breach of contract. 39 Explaining his position, Chief Justice Traynor emphasized the following:

33. 476 U.S. 858 (1986).
34. Id. at 868.
35. Id. at 868-70.
36. 403 P.2d 145 (Cal. 1965).
37. Id. at 149.
38. Id. at 151.
39. Id.
The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products . . . unless he agrees that the product was designed to meet the consumer's demands.40

Thus, consumers that are affected by dangerous products should find protection through tort law.41 An individual that merely seeks redress for economic losses, as a result of a product that does not perform up to the individual's expectations, must find a remedy in the law of contracts.42 The Supreme Court, in adopting the reasoning of Seely, stated that to hold otherwise would allow contract law to "drown in a sea of tort."43

The Supreme Court of New Jersey, however, took an entirely different approach. In Santor v. A and M Karagheusian, Inc.,44 New Jersey's highest court found no good reason to distinguish products liability claims brought as a result of personal injury from claims stemming solely from economic losses.45 The court noted that although products liability claims have "been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, we reiterate . . . that the responsibility of the maker should be no different where damage to the article sold . . . is involved."46 Jurisdictions adopting the Santor rationale reject Seely "because they find it arbitrary [to say] that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a product injures itself."47 These courts find the distinction

40. Id.
41. Id.
42. Id.
44. 207 A.2d 305 (N.J. 1965).
45. Id. at 312.
46. Id. (citation omitted). The Supreme Court of New Jersey subsequently rejected the application of Santor in a commercial context. See Spring Motors Distrib. Inc. v. Ford Motor Co., 489 A.2d 660, 672 (N.J. 1985) (dismissing tort claims brought by truck dealer against Ford Motor Company for defective transmissions).
47. East River S.S. Corp., 476 U.S. at 869.
irrelevant because the conduct of the defendant caused the injury or damage in either case.\textsuperscript{48}

In \textit{East River Steamship Corp.}, the Supreme Court noted that "between [these] two poles fall a number of cases that would permit a \textit{products-liability} action under certain circumstances when a product injures only itself."\textsuperscript{49} Within this middle ground, courts have allowed plaintiffs to recover in tort for damages solely to the product itself, "but only when the damage results from an occurrence posing an unreasonable risk of harm to people or other property."\textsuperscript{50} Jurisdictions adopting this intermediate approach have attempted to differentiate between merely "‘disappointed’" consumers and "‘endangered ones,’” allowing only the latter to sue in tort.\textsuperscript{51}

In Maryland, without the requisite elevated risk of harm, a buyer of a defective product cannot recover in tort from a manufacturer for damage resulting only to the product itself.\textsuperscript{52} The Court of Appeals, in \textit{Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.},\textsuperscript{53} recognized that "[i]n products cases, liability in negligence for economic loss alone, unaccompanied by physical injury, is often denied regardless of privity."\textsuperscript{54} Writing for the court, Judge McAuliffe rejected the bright line test of denying recovery for economic losses where there is no proof of personal injury or property damage.\textsuperscript{55} Instead, the court concluded:

\begin{quote}
[T]he determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition.\textsuperscript{56}
\end{quote}

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Connaughton, \textit{supra} note 30, at 522.
\textsuperscript{51} \textit{East River S.S. Corp.}, 476 U.S. at 869 (quoting Russell v. Ford Motor Co., 575 P.2d 1383, 1387 (Or. 1978)).
\textsuperscript{52} \textit{United States Gypsum Co. v. Mayor of Baltimore}, 336 Md. 145, 156, 647 A.2d 405, 410 (1994).
\textsuperscript{53} 308 Md. 18, 517 A.2d 336 (1986).
\textsuperscript{54} Id. at 33, 517 A.2d at 344.
\textsuperscript{55} Id. at 35, 517 A.2d at 345.
\textsuperscript{56} Id. In arriving at this conclusion, the Court of Appeals found persuasive the reasoning of the Indiana Supreme Court in \textit{Barnes v. Mac Brown and Co.}, 342 N.E.2d 619 (Ind. 1976). \textit{See Whiting-Turner}, 308 Md. at 34, 517 A.2d at 345. In \textit{Barnes}, the Indiana Supreme Court asked rhetorically, "If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck?" \textit{Barnes}, 342
Thus, in *Whiting-Turner*, the Court of Appeals established a significant exception to the economic loss rule in products liability cases. The court shifted the analysis from injuries that had actually occurred to the risk of potential injury. The court, however, cautioned against an overly broad application of its holding, noting:

It is the serious nature of the risk that persuades us to recognize the cause of action in the absence of actual injury. Accordingly, conditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice. A claim that defective design or construction has produced a drafty condition that may lead to a cold or pneumonia would not be sufficient.

As recently as 1994, the Court of Appeals held that "[e]ven where a recovery, based on a defective product, is considered to be for economic loss, a plaintiff may still recover in tort if the defect creates a substantial and unreasonable risk of death or personal injury." In *United States Gypsum Co. v. Mayor of Baltimore*, the plaintiffs sued for the significant costs of removing and rectifying the effects of asbestos contamination in numerous municipal properties. In allowing the plaintiffs to seek purely economic damages, the court stated that

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58. *Id.*
59. *Id.* at n.5. Interestingly, Judge McAuliffe's reasoning in *Whiting-Turner* is in accord with a decision he authored only a month earlier—*Jacques v. First National Bank of Maryland*, 307 Md. 527, 515 A.2d 756 (1986). In deciding whether a bank owes a duty of care to a customer in processing a loan application, the *Jacques* court held that the determination of whether a tort duty exists in a particular context is based on two major considerations. *Id.* at 534-35, 515 A.2d at 759-60. First, a court must consider "the nature of the harm likely to result from a failure to exercise due care." *Id.* at 534, 515 A.2d at 759. Second, the court must examine "the relationship that exists between the parties." *Id.* The court held that "where the risk created is one of personal injury, no . . . direct relationship [between the parties] need be shown, and the principal determinant of duty becomes foreseeability." *Id.* at 535, 515 A.2d at 760. Therefore, in tort cases involving only economic loss, courts may only permit recovery in those cases in which the risk of such harm is foreseeable.

60. *United States Gypsum Co. v. Mayor of Balúmore*, 336 Md. 145, 156-57, 647 A.2d 405, 410 (1994); *see also* A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 251, 634 A.2d 1390, 1398 (1994) (holding that "the determination of whether a duty should be imposed . . . depend[s] upon the risk generated by the negligent conduct rather than the nature of the resultant damage").
62. *Id.* at 152, 647 A.2d at 408.
"[r]ather than waiting for an occupant or user of the building to develop an asbestos-related injury, we believe building owners should be encouraged to abate the hazard to protect the public." Thus, the plaintiffs were able to sue in tort under the exception to the economic loss rule due to the high probability of injury or death resulting from exposure to asbestos.

3. The Court's Reasoning.—In Morris v. Osmose Wood Preserving, the Court of Appeals applied the same principles articulated in United States Gypsum, but came to the opposite result, holding that the Morris plaintiffs failed to fit within Maryland's limited exception to the economic loss rule. Thus, the court ruled that the trial judge had properly dismissed the tort claims brought by the plaintiffs against the manufacturers of FRT plywood. While the court acknowledged the general rule that plaintiffs cannot recover for purely economic losses, it went on to observe that "[s]uch losses are often the result of some breach of contract and ordinarily should be recovered in contract actions, including actions based on breach of implied or express warranties." Under the Whiting-Turner exception, however, the Mor-

63. Id. at 158, 647 A.2d at 411 (quoting 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 398 (Minn.), amended by 492 N.W.2d 256 (Minn. 1992)).
65. Id. at 536, 667 A.2d at 633. This Note primarily addresses the tort claims brought by the plaintiffs and the application of the economic loss rule in Maryland. The Court of Appeals affirmed the dismissal of the claims brought under the Consumer Protection Act on the ground that "the allegedly deceptive practices occurred entirely during the marketing of the plywood to the builders." Id. at 541, 667 A.2d at 636. The majority further noted:
The only effect the alleged misrepresentations had on the sale of the townhouses was the creation of a possibly erroneous belief on the part of the builders which caused them to include allegedly inferior products in the townhouse. This remote effect on the sale of consumer realty is not sufficient for us to conclude that the deceptive trade practice actually occurred in that sale.

Id. at 542, 667 A.2d at 636.

The Court of Appeals also dismissed the plaintiffs' warranty claims on the ground that "[t]he only contracts for the sale of goods occurred between defendants and the builders." Id. at 545, 667 A.2d at 637. The court held that the plaintiffs could not bring a contract action unless they could "circumvent the so-called 'horizontal' privity requirement." Id. Because the plaintiffs had not been "injured in person," as required by section 2-318 of the Maryland Commercial Law Article to abrogate the horizontal privity requirement, the court concluded that the plaintiffs could not bring a contract action. Id., 667 A.2d at 638; see Md. Code Ann., Com. Law I § 2-318 (1992) (allowing a third party beneficiary of an express or implied warranty to bring a cause of action "if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty").

66. Morris, 340 Md. at 545, 667 A.2d at 638.
67. Id. at 531, 667 A.2d at 631.
68. Id.
The court recognized that claims for purely economic losses would not be barred if there was the requisite risk of death or personal injury from a defective product.  

In presenting their case to the Court of Appeals, the parties focused on whether the facts alleged in the complaint fell within the Whiting-Turner exception to the economic loss rule. The plaintiffs argued that the roofs could not support significant amounts of weight and thereby created a danger of injury to anyone who walked on the roofs or to anyone below the roof during a heavy snowfall. The defendants countered that "the risk is not clear enough to bring the claim within the Whiting-Turner exception." In addressing this issue, the court further refined the exception to the economic loss rule by promulgating a two-part test "to determine the degree of risk required to circumvent the economic loss rule." The court declared: "We examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury." To provide guidance on the application of this test, the Court of Appeals stated:

[1]f the possible injury is extraordinarily severe, i.e., multiple deaths, we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe, i.e. a broken leg or damage to property. Likewise, if the probability of the injury occurring is extraordinarily high, we do not require the injury to be as severe as we would if the probability of injury were lower.

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69. Id. at 532, 667 A.2d at 631.
70. Id. at 533, 667 A.2d at 631.
71. Id.
72. Id.
73. Id.
74. Id., 667 A.2d at 631-32.
75. Id., 667 A.2d at 632. The two-part test presented by the Morris court combines reasoning found in Whiting-Turner and United States Gypsum. Id., 667 A.2d at 631. The "severity component" stems from Whiting-Turner, in which the court found that the construction of a twenty-one story condominium, with ten vertical utility shafts that lacked a sufficient fire-resistance rating, put residents at risk of death or severe personal injury. Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 22, 517 A.2d 336, 338 (1986). The Morris court, in construing Whiting-Turner, stated that "[e]ven though no fire had actually occurred and the probability that the defect would cause the fire was not extraordinarily high, we allowed the plaintiffs to maintain a tort action because the nature of the possible damage was very serious—multiple deaths and personal injuries." Morris, 340 Md. at 533-34, 667 A.2d at 632.

The Morris court derived the "probability element" from United States Gypsum. Id. at 534, 667 A.2d at 632. As the Morris court recounted, in United States Gypsum, "[t]he possible injury—inhalaition of asbestos fibers causing serious diseases—was coupled with a high
The Court of Appeals recognized that using the two-part approach to analyze whether a tort claim for purely economic losses is actionable creates a prudent balance between two competing policy interests. The court emphasized that this narrow exception adequately addressed concerns announced in East River Steamship Corp. and in Seely over "'keep[ing] products liability and contract law in separate spheres.'" The Court of Appeals maintained that this consideration, however, must be tempered by the necessity "of en-couraging people to correct dangerous conditions before a tragedy results."

Applying the test to the facts of Morris, the Court of Appeals concluded that the plaintiffs failed to "meet the required legal threshold of pleading the existence of a clear and extreme danger of death or serious personal injury." The majority noted that none of the plaintiffs had alleged that a single individual had actually suffered injury since the installation of the roofs, nor had the plaintiffs alleged that a single roof had collapsed under the weight of a heavy snowfall. The court stressed that in order to properly invoke the exception to the economic loss rule, a "substantial risk of death or serious physical injury" must exist. The court ultimately warned that "[t]o lower the threshold to encompass mere 'possibilities' of injury . . . is to probability that personal injuries thereby would result because everyone who used the building could have been exposed to asbestos fibers in the air." Id.; see United States Gypsum Co. v. Mayor of Baltimore, 396 Md. at 145, 157-58, 647 A.2d 405, 411 (1994).

76. Morris, 340 Md. at 534, 667 A.2d at 632.
77. Id. (quoting East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870-71 (1986)).
78. Id. at 534, 667 A.2d at 632. The Morris court rejected Supreme Court criticism of approaches "based on the degree of risk as 'too indeterminate to enable manufacturers easily to structure their business behavior.'" Id. at 535, 667 A.2d at 632 (quoting East River S.S. Corp., 476 U.S. at 870). The court observed that tort liability requires manufacturing enterprises to modify their business behavior in two areas and that Maryland's risk-of-harm rule does not cause major disruptions in either area. Id. The court explained:

The first area is the actual manufacturing and marketing of the product, in which manufacturers, regardless of the extent of tort liability, should always attempt to mitigate risks of death or personal injury. The second area is the allocation of funds to cover potential tort liability. In this area, our rule, because of the extreme nature of the risk required to trigger it, limits liability to, predominantly, those situations in which either liability would inevitably be created by actual physical injury or the manufacturer's exposure to liability is so great that it cannot be ignored.

Id., 667 A.2d at 632-33. With this statement, the court emphasized the narrow scope of the exception to the economic loss rule, by implying that the exception's application is appropriate only in the most extreme and foreseeable circumstances. Id.
‘cheapen’ the legitimacy of the exception to the economic loss rule and thereby invite an avalanche of such tort claims in future cases.”

Judge Eldridge dissented from the court’s decision to affirm the dismissal of the plaintiffs’ tort claims. He found that “the plaintiffs have alleged in their complaint that there is an immediate threat of personal injury if weight is applied to their roofs which are constructed with FRT plywood.” He noted that the complaint had sufficiently alleged potential injuries stemming from either snow or someone walking on the roof. Judge Eldridge criticized the majority for not “accepting these assertions on their face and drawing reasonable inferences from the assertions favorable to the plaintiffs, which is the correct approach in reviewing the dismissal of a complaint for failure to state a claim.”

4. Analysis.—The approach adopted by the Morris court delicately balances policy issues on both sides of the spectrum by requiring plaintiffs to allege facts showing that a defective product presents a serious risk of danger before falling outside the pale of the economic loss rule. This decision keeps products liability and contract law within their respective spheres while properly holding manufacturers liable in tort, not only for the harm they cause but also for the unreasonable risk that they create.

The test applied by the Morris court can only serve these polar interests if employed with discretion. To allow superficial allegations of risks for potential injury in order to find shelter within the exception would “‘cheapen’ the legitimacy” of the economic loss rule. Accordingly, the Court of Appeals reiterated the necessity of maintaining a high threshold for circumventing the economic loss

83. Id.

84. Id. at 547, 667 A.2d at 638 (Eldridge, J., dissenting). Judge Eldridge also dissented from the majority’s dismissal of the plaintiffs’ Consumer Protection Act claim. Id. at 552, 667 A.2d at 641. He maintained that “[t]he distinction drawn by the majority between a manufacturer’s advertising aimed directly at the ultimate consumers and a manufacturer’s advertising aimed at intermediate sellers such as builders or building supply stores, is largely a distinction without a difference.” Id. at 553, 667 A.2d at 641. Judges Bell and Raker concurred with Judge Eldridge’s dissent. Id. at 555, 667 A.2d at 642.

85. Id. at 548, 667 A.2d at 639.

86. Id.

87. Id.

88. Morris, 340 Md. at 536, 667 A.2d at 683.


90. Morris, 340 Md. at 536, 667 A.2d at 683.
rule such that only the "extreme nature of the risk" can trigger the availability of the exception. 91

Unfortunately, though, the Morris court also left itself open to criticism. In holding that the plaintiffs did not have a cognizable tort claim under the exception to the economic loss rule, the majority pointed to the absence of allegations that actual injuries had resulted from people walking on the roofs or from collapsed roofs. 92 Judge Eldridge, in dissent, appropriately countered: "This clearly is not the law." 93 In so concluding, Judge Eldridge pointed to language in Whiting-Turner that provides: "where the dangerous condition is discovered before it results in injury, an action in negligence will lie for the recovery of the reasonable cost of correcting the condition." 94 He further stressed that the entire premise behind Maryland's exception to the economic loss rule is that plaintiffs should not have to wait for an injury to occur before they can bring an action to recover the reasonable cost to repair the defect. 95

Under Whiting-Turner and its progeny, Judge Eldridge appropriately admonished the majority for referring to actual injury as a prerequisite to recovery under the exception to the economic loss rule. That requirement clearly contradicts the policy interests behind the exception. This did not detract significantly, however, from the central focus of the majority's holding. For the exception to apply, the onus fell on the plaintiffs to plead facts that constituted a serious and real risk of injury. 96 With the burden of balancing the competing interests under the exception to the economic loss rule, the court simply made a determination that the facts alleged by the plaintiffs failed to meet the strict standard that it had set forth. A lenient policy toward adjudicating such claims would transform the exception into the norm and precipitate a flood of tort claims in the future. 97 Plaintiffs that do not allege the requisite risk of harm would be allowed to institute pure economic loss tort actions, which should properly be reserved for the realm of contract law. 98

91. Id. at 535, 667 A.2d at 633.
92. Id. at 536, 667 A.2d at 633.
93. Id. at 549, 667 A.2d at 639 (Eldridge, J., dissenting).
94. Id. (emphasis in original) (quoting Whiting-Turner, 308 Md. at 22, 517 A.2d at 338).
95. Id.
96. Morris, 340 Md. at 536, 667 A.2d at 633.
97. Id.
98. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872 (1986) ("The maintenance of product value and quality is precisely the purpose of express and implied warranties.").
Judge Eldridge also attacked the majority for failing to accept the factual pleadings on their face and “drawing reasonable inferences from the assertions favorable to the plaintiffs.” Judge Eldridge characterized the majority’s holding that the plaintiffs had failed to meet the “legal threshold of pleading” as drawing “inferences in the light most favorable to the defendants.” Judge Eldridge failed to acknowledge, however, that the strict legal standard established by the majority’s position is the natural result of balancing the competing policy interests surrounding the exception to the economic loss rule. Deference to a plaintiff’s claims is certainly mandated when considering a motion to dismiss. In setting forth the exception to the economic loss rule, however, the majority was acutely aware of the need to differentiate contract and tort law while still protecting consumers from those products that pose a serious risk of injury. In order to serve both of these goals, the court set a high legal standard that the plaintiffs simply failed to satisfy when alleging the potential for harm resulting from the defective roofs. By emphasizing the “serious” nature of the risk involved, the court has put subsequent plaintiffs on notice of the legal requirements necessary to bring an economic loss action under tort law.

5. Conclusion.—By adopting a definitive two-part approach for determining exceptions to the economic loss rule—requiring analysis of both the magnitude and potential for risk from a defective product—the Court of Appeals successfully balanced two competing societal interests. The court heeded the necessity of distinguishing products liability from contract law and imposed a rigorous standard that a plaintiff must meet to succeed on a tort claim for purely economic losses. Only if the risk of harm presents a serious danger of death or personal injury can a plaintiff avoid the harshness of the economic loss doctrine. In these situations, the degree of risk justifies

100. Id.
101. Id.
102. See A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 249, 634 A.2d 1330, 1332 (1994) (stating that it is necessary to “assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom” in reviewing a trial court’s decision to dismiss for failing to state a claim).
104. Id. at 536, 667 A.2d at 633.
105. See Connaughton, supra note 30, at 522.
106. Morris, 340 Md. at 534, 667 A.2d at 632.
107. Id. at 535, 667 A.2d at 632.
the "imposition of a duty in favor of a large class of persons." Thus, through this exception, manufacturers are charged with addressing defects in their products before a tragedy occurs.

JAMES H. WEST

X. Workers' Compensation

A. Failing to Construe the Workers' Compensation Act Liberally

In Waskiewicz v. General Motors Corp.,1 a case of first impression,2 the Court of Appeals held that an employee could not base a new claim for workers' compensation benefits on a new injurious exposure to the hazards of an occupational disease if the employee had already received benefits for a prior exposure and the new exposure merely caused the already existing disability to worsen.3 More specifically, the court held that because the plaintiff, Robert Waskiewicz (Waskiewicz), who suffered from a severe case of carpal tunnel syndrome, failed to demonstrate that his recent exposure to hazardous workplace duties caused him to develop a new occupational disease, rather than exacerbating a pre-existing condition for which he had been compensated sixteen years earlier, Waskiewicz could not establish the basis for a new claim.4 Moreover, because Maryland's Workers' Compensation Act imposes a five-year statute of limitations period on the modification of an award of benefits, the court held that the Act precluded Waskiewicz from all further recovery.5

The decision, which even the court's majority acknowledged as having created "some seeming unfairness,"6 has generated considerable controversy.7 The provisions of the Act pertaining to occupational disease do not precisely address the particular facts of Waskiewicz's case. In such cases, where uncertainty exists, the legislature requires courts to construe the Act liberally in favor of employees.8 The court's narrow reading of the Act dealt a harsh and unfair blow to plaintiffs and provided employers with unnecessary and undeserved immunity.

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2. Id. at 704, 679 A.2d at 1096.
3. Id. at 700, 679 A.2d at 1095.
4. Id. at 704, 679 A.2d at 1096.
5. Id. at 709-13, 679 A.2d at 1099-1101.
6. Id. at 712, 679 A.2d at 1101.
7. See id. at 715-23, 679 A.2d at 1102-06 (Chasanow, J., dissenting) (maintaining that the majority's holding runs contrary to the legislature's intent); Gregory C. Baumann, Burden on Workers to Tend Comp Claims, WARFIELD'S BUS. REC., Aug. 5, 1996, at 3, available in 1996 WL 8797993 (describing the court's narrow reading of the workers' compensation statute); Gregory C. Baumann, High Court Takes Hard Line in Workers' Comp Decision, DAILY REC., July 30, 1996, at 1, available in 1996 WL 8558955 (noting that the court's four-to-three ruling "threatens to deny workers' compensation to injured employees who fail to protect their claims as their conditions worsen").
I. The Case.—General Motors (GM) hired Waskiewicz as an assembly line worker in the early 1970s. In 1973, shortly after he began his employment, Waskiewicz developed bilateral carpal tunnel syndrome. This condition, which resulted from the repetitive labor that Waskiewicz performed on GM's assembly line, caused Waskiewicz to experience inflammation, pain, and numbness in the muscles of his wrists and hands. At the time the disease first developed, Waskiewicz underwent surgery and filed a workers' compensation claim for disability resulting from occupational disease. In April 1976, the Workers' Compensation Commission (Commission) awarded Waskiewicz benefits for "temporary total and permanent partial disability" because of Waskiewicz's fifteen percent loss of the use of both of his hands.

Between 1976 and 1989, Waskiewicz continued to receive treatment for his condition, including several surgical procedures. Moreover, in 1987, GM placed Waskiewicz on "light duty" because of his continuing condition. This light duty effectively restricted Waskiewicz from performing job duties involving heavy lifting or the use of power tools. In 1991, Waskiewicz's surgeon recommended to GM that Waskiewicz no longer engage in lifting, repetitive motion, or the use of air guns. GM disregarded this recommendation, however, and placed Waskiewicz back on its assembly line, requiring Waskiewicz to use "hand tools in a repetitive manner." Not surprisingly, Waskiewicz's condition subsequently worsened. Finally, in March 1992, Waskiewicz's surgeon recommended that Waskiewicz cease working. Waskiewicz underwent another surgery in September 1992 that

9. Waskiewicz, 342 Md. at 700-01, 679 A.2d at 1095.
10. Id. at 701, 679 A.2d at 1095. Carpal tunnel syndrome is defined as:
A condition resulting from pressure on the median nerve as it traverses the carpal tunnel . . . , usually by fibers of the transverse carpal ligament. The condition is characterized by pain, tingling, burning, numbness, etc. in the areas supplied by the nerve, i.e., in the skin of the palm, fingers, wrist, etc. There may also be swelling of the fingers and atrophy of some of the muscles of the hand, especially those at the base of the thumb.
12. Id. at 701, 679 A.2d at 1095 n.2.
13. Id.
14. Id.
15. Id. at 701-02, 679 A.2d at 1095.
16. Id. at 702, 679 A.2d at 1095.
17. Id.
18. Id., 679 A.2d at 1096.
19. Id.
20. Id.
21. Id.
proved unsuccessful. As a result of the repetitive work activities that required the use of power tools, Waskiewicz suffered a one hundred percent loss in the use of both of his hands and could no longer continue working.

In August 1992, Waskiewicz filed a second claim for workers’ compensation for injuries resulting from carpal tunnel syndrome. In his application for benefits, Waskiewicz claimed that his disability began on March 3, 1992. The Workers’ Compensation Commission refused to provide benefits for Waskiewicz’s second claim, however, on the ground that he “did not sustain an occupational disease of carpal tunnel syndrome arising out of and in the course of employment as alleged to have occurred on [March 3, 1992].” The Commission’s one-sentence order suggested that it “did not regard Mr. Waskiewicz’s condition in 1992 as a new occupational disease.”

Waskiewicz appealed the Commission’s decision to the Circuit Court for Baltimore City, which reversed. The Circuit Court held that Waskiewicz’s most recent exposure to the hazards of carpal tunnel syndrome, which resulted in total disability, constituted a new compensable event that gave rise to an entirely new claim. The Circuit Court judge concluded that to relate Waskiewicz’s most recent injurious exposure back to his first exposure in 1973 would “unnecessarily create a hardship and would result in an unreasonable interpretation of [Maryland’s Workers’ Compensation] statute.”

The Court of Special Appeals reversed, holding that Waskiewicz had not suffered a new disability, but had instead exacerbated an existing condition that first developed in 1973. The court concluded that Waskiewicz’s continued exposure to the causes of carpal tunnel syndrome could not form the basis of a new claim under the provisions of the Act pertaining to occupational disease. In dicta, the court noted that Waskiewicz could only recover additional benefits by reopening his 1973 claim, but that the Act’s five-year statute of limi-

22. Id.
23. Id.
24. Id.
25. Id.
27. Waskiewicz, 342 Md. at 703, 679 A.2d at 1096.
28. Id.
29. Id.
30. Joint Record Extract at 76, Waskiewicz (No. 105).
32. Waskiewicz, 342 Md. at 703, 679 A.2d at 1096.
tions for the modification of claims would prevent him from doing so.\textsuperscript{33}

The Court of Appeals granted certiorari\textsuperscript{34} to resolve the question of "whether a new workers' compensation claim, rather than a request for modification of an existing award, can be based on an additional injurious exposure to hazards aggravating an existing disability resulting from an occupational disease."\textsuperscript{35}

2. Legal Background.—

\textit{a. Maryland's Workers' Compensation Act.}—Prior to the enactment of Maryland's workers' compensation statute in 1914, an employee's sole remedy against an employer for a workplace injury was a common law tort action.\textsuperscript{36} Employees, more often than not, found such actions difficult to win.\textsuperscript{37} When they did win, though, employers faced high monetary verdicts.\textsuperscript{38} Maryland adopted its first workers' compensation statute as a means to relieve the burdens of tort litigation on both parties.\textsuperscript{39} The legislature created the Workers' Compensation Act in order to provide "sure and certain" compensation to employees for disabilities resulting from workplace injuries "regardless of questions of fault and to the exclusion of every other remedy."\textsuperscript{40} Employees, therefore, were more likely to recover for workplace injuries, and employers could avoid costly litigation and excessive damages awards.

\textit{b. Compensation for Occupational Disease.}—Section 9-502 of Maryland's Workers' Compensation Act allows employees to receive compensation for disability resulting from occupational disease.\textsuperscript{41} The definition of disablement does not require that an employee be incapacitated from working in any occupation, but only in the occupa-

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 703-04, 679 A.2d at 1096.
  \item \textsuperscript{34} Waskiewicz v. General Motors Corp., 340 Md. 650, 667 A.2d 897 (1995).
  \item \textsuperscript{35} Waskiewicz, 342 Md. at 704, 679 A.2d at 1096.
  \item \textsuperscript{36} See MAURICE J. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND \textsection{} 1-1 (2d ed. 1977) (describing the history and purpose of Maryland's workers' compensation laws).
  \item \textsuperscript{37} See \textit{id.} (discussing the difficulties in establishing employer liability and the availability of defenses, such as contributory negligence, assumption of risk, and fellow servant negligence).
  \item \textsuperscript{38} See \textit{id.}
  \item \textsuperscript{39} See \textit{id.}
  \item \textsuperscript{40} Act of Apr. 16, 1914, ch. 800, Md. Laws 1430 (Preamble).
  \item \textsuperscript{41} MD. CODE ANN., LAB. \& EMPL. \textsection{} 9-502 (1991). Section 9-502 states in pertinent part:
    \begin{itemize}
      \item \textit{"Disablement" defined.}—In this section, "disablement" means the event of a covered employee becoming partially or totally incapacitated:
    \end{itemize}
\end{itemize}
tion through which the employee was exposed to the disease. If the claimant can "perform reasonably analogous work within the same occupational classification at the same or higher wages," the claimant is not regarded as being incapacitated from performing the work in which the claimant was last occupied.

The Act holds liable for the employee's disability the employer for whom the employee was working when she was last injuriously exposed to the hazards of the occupational disease. Prior to the development of the last injurious exposure rule, courts apportioned liability among employers, both past and present, by determining what percentage of the claimant's disability arose at each workplace. Under this system, courts faced the difficult problem of "prorating

(1) because of an occupational disease; and
(2) from performing the work of the covered employee in the last occupation in which the covered employee was injuriously exposed to the hazards of the occupational disease.

(b) *Scope of application to employer.* - Subsection (c) of this section applies only to:

(1) the employer in whose employment the covered employee was last injuriously exposed to the hazards of the occupational disease;

(c) *Liability of employer.* - Subject to subsection (d) of this section and except as otherwise provided, an employer to whom this subsection applies shall provide compensation in accordance with this title to:

(1) a covered employee of the employer for disability of the covered employee resulting from an occupational disease.

*Id.* The Act defines occupational disease as "a disease contracted by a covered employee: (1) as the result of and in the course of employment; and (2) that causes the covered employee to become temporarily or permanently, partially or totally incapacitated." *Id.* § 9-101(g). Maryland courts have, in turn, defined occupational disease as an "ailment, disorder, or illness which is the expectable result of working under conditions naturally inherent in the employment and inseparable therefrom, and is ordinarily slow and insidious in its approach." Foble v. Knefely, 176 Md. 474, 486, 6 A.2d 48, 53 (1939). The Court of Special Appeals has made clear that carpal tunnel syndrome qualifies as an occupational disease under the Act. *See* CES Card Establishment Servs., Inc. v. Doub, 104 Md. App. 301, 656 A.2d 332 (1995).


In order to show partial incapacitation, an employee must demonstrate that she is "less capable of working than she had been previously." Miller v. Western Elec. Co., 310 Md. 173, 193, 528 A.2d 486, 496 (1987). Courts must consider a number of factors when deciding whether an employee is partially incapacitated. *See id.* These factors include whether the employee has suffered wage loss or has experienced a decrease in production and whether the employer has become dissatisfied with the employee's work or decreased the employee's work assignments. *See id.; CES Card*, 104 Md. App. at 318, 656 A.2d at 340.

45. *See* Edward M. Vokoun, *Using the Last Exposure Rule in the Determination of Liability of Employers and Insurers for Occupational Diseases*, 20 Forum 102, 104 (1984) (discussing the
disability" and using complex "medical evidence identifying manifestation of symptoms, their origin, and the disabling event." Courts developed the "last injurious exposure rule" to eliminate difficulties that arose in cases involving employees exposed to occupational disease at multiple worksites. Eventually, the Maryland General Assembly codified the rule in Article 101, section 23 (b), section 9-502's predecessor.

The last injurious exposure rule requires courts to locate the date of disability and then search backward to the last instance the employee was exposed to the disease-causing hazard. The employer for whom the employee worked at that time and its insurer are then liable to the employee for compensation benefits. If an employee has already been compensated for an occupational disease, any subsequent disability "occurring under a different carrier will be chargeable to the first carrier if it is a recurrence of the first disability."

Recently, in CES Card Establishment Services, Inc. v. Doub, the Court of Special Appeals further examined the "relationship between the date of disablement and date of last injurious exposure to the hazards of an occupational disease." In CES Card, the court had to determine which of two employers should be held liable for an employee's disability due to carpal tunnel syndrome. The employee had been exposed to the hazards of the disease while working for both

problem of establishing employer liability for longstanding, insidious occupational diseases).

46. Id. at 106.
47. See, e.g., Enyard v. Consolidated Underwriters, 390 S.W.2d 417, 429-30 (Mo. Ct. App. 1965) (noting that application of the last injurious exposure rule eliminates the difficulties of allocating liability among a number of employers and identifying a precise time when an injury took place); Osteen v. A.C. & S., Inc., 307 N.W.2d 514, 518-19 (Neb. 1981) (stating that application of the last injurious exposure rule eliminates the "guess work" involved in apportioning liability and pinpointing the inception of the disease); Rutledge v. Tultex Corp./Kings Yarn, 301 S.E.2d 359, 362-63 (N.C. 1983) (holding that the last injurious exposure rule does not require an employee to prove that the most recent exposure caused or significantly contributed to the disease).

49. See 4 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 95.25(a) (Supp. 1996).
50. See id.
51. Id. § 95.27.
53. Waskiewicz, 342 Md. at 707 n.6, 679 A.2d at 1095 n.6 (discussing CES Card).
54. CES Card, 104 Md. App. at 304, 656 A.2d at 333. Originally, the plaintiff worked at Citicorp from January 1986 to July 1, 1992. Id. at 305, 656 A.2d at 334. On July 1, 1992, a change in ownership occurred, and the plaintiff became an employee of CES Card. Id. The plaintiff named CES Card and its insurers as defendants. Id. at 305-06, 656 A.2d at 334. CES Card, in turn, impleaded Citicorp. Id. at 306, 656 A.2d at 334.
employers. The court determined that the employer for whom the employee was working when she was last injuriously exposed should assume liability. Significantly, the court defined an injurious exposure as an exposure that "contributed to the onset of disability—not one that may have exacerbated an existing disability." Thus, the court held, "in occupational disease cases the date of last injurious exposure can never come after the date of disability." c. Distinguishing Between Occupational Disease and Accidental Injury.—Disablement due to accidental personal injury differs in some respects from disablement due to occupational disease. For example, the dependents of a covered employee may only recover benefits for her death from accidental personal injury if the death occurs within seven years of the accident. No such limitation exists in occupational disease cases. Nevertheless, in Shifflett v. Powhatan Mining Co., the Court of Appeals reasoned that disablement from occupational disease should be "statutorily treated much like an injury caused by an accident," although "[s]ome special provisions are required which depart from a strict application of the analogy." Other jurisdictions are leaning toward the more modern approach of treat-

55. Id. at 305-06, 656 A.2d at 334.
56. Id. at 314, 656 A.2d at 338. The court emphasized that it is the date of disability and not the date of diagnosis that is relevant in determining when the employee was last injuriously exposed. Id. at 310, 656 A.2d at 336. The date of disability is "the moment at which in most instances the claimant ought to know he has a compensable claim." Id. at 311-12, 656 A.2d at 337 (quoting Lowery v. McCormick Asbestos Co., 300 Md. 28, 40, 475 A.2d 1168, 1174 (1984) (quoting 4 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 95.21 (1981))).
57. Id. at 314, 656 A.2d at 338.
58. Id.
59. Compare section 9-502 of the Act, see supra note 41, with section 9-501. Section 9-501 states in pertinent part:
   (a) In general.—Except as otherwise provided, each employer of a covered employee shall provide compensation in accordance with this title to:
      (1) the covered employee for an accidental personal injury sustained by the covered employee; or
      (2) the dependents of the covered employee for death of the covered employee:
         (i) resulting from an accidental personal injury sustained by the covered employee; and
         (ii) occurring within 7 years after the date of the accidental personal injury.
61. 293 Md. 198, 442 A.2d 980 (1982).
62. Id. at 202, 442 A.2d at 983.
63. Id. at 203, 442 A.2d at 983.
ing disability from occupational disease and disability from accidental injury the same.\textsuperscript{64}

d. Preexisting Conditions.—Section 9-656 of the Act permits an employee to receive compensation when the employee becomes disabled in part because of a "preexisting disease or infirmity" and in part because of a subsequent accidental personal injury or occupational disease.\textsuperscript{65} When this situation occurs, the Commission must determine "the proportion of the disability that is reasonably attributable solely to the accidental personal injury or occupational disease" and "the proportion of the disability that is reasonably attributable to the preexisting disease or infirmity."\textsuperscript{66} The employer must then compensate the employee for the part of the disability that is attributable solely to the subsequent personal injury or occupational disease.\textsuperscript{67}

Section 9-656 applies in cases in which the resulting disability does not exceed fifty percent of the body as a whole.\textsuperscript{68} If the resulting disability exceeds fifty percent of the body as a whole, section 9-802 applies.\textsuperscript{69} Section 9-802 provides in pertinent part:

\begin{quote}
\begin{itemize}
\item \textsuperscript{64} See, e.g., Fry's Food Stores v. Industrial Comm'n, 866 P.2d 1350, 1353 (Ariz. 1994) (en banc) ("While some distinct provisions for occupational diseases remain, the modern approach is to treat diseases and injuries the same.").
\item \textsuperscript{65} In the past, finding that a disability resulted from disease as opposed to an injury was simply another way of holding that the disability was "noncompensable." B Larson, supra note 49, § 41.31. Because many states have expanded occupational disease legislation, however, the contrast between the two types of disabilities has lost much of its importance. See id. Often, awards are made "without specifying which category the injury falls in." Id.
\item \textsuperscript{66} Md. Code Ann., Lab. & Emp. § 9-656. Section 9-656 provides:
\begin{itemize}
\item (a) Determination by Commission.—If it appears that a permanent disability of a covered employee following an accidental personal injury or occupational disease is due partly to the accidental personal injury or occupational disease and partly to a preexisting disease or infirmity, the Commission shall determine:
\begin{itemize}
\item (1) the proportion of the disability that is reasonably attributable to the accidental personal injury or occupational disease; and
\item (2) the proportion of the disability that is reasonably attributable to the preexisting disease or infirmity.
\end{itemize}
\item (b) Payment of compensation.—The covered employee:
\begin{itemize}
\item (1) is entitled to compensation for the portion of the disability of the covered employee that is reasonably attributable solely to the accidental personal injury or occupational disease; and
\item (2) is not entitled to compensation for the portion of the disability that is reasonably attributable to the preexisting disease or infirmity.
\end{itemize}
\end{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See Subsequent Injury Fund v. Rinehart, 12 Md. App. 649, 654, 280 A.2d 298, 301 (1971).
\item \textsuperscript{69} Md. Code Ann., Lab. & Emp. § 9-802(a).
\end{itemize}
\end{quote}
(a) Limitation on liability of employer and insurer.—If a covered employee has a permanent impairment and suffers a subsequent accidental personal injury, occupational disease, or compensable hernia resulting in permanent partial or permanent total disability that is substantially greater due to the combined effects of the previous impairment and the subsequent occurrence than it would have been from the subsequent compensable event alone, the employer or its insurer is liable only for the compensation payable under this title for the subsequent accidental personal injury, occupational disease, or compensable hernia.\textsuperscript{70}

If this is the case, the employee, in addition to her recovery from the employer, may recover from the Subsequent Injury Fund under section 9-802(b), if certain requirements are met.\textsuperscript{71} A majority of states have passed similar apportionment provisions.\textsuperscript{72} The general goal of these provisions is to "encourage employers to hire previously-injured workers and to discourage discrimination against handicapped individuals"\textsuperscript{73} by reassuring employers that they must only compensate for that part of the disability that is attributable to the accident or disease caused by employment.\textsuperscript{74}

e. Liberal Construction of the Act.—The legislature intended courts to construe Maryland's Workers' Compensation Act liberally in favor of employees. The statute itself states that the Act should be "construed to carry out its general purpose" and should not be "strictly construed."\textsuperscript{75} The general purpose of the Act is the "benevo-

\textsuperscript{70} Id. § 9-802.

\textsuperscript{71} See id. § 9-802(b). The Subsequent Injury Fund is funded by "a 6 1/2 percent assessment against employer/insurers on all permanent disability and death benefit awards." \textsuperscript{72} Theodore B. Cornblatt et al., Workers' Compensation Manual § 4.1, at 4-2 (7th ed. 1993).


\textsuperscript{74} See Peirce & Dworkin, supra note 72, at 667-68.

\textsuperscript{75} Md. Code Ann., Lab. & Empl. § 9-102. This section reads: "(a) In general.—This title shall be construed to carry out its general purpose. (b) Rule for strict construction inapplicable.—The rule that a statute in derogation of the common law is to be strictly construed does not apply to this title." Id.
lent" one of "remedial social legislation." Maryland courts have followed the general rule that the "Workers' Compensation Act as a whole 'should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes.'" Moreover, the Court of Appeals has held that "[a]ny uncertainty in the meaning of the statute should be resolved in favor of the claimant" and that courts should "seek to avoid [statutory] constructions that are illogical, unreasonable, or inconsistent with common sense." Statutory language, the court has reasoned, should not be read in isolation, but with an eye toward the general purpose of the statute. The duty to construe the Act liberally, however, is not without its limitations. Maryland courts have clearly held that "neither statutory language nor legislative intent can be stretched beyond the fair implication of the statute's words or its purpose."

f. Reopening and Modifying Claims.—The General Assembly created a provision by which the Workers' Compensation Commission can reopen and modify claims. The Act empowers the Commission to readjust or terminate compensation payments if there is an "aggravation, diminution, or termination of disability." The Act imposes a statute of limitations period, however, with respect to reopening claims. An employee must file an application for modification "within 5 years after the last compensation payment."

Although the Act calls for a liberal construction, Maryland courts have made clear that this mandate does not apply to the statute of limitations provisions for the reopening and modification of claims.

78. Lovellette, 297 Md. at 282, 465 A.2d at 1147; see also Walls, 288 Md. at 530, 418 A.2d at 1213 ("Any uncertainty in the law should be resolved in favor of the claimant.").
80. See id.
83. Id. § 9-736(a).
84. Id. § 9-736(b)(3).
85. Id.
86. See Montgomery County v. McDonald, 317 Md. 466, 564 A.2d 797 (1989), a case involving an attempt to reopen an occupational disease claim barred by the Act's limitations provisions. Id. The Court of Appeals held that, although the legislature clearly intended
The Court of Appeals justified its strict adherence to the statute of limitations for modifying claims in Vest v. Giant Food Stores, Inc. The Vest court reasoned that allowing claims to be reopened based on injuries from many years prior would "necessarily encounter awkward problems of proof" and would impose hardships on insurance companies that would have "difficulty in computing appropriate reserves" because of the uncertainty of potential future liabilities. Further, the court held that, even if the Commission expressed an intention to reserve continuing jurisdiction over the case at the time the original award was granted, it could not do so because the statute plainly limits the jurisdiction of the Commission to within five years of the last compensation payment.

Professor Larson, in his well-known and highly regarded treatise on workers' compensation law, drew a clear distinction between circumstances in which the aggravation of disability requires use of reopening provisions and circumstances in which the aggravation of disability constitutes a new compensable injury. Professor Larson stated that "when complications develop directly from the original injury . . . the reopening statute applies, and the limitation period cannot be escaped by calling the condition a new disability." Moreover, he stated, if there is "no causal relation between the first injury and the subsequent condition, reopening is obviously not the appropriate remedy." Professor Larson offers a list of the types of changes in condition that would ordinarily come under the re-opening statute: "progression, deterioration, or aggravation of the compensable condition, achievement of disabling character by a previously asymptomatic complaint, appearance of new and more serious features . . . failure to recover within the time originally predicted, and superimposition or worsening of a neurotic condition." One of the principal advantages of the reopening statute, he states, is that it "permits a commission to make the best estimate of disability it can at the time of the

the court to interpret the Act liberally, this was not meant to imply that specific provisions should be disregarded. Id. at 472, 564 A.2d at 800.

88. Id. at 471, 620 A.2d at 344 (quoting 2 Arthur Larson, Workmen's Compensation § 81.10 (Desk ed. 1976)).
89. Id. at 475-76, 620 A.2d at 346-47.
90. See 3 Larson, supra note 49, § 81.31(b).
91. Id. (footnote omitted).
92. Id.
93. Id. § 81.31(a) (footnotes omitted).
original award, although at that moment it may be impossible to predict the extent of future disability.”

3. The Court’s Reasoning.—Waskiewicz argued to the Court of Appeals that his most recent exposure to carpal tunnel syndrome in 1992, which rendered him totally disabled, should have served as a sufficient basis for an entirely new workers’ compensation claim. In support of this argument, Waskiewicz interpreted section 9-502 of the Act to mean that any time “an employee is exposed to the hazards of an occupational disease and he thereby becomes ‘precluded from performing his work in the last occupation in which he was injuriously exposed,’ he ‘shall be entitled to compensation.”’ In other words, Waskiewicz argued that his last injurious exposure constituted a compensable event under the Act.

In a four-to-three decision, however, the Court of Appeals rejected Waskiewicz’s argument, holding that an employee may not file a new workers’ compensation claim based on additional injurious exposure to the causes of occupational disease if that exposure results in the aggravation of a preexisting condition for which the employee has already been compensated. In so ruling, the court held that Waskiewicz had misinterpreted the meaning of section 9-502 of the Workers’ Compensation Act when he argued that an employee’s last injurious exposure to an occupational disease constituted the “compensable event” for the purpose of awarding benefits. Rather, the court held, the “event of disablement,” which occurs as a result of exposure to occupational disease, “is the only event entitled [an employee] to compensation.”

The court reasoned that the language of the statute clearly defines the term “disablement” as a “singular ‘event’ of becoming partially or totally incapacitated because of an occupational disease, not as a series of exposures to the hazards of the same disease.” The court concluded that Waskiewicz incorrectly interpreted the language

94. Id.
95. Waskiewicz, 342 Md. at 704, 679 A.2d at 1097.
96. Id. at 705-06, 679 A.2d at 1097 (quoting Md. Code Ann., Lab. & Empl. § 9-502 (1991)).
97. Id. at 700, 679 A.2d at 1095.
98. Id. at 706, 679 A.2d at 1097-98. The court first pointed out that Waskiewicz had misquoted the statute when he used the phrase “precluded from performing his work” in defining disability. Id., 679 A.2d at 1097. The statute’s definition of disablement includes partial incapacitation, which hinders but does not “preclude” an employee from performing his work. Id.
99. Id., 679 A.2d at 1098.
100. Id.
of section 9-502(a)(2) when he argued that injurious exposure to the hazards of a disease constitutes the compensable event.\textsuperscript{101} The court maintained that the legislature merely intended the phrase “from performing the work of the covered employee in the last occupation in which the covered employee was injuriously exposed”\textsuperscript{102} to clarify that, “in order to be found ‘disabled,’ an employee does not have be [sic] precluded by virtue of his disability from doing anything, but rather must be incapacitated only from the last type of occupation which exposed him to the disease.”\textsuperscript{105}

The court noted that allowing a new claim for each exposure after the date of disablement would render subsection 9-502(c) meaningless.\textsuperscript{104} This subsection states that an employer shall provide compensation to “a covered employee of the employer for disability of the covered employee resulting from an occupational disease.”\textsuperscript{105} The majority reasoned that if the courts allowed a new claim for each exposure after the date of disablement, there would be no way to “pinpoint the compensable event of disability.”\textsuperscript{106} In addition, subsection (b) assesses liability against the employer “in whose employment the covered employee was last injuriously exposed to the hazards of the occupational disease.”\textsuperscript{107} The court stated that the injurious exposure referred to in that subsection is used “only to determine where the employee was working on the date of disablement” and, therefore, which employer should be liable under subsection (c).\textsuperscript{108} If the injurious exposure itself served as the trigger for compensation, “a liable employer could never be ascertained and subsection (b) would also be meaningless.”\textsuperscript{109}

The court cited \textit{CES Card} in support of its conclusion that there can be only one date of disablement and one recovery.\textsuperscript{110} The Court of Appeals noted that because Waskiewicz’s most recent injurious exposure to carpal tunnel syndrome did not “cause” his condition but “aggravated” it, this exposure could not be the basis for a new workers’ compensation claim.\textsuperscript{111}

\begin{itemize}
  \item 101. \textit{Id}.
  \item 103. \textit{Waskiewicz}, 342 Md. at 707, 679 A.2d at 1098.
  \item 104. \textit{Id}., 679 A.2d at 1098.
  \item 105. \textit{Md. Code Ann.}, \textit{Lab. \& Empl.} § 9-502(c)(1).
  \item 106. \textit{Waskiewicz}, 342 Md. at 707, 679 A.2d at 1098 (internal quotations omitted).
  \item 108. \textit{Waskiewicz}, 342 Md. at 707, 679 A.2d at 1098.
  \item 109. \textit{Id}.
  \item 110. \textit{Id}., at 707-08, 679 A.2d at 1098-99; see \textit{supra} notes 52-58 and accompanying text.
  \item 111. \textit{Waskiewicz}, 342 Md. at 707 n.6, 679 A.2d at 1098 n.6.
\end{itemize}
The court expressed concern over the consequences of allowing Waskiewicz to recover on the "theory [that] exposure to the hazards of an occupational disease [is] a compensable event in itself."\textsuperscript{112} Such reasoning, the court noted, might lead to employees bringing a new workers' compensation claim each day, based on a slight worsening of a condition.\textsuperscript{113} The court also reasoned that the legislature would not have included a provision for reopening existing claims if it intended employees in Waskiewicz's circumstances to establish a brand new claim.\textsuperscript{114} In fact, the court held, the legislature intended the reopening provision to cover cases precisely like this one, in which an aggravation of an existing disability took place after the rate of compensation had been established.\textsuperscript{115} Unfortunately for Waskiewicz, the court held that the five-year statute of limitations period for modifying claims barred Waskiewicz from any further recovery.\textsuperscript{116}

The court pointed to \textit{Vest}\textsuperscript{117} for a review of the history and purposes behind the limitations rule\textsuperscript{118} and emphasized problems that the \textit{Vest} court had identified as inherent in the reopening of old cases—"awkward problems of proof" and the difficulty insurance companies would have estimating future liabilities and "computing appropriate reserves."\textsuperscript{119}

The court speculated that Waskiewicz only attempted to file a new claim because he knew he could not circumvent the plain meaning of the Act's limitations period.\textsuperscript{120} Knowing that a request for modification would fail, Waskiewicz attempted "to distinguish his particular situation from a simple reopening of an existing claim," arguing that his return to the assembly line and additional exposure to the risks of carpal tunnel syndrome were "more analogous to a new accidental personal injury than an aggravation of an existing disability."\textsuperscript{121} The court found Waskiewicz's analogy unpersuasive, how-

\begin{footnotes}
\item[112] \textit{Id.} at 708, 679 A.2d at 1099.
\item[113] \textit{Id.}
\item[114] \textit{Id.}
\item[115] \textit{Id.} at 712-13, 679 A.2d at 1101. The court cited \textit{Stevens v. Rite-Aid Corp.}, 340 Md. 555, 667 A.2d 642 (1995), in which the Court of Appeals had explained that "the reopening provision typically exists 'for situations in which a claimant's condition degenerates, entitling the claimant to increased benefits.'" \textit{Id.} at 565 n.11, 667 A.2d at 647 n.11).
\item[116] \textit{Waskiewicz}, 342 Md. at 712-13, 679 A.2d at 1101.
\item[117] See \textit{supra} note 87 and accompanying text.
\item[118] \textit{Waskiewicz}, 342 Md. at 709, 679 A.2d at 1099.
\item[119] \textit{Id.} at 710, 679 A.2d at 1100 (quoting \textit{Vest v. Giant Food Stores, Inc.}, 329 Md. 461, 471, 620 A.2d 340, 344 (1993) (quoting 2 \textsc{Arthur Larson}, \textsc{Workmen's Compensation}, § 81.10 (Desk ed. 1976))).
\item[120] \textit{Id.} at 711, 679 A.2d at 1100.
\item[121] \textit{Id.} The court assumed that Waskiewicz's theory of recovery was based on the fact that GM was at fault for reassigning him to the assembly line where he faced the repetitive
\end{footnotes}
ever. In so ruling, the court noted that Waskiewicz had stipulated that his present condition was the same disease that he had acquired in 1973. The court held that "this stipulated fact alone" precluded Waskiewicz from filing a new claim based on this disease.

The court also rejected Waskiewicz's argument that the five-year limitations period for reopening claims was not intended to bar the claim of an employee whose increased disability resulted from an employer subjecting an employee to hazardous employment conditions a second time. In this situation, Waskiewicz argued, the employee should be permitted to file a new claim for increased disability, much like an employee who suffers an accidental injury that worsened a pre-existing disability. In dismissing this argument, the court noted that Waskiewicz did not base this theory on any legislative history of the reopening provision.

The court acknowledged that the legislature intended courts to construe the Workers' Compensation Act liberally, but cited past Maryland cases holding that courts may not ignore specific terms of the Act for the purpose of aiding injured employees. Acknowledging "some seeming unfairness" in the outcome of the case, the court intimated that had the issue been a question of equity, it would have ruled in Waskiewicz's favor. The court stated that it could not make use of its equitable power, however, because "the workers' compensation statutory scheme specifically addresses [Waskiewicz's] situation." Therefore, the court reasoned, to allow Waskiewicz to file a new claim would be "in essence writing new legislation."

work that had brought about his condition in the first place. This assumption was based on the court's belief that it was clear that had Waskiewicz "stayed on the assembly line without interruption, and his carpal tunnel syndrome continued to worsen over that time, his only opportunity for increased benefits would be under the reopening provision." Because workers' compensation is a no-fault system, the court found Waskiewicz's theory "quite shaky." at 711-12, 679 A.2d at 1100.

122. Id. at 712, 679 A.2d at 1101.
123. Id. at 713, 679 A.2d at 1101.
124. Id.
125. Id. at 712, 679 A.2d at 1100-01.
126. Id.
127. Id., 679 A.2d at 1101.
128. Id. (citing Montgomery County v. McDonald, 317 Md. 466, 472, 564 A.2d 797, 800 (1989), for the proposition that a liberal construction does not allow courts to overlook specific provisions of a statute).
129. Id.
130. See id. at 713, 679 A.2d at 1101 ("Were the issue before us a question of equity rather than statutory law, GM would surely not fare so well.").
131. Id.
132. Id. at 715, 679 A.2d at 1102.
4. Analysis.—In Waskiewicz, the Court of Appeals placed unnecessarily severe limitations on employees disabled by occupational disease. According to the Waskiewicz decision, unless increased disability from an occupational disease occurs within five years of the employee’s last compensation payment—the statute of limitations period for reopening an earlier claim—the employee cannot receive further compensation. In so holding, the court narrowly construed the provisions of Maryland’s Workers’ Compensation Act, ignoring the legislative mandate that courts construe the Act liberally. This ruling is certain to lead to unfair outcomes that the legislature surely did not intend.

a. Waskiewicz Suffered a “New Injury.”—The court extensively discussed how the Act’s provision for reopening claims should be interpreted so as to preclude Waskiewicz from filing a new claim for disability.133 The court reasoned that the reopening provision covered Waskiewicz’s exact situation—an aggravated condition for which he had already been compensated.134 Nevertheless, the court’s characterization of Waskiewicz’s condition is flawed. As Judge Chasanow pointed out in his dissent, Waskiewicz’s disability was not “aggravated” by a natural recurrence of the disease, but, rather, developed as a result of “subsequent injurious exposure to workplace hazards” that occurred more than fifteen years after Waskiewicz initially received compensation for the disease.135

Other jurisdictions faced with similar facts have arrived at conclusions contrary to Waskiewicz, holding that increased disability resulting from additional exposure to occupational disease amounts to a “new injury.” In Muldoon v. Homestead Insulation Co.,136 for example, the Supreme Court of Connecticut allowed a claimant to recover for asbestosis even though he had previously been disabled by and compensated for the same disease.137 The employee had been exposed to asbestos while working a number of different jobs between 1947 and 1974 and had received workers’ compensation benefits for asbestosis from several former employers in 1977.138 At the time the employee received this award, he signed a stipulation stating that the award was to be his only compensation relating to the “occupational disease oc-

133. See id. at 700-15, 679 A.2d at 1094-1102.
134. Id. at 713, 679 A.2d at 1101.
135. Id. at 717, 679 A.2d at 1103 (Chasanow, J., dissenting).
136. 650 A.2d 1240 (Conn. 1994).
137. See id. at 1240.
138. Id. at 1241.
curring between 1947 and 1974.” After he received compensation, and until 1984, the employee continued to work in an environment that exposed him to asbestos, resulting in a significant worsening of his condition. The court found that this “substantial increase” in the employee’s disability constituted a “new injury” because it resulted from additional exposure to the hazards of the disease and did not “directly flow from the original injury.” The stipulation that the employee had signed prevented him only from filing a new claim based on his exposure to asbestos between 1947 and 1974. Thus, the court held, the employee could file a new claim for benefits against his employers through 1984.

Similarly, in *General Electric Co. v. Industrial Commission*, the Supreme Court of Illinois allowed a claimant to file a new claim for workers’ compensation benefits against her employer for disability resulting from carpal tunnel syndrome, even though she had been disabled by and compensated for this disease while working for another employer ten years earlier. The new employer argued that the employee had not established the basis for a new claim because she had merely suffered a natural recurrence of a prior disability. The court held, however, that the employee’s repetitive work duties, which involved inserting and removing coils from a processing machine, did not cause a recurrence of carpal tunnel syndrome but, rather, resulted in a “new, work-related injury.”

Finally, in *Mikitka v. Johns-Manville Products Corp.*, the employee had received benefits in 1967 for a seven-and-a-half percent partial permanent disability from asbestosis. After she received her compensation award, the employee continued to work at Johns-Manville until her retirement in October 1970. In February 1973, she filed a new compensation claim alleging that her continued exposure to hazardous conditions of employment caused her permanent disability to

139. Id.
140. Id. at 1241-42.
141. Id. at 1244-45. The court sustained the commission’s finding that the increased disability did not arise out of the original disability but was caused by increased exposure to the cause of the disease. See id. at 1243.
142. Id. at 1245.
143. Id.
144. 433 N.E.2d 671 (Ill. 1982).
145. Id. at 671.
146. Id. at 672.
147. Id.
149. Id. at 592.
150. Id.
increase to thirty-two-and-a-half percent.\textsuperscript{151} Johns-Manville argued that a provision in the New Jersey workers' compensation statute that established a two year statute of limitations for the reopening of old claims barred her new claim.\textsuperscript{152} The court held, however, that the employee had not attempted to reopen her old claim but had filed a completely new one based on additional injurious exposures.\textsuperscript{153} General Electric, Muldoon, and Mikitka, like Waskiewicz, all dealt with situations in which an employee suffered increased disability from additional injurious exposure to an occupational disease from which the employee had already become disabled.

\textit{b. The Court's Misplaced Reliance on CES Card.}—The court relied heavily on the reasoning in CES Card in barring Waskiewicz's claim. In CES Card, the Court of Special Appeals held that an "injurious exposure" is one that causes the "onset" of disability, not the exacerbation of it. Therefore, the "last injurious exposure can never come after the date of disability."\textsuperscript{154} In Waskiewicz, however, the Court of Appeals's reliance on CES Card is misplaced.

In CES Card, the Court of Special Appeals specifically addressed "[w]hether, for purposes of assigning liability to a particular employer in an occupational disease case . . . , the date of last injurious exposure may follow the date upon which the claimant became disabled from the disease."\textsuperscript{155} This precise issue was not before the Court of Appeals in Waskiewicz. Waskiewicz clearly worked for the same employer—GM—during each of his injurious exposures to occupational disease.\textsuperscript{156} Further, the CES Card court made clear that it had confined its decision to the facts before it.\textsuperscript{157} Therefore, the reasoning in CES Card does not apply in Waskiewicz.\textsuperscript{158}

\textsuperscript{151} Id.
\textsuperscript{152} Id. at 593. The New Jersey statute stated: "A formal award, determination and rule for judgment or order approving settlement may be reviewed within 2 years from the date when the injured person last received a payment upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased." N.J. STAT. ANN. § 34:27 (West 1988). This statute is substantially similar to Maryland's limitations provision. See supra notes 82-85 and accompanying text.
\textsuperscript{153} See Mikitka, 352 A.2d at 593.
\textsuperscript{155} Id. at 304, 656 A.2d at 339 (emphasis added).
\textsuperscript{156} Waskiewicz, 342 Md. at 700-02, 679 A.2d at 1095-96.
\textsuperscript{157} See CES Card, 104 Md. App. at 314, 656 A.2d at 338 (stating that the court's holding applied "for the purposes of assigning liability as among several employers").
Contrary to the Waskiewicz court's reading of CES Card, Professor Larson suggests that it is possible to have a compensable injurious exposure after the initial date of disablement. Take, for instance, the application of the last injurious exposure rule "when disability has once resulted from occupational disease." According to Larson, the employer or insurer that first assumed liability when the employee initially became disabled will remain liable if there is a natural recurrence of the disease—even while a second employer or insurer is "on the risk." If, however, the employee's disability increases due to additional injurious exposure to the disease, as opposed to the condition's natural progress, that takes place while the second employer or insurer is "on the risk," the second employer or insurer may become liable.

Therefore, contrary to the Waskiewicz court's reading of CES Card, Larson correctly observes that it is appropriate in some circumstances to recognize a compensable injurious exposure after the date of initial disablement. The last injurious exposure rule was developed to avoid the difficulties of apportioning liability among a number of different employers. It should not be misapplied to defeat the legitimate claim of an employee such as Waskiewicz.

c. Inapplicability of the Modification Provision.—The court inappropriately applied the Act's reopening provision to the Waskiewicz case. With respect to this issue, Professor Larson provides some instructive guidance. Larson states that reopening provisions apply when increased disability arises as a direct result of the original injury and does not apply when there is "no causal relation between the first injury and the subsequent condition." Applying Larson's reasoning, the Waskiewicz court appropriately cited Vest v. Giant Food Stores, Inc. as illustrative of circumstances clearly covered by the modification statute. In Vest, the claimant alleged that he had sustained an increase in disability after he underwent two operations to correct a work-related back injury that had occurred seven years earlier and for which he had been compensated. In Vest, the Court of Appeals correctly held that the modification provision's statute of limitations period barred the employee's second claim.

159. 4 Larson, supra note 49, § 95.27.
160. Id.; see also supra note 51 and accompanying text.
161. See 4 Larson, supra note 49, § 95.27.
162. See Vokoun, supra note 45, at 106.
163. 3 Larson, supra note 49, § 81.31(b).
165. See id. at 477-78, 620 A.2d at 343.
Unlike *Vest*, however, Waskiewicz did not allege that his increased disability resulted from a *natural progression or worsening* of the condition originally suffered in 1974. Rather, Waskiewicz alleged that additional injurious exposure to occupational disease hazards caused his increased disability.\(^{166}\) In other words, Waskiewicz’s increased disability did not stem from his original disability, but, rather, from additional injurious exposure to hazardous work conditions after GM placed him back on the assembly line in 1991.\(^{167}\) Waskiewicz presents a situation similar to those in *General Electric, Muldoon,* and *Mikitka.*\(^{168}\) In *Mikitka,* the New Jersey court correctly reasoned that the modification provision is invoked only when the claim is based upon “increased disability stemming from the same exposure as was the basis of the original award.”\(^{169}\) Thus, the *Mikitka* court held, the employee could bring a new claim so long as she filed the claim within two years of the date that she knew or should have known of the existence of the increased disability.\(^{170}\) Especially in light of the Act’s mandate that courts construe the statute liberally, the Court of Appeals should have adopted reasoning similar to that of the New Jersey Superior Court in *Mikitka.*

Further, Professor Larson discusses some of the problems that legislatures intended to address through limitations periods in modification statutes.\(^{171}\) These problems included “the difficulty of determining the relationship between some ancient injury and a present aggravated disability” and the difficulty that insurance companies would have in estimating future reserves.\(^ {172}\) Although these problems surely may arise in cases involving the natural recurrence of a disability in which the modification statute properly comes into play, they would not arise in a case such as *Waskiewicz.* These issues do not arise because Waskiewicz did not attempt to establish a relationship between his fifteen percent disability in 1976 and his present disability.\(^ {173}\) Rather, he attempted to file a new claim that was completely independent of the injurious exposure that led to his initial disabil-

\(^{166}\) *Waskiewicz,* 342 Md. at 702-03, 679 A.2d at 1096.

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

\(^{168}\) *See supra* notes 136-147 and accompanying text.

\(^{169}\) *Mikitka v. Johns-Manville Prods. Corp.,* 352 A.2d 591, 593 (N.J. Super. Ct. App. Div. 1976) (per curiam). The court dealt with this issue rather summarily. In a footnote, the court stated that the reopening provision only applied in cases in which the employee based her claim on the exposure that led to the first award, even if the disease later naturally progressed to a point where serious disability resulted. *Id.* at 593 n.1.

\(^{170}\) *See id.* at 594-95.


\(^{172}\) *Id.*

\(^{173}\) *See Waskiewicz,* 342 Md. at 702-03, 679 A.2d at 1096.
Moreover, GM should have had no difficulty “estimating reserves” in this situation because Waskiewicz’s increased disability resulted from current, not past, exposure to the hazards of an occupational disease. Because the problems that the statute of limitations provision seeks to address do not arise in this situation, it follows that it should not have been applied.

Applying the Act’s modification provisions to the facts of this case violates the fundamental principal that courts should avoid construing statutes in illogical and unreasonable ways. Waskiewicz did not suffer the injurious exposure that resulted in his total disability until more than fifteen years after he had been previously compensated for the disease. Allowing the limitations period in the reopening statute to bar Waskiewicz’s claim, therefore, has the effect of holding that his claim had expired ten years before he suffered the injurious exposure that resulted in his total disability. When the legislature created the modification statute and its limitations provision, it surely did not intend to produce “the absurd result of possibly barring claims before they even existed.” Holding that Waskiewicz’s claim was barred before it had arisen was an unfair result, as well as an incorrect one.

d. Unfair Distinction Between Occupational Disease and Accidental Injury.—Waskiewicz argued that “just as employees who are re-injured on the job because of another accident are entitled to file a new workers’ compensation claim . . . , so should he be entitled to file a new claim because of another ‘injurious exposure’” to occupational disease. The court recognized “reassignment to a hazardous set of duties” as “somewhat analogous to a new accidental injury causing a new disability,” but nevertheless found the analogy unpersuasive. Yet this holding flies in the face of the court’s holding in Shifflett, case law in other jurisdictions, and the informed view of Professor Larson that the two types of disability should statutorily be treated the same. As Judge Chasanow stated in his dissent:

174. Id.
176. Waskiewicz, 342 Md. at 702, 679 A.2d at 1096.
177. Id. at 717, 679 A.2d at 1103 (Chasanow, J., dissenting).
179. Waskiewicz, 342 Md. at 711, 679 A.2d at 1100.
180. Id. at 714, 679 A.2d at 1101.
181. See supra notes 61-63 and accompanying text.
182. See supra note 64 and accompanying text.
183. See supra note 64.
There is no reason to treat employees whose disabilities are exacerbated because of an additional accidental injury on the job differently from employees whose occupational disease is exacerbated because of an additional injurious exposure on the job. Nothing in § 9-501 or § 9-502, or any other provision in the Act, requires such unfair and disparate treatment of employees with occupational diseases.\(^4\)

The court failed to explain why it found the analogy between increased disability from accidental injury and from occupational disease unconvincing, although it seemed to take issue with what it viewed as the "underlying assumptions" in Waskiewicz's analogy—that Waskiewicz based his claim in part on the fault of General Motors in returning him to assembly line work despite his condition.\(^5\) The court noted that because workers' compensation is a "no-fault" system, the "very foundation of Mr. Waskiewicz's argument [is] quite shaky."\(^6\) The "fault" of GM, however, was not essential to Waskiewicz's claim. Although there is little doubt that Waskiewicz does imply that he blamed GM for exposing him to the hazards of carpal tunnel syndrome a second time,\(^7\) the key to his claim was simply that he suffered additional injurious exposure to the disease while working for GM, which rendered him totally disabled.\(^8\)

e. Unfair Requirement of a "Subsequent and Different" Occupational Disease.—The Court of Appeals found that Waskiewicz had not "suffer[ed] a subsequent occupational disease," which would have allowed him to recover under sections 9-656 and 9-802 of the Act.\(^9\) As Judge Chasanow stated in dissent, the majority effectively held that an employee must suffer from a "subsequent and different occupational disease" in order to recover.\(^10\) In other words, Waskiewicz could not recover under those sections because both his preexisting condition and subsequent occupational disease were the same—carpal tunnel syndrome. A requirement that the plaintiff suffer from a different oc-

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\(^4\) Waskiewicz, 342 Md. at 717-18, 679 A.2d at 1103 (Chasanow, J., dissenting).

\(^5\) Waskiewicz, 342 Md. at 711, 679 A.2d at 1100; see also supra notes 121-122 and accompanying text.

\(^6\) Waskiewicz, 342 Md. at 711-12, 679 A.2d at 1100.

\(^7\) See Brief of Appellant at 8, Waskiewicz (No. 105) (discussing an employer's ability to knowingly assign a previously injured employee to hazardous work duties without facing any further liability).

\(^8\) See id. at 1. The court, in fact, acknowledges that Waskiewicz did not explicitly allege bad faith on the part of GM. See Waskiewicz, 342 Md. at 711, 679 A.2d at 1100. The court states only that GM's fault "impliedly" underlies his claim. Id.

\(^9\) Waskiewicz, 342 Md. at 711, 679 A.2d at 1100 (emphasis added).

\(^10\) Id. at 720, 679 A.2d at 1104 (Chasanow, J., dissenting).
occupational disease does not appear on the face of the statute, and it is unclear why the court would read this into the statute. The statute requires only that the "employee be permanently disabled due partly to a preexisting disease and partly to a subsequent occupational disease."

Waskiewicz suffered from carpal tunnel syndrome when he returned to the assembly line in 1991, and subsequently suffered additional injurious exposure to the hazards of the disease. According to the plain language of the two statutes, Waskiewicz should be able to recover.

As the dissent pointed out, the majority's holding that an employee is only permitted "a single claim for a single type of occupational disease" ignores subsection (e) of the occupational disease statute, which "clearly envisions more than one claim for the same occupational disease."

This provision "would have been totally superfluous if the legislature intended to limit a worker to one claim for each type of occupational disease."

Subsection (e) bars compensation for an occupational disease if the employee had falsely represented that she had not been previously disabled by or compensated for that occupational disease. This provision would have been unnecessary if the Act barred second claims for the same occupational disease in all situations.

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191. Id., 679 A.2d at 1105.
192. Id. at 721, 679 A.2d at 1105. Section 9-502 (e) provides:
   False representation — Compensation prohibited. — A covered employee or a dependent of the covered employee is not entitled to compensation for a disability or death that results from an occupational disease if, when the covered employee began employment with the employer, the covered employee falsely represented in writing that the covered employee had not been disabled, laid off, or compensated in damages or otherwise, due to the occupational disease for which the covered employee or dependent is seeking compensation.

196. See Brief of Appellant at 8, Waskiewicz (No. 105).
197. Id.
ployees and their families should not be forced to suffer the physical, financial, and emotional strain that accompanies a severe case of occupational disease. Rather, Maryland's Workers' Compensation Act should be construed so as to encourage early intervention. Not only would early intervention prevent needless suffering, but it would also save employers and insurers the high costs of compensating victims for total disability.

Further, as a matter of public policy, Maryland's Workers' Compensation Act should not create incentives for employers to abuse their employees. Recall that in Waskiewicz, GM reassigned Waskiewicz to the assembly line despite its knowledge of his condition and that this type of work would likely cause him to suffer additional injury. The court's holding leaves employees in Waskiewicz's position "at the mercy of their employers," because an employer could essentially expose them to the hazardous effects of occupational disease after the limitations period had expired, "knowing that there would be no liability for any increased disablement the employee might sustain as a result."

In addition, the court's holding "should result in a great increase in trivial motions to modify permanent partial disability awards" by employees who do not want to lose their right to recover for later injuries. This would have the effect of overburdening this state's Workers' Compensation Commission and subjecting employers to the unnecessary expense of defending and paying such claims.

5. Conclusion.—As Judge Chasanow noted in his dissent, the Waskiewicz majority construed "all ambiguous provisions [of Maryland's Workers' Compensation Act] against the worker," directly contravening the statute's mandate that courts interpret the Act liberally. The statute itself provides that the Act should not be strictly construed and, as Maryland courts have held, "'should be construed . . . liberally in favor of injured employees . . . in order to effectuate its benevolent purposes.'" By holding that Waskiewicz's claim was barred ten years before it arose, the Court of Appeals ignored the

198. Waskiewicz, 342 Md. at 702, 679 A.2d at 1095-96.
199. Brief of Appellant at 8, Waskiewicz (No. 105).
200. Waskiewicz, 342 Md. at 717, 679 A.2d at 1103 (Chasanow, J., dissenting).
201. Id. at 716, 679 A.2d at 1103.
statute, Maryland case law, and the court's own mandate that statutes should not be construed so as to produce "absurd" results.\textsuperscript{203}

\textit{Waskiewicz} promises to create hardship for future workers' compensation claimants suffering from occupational diseases, and it will place additional burdens on Maryland's workers' compensation system as a whole. Such results are unreasonable and wholly unnecessary. For this reason, the General Assembly should undo the damage done by the \textit{Waskiewicz} holding.

\textbf{MICHAEL K. HOURIGAN}

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\textsuperscript{203} Uninsured Employers' Fund v. Lutter, 342 Md. 334, 346, 676 A.2d 51, 57 (1996).
Recent Decisions
The United States Court of Appeals for the Fourth Circuit

I. CONSTITUTIONAL LAW

A. Don’t Ask, Don’t Tell: Unequal Protection in the Military

In Thomasson v. Perry, the United States government scored a pyrrhic victory in the courtroom struggle over the constitutionality of the military’s four-year-old policy on homosexuals, called “Don’t Ask, Don’t Tell.” The United States Court of Appeals for the Fourth Circuit, sitting en banc, upheld the Navy’s dismissal of Lieutenant Paul G. Thomasson for his statement “I am gay.” In so holding, the court reduces equal protection analysis to a facial acceptance of the federal government’s explanation for its discriminatory classification.

The court accepted the military’s and Congress’s pretextual justification for Don’t Ask, Don’t Tell—that homosexual conduct affects military troop “morale” or “unit cohesion”—but chose to remain blind to the invidious nature of the justification and its constitutional implications. By ignoring the policy’s internal contradictions and the military’s own experience with homosexuals, the court found that the policy works to promote its purported goal. Despite the court’s holding, ten of the thirteen judges wrote concurring and dissenting opinions rebuffing the government’s basic defense of the policy—that it prohibits only homosexual conduct, not homosexual orientation or status. In truth, the policy of “Don’t Ask, Don’t Tell” is nothing more than discrimination based on homosexual status in violation of core equal protection guarantees.

I. The Case.—On January 29, 1993, after just over one week in office, President Clinton announced his intention to fulfill his campaign promise of “ending discrimination [in the military] on the basis of...
of sexual orientation."\(^4\) Later that year, Congress passed the National Defense Authorization Act of 1994,\(^5\) which contained what is now commonly referred to as the "Don't Ask, Don't Tell" policy. Congress declared the policy necessary for "exclud[ing] persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."\(^6\)

On their face, the Defense Authorization Act of 1994 and the Department of Defense's (DOD) implementing directive\(^7\) do not prohibit an individual with homosexual orientation from serving in the armed forces.\(^8\) The Act requires the discharge of a service member who demonstrates that he or she (1) "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act,"\(^9\) (2) "has stated that he or she is a homosexual or bisexual,"\(^10\) or (3) "has married or attempted to marry a person known to be of the same biological sex."\(^11\)

A service member threatened with separation for his or her statement of homosexuality can avoid discharge only by proving "that he

8. See 10 U.S.C. § 654(a) (13) ("The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary." (emphasis added)); 32 C.F.R. pt. 41, app. A ("A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." (emphasis added)). In passing the Act, Congress deferred to President Clinton's desire that the military discontinue its recently adopted policy of not questioning individuals about homosexuality during accession to military service. See Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Servs., 103d Cong. 2-3 (1993) (statement of Sen. Nunn) (discussing cooperation between the Clinton Administration and Congress) [hereinafter S. Hrg. 103-845]. Hence, "Don't Ask, Don't Tell." In an uncodified "Sense of Congress," however, Congress stated that "the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate." Pub. L. No. 103-160, § 571(d), 107 Stat. 1670. Don't Ask, Don't Tell was the first law passed by Congress relating to military service by homosexuals. Prior to enactment, the military's own directives governed military service by homosexuals.
9. 10 U.S.C. § 654(b)(1). The statute defines a "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." Id. § 654 (e)(3).
10. Id. § 654(b)(2).
11. Id. § 654(b)(3).
or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”

Although the statute does not define the term “propensity,” the DOD Directive defines “propensity” as “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts,” and it defines a declaration of homosexuality as “homosexual conduct.”

The case against Lt. Paul G. Thomasson arose in March 1994, when after reading the Navy’s directive implementing the Defense Authorization Act of 1994 and the DOD Directive, Lt. Thomasson delivered a letter to his naval commandeers stating that he could “remain silent no longer. . . . I am gay.” On the basis of his letter, a three-member Board of Inquiry initiated a hearing on his discharge. At the hearing, Lt. Thomasson presented evidence regarding his service record, written and oral testimony from his coworkers, and expert testimony on homosexuality and the military’s policy relating to homosexuals. Lt. Thomasson refused to present evidence refuting that he was gay or had a propensity to engage in homosexual conduct, stating that he would “not go further in degrading [himself] by disproving a

12. Id. § 654(b)(2) (emphasis added). Members who have engaged in, attempted to engage in, or solicited another to engage in a homosexual act may also be excused from separation if they demonstrate:

(A) such conduct is a departure from the member’s usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts.

Id. § 654(b)(1).

The statute defines a “homosexual” as “a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms ‘gay’ and ‘lesbian.’” Id. § 654(f)(1).

13. Cf. id. (“Homosexual conduct includes . . . a statement by a member that demonstrates a propensity or intent to engage in homosexual acts.”). The prior regulation defined “homosexual” as “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.” DOD Directive (Enlisted Administrative Separations), 32 C.F.R. pt. 41, (1981). For the definition of the term “homosexual” in the new regulation, see supra note 12; see also Able v. United States, 88 F.3d 1280, 1286 (2d Cir. 1996) (“A comparison of the former policy with the Act and the new Directives . . . reveals that the grounds for separation under the two are virtually identical.”).


16. Thomasson, 80 F.3d at 920.

17. Id. at 921.
charge about sexual conduct that no one has made." Based on the evidence presented, the Board of Inquiry recommended that Lt. Thomasson be honorably discharged.

A three-member Board of Review unanimously concurred in the Board of Inquiry's conclusion that Thomasson "failed to demonstrate acceptable qualities of leadership . . . as evidenced by statements that he made which are conduct within the meaning of [the policy] and the presumption of homosexual conduct thereby raised is not rebutted." The Board of Review upheld the Board of Inquiry's recommendation to honorably discharge Lt. Thomasson. The Chief of Navy Personnel officially signed Lt. Thomasson's discharge orders.

In February 1995, Lt. Thomasson sued the federal government, challenging the Don't Ask, Don't Tell policy on the grounds that (1) it violates the equal protection laws by discriminating based on status and by presuming conduct from status, (2) it violates the First Amendment by restricting speech based on its content, (3) it is overbroad in violation of the Due Process Clause of the Fifth Amendment, and (4) his dismissal was not supported by substantial evidence as required by the Administrative Procedure Act.

Although Lt. Thomasson initially won a temporary restraining order enjoining his dismissal, the district court eventually granted the government's motion for summary judgment, concluding that Lt. Thomasson's statement constituted evidence of homosexual conduct. The district court arrived at its conclusion even though the government had conceded that Lt. Thomasson's service record was

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18. Id.
19. Id.
20. Brief for Appellant at 10, Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (No. 95-2185) (alteration in original).
21. Thomasson, 80 F.3d at 921.
22. Id.
23. Thomasson v. Perry, 895 F. Supp. 820, 821, 824, 826, 830-31 (E.D. Va. 1995), aff'd, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996). Thomasson emphasized his claims under the First Amendment and the equal protection guarantee of the Fifth Amendment. See id. at 824-30. This Note focuses on Lt. Thomasson's equal protection claims. The Don't Ask, Don't Tell policy also raises significant questions concerning separation of powers and judicial deference to military considerations. Because of the differences of opinion among the judges of the Fourth Circuit, the decision raises further questions of administrative law and judicial process. See infra note 95 and accompanying text.
25. Id. at 825, 831.
“enviable” and had acknowledged “that there was no evidence that Lt. Thomasson had engaged in any ‘homosexual act.’” Without addressing the evidentiary record amassed by Thomasson, the district court denied Lt. Thomasson’s First Amendment claim, accepting the government’s argument that the policy placed a permissible burden on speech because the military used speech merely as evidence of conduct.

The district court denied Lt. Thomasson’s other claims as well. In ruling on his equal protection claim, the district court applied rational basis scrutiny to find that the policy was based on the government’s “concrete, articulated concerns about privacy and sexual tension and the resulting impact on unit cohesion,” and that the regulation “is, at bottom, a regulation governing employment in a profession with somewhat unique criteria.”

The Navy subsequently discharged Lt. Thomasson. Lt. Thomasson appealed the district court’s ruling, alleging errors under the First Amendment, the Due Process Clause and the equal protection guarantee of the Fifth Amendment, and the Administrative Procedure Act. After hearing oral argument, the Fourth Circuit voted, sua sponte, to rehear the case en banc.

2. Legal Background.—Thomasson v. Perry is one of a series of challenges to the military’s policy on homosexuals. Like other challenges, Lt. Thomasson’s challenge to the policy of Don’t Ask, Don’t Tell and the Fourth Circuit’s opinion relating to that challenge raise several important legal issues, ranging from questions of equal protec-
tion and due process to judicial deference to military decisionmaking and administrative processes. This Note considers only one of those constitutional challenges—Lt. Thomasson’s allegation that the policy of Don’t Ask, Don’t Tell violates the equal protection guarantee of the Fifth Amendment to the United States Constitution. A complete understanding of the equal protection issues at stake in Thomasson requires consideration, first, of the scope of judicial review afforded equal protection challenges and, second, of how judicial review has been applied in previous cases concerning the military’s policy on homosexuals.

a. Standard of Review.—Supreme Court equal protection jurisprudence consists of three standards of review: strict scrutiny, intermediate scrutiny, and rational basis scrutiny. Under strict scrutiny, the most demanding scope of review for classifications based on race, alienage, or national origin, the government’s classification must be “suitably tailored to serve a compelling [government] interest.” Intermediate scrutiny applies to classifications based on gender and illegitimacy. A classification subject to intermediate scrutiny must be “substantially related to a sufficiently important governmental interest.” Other classifications are scrutinized under the more lenient rational basis test, under which the “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate [government] interest.” A court’s decision to apply rational basis review does not necessarily predetermine the outcome of its decision; rather, the presumption of rationality has been accorded varying weight by the different

38. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as applied to the federal government by way of the Due Process Clause of the Fifth Amendment, forbids the federal government from “deny[ing] to any person . . . the equal protection of the laws.” U.S. CONST. amend. XIV.
40. Id. at 440.
41. Id. at 441.
42. Id.
43. Id. at 440.
44. Thomasson, 80 F.3d at 928. Although this Note focuses on the application of rational basis scrutiny to the Don’t Ask, Don’t Tell policy, a strong argument can be made that the policy should be analyzed using heightened or strict scrutiny. See generally Note, The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification, 98 HARV. L. REV. 1285, 1287 (1985) (“[C]ourts should recognize homosexuality as a suspect classification under the equal protection clause of the fourteenth amendment and therefore subject laws that discriminate on the basis of sexual preference to heightened scrutiny, beyond the ‘rational basis’ test currently applied.” (footnotes omitted)); Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 797-98 (1984) (“[C]ourts should apply equal protection height-
opinions. In *Williamson v. Lee Optical of Oklahoma, Inc.*[^45] an early case applying the rational basis test, the Supreme Court upheld an Oklahoma law that forbade an optician from fitting or duplicating lenses without a prescription from an ophthalmologist.[^46] In rejecting the optician's due process challenge, the Court concluded that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[^47]

The deferential analysis applied in *Lee Optical* sharply contrasts with an earlier case, *F.S. Royster Guano Co. v. Virginia*,[^48] in which the Court invalidated under the Equal Protection Clause of the Fourteenth Amendment a state tax that required corporations doing business in Virginia to pay taxes for income derived from out-of-state operations.[^49] Other companies incorporated under Virginia laws, but not deriving income from in-state activities, were exempt from the tax.[^50] The Court noted that although Virginia had a "wide range of discretion"[^51] to resort to classifications, a classification "cannot be sustained . . . if the classification appear[s] to be altogether illusory."[^52] Moreover, the Court observed that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[^53]

In some of its more recent cases, the Supreme Court has continued to shift back and forth from the deferential to the more rigorous

[^46]: Id. at 488-89.
[^47]: Id. at 487-88. The Court further stated:
The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.
[^48]: 253 U.S. 412 (1920).
[^49]: Id. at 417.
[^50]: Id. at 414.
[^51]: Id. at 415.
[^52]: Id.
[^53]: Id.
form of the rational basis test. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court applied rational basis review to a zoning requirement for a special use permit for the operation of a group home for individuals with mental retardation. The United States Court of Appeals for the Fifth Circuit ruled that individuals with mental retardation constituted a "suspect" class entitled to a heightened level of scrutiny.

The Supreme Court rejected the Fifth Circuit's use of strict scrutiny "[b]ecause mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions." Nonetheless, the Court invalidated the zoning regulation because it could find no rational relation between the state's chosen means—the regulation—and its purported interest. Although it applied the rational basis test, the Court undertook an extensive examination of the state's reasons for requiring a special permit for a home for mentally retarded individuals, comparing those reasons to the absence of a permit requirement for boarding houses, nursing homes, and other dwellings. The Court found that the different treatment of individuals with mental retardation was based on "negative attitudes, or fear," which the Court concluded were not "permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."

In cases subsequent to *Cleburne*, including *FCC v. Beach Communications, Inc.* and *Heller v. Doe*, the Court applied the more deferential form of rational basis review. In *Beach Communications*, the Court upheld a provision of the Cable Communications Act of 1984 that exempted certain facilities from franchise requirements, concluding that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." In *Heller*, the Court held constitutional a Kentucky law applying different procedures and evidentiary standards for involun-

55. Id. at 435, 442-47.
56. Id. at 437.
57. Id. at 446.
58. Id. at 449-50.
59. Id. at 447-50.
60. Id. at 448.
61. Id.
64. *Beach Communications*, 508 U.S. at 315.
tary commitment of individuals with mental retardation and individu-
als with mental illness.\footnote{Heller, 509 U.S. at 314-15. The Court found a number of differences between mental retardation and mental illness that justified the different treatment, including the fact that mental retardation is easier to diagnose and may be treated through less intrusive methods. \textit{Id.} at 322-28.}

In 1996, however, the Court returned to the more rigorous form of the rational basis test. In \textit{Romer v. Evans},\footnote{116 S. Ct. 1620 (1996).} the Court invalidated “Amendment 2” to the Colorado Constitution on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Amendment 2 barred state and local jurisdictions from enacting laws and regulations specifically designed to protect homosexuals from discrimination in certain transactions and activities.\footnote{\textit{Id.} at 1623. Many of the ordinances sought to protect homosexuals from discrimination in “housing, employment, education, public accommodations, and health and welfare services.” \textit{Id.}} The Court disagreed with the Colorado Supreme Court’s decision to apply strict scrutiny to the classification, but eventually found Amendment 2 unconstitutional under the rational basis test.\footnote{\textit{Id.} at 1627. The Colorado Supreme Court had held that Amendment 2 was subject to strict scrutiny review “because it infringed the fundamental right of gays and lesbians to participate in the political process.” \textit{Id.} at 1622.}

Finding that the amendment was “at once too narrow and too broad,”\footnote{\textit{Id.} at 1628.} Justice Kennedy stated for the majority that Amendment 2 “identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprece-
dented in our jurisprudence.”\footnote{\textit{Id.}} Justice Kennedy continued:

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a \textit{legitimate} governmental interest.”\footnote{\textit{Id.} (alteration and emphasis in original) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). Although \textit{Romer} involved discrimination against homosexuals as a class and bears this resemblance to \textit{Thomasson}, the Court also emphasized that the law sought to deprive political recourse to a particular class of citizens. \textit{See id.}}

The Court’s decision in \textit{Romer} affects the policy of Don’t Ask, Don’t Tell in three ways. First, it represents a shift away from the
more deferential form of rational basis review epitomized by *Heller* toward the *Cleburne* application of the more rigorous rational basis review. Second, as Justice Scalia’s dissent observes, the Court’s decision “places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”

Third, like *Cleburne* and *Palmore v. Sidoti,* *Romer* suggests that when evidence indicates that government action is motivated by prejudice, public or private, the Court is more willing to take a harder look at what the government professes as its legitimate interest, even though the classification is subject to mere rational basis scrutiny.

The Court’s vacillation between the rigorous and deferential versions of the rational basis test leaves much uncertainty over the proper meaning of rational basis review. The trend represented by *Sidoti,* *Cleburne,* and *Romer* further entangles the analysis. As Justice Stevens observed in 1995, “substantial agreement on the [equal protection] standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved.”

**b. Constitutional Challenges to the Military’s Policy on Homosexuals.**—The Supreme Court has not yet addressed the policy of Don’t Ask, Don’t Tell in the military, but the ambiguity in the Court’s rational basis review standards has left its mark on lower court decisions that have addressed challenges to the policy. While the factual and

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72. Id. at 1629 (Scalia, J., dissenting). *Romer* also leaves in question the continuing precedential value of *Bowers v. Hardwick,* 478 U.S. 186 (1986), which provides support for the government’s right to prohibit certain forms of sexual conduct. Id. at 192. In *Bowers,* the Court upheld a Georgia sodomy statute against a Fourteenth Amendment due process challenge. Id. at 196. Although *Romer* and *Bowers* were decided on different constitutional theories, Justice Scalia believed that *Romer* upset the Court’s holding in *Bowers:* “In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago.” *Romer,* 116 S. Ct. at 1629 (Scalia, J., dissenting).

73. 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”); see infra notes 141-148.

74. *See supra* notes 54-61 and accompanying text; *infra* notes 141-149 and accompanying text.

75. Compare *Evans v. Romer,* 882 P.2d 1335, 1341-50 (Colo. 1994) (applying strict scrutiny and holding that an amendment to the Colorado Constitution which prohibits legislative, judicial, or executive action to protect homosexuals violates the Equal Protection Clause), with *Romer v. Evans,* 116 S. Ct. 1620 (1996) (applying rational basis review and reaching the same result).


procedural differences of each challenge make it difficult to generalize about their outcomes, the ultimate result often depends on whether the court believes the military separated the challenger as a result of his homosexual conduct or homosexual status.\textsuperscript{78} The decisions of courts faced with challenges to the Don't Ask, Don't Tell policy tend to fall into three general holdings: (1) the policy is based on status and is therefore unconstitutional;\textsuperscript{79} (2) the policy is either directed at conduct only or the challenger has engaged (or will engage) in conduct, either of which is held constitutional;\textsuperscript{80} or (3) the policy can be construed as requiring conduct, but as applied to the individual challenger is unconstitutional because the dismissal was based on status.\textsuperscript{81}

An excellent example of the courts' emphasis on the conduct-status distinction is the Ninth Circuit’s decision in Meinhold v. United States Department of Defense.\textsuperscript{82} This case is similar to Thomasson, but falls into the third category of holdings. Like Lt. Thomasson, the Navy unconstitutional), and Cammermeyer v. Aspin, 850 F. Supp. 910, 914-26 (W.D. Wash. 1994) (same), \textit{appeal dismissed and remanded} by 97 F.3d 1235 (9th Cir. 1996), and Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993) (same), and Thomasson v. Perry, 895 F. Supp. 820, 830 (E.D. Va. 1995) (same), \textit{aff'd}, 80 F.3d 915 (4th Cir.) (en banc), \textit{cert. denied}, 117 S. Ct. 358 (1996), \textit{with} Philips v. Perry, 883 F. Supp. 539, 545-46 (W.D. Wash. 1995) (applying rational basis scrutiny and holding the Don't Ask, Don't Tell policy constitutional as applied to a service member who engaged in homosexual acts), \textit{and} Selland v. Perry, 905 F. Supp. 260, 266 (D. Md. 1995) (applying rational basis scrutiny and holding Don't Ask, Don't Tell constitutional as applied to a service member working in the confines of a nuclear attack submarine, but observing that the rationality of the policy would be "more dubious if the statement occurred on a base on the mainland"), \textit{aff'd}, 100 F.3d 950 (4th Cir. 1996).

\textsuperscript{78} See, \textit{e.g.}, Holmes, 920 F. Supp. at 1527-31 (identifying as the "threshold issue" whether the policy discriminates based on conduct or status); Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1372 (E.D. Va. 1996) (examining the status-conduct distinction for analysis under the First Amendment and finding that the policy discriminates based on status); Selland, 905 F. Supp. at 265 (analyzing the conduct-status distinction as a claim separate from the challenger's equal protection and free speech claims).

\textsuperscript{79} See, \textit{e.g.}, Holmes, 920 F. Supp. at 1527-31 (finding that the policy is unconstitutional because it discriminates on the basis of status); Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (holding that under the First Amendment, a mere statement of orientation is "not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings"), \textit{vacated and remanded}, 88 F.3d 1280 (2d Cir. 1996). Judge Luttig’s concurring opinion in Thomasson, concluding that the policy is directed at status but is still constitutional, appears to be an exception to this category. See \textit{infra} notes 102-107 and accompanying text.

\textsuperscript{80} See, \textit{e.g.}, Philips, 883 F. Supp. at 541 (upholding discharge based on a finding that the service member who challenged the policy "has engaged in homosexual acts and says he will continue doing so"). Both the district court's and Fourth Circuit's majority's decisions in Thomasson, which found that the policy prohibited only homosexual conduct, fall into this category.

\textsuperscript{81} See, \textit{e.g.}, Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

\textsuperscript{82} 34 F.3d 1469 (9th Cir. 1994).
dismissed Petty Officer Meinhold solely for his statement "I am in fact gay." The court in Meinhold found that "[c]onstruing the regulation to apply to the 'classification of being homosexual' clearly implicates equal protection," but the court decided that the policy might "reasonably be construed to reach only statements that show a concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited." Applying its analysis to Petty Officer Meinhold, however, the court found his statement that he was "gay" insufficient to demonstrate a concrete desire to commit homosexual acts and concluded that the Navy's dismissal violated Meinhold's equal protection rights.

The distinction between status and conduct also determined the outcome in Able v. United States. This case represented another challenge to the codified version of the Don't Ask, Don't Tell policy and eventually generated a circuit court decision. In analyzing a First Amendment claim, the district court found that the policy was premised on status and not conduct, a distinction which it found unconstitutional. On appeal, the United States Court of Appeals for the Second Circuit disagreed that the policy was status-based and reversed the lower court's First Amendment holding. The court then remanded the case to the trial court for consideration of Able's equal protection claim.

83. Id. at 1472. Meinhold made this statement on ABC's World News Tonight.
84. Id. at 1477.
85. Id. at 1479. As in Thomasson, the military in Meinhold had no evidence of homosexual conduct. See id. at 1479-80.
86. Id. at 1479-80 ("The Navy's presumption that Meinhold desires or intends to engage in prohibited conduct on the basis of his statement alone therefore arbitrarily goes beyond what DOD's policy seeks to prevent. Accordingly, Meinhold's discharge on that basis cannot stand."). Interestingly, the district court rendered its decision in Meinhold only one day before President Clinton's news conference announcing his plans to change the military's policy on homosexuals. President Clinton referred to the Meinhold opinion and embraced the court's distinction between orientation and conduct as consistent with his own views. See The President's News Conference, I PUB. PAPERS 20 (Jan. 29, 1993); see also Thomasson, 80 F.3d at 935 (Luttig, J., concurring) (describing President Clinton's announcement and the Meinhold decision).
88. Id. at 975-76, 980 (finding that the policy is unconstitutional because it discriminates based on sexual orientation).
89. Able v. United States, 88 F.3d 1280, 1298 (2d Cir. 1996).
90. Id. (holding that "the Act does not bar those who have a homosexual orientation but are not likely to engage in homosexual acts" and remanding the case back to district court for further proceedings).
In cases arising under the policy prior to the National Defense Authorization Act of 1994, various appellate courts held that the military may discharge members who engage in homosexual acts. Able and Thomasson involve challenges to the statutory enactment of the Don’t Ask, Don’t Tell policy that have generated federal circuit court decisions. Both cases arrived in the wake of numerous challenges to the military’s policy on homosexuals, yet were decided before significant developments occurred in Supreme Court equal protection jurisprudence.

3. The Court’s Reasoning.—Sitting en banc, a majority of the Fourth Circuit rejected Lt. Thomasson’s equal protection claims, but the judges could not agree on a clear rationale for doing so. Only two judges sat squarely behind the majority opinion, and no rationale for the decision captured a majority. Chief Judge Wilkinson’s majority opinion noted that the challenged policy was a “carefully crafted national political compromise” and emphasized judicial deference on military matters to the Executive branch, Congress, and the military itself.

91. See supra notes 8, 14 (discussing the military’s policy before 1994).
92. See, e.g., Steffan v. Perry, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); Meinhold v. United States Dep’t of Defense, 94 F.3d 1469, 1477 (9th Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989).
94. Thomasson, 80 F.3d at 931.
95. Of the eight judges who joined Chief Judge Wilkinson’s majority opinion, five also joined Judge Luttig’s concurring opinion (J. Russell, Widener, Wilkins, Hamilton, and Williams). See id. at 916; id. at 949 (Luttig, J., concurring). Judge Murnaghan, who also joined the majority opinion, authored a separate one paragraph concurrence stating that he would uphold Lt. Thomasson’s dismissal on the simple grounds that Lt. Thomasson failed to rebut the presumption of homosexual conduct and that the presumption is rational without the discussion of judicial deference to the military. See id. at 934 (Murnaghan, J., concurring). Judge Niemeyer was, therefore, the only judge who signed Chief Judge Wilkinson’s opinion without signing a separate concurring opinion.
96. Thomasson, 80 F.3d at 921.
97. Id. at 921-27. Following his extensive analysis, Judge Wilkinson conceded that “[n]one of this means, of course, that the statute before us may escape constitutional scrutiny.” Id. at 927. Because of the split of opinions, Chief Judge Wilkinson’s emphasis on deference to other branches on military affairs won the full support of only Judge Niemeyer. See supra note 95; cf. Rostker v. Goldberg, 453 U.S. 57, 67, 83 (1981) (stating that judicial deference to Congress and the Executive Branch on military affairs does not require abdication of the “ultimate responsibility to decide the constitutional question” but holding all-male draft registration constitutional); Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991) (acknowledging that “military decisions by the Army are not lightly to be overruled by the judiciary,” especially when “judging whether the reasons put forth on the record for the Army’s discrimination against [the soldier] are rationally related to any of
invoke a higher level of scrutiny because the "statutory classification here is not suspect, nor does it burden any fundamental right."\textsuperscript{98} Citing prior applications of rational basis review, including \textit{Heller} and \textit{Cleburne},\textsuperscript{99} Chief Judge Wilkinson concluded that he need not go any further in assessing the first equal protection prong—the government's interest in the policy on homosexuals—than to recite the statutory findings of the National Defense Reauthorization Act of 1994 and the congressional testimony of military officials.\textsuperscript{100} Applying the second prong of the rational basis test—the fit between the policy and the government's objective—the majority opinion concluded that "the legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts."\textsuperscript{101}

Six of the nine judges who signed the majority opinion also endorsed Judge Luttig's concurring opinion. Although the majority opinion accepted, and even emphasized, the conduct-status distinction urged by the government, the concurrence rejected this distinction, finding that Congress intended to prohibit homosexuals from service in the military.\textsuperscript{102} Based on an extensive analysis of the congressional record and a comparison of the statute and the regulation, Judge Luttig contended that the "statute requires the discharge of homosexual service members who merely say that they are homosexual or otherwise evidence their homosexuality, regardless of whether they have actually engaged in homosexual conduct or are likely to engage in any such conduct."\textsuperscript{103} Judge Luttig argued that the DOD's implementing directive departs from the statutory requirement by substitut-
ing the word "likelihood" for "propensity"—thus weakening the congressional goal of removing from the military anyone with a "propensity" toward homosexual conduct.\textsuperscript{104} The opinion then distinguishes between "propensity" and "status" in order to sidestep constitutional problems associated with legislation that discriminates based on status.\textsuperscript{105} Judge Luttig (perhaps disingenuously) claimed that in this analysis he created a new "hybrid" classification, but he still conceded that the hybrid is closer to "status" than "conduct."\textsuperscript{106} Finally, Judge Luttig concluded that in contravening Congress's intent to prohibit all service members having a homosexual orientation from serving in the Armed Forces, the DOD has "created what is in effect a sanctuary for known homosexuals whom the military determines are not likely to engage in homosexual acts."\textsuperscript{107}

The four-judge dissent authored by Judge Hall shared common ground with the concurrence—both opinions rejected the government's contention that the policy is directed at conduct.\textsuperscript{108} In contrast to Judge Luttig's concurring opinion, finding a prohibition on orientation to be constitutional, Judge Hall concluded that the policy operates unconstitutionally.\textsuperscript{109} He based his conclusion on three fac-

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\textsuperscript{104} Id. at 999.
\textsuperscript{105} See id.
\textsuperscript{106} Id. Judge Luttig writes:

Such a policy is, as between pure status and pure conduct, a status-based policy, because it merely recognizes certain conduct as evidence of homosexuality; it does not exclude on the basis of that conduct itself. . . . [I]t is not . . . status-based in the same way that an exclusion on the basis of an immutable characteristic would be. Rather, it is to say that the policy is based upon what is in fact a hybrid of status and conduct, namely 'propensity.' . . . It is, as commonly understood, merely an inclination . . . and it is that inclination, that propensity, not any likelihood of conduct, at which this particular policy is directed.

\textit{Id.} (emphasis added).

Later in his opinion, however, Judge Luttig states that the statute is directed at homosexual orientation: "I do not know what homosexual orientation is, if it is not the propensity to commit homosexual acts; indeed, I do not understand how one even knows that he has a homosexual orientation except by realizing that he has a propensity toward the commission of homosexual acts." \textit{Id.} at 942 n.8. \textit{But see} Able v. United States, 880 F. Supp. 968, 975 (E.D.N.Y. 1995) (characterizing as "Orwellian" the attempted distinction between "propensity" and "orientation"), \textit{vacated and remanded}, 88 F.3d 1280 (2d Cir. 1996). Judge Luttig never explained the difference he perceived, if any, between "orientation" and "status."

\textsuperscript{107} Thomasson, 80 F.3d at 941 (Luttig, J., concurring).
\textsuperscript{108} Id. at 950 (Hall, J., dissenting) ("Conduct cannot be the cause of his discharge."). Because the four dissenters and the nine judges agreeing with Judge Luttig's concurrence all agreed that the Don't Ask, Don't Tell policy is based on homosexual status, the Fourth Circuit apparently had the votes to reverse the district court's holding on administrative law grounds that the military regulations, which emphasized conduct, were unauthorized under the statute.

\textsuperscript{109} Id. at 953.
tors: (1) "a great deal of evidence [exists] that the statute was motivated by a desire to accommodate prejudice against homosexuals,"110 (2) the policy operates unconstitutionally by presuming that "everyone will fail to comply with rules of conduct";111 and (3) by defining speech as conduct, the policy of Don't Ask, Don't Tell creates "a classification among homosexuals based solely on speech."112

4. Analysis.—The policy of Don't Ask, Don't Tell fails both prongs of the equal protection rational basis test. The government's purported interests of unit cohesion and the prevention of homosexual conduct are pretextual justifications for invidious discrimination against homosexuals. The government invoked these interests as a smokescreen for its unconstitutional response to the private prejudices of service members against homosexuals. The majority opinion in Thomasson refused to lift the veil to see the government's real purpose of discriminating against homosexual status. Even so, its refusal should not have affected the outcome. Even if one grants the military the benefit of a legitimate government interest, Don't Ask Don't Tell fails the second prong of the rational basis test in that the policy is not rationally related to preventing homosexual conduct. By hiding behind the language of deference, the majority opinion fails to apply any level of constitutional scrutiny to the policy. The court skirts the numerous inconsistencies which reveal that the policy does not operate to achieve the government's goal of preventing homosexual conduct.

a. The Government's Illegitimate Interest.—Chief Judge Wilkinson, writing for a deeply divided majority, avoids direct inquiry into the first requirement of meeting rational basis review—that the challenged classification serve a legitimate interest—by accepting at face value the government's justification for the Don't Ask, Don't Tell policy.113 By alluding to various military personnel opinions and empty

110. Id. at 951. The majority and concurring opinions do not address the possibility that the policy may be derived out of prejudice. This factor may be particularly significant in the wake of Romer v. Evans, 116 S. Ct. 1620 (1996), which emphasized that Colorado's constitutional amendment directed at homosexuals was "born of animosity toward the class of persons affected." Id. at 1628; see supra notes 66-71 and accompanying text.

111. Thomasson, 80 F.3d at 953 (Hall, J., dissenting).

112. Id. at 954.

113. Thomasson, 80 F.3d at 927-30. Chief Judge Wilkinson's discussion of the government's legitimate interest in prohibiting homosexual conduct occupies slightly more than one page. See id. at 928-30. Yet his discussion of judicial deference to the Administration, Congress, and the military itself on military matters lasts for more than six pages. See id. at 921-27.
statutory declarations, he finds that “homosexual acts impair military readiness.” Nevertheless, ten out of thirteen judges on the bench believed that the policy is not directed at homosexual acts. These ten judges argued in their concurring and dissenting opinions that the Don’t Ask, Don’t Tell policy is intended to discharge from service all homosexuals, regardless of their conduct. Indeed, even a superficial review reveals that the policy’s concern over homosexual conduct is illusory because the government’s real concern is with homosexual status. As a result of the government’s concern, the policy operates on the basis of status.

Judge Luttig’s and Judge Hall’s rejections of the conduct distinction are supported by an examination of the legislative history and the military’s implementation of the policy. As one lower court explained, “once Congress decided to try to get all known homosexuals out of the Services, the chief concern was to draft legislation to insure that the enactment would survive judicial review.” Congress’s (and subsequently the administration’s) effort to survive constitutional review focused on characterizing sexual orientation as conduct. Jamie Gorelick, general counsel for the DOD, acknowledged this in her congressional testimony by stating that “the reason that we do not now discharge people because we believe them to have a homosexual ori-

114. Id. at 929.
115. See supra note 95.
116. Thomasson, 80 F.3d at 999 (Luttig, J., concurring) (asserting that the government “fully understands that the policy enacted by Congress is not conduct-based in the sense that it is targeted at homosexual acts and the likelihood that one will commit such acts”); id. at 950 (Hall, J., dissenting) (“Conduct cannot be the cause of his discharge.”).
The majority opinion rested its holding at least in part on the conduct-status distinction. See Thomasson, 80 F.3d at 929 (“Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to prevent the commission of such acts.”). Six of the nine judges signing the majority opinion joined the concurrence, which found that the policy does not stop at precluding homosexual conduct, but also prohibits status. As a result, it appears that they join in an opinion with which they do not agree in order to form a majority to uphold Lt. Thomasson’s dismissal.
117. Cf. United States v. Virginia, 116 S. Ct. 2264, 2277 (1996) (“[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (observing that courts are not required to “accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation”).
118. See infra notes 119-137 and accompanying text.
119. Lt. Thomasson’s own experience confirms this, since the Navy acknowledged it had no evidence of any conduct. See supra text accompanying note 28.
121. Id.
entation is because in 1981 it was recognized that if we did have a status-based as opposed to a conduct-based rule, that it would be vulnerable in the courts."122 The government's problem, then, was how to achieve the practical result of banning homosexual status while at the same time declaring as its goal the prohibition of homosexual conduct. The government tried to evade this problem by defining a statement of homosexuality as the equivalent of conduct, thereby creating a presumption of conduct based on a service member's statement of homosexuality.123 Thus, a service member is subject to discharge if "the member has stated that he or she is a homosexual or bisexual, or words to that effect."124 Form has thus been elevated over substance to avoid constitutional problems.

Nevertheless, the government recognized that basing a presumption of wrongful conduct on a statement of status posed its own constitutional problems. The government attempted to overcome this constitutional problem by purportedly allowing a service member to rebut the presumption of homosexual conduct.125 In practice, however, the opportunity to rebut the presumption is nothing but a mirage because the presumption cannot be rebutted. This further evidences that the ban is directed at homosexual status, rather than homosexual conduct.126

The statutory scheme operates as follows: A service member who states that he or she is homosexual triggers the statutory presumption that one has a propensity for homosexual conduct.127 To avoid discharge, the individual must rebut the presumption "that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."128 Thus, in theory, the service member can escape separation by showing that he or she has a homosexual "orientation," but not a "propensity" toward homosexual conduct.129 In practice, however, the sole method of rebutting the presumption is for the service member to deny his or her homosexual orientation, because by statutory definition, a homosex-

122. S. Hrg. 103-845, supra note 8, at 777 (statement of Jamie Gorelick, Gen. Counsel, United States Dep't of Defense).
124. Id. § 654(b)(2).
125. See Able, 880 F. Supp. at 975 (observing that the government "recognized that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny").
126. See infra notes 136-138 and accompanying text.
128. Id.
129. Id.
ual is a person who "has a propensity to engage in, or intends to engage in homosexual acts." A commitment to remain celibate is insufficient to rebut the presumption if the service member does not dispute his or her homosexual status. The DOD Directive attempts to circumvent these constitutional problems by severing all ties between "orientation" and "propensity" in its regulation and by defining "propensity" as "likelihood." District Court Judge Nickerson aptly described this attempt to draw a distinction between orientation and propensity in Able as "Orwellian." Judge Nickerson concluded:

Neither the Act nor the Directives explain how to differentiate an "orientation" from a "propensity," although the Act's avowed policy to insure that "homosexual orientation" not be treated as a "bar" to service would seem to make such differentiation crucial. . . .

These facts seem to the court to be powerful evidence that despite their semantic gymnastics, defendants them-

130. Id. § 654(f)(1). Further support that the statute intends to preclude those claiming homosexual orientation may be found in the "Sense of Congress," which states that the military could continue its new policy of not questioning individuals about homosexuality during accession, "but [that] the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate." Pub. L. No. 103-160, § 571(d), 107 Stat. 1670 (1993).
131. See Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995), vacated and remanded, 88 F.3d 1280 (2d Cir. 1996). The court observed:

Congress' specific intent was that "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future, nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it."
132. See DOD Directive, supra note 7 ("A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." (emphasis added)); see also Thomason, 80 F.3d at 989 (Luttig, J., concurring) (asserting that the government "fully understands that the policy enacted by Congress is not conduct-based in the sense that it is targeted at homosexual acts and the likelihood that one will commit such acts"). Judge Luttig analyzed the government's quotations from the congressional record and concluded:

On virtually every occasion when the Administration references either a statutory provision or a passage from testimony wherein Congress or a witness observed that the presence of open homosexuals would be detrimental to combat capability or unit cohesion, it substitutes its regulatory definition of "propensity" (i.e., a likelihood that one will engage in homosexual acts) for the words actually enacted or spoken.
Id. at 939-40.
133. Able, 880 F. Supp. at 975 ("Although the Act and the Directives are written in such a manner as to give the impression that there is a principled distinction between the two characteristics, only a brief critique will demonstrate that in practice no such distinction exists.").
Plainly they intended that the articulation of a mere "orientation" be sufficient to initiate a discharge proceeding. Thus, one who does no more than express an "orientation" is faced with the prospect of somehow showing that he or she does not have a "propensity" to engage in prohibited acts in order to avoid discharge. Indeed, in her testimony on the Don't Ask, Don't Tell policy, Jamie Gorelick, general counsel for the DOD, acknowledged that the presumption based on the service member's statement places "a very high burden" on the service member and that any distinction between orientation and propensity is merely "hypothetical." If the situation was not one in which "someone made the statement knowingly and was not drunk or had not lost his or her mind," she testified, it would be "very unlikely" that the burden could be overcome by asserting that the individual has no "propensity" to engage in homosexual conduct.

The strong evidence showing that the Don't Ask, Don't Tell policy is based on status leaves the government's unit cohesion theory as the only plausible justification for the policy. The unit cohesion theory has little, if anything, to do with homosexual conduct; it can only be explained as resulting from homophobia by some members of the military. As one district judge concluded:

134. Id. (citations omitted). But see id. at 976 (observing that, in at least three cases, service members have rebutted the presumption of conduct, but concluding that these results were "aberrations").

In one convoluted attempt to overcome the constitutional problems with the statute, a district court in Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996), attempted to explain that the statement "I have a homosexual orientation" would not raise a presumption of homosexual conduct, reasoning that, where possible, a court must construe a statute to meet constitutional concerns. Id. at 1414. The court proceeded to explain that whether a statement identifying oneself as a "homosexual" constitutes grounds for separation would depend on whether the speaker is acknowledging that he or she is "homosexual" as that term is defined by the statute or rather merely expressing his or her orientation. A reasonable constitutional construction of the statute would not permit the presumption to be created by the statement, "I am homosexual" alone unless it was clear that the speaker was defining himself or herself in accordance with the statutory definition.

Id. at 1414 n.5.

135. S. Hrg. 103-845, supra note 8, at 772 (testimony of Jamie Gorelick, Gen. Counsel, Dep't of Defense).

136. Id.

137. Id.; see also Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1364-65 (E.D. Va. 1996) ("Closely read, the statute is a tautology and hence the rebuttable presumption it purports to express is illusory, for it cannot be rebutted short of the declarant recanting the original statement declaring his or her homosexuality.").
Even assuming that homosexuals threaten "unit cohesion," ... such threats can only conceivably arise from: (1) heterosexual dislike of homosexuals for moral or other reasons; (2) heterosexuals' apparent fear that they will be victimized, threatened or harassed by homosexuals; and/or (3) the notion that homosexuals are uniquely incapable of controlling their sexual desires.\footnote{138}

The unit cohesion justification raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."\footnote{139}

_Romer v. Evans_-like_ Thomasson_, an equal protection case concerning sexual orientation—is a recent Supreme Court case holding unconstitutional a classification premised on people's fears and prejudices. Supporting precedent, however, runs even deeper. In the context of racial discrimination, the Court held in 1917 that "promot[ing] the public peace by preventing race conflicts," though a desirable objective, "cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."\footnote{140}

In _Palmore v. Sidoti_,\footnote{141} the Court held that "private biases" against interracial marriages are not "permissible considerations" in determining whether a state could remove a child from her mother because of the mother's interracial marriage.\footnote{142} The Court agreed that protecting the welfare of a child is the "controlling factor,"\footnote{143} but concluded that "[t]he Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\footnote{144}

_City of Cleburne v. Cleburne Living Center, Inc._\footnote{145} makes clear that the constitutional restrictions on government action motivated by private biases are not confined to racial distinctions reviewed under strict scrutiny.\footnote{146} In striking down the state law, the Court found it signifi-

\footnotesize{\begin{itemize}
\item \footnote{138. Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1332 (E.D. Cal. 1993).}
\item \footnote{139. Romer v. Evans, 116 S. Ct. 1620, 1628 (1996); see also supra notes 66-71 and accompanying text.}
\item \footnote{140. Buchanan v. Warley, 245 U.S. 60, 81 (1917) (holding unconstitutional a city ordinance forbidding "colored persons" from occupying houses in areas where a large proportion of houses are occupied by whites).}
\item \footnote{141. 466 U.S. 429 (1984).}
\item \footnote{142. Id. at 433.}
\item \footnote{143. Id. at 432.}
\item \footnote{144. Id. at 433.}
\item \footnote{145. 473 U.S. 432 (1985).}
\item \footnote{146. Id.; see supra notes 54-61 and accompanying text.}
\end{itemize}}
cant that homes for people with mental retardation were subject to special zoning ordinances that did not apply to similarly situated multiple dwelling units. Citing Palmore, the Court noted that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."

Romer, Cleburne, and Palmore all stand for the proposition that even when government's ultimate interest is legitimate, the classification will be held unconstitutional if it springs from prejudice. Thus, although the government's ultimate interest of maintaining effective unit cohesion is legitimate, this interest cannot be attained by giving homophobic prejudice the force of law. As Judge Hall's dissent in Thomasson observes: "There is a great deal of evidence that the statute was motivated by a desire to accommodate prejudice against homosexuals."

In announcing the policy, President Clinton observed that "those who oppose lifting the ban are clearly focused not on the conduct of individual gay service members, but on how nongay service members feel about gays in general and, in particular, those in the military service." One district court judge, hearing a challenge to the policy, concluded that, based on the policy's failure to reach undeclared homosexuals, he could not "conceive how the policy cannot be motivated by prejudice." Moreover, the military has drawn the same conclusion, as evidenced by military reports, studies, and statements by military leaders. Assistant Secretary of Defense Edwin Dorn testified that "much of the resistance to gays is grounded in fear and prejudice."

Similarly, a 1988 report by the Defense Personnel Security

147. Cleburne, 473 U.S. at 447.
148. Id. at 448.
149. Thomasson, 80 F.3d at 951 (Hall, J., dissenting). In Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc), Judge Wald made a similar dissenting argument: Palmore, Cleburne and the fundamental constitutional principle that they embody compel us to reject the government's argument that individuals of homosexual orientation may be excluded from the military because others may be offended or angered by their mere presence. The Constitution does not allow government to subordinate a class of persons simply because others may not like them.

Id. at 719 (Wald, J., dissenting).
152. See infra notes 173-178 and accompanying text.
153. Thomasson, 80 F.3d at 951 (Hall, J., dissenting) (citation omitted); see also S. Hrg. 103-845, supra note 8, at 630-31 (statement of Maj. Bergeron) (expressing concern about the effect on military life of allowing homosexuals to openly serve and having children of
Research and Education Center (PERSEREC) described "the existence of a deep-seated prejudice against homosexuals [which] . . . may be of the same order as the prejudice against blacks in 1948, when the military was ordered to integrate."\footnote{154}

Any doubts as to the policy's origins in prejudice is resolved by reviewing the military's historical treatment of homosexuals. Over time, the military's policy has been justified by perceptions that homosexuality constitutes a personality disorder or mental illness or that homosexuals posed a security risk.\footnote{155} Because Congress explicitly rejected previous justifications of the policy as untenable,\footnote{156} the military is now forced to grasp at new straws. No longer permitted to invoke the illness, disorder, and security risk rationales, the military now attempts to justify the policy based on the need for "unit cohesion." This justification is just shorthand for the proposition that homosexuals cannot serve in the military because some service persons do not feel comfortable around them.

In sum, both logic and evidence overwhelmingly suggest that the Don't Ask, Don't Tell policy authorizes the discharge of homosexuals based on their status in response to the animosity and prejudice harbored by some heterosexuals. Yet even though most of the judges on the Fourth Circuit in \textit{Thomasson} unveiled the pretext behind the government's conduct argument, the court nevertheless chose to remain blind to the homophobic prejudice driving the military's policy. Judge Luttig's concurrence fails to come to the logical conclusion that a prohibition on status is unconstitutional—a conclusion the military


\footnote{156. See C. Dixon Osburn, \textit{A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals}, 64 U. MO.-KAN. CITY L. REV. 199, 203-13 (1995) (describing how the military has changed its justifications for its policy on homosexuality from mental illness, to security risk, to unfitness, to sexual misconduct and unit cohesion); \textit{RAND NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT} 189 (1993) [hereinafter \textit{RAND REPORT}] (reviewing the unit cohesion rationale, its policy implications, and issues regarding its implementation).}
itself admits the policy was designed to avoid. Nevertheless, even if the policy of Don't Ask, Don't Tell could pass the legitimate government interest prong, it is doomed under the second prong of equal protection analysis.

b. No Rational Relation Between the Government’s Objective and Don’t Ask, Don’t Tell.—The majority and concurring opinions in Thomasson overlook the internal and external inconsistencies that cause the policy of Don’t Ask, Don’t Tell to fail the test of whether the policy is rationally related to a legitimate government interest. This oversight is made possible in part by a misapplication of the second prong of the rational basis test. It is possible to selectively quote from Supreme Court decisions to elicit support for practically insurmountable deference to government classifications, but such efforts ignore the level of examination the Court has actually undertaken.

In Romer v. Evans, the Court made clear that “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” This effort, the Court said, “gives substance to the Equal Protection Clause.” Chief Judge Wilkinson, for the majority, and Judge Luttig, in concurrence, cite to Heller v. Doe for the proposition that a statute must be sustained “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” Heller, however, hardly stands for the proposition that courts should accept at face value that the asserted means to achieve the state interest is rational. Even in Heller, in which the Court applied the more deferential version of the rational basis test, the Court inquired into whether the government policy was rationally based. The Heller Court examined at length the differences between

157. See supra notes 46-65 and accompanying text.
159. Id.
160. Thomasson, 80 F.3d at 928.
161. Id. at 947 (Luttig, J., concurring).
163. Id. at 920 (“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (quoting Lehnhausen v. Lake Shore Auto Parks Co., 410 U.S. 356, 364 (1973))).
164. See supra note 65 and accompanying text; see also United States v. Virginia, 116 S. Ct. 2264, 2277 (1996) (noting in the Virginia Military Institute’s gender-based discrimination case that “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded”); Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991) (noting that under rational basis scrutiny the court must actively review the record “to see whether the government ha[s] established on the record a rational basis for the challenged discrimination”); Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1327 (E.D. Cal. 1997).
tween mental illness and mental retardation to determine whether the application of different standards for involuntary commitment "find[s] some footing in the realities of the subject addressed by the legislation."\textsuperscript{165}

The majority's further reliance on \textit{FCC v. Beach Communications, Inc.}\textsuperscript{166} is similarly misplaced. In \textit{Beach Communications}, the Supreme Court upheld an economic regulation only after an examination that found two possible bases for the challenged classification.\textsuperscript{167}

In stark contrast to these cases, the majority and concurring opinions in \textit{Thomasson} lack any real examination of the "relation between the classification adopted and the object to be attained."\textsuperscript{168} For the most part, the opinions fail to explore the rationale behind the government's decision to differentiate between homosexual misconduct and heterosexual misconduct and between declared and undeclared homosexuals. Having already accepted the government's conduct-status distinction, the majority opinion simply concludes that the presumption of conduct from a declaration of homosexuality "certainly has a rational basis"\textsuperscript{169} and that the "presumption is a reasonable means of allocating the burden of proof."\textsuperscript{170} Similarly, the majority found the distinction between declared and undeclared homosexuals rational by recharacterizing a statement—pure speech—as conduct that provides affirmative evidence of a propensity to engage in conduct.\textsuperscript{171} Judge Luttig, on the other hand, having determined that Congress intended to ban the "mere presence" of homosexuals to promote unit cohesion, concludes that such a ban is not only rationally based, but is also narrowly tailored.\textsuperscript{172}

Both opinions ignore the inconsistencies and evidence that undermine the policy's rationale. First, and perhaps most obvious, are

\textsuperscript{165} \textit{Heller}, 509 U.S. at 321. \textit{Heller} is replete with citations to books and journal articles on mental retardation and mental illness. See id. at 321-29. Ultimately, the \textit{Heller} Court found "plausible rationales" for the difference in treatment. Id. at 321-30. Justice Souter vigorously dissented, arguing that one of the two statutory provisions was not rationally related to the government's interest. Id. at 348 (Souter, J., dissenting).

\textsuperscript{166} See \textit{Thomasson}, 80 F.3d at 930.

\textsuperscript{167} Id.


\textsuperscript{169} Id.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id. at 948 (Luttig, J., concurring).
the considerable contributions that homosexuals have made to the armed services.\textsuperscript{173} No evidence supports the proposition that a ban on open homosexuality will enhance unit cohesion.\textsuperscript{174} As Judge Richard A. Posner has observed, "[t]he most important reason for doubting that dropping the ban on homosexuals in the military would cause serious morale problems is simply that a large number of homosexuals already serve without significant difficulties."\textsuperscript{175} Indeed, the extensive evidence points to the conclusion that open homosexuality does not destroy unit cohesion or morale.\textsuperscript{176} As the military-commissioned study by the Rand Corporation concluded, "there is no scientific evidence regarding the effects of acknowledged homosexuals on a unit's cohesion and combat effectiveness. . . . [A]ny attempt to predict the

\textsuperscript{173} See, e.g., Philips v. Perry, 883 F. Supp. 539, 545 (W.D. Wash. 1995) ("[H]omosexuals—including many who were not celibate—have served in the armed forces ably, devotedly, and often with valor.").

\textsuperscript{174} The sole support for the military's "unit cohesion" justification for its policy consists of the opinions of military personnel. See Cammermeyer v. Aspin, 850 F. Supp. 910, 924 (W.D. Wash. 1994) (noting Assistant Secretary of Defense Dorn's admission in a deposition that DOD has "no facts" supporting its rationale), appeal dismissed and remanded, 97 F.3d 1235 (9th Cir. 1996).

\textsuperscript{175} Richard A. Posner, Sex and Reason 319 (1992); see also S. Hrg. 103-845, supra note 8, at 702 (statement of Les Aspin, Secretary of Defense) (observing that "homosexuals have served with distinction in the Armed Forces of the United States"); id. at 612 (statement of Gen. H. Norman Schwarzkopf) ("[H]omosexuals have served in the past and have done a great job serving their country.").

\textsuperscript{176} The Supreme Court's decision in United States v. Virginia, 116 S. Ct. 2264 (1996), is instructive in this respect. In rejecting the State's justifications for denying women access to the all-male Virginia Military Institute (VMI), the Court ruled that Virginia's previously male-only Virginia Military Institute violated the Equal Protection Clause by discriminating against women. Id. at 2291. Although arguably the case is distinguishable because it involves a gender-based equal protection challenge, in the VMI case the Court had no historical evidence to contradict Virginia's assertion that VMI's method of training could not be made available to women without modification. In contrast, the military itself has admitted that homosexuals have served admirably. See President's Remarks, supra note 150, at 1110 ("[T]here have been and are homosexuals in the military service who serve with distinction."). This admission on the part of the military flatly contradicts the speculative nature of the military's justification that unit cohesion will suffer and military objectives will be undermined should open homosexuals be permitted to remain in the service. In the VMI case, no historical facts based on VMI's own experience undermined the State's justification for excluding women; in Thomasson, the record serves to discredit the "unit cohesion" justification without any need for speculation about the future. Lt. Thomasson's own record provides adequate evidence to refute the "unit cohesion" justification. Almost one year after Lt. Thomasson first stated that he was gay, Rear Admiral Konezni stated in Thomasson's annual fitness report that Lt. Thomasson is one of the finest junior officers I have ever had the pleasure to serve with. Clearly ready now for positions of increased responsibility. His contributions to the Navy . . . have been exceptional. He should be a first choice for Lieutenant Commander! . . . [H]e has earned my strongest possible recommendation for command ahead of his peers.

Brief for Appellant at 7, Thomasson (No. 95-2185) (alteration in original).
consequences of allowing them to serve is necessarily speculative."177 Another study prepared for Congress reported that the experience of other Western countries that have allowed homosexuals to serve show that "the inclusion of homosexuals in the military is not a problem and has not adversely affected unit readiness, effectiveness, cohesion, or morale."178

The second problem is the Don't Ask, Don't Tell policy's distinction between declared homosexuals and undeclared homosexuals.179 While a declared homosexual faces automatic dismissal, undeclared homosexuals face no consequences.180 In urging that a declaration of homosexuality is merely used for evidentiary purposes,181 the majority fails to confront the question of whether one who is a declared homosexual is more likely to engage in homosexual conduct. In fact, "the opposite speculation seems far more accurate".182 a service member

177. RAND REPORT, supra note 156, at 1165.


179. See Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1334 (E.D. Cal. 1993) (describing as "untenable" the government's assertion that "an undetected homosexual has no propensity to engage in homosexual acts and presents no risk of undermining the military mission by engaging in prohibited homosexual conduct, while a declared homosexual does have such a propensity and does present such a risk"). This problem overlaps with the first prong of the rational basis test—it provides further evidence that the policy is meant to address the fears and prejudices of heterosexuals. See id. at 1332-33. The court observed:

The only inference to be drawn from the instruction's failure to reach undeclared homosexuals is that the threats to military effectiveness posed by homosexuals, assuming such threats actually exist, arise solely from heterosexuals' adverse reactions to the presence of known homosexuals in the Navy, and not from the behavior of homosexuals themselves.

Id.; see also supra notes 139-156 and accompanying text.

180. Undeclared homosexuals are free to criticize the military's policy, attend marches in support of homosexual rights, and read gay or lesbian magazines—so long as they do not openly state that they are gay or lesbian. See DOD Directive, supra note 7 (describing bases for conducting inquiries); Samuel A. Marcosson, A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness, 64 U. MO.-KAN. Cty L. Rev. 59, 86 n.147 (1995) ("The difficulty with [the government's "evidentiary use" of speech argument] is that it does not comport with the actual language of the policy itself. . . . [The court] rewrote the policy to treat a statement of homosexual orientation as evidence of homosexual conduct, rather than as a form of homosexual conduct.").

181. There are additional problems with the argument that a declaration of homosexuality is only used as evidence. For example, it runs counter to the policy itself, which defines speech not as evidence, but as "conduct." See DOD Directive, supra note 7.

182. Thomasson, 80 F.3d at 954 (Hall, J., dissenting). The problem is that conduct can be controlled, while status or orientation is a matter of identity. See Note, Constitutional Law—Equal Protection—D.C. Circuit Upholds Military Discharge Based on a Statement of Homosexual Orientation.—Steffen v. Perry, 41 F.3d 667 (D.C. Cir. 1994), 108 HARV. L. REV. 1779, 1782 (1995) ("Although the sexual desires of each group may be equally strong, the desire of
desiring to stay in the armed forces would have more reason not to engage in homosexual conduct after making a statement than before, since a declared homosexual is more likely to be watched closely.\textsuperscript{183} Even if declared homosexuals were more likely to engage in homosexual conduct, the presumption of homosexual conduct from a statement or acknowledgement of homosexual status raises its own constitutional problems.\textsuperscript{184} As the Supreme Court has observed, "most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence."\textsuperscript{185} This holds true even when the sanction does not involve criminal penalties.\textsuperscript{186}

Third, the policy operates irrationally by excusing homosexual conduct by persons claiming to be heterosexuals. The statute excuses a person who has engaged in a homosexual act from discharge if he or she demonstrates that "such conduct is a departure from the mem-

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homosexuals for sex is not necessarily greater than their desire to retain their positions in the military."). As Chief Judge Richard S. Arnold of the Eighth Circuit stated in a case similar to \textit{Thomasson}:

This presumption appears to me to be at best questionable. If I am a heterosexual and not married, do I have a propensity to commit fornication? If I am covetous, do I have a propensity to steal? If I am angry, do I have a propensity to strike someone or to kill? I think not. The distinction between disposition and action is clear. The presumption contained in the current policy ignores this distinction. Many people, homosexual and heterosexual, are celibate. The current policy entirely overlooks this aspect of human conduct.

\textit{Richenberg v. Perry}, 73 F.3d 172, 174 (8th Cir. 1995) (Arnold, C.J., dissenting). \textit{Cf. President's Remarks, supra note 150, at 1110 ("[T]here is no study showing [homosexuals] to be less capable or more prone to misconduct than heterosexual soldiers.").}

183. Interestingly, the statute provides that a service member will not be discharged if the statement or conduct is for the purpose of being discharged. See 10 U.S.C. § 654(e)(1) (1994).

184. \textit{See Jacobson v. United States}, 503 U.S. 540, 550-51 (1992) (observing in a child pornography case that a predisposition to do what was once lawful does not indicate a propensity to take the same action after it is illegal); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."); \textit{cf. Thomasson}, 80 F.3d at 953 (Hall, J., dissenting) ("[The policy's] bedrock is a presumption that \textit{everyone} will fail to comply with rules of conduct—a declared homosexual is bound to misbehave . . . ."). Moreover, the majority opinion in \textit{Thomasson} suggests that Chief Judge Wilkinson and Judge Niemeyer—the only two judges in the majority who did not sign a concurring opinion—believe that a ban on status is unconstitutional, because the opinion accepts the government's conduct argument. \textit{See supra} note 116.


ber's usual and customary behavior"187 and "the member does not have a propensity or intent to engage in homosexual acts."188 This paradox is particularly acute for Lt. Thomasson because he was discharged for making a statement, even though over the course of almost ten years of service the military had no evidence that he had ever engaged in prohibited conduct.189 On the other hand, a service member who is caught engaging in homosexual conduct can be excused from discharge by simply declaring that the conduct is anomalous and denying homosexual status.

Fourth, it is difficult to rationalize how a "Don't Tell" prohibition on statements of sexual orientation will damage unit cohesion, while the presence of undeclared homosexuals does not affect unit cohesion.190 A policy promoting secrecy would seem logically to prevent the military from addressing the "problem" posed by those with a propensity for homosexual conduct. As one district court judge concluded: "[E]ven granting that sexual tension is destructive of unit cohesion, it is hard to see how the 'Don't Ask, Don't Tell' plan further minimiz[es] sexual tension in the military. . . . [I]t may plausibly be argued[ ] that the opposite is true."191 Moreover, the policy of Don't Ask, Don't Tell provides a powerful inducement for homosexuals to lie.192 Government-endorsed secrecy and deception can hardly promote unit cohesion.193

Finally, simple historical observations raise troubling conclusions about the policy of Don't Ask, Don't Tell. The same "unit cohesion" theory was used to support racial segregation and gender discrimination in the armed forces and opposition to an all volunteer army.194

188. Id. § 654(b)(1)(E).
189. See supra note 28 and accompanying text.
190. Because the Don't Ask, Don't Tell policy permits undeclared homosexuals to remain in the Armed Services, one can only presume that unannounced homosexuality does not affect unit cohesion.
193. Id.
194. See S. Hrg. 103-845, supra note 8, at 259-60 (statement of Lawrence J. Korb, Director of the Center for Public Policy Education and Senior Fellow in the Foreign Policy Studies Program at the Brookings Institution). In his Senate testimony, Korb noted the parallels between military policy on gays and prior policies concerning race, gender, and volunteers. He concluded that there was no convincing evidence that changing the current policy [on homosexuals] would undermine unit cohesion any more than the other social changes that society has asked the Armed Forces to make over the past 50 years. In fact, this change is likely to have less short-term impact on cohesion.
In each case, experience proved that the unit cohesion theory is flawed.\textsuperscript{195} For example, the military's opposition in the 1940s to racial desegregation bears remarkable semblance to the opposition to homosexuals in the military.\textsuperscript{196} The military should have learned a lesson from the fact that desegregation of the armed forces proved more successful than anyone anticipated.\textsuperscript{197} The military might realize just as much success if it accepts homosexuals into the military.

Each of these factors indicates that the prohibition on homosexual conduct is not rationally related to the government's interest of unit cohesion. The military's own experience with homosexuals, women, and blacks, and the experiences of other western countries that have allowed homosexuals into military service provide firsthand experience that unit cohesion does not require protecting the irrational sensitivities of other service members. Moreover, if one accepts the government's view that the policy is based on homosexual conduct, its internal inconsistencies—such as unequal treatment of declared and undeclared homosexuals—fail any test of rationality. Unfortunately, the majority opinion and Judge Luttig's concurring opinion ignore each of these obvious difficulties.

\textit{Id.} at 260-61.

As Judge Hall's dissent observed, "'Unit cohesion' is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs." \textit{Thomasson}, 80 F.3d at 952 (Hall, J., dissenting).

\textsuperscript{195} See S. Hrg. 103-845, supra note 8, at 259-60 (statement of Lawrence J. Korb, Director of the Center for Public Policy Education and Senior Fellow in the Foreign Policy Studies Program at the Brookings Institution).

\textsuperscript{196} One military committee that studied the issue of desegregation concluded:

"Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks they work side by side; and in particular tasks such as those of a gun's crew, they form a closely knit, highly coordinated team. How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that the answer is 'Few, if any,' and further believes that if the issue were forced, there would be a lowering of contentment, teamwork and discipline in the service."

\textit{Thomasson}, 80 F.3d at 952 (Hall, J., dissenting) (quoting a committee that studied military integration of the Navy in the 1940s).

\textsuperscript{197} See Dahl v. Secretary of the U.S. Navy, 830 F. Supp. 1319, 1330 (E.D. Cal. 1993) (observing that none of the dire consequences of desegregation of the military has come true); S. Hrg. 103-845, supra note 8, at 260 (statement of Lawrence J. Korb, Director of the Center for Public Policy Education and Senior Fellow in the Foreign Policy Studies Program at the Brookings Institution) (observing that, while in 1943 roughly 80% of whites in the military opposed desegregation, when the policy changed three years later in 1951, the number had dropped to 44%).
5. **Conclusion.**—The Fourth Circuit in *Thomasson* turned a blind eye to the reality of the military’s policy of Don’t Ask, Don’t Tell. In disregarding the logical consequences of the statutory language, the court upheld the dismissal of Lt. Thomasson because of the homophobia of other service members. The government conceded that Lt. Thomasson had an outstanding career and that he had taken no action beyond a mere statement that was not conducive to the demands of military life—thus providing real-life evidence that the policy of Don’t Ask, Don’t Tell has nothing to do with conduct, but rather seeks to purge the military of those identifying themselves as homosexuals. Judge Luttig’s concurring opinion, on the other hand, incisively dismantles the military’s status-conduct argument, but then fails to reach the logical conclusion that “unit cohesion” is a euphemism for prejudice. Both opinions fail to address the internal inconsistencies and external evidence that undermine the government’s argument that the policy of Don’t Ask, Don’t Tell fits the means it intends to promote. Hopefully, in the near future, today’s policy of Don’t Ask, Don’t Tell will seem just as distasteful to the nation’s leaders as the military’s previous exclusion of African Americans and women.

DAVID S. LAPP
II. CRIMINAL LAW

A. Trial Court Deference in Conducting Voir Dire Takes Precedence over the Right to Impartial Jury

In United States v. Lancaster, the United States Court of Appeals for the Fourth Circuit held that a trial court's refusal to ask potential jurors about their views concerning the credibility of law enforcement officers does not constitute an abuse of discretion per se. In so ruling, the Fourth Circuit overruled its own precedent and reinstated a more deferential review of trial court discretion in conducting voir dire. The court explained that the proper method of review, and the one that complies with the traditional notion of deference to the trial court, is to examine voir dire as a whole rather than the omission of a particular line of questioning.

This Note first examines the constitutional goals that voir dire serves in criminal cases. It then questions whether the Fourth Circuit's reinstatement of trial court deference supports or undermines those constitutional principles. This Note concludes that the Lancaster court improperly overruled precedent and undermined the constitutional right to an impartial jury.

1. The Case.—Bert Lancaster (Lancaster) and Derrick Vanlierop (Vanlierop) were convicted in the United States District Court for the Eastern District of Virginia for assault resulting in serious bodily injury and prisoner possession of a shank in connection with an attack on another inmate at the Lorton Reformatory in Lorton, Virginia, on May 14, 1994. At trial, the parties presented conflicting accounts of the facts. According to the Government's theory of the case,

2. Id. at 742.
3. Id., overruling United States v. Evans, 917 F.2d 800 (4th Cir. 1990).
4. Id.
5. Id. at 742-43.
6. "The jury convicted [both] Appellants of assault by striking, beating, or wounding; assault resulting in serious bodily injury; and prisoner possession of a shank." Id. at 738. In addition, Vanlierop was convicted of simple assault on a correctional officer. Id. The district court dismissed the convictions for assault resulting by striking, beating, or wounding, maintaining that those convictions were subsumed within the convictions for assault resulting in serious bodily injury. Id.
7. A shank is defined as "a straight, narrow part between other parts, as... the part of a tool or instrument between the handle and the working part; shaft," WEBSTER'S NEW WORLD DICTIONARY 1308 (2d ed. 1980), or "an often homemade knife," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1076 (10th ed. 1996).
8. Lancaster, 96 F.3d at 736.
9. See id. at 736-37.
presented primarily through the testimony of Corporal Lloyd R. Staggs, III (Corporal Staggs), Lancaster attacked another inmate, Aaron Davis (Davis), stabbing him repeatedly with a shank. Further testimony revealed that Vanlierop, in cooperation with Lancaster, prevented correctional officers from coming to Davis's aid. In contrast to the Government's version of events, the defendants argued that Davis attacked Lancaster, Lancaster acted in self-defense, and Vanlierop attempted to assist Lancaster.

Based on the conflicting stories presented at trial, the defendants maintained that the case turned on a credibility dispute between Corporal Staggs and Vanlierop. According to the defendants, the determination of guilt or innocence depended entirely on the jury's belief of either Vanlierop's story of self-defense or of Corporal Staggs's story that Lancaster attacked Davis with the aid of Vanlierop. Accordingly, during jury selection, the defendants requested that the district court pose the following question to the venire: "Do any of you believe that a guard at Lorton, a police officer or a member of the F.B.I. is more worthy of belief than any other citizen of our community?" The district court refused the request.

At the conclusion of the trial, the jury convicted both defendants. The district court judge sentenced Lancaster and Vanlierop to 100 and 115 months of imprisonment, respectively. Because the defendants believed the trial amounted to a "swearing contest" between Vanlierop and Corporal Staggs, they appealed, asserting that the district court's refusal to query the jury as to law enforcement bias constituted reversible error.

A three-judge panel of the Fourth Circuit held that the district court erred in refusing to ask the proposed voir dire question, but found the error harmless and affirmed the convictions. One month

10. Id.
11. Id. at 737.
12. Id. at 737-38.
13. See id.
14. Id.
15. Id. at 738.
16. Id. For a detailed account of the voir dire see infra note 85 and accompanying text.
17. Lancaster, 96 F.3d at 738.
18. Id.
19. Id.
20. Id.
later, a majority of judges of the Fourth Circuit vacated the panel opinion and voted to rehear the case en banc.22

2. Legal Background.—

   a. The Clear and Uncontroversial Right to a Jury Trial.—The United States Constitution guarantees the right to trial by impartial jury in criminal cases.23 Indeed, jury trials are central to the American scheme of justice.24 The Founding Fathers regarded the right to a jury trial as essential to our newly formed republic.25 John Adams, the primary colonial exponent of the power of juries, described jury trials as one of the two key elements, together with popular elections, of the British system.26 Alexander Hamilton observed that both the proponents and the opponents of the new Constitution agreed upon the importance of a trial by jury.27 Nevertheless, although the Constitution guarantees the right to trial by an impartial jury,28 the assemblage

22. See Lancaster, 96 F.3d at 736.
23. Article III, Section 2, Clause 3 reads in pertinent part:
   The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
U.S. CONST. art. III, § 2, cl. 3.

   The Sixth Amendment to the United States Constitution further states:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
U.S. CONST. amend. VI.

24. See Reid Hastie et al., Inside the Jury 1 (1983) (regarding the jury trial as “the central element in the American conception of justice . . . [and] as one of the oldest and least controversial guarantees in the Constitution”). For an overview of the right to trial by jury, see David A. Huberman, Note, Right to Jury Trial, 83 GEO. L.J. 1106 (1995).

25. See Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence 185 (1992) (stating that “[t]he Founding Fathers valued the right to a jury trial as an instrument of the democratic process”).


27. See The Federalist No. 88 (Alexander Hamilton). Nevertheless, while the opponents to the new constitution regarded the jury trial as a “valuable safeguard to liberty,” the proponents saw the right to trial by jury as the “very palladium of free government.” Id. at 257-58 (Roy P. Fairfield ed., 1981).

28. See Garcia, supra note 25, at 185.
of an impartial jury is not as clear as its express constitutional guarantee.  

b. *The Nebulous and Controversial Process of Voir Dire.*—The United States Supreme Court has held that in both capital cases and cases in which racial issues are inextricably bound to the conduct of the trial such that a heightened risk of racial bias and ethnic prejudice is present, the Constitution requires that the trial court voir dire the venire pool regarding prospective juror bias or prejudice. For instance, in *Ham v. South Carolina,* an African-American civil rights

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29. “Although the jury trial played a key role in our historical development as a nation, its history is shrouded in ambiguity and confusion.” *Id.*

30. See *Hastie et al., supra* note 24, at 2 (stating that the Constitution guarantees the right to a jury trial without any reference to the selection procedure). Many rules of procedure provide discretion to trial judges in administering voir dire. For example, Rule 24(a) of the Federal Rules of Criminal Procedure reads:

> The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

FED. R. CRIM. P. 24(a).

31. Voir dire means to speak the truth. See *Black's Law Dictionary* 1575 (6th ed. 1990). Voir dire denotes the preliminary examination of prospective jurors to determine their qualification and suitability to serve as jurors. See *id.* Peremptory challenges or challenges for cause may result from such examination. See *id.*


As opposed to "for cause" challenges, attorneys may employ peremptory challenges without stating a reason and without judicial approval. See *id.* For a detailed examination of peremptory challenges and an argument for their abolition, see Gurney, *supra.*

32. See Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that the Constitution requires voir dire in a capital case and, if requested, requires questions regarding whether prospective jurors would automatically vote for imposing the death penalty).

33. See *Rosalez-Lopez v. United States, 451 U.S. 182, 189 (1981)* (noting that the Constitution requires inquiry into racial prejudice on voir dire when "racial issues [are] 'inextricably bound up with the conduct of the trial'" (citations omitted)).


worker was convicted by the state trial court of a drug offense.\textsuperscript{36} On appeal, he argued that his Sixth Amendment right to a fair trial had been violated because the trial court had failed to inquire into the racial biases of the potential jurors.\textsuperscript{37} The Supreme Court agreed and held that the trial judge's refusal to examine potential jurors about racial prejudice violated Ham's Sixth Amendment rights and constituted reversible error.\textsuperscript{38} The Court explained that, although broad discretion is given to the trial court in conducting voir dire, the trial court must make some minimal inquiry into racial prejudice when conducting voir dire.\textsuperscript{39}

Three years later, the Supreme Court sharply limited Ham. In \textit{Ristaino v. Ross},\textsuperscript{40} a jury convicted an African-American defendant of armed robbery, assault, battery, and attempted murder of a white security guard.\textsuperscript{41} Although the trial judge questioned the prospective jurors generally about bias and prejudice, the trial judge did not pose a question directed specifically at racial prejudice.\textsuperscript{42} The Supreme Court restricted Ham to its facts\textsuperscript{43} and noted that although Ham required inquiry into racial prejudice in particular circumstances, it did not "announce a requirement of universal applicability." Similarly, according to \textit{Ristaino}, the constitutional right to a fair trial and impartial jury does not mandate particular questions during voir dire.\textsuperscript{44}

Although the Supreme Court has been active in describing the constitutional parameters of voir dire in racial, ethnic, and capital crime cases, it has declined to broaden the constitutional requirements beyond these limited circumstances.\textsuperscript{45} Accordingly, federal circuit courts of appeals have been inconsistent in their development of trial court voir dire requirements outside the scope of Supreme Court precedent.

c. \textit{Voir Dire As to the Credibility of Law Enforcement Officers}.—The federal circuits have split over cases involving juror bias in favor of law enforcement. The First, Second, Seventh, Ninth, Tenth, and

\begin{itemize}
  \item 36. \textit{Id.} at 524.
  \item 37. \textit{Id.} at 525.
  \item 38. \textit{Id.} at 529.
  \item 39. \textit{Id.} at 527-28.
  \item 40. 424 U.S. 589 (1976).
  \item 41. \textit{Id.} at 590-93.
  \item 42. \textit{Id.} at 592. More specifically, the court refused to ask the venire whether "a white person is more likely to be telling the truth than a black person[.]" \textit{Id.} at 590 n.1.
  \item 43. \textit{Id.} at 595-96.
  \item 44. \textit{Id.} at 596.
  \item 45. \textit{Id.} at 595-97.
  \item 46. \textit{Lancaster}, 96 F.3d at 739.
\end{itemize}
D.C. Circuits have held that, in certain factual circumstances, refusal to ask prospective jurors whether they would be biased in favor of law enforcement witnesses constitutes error per se.\textsuperscript{47} In contrast, the Fifth, Eighth, and Eleventh Circuits have held that the district court need not pursue a specific line of questioning, provided that the voir dire as a whole is "reasonably sufficient" to uncover law enforcement bias or partiality in the venire.\textsuperscript{48}

(i) The Per Se Test.—The Fourth Circuit, prior to Lancaster, followed those circuits which held that, under certain circumstances, refusal to ask prospective jurors whether they would be biased in favor of law enforcement witnesses constitutes error. The Fourth Circuit implemented this rationale in United States v. Evans.\textsuperscript{49} In Evans, the defendants were convicted of distributing cocaine and aiding and abetting such distribution.\textsuperscript{50} The critical factual issue primarily involved law enforcement testimony.\textsuperscript{51} Nevertheless, the district court refused the defense’s request to inquire into whether members of the venire would be biased in favor of testimony from a law enforcement agent.\textsuperscript{52} The Fourth Circuit reasoned that ferreting out bias in favor

\textsuperscript{47} United States v. Victoria-Peguero, 920 F.2d 77, 85 (1st Cir. 1990) (finding that the court should have posed the question, but this was not reversible error), cert. denied, 500 U.S. 992 (1991); United States v. Gelb, 881 F.2d 1155, 1164-65 (2d Cir.) (applying the Baldwin standard, finding error in not asking the proposed law enforcement question), cert. denied, 493 U.S. 994 (1989); Darbin v. Nourse, 664 F.2d 1109, 1114-15 (9th Cir. 1981) (holding that when important testimony of law enforcement officer is made, the inquiry must be made); United States v. Martín, 507 F.2d 428, 432-33 (7th Cir. 1974) (determining that the question should have been asked directly and this was error); Brown v. United States, 338 F.2d 543, 545 (D.C. Cir. 1964) (stating that the inquiry should be given if requested, but this error does not mandate reversal); Chavez v. United States, 258 F.2d 816, 819 (10th Cir. 1958) (holding that it is a proper subject to inquire into whether a juror who would be included to give heightened credence to an officer because of that officer's status as an officer), cert. denied, 359 U.S. 916 (1959).

\textsuperscript{48} See Lancaster, 96 F.3d at 739-40 (rejecting the per se test and opting for a reasonably sufficient inquiry into prejudice); United States v. Nash, 910 F.2d 749, 753 (11th Cir. 1990) (holding that so long as voir dire questioning as a whole gave the parties reasonable assurance that prejudice would be discovered, the court will find no abuse of discretion); United States v. Spaar, 748 F.2d 1249, 1253 (8th Cir. 1984) (determining that a trial court is not required to perform exacting inquiry and that the central inquiry is the overall examination of the venire); United States v. Gassaway, 456 F.2d 624, 625-26 (5th Cir. 1972) (distinguishing Brown and holding that the numerous questions posed by the trial court ensured a fair and impartial jury).

\textsuperscript{49} 917 F.2d 800 (4th Cir. 1990), overruled by United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 967 (1997).

\textsuperscript{50} Id. at 802.

\textsuperscript{51} Id. at 806.

\textsuperscript{52} Id. During voir dire, the trial court asked eight questions:

1. I would ask if any member of this panel knows anything about the facts and the circumstances of this case?
of law enforcement testimony was essential because "[i]f a juror was prepared to find [the government's witness] believable simply because of his position as [a law enforcement officer], the defendants [could] not receive a fair trial." Accordingly, the Fourth Circuit held that when the Government's case depends solely on the testimony of law enforcement officers, the refusal of the voir dire request as to law enforcement bias would be an abuse of discretion.\textsuperscript{54}

Such abuse of discretion, however, does not necessarily constitute \textit{reversible} error.\textsuperscript{55} The error might well be harmless, as stated in \textit{United States v. Baldwin}.\textsuperscript{56}

All circuits appear to be in agreement that the refusal to ask the question of whether the prospective jurors would be unduly influenced by the testimony of a law enforcement officer does not always constitute reversible error; that question hinges upon such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses.\textsuperscript{57}

2. Are any of you close personal friends or relatives of, have any kind of business relationship, including an attorney/client relationship, with either of these defendants or any of the lawyers in the case?

3. Is there any member of this jury panel that is employed or works with or in any law enforcement capacity?

4. Has any member of this jury panel received any kind of legal training?

5. Now obviously this case involves a drug charge. And I would ask, is there any member of this jury panel that holds any opinions or beliefs in regard to drugs, illegal drugs, that would prevent you from rendering a fair and impartial verdict in this case?

6. Have any members of this panel ever either personally or had a member of their immediate family who has been the victim of drug abuse?

7. Is there any member of this panel that has any particular difficulty or disability that would prevent you from sitting on this jury today?

8. Now considering all of the questions I have already asked you, is there any reason why any one of you could not sit on the jury and render a fair and impartial verdict based upon the evidence presented here in the courtroom and the instructions on the law as will be given you by the court?

\textit{Id.} at 805-06.

\textsuperscript{53} \textit{Id.} at 806.

\textsuperscript{54} \textit{Id.} at 807.

\textsuperscript{55} \textit{United States v. Baldwin}, 607 F.2d 1295, 1298 (9th Cir. 1979); \textit{see supra} note 47 and accompanying text.

\textsuperscript{56} 607 F.2d 1295 (9th Cir. 1979).

\textsuperscript{57} \textit{Id.} at 1298.
(ii) The Totality of the Circumstances Test.—Other circuits have held that the district court need not pursue a specific line of questioning, provided that the voir dire as a whole is reasonably sufficient to uncover bias or partiality in the venire. In United States v. Nash, the defendant was convicted of conspiring and attempting to import cocaine. Nash appealed his convictions based on the trial court’s refusal to ask whether the members of the venire would tend to believe a law enforcement officer’s testimony merely because of his position as a police officer. The Nash court held that the trial court need not pursue a specific line of questioning so long as the questioning as a whole complied with “the essential demands of fairness.” Applying this ethereal analysis, the Eleventh Circuit found the trial court’s questioning and jury charge to be sufficient.

The standard adopted by the Eleventh Circuit is now, following Lancaster, the controlling standard in the Fourth Circuit as well. This new standard conflicts with Evans’s per se analysis, but such tension is not unique to the Fourth Circuit. The circuits are split, with at least four circuits applying the per se rule and three following the less strict totality test.

As evinced by the lack of uniformity among the circuits, in cases involving the potential for law enforcement bias, courts have developed varying views on the assemblage of an impartial jury. The totality of the circumstances rule affords the trial judge wide latitude in conducting voir dire, provided that the voir dire as a whole is reasonably sufficient to uncover potential bias. The per se rule, in contrast, restrains trial court leeway by providing an additional measure for assuring that reasonable steps will be taken to assemble an impartial jury when the trial hinges on law enforcement testimony.

3. The Court’s Reasoning.—In discarding the per se test in favor of the totality of the circumstances test, the Lancaster court downplayed and rejected the same rationale that it accepted in Evans only six years earlier. In reaching its conclusion, the court first surveyed

58. See supra note 48 and accompanying text.
59. 910 F.2d 749 (11th Cir. 1990).
60. Id. at 752.
61. Id. at 753.
62. Id. (quoting United States v. Tegzes, 715 F.2d 505, 507 (11th Cir. 1983)).
63. Id. at 756.
64. Lancaster, 96 F.3d at 748 (Mumaghan, J., dissenting); see supra notes 47-48 and accompanying text.
65. See Lancaster, 96 F.3d at 741 (noting that this approach “restor[es] discretion in the handling of voir dire to the trial judge—where it rightfully belongs”).
the principles governing the review of challenges to sufficiency of voir
dire.66 Next, the court examined Evans, found that it did not fall in
accordance with the traditional principles of review, and overruled
it.67 Finally, the court reviewed the voir dire as a whole and found it
sufficient to ensure an impartial jury.68

a. Traditional Review of Sufficiency of Voir Dire.—In exploring
the standard of review for evaluating the sufficiency of trial court voir
dire, the Fourth Circuit examined opinions of both the United States
Supreme Court and other circuits.69 The court noted that because
assessing a prospective juror's impartiality requires observation of the
juror's demeanor, voir dire must lie within the trial court's
discretion:70

"Despite its importance, the adequacy of voir dire is not eas-
ily subject to appellate review. The trial judge's function at
this point in the trial is not unlike that of the jurors later on
in the trial. Both must reach conclusions as to impartiality
and credibility by relying on their own evaluations of de-
meanor evidence and of responses to questions. In neither
instance can an appellate court easily second-guess the con-
clusions of the decisionmaker who heard and observed the
witnesses."71

The Fourth Circuit further noted that, except in cases in which
the Constitution requires certain inquiries,72 the district court need
not follow a specific line of questioning, so long as the voir dire, as a
whole, is reasonably sufficient to uncover any bias or partiality.73 Nev-
ertheless, "a district court abuses its discretion . . . if the voir dire does
not provide "a reasonable assurance that prejudice would be discov-
ered if present."

66. Id. at 738.
67. Id. at 740-42.
68. Id. at 742-44.
69. Id. at 738-41.
70. Id. at 738.
71. Id. at 739 (quoting Rosalez-Lopez v. United States, 451 U.S. 182, 188 (1981)).
72. See supra notes 33-35 and accompanying text (describing voir dire requirements in
cases involving capital punishment or heightened risk of ethnic or racial bias).
73. Lancaster, 96 F.3d at 739-40.
74. Id. at 740 (quoting United States v. Flores, 68 F.3d 1342, 1353 (5th Cir. 1995), cert.
Quiroz-Hernandez, 48 F.3d 858, 868 (5th Cir. 1995))).
b. Overruling Evans.—In adopting the totality of the circumstances test, the Lancaster court overruled Evans and its progeny.\(^7\) The court determined that the Evans per se rule offended "the deference traditionally accorded the trial court's conduct of voir dire and is virtually unlimited in its application."\(^6\)

(i) Offensive to Traditional Deference.—Evans held that in certain situations every refusal to ask prospective jurors whether they would be biased in favor of law enforcement witnesses constitutes error.\(^7\) After finding such error, a court would then determine whether the error was harmless.\(^8\) In Lancaster, the court found that this per se rule stripped the trial court of traditional discretion in evaluating voir dire.\(^9\)

(ii) Boundless Application.—Besides offending notions of traditional deference, the Lancaster court feared that the Evans rule could have virtually unlimited application.\(^8\) The Evans rule required a district court to inquire into bias in favor of law enforcement testimony whenever the Government's case depended "completely" on such testimony.\(^1\) As the court noted:

If the district court must, on pain of reversal, ask the venire whether they would give heightened credibility to the testimony of a police officer when the Government's case depends on law enforcement testimony, logic compels that a similar question be asked whenever the Government's case depends on the testimony of any identifiable class of witnesses that might conceivably be thought by jurors to be inherently credible, be they firefighters, priests, physicians, attorneys, butchers, bakers, or candlestick makers. Indeed, during oral argument counsel was unable to offer a persuasive reason why this should not be the case.\(^2\)

Based on fears of unlimited applicability and the desire to maintain deference to trial courts, the Fourth Circuit concluded that Evans

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75. Id. at 742.
76. Id.
77. See United States v. Evans, 917 F.2d 800, 806 (4th Cir. 1990).
78. Id. at 807.
79. Lancaster, 96 F.3d at 741.
80. Id.
81. Id. at 740. The court also made note of the inherent difficulty of determining how "complete" dependence is to be defined. Id.
82. Id. at 741.
should be overruled.\textsuperscript{83} The court determined that a totality of the circumstances test would give proper deference to trial courts and would prevent needless inquiries into, for instance, whether a prospective juror thought physicians more credible than other witnesses.\textsuperscript{84} Applying the totality of the circumstances test, the court held that the \textit{Lancaster} trial court's voir dire, when viewed as a whole,\textsuperscript{85} was sufficient to ferret out any bias and allowed the impaneling of an impartial jury.\textsuperscript{86}

The dissent, on the other hand, did not believe that the \textit{Lancaster} trial court's voir dire was adequate.\textsuperscript{87} Judge Murnaghan dissented, arguing not only that \textit{Evans} was necessary to secure the constitutional right to an impartial jury, but that the district court should be overturned even under the majority's new, lower standard.\textsuperscript{88} He found little merit to the majority's contention that the \textit{Evans} rule violated notions of trial court deference,\textsuperscript{89} and he took issue with the major-

\footnotesize{\bibitem{83} Id. at 742. The court relied on \textit{United States v. Flores}, 63 F.3d 1342 (5th Cir. 1995), which observed that the appellate court's role "is not to decide what voir dire procedure is best, but to determine whether the procedure chosen by the district court is sufficient," \textit{id.} at 1353, and \textit{United States v. Nash}, 910 F.2d 749 (11th Cir. 1990), which held that refusal to ask a voir dire question regarding whether prospective jurors would give heightened credibility to law enforcement testimony did not constitute an abuse of discretion, even though the Government's case "depended heavily" on such testimony. \textit{Id.} at 756.

\bibitem{84} \textit{Lancaster}, 96 F.3d at 742.

\bibitem{85} In reviewing the totality of the circumstances, the Fourth Circuit examined the entire voir dire. \textit{See id.} at 742-43. The court found the following voir dire sufficient: (1) "Do you think that the fact that you have so many family members in law enforcement would make it difficult for you to be impartial in this case?", \textit{id.}; (2) "Would [your employment with the Bureau of Alcohol, Tobacco and Firearms] make it difficult for you to be impartial in this case?", \textit{id.} (alteration in original); (3) "Would you feel that you would be somewhat predisposed towards favoring the prosecution?"; \textit{id.} (alteration in original). "Would [your employment as a parol officer] make it difficult for you to be completely impartial in this case?", \textit{id.} (alteration in original); (4) "Do you feel that those relationships would make it difficult for you to be impartial in this case?... I notice a little hesitation. Do you sort of think that you might be tilted in favor of law-enforcement witnesses in this case?" \textit{Id.} at 743 (alteration in original).

The Fourth Circuit also examined the transcript and found adequate the district court's instruction before voir dire that:

[I]t's very important that as a juror you not come into the courtroom with... any preconceived ideas, prejudices, biases, or anything like that... In other words, the purpose of voir dire is to try to get as impartial a jury as possible... [I]f you have any doubt about the answer to [a] question, if there is any possibility that your answer would be yes, raise your hand; and I would rather have you give me too much information than too little.

\textit{Id.} (alteration in original).

\bibitem{86} \textit{Id.} at 744.

\bibitem{87} \textit{See id.} at 745 (Murnaghan, J., dissenting).

\bibitem{88} \textit{See id.}

\bibitem{89} \textit{See id.} at 749.
ity's "flippant tone" toward legal precedent. Moreover, Judge Murnaghan disagreed with the majority's finding that the trial court did not abuse its discretion under the totality test because "[q]uestions concerning law enforcement employment and general biases . . . [are] wholly inadequate to ensure that jurors will not be predisposed to believe the testimony of a law enforcement official." Judge Motz agreed with Judge Murnaghan's dissent, but wrote separately to emphasize that, even if the Constitution did not require a rule such as that adopted in Evans, the Fourth Circuit should adopt one in its supervisory capacity.

4. Analysis.—In overruling Evans and the per se test, the Fourth Circuit undermined the constitutional right to an impartial jury. While the Lancaster court eliminated one problem—a rule that "straightjacket[ed] the district court's discretion"—it created another. Instead of the bright line per se rule, the Fourth Circuit now has an amorphous gestalt of factors that provide courts with little guidance.

a. The Purpose and Nature of Voir Dire.—"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Without adequate voir dire, the trial judge cannot fulfill her responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and fairly evaluate the evidence. Impartiality allows the jury to analyze the evidence and to make a fair and reliable determination of the facts. Accordingly, time and time again, the Supreme Court has held that justice requires an impartial jury.

90. Id. at 751.
91. Id. at 753.
92. Id. at 752.
93. Id. at 753-54 (Motz, J., dissenting).
94. Lancaster, 96 F.3d at 742.
96. See Connors v. United States, 158 U.S. 408, 413 (1895) (noting that the voir dire is conducted under the supervision of the court and that this necessarily means that "a great deal" must be left to the sound discretion of the court).
98. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). The Supreme Court has also commented:

"[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." That purpose simply cannot be achieved if the jury's deliberations are
The right to an impartial jury carries with it the concomitant right to take reasonable steps designed to ensure an unbiased jury. This right to an impartial jury is meaningless unless the court takes sound steps to ensure that it will be unbiased. As Judge Murnaghan argued in his dissent: "The Constitution is a real document providing—when properly construed—real assurances."

b. Potential for Abuse.—It necessarily follows from the examination of the purpose and nature of voir dire that the defendant’s right to an impartial jury demands the real assurance of lack of bias. In United States v. Lancaster, however, the Fourth Circuit dismantled the available assurance by overruling Evans and opening the door to potential abuses with its adoption of the nebulous “totality” test.

In cases such as Lancaster and Evans, the determination of guilt or innocence hinges directly on the testimony of persons in authority. Evans set forth a framework for these situations that guaranteed defendants that an inquiry would be made into whether law enforcement bias was present in the venire.

In cases in which the evidence overwhelmingly supports the prosecution, trial courts may be tempted to speed through the trial to reach the seemingly inevitable guilty verdict. In pursuit of a speedier trial, judges might refrain from asking proposed questions to the venire and thus might miss partial jurors. Evans, however, required judges to take additional time—although only a moment—to query

tainted by bias or prejudice. Fairness and reliability are assumed only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial. Thus, time and time again, in a broad variety of contexts, the Court has adopted strong measures to protect the right to trial by an impartial jury.


100. Lancaster, 96 F.3d at 752 (Murnaghan, J., dissenting).

101. See generally id. (suggesting that the constitutional right to an impartial jury is not adequately protected by the majority’s decision in Lancaster).

102. See, e.g., Lancaster, 96 F.3d at 736 (prison officer); United States v. Victoria-Peguero, 920 F.2d 77, 84 (1st Cir. 1990) (government agent); United States v. Evans, 917 F.2d 800, 806 (4th Cir. 1990) (DEA Agent), overruled by United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 967 (1997); United States v. Nash, 910 F.2d 749, 753 (11th Cir. 1990) (police officer); United States v. Gelb, 881 F.2d 1155, 1165-66 (2d Cir. 1989) (Postal Service Inspector and Internal Revenue Service Agent); United States v. Spaar, 748 F.2d 1249, 1251 (8th Cir. 1984) (Secret Service Agents); United States v. Martin, 507 F.2d 428, 432-33 (7th Cir. 1974) (government agent); United States v. Gassaway, 456 F.2d 624, 625 (5th Cir. 1972) (federal agents); Brown v. United States, 338 F.2d 543, 544 (D.C. Cir. 1964) (military police); Chavez v. United States, 258 F.2d 816, 818 (10th Cir. 1958) (government witness).

103. Evans, 917 F.2d at 807.
the venire as to whether they would give unduly heightened credence to law enforcement testimony. Thus, *Evans*, in light of the defendant's likely determination of guilt, provided an assurance that the defendant's constitutional right to an impartial jury would not be usurped.

Unfortunately, the Fourth Circuit failed to recognize this potential for abuse. In its quest not to "straightjacket the district court's discretion," the court opted for the totality test, which creates possibilities for abuse at both the trial and appellate levels. According to the court, at the trial level, judges must be given broad deference in conducting voir dire and may not be held to a specific line of questioning. This extremely deferential standard allows judges to ignore the defendant's specific request to query the venire regarding law enforcement bias and partiality. Considering the overwhelming caseloads that some judges face, it is not difficult to imagine a judge—either consciously or subconsciously—opting for a speedier, rather than a fairer trial.

The majority in *Lancaster*, however, would probably argue that review of the trial court's voir dire to determine whether it was "reasonably sufficient" is adequate protection. Nonetheless, appellate review of the sufficiency of trial court voir dire poses more potential for abuse. Appellate judges are naturally disinclined to order a new trial of an apparently guilty defendant based merely on a defect in the voir dire. Furthermore, the reversal would be based on a technicality that, although constitutionally grounded, could not on its face show whether the guilty verdict was based on this technical mistake. Thus, judges might be inclined to gloss over mistakes, finding the voir dire reasonably sufficient on appeal, even though the voir dire was somewhat less than adequate at the trial level.

By overruling *Evans*, the Fourth Circuit removed a necessary safeguard that ensured that society's interest in punishing the guilty would not trump a defendant's right to a fair trial. *Evans* required

104. *Id.* at 806.
105. *Id.* at 809.
106. The majority's discussion did not address the potential for abuse by trial judges when applying the "totality" test. See *Lancaster*, 96 F.3d at 736-45.
107. *Id.* at 742.
108. *Id.*
109. *Id.*
courts to ask one more question when the case relied primarily on law enforcement testimony—a small price to pay considering the potential for abuse.

c. Application.—Not only did Evans provide a necessary assurance of a constitutionally grounded right, but it did so in a manner that was easy to apply. This simplicity in application allowed appellate judges to apply bright line criteria to determine whether the trial court committed error. Evans required the district court to query potential jurors regarding their partiality with regard to law enforcement officers when the case rested on the credibility of law enforcement testimony. In reviewing appeals, judges need only determine whether the government’s case relied on law enforcement testimony and whether the trial court posed the proposed law enforcement credibility question. Contrary to the majority’s belief in Lancaster, these criteria are extremely easy to administer. The majority found that determining whether the government’s case “depends completely” on law enforcement testimony is inherently difficult, presumably because the language “depends completely” provides no bright line as to how important the law enforcement testimony must be. As Judge Murnaghan noted in dissent, however, no cases have reported a problem with discerning whether a case relies completely on such testimony. Presumably, such cases have not arisen because judges simply give defendants the benefit of the doubt, and doing so only requires a few moments delay.

Asserting that the Evans threshold was inherently difficult to grasp, the majority strangely adopted an even more difficult standard. Requiring that the voir dire must be “reasonably sufficient” to uncover any bias or partiality in the venire, the Fourth Circuit sets forth no criteria with which appeals can be reviewed, leaving judges in

111. Evans, 917 F.2d at 805-09.
112. See Lancaster, 96 F.3d at 741.
113. Id.
114. Id. at 750 (Murnaghan, J., dissenting).
115. In fact, the simplest and “brightest” bright line test would be to require the judge to poll the venire about potential biases whenever the testimony relies upon law enforcement testimony at all. Although the Lancaster majority raises the argument of “unlimited application” and predicts that judges will be required to poll the jury about the credibility of even a butcher, see supra notes 32-33 and accompanying text, it seems more plausible to rely upon the good sense and judgment of defense lawyers to exclude absurd questions. In those rare cases in which the defense abuses its right to frame questions for the voir dire, then if the judge commits a technical error by refusing to ask such questions, the harmless error doctrine will prevent such errors from requiring reversal.
116. Lancaster, 96 F.3d at 741.
117. Id. at 750-51 (Murnaghan, J., dissenting).
an analytical vacuum. Thus, the appellate court will be required to review the entire record to determine the sufficiency of the voir dire. The Evans standard established a threshold that allowed courts to ferret out unwarranted appeals. Unlike the standard adopted in Lancaster, a bright line test would promote judicial efficiency.

5. Conclusion.—In United States v. Lancaster, the United States Court of Appeals for the Fourth Circuit held that there is no per se rule requiring a trial court to question prospective jurors regarding the credibility of law enforcement testimony. Reasoning that such a rule conflicts with the traditional deference afforded trial judges in conducting voir dire, and is virtually unlimited in its application, the Fourth Circuit sided with those circuits requiring an evaluation of the voir dire as a whole to determine the sufficiency of the voir dire. The court concluded that the totality of the circumstances test is in full accordance with traditional voir dire principles.

In order to preserve a defendant's Sixth Amendment right to an impartial jury, the trial court should be required to question the venire regarding the credibility of law enforcement testimony. It is essential to assemble "a body of unbiased individuals, strangers to a dispute, who evaluate facts with respect for, but without slavish adherence to, the testimony of those in authority" as mandated by the constitutional right to an impartial jury. Evans required courts simply to ask one more question—a small price to ensure a fair trial. In rejecting Evans's bright line test, the Fourth Circuit has not only encouraged unnecessary appeals, but also diluted an important constitutional right.

JOEL L. PERRELL, JR.

118. Lancaster, 96 F.2d at 742.
119. Id.
120. Id.
121. Id. at 745 (Murnaghan, J., dissenting).
III. Education

A. Expelling Disabled Students for Reasons Unrelated to Their Disabilities: What's the Big IDEA?

In *Virginia Department of Education v. Riley,* the United States Court of Appeals for the Fourth Circuit, sitting en banc, held that a policy of terminating the education of disabled children for misbehavior unrelated to their disabilities did not violate the Individuals with Disabilities Education Act (IDEA). The court reversed Secretary of Education Richard Riley's determination that such a policy by the Virginia Department of Education (Virginia) contravened the spirit of the IDEA. In so ruling, the *Riley* court properly refused to extend more rights to disabled children than Congress intended to grant when it enacted the IDEA.

1. The Case.—In 1994, Secretary of Education Richard Riley determined that the State of Virginia violated the IDEA by maintaining a policy that permitted the cessation of educational services for disabled students who misbehave for reasons unrelated to their disabilities. The IDEA provides federal education funds to states that adhere to the statute's policies. The statute requires, in pertinent part, that in order for a state to qualify, the state must have in effect a policy that "assures all children with disabilities the right to a free appropriate public education." Under the Act, the Secretary of Education releases IDEA funds to a state only after the Secretary determines that the state has complied with the statute's provisions.

Virginia's disciplinary policy at the root of this controversy stated: "If there is no causal connection [between a child's misconduct and his or her disability] and if the child was appropriately placed at the time of the misconduct, the child may be disciplined the same as a

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1. 106 F.3d 559 (4th Cir. 1997) (per curiam) (en banc).
2. *Id.* at 561; *see* 20 U.S.C. §§ 1400-1417 (1994).
4. *See id.* at 563 (contrasting Secretary Riley's decision with Congress's intent in enacting the IDEA).
5. *See Virginia Dep't of Educ. v. Riley,* 23 F.3d 80, 83 (4th Cir. 1994) (granting interlocutory relief from the Department of Education's decision to withhold education funds and ordering an administrative hearing).
7. *Id.* § 1412(1).
8. *Id.* § 1412(6). Under the IDEA, states must submit detailed plans declaring the policies and procedures they intend to implement in educating children with disabilities. *See id.* § 1413(a). Section 1413 of the IDEA requires the Secretary of Education to "disapprove any State plan which does not meet the requirements of [the IDEA's enumerated provisions]." *Id.* § 1413(c)(2).
non-handicapped child." Secretary Riley determined that this policy violated the IDEA insofar as it denied the disobedient disabled students the "free public education" guaranteed by the statute. As a result of this finding, the Secretary threatened to withhold Virginia's entire sixty million dollar annual IDEA grant for fiscal years 1994 and 1995 unless Virginia amended its disciplinary policy.

Virginia refused to acquiesce to the Secretary's pressure to change its policy and petitioned the United States Court of Appeals for the Fourth Circuit for interlocutory relief in order to collect funds under the IDEA. The Fourth Circuit held that the Secretary could not withhold funding without affording Virginia notice and an opportunity for a hearing and thus directed the Department of Education to conduct a hearing to determine whether Virginia's disciplinary policy was inconsistent with the IDEA. After the hearing's completion, a hearing officer, appointed by the Secretary of Education, concluded that the Department of Education properly withheld all of Virginia's IDEA funds.

Virginia appealed the hearing decision to the Fourth Circuit, contesting the decision on several grounds. First, Virginia maintained that Congress must "clearly demonstrate its intent to override local authority concerning school disciplinary policies before the federal government may intrude in such matters, and that no such intent has been evidenced [in the Act]." Virginia further contended that Secretary Riley's interpretation of the IDEA was inconsistent with the statute's policy of "equal access" for disabled and nondisabled students. Lastly, Virginia argued that the Secretary of Education's threat to withhold its IDEA funding amounted to federal government coercion, violative of the Tenth Amendment.


10. Id. at 1340.

11. Id.

12. Id.

13. See Virginia Dep't of Educ. v. Riley, 23 F.3d 80, 87 (4th Cir. 1994).

14. Riley, 86 F.3d at 1340.

15. Id.

16. Id. at 1340-41.

17. Id. at 1341.

18. Id. at 1346. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
A Fourth Circuit Court panel affirmed Secretary Riley's decision to withhold Virginia's funds.\textsuperscript{19} Several months after the Fourth Circuit issued its panel decision, however, the court, sitting en banc, vacated the panel decision and heard the \textit{Riley} case anew.\textsuperscript{20}

2. \textit{Legal Background.}\textemdash

\textit{a. The IDEA.}\textemdash Originally passed as the \textit{Education for All Handicapped Children Act},\textsuperscript{21} the IDEA ensures that states provide educational services for children with disabilities.\textsuperscript{22} In 1975, Congress found that "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity."\textsuperscript{23} The seminal federal court cases, \textit{Pennsylvania Association for Retarded Children v. Pennsylvania}\textsuperscript{24} and \textit{Mills v. Board of Education},\textsuperscript{25} drew Congress's attention to the inadequacies of state special education services. Both decisions created entitlements to free public education for disabled children who were effectively excluded from such services before the lawsuits arose.\textsuperscript{26} The \textit{Mills} court, in particular, held that states must provide equal protection to children with disabilities by providing them with equal access to education.\textsuperscript{27} Following the \textit{Mills} court, the drafters of the IDEA sought to rectify the inadequacies of state special education by conditioning grants of federal funds on state assurances of free public education for "all children with disabilities."\textsuperscript{28}

In addition to this general requirement, the IDEA places several administrative requirements on states wishing to receive federal edu-

\begin{itemize}
\item \textsuperscript{19} \textit{Riley}, 86 F.3d at 1347.
\item \textsuperscript{20} \textit{Riley}, 106 F.3d at 560-61.
\item \textsuperscript{22} 20 U.S.C. § 1400 (1994).
\item \textsuperscript{24} 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam).
\item \textsuperscript{25} 348 F. Supp. 866 (D.D.C. 1972).
\item \textsuperscript{26} \textit{See Pennsylvania Association for Retarded Children}, 334 F. Supp. at 1258 (holding that schools in Pennsylvania must provide "to every retarded person between the ages of six and twenty-one years . . . access to a free public program of education and training appropriate to his learning capacities"); \textit{Mills}, 348 F. Supp. at 878 (holding that "the District of Columbia shall provide each child of school age a free and suitable publicly financed education regardless of the degree of the child's mental, physical or emotional disability or impairment").
\item \textsuperscript{27} \textit{Mills}, 348 F. Supp. at 874.
\item \textsuperscript{28} 20 U.S.C. § 1412(1) (1994). The statute cites the \textit{Mills} court's rationale, stating that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure \textit{equal protection of the law.}" 20 U.S.C. § 1400(b)(9) (1975) (amended 1990) (emphasis added).
\end{itemize}
cation funds. For example, when parents or school officials become aware of a problem in a disabled child's placement, the IDEA provides formal mechanisms for changing that child's placement. These mechanisms include an opportunity for the child's parents to be heard at an impartial due process hearing and a review of the local hearing decision by a state educational agency. The statute also contains a "stay put" provision, mandating that students remain in their current placement until the due process proceedings are completed. The "stay put" provision and due process guarantees apply when school systems seek to suspend or expel disabled students for misconduct.

b. Federal Court Interpretations.—Every federal court that has considered disciplinary action under the IDEA has held that the statute prohibits school systems from terminating educational services for unruly disabled students when the students' misconduct is related to their disabilities. These courts reason that the IDEA's assurance of a public education for all disabled students limits the disciplinary action available against such students to changes of placement. Many courts have held, however, that this limitation does not apply when school systems seek to terminate the educational services of disabled students whose misbehavior is unrelated to their disabilities. Although the language of the IDEA fails to differentiate between the disciplinary action available against children whose misbehavior arises from their disabilities and those whose misbehavior is unrelated to their disabilities, some courts have read a dual standard into the statute.

30. Id. § 1415(b).
31. Id.
32. See id. § 1415(e)(3)(b) ("During the pendency of any proceedings conducted pursuant to this section, . . . the child shall remain in the then current educational placement of such child.").
34. See, e.g., Doe v. Maher, 793 F.2d 1470, 1481 (9th Cir. 1986) ("[T]he IDEA prohibits the expulsion of a handicapped student for misbehavior that is a manifestation of his handicap."); aff'd and modified sub nom Honig v. Doe, 484 U.S. 305 (1988); Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982) ("A handicapped child may not be expelled, however, if his disruptive behavior was a manifestation of his handicap."); Doe v. Koger, 480 F. Supp. 225, 228 (N.D. Ind. 1979) ("A school which accepts Handicapped Act funds is prohibited from expelling students whose handicaps cause them to be disruptive.").
35. See supra note 34.
36. See infra notes 40-43 and 49-52 and accompanying text.
38. See infra notes 40-43 and 49-52 and accompanying text.
An Indiana federal district court set a trend in *Doe v. Koger* when it held that the IDEA does not ensure education to a student whose misbehavior is unrelated to her disability. The court reasoned as follows:

It is the purpose of the [IDEA] and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the students' handicap. It is not the purpose of the . . . Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble.

The *Koger* court stated that the IDEA's change of placement proceedings must include a determination as to whether a child's misconduct stemmed from her disability. Under *Koger*, a school system can completely terminate a disabled child's educational services only if the child's misbehavior is unrelated to her disability.

In *Kaelin v. Crubbs*, the Sixth Circuit also found that school systems retained the power to expel disabled students whose misbehavior is unrelated to their disabilities. The Sixth Circuit, however, differentiated "expulsion" from "complete cessation of educational services." The court found that the IDEA's guarantee of a public education for "all children with disabilities" ensures disabled students some form of education. Therefore, the court held that school systems must provide alternative educational services to disabled children expelled from school for any reason.

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40. *Id.* at 229-30. *But see* Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978) (stating broadly that "the use of expulsion proceedings as a means of changing the placement of a disruptive handicapped child contravenes the procedures of the [IDEA]").
42. *Id.*
43. *Id.* Cf. S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981) ("The parties agree that a handicapped student may not be expelled for misconduct which results from the handicap itself. It follows that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap.").
44. 682 F.2d 595 (6th Cir. 1982).
45. *Id.* at 600.
46. *Id.* (quoting *Turlington*, 635 F.2d at 348).
47. *Id.*
48. *Id.* at 602. In an earlier case, the Fourth Circuit agreed with the *Kaelin* court's decision insofar as it distinguished between "expulsion" and a "complete cessation of educational services." *See* School Bd. of Prince William County v. Malone, 762 F.2d 1210, 1218 (4th Cir. 1985). The Fourth Circuit stated that expulsion is an acceptable option for disabled children whose misbehavior is unrelated to their disability. *See id.* The *Malone* court, however, expressly declined to address the question of whether a "cessation of all educational services" is appropriate for such students. *See id.*
The Ninth Circuit, in *Doe v. Maher*,49 disagreed with the *Kaelin* court’s distinction between expulsion and complete cessation of educational services.50 After holding that a school can suspend a disabled student for more than ten days without providing a due process hearing,51 the Ninth Circuit stated, in dicta, that “when a handicapped child is properly expelled [for misbehavior unrelated to disability], the school district may cease providing all educational services—just as it could in any other case.”52 In *Maher*, the relation between disability and misconduct was not raised in the parties’ petition for review to the Supreme Court.53 As a result, when the Supreme Court granted certiorari in the case (renamed *Honig v. Doe*),54 it did not consider whether the IDEA requires states to provide educational services for a disabled student whose misbehavior was unrelated to her disability.55

3. The Court’s Reasoning.—In *Riley*, the Court of Appeals for the Fourth Circuit, sitting en banc, rejected the Secretary of Education’s interpretation of the IDEA.56 The court vacated the Fourth Circuit panel decision that supported Secretary Riley’s interpretation of the IDEA and adopted the opinion of the panel dissent.57 A plurality of the en banc court adopted Judge Luttig’s entire dissenting panel opinion, thereby permitting Virginia to receive its sixty million dollars

50. *Id.* at 1482.
51. *See id.* at 1485 (stating that a suspension of ten school days does not trigger due process protection because “[s]erious though it may be . . . [such a suspension] is not . . . so substantial as to constitute a ‘change in placement’ or a loss of a ‘free appropriate public education’ within the meaning of the [IDEA]”).
52. *Id.* at 1482.
55. In June 1997, Congress passed the 1997 Amendments to the IDEA. *See Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37*. These Amendments speak directly to the issue of disciplining disabled children who misbehave for reasons unrelated to their disabilities. *See id.* at 95. The Amendments state that if, as a result of a hearing officer’s review, it is determined that “the behavior of the child with a disability was not a manifestation of the child’s disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities.” *Id.* Therefore, as of the June 4, 1997, effective date of the 1997 Amendments, the Secretary of Education’s position on disciplining disabled children is overturned by Congress itself. Nevertheless, the Amendments are determinative of neither the *Riley* case nor any other case arising before the Amendments were enacted.
57. *Id.*
in IDEA funds. Six judges wrote separate concurrences, supporting only part of Judge Luttig’s panel dissent. Judge Murnaghan, who wrote the Fourth Circuit panel majority opinion, and Judge Hall dissented.

In his now-vindicated Fourth Circuit panel dissent, Judge Luttig first discussed the substance of the rights that Congress granted to disabled children under the IDEA. Section IA of the opinion, which received the support of a majority of the en banc court, noted that the IDEA requires merely that states “‘ha[ve] in place a policy that assures all children with disabilities the right to a free appropriate public education.’” Nothing in the language of the IDEA indicates that Congress intended to confer an absolute right to education upon children with disabilities. Judge Luttig reasoned that a child with a disability forfeits her right to an education under the IDEA if she engages in “conduct antithetical to the right,” just as she forfeits any other right if abused. The court held that “[a] state . . . no more fails to satisfy the statute[ ] . . . when it refuses to continue educational services to a student who has forfeited his right to such services, than when it does not provide an education to a student who chooses not to avail himself of the opportunity at all.”

Judge Luttig supported his reading of the IDEA by citing to Congress’s intent in enacting the statute. Without the incentive of federal funds, many states would continue to exclude disabled children from schools because of their disabilities. Congress sought to create equal access to public education for disabled children when it enacted the IDEA. Judge Luttig claimed, however, that this purpose is accomplished without requiring states to continue educational services for disabled students expelled for conduct unrelated to their disabilities. Accordingly, the en banc Riley court held that the Secretary of Education erred in withholding Virginia’s sixty million dollars be-

58. Id. at 560-72.
59. Id. at 561.
60. Id. at 572-82.
61. Id. at 562.
62. Along with the six-judge plurality, Judges Niemeyer, Hamilton, and Michael supported part IA of Judge Luttig’s opinion. Id. at 572.
63. Id. at 563 (emphasis added) (quoting 20 U.S.C. § 1412 (1994)).
64. Id.
65. Id.
66. Id. at 566.
67. Id. at 565.
68. Id. at 563.
cause Virginia acted in complete compliance with the aims of the IDEA.69

A majority of the en banc Riley court also supported Judge Luttig’s contention that Congress failed to clearly condition Virginia’s receipt of IDEA funds on its acceptance of Secretary Riley’s disciplinary policy.70 According to the court, the Fourth Circuit panel decision violated the principles set forth in South Dakota v. Dole71 and Pennhurst v. Halderman,72 in which the Supreme Court required Congress’s conditional spending statutes to be clear and unambiguous.73 The en banc Riley court noted that “[t]he [Riley panel] majority is unable to cite to a single word from the statute or from the legislative history of IDEA evidencing that Congress even considered such a condition . . . and its implications for the sovereignty of the States, and determined to condition the States’ funds in this manner.”74 Congress had not conditioned, in “unmistakable terms,” states’ receipt of IDEA funds on states’ provision of educational services for disabled children whose misbehavior is unrelated to their disabilities.75

In Section II of his Riley opinion, Judge Luttig opined that the Secretary of Education’s decision violated the Tenth Amendment to the Constitution.76 This part of his opinion, which received only the support of the six judge Riley plurality, explained how Secretary Riley’s decision to withhold Virginia’s IDEA funds usurped the state’s power to govern local educational affairs—matters traditionally reserved to state sovereignty.77 The Tenth Amendment places substantive limits on the extent to which the federal government can use federal funds to coerce states into accepting its policies on local matters.78 Accord-

69. Id. at 561.
70. This was not the same majority that supported section IA of Judge Luttig’s Fourth Circuit panel dissent. This majority included the six-judge plurality, Judges Niemeyer, Hamilton, and Motz. Id. at 572.
73. See Riley, 106 F.3d at 566. Judge Luttig wrote: Applying the clear statement rule [established in Dole and Pennhurst] . . . , it is apparent that Congress has not spoken through the IDEA with anywhere near the clarity and degree of specificity required for us to conclude that the States’ receipt of special education funds is conditioned upon their continued provision of education to handicapped students expelled for criminal activity or other misconduct unrelated to their disabilities.
74. Id. at 567.
75. Id.
76. Id. at 566.
77. Id. at 572.
78. Id. at 561.
ingly, such Supreme Court decisions as *South Dakota v. Dole* reify the Tenth Amendment's bite, providing states with tools for attacking the constitutionality of overly intrusive federal legislation.

Ultimately, if the [Supreme] Court meant what it said in *Dole*, then . . . a Tenth Amendment claim of the highest order lies where, as here, the Federal Government (accepting the majority's interpretation of the statute) withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States.

Following Judge Luttig's panel dissent, the en banc *Riley* plurality was "[u]nwilling to acquiesce in such a pretentious arrogation of power."

4. Analysis.—The en banc *Riley* court correctly rejected the Secretary of Education's interpretation of the IDEA and recognized Congress's true intent. When it enacted the IDEA, Congress intended to provide disabled children with access to education equal to that of nondisabled children. Secretary Riley's interpretation of the IDEA violated this legislative intent by extending more rights to disabled children than those enjoyed by their nondisabled counterparts. Section 4.a of this Note will argue that the Fourth Circuit corrected Secretary Riley's erroneous interpretation. Section 4.b will demonstrate that the undesirable consequences flowing from the Secretary of Education's interpretation weigh heavily in favor of the *Riley* decision.

a. Furthering Congress's Intent.—The equal access policy underlying the IDEA is evident in both the statute's legislative history and Congress's express legislative intent. Congress enacted the IDEA,

80. *Riley*, 106 F.3d at 570.
81. Id.
82. Id. at 572. The breadth of a Tenth Amendment argument deserves the treatment of an entire Note. The subject will not be analyzed further in this Note in order to focus on issues less developed in academic literature. For a review of the limits that the Tenth Amendment places on Congress's power to enact conditional spending statutes see Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 Sup. Ct. Rev. 85, 117-25.
83. See infra notes 86-96 and accompanying text.
84. See infra notes 94-96 and accompanying text.
85. See infra notes 97-99 and accompanying text.
in part, as a response to *Mills v. Board of Education*, a United States district court decision directing a school system to provide disabled children with publicly financed education. The *Mills* court held that states must provide equal protection to children with disabilities by providing them with equal access to education. Congress invoked the *Mills* court’s rationale in the “Congressional statements and declarations” section of the IDEA, demonstrating that Congress’s intent was limited to providing disabled children with equal access to education.

The *Riley* court correctly rejected the Secretary of Education’s interpretation of the IDEA because that interpretation failed to reflect Congress’s equal access rationale. Secretary Riley argued that his interpretation of the IDEA was consistent with the statute, considered in its entirety, because the IDEA “provides various benefits and procedural protections to children with disabilities without regard to whether similar benefits and protections are provided to nondisabled children.” Therefore, he concluded that the legislative intent of the statute was not strict equal protection.

The “special rights” identified by Secretary Riley, however, are more rightly understood as procedural safeguards that protect disabled children from inappropriate placements. For example, disabled children, under the IDEA, enjoy rights to annual evaluations of their educational placements, while nondisabled children enjoy no such rights. These special rights merely ensure that disabled children’s educations meet the minimum standard of “meaningfulness” dictated by the IDEA. Such safeguards do not require states to provide any level of substantive educational services, nor do the safeguards provide disabled students with an education when nondisabled children would be turned away, unlike the Secretary of Education’s disciplinary policy. As the *Riley* court correctly acknowledged, Congress left such substantive standards to the discretion of states.

87. *Mills*, 348 F. Supp. at 874; see also *supra* note 27 and accompanying text.
90. See *supra* note 5.
91. See *supra* note 30.
93. See *Riley*, 106 F.3d at 571.
Contrary to Congress's intent, the special rights for disabled children approved by the Secretary of Education promoted *inequality* of opportunity.94 Disabled children would remain in school despite willful misbehavior.95 These superior rights are antithetical to the goal of equal protection because nondisabled children do not enjoy educational opportunities when they willfully misbehave.96 Therefore, the Secretary of Education's policy on disciplining disabled children conflicted with Congress's stated legislative purpose in enacting the IDEA. Thus, the *Riley* court correctly overturned Secretary Riley's decision.

b. Avoiding Undesirable Consequences.—The *Riley* decision avoided several undesirable consequences that would have resulted from the Secretary of Education's interpretation of the IDEA. First, Secretary Riley's decision left educators without the ability to maintain discipline in schools. The IDEA, as interpreted by Secretary Riley, gave disabled students a license to misbehave without fear of losing their educational services. In addressing the issue, scholar Omyra Ramsingh wrote that such a policy "inadvertently creates a loophole whereby the Act can be manipulated by students to undermine a school's ability to discipline them."97 Secretary Riley's decision removed the deterrent effect of a school's threat to terminate a disabled child's education.

Second, the Secretary of Education's decision requires states to spend funds on students who willfully misbehave if the states wish to receive federal funding.98 As Judge Luttig persuasively argued, the federal government should not induce states to send private tutors to

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94. Cf. Erica Bell, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 *Fordham L. Rev.* 168, 180 (1982) (stating that disparate disciplinary treatment of nondisabled children and disabled children who misbehave for reasons unrelated to their disabilities "potentially conflicts with the constitutional principle of equal protection"); Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 *J. Contemp. Health L. & Pol'y* 155, 172 (1995) (arguing that when a court demands that disabled students remain in school after the students misbehave willfully, the court creates "a dual system of disciplinary procedures, whereby disabled students are not subject to the same consequences for their misconduct as nondisabled students").

95. Virginia Dep't of Educ. v. Riley, 86 F.3d 1337, 1344 (4th Cir. 1996), rev'd, 106 F.3d 559 (4th Cir. 1997) (per curiam) (en banc).

96. The Virginia Department of Education permits schools to expel unruly nondisabled students from school after providing children with fair notice, an opportunity to be heard, and a right to appeal. VA. CODE ANN. § 22.1-277 (Michie 1993). In this context, expulsion means terminating a student's educational services. See Brief of Petitioner at 8, *Riley* (No. 95-2627).


98. *Riley*, 106 F.3d at 563.
jails and to children's homes when children choose to misbehave. These extra expenditures drain the resources available to responsible disabled students. As a result of the depleted resources, those disabled students that Congress intended to help—disabled students that behave and disabled students whose misconduct is fairly attributable to their disabilities—may enjoy lesser educational opportunities than their nondisabled counterparts.

5. Conclusion.—The Fourth Circuit correctly overturned the Secretary of Education's decision to withhold Virginia's sixty million dollars in IDEA funds. Secretary Riley failed to view the IDEA's assurance of a right to public education for "all children with disabilities" in light of the statute's principle goal: assuring equal access to education for all disabled children. By overturning the Secretary of Education's decision, the Riley court saved schools from a likely increase in misbehavior among disabled students and from a decrease in the educational opportunities enjoyed by deserving children with disabilities. In so doing, the Fourth Circuit set the IDEA back on the path Congress paved towards justice for children with disabilities.

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99. Id.
100. See supra notes 83-96 and accompanying text.
101. See supra notes 97-98 and accompanying text.
IV. EMPLOYMENT LAW

A. A Strict Construction and Application of Title VII to Same-Sex Sexual Harassment

In *McWilliams v. Fairfax County Board of Supervisors*, the United States Court of Appeals for the Fourth Circuit, in a divided panel, held that a claim for hostile environment sexual harassment cannot lie under Title VII of the Civil Rights Act of 1964 (Title VII) if the victim and alleged harassers are heterosexuals of the same sex. In dicta, however, the Fourth Circuit left the door open for consideration of sexual harassment claims involving parties of the same sex when the alleged harasser makes homosexual advances. Thus, the Fourth Circuit diverged from one other federal appellate court decision that directly addresses the subject of same-sex sexual harassment, *Garcia v. Elf Atochem North America*. In *Garcia*, the Fifth Circuit held that, because Title VII addresses gender discrimination, harassment by a male employer against a male employee was not actionable under Title VII, regardless of the sexual overtones of the harassment. In contrast, the Fourth Circuit's decision in *McWilliams* appears to turn on the sexual orientation of the parties. In deciding the actionability of same-sex sexual harassment cases, "courts have relied on their interpretation of the intent of Title VII, on the [Equal Employment Opportunity Commission] guidelines, and on case law." Consequently, courts have not been uniform in their rulings or their approaches to the problem. Rather, courts have used three separate approaches in deciding same-sex sexual harassment cases. This Note explores those approaches critically and argues that, in light of the Supreme Court's

3. *McWilliams*, 72 F.3d at 1195.
4. *See id.* at 1195 n.4.
5. 28 F.3d 446 (5th Cir. 1994) (holding that harassment by a male supervisor against a male subordinate did not state a claim under Title VII even though the harassment had sexual overtones).
6. *Id.* at 451-52. In reaching its holding, the Fifth Circuit cited *Goluszcz v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988), which found that the plaintiff did not show that he worked in an atmosphere that treated males in a hostile, oppressive, or aggressive manner. *See id.* at 1456; *Garcia*, 28 F.3d at 451-52.
8. *See id.*
9. The Fourth, Fifth, and Eighth Circuits have expressed these varying views. *See infra* notes 74, 99 and accompanying text.
rulings in *Meritor Savings Bank, FSB v. Vinson*[^10] and *Harris v. Forklift Systems, Inc.*,[^11] the Fourth Circuit's refusal to impose liability when both the victim and the harasser are heterosexual men disregards the fundamental goals of Title VII.

1. The Case.—In 1987, Mark McWilliams (McWilliams) began working as an automotive mechanic at the Newington Facility of the Fairfax County Equipment Management Transportation Agency (EMTA), located in Fairfax County, Virginia.[^12] McWilliams was learning disabled, and his coworkers subjected him to unwelcome sexually offensive conduct.[^13] McWilliams worked at an all-male workplace, and the general environment there was "heavily focused on sex."[^14] For example, McWilliams's coworkers circulated centerfold pictures and off-color cartoons during work hours on a regular basis.[^15] Beginning in 1989, several coworkers began teasing McWilliams, exposing themselves to him and asking him about his sexual activities.[^16] The harassment grew progressively worse over time.[^17] Eventually, McWilliams's co-workers subjected him to offensive physical abuse:

On at least three occasions, coworkers tied McWilliams' hands together, blindfolded him, and forced him to his knees. On one of these occasions, a coworker placed his finger in McWilliams' mouth to simulate an oral sexual act. During another of these incidents, a coworker, Doug Witsman, and another placed a broomstick to McWilliams' anus while a third exposed his genitals to McWilliams. On yet another occasion, Witsman entered the bus on which McWilliams was working and fondled him.[^18]

McWilliams complained several times to his supervisors about the conduct of his coworkers.[^19] In 1991, McWilliams told his supervisor that a coworker had placed a condom in his food.[^20] In 1992, McWilliams informed a subsequent supervisor that a coworker had offered

[^10]: 477 U.S. 57 (1986); see infra notes 41-46, 52 and accompanying text.
[^11]: 510 U.S. 17 (1993); see infra notes 53-56 and accompanying text.
[^12]: *McWilliams*, 72 F.3d at 1193.
[^13]: Id.
[^14]: Id.
[^15]: Id.
[^16]: Id.
[^17]: Id.
[^18]: Id.
[^19]: Id. None of the complained incidents, however, involved incidents of physical abuse. Id.
[^20]: Id. This coworker sometimes took on a supervisory role at EMTA. Id.
him money for sex.\textsuperscript{21} Each time that McWilliams complained, his supervisors launched informal investigations into the allegations.\textsuperscript{22} In October 1992, when McWilliams finally informed a supervisor of the physical assaults,\textsuperscript{23} Fairfax County initiated a formal investigation of McWilliams’s allegations, and the Fairfax County Police Department launched a criminal investigation against one of the most abusive of McWilliams’s coworkers.\textsuperscript{24}

In January 1993, McWilliams filed a charge with the United States Equal Employment Opportunity Commission (EEOC),\textsuperscript{25} which issued a right-to-sue letter on July 14, 1993.\textsuperscript{26} On October 13, 1993, McWilliams filed an action in the United States District Court for the Eastern District of Virginia against Fairfax County,\textsuperscript{27} claiming that he had been a victim of sex discrimination in violation of Title VII.\textsuperscript{28} In addition to his Title VII claim, McWilliams alleged that his supervisors’ actions violated 42 U.S.C. § 1983.\textsuperscript{29} McWilliams also asserted several state tort claims against many of his supervisors and coworkers.\textsuperscript{30}

The district court granted the defendants’ motion for summary judgment on both the Title VII and the section 1983 claims.\textsuperscript{31} In so ruling, the district court concluded that none of the defendants had actual or constructive knowledge of the alleged harassing conduct.\textsuperscript{32} McWilliams appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit found that the case could be decided on more “fundamental” grounds—whether hostile environment same-sex sexual harassment is actionable under Title VII when both parties are heterosexual and of the same sex.\textsuperscript{33}

\begin{thebibliography}{33}
\bibitem{21} Id.
\bibitem{22} Id. at 1193-94. The supervisors held meetings with McWilliams’s coworkers and questioned them about their alleged participation in the teasing and harassment. Id. McWilliams’s assistant supervisors assisted in the investigation, and the day and night foremen were informed of the situation. Id.
\bibitem{23} Id. at 1194.
\bibitem{24} Id.
\bibitem{25} The EEOC is charged with enforcement of Title VII. See 42 U.S.C. § 2000e-5 (1994).
\bibitem{26} McWilliams, 72 F.3d at 1194.
\bibitem{27} Id.
\bibitem{28} Id.
\bibitem{29} Id.
\bibitem{30} Id. The court noted that McWilliams did not plead a Title VII claim against his supervisors and that McWilliams re-filed his state law claims in state court. Id. at 1194 n.3.
\bibitem{31} Id. at 1194.
\bibitem{32} Id.
\bibitem{33} Id. at 1195.
\end{thebibliography}
2. Legal Background.—

a. Legislative Intent of Title VII.—In 1964, Congress enacted Title VII of the Civil Rights Act, which provides, in pertinent part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Since the enactment of Title VII, courts have struggled to define the contours of sex discrimination in employment. No legislative history exists regarding the meaning of the term "sex" within Title VII's original prohibitions. A southern congressman had introduced the term by amendment in an attempt to defeat the bill altogether. The congressman introduced the term "sex" as a floor amendment at the eleventh hour, without prior hearings or debates. The plan failed and the bill passed with the added provision.

The Supreme Court has interpreted Title VII to prohibit discrimination “because of sex” regardless of whether the discrimination is directed against women or men. In Newport News Shipbuilding & Dry Dock Co. v. EEOC, for example, the Court interpreted Title VII to protect male employees from a sexually discriminatory employer-sponsored medical plan that limited the availability of pregnancy-related coverage to the spouses of male employees but did not limit such coverage to female employees. Further, lower federal courts have held that both women and men can state claims for sexual harassment under Title VII. One distinction that federal courts have

35. See 110 Cong. Rec. 2577-84 (1964) (statement of Rep. Thompson). Representative Thompson stated:

As much as I hope the day will come when discrimination will be ended against women, I really and sincerely hope that this amendment will not be added to this bill. It will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it.

Id.

38. Id. at 683.
made, however, is that the term "sex" applies solely to gender and does not allow for Title VII claims based on sexual orientation.

b. Sexual Harassment Under Title VII.—The Supreme Court did not recognize sexual harassment as a form of sex discrimination under Title VII until its 1986 decision in *Meritor Savings Bank, FSB v. Vinson.* The *Meritor* Court relied on the EEOC's definition of sexual harassment to hold that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." The Court stated that the EEOC had relied on "a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Although the Court limited its holding in *Meritor* to sexual harassment between members of the opposite sex, the general effect of the Court's holding was to strengthen the language of Title VII in combating sexual harassment in the workplace.

Two forms of sexual harassment are actionable under Title VII: "quid pro quo harassment" and "hostile environment harassment." Quid pro quo harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as a basis for employment decisions affecting such individual." The Supreme Court has defined "hostile environment harassment" as discriminatory intimidation, ridicule, or insult that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." In order to state a claim of hostile work environment sexual harassment, a plaintiff must show:

1. The subject conduct was unwelcome;
2. It was based on the sex of the plaintiff;

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40. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-41 (1989) (stating there is no need to distinguish between the terms "sex" and "gender").
42. *Meritor*, 477 U.S. at 66.
43. *Id.* at 65.
44. *See* id. at 72 (holding that a claim of hostile environment sex discrimination is actionable under Title VII).
45. *See* id.
47. *Meritor*, 477 U.S. at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
(3) it was sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment;

(4) it was imputable on some factual basis to the employer.\textsuperscript{48}

c. The Supreme Court’s Influence on Lower Federal Court Same-Sex Sexual Harassment Decisions.—The Supreme Court has yet to directly address the issue of same-sex sexual harassment,\textsuperscript{49} and various federal district courts and circuit courts of appeals have interpreted the \textit{Meritor} holding differently. Some courts have adopted the Court’s reasoning in \textit{Meritor} as evidence that the Supreme Court would not recognize same-sex sexual harassment claims,\textsuperscript{50} while other courts have permitted broad application of the standards set out in \textit{Meritor} to hold that same-sex sexual harassment is actionable under Title VII.\textsuperscript{51} In \textit{Meritor}, the Court explained that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”\textsuperscript{52}

In 1993, the Supreme Court reaffirmed its position in \textit{Meritor}, in \textit{Harris v. Forklift Systems, Inc.}\textsuperscript{53} In \textit{Harris}, the Court rejected the employer’s argument that hostile environment harassment must seriously affect an employee’s well-being to be actionable under Title VII.\textsuperscript{54} Rather, the Court held that Title VII is violated whenever “the workplace is permeated with ‘discriminatory intimidation, ridicule and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”\textsuperscript{55} The Court emphasized that, in enacting Title VII, Congress

\textsuperscript{48} Spicer v. Virginia, 66 F.3d 705, 710 (4th Cir. 1995).

\textsuperscript{49} On June 9, 1997, the Supreme Court granted certiorari in a same-sex sexual harassment case. See Oncale v. Sundowner Offshore Servs., Inc., 65 U.S.L.W. 3432 (U.S. June 9, 1997) (No. 96-568), granting cert. to 88 F.3d 118 (5th Cir. 1996).


\textsuperscript{52} \textit{Meritor}, 477 U.S. at 64 (alteration in original).

\textsuperscript{53} 510 U.S. 17 (1995).

\textsuperscript{54} \textit{Id.} at 22.

\textsuperscript{55} \textit{Id.} at 21 (quoting \textit{Meritor}, 477 U.S. at 65, 67) (citation omitted).
intended "to strike at the entire spectrum of disparate treatment of men and women' in employment." 56

The EEOC has taken the position that Title VII may protect employees from same-sex sexual harassment. EEOC guidelines state:

The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way. 57

d. Same-Sex Sexual Harassment: The Dilemma in the Federal Courts.—

(i) The Evolution of "But For" Causation Analysis.—One of the earliest cases to address the issue of same-sex sexual harassment was Wright v. Methodist Youth Services, Inc., 58 decided in 1981. In Wright, a male plaintiff brought an action against a homosexual supervisor alleging that he was terminated from his job because he rejected his supervisor's sexual advances. 59 A federal district court in Illinois found that the supervisor's conduct was actionable under Title VII because, "but for" the employee's sex, the employee would not have been the object of harassment. 60 Two years later, in Joyner v. AAA Cooper Transportation, 61 a federal district court in Alabama also found that same-sex homosexual advances could form the basis of a quid pro quo sexual harassment claim under Title VII. 62 The court held that the harassment was based on the plaintiff's sex because employees of the opposite gender had not been subject to similar advances. 63

Each of these cases involved a factual scenario in which an employee rejected the homosexual advances of his same-sex supervisor, and each brought a quid pro quo claim of sexual harassment, rather

56. Id. (quoting Meritor, 477 U.S. at 64).
59. Id. at 308.
60. Id. at 310.
62. See id. at 541 (holding that a clear connection existed between the company's failure to rehire the plaintiff and the plaintiff's prior refusal to respond to the manager's sexual demands).
63. Id. at 542.
than a claim of hostile work environment. These two early cases were
grounded in the concept that same-sex harassment was "based on sex"
because employees of the opposite gender would not have inspired
the same treatment. In reaching their conclusions, the courts in
Wright and Joyner focused on the sexual preference of the harasser.  

(ii) The Intervention of Goluszek and Garcia: The Anti-Male
Environment Requirement.—After Wright and Joyner, a number of courts
deciding the issue of same-sex sexual harassment abandoned the "but
for" analysis. The second distinct analysis used by federal courts to
decide same-sex sexual harassment cases requires a male plaintiff to
show the existence of an anti-male work environment or, in the case
of a female plaintiff, an anti-female environment in order to satisfy the
"but for" causation test. In 1988, the case of Goluszek v. H.P. Smith  
emerged as the precedent-setting ruling on this approach to deciding
same-sex sexual harassment cases. The male plaintiff in Goluszek al-
leged that a number of his male coworkers had sexually harassed
him. The Goluszek court began its analysis by applying the "but for"
standard of causation. The court held that Goluszek needed to
prove that but for the fact that he was male he would not have been
harassed. The court concluded that Goluszek may have been
harassed on the basis of his sex, but nevertheless granted summary
judgment for the defendant on the ground that Goluszek failed to
show that he worked in an atmosphere that treated males in a hostile,
oppressive, or aggressive manner. The court reasoned that Title VII
was designed to protect powerless groups from dominant groups.

The court distinguished between the appropriate use of Title VII
to protect less powerful groups and the unwarranted extension of the
statute as a remedy for all workplace conduct of a sexual nature. The
court found no evidence that males were treated inferior to fe-
males in Goluszek's workplace and held, therefore, that Goluszek's

64. See id.; Wright, 511 F. Supp. at 310.
66. Id. at 1454. The plaintiff's coworkers poked him in the buttocks with a stick, asked
him if he had intercourse with a woman, accused him of being gay, and made other sexu-
ally explicit comments. Id. at 1453-54.
67. Id. at 1456.
68. Id.
69. Id. The court ruled that Goluszek "may have been harassed 'because' he is a male,
but that the harassment was not of a kind which created an anti-male environment in the
workplace." Id.
70. Id.
71. Id.
allegations fell outside the purview of Title VII.\textsuperscript{72} Several federal district courts have relied on \textit{Goluszek} in their refusal to extend Title VII coverage to same-sex sexual harassment.\textsuperscript{73}

The Fifth Circuit was the first federal appellate court to rule on the issue of same-sex harassment. In \textit{Garcia v. Elf Atochem North America},\textsuperscript{74} the plaintiff claimed that his male foreman sexually harassed him by frequently touching and grabbing him in a sexual manner.\textsuperscript{75} The court summarily dismissed the plaintiff’s claim on the ground that “'[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.'”\textsuperscript{76} Although, beyond this, the Fifth Circuit offered no rationale for its position, it cited \textit{Goluszek} as in “accord” with its ruling.\textsuperscript{77} Because \textit{Garcia} was the first same-sex sexual harassment decision from a federal appellate court, its ruling has guided many lower federal courts applying Title VII to same-sex sexual harassment claims.\textsuperscript{78}

One of the first cases to follow \textit{Garcia} was \textit{Vandeventer v. Wabash National Corp.}.\textsuperscript{79} The Vandeventer court agreed with both \textit{Goluszek} and \textit{Garcia} that Congress enacted Title VII to eliminate “an atmosphere of oppression by a 'dominant' gender.”\textsuperscript{80} Further, the court found that the male plaintiff had not reached the threshold requirement of prov-

\textsuperscript{72} Id.

\textsuperscript{73} See, e.g., \textit{Quick v. Donaldson Co.}, 895 F. Supp. 1288, 1294 (S.D. Iowa 1995) (“[M]ale employees are afforded Title VII protection if they can show they are members of a disadvantaged or vulnerable group (i.e., if they are working in an anti-male environment or predominantly female environment).”), rev’d, 90 F.3d 1372, 1379 (8th Cir. 1996) (“[T]he proper inquiry for determining whether discrimination was based on sex is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'” (quoting \textit{Harris v. Forklift Sys., Inc.}, 510 U.S. 17, 25 (1993))); \textit{Benekritis v. Johnson}, 882 F. Supp. 521, 526 (D.S.C. 1995) (relying on \textit{Goluszek} to argue that Congress never intended Title VII to remedy same-sex sexual harassment claims); \textit{Vandeventer v. Wabash Nat’l Corp.}, 867 F. Supp. 790, 796 (N.D. Ind. 1994) (“This court agrees with the \textit{Goluszek} analysis that Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender.”), modified, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (holding that "it would be going too far to state that there is never any possible basis of relief" under the \textit{Goluszek} standard).

\textsuperscript{74} 28 F.3d 446 (5th Cir. 1994).

\textsuperscript{75} Id. at 448.

\textsuperscript{76} Id. at 451-52 (quoting \textit{Giddens v. Shell Oil Co.}, 12 F.3d 208 (5th Cir. 1993) (unpublished opinion)).

\textsuperscript{77} Id. at 452.

\textsuperscript{78} See, e.g., \textit{Benekritis}, 882 F. Supp. at 525 (“Since \textit{Garcia}, most reported opinions appear to be following its finding.”); \textit{Myers v. City of El Paso}, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (“[T]he Fifth Circuit has clearly and succinctly stated that Title VII addresses gender discrimination and does not allow a claim for same-gender discrimination.”).


\textsuperscript{80} Id. at 796.
ing the existence of an anti-male environment. The court stated that the evidence showed only that the plaintiff had been harassed, not that he had been harassed because he was male. The decision suggested that same-sex sexual harassment was never actionable under Title VII. That court later modified its decision, however, to acknowledge that "a man can state a claim under Title VII for sexual harassment by another man [but] only if he is being harassed because he is a man." The court made clear that "it would be going too far" to say that same-sex sexual harassment is never actionable. Thus, even in the wake of the Garcia holding, the Vandeventer court did not hold that same-gender sexual harassment is never actionable under Title VII.

(iii) Application of the But For Causation Test.—A number of courts, however, have focused their analysis on the but for causation test to hold heterosexual as well as homosexual same-sex sexual harassment actionable under Title VII. In Prescott v. Independent Life & Accident Insurance Co., for instance, a federal court in Alabama squarely rejected the Garcia rule. In Prescott, the plaintiff alleged quid pro quo sexual harassment by his homosexual supervisor who demanded sexual favors in return for job benefits. The court in Prescott did not agree that Title VII only protected a powerless group against a dominant group. Applying the but for causation test, the court concluded that the plaintiff's homosexual supervisor would not have similarly harassed a female, and thus homosexual sexual harassment was actionable under Title VII. The Prescott opinion reasoned that had Congress intended to prohibit only heterosexual sexual harassment, it could have used the term "member of the opposite sex"

81. Id.

82. Id. ("[The plaintiff] was 'razzed' in a way designed to be the most annoying to him personally—he was called a homosexual. The record does not support a reasonable inference that [a crew leader] 'harassed' [the plaintiff] because he was a man. This was not actionable sexual harassment.").

83. See id. at 796 ("Same-sex harassment is not actionable under Title VII.").


86. Id. at 1550.

87. Id. at 1547-48.

88. Id. at 1550.

89. Id. at 1550-51.

rather than the gender neutral term "sex" within the language of Title VII.\(^9\)

In *Pritchett v. Sizeler Real Estate Management Co.*,\(^9\) a federal district court in Louisiana took a similar position. The *Pritchett* case involved a female employee who alleged that her former female supervisor had sexually harassed her.\(^9\) The court held that same-sex sexual harassment constituted a form of sex discrimination under Title VII because a ruling to the contrary would exempt homosexuals from Title VII anti-discrimination provisions.\(^9\)

The case of *Raney v. District of Columbia*\(^9\) provided a unique twist to the same-sex sexual harassment controversy. *Raney* involved the harassment of a male employee by his bisexual supervisors.\(^9\) The plaintiff claimed that he had been denied a promotion because he refused to provide sexual favors to his supervisors.\(^9\) The *Raney* court held that harassment by a bisexual was actionable except in the rare case in which a bisexual harasses both sexes equally.\(^9\)

The most recent appellate decision to hold same-sex sexual harassment actionable under Title VII is *Quick v. Donaldson Co.*\(^9\) The facts in *Quick* closely resemble those in *McWilliams*. The plaintiff, Donald Quick, worked in a predominantly male workplace, and Quick's claim included allegations of both physical assault and verbal taunting.\(^10\) The Eighth Circuit applied the traditional elements of hostile environment sexual harassment to the facts of the case and reversed the district court decision, which had required the plaintiff to show evidence of a predominantly female work environment.\(^10\) The court held that a plaintiff states an actionable claim of same-sex sexual harassment so as long as the plaintiff can show evidence that "members of one sex are exposed to disadvantageous terms or conditions of em-

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93. Id. at 1377.
94. Id. at 1379. The court noted that when a homosexual man propositions male but not female subordinates, he singles out male subordinates because of their gender. Id.
96. Id. at 286.
97. Id.
98. Id. at 288. See generally, Sandra Levitsky, Note, Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases, 80 Minn. L. Rev. 1013 (1996) (illustrating the inadequacies of current sexual harassment standards under Title VII's "because of sex" requirement).
99. 90 F.3d 1372 (8th Cir. 1996).
100. Id. at 1374.
101. Id. at 1378.
ployment to which members of the other sex are not exposed." As a result of the Quick decision, district courts within the Eighth Circuit now examine the facts of same-sex sexual harassment cases on a case-by-case basis. To date, only the Fourth, Fifth, and Eighth Circuits have directly addressed the issue of same-sex sexual harassment. Other circuits, however, have suggested in dicta that they might recognize a same-sex sexual harassment claim.

3. The Court's Reasoning.—The Fourth Circuit's approach to same-sex harassment turns on the sexual orientation of the alleged harasser. The McWilliams decision precludes same-sex sexual harassment claims in which both parties are heterosexuals of the same sex. In so ruling, the court reasoned that harassment of a heterosexual man by another heterosexual man could never be "because of" the victim's sex, as required by Title VII. The McWilliams court reserved in dicta, however, the question of whether a same-sex claim would be actionable if the plaintiff alleges that the harasser is homosexual or bisexual.

The court first set forth the pertinent sections of Title VII and the elements that a plaintiff must prove to establish a claim of hostile environment sexual harassment. The court then declined to rule on the issue of whether the defendant had received actual or constructive notice of the harassment—the basis of the district court's dismissal—on the ground that such a ruling would be necessary only if the unwelcome conduct fell within the purview of Title VII.

102. Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The court found that a fact finder could have reasonably concluded that there was disparate treatment between men and women at the plaintiff's place of employment. See id. at 1379.


104. See Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996); Quick, 90 F.3d at 1372; Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996); McWilliams, 72 F.3d at 1191; Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994).

105. See, e.g., Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) ("Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.").

106. McWilliams, 72 F.3d at 1196.

107. Id.

108. Id. at 1195 nn.45.

109. Id. at 1194-95.

110. Id. at 1195.
The court strictly construed the language of Title VII in reaching its result. In particular, the court held that heterosexual male-on-male harassment can never occur "because of the [claimant's] sex" as required by Title VII.\textsuperscript{111} The court acknowledged that such conduct constituted inappropriate workplace behavior.\textsuperscript{112} According to the court, however, Title VII does not proscribe all inappropriate behavior.\textsuperscript{113} The court determined that the alleged harassment did not occur "because of" the victim's sex. Rather, the court opined, the behavior very likely occurred because of other vulnerabilities of McWilliams or the propensities of his alleged harassers.\textsuperscript{114} The court stated:

[\textit{W}]e do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here . . . is considered to be "because of [McWilliams's] 'sex.'" Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed speech or conduct. Perhaps "because of" the perpetrator's own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's \textit{sex}.\textsuperscript{115}

The court grounded its reasoning in administrative concerns and its interpretation of the intent of Congress.\textsuperscript{116} The court conceded that the conduct alleged by McWilliams was reprehensible and perhaps should be redressable through other remedies.\textsuperscript{117} The court refused, however, to expand the coverage of Title VII to include all behavior that might fall within a broad range of activities characterized by a sexual nature.\textsuperscript{118} To do so, the court concluded, would overwhelm the courts with cases that Congress never envisioned Title VII should address.\textsuperscript{119} To extend Title VII, the court concluded, would give "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'"\textsuperscript{120}

\textsuperscript{111} \textit{Id.} at 1195-96.
\textsuperscript{112} \textit{Id.} at 1196.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 1195-96.
\textsuperscript{116} \textit{Id.} at 1196-97.
\textsuperscript{117} \textit{Id.} at 1196. The court stated that "there perhaps ought to be a law against such puerile and repulsive workplace behavior." \textit{Id.} (internal quotations omitted).
\textsuperscript{118} \textit{Id.} The court distinguished between "because of the worker's sex" and "in matters of sex." \textit{See id.}
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
The court expressly limited its holding to hostile environment harassment cases involving heterosexuals of the same sex. The court clearly stated that its decision in McWilliams did not reach situations in which one of the parties is homosexual or bisexual. Further, the court stated that its holding did not “purport to rule out claims of discrimination by adverse employment decisions (hiring, firing, etc.) involving only same-sex heterosexual actors.” The court stated that all future same-sex cases should be determined on a case-by-case basis.

In his dissent, Judge Michael disagreed with the majority’s analysis. Judge Michael argued that there should be a cause of action under Title VII for same-sex sexual harassment and that a material issue of fact remained as to whether McWilliams had been discriminated against “because of” his sex. Judge Michael raised serious concerns regarding the majority’s focus on the sexual preferences of the parties. He opined that to make the harasser’s sexual orientation an element of a Title VII claim would drastically impair the effectiveness, practicality, and availability of a remedy. Judge Michael stated that requiring a plaintiff to show that his harasser was homosexual “puts too fine a point on the ‘discriminat[ion] . . . because of [his] sex’ issue. I would simply hold that Title VII is implicated whenever a person physically abuses a co-worker for sexual satisfaction or propositions or pressures a co-worker out of sexual interest or desire.”

The plaintiff should be able to establish such facts, Judge Michael argued, “by an account of what the harasser did or said to the victim” and not the harasser’s sexual orientation. Further, Judge Michael suggested that, in the McWilliams case, “[t]he acts of assault and harassment are sufficiently direct and suggestive by themselves to raise the question whether they were done ‘because of [McWilliams’s] . . . sex.’”

In addition, Judge Michael, addressing the majority’s concerns over the administration of a broader application of Title VII, vigorously disagreed with the majority’s view that no clear line could be

121. Id. at 1195 n.4.
122. See id.
123. Id.
124. Id.
125. Id. at 1198 (Michael, J., dissenting).
126. Id.
127. Id.
128. Id.
129. Id. (alteration in original).
130. Id.
131. Id. at 1199. Judge Michael noted that courts should be able to properly infer sexual orientation from the conduct of the harasser. Id.
drawn between discrimination "because of sex" and objectionable conduct in "matters of sex." Judge Michael analogized to a long line of case law from both the federal district courts and circuit courts of appeals that had successfully distinguished between "actionable hostility" and "non-actionable horseplay" in matters of sexual harassment and discrimination.

The Fourth Circuit has affirmed its position, also in dicta, in subsequent rulings. Two months after the decision in McWilliams, the Fourth Circuit again addressed the issue of same-sex harassment in Hopkins v. Baltimore Gas & Electric Co. The court held that the alleged harassment was not severe or pervasive enough to create a hostile work environment and dismissed the case on those grounds. The court stated in dicta, however, that it did not find persuasive the Fifth Circuit's reasoning in Garcia and indicated that some same-sex sexual harassment claims may be actionable under Title VII. Specifically, the court noted that "when someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is 'because of' the victim's gender." When the victim and harasser are of the same gender, however, the sexually suggestive conduct may also be, and is more likely to be, "because of" many other variables.

In Wrightson v. Pizza Hut of America, Inc., the Fourth Circuit finally recognized a Title VII claim for same-sex sexual harassment in which the harasser was homosexual. The facts in McWilliams and Wrightson were strikingly similar, but the crucial difference between the two cases was the sexual orientation of the alleged harasser. Therefore, Wrightson addressed head-on the issue left open in McWilliams and affirmed the distinction between harassment committed by homosexual defendants upon heterosexual employees of the same sex and harassment committed by heterosexual defendants upon heterosexual employees of the same sex. These cases illustrate that, although the harassment may be exactly the same, a Title VII remedy

132. Id.
133. Id.
134. 77 F.3d 745 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996).
135. Id. at 747.
136. Id. at 751.
137. Id. at 752.
138. Id.
139. 99 F.2d 138 (4th Cir. 1996).
140. Id. at 143.
141. In Wrightson, the harasser pressured the plaintiff for sex, made numerous graphic and explicit comments, and touched the plaintiff in sexually provocative ways. Id. at 139-40.
exists in the Fourth Circuit only if the plaintiff proves the homosexuality of the harasser.

4. Analysis.—In McWilliams, the Fourth Circuit held that the gender and sexual orientation of McWilliams’s harassers precluded McWilliams from establishing a cognizable same-sex hostile environment claim under Title VII. By focusing on the gender and sexual orientation of the alleged harassers, rather than proof of discriminatory intent, the Fourth Circuit departs from settled Title VII doctrine. Moreover, the Fourth Circuit’s strict interpretation of Title VII’s language is misplaced, and the consequences are troubling. The McWilliams decision essentially creates difficult obstacles for victims of same-sex sexual harassment by requiring proof of homosexual conduct by their harassers. The decision also builds a framework that will inevitably lead to the inconsistent treatment of victims of same-sex harassment and underestimates the ability of federal courts to distinguish between behavior that constitutes discrimination and behavior that constitutes mere horseplay.

a. Title VII’s Legislative and Jurisprudential History Does Not Preclude Same-Sex Claims.—The ruling in McWilliams turned, in large part, on the court’s reading of the language of Title VII. The court’s narrow interpretation of the “because of sex” language in Title VII is flawed in many respects. First, because there is no clear legislative history surrounding the inclusion of the term “sex” in Title VII, it is difficult to discern Congress’s true intent. Although the McWilliams court tried to uncover what Congress’s actual intent may have been, the sheer absence of guidance from Congress poses an obstacle to this interpretive strategy.

One role of the court is to adapt enactments of the legislature to modern situations. This role is particularly important in the context of anti-discrimination law. Significantly, the Supreme Court has recognized reverse race discrimination claims under Title VII, thus

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142. *McWilliams*, 72 F.3d at 1195-96.

143. *See supra* notes 34-37 and accompanying text.

144. In fact, the term “sexual harassment” was not even used until the late 1970s and, thus, was not in Congress’s vocabulary when it passed Title VII in 1964. *See Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sexual Discrimination* 17 (1979).

evidencing an intent to construe Title VII broadly.\textsuperscript{146} One federal court in Tennessee observed: \textsuperscript{147} "[I]t would be untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII."\textsuperscript{148} Similarly, in \textit{Prescott}, the court correctly concluded that the term "sex" should be awarded the same status of neutrality that has been given to the term "race."\textsuperscript{149} The Supreme Court's opinion in \textit{Meritor} set forth a gender neutral and race neutral policy on sexual harassment when it stated, "'Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'"\textsuperscript{150} Therefore, courts that have read Title VII broadly to prohibit all forms of sex discrimination have properly done so. The \textit{McWilliams} court, in its rigid interpretation of Title VII, failed to allow the flexibility that has been used to interpret the term "because of race" within the meaning of Title VII. If the term "because of race" can be read expansively, then it would logically follow that Congress would also allow the term "because of sex" to be read inclusively rather than exclusively.

Second, there is no indication within the legislative history of Title VII that harassment "because of one's sex" requires harassment by a member of the opposite sex or by someone who is seeking sexual favors. Instead, the Supreme Court has stated that the language of the statute provides a "broad rule of workplace equality."\textsuperscript{151} In fact, the Supreme Court's decision in \textit{Meritor} implicitly adopts the view that Title VII's anti-sex discrimination provision should be construed broadly to permit sexual harassment claims by both men and women.\textsuperscript{152} The Court stated: "'Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being

\textsuperscript{146} See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976) (stating that Title VII coverage extends to discrimination of members of any race, including whites).

\textsuperscript{147} EEOC v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995).

\textsuperscript{148} Id. at 1103.


\textsuperscript{150} Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).


\textsuperscript{152} Meritor, 477 U.S. at 67.
allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Thus, the court in *McWilliams* stands on weak ground when it suggests that Title VII was not intended to reach non-traditional situations of harassment. The Court in *Meritor* never suggested that Title VII requires courts to identify the sexual orientation of the parties in deciding sexual harassment cases. Rather, *Meritor*'s inquiry is whether men and women were treated differently and whether the harassment was "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Thus, the Fourth Circuit did not rely on the Supreme Court's analysis in *Meritor* and *Harris*, but instead placed an incorrect emphasis on Title VII's legislative history to conclude that the statute does not protect heterosexual employees from harassment by other heterosexuals of the same sex.

b. Problems with Proof and Invasions of Privacy.—Judge Michael, in his dissent, aptly explained that the majority's decision to require a plaintiff to prove the sexual orientation of the harasser is not only unfounded in prior case law, but also poses serious issues of proof and privacy. By changing the elements of proof in a sexual harassment case, the majority in *McWilliams* shifted the focus of Title VII. The Supreme Court has consistently held that the basis of a hostile environment claim is that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." The necessary element is that a person be subjected to disparate treatment "because of" his or her sex. The gender or sexual orientation of the harasser is not determinative of this element.

Despite precedent to the contrary, the court in *McWilliams* required a higher standard of proof in Title VII claims of same-sex sexual harassment than in other discrimination contexts. In cases in which the alleged harassment involves a male harasser and a female victim, courts usually do not ask the victim to prove that the harass-

153. *Id.* (quoting *Henson* v. *Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).
154. *See McWilliams*, 72 F.3d at 1196.
155. *Meritor*, 477 U.S. at 67 (alteration in original) (quoting *Henson*, 682 F.2d at 904); *see also Harris*, 510 U.S. at 17 (further developing the fact-specific test laid out in *Meritor*).
156. *McWilliams*, 72 F.3d at 1195-96.
157. *See id.* at 1198 (Michael, J., dissenting).
158. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).
159. *Id.* at 22.
160. *See McWilliams*, 72 F.3d at 1195-96.
ment was based on sex. This fact is usually presumed from the fact that the harassment involved a victim and harasser of the opposite sex. Moreover, in cases involving a harasser and victim of the opposite sex, courts do not require the victim to show that the harasser is heterosexual. Such disparate treatment is simply unfair. It is also unnecessary. The Fourth Circuit imposed higher standards of proof because it could not envision a scenario in which a heterosexual employee could harass another heterosexual employee "because of the victim's sex." The idea that heterosexual same-sex sexual harassment can never occur because of the victim's sex is wrong. As feminist commentators have pointed out, men who exhibit characteristics traditionally defined as "feminine" are often harassed or discriminated against precisely because they are men who are exhibiting these characteristics.

Further, as Judge Michael suggested, the very nature of the harassing conduct in McWilliams may alone be sufficient to raise the question of whether the conduct occurred "because of" the victim's sex. This is particularly true in light of the specific facts found in McWilliams. Allowing plaintiffs to infer sex-based harassment from the nature of the conduct would prevent plaintiffs in same-sex harassment cases from having to launch a separate investigation into the sexual orientation of the alleged harasser. Judge Michael noted the difficulty inherent in having to prove an individual's sexual orientation. Determining the "true" sexual orientation of the alleged harasser, Judge Michael observed, would "surely . . . be complicated, far-ranging and elusive."

The majority in McWilliams made a valid point that the plaintiff in a same-sex case must be able to demonstrate that the harassment occurred "because of" the plaintiff's sex. The court deviated from a fair and equitable ruling, however, because the but for demonstration should not hinge on the sexual orientation of the alleged harasser. Sexual harassment should be defined as discrimination based on sex, regardless of the harasser's sexual orientation. According to the

162. See McWilliams, 72 F.3d at 1195.
163. See Franke, supra note 145, at 75-80.
164. See McWilliams, 72 F.3d at 1199 (Michael, J., dissenting) ("The facts, construed in McWilliams' favor, are sufficient to show that he was subject to a hostile work environment because of his sex.").
165. See id. at 1198-99. For example, one of McWilliams's coworkers told McWilliams that he loved him and asked McWilliams for sex. Id.
166. Id. at 1198.
167. Id.
168. McWilliams, 72 F.3d at 1195-96.
Supreme Court, the question that the trial court must ask is whether the plaintiff would have been treated differently if the plaintiff was a member of the opposite sex.169

In *Quick v. Donaldson Co.*,170 the Eighth Circuit provided an interpretation of the "because of sex" requirement that does not turn on the sexual orientation of the alleged harasser. That interpretation requires the plaintiff to prove that he has been treated differently than members of the opposite sex in order to state an actionable same-sex claim.171 In *Quick*, the court first analyzed the presence of disparate treatment using the but for standard and then proceeded to evaluate the severity of the conduct.172 Under the *Quick* analysis, a determination of a hostile environment "entails consideration of the entire record and all the circumstances."173 Unlike *McWilliams*, no single factor has the potential to dictate a motion to dismiss, nor does the Eighth Circuit’s multifactor approach implicate the proof and privacy concerns brought about by the Fourth Circuit’s position.

c. Drawing the Line Between Harassment and Horseplay.—The majority in *McWilliams* raised the concern that courts are ill-equipped to make the distinction between intentional discrimination "because of" a worker’s sex and workplace sexual harassment.174 In his dissent, Judge Michael aptly argued that similar distinctions between actionable and non-actionable conduct have been made and continue to be made by courts in sexual harassment cases involving parties of the opposite gender, as well as parties of the same gender.175 The court in *McWilliams* could have ruled that same-sex heterosexual harassment was actionable under Title VII and still have ruled in favor of the defendant. By allowing courts to consider the nature of the conduct on a case-by-case basis, future plaintiffs will have a greater opportunity to defeat a motion to dismiss, thus permitting a jury to decide whether the alleged conduct would constitute a hostile working environment.

Several courts have begun to emphasize the actual hostile environment as opposed to the parties’ sexual preferences. For example, in *Gerd v. United Parcel Service, Inc.*,176 a federal district court in Colo-
rado rejected the reasoning of the Fourth and Fifth Circuits and recognized same-sex claims under Title VII when the harassment is based on the plaintiff’s gender. The court followed the reasoning of Quick in holding that the target's sexual preference is not determinative. The court also cited to the reasoning of Tanner v. Prima Donna Resorts, Inc. in holding that the plaintiff is not required to prove that the work environment was hostile to all employees of the plaintiff’s sex. The court in Gerd noted that same-sex harassment tends to be fact-specific and should not be resolved on a motion to dismiss.

The Supreme Court has articulated a demanding standard of proof in adjudicating claims of sexual harassment: “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” This standard challenges several of the administrative concerns that the majority in McWilliams raised. First, the established standard of care is that of a reasonable person. Therefore, courts would decide whether a reasonable person would find the alleged conduct to be abusive, as opposed to merely locker room antics, joking, or horseplay; thus, the particular sensitivities of the plaintiff would not be relevant. For example, in Goluszek, the plaintiff lived with his mother, blushed easily, and lived an “isolated existence” with “little or no sexual experience.” Under the reasonable person standard, conduct directed at this plaintiff would not be judged by what he subjectively believed created a hostile environment. Rather, the standard would be an objective one, and the jury or judge would be required to determine whether the alleged conduct was sufficiently severe to violate Title VII.

The Supreme Court in Harris v. Forklift Systems, Inc. directed lower courts to look at the totality of the circumstances in deciding whether an environment was hostile or abusive. The lower courts

177. Id. at 360.
178. Id.
181. Id. at 361.
183. See id.
187. Id. at 23 (explaining that the court should examine the frequency of the discriminatory conduct; the severity of the conduct; whether the conduct is physically threatening
have successfully applied this test in deciding both same-sex and opposite-sex sexual harassment cases. For example, in *Easton v. Crossland Mortgage Corp.*,\(^{188}\) the court held that although same-sex claims are actionable under Title VII, the plaintiff’s claim failed because the alleged conduct was not sufficiently severe.\(^{189}\) Specifically, the court found the plaintiff’s failure to complain to upper management to be highly probative evidence that the harassing conduct was not sufficiently severe.\(^{190}\) The court granted summary judgment for the defendant.\(^{191}\) In *Taylor v. National Group of Companies, Inc.*,\(^ {192}\) the court held that the fact that the plaintiff was struck on the buttocks with a board by the president of the company, rather than merely a co-worker, increased the severity of the harassment.\(^{193}\) It is this type of careful fact-specific inquiry that has enabled courts to distinguish between actionable and non-actionable harassment—a distinction that the *McWilliams* court incorrectly concluded was virtually impossible.\(^ {194}\)

A fairer way to decide same-sex hostile environment cases would be to rule on a case-by-case basis with attention to the individual factual situations. The court in *McWilliams* had a valid point in wanting to ensure that the offensive behavior is based on an employee’s sex, rather than mere horseplay or joking.\(^ {195}\) This, however, can be accomplished if the courts carefully scrutinize the facts and apply the objective reasonable person standard to determine whether the unwelcome conduct is sufficiently severe to violate Title VII.

5. Conclusion.—In *McWilliams*, the Fourth Circuit unnecessarily limited the protections afforded to victims of sexual harassment in a hostile workplace environment. The court narrowly interpreted the meaning of the phrase “because of sex” to turn on the sexual orientation of the alleged harasser, rather than on the central question of whether men and women were treated differently. Although the

188. 905 F. Supp. 1368 (C.D. Cal. 1995). The facts in *Easton* involved a female supervisor who called her employees “bitch, slut, and whore”; exposed herself to her employees; subjected employees to unwanted touching; and continuously questioned her employees about their sex lives. *Id.* at 1380-81.
189. *Id.* at 1383-84.
190. *See id.* at 1381.
191. *Id.* at 1381-82.
193. *Id.* at 464.
194. The purpose of these examples is to show that the “totality of the circumstances” test is applicable in situations of same-sex harassment as well as traditional opposite-sex harassment.
195. *See supra* notes 116-120 and accompanying text.
Fourth Circuit in *McWilliams* tried to protect the core of Title VII from overuse and dilution, the court's decision essentially minimized the importance of protecting the workplace from harassment and discrimination. It is true that not every instance of unwelcome conduct constitutes hostile environment harassment, but an all-encompassing ban on harassment claims between heterosexuals of the same sex goes too far. If a plaintiff can establish that he or she was the victim of abusive or offensive conduct to which members of the opposite sex were not subjected, then that plaintiff should have a viable hostile environment claim. In *McWilliams*, however, the Fourth Circuit inappropriately closed the door to certain employees in the workplace, who by virtue of the sex and sexual orientation of their harassers are now left without a Title VII remedy.

Karen L. Steinbach
A. EMTALA: The Fourth Circuit's Backdoor Effort to Reconcile the Spirit with the Letter of the Law

Historically, the United States Court of Appeals for the Fourth Circuit has liberally construed the language of the Emergency Medical Treatment and Active Labor Act (EMTALA), despite Congress's narrow intent that this statute serve to enhance the availability of emergency medical care for indigent and uninsured patients. The court's broad interpretation of EMTALA's language has evoked criticism that the Fourth Circuit invites overuse and misuse of this federal cause of action. Yet in *Vickers v. Nash General Hospital, Inc.*, the Fourth Circuit affirmed the dismissal of an EMTALA complaint brought against a hospital and physician. The court avoided the necessity of explicitly reaffirming or reversing its prior construction of EMTALA's language by failing to interpret Vickers's complaint in the light most favorable to him and by requiring that he allege specific facts in his complaint to support allegations that the hospital employed disparate medical screening and failed to stabilize an emergency medical condition. These types of facts are unlikely to be available to an EMTALA plaintiff prior to discovery. In an apparent effort to place limits on the number of EMTALA claims resulting from the court's literal interpretation of the statute's overly broad language, the Fourth Circuit required that Vickers's EMTALA claim meet an inappropriately high standard of factual specificity in order to survive a motion to dismiss on the pleadings.

1. The Case.—On June 20, 1992, Martin Vickers arrived at the emergency room of Nash General Hospital. Vickers had apparently hit his head during an altercation earlier that evening and sustained a laceration of his scalp. Dr. James R. Hughes examined Vickers and arrived at a medical diagnosis of "laceration and contusions and multiple substance abuse." Dr. Hughes also ordered cervical spine x-rays.

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2. See infra notes 58-62, 78-91 and accompanying text.
3. See infra notes 92-93, 139-140 and accompanying text.
4. 78 F.3d 139 (4th Cir. 1996).
5. Id. at 145.
6. Id. at 143-45.
9. Vickers, 78 F.3d at 141.
which revealed no spinal damage. He did not order x-rays or other diagnostic tests to rule out intracranial injury. After Vickers's scalp laceration was repaired with staple sutures, the hospital discharged him with instructions to return in ten days for suture removal. Discharge recommendations also included follow-up with the mental health department the following Monday, two days after the injury.

Four days after Vickers's discharge from the hospital, paramedics responded to an emergency call. They discovered Vickers without a pulse and not breathing. The paramedics transported Vickers to Nash General Hospital's emergency room, where efforts to resuscitate him were unsuccessful. Vickers was pronounced dead, and an autopsy was subsequently performed. The autopsy report identified Vickers's cause of death as cerebral herniation resulting from a left epidural hematoma, produced by a left parietal skull fracture.

Franklin Vickers, executor of Martin Vickers's estate, brought suit against the hospital and Dr. Hughes in the United States District Court for the Eastern District of North Carolina. Vickers's complaint alleged that the hospital had failed to provide the decedent with an appropriate medical screening examination during his first emergency room visit on June 20, and had failed to stabilize Vickers's emergency medical condition before discharging him on that date. The plaintiff alleged that these actions, on the part of both Dr. Hughes and the hospital, constituted violations of EMTALA.

10. Id.
12. Id. at 7-8.
13. Id.
15. Id.
16. Id.
17. Id.
18. Id.
20. Id. at 315.
21. Id. at 315-16.
(a) Medical screening requirement
In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the
Specifically, the complaint alleged that Martin Vickers "received less screening, both in quantity and quality, than required under the Act, and less than those other patients presenting in this same medical condition received." The complaint further asserted that Vickers arrived at the hospital in an "emergency medical condition," as defined by EMTALA, and that "upon determining Martin's emergency medical condition, the Hospital had a duty to provide stabilizing treatment and it failed to do so before discharging Martin." Vickers also brought medical malpractice claims against Dr. Hughes and against the hospital on the theory of respondeat superior and asked the district court to exercise supplemental jurisdiction over these state law claims.

emergency department, to determine whether or not an emergency medical condition exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor.

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.


23. Brief of Appellant at 8, Vickers (No. 95-1391) (quoting Complaint ¶ 26, App. at 8).

24. Id. (citing Complaint ¶¶ 28-29, App. at 9).

25. See 42 U.S.C. § 1395dd(e)(1). The Act defines "emergency medical condition" as:

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant women [sic] who is having contractions—

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

Id.


27. Supplemental jurisdiction permits a federal court to exercise jurisdiction over state claims arising from cases over which the court already has jurisdiction, provided that the state claims are "so related . . . that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (1994).

Before filing answers to the complaint, the hospital and Dr. Hughes moved to dismiss the EMTALA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendants contended that Vickers's complaint failed to state an EMTALA claim because it set forth no factual allegations to support the assertion that Martin Vickers had received "disparate treatment." The district court granted the defendants' motion to dismiss, reasoning that Vickers's "speculative assertion" regarding disparate treatment was insufficient to state a claim under EMTALA. The court noted that Vickers had presented no "evidence" of disparate treatment. However, the court rejected the defendant's argument that EMTALA requires an allegation of disparate treatment motivated by consideration of "low economic status."

Having dismissed the federal cause of action, the district court declined to exercise its supplemental jurisdiction over the state medical malpractice claims and dismissed them without prejudice for lack of subject matter jurisdiction. Vickers appealed to the United States Court of Appeals for the Fourth Circuit.

2. Legal Background.—Congress enacted EMTALA in 1986 in response to concern over the widespread practice in American hospitals of "patient dumping." Patient dumping occurs when a hospital emergency room refuses to admit an indigent or uninsured patient with an emergency medical condition or when a hospital inappropriately transfers such a patient to another facility before the individual's condition has been stabilized. The federal circuit courts have uniformly recognized that, in enacting EMTALA, Congress intended to

29. Brief of Appellant at 9, Vickers (No. 95-1391).
30. FED. R. Civ. P. 12(b)(6). Rule 12 provides that certain enumerated defenses may be made by motion, including "failure to state a claim upon which relief can be granted." Id.
31. Brief of Appellees at 5-6, Vickers (No. 95-1391).
33. Id.
34. Id. at 316 (citing Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538 (E.D.N.C. 1991)).
35. Id. at 317.
36. Vickers, 78 F.3d at 142.
37. See H.R. REP. NO. 241 at 27, reprinted in 3 U.S.C.C.A.N. 579, 605 (1986) (documenting congressional concern "about the increasing number of reports that hospital emergency rooms are refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance").
38. See Karen I. Treiger, Note, Preventing Patient Dumping: Sharpening the COBRA's Fangs, 61 N.Y.U. L. Rev. 1186, 1186-87 (1986) (describing "patient dumping" as the phenomenon that occurs "when a hospital that is capable of providing the needed medical
enhance access to emergency medical care for the indigent and uninsured. The judiciary has been less consistent, however, in its construction of EMTALA’s language when applying the statute to specific cases and controversies. Two key phrases in the statute’s operative language have sparked disagreement.

a. What Is an “Appropriate Medical Screening Examination”? — The first source of confusion has been the Act’s requirement that “the hospital must provide for an appropriate medical screening examination within the capability of the hospital’s emergency department.” The Sixth Circuit accentuated the ambiguity of the word “appropriate” in the context of an EMTALA claim when the court described the word as “one of the most wonderful weasel words in the dictionary.” In the absence of a statutory definition of an “appropriate medical screening examination,” federal courts have interpreted this term at least two ways.

One school of thought suggests that each hospital emergency room is held to its own internal set of standards in determining what
constitutes an appropriate medical screening examination. The D.C. Circuit introduced this subjective standard for "appropriateness" in Gatewood v. Washington Healthcare Corp.\(^{44}\) In Gatewood, the plaintiff alleged that the misdiagnosis of her husband's impending heart attack by a member of the hospital emergency room staff constituted inappropriate medical screening under EMTALA.\(^{45}\) Noting that "allegations of misdiagnosis, without more, are simply not cognizable under [EMTALA]," the court held that "a hospital fulfills the 'appropriate medical screening' requirement when it conforms in its treatment of a particular patient to its standard screening procedures. By the same token, any departure from standard screening procedures constitutes inappropriate screening in violation of [EMTALA]."\(^{46}\) Anticipating concerns that such a subjective standard may encourage hospitals to establish artificially low internal standards to insulate themselves from EMTALA liability, the D.C. Circuit reasoned:

> We recognize . . . that there may be some instances in which a hospital's normal screening procedure will fall below the standard of care established by local negligence or malpractice law. Nevertheless, we decline the appellant's invitation to incorporate a malpractice or negligence standard into subsection 1395dd(a). The federal Emergency Act is not intended to duplicate preexisting legal protections, but rather to create a new cause of action . . . for what amounts to failure to treat.\(^{47}\)

Thus, according to this first view, the key to "appropriate" screening procedures is that hospitals "apply their standard screening procedure for identification of an emergency medical condition uniformly to all patients."\(^{48}\) Community standards of what constitutes an acceptable medical screening, although appropriately considered in a state malpractice or negligence claim, are irrelevant for the purpose of an EMTALA analysis using this subjective test.\(^{49}\)

Though agreeing with the D.C. Circuit that EMTALA does not create a federal negligence or malpractice cause of action, some fed-

\(^{44}\) 933 F.2d 1037 (D.C. Cir. 1991).
\(^{45}\) Id. at 1039.
\(^{46}\) Id. at 1041.
\(^{47}\) Id.; see also Barry R. Furrow, An Overview and Analysis of the Impact of the Emergency Medical Treatment and Active Labor Act, 16 J. LEGAL MED. 325, 332 (reviewing the concern expressed by several courts that "cases might arise where the examination of the patient was so cursory or inadequate that the court could find that no examination has been given at all under the EMTALA requirements").
\(^{48}\) Baber v. Hospital Corp. of Am., 977 F.2d 872, 878 (4th Cir. 1992).
\(^{49}\) See id. at 879-80.
eral courts have nonetheless suggested a second, more objective standard for assessing the appropriateness of a medical screening examination. In *Ruiz v. Kepler*, the federal district court for New Mexico considered a fact pattern closely analogous to that in *Vickers*. In determining whether the plaintiff had a viable EMTALA claim, the district court examined the meaning of an "appropriate screening examination."

Although it acknowledged that the standard for "appropriateness" must be "individualized for each hospital," and is "[u]nlike malpractice law in which the standard of care required is based on the objective, reasonable person standard," the court reasoned that use of a subjective test "does not mean that the Court should ignore evidence of accepted medical practice from which subjective standards can be inferred." The court held that an expert witness's assertion of the parameters of "an appropriate medical screening examination within the capability of an emergency department anywhere in New Mexico in 1991" was properly considered in determining whether the hospital in question had provided an appropriate screening. In so holding, the court opened the door for the application of external community standards in determining what constitutes an appropriate screening examination for EMTALA purposes.

The following year, the Fourth Circuit applied a similar test for appropriateness in *Power v. Arlington Hospital Ass'n*. In a case involving circumstances that have been described as "every emergency room's—and every patient's—worst nightmare," a patient brought an EMTALA action against a hospital, claiming, in part, that the hospital emergency department failed to provide an appropriate medical

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51. See id. at 1444. The case involved an emergency room patient presenting with head wounds sustained in a fight. Id. at 1445-46. An emergency room nurse took a medical history and checked the patient's vital signs, and the physician on call cleaned and sutured the patient's head and ordered skull x-rays. Id. at 1446. In examining the x-rays, the physician failed to detect a skull fracture, which allegedly resulted in irreparable brain damage. Id.
52. Id. at 1447-48.
53. Id. at 1448 (quoting Baber, 977 F.2d at 879-80).
54. Id.
55. Id.
56. Id.
58. 42 F.3d 851 (4th Cir. 1994).
The Fourth Circuit announced a standard for determining the appropriateness of a medical screening examination that involved:

allow[ing] a hospital, after a plaintiff makes a threshold showing of differential treatment, to offer evidence rebutting that showing either by demonstrating that the patient was accorded the same level of treatment that all other patients receive, or that a test or procedure was not given because the physician did not believe that the test was reasonable or necessary under the particular circumstances of that patient.

If a hospital offers such rebuttal evidence, fairness dictates that the plaintiff should be allowed to challenge the medical judgment of the physicians involved through her own expert medical testimony.61

The court determined that the allowance of expert testimony regarding community standards of care was particularly necessary when the defendant hospital asserted that it had no standard emergency room screening procedures, and thus could not have deviated from its procedures in the plaintiff’s case.62

b. Who Qualifies As “Any Individual”?—Unlike the ambiguous term “appropriate medical screening examination,” the meaning of the second controversial phrase in EMTALA’s language appears all too clear. The statute requires that hospital emergency departments provide an appropriate medical screening examination for “any individual” who comes to the emergency department for examination or treatment63 and that the hospital stabilize the condition of “any indi-

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60. Power, 42 F.3d at 853-54. Power had presented to the hospital emergency room complaining of “pain in her left hip, her lower left abdomen, and in her back running down her leg, and reporting that she was unable to walk, was shaking, and had severe chills.” Id. at 853. After being seen by two physicians and two nurses, Power was discharged and given a prescription for pain medication, the name of an orthopedist, and instructions to return to the hospital if her condition worsened. See id. The next day, Power returned to the emergency room and was diagnosed with septic shock. See id. She was subsequently hospitalized “in intensive care for over four months during which time she was on life support equipment, had both legs amputated below the knee, lost sight in one eye, and experienced severe and permanent lung damage.” Id.

61. Id. at 858.

62. Id.; see also Correa v. Hospital San Francisco, 69 F.3d 1184, 1192 (1st Cir. 1995) (“A hospital fulfills its statutory duty to screen patients in its emergency room if it provides for a screening examination reasonably calculated to identify critical medical conditions . . . and provides that level of screening uniformly to all those who present substantially similar complaints.” (emphasis added)), cert. denied, 116 S. Ct. 1423 (1996).

vidual" with an identified emergency medical condition. Despite the facially clear meaning of the phrase "any individual," early judicial interpretations of its meaning reflected an effort to incorporate what the courts uniformly understood to be Congress's clear intent when it enacted the statute.

Thus, early cases required proof of an underlying economic motive for failure to appropriately screen for or stabilize an emergency medical condition in order to sustain a cause of action under EMTALA. In Nichols v. Estabrook, the federal district court for New Hampshire dismissed an EMTALA claim arising from an emergency room physician's failure to detect and stabilize an ultimately fatal condition in the plaintiffs' infant son before sending him to another hospital. The court held that the plaintiffs had failed to state a claim under EMTALA because they did "not allege that their financial condition or lack of health insurance contributed to Dr. Estabrook's decision not to treat their son." The court reasoned: "The interest which Congress sought to protect by enacting 42 U.S.C. § 1395dd was not invaded by the defendant's conduct as . . . alleged."

Similarly, in Evitt v. University Heights Hospital, a federal district court in the Southern District of Indiana held that an emergency room patient who was examined and discharged with chest pain that later proved to be symptomatic of a heart attack could not sustain an EMTALA cause of action. The plaintiff's failure to allege that she had been turned away from the hospital for economic reasons led the court to dismiss her EMTALA claim. The court reasoned that allowing the federal cause of action without allegation of an improper economic motive would "lead to the result that any patient dissatisfied with an emergency room diagnosis and release could sue the hospital under the anti-dumping provision. . . . [The plaintiff's] complaint that the original diagnosis was incorrect obviously states a mere malpractice claim which should be resolved in state court."

64. See id. § 1395dd(b).
65. See supra notes 37-39 and accompanying text.
67. Id.
68. Id. at 330.
69. Id.
70. 727 F. Supp. 495 (S.D. Ind. 1989).
71. Id. at 497-98.
72. Id.
73. Id.; see also Stewart v. Myrick, 731 F. Supp. 433, 434-36 (D. Kan. 1990) (reviewing EMTALA's legislative history and holding that there was no EMTALA claim when it was "uncontroverted that [the patient] was never denied treatment or discharged . . . due to a lack of insurance").
This line of reasoning was first explicitly rejected in *DeBerry v. Sherman Hospital Ass'n.* In *DeBerry*, the district court held that an EMTALA claim does not require an allegation of disparate treatment based on inability to pay. Legislative intent notwithstanding, the court noted that "the language of the statute quite plainly goes further . . . . [I]t nowhere mentions either indigency, an inability to pay, or the hospital's motive as a prerequisite to statutory coverage." The court reasoned:

While one may disagree with the efficacy of § 1395dd's breadth or its necessity, it is not this court's place to rewrite the language enacted by our duly elected officials. If Congress went too far in § 1395dd, then the statute must either be attacked constitutionally . . . or through the same political processes which caused its enactment. Amendment by the judiciary, however, is never proper.

All of the federal circuit courts that have addressed the meaning of "any individual" within the context of EMTALA have adopted the *DeBerry* court's plain language approach to statutory construction. Like the First, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits, the Fourth Circuit has taken Congress's term "any individual" literally. In *Power v. Arlington Hospital Ass'n*, the court considered the issue of whether an "improper motive" for deviation from standard screening

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75. Id. at 1307.
76. Id. at 1306.
77. Id. at 1307.
78. See, e.g., Correa v. Hospital San Francisco, 69 F.3d 1184, 1194 (1st Cir. 1995) (holding that "EMTALA, by its terms, covers all patients who come to a hospital's emergency department . . . regardless of insurance status or ability to pay"), cert. denied, 116 S. Ct. 1423 (1996); Collins v. DePaul Hosp., 963 F.2d 305, 308 (10th Cir. 1992) ("The fact that Congress, or some of its members, viewed COBRA as a so-called 'anti-dumping' bill, i.e., a bill designed to prohibit hospitals from 'dumping' poor or uninsured patients in need of emergency care, does not subtract from its use of the broad term 'any individual.'"); Brooker v. Desert Hosp. Corp., 947 F.2d 412, 414 (9th Cir. 1991) (holding "Congress to its words . . . that the Act applies to any and all patients, not just to patients with insufficient resources"); Burditt v. United States Dep't of Health & Human Servs., 934 F.2d 1382, 1373 (5th Cir. 1991) (refusing to "invent a requirement found nowhere in the statute that an improper, or nonmedical, motive for transfer must be proved as an element of all EMTALA transfer violations"); Gatewood v. Washington Healthcare Corp., 933 F.2d 1087, 1040 (D.C. Cir. 1991) (noting that "the Act's plain language unambiguously extends its protections to 'any individual' who seeks emergency room assistance"); Cleland v. Bronson HealthCare Group, Inc., 917 F.2d 266, 268-71 (6th Cir. 1990) (holding that the plain words of the statute extend EMTALA protection to "any individual," but interpreting the requirement of an "appropriate medical screening exam" to refer to the motives—in terms of characteristics of the individual patient—with which the hospital acts).
79. See supra note 78 and cases cited therein.
80. 42 F.3d 851 (4th Cir. 1994).
procedures is required to assert an EMTALA claim and concluded that it is not. The court reasoned there is "nothing in the statute itself that requires proof of indigence, inability to pay, or any other improper motive on the part of a hospital as a prerequisite to recovery. The language of subsection 1395dd(a) simply refers to 'any individual' who presents to the emergency room." The Fourth Circuit also adopted the plain meaning of Congress's term "any individual" in its 1994 opinion in *In re Baby K*.

In that case, a Virginia hospital sought a declaratory order that it was not obliged under EMTALA to provide mechanical respiratory assistance to an anencephalic infant who was repeatedly brought to its emergency room in respiratory distress. The hospital argued, inter alia, that "in prohibiting disparate emergency medical treatment Congress did not intend to require physicians to provide treatment outside the prevailing standard of medical care" and that "an interpretation of EMTALA that requires a hospital or physician to provide respiratory support to an anencephalic infant fails to recognize a physician's ability, under Virginia law, to refuse to provide medical treatment that the physician considers medically or ethically inappropriate." Nonetheless, the Fourth Circuit held that the plain language of the statute obligated the hospital to provide mechanical ventilation for Baby K "when she arrives at the emergency department of the Hospital in respiratory distress and treatment is requested on her behalf."

In a dissenting opinion, Senior Circuit Judge Sprouse raised a legislative intent argument reminiscent of the reasoning that the district courts applied in early EMTALA cases. He noted that "the statute was designed narrowly to correct a specific abuse: hospital 'dumping' of indigent or uninsured emergency patients," and went on to suggest:

81. *Id.* at 857-58; *see supra* notes 58-62 and accompanying text.
82. *Power*, 42 F.3d at 857.
83. 16 F.3d 590 (4th Cir. 1994).
84. Anencephaly is:

a congenital malformation in which a major portion of the brain, skull, and scalp are missing. While the presence of a brain stem does support . . . autonomic functions and reflex actions, because [an anencephalic infant] lacks a cerebrum, she is permanently unconscious. Thus, she has no cognitive abilities or awareness. She cannot see, hear, or otherwise interact with her environment.

*Id.* at 592.
85. *See id.* at 592-93.
86. *Id.* at 595.
87. *Id.* at 594-95.
88. *See id.* at 598-99 (Sprouse, J., dissenting).
89. *See supra* notes 66-73 and accompanying text.
90. *Baby K*, 16 F.3d at 598 (Sprouse, J., dissenting).
There is no indication in the legislative history of EMTALA that Congress meant to extend the statute's reach to hospital-patient relationships that do not involve "dumping." Clearly, there is no suggestion of patient "dumping" in this case. . . . In light of the purposes of the statute and this child's unique circumstances, I would find this case to be outside the scope of EMTALA's anti-dumping provisions.

I also submit that EMTALA's language concerning the type and extent of emergency treatment to be extended to all patients was not intended to cover the continued emergencies that typically attend patients like Baby K.91

The Fourth Circuit's Baby K decision engendered disapproval in scholarly commentary as well. Criticisms included the decision's establishment of "a troubling precedent" of using EMTALA to determine specific treatment issues such as those in Baby K.92 One physician commentator, noting the court's refusal to permit exceptions to EMTALA that would allow physicians to withhold treatment in cases they considered "hopeless," suggested that the application of EMTALA's plain language is "unrealistic because it separates the patient's emergency event from the entire context of the patient's illness."93

3. The Court's Reasoning.—In Vickers, the Fourth Circuit began its analysis by recognizing that Congress's intent in enacting EMTALA was to prevent hospitals from engaging in the practice of patient dumping based on a person's inability to pay.94 Writing for the court, in an opinion joined by Judge Hall, Chief Judge Wilkinson noted that EMTALA imposes only a "limited duty on hospitals with emergency rooms to provide . . . care to all individuals who come there,"95 and he underscored that EMTALA was not intended to create a federal cause of action for negligence or medical malpractice.96

91. Id. at 598-99.
94. Vickers, 78 F.3d at 142.
95. Id. (quoting Brooks v. Maryland Gen. Hosp., Inc., 996 F.2d 708, 715 (4th Cir. 1993)).
96. Id.
The court next examined the plaintiff’s complaint, which included allegations of failure to provide an appropriate screening examination as required under 42 U.S.C. § 1395dd(a), and failure to stabilize Vickers’s medical condition before discharging him as required by 42 U.S.C. § 1395dd(b). Addressing the first allegation, the court stated that the standard for “appropriateness” of a medical screening examination is the application of “‘uniform screening procedures to all individuals coming to the emergency room.’” Citing the plaintiff’s contention that Vickers “received less screening, both in quantity and quality, than required under the Act, and less than those other patients presenting in this same medical condition received,” the majority acknowledged that “[o]n the surface, this allegation may seem to state a claim under EMTALA’s screening provision.” However, the court reasoned that the plaintiff had confused EMTALA’s requirement of an initial screening examination with an obligation that the treatment following that screening examination be correct. According to the majority, this confusion reflected a “failure to take the actual diagnosis as a given.” Vickers had received a screening examination in the emergency room, and Dr. Hughes’s diagnosis based on that screening examination was “laceration and contusions and multiple substance abuse.” That this diagnosis ultimately proved to be incomplete is a question for state medical malpractice law, according to the majority, but does not state a cause of action under EMTALA. The majority noted that “mechanical invocation of the phrase ‘disparate treatment’ does not convert [Vickers’s] allegations of misdiagnosis into a valid claim under EMTALA.”

The majority’s analysis relied heavily upon the Fourth Circuit’s reasoning in *Baber v. Hospital Corp. of America.* In *Baber*, a patient with a history of psychosis and alcohol abuse was treated at a hospital emergency room for nausea and agitation. While there, the patient experienced a seizure and fell, striking her head and lacerating her scalp. The emergency room physician re-examined her and su-

97. Id. at 143.
98. Id. (quoting *In re Baby K*, 16 F.3d 590, 595 (4th Cir. 1994)).
99. Id. (internal quotations omitted).
100. Id.
101. Id. at 144.
102. Id. at 141 (internal quotations omitted).
103. Id. at 144-45.
104. Id. at 144 n.3.
105. 977 F.2d 872 (4th Cir. 1992).
106. Id. at 875.
107. Id.
tured her head wound, but ordered no x-rays of her scalp.\textsuperscript{108} The patient was subsequently transferred to another hospital, in part because the facility owned sophisticated equipment that the treating physician believed would be of assistance in identifying the cause of the patient's seizure.\textsuperscript{109} The patient later died from a subdural hematoma and skull fracture, which might have been identified by x-rays of her skull.\textsuperscript{110} Her brother brought an EMTALA action against both hospitals.\textsuperscript{111} The \textit{Baber} court affirmed the district court's summary judgment in favor of the hospitals.\textsuperscript{112} The Fourth Circuit held that the plaintiff had not produced evidence that either hospital failed to treat Ms. Baber and that this was sufficient to defeat an EMTALA claim on a motion for summary judgment.\textsuperscript{113}

Likewise, in \textit{Vickers}, the majority reasoned that Dr. Hughes had treated the patient for what he "perceived to be" the patient's medical condition.\textsuperscript{114} The court commented that "none of the evidence demonstrates an attempt . . . to 'dump' [the patient]"\textsuperscript{115} and noted that "[i]n light of the substantial medical attention paid to Vickers, the circumstances are far afield from those that concerned Congress in enacting EMTALA."\textsuperscript{116} After making this distinction between Vickers's situation and those situations the legislature intended to address with EMTALA, the court turned to the plaintiff's complaint and concluded that it did not state a cause of action under EMTALA's appropriate screening requirement "[b]ecause [the plaintiff] does not allege that Vickers received different treatment than other patients."\textsuperscript{117}

The majority also affirmed the dismissal of the plaintiff's second EMTALA claim—that the hospital failed to stabilize Vickers before discharging him.\textsuperscript{118} Again, harkening back to congressional intent, the Fourth Circuit emphasized that EMTALA's purpose was limited to establishing a duty of hospital emergency rooms to stabilize emergency medical conditions they identify, reserving the establishment of malpractice liability to state law.\textsuperscript{119} The court reasoned that EM-

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 876.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 873.
\textsuperscript{112} Id. at 885.
\textsuperscript{113} Id.
\textsuperscript{114} Vickers, 78 F.3d at 144 (internal quotations omitted).
\textsuperscript{115} Id. at 145 (alteration in original) (quoting Baber, 977 F.2d at 885).
\textsuperscript{116} Id. at 144.
\textsuperscript{117} Id. at 144-45.
\textsuperscript{118} Id. at 145.
\textsuperscript{119} Id.
TALA's stabilization requirement "takes the actual diagnosis as a given, only obligating hospitals to stabilize conditions that they actually detect."\textsuperscript{120} The majority concluded that the emergency medical condition identified by Dr. Hughes was Vickers's scalp laceration, and that the plaintiff had not alleged that Dr. Hughes had actually perceived the intracranial injury but nonetheless failed to stabilize it.\textsuperscript{121}

In a dissenting opinion, Judge Ervin chastised the majority for finding Vickers's allegations insufficient to state an EMTALA claim. He opined: "The majority's real problem is not with what Vickers alleged, but with the statutory language, which allows an EMTALA violation to be proven even when the failure to screen or stabilize is not shown to have been based on an economic motive."\textsuperscript{122} Judge Ervin noted that, under the notice pleading system established by the Federal Rules of Civil Procedure, "[c]omplaints should be dismissed for failure to state a claim on which relief can be granted only when, construing all allegations in the light most favorable to the plaintiff, it is clear that no set of facts could be proven under which the plaintiff would be entitled to relief."\textsuperscript{123}

In Judge Ervin's view, the allegations upon which Vickers based his EMTALA claims were adequate to put Nash General Hospital on notice regarding the nature of the claims against it.\textsuperscript{124} The dissent maintained that Vickers's allegations were sufficient to allow him to withstand dismissal and undertake discovery and that the majority erred in upholding the district court's dismissal under Rule 12(b)(6).\textsuperscript{125} Judge Ervin found the majority's reliance on Baber to be unavailing because that case was decided on summary judgment, after the plaintiff had an opportunity to engage in discovery and present evidence of disparate treatment.\textsuperscript{126}

4. Analysis.—

a. Reconciling Narrow Congressional Intent with Broad Statutory Language.—Early Supreme Court jurisprudence suggested that, in the interest of preserving the spirit of the law, the letter of the law need

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 146 (Ervin, J., dissenting).
\textsuperscript{123} Id. (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).
\textsuperscript{124} Id.
\textsuperscript{125} Id.; see supra note 30 and accompanying text regarding Fed. R. Civ. P. 12(b)(6).
\textsuperscript{126} Vickers, 78 F.3d at 146 (Ervin, J., dissenting).
not necessarily be taken literally.\textsuperscript{127} However, contemporary Supreme Court statutory construction affords much greater deference to the statutory language itself. In a frequently cited example of the Court's position on interpretation of unambiguous statutory language, Justice Black wrote that when statutory provisions "are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act."\textsuperscript{128} Justice Black's opinion went on to note that legislators' comments during congressional discussions about a bill's enactment "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute."\textsuperscript{129}

In interpreting EMTALA's provisions, the federal circuit courts of appeals have expressed the belief that they are bound by the plain language of the statute's term "any individual."\textsuperscript{130} Despite unanimous recognition that EMTALA's purpose was to prevent hospital emergency rooms from dumping indigent or uninsured patients,\textsuperscript{131} the federal circuit courts of appeals have declined to interpret "any individual" as meaning "any indigent or uninsured individual."\textsuperscript{132}

The ambiguous phrase "appropriate screening examination" has afforded the courts more "wiggle room" within which to engage in statutory interpretation.\textsuperscript{133} In fact, the Sixth Circuit seized the opportunity this ambiguity afforded to incorporate the legislative purpose of preventing patient dumping into the meaning of the phrase. In Clelland v. Bronson Health Care Group, Inc.,\textsuperscript{134} the Sixth Circuit held that "appropriate medical screening" means "a screening that the hospital would have offered to any paying patient" and that "emergency medical condition" means a "condition within the actual knowledge of the doctors on duty or those doctors that would have been provided to

\textsuperscript{127} See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because [it is] not within its spirit, nor within the intention of its makers.").


\textsuperscript{129} Id.

\textsuperscript{130} See, e.g., Brooker v. Desert Hosp. Corp., 947 F.2d 412, 414 (9th Cir. 1991) ("The [EMTALA] . . . is not ambiguous as to the type of individuals covered. If a statute is clear and unequivocal on its face we need not resort to the statute's legislative history."); Gatewood v. Washington Healthcare Corp., 933 F.2d 1037, 1040 (D.C. Cir. 1991) ("[T]he Act's plain language unambiguously extends its protections to 'any individual' who seeks emergency room assistance. We conclude that we are bound by statutory language this clear, at least where, as here, it is not manifestly inconsistent with legislative intent." (citations omitted)).

\textsuperscript{131} See supra note 39 and accompanying text.

\textsuperscript{132} See supra notes 78-87 and accompanying text.

\textsuperscript{133} See supra notes 40-62 and accompanying text.

\textsuperscript{134} 917 F.2d 266 (6th Cir. 1990).
any *paying* patient." To date, no other circuit has followed the Sixth Circuit's lead in this regard.

Unfortunately, the Fourth Circuit adopted the broader of the two more commonly recognized interpretations of "appropriate medical screening," allowing objective evidence of community standards of care to be considered in determining whether an emergency room medical screening was appropriate. This liberal interpretation of the statutory language, combined with a nearly total disregard of legislative intent, culminated in the controversial outcome of *In re Baby K*. Among other criticisms of the *Baby K* decision, commentators have expressed concern that giving literal effect to EMTALA's broad language invites plaintiffs to overuse this federal cause of action. Others have remarked that EMTALA's language, as interpreted by the Fourth Circuit in *Baby K*, may "force physicians to act against their moral, ethical and professional standards," and may impermissibly intrude upon state law governing standards of medical care.

The Fourth Circuit's opinion in *Vickers* appears to be an attempt to extricate the court from the dilemma it has faced as the result of its history of broadly interpreting EMTALA's language and straying too far from the statute's purpose. In its five-page opinion, the majority referred to Congress's intention in enacting EMTALA on five separate occasions. However, the court avoided the need to address the wisdom of Congress's imprecise drafting or of its own broad interpreta-

135. *Id.* at 268-69 (emphasis added).
137. *See supra* notes 83-93 and accompanying text.
138. *See supra* notes 92-93 and accompanying text.
139. *See, e.g.*, Singer, *supra* note 43, at 119-21 (noting the risk that overuse of EMTALA by plaintiffs will flood the federal docket with what amounts to state malpractice and negligence claims, and will increase damage awards with the availability of both state and federal theories of recovery for the same injury).
141. *See Vickers*, 78 F.3d at 141 ("Under [Vickers's] reasoning, every claim of misdiagnosis could be recast as an EMTALA claim, contravening Congress' intention and this circuit's repeated admonition that EMTALA not be used as a surrogate for traditional state claims of medical malpractice."); *id.* at 142 ("Congress enacted EMTALA in 1986 'to address a growing concern with preventing "patient dumping," the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring them before emergency conditions were stabilized.'" (quoting Power v. Arlington Hosp. Ass'n, 42 F.3d 851, 856 (4th Cir. 1994))); *id.* at 144 (expressing concern about "subvert[ing] Congress' intent that EMTALA remain distinct from state malpractice law"); *id.* at 145 ("'It is enough for purposes of EMTALA that none of the evidence demonstrates an attempt . . . to "dump" [the patient].'" (alteration in original) (quoting Baber v. Hosp. Corp. of Am., 977 F.2d 872, 885 (4th Cir. 1992))); *id.* ("'Congress deliberately left the establishment of malpractice liability to state law.'" (quoting Brooks v. Maryland Gen. Hosp., Inc., 996 F.2d 708, 711 (4th Cir. 1993))).
tion of EMTALA by instead affirming the district court's dismissal of Vickers's EMTALA claim on a 12(b)(6) motion.142

b. Dismissal of Vickers's EMTALA Cause of Action on the Pleadings.—Rule 8 of the Federal Rules of Civil Procedure provides that, under the federal notice pleading system, "a pleading ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief."143 Rule 12(b)(6) provides for a pre-answer motion to dismiss for "failure to state a claim upon which relief can be granted."144 The Supreme Court addressed the circumstances in which a motion to dismiss on the pleadings should be granted in Conley v. Gibson.145 In Conley, the defendants moved for a 12(b)(6) dismissal based upon the plaintiff's failure to set forth specific facts in the complaint to support his general allegations.146 The Supreme Court held:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.147

The Supreme Court has also held that when considering a defendant's motion to dismiss the court must view the complaint's allegations in the light most favorable to the plaintiff.148 Several federal courts have applied the principals set forth in Conley and Scheuer to determine whether an EMTALA claim can withstand

142. See supra notes 114-121 and accompanying text.
143. FED. R. CIV. P. 8(a).
144. See FED. R. CIV. P. 12(b)(6).
146. Id. at 47.
147. Id. at 47-48 (footnotes omitted).
a 12(b)(6) motion. In *Ruiz v. Kepler*, the court held that the plaintiff had satisfied the pleading requirements for stating an EMTALA cause of action "by alleging he (1) went to defendant's emergency room (2) with an emergency medical condition, and defendant hospital either (3) did not adequately screen him to determine whether he had an emergency medical condition, or (4) discharged him before the emergency condition was stabilized." In dicta, the *Ruiz* court opined that an EMTALA plaintiff's burden of proving unequal treatment is an onerous one:

The hospital possesses records of similarly situated patients and plaintiff's access to those records would most likely be strongly opposed because of patient confidentiality. Thus, a hospital is in a more favorable position to show it did not treat the plaintiff differentially than is the plaintiff to show differential treatment.

In *Jones v. Wake County Hospital System, Inc.*, the same federal district court that dismissed Vickers's EMTALA cause of action considered a 12(b)(6) motion to dismiss a case with analogous facts and a complaint facially similar to that in *Vickers*. In *Jones*, an emergency room physician failed to identify a burn patient's sepsis during an initial examination. The patient was treated for his burns and released. Shortly thereafter, the patient developed septic shock, respiratory arrest, and renal failure, and died from cardiac arrest. The patient's administratrix filed an EMTALA claim and pendent state medical malpractice and negligence claims in federal district court against the hospital and two of its emergency room physicians. The complaint alleged that the hospital's physicians had failed to provide "an appropriate medical screening" and failed to "stabilize" the patient's "emergency medical condition." In *Jones*, the plaintiff's EMTALA cause of action survived the defendants' mo-

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150. *Id.* at 1447; see also *DeBerry v. Sherman Hosp. Ass'n*, 741 F. Supp. 1302, 1305 (N.D. Ill. 1990) (holding that an EMTALA plaintiff's complaint containing these same elements was sufficient to state a claim on which relief could be granted).
153. *Id.*
154. Sepsis is "the presence in the blood or other tissues of pathogenic microorganisms or their toxins." *Dorland's Illustrated Medical Dictionary* 1400 (25th ed. 1974).
156. *Id.*
157. *Id.*
158. *Id.* at 540-41.
159. *Id.* at 543.
tion to dismiss for failure to state a claim. The district court reasoned that the "plaintiff has alleged that Jones was not given the same medical screening examination that would be given to every other patient at Wake Medical Center. Thus, she must be given an opportunity to prove that Wake Medical Center deviated from its customary standard of care when it treated Jones." 

In the instant case, Vickers alleged that the decedent received "less screening . . . than those other patients presenting in this same medical condition received." Taken in the light most favorable to the plaintiff, this first cause of action alleges that the medical screening provided to Martin Vickers was less than that provided to other patients with a "severe scalp laceration." The Fourth Circuit wrongly assumed that the "same medical condition" to which the disparate screening claim referred was the patient's intracranial injury rather than his severe scalp laceration and faulted the plaintiff for "failure to take the actual diagnosis as a given." 

Without an opportunity to engage in discovery, Franklin Vickers was unlikely to have access to the specific facts that may have supported his allegation of disparate screening, such as the standard screening procedures that Nash General Hospital used with other patients presenting to the emergency room with severe scalp lacerations, and precisely how the hospital failed to uniformly apply that standard in Martin Vickers's case. Under a notice pleading system, he should not be required to state his complaint with such a high degree of particularity.

As to Vickers's second allegation, the Fourth Circuit concluded that EMTALA imposed no duty to stabilize the intracranial injury prior to discharge because Vickers's claim did not allege that Dr. Hughes had actually detected the intracranial injury. Taken in the light most favorable to the plaintiff, Vickers's second EMTALA complaint is an alternative allegation that if Dr. Hughes did not provide Martin Vickers with less screening than that provided to other patients with severe scalp lacerations, then he had determined that Martin Vickers had an emergency medical condition but failed to stabilize

160. Id. at 544.
161. Id.
162. Brief of Appellant at 8, Vickers (No. 95-1391).
163. See Brief of Appellees at 3, Vickers (No. 95-1391); Reply Brief of Appellant at 4, Vickers (No. 95-1391) (both defining the emergency medical condition for which the decedent allegedly received disparate screening as the "severe scalp laceration").
164. Vickers, 78 F.3d at 144.
165. Id. at 145.
that condition before discharging Vickers.\textsuperscript{166} Although this alternative allegation may have been inartfully pleaded, this misstep should not be decisive in defeating Vickers's claim before he had an opportunity, through discovery, to determine which of the two claims was best supported by the facts.

5. Conclusion.—The federal courts have struggled for a decade to reconcile the narrow purpose for which EMTALA was enacted with the statute's overly broad and ambiguous language.\textsuperscript{167} The Fourth Circuit's approach has been characterized by broad, literal construction of EMTALA's language and a relative disregard of Congress's intent in enacting the statute.\textsuperscript{168} This course has resulted in decisions that have been criticized for encouraging overuse and misuse of a federal cause of action to bring what often amounts to a state malpractice claim.\textsuperscript{169} In Vickers, the Fourth Circuit cut EMTALA plaintiffs off at the knees, not by altering the court's statutory interpretation, but by requiring an inappropriately high degree of factual specificity in an EMTALA plaintiff's complaint in order to state a claim upon which relief under EMTALA can be granted.

Therese M. Goldsmith

\textsuperscript{166} See Brief of Appellant at 12, \textit{Vickers} (No. 95-1391); see also \textit{Fed. R. Civ. P.} 8(a) (stating that "[r]elief in the alternative . . . may be demanded").

\textsuperscript{167} See supra notes 37-91 and accompanying text.

\textsuperscript{168} See supra notes 58-62, 80-91 and accompanying text.

\textsuperscript{169} See supra notes 92-93, 139-140 and accompanying text.
VI. Procedure

A. The Fourth Circuit Court of Appeals Holds Occasional Interstate Telephone Calls Insufficient to Sustain Personal Jurisdiction by a Maryland Court

In Stover v. O'Connell Associates,1 the United States Court of Appeals for the Fourth Circuit held that an out-of-state telephonic retention of a Maryland firm to conduct a criminal background check on a Maryland resident was an insufficient basis to sustain personal jurisdiction by a Maryland court.2 Concluding that the United States District Court for the District of Maryland did not have personal jurisdiction over the out-of-state defendant, the Fourth Circuit assumed that Maryland's long-arm statute authorizes personal jurisdiction to the limits allowed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.3 The Fourth Circuit held that subjecting O'Connell Associates—a New York firm—to suit in Maryland based on its occasional telephonic retention of Maryland firms over several years would contravene the Due Process Clause.4 This Note will argue that the Fourth Circuit properly affirmed the lower court's dismissal of the suit, but in reaching its conclusion, the Fourth Circuit assumed an interpretation of Maryland's long-arm statute that is inconsistent with the plain language of the law.

1. The Case.—In September 1992, Richard Stover (Stover), a Maryland resident, discovered that O'Connell Associates, Inc. (O'Connell), a New York private investigation firm, had requested and received information about his consumer credit history from Equifax Corporation, a consumer credit reporting agency.5 Stover suspected that O'Connell sought this information because of Stover's work on Ross Perot's 1992 presidential campaign.6

2. Id. at 137.
3. Id. at 135-36. The Fourteenth Amendment states, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.
4. Stover, 84 F.3d at 137.
5. Id. at 134.
6. Id. In April 1992, Stover began volunteering in the Frederick County, Maryland office of the Perot campaign. Brief of Defendant-Appellee at 5, Stover v. O'Connell Assocs., 84 F.2d 132 (4th Cir. 1996) (No. 94-1309). Lawrence Way served as the volunteer coordinator in the Frederick office of the Perot campaign. Id. at 4. Mark Blahnik, Manager of Field Operators for the National Perot Petition Committee in Texas, contacted the Callahan & Gibbons Group (Callahan) in late April 1992, after other Perot campaign volunteers working at the Frederick office expressed concerns about racist statements allegedly made by Lawrence Way. Id. The volunteers told Blahnik that they felt threatened by
O’Connell alleged that the Callahan & Gibbons Group (Callahan), a private investigation firm located in California, retained O’Connell to obtain the public information about Stover.7 In response to Callahan’s request, O’Connell used a computer in its New York office to obtain Stover’s name, address, birthdate, social security number, and place of employment from Equifax.8 O’Connell also placed a telephone call to Montgomery Investigative Services, Ltd. (Montgomery), a private investigation firm in Rockville, Maryland,9 to request Stover’s criminal record.10 In addition, O’Connell asked Montgomery to ascertain whether Stover had connections with the Ku Klux Klan or any other known white supremacist group.11 O’Connell then provided the information it obtained from Equifax and Montgomery to Callahan, O’Connell’s California client.12

Stover filed suit in the United States District Court for the District of Maryland alleging that “because consumer credit reports may be furnished only for limited purposes,” O’Connell had violated the federal Fair Credit Reporting Act,13 the Maryland statute regulating consumer credit reporting agencies,14 and Stover’s common law right to privacy.15 Stover asked for compensatory damages in the amount of $50,000 and punitive damages in the amount of $100,000.16

Way’s statements and that they believed Way was affiliated with the Ku Klux Klan. Id. Blahnik asked Callahan to investigate the matter, which may have prompted Callahan to also conduct an investigation on Stover. Id.

7. See Brief of Defendant-Appellee at 5, Stover (No. 94-1309).
8. Stover, 84 F.3d at 134.
10. Stover, 84 F.3d at 134. O’Connell asserted that Montgomery limited its criminal background check to public court records in Maryland. Id.; see also Stover, 1994 WL 146794, at *3 (citing Montgomery’s affidavit, which alleged that the criminal background check of Stover was limited to public court records in Maryland).
11. Stover, 84 F.3d at 134.
12. Id.
13. 15 U.S.C. §§ 1681-1693 (1994). Under federal law, consumer credit reports may not be issued to a third party unless in response to a court order or to a person who intends to use the information for the following purposes: extending credit, employment decisions, underwriting insurance, eligibility for a license or government benefit, or other legitimate business reason. Id. § 1681(b). Maryland’s consumer credit reporting law is identical to the federal law in this respect. See Md. Code Ann., Com. Law II §§ 14-1202(a) (1996).
15. Stover, 1994 WL 146794, at *1; see also Stover, 84 F.3d at 134.
16. Stover, 84 F.3d at 134.
Pursuant to Federal Rule of Civil Procedure 12(b)(2), O'Connell filed a motion in the district court to dismiss the complaint, asserting that the firm was not subject to personal jurisdiction in Maryland. At the outset, the district court noted that it could not assert in personam jurisdiction over O'Connell unless the firm had certain "minimum contacts" with Maryland "such that 'the maintenance of the suit [did] not offend traditional notions of fair play and substantial justice.'"

The district court took note, however, of the "dearth of contacts" O'Connell had with the State of Maryland. The district court found that O'Connell, incorporated in New York, also maintained its primary place of business in New York. Further, O'Connell was not a licensed business in Maryland, had no agent for service of process in Maryland, and maintained no "bank accounts, telephone listings, office space, agents, employees or corporate officers in Maryland." Finally, the district court noted that O'Connell did not advertise, solicit, promote business, provide services, or derive revenue from Maryland.

Following O'Connell's challenge to the court's jurisdiction, the district court held that the burden shifted to Stover to establish a factual basis to support the exercise of in personam jurisdiction. Stover offered two theories: general and specific jurisdiction. In urging

17. Federal Rule 12 sets out procedural defenses and objections that a defendant may raise. Rule 12(b)(2) provides the defense of "lack of jurisdiction over the person." Fed. R. Civ. P. 12(b)(2).
18. Stover, 84 F.3d at 134.
19. In personam jurisdiction allows a court to "enter a judgment imposing obligations on persons." Hanson v. Denckla, 357 U.S. 235, 246 (1958). In personam jurisdiction is distinguished from quasi in rem jurisdiction, which concerns a court's power over a person's interest in property, and in rem jurisdiction, which pertains to a court's power over the property itself. See generally BLACK'S LAW DICTIONARY 791 (6th ed. 1990).
21. Id.
22. Id.
23. Id.
24. Id.
25. Id. at *2.
26. Id. The court noted that "[g]eneral jurisdiction applies to situations in which there is no relationship between the defendant's contacts with the forum and the facts underlying the cause of action. In such instances, courts may exercise jurisdiction over the defendant if its contacts are 'extensive, continuous and systematic.'" Id. (citing Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984); Goodyear Tire & Rubber Co. v. Ruby, 312 Md. 413, 422-23, 540 A.2d 482, 486 (1988)). By contrast, specific jurisdiction is applicable when the cause of action arises out of or is related to the defendant's contacts with the forum, and "[e]ven a single contact may be sufficient to permit the exercise of specific jurisdiction when the cause of action arises out of that single contact, provided that
the district court to assert general jurisdiction over O'Connell, Stover pointed to O'Connell's ongoing "relationship" with Montgomery, employing Montgomery to obtain investigative reports on various persons over the last several years.\(^{27}\) The district court rejected this argument, however, holding that O'Connell's past dealings with Maryland investigative firms were "not so extensive, continuous and systematic as to sustain this Court's general jurisdiction."\(^{28}\) Therefore, the district court determined, Stover's claim must rest on specific jurisdiction to survive the motion to dismiss.\(^{29}\)

To persuade the district court that an exercise of specific jurisdiction was appropriate, Stover argued that an agency relationship existed between O'Connell and Montgomery, whereby Montgomery's actions, performed under the direction of O'Connell, "formed the basis for the violations which necessitated the institution of the present action."\(^{30}\) The district court rejected this argument as inconsistent with the factual record of the case.\(^{31}\) The district court held that "the undisputed record indicate[d] that [O'Connell had not hired] Montgomery [to] seek information about Stover's credit history from Equifax."\(^{32}\) Rather, evidence suggested that O'Connell had obtained the information itself in New York, via computer. Thus, the district court held that Stover's fair credit and related claims did not arise from Montgomery's conduct in Maryland, but instead, from "O'Connell's conduct in New York,"\(^{33}\) and granted O'Connell's motion to dismiss for lack of personal jurisdiction.\(^{34}\)

The Fourth Circuit agreed to review the district court's ruling as to whether Maryland courts may exercise personal jurisdiction over a

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27. Id. John O'Connell, President of O'Connell Associates, admitted that his company had, over the last several years, "engaged Maryland investigations agencies to review public court records in Maryland regarding various persons, including [Stover]." Id.
28. Id.
29. Id.
30. Id.
31. Id. at *3.
32. Id. In his affidavit, John O'Connell asserted that O'Connell, itself, had made the request to Equifax by means of a computer located in its New York offices—not through Montgomery. Id. Lending support to John O'Connell's statement, Daniel Frishkorn, president of Montgomery Investigative Services, stated in his affidavit that the assignment sheet accompanying O'Connell's inquiry for information on Stover did not include a request for a "financial/asset check." Id. Further, Montgomery billed O'Connell only for the criminal inquiry. Id.
33. Id.
34. Id.
New York company whose only connection with Maryland was its occasional telephonic retention of Maryland investigation companies to provide information on Maryland residents.\textsuperscript{35}

2. Legal Background.—

\textit{a. Maryland's Long-Arm Statute and Previous Interpretations.}\textemdash Federal and Maryland courts have disagreed over whether Maryland's long-arm statute authorizes personal jurisdiction to the extent allowed by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{36} In \textit{Beaty v. M.S. Steel Co.},\textsuperscript{37} the Fourth Circuit held that a Maryland court may not exert personal jurisdiction over an out-of-state defendant unless the state's long-arm statute permits it to do so.\textsuperscript{38} In \textit{Beaty}, the appellants had argued that personal jurisdiction need only satisfy the requirements of the Due Process Clause before a court may establish personal jurisdiction over a defendant.\textsuperscript{39} The Fourth Circuit rejected this argument, holding that due process issues do not arise "unless a federal statute or a state statute or rule of court authorizes an assertion of jurisdiction over [an] out-of-state defendant."\textsuperscript{40}

Further, the Fourth Circuit held that Maryland's long-arm statute did not authorize personal jurisdiction in the situation contested in the suit.\textsuperscript{41} Of particular significance was the Fourth Circuit's interpret-

\textsuperscript{35} \textit{Stover}, 84 F.3d at 134.
\textsuperscript{36} Maryland's long-arm statute states, in pertinent part:
\begin{itemize}
\item[(a)] \textit{Condition.}—If jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.
\item[(b)] \textit{In general.}—A court may exercise personal jurisdiction over a person, who directly or by an agent:
\begin{itemize}
\item[(3)] Causes tortious injury in the State by an act or omission in the State;
\item[(4)] Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State ....
\end{itemize}
\end{itemize}
\textsuperscript{37} \textit{Ident.} at 159.
\textsuperscript{38} \textit{Id.} at 161.
\textsuperscript{39} \textit{Id.} at 159.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
tation of section 6-103(b)(4) of Maryland's long-arm statute. The appellants in *Beaty* argued that the court could exercise personal jurisdiction over any out-of-state defendant that caused a tortious injury in the state. In support of this proposition, the appellants relied on case law interpreting the Illinois long-arm statute. The Fourth Circuit rejected the appellant's argument, interpreting Maryland's long-arm statute as "requiring ... some other reasonable connection between the state and the defendant besides the single out-of-state act." The Fourth Circuit interpreted the Maryland statute's additional requirements of regular business activity or other persistent conduct in Maryland as requiring more forum-related activity than is necessary under the Due Process Clause. Although not holding so directly, the *Beaty* court implied that Maryland's long-arm statute did not extend personal jurisdiction to the limits allowed by the Due Process Clause of the Fourteenth Amendment.

In *Craig v. General Finance Corp.*, the United States District Court for the District of Maryland stated that the interpretation of Maryland's long-arm statute was governed by the decisions of the Maryland Court of Appeals. The district court, however, expressly stated that Maryland's long-arm statute was more limited than the Due Process Clause allows. In particular, the court said that sections 6-103(b)(3) and (b)(4) of the long-arm statute were not "coterminous with due process."

The conclusions about the proper interpretation of the statute reached in *Beaty* and *Craig*, however, are contradicted by a line of Maryland cases. In *Geelhoed v. Jensen*, which was decided between *Beaty* and *Craig*, the Maryland Court of Appeals noted that Maryland's "long arm statute represents an effort by the Legislature to expand the

42. See supra note 36. Although *Beaty* was decided in 1968, the wording of section 6-103(b)(4) of the long-arm statute has remained essentially the same. See *Beaty*, 401 F.2d at 159.
43. *Beaty*, 401 F.2d at 159.  
44. *Id.*  
45. *Id.* In addition to requiring a tortious injury in the state or outside of the state by an act or omission outside of the state, the statute requires the defendant to engage "in any other persistent course of conduct in the State." Md. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(4).  
46. See *Beaty*, 401 F.2d at 159 & n.3.  
47. See *id.* at 160 (stating that the statute requires an independent connection with the state before jurisdiction can be asserted).  
49. *Id.* at 1036.  
50. *Id.*  
51. *Id.*  
boundaries of permissible in personam jurisdiction to the limits permitted by the Federal Constitution.\textsuperscript{58} In \textit{Mohamed v. Michael},\textsuperscript{54} the Maryland Court of Appeals reaffirmed the \textit{Geelhoed} decision.\textsuperscript{55} The Fourth Circuit finally adopted this interpretation of the long-arm statute in 1993.\textsuperscript{56} In \textit{Ellicott Machine Corp. v. John Holland Party Ltd.}, the Fourth Circuit held that the two-step inquiry of first determining whether jurisdiction is authorized by statute and then determining if jurisdiction comports with due process “merges into one.”\textsuperscript{57} The Fourth Circuit, in \textit{Stover}, took notice of the conflicting interpretations of the state's long-arm statute, but proceeded under the assumption that Maryland law authorizes personal jurisdiction to the extent allowed by the Fourteenth Amendment.\textsuperscript{58}

\textit{b. Constitutional Due Process Limitations of Personal Jurisdiction.}—Supreme Court jurisprudence of personal jurisdiction is rooted in the seminal case of \textit{Pennoyer v. Neff}.\textsuperscript{59} According to the \textit{Pennoyer} Court, “the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”\textsuperscript{60} Therefore, the Court laid down the principles that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and, conversely, that “no State can exercise direct jurisdiction and authority over persons and property without its territory.”\textsuperscript{61} The central holding of the case, however, was that a court violates the Due Process Clause of the Fourteenth Amendment if it overreaches its jurisdictional authority.\textsuperscript{62}

\textsuperscript{53} \textit{Id.} at 224, 352 A.2d at 821.
\textsuperscript{54} 279 Md. 653, 370 A.2d 551 (1977).
\textsuperscript{55} \textit{Id.} at 657, 370 A.2d at 553; \textit{see also} Camelback Ski Corp. v. Behning, 307 Md. 270, 274, 513 A.2d 874, 876 (1986) (noting that when enacting the long-arm statute, the legislature intended to expand personal jurisdiction to the limits allowed by the Due Process Clause).
\textsuperscript{56} \textit{See} Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 477 (4th Cir. 1993) (concluding that “the Maryland legislature designed its long-arm statute to extend personal jurisdiction to the limits allowed by federal due process”); \textit{see also} Lesnick v. Hollingsworth & Vose Co., 35 F.3d 989, 940 (4th Cir. 1994) (stating that Maryland authorizes long-arm jurisdiction to the full extent allowed by the Due Process Clause).
\textsuperscript{57} \textit{Ellicott Mach. Corp.}, 995 F.2d at 477.
\textsuperscript{58} \textit{Stover}, 84 F.3d at 135 n.* (“Were we to read Maryland’s long-arm statute naturally, we might question the Maryland courts’ interpretation, at least with respect to the constitutional limits of specific jurisdiction. . . . In any event, we shall assume that Maryland’s long-arm statute reaches the limits of due process.” (citations omitted)).
\textsuperscript{59} 95 U.S. 714 (1877).
\textsuperscript{60} \textit{Id.} at 720.
\textsuperscript{61} \textit{Id.} at 722.
\textsuperscript{62} \textit{Id.} at 733.
The Court substantially modified the rule laid down in Pennoyer—requiring the physical presence of the defendant in the forum state before a court could exercise personal jurisdiction—in International Shoe Co. v. Washington. According to the International Shoe Court, if a person or corporation was not physically present in the state, jurisdiction over the person or corporation could still be achieved so long as there were "certain minimum contacts" between the defendant and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Explaining the test set forth in its decision, the Court noted that "the boundary line between those activities which justify the subjecting of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." In determining whether the Due Process Clause is satisfied, a court should examine "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." The Court held that the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."

The "minimum contacts" test formulated in International Shoe received a resounding endorsement in McGee v. International Life Insurance Co. In that case, the Court noted that the minimum contacts test of International Shoe was proper since the nation's economic transformation allowed business transactions to be conducted across state lines with relative ease.

The Court further refined the minimum contacts test in Hanson v. Denckla. The Hanson case concerned the appointees' and beneficiaries' rights to the proceeds of a trust established in Delaware by a settlor who resided in Pennsylvania at the time the trust was created.

63. 326 U.S. 310 (1945).
64. Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
65. Id. at 319.
66. Id.
67. Id.
69. Id. at 222-23. Taking note of the fact that the insurance contract at issue in McGee was delivered to the plaintiff in California, that the premiums were mailed from California to the insurance company in Texas, and that the plaintiff's beneficiary was a resident of California, the Court held that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [California]." Id. at 223. Under these circumstances, the Court reasoned that the insurance company "had no vested right not to be sued in California." Id. at 224.
but later became domiciled in Florida.\textsuperscript{71} When the settlor died, one group of claimants maintained that the trust proceeds passed under the residuary clause of the settlor’s will, which was admitted to probate in Florida.\textsuperscript{72} These claimants brought suit in a Florida chancery court for a declaratory judgment concerning what property had passed under the residuary clause of the settlor’s will.\textsuperscript{73} The Florida court held that the trust proceeds had passed under the residuary clause of the will.\textsuperscript{74} The second group of claimants, however, contended that the trust proceeds passed pursuant to the settlor’s exercise of a power of appointment created in the deed of trust.\textsuperscript{75} This group of claimants brought suit in Delaware for a declaratory judgment to determine who was entitled to participate in the trust assets.\textsuperscript{76} The Delaware court refused to give full faith and credit to the Florida court decision on the ground that Florida had no personal jurisdiction over the Delaware trust companies, which were acting as trustees for the trust.\textsuperscript{77}

In deciding the case, the Court noted that the first relationship Florida had to the contested trust agreement executed in Delaware was established when the settlor voluntarily moved from Pennsylvania to Florida.\textsuperscript{78} The Court held that “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State;” rather, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\textsuperscript{79}

The Court next addressed the law of personal jurisdiction in \textit{World-Wide Volkswagen Corp. v. Woodson}.\textsuperscript{80} In that case, the owners of an automobile brought a products liability suit in Oklahoma after they became involved in an accident in Oklahoma that caused severe injuries to several passengers.\textsuperscript{81} The plaintiffs named as defendants the automobile’s manufacturer, importer, regional distributor, and retail

\textsuperscript{71} Id. at 238-39.
\textsuperscript{72} Id. at 240.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 242-43.
\textsuperscript{75} Id. at 242.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 243.
\textsuperscript{78} See id. at 252.
\textsuperscript{79} Id. at 253. Therefore, because it was the settlor who initiated the contact with Florida by voluntarily moving there, and not the Delaware trust companies, the Court held that Florida could not exercise personal jurisdiction over the trust companies. Id. at 255.
\textsuperscript{80} 444 U.S. 286 (1980).
\textsuperscript{81} Id. at 288.
dealer. The regional distributor, incorporated in New York, distributed vehicles to retail dealers in New York, New Jersey, and Connecticut. The retail dealer was incorporated and conducted business in New York. Applying the relevant precedent, the Court found "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." The Court listed five factors that it would consider when deciding whether a court reasonably asserted personal jurisdiction over an out-of-state defendant. These five factors were: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies."

Rejecting the plaintiff's arguments based on the foreseeability of the product entering the forum state, the Court held that personal jurisdiction is appropriate when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In support of its holding, the Court noted that the exercise of personal jurisdiction under the Due Process Clause should allow "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

In Helicopteros Nacionales de Columbia v. Hall, the Court clarified the concepts of specific and general jurisdiction. When a state asserts personal jurisdiction over a defendant in a cause of action arising out of, or related to, the defendant's forum state contacts, the state is exercising specific jurisdiction over the defendant. If the state at-

82. Id.
83. Id. at 288-89.
84. Id. at 289.
85. Id. at 295. The Court noted that the regional and retail dealers conducted no business in Oklahoma, stating: "They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State." Id.
86. Id. at 292.
87. Id.
88. Id. at 297.
89. Id.
91. Id. at 414.
92. Id. at 414 n.8.
tempts to exercise personal jurisdiction over the defendant in a cause of action unrelated to the defendant's forum state contacts, the state is exercising general jurisdiction. The distinction is crucial because the assertion of general jurisdiction requires substantial contacts by the defendant to the forum state, whereas specific jurisdiction may be sustained even if the contacts between the defendant and the forum state were sporadic.

In *Burger King Corp. v. Rudzewicz*, the Court identified several factors a court should take into account when determining if personal jurisdiction can be asserted. The case involved a suit filed in Florida by Burger King, a Florida company, against one of its franchisees, a Michigan resident, for breach of the franchise agreement. The contract establishing the franchise relationship was established in Florida, with provisions stating that Florida law would control future disputes and directives for the franchisee to forward required fees and relevant notices to Burger King's Miami headquarters. Taking note of the franchise agreement, the Florida choice-of-law provision contained in the agreement, and the requirement to send all payments and notices to Burger King's Florida headquarters, the Court determined that Florida could exercise personal jurisdiction over Rudzewicz. According to the Court, Rudzewicz could be held liable to suit in Florida because he "established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair."

Finally, in *Calder v. Jones*, the Court considered whether actress Shirley Jones could bring suit in California against the *National Enquirer*, and a reporter and an editor of the newspaper, for libel and defamation. Both the reporter and editor challenged the suit, claiming that California did not have personal jurisdiction over them because both resided in Florida and had researched and written the

93. Id. at 414 n.9.
94. See Jack H. Friedenthal et al., Civil Procedure § 3.10, at 124 (2d ed. 1993); see also Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (holding that forum state contacts must be sufficiently substantial in order to permit personal jurisdiction when the cause of action is unrelated to the defendant's activities in the state).
96. Id. at 464-68.
97. Id. at 463-64.
98. Id. at 478-82.
99. Id. at 487.
101. Id. at 784-86.
article primarily in Florida. In deciding the issue, the Court noted that more copies of the National Enquirer were sold in California than in any other state. Because the article was intentionally written to impugn the reputation of "an entertainer whose television career was centered in California," the Court held that the defendants targeted their intentional acts toward California and knew the article's impact would fall disproportionately on that state. As such, the Court held that "jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California."

It is against this legal background that the United States Court of Appeals for the Fourth Circuit considered Stover v. O'Connell Associates.

3. The Court's Reasoning.—In affirming the district court's decision, the Fourth Circuit declared that a challenge to personal jurisdiction requires a court, first, to consider whether the long-arm statute of the state authorizes the exercise of jurisdiction over the defending party and, if so, to then determine whether the exercise of personal jurisdiction satisfies the Due Process Clause of the Fourteenth Amendment. Consequently, the Fourth Circuit began its analysis by examining whether Maryland's long-arm statute authorized jurisdiction over O'Connell.

In support of his argument that the district court could assert personal jurisdiction over O'Connell, Stover relied on two sections of Maryland's long-arm statute. The Fourth Circuit rejected Stover's argument that the long-arm statute allowed personal jurisdiction because O'Connell caused injury in Maryland by an act that occurred in the state. The court conceded that O'Connell may have caused Stover injury in Maryland, but agreed with the district court's determinations.

102. Id.
103. Id. at 783.
104. Id. at 788-90.
105. Id. at 791.
106. Stover, 84 F.3d at 134.
107. Id. at 135.
108. Id. Stover relied on sections 6-103(b)(3) and (b)(4) of the Courts and Judicial Proceedings Article of the Maryland Code. Section 6-103(b)(3) allows a Maryland court to exercise jurisdiction over a person, who directly or by agent "causes tortious injury in the State by an act or omission in the State." Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(3) (1995). Section 6-103(b)(4) allows a Maryland court to exercise jurisdiction over a person, who directly or by agent "causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, [or] engages in any other persistent course of conduct in the State . . . ." Id. § 6-103(b)(4).
109. Stover, 84 F.3d at 135.
nation that the injury-causing acts occurred outside of the state. According to the Fourth Circuit, O'Connell’s conduct—obtaining information about Stover from Equifax and placing a telephone call to a Maryland investigation firm to request a survey of Stover’s criminal background—occurred “entirely in New York state.” Relying on Mylan Laboratories, Inc. v. Akzo, the court refused to allow Stover to attribute the activities of Montgomery to O’Connell pursuant to agency theory because O’Connell did not exercise control over Montgomery’s business practices.

After rejecting Stover’s first argument, the Fourth Circuit addressed Stover’s contention that Maryland’s long-arm statute authorized personal jurisdiction because, although O’Connell caused injury in Maryland by an act outside of the state, O’Connell engaged in a “persistent course of conduct in the State.” Noting that Maryland’s long-arm statute was “coterminous with the limits of the Due Process Clause,” the court initiated a constitutional inquiry.

Addressing the constitutional issue, the Fourth Circuit proceeded with a summary of relevant Supreme Court precedent on the due process requirements for personal jurisdiction. Relying primarily on International Shoe, Hanson, Helicapteros Nacionales, and Burger King, the court concluded that asserting jurisdiction over O’Connell would violate the Due Process Clause of the Fourteenth Amendment.

According to the Fourth Circuit, O’Connell’s request to Equifax did not create a connection with Maryland because it was unclear...

110. Id.
111. Id.
112. 2 F.3d 56 (4th Cir. 1993). In Mylan Laboratories, the Fourth Circuit developed an agency test for personal jurisdiction purposes. See id. at 61. Under the test, actions of a subsidiary corporation could be attributed to a foreign parent corporation “only if the parent exerts considerable control over the activities of the subsidiary.” Id.
113. Stover, 84 F.3d at 135.
114. Id.
115. Id. at 135-36.
116. Id. at 136.
117. Id.
118. See supra notes 68-67 and accompanying text.
119. See supra notes 70-79 and accompanying text.
120. 466 U.S. 408, 417 (1984) (“[P]urchases and related trips, standing alone, are not a sufficient basis for a State’s assertion of jurisdiction.”); see supra notes 90-93 and accompanying text.
121. 471 U.S. 462, 475 (1985) (“Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum State.” (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957))); see supra notes 95-99 and accompanying text.
122. Stover, 84 F.3d at 137.
from the record "where Equifax stored that information or where Equifax is located." O'Connell's telephone call to Montgomery requesting a criminal check also did not create a sufficient connection because "[o]rdering a product or service by telephone from a company in a different state does not subject the customer to that state's jurisdiction." While conceding that a telephone call does transport the caller into the state of the person being called, the court held, nonetheless, that a phone call does not establish a caller's "presence in that jurisdiction." Finally, the Fourth Circuit rejected Stover's argument based on Calder v. Jones, describing the conduct of the Calder defendants as completely different in "magnitude." Characterizing O'Connell's conduct as "occasional telephonic requests for information from Maryland-based investigation services over a period of years," the Fourth Circuit held that the firm could not have expected to defend its actions in the State of Maryland.

4. Analysis.—

a. Misreading Maryland's Long-Arm Statute.—In Stover, the Fourth Circuit assumed that Maryland's long-arm statute authorizes personal jurisdiction to the limits allowed under the Due Process Clause of the Fourteenth Amendment. In so assuming, the Fourth Circuit based its holding on a dubious interpretation of Maryland's long-arm statute. Section 6-103(b)(4) of the statute allows personal jurisdiction if an out-of-state defendant causes a tortious injury in the state, but only if the defendant also "regularly does or solicits business, [or] engages in any other persistent course of conduct" in Maryland. The Supreme Court has held that a tortious act is sufficient under due process to allow for an exercise of personal jurisdiction if the cause of action arises out of, or is related to, contacts with the forum-state. A plain reading of this section of the statute, however, clearly indicates that greater contacts than the tortious act itself are

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123. Id. at 136.
124. Id. at 137.
125. Id.
126. See supra notes 100-105 and accompanying text.
127. Stover, 84 F.3d at 137.
128. Id.
129. See supra note 115 and accompanying text.
131. See Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 414 nn.8-9 (1984); see also Friedenthal et al., supra note 94, at 129 (stating that a single act may be sufficient provided that the cause of action arises out of that act).
required before the state may exercise personal jurisdiction over the out-of-state defendant.

In Beaty v. M.S. Steel Co., the Fourth Circuit noted that Maryland's long-arm statute was patterned after the Uniform Interstate and International Procedure Act.\textsuperscript{132} In a footnote, the Beaty Court included a quotation from one of the drafters of Wisconsin's long-arm statute, which was also patterned after the Uniform Interstate and International Procedure Act.\textsuperscript{133} According to the drafter, language was deliberately included in the statute to make clear that it did not approach the "'outer limits permissible under the Fourteenth Amendment.'"\textsuperscript{134} Although, in Stover, the Fourth Circuit took note of this alternative interpretation of the long-arm statute, the court proceeded under the assumption that the statute authorized jurisdiction to the extent allowed by the Due Process Clause.\textsuperscript{135} This assumption contradicts Beaty, conflicts with the plain language of the statute, and allows Maryland courts to bypass the inquiry of whether Maryland's long-arm statute permits personal jurisdiction and to proceed directly to the due process inquiry.

Any difference in the plain language of a statute and the judicial interpretation of that statute creates uncertainty for those seeking to order their affairs in Maryland. As the Supreme Court emphasized in World-Wide Volkswagen, due process considerations require that there exist "'predictability' in a state's legal system so that potential defendants can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."\textsuperscript{136} This degree of predictability is lacking under the current state of the law in Maryland. In this world of ever-growing interconnectedness, the Maryland General Assembly should clarify the reach of the state's long-arm statute.

b. Court Made Proper Decision Using Due Process Analysis.—Notwithstanding the Fourth Circuit's questionable use of a straight due process analysis, the court correctly analyzed the facts of Stover under the Due Process Clause for several reasons. A Maryland court could not, consistent with the Due Process Clause, exercise specific

\textsuperscript{132} See 401 F.2d 157, 159 (4th Cir. 1968).
\textsuperscript{133} Id. at 159 n.3.
\textsuperscript{134} Id. (quoting Foster, Judicial Economy: Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts, An Address to the Thirty-eighth Judicial Conference of the Fourth Circuit, 1968).
\textsuperscript{135} Stover, 84 F.3d at 135 n.* (noting that the plain language of section 6-103(b)(4) seems "to require greater contacts than the specific jurisdiction jurisprudence requires").
\textsuperscript{136} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
jurisdiction over O'Connell. As noted earlier, specific jurisdiction is proper if the cause of action arises out of the defendant's contacts with the forum state.\textsuperscript{137} In \textit{Stover}, O'Connell's contact with Maryland consisted of a single telephone call to Montgomery requesting a criminal background check.\textsuperscript{138} Stover sued O'Connell, however, for violations of federal and state credit reporting laws.\textsuperscript{139} Stover also sued O'Connell for a violation of his common law right to privacy.\textsuperscript{140} Yet the district court, in dismissing Stover's complaint for want of specific jurisdiction, found that Stover's privacy complaint was based on O'Connell's alleged credit reporting violations, not on its retention of Montgomery to perform a criminal background check from public court records in Maryland.\textsuperscript{141} It is clear, therefore, that specific jurisdiction was inappropriate because Stover's causes of action did not derive from, or arise out of, O'Connell's contact with Maryland.

The Fourth Circuit was also correct in holding that general jurisdiction over O'Connell was improper. To reach its holding, the Fourth Circuit correctly interpreted and applied Supreme Court precedent. Under \textit{International Shoe}, O'Connell, as an out-of-state defendant, would be subject to suit in Maryland only if the firm had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"\textsuperscript{142} Under \textit{Hanson}, Stover needed to show that O'Connell "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."\textsuperscript{143} Further, under \textit{World-Wide Volkswagen}, O'Connell's activities and contacts with Maryland needed to be of the variety that the firm "should reasonably anticipate being haled into court there."\textsuperscript{144} Even though the Supreme Court lowered the personal jurisdiction threshold in \textit{International Shoe} because of the increasing demands of interstate commerce and the multi-state activities of corporations, the Fourth Circuit was correct in noting that the post-\textit{Pennoyer} tests for establishing presence in a state were "never intended to reorder the

\textsuperscript{137} See supra note 92 and accompanying text.
\textsuperscript{138} \textit{Stover}, 84 F.3d at 134.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{143} \textit{Hanson v. Denckla}, 357 U.S. 235, 253 (1958).
\textsuperscript{144} \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 297 (1980).
concepts of state sovereignty which form the basis of the Constitution's due process guarantee."145

Given these jurisdictional hurdles, O'Connell's one telephone call to Montgomery to request a criminal background check was clearly insufficient to sustain personal jurisdiction. If a telephone call from one state to another were sufficient to sustain personal jurisdiction in the state where the call was received, the concept of sovereignty inherent in personal jurisdiction would be a nullity. If a telephone call were sufficient to establish adequate contacts for jurisdictional purposes, any person who called another state would, in effect, be appointing her telephone as her agent for service of process and her amenability to suit would travel wherever she placed a call. Such a concept could not be in accord with the requirements of the Due Process Clause, as interpreted by the Supreme Court.146

Finally, the Fourth Circuit correctly refused to apply Calder v. Jones147 to Stover's claim. As the court noted, Calder can be distinguished from Stover by the magnitude of the contacts involved.148 In Calder, the National Enquirer printed a defamatory article knowing it would be read by 600,000 California residents and would result in substantial harm to the plaintiff in California.149 In Stover, the public records concerning Stover's criminal background were to be disclosed to one entity—O'Connell's California client that requested the information.150 To compare the harm suffered by the plaintiff in Calder to the harm allegedly suffered by Stover is implausible.

Although the Fourth Circuit did not address this matter, Calder and Stover can also be distinguished based on the intent of the defendants. In Calder, the Court grounded its holding, in part, on the defendant's intentional conduct and its harm to the plaintiff.151 In Stover, it was not alleged that the information O'Connell obtained about Stover (all of it public information) was sought with the intent of harming Stover.

145. Stover, 84 F.3d at 136.
146. See World-Wide Volkswagen, 444 U.S. at 293 ([W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").
147. See supra notes 126-127 and accompanying text.
148. Stover, 84 F.3d at 137 (noting the differences in the facts and the magnitude of the harm of the two cases).
150. Stover, 84 F.3d at 134.
5. Conclusion.—In affirming the district court’s dismissal of Stover’s suit against O’Connell for lack of personal jurisdiction, the United States Court of Appeals for the Fourth Circuit accepted a questionable interpretation of Maryland’s long-arm statute, but reached the correct decision based on a due process analysis consistent with Supreme Court precedent. Subjecting O’Connell to suit in Maryland based on its telephonic contact with the state would have rendered meaningless the sovereignty component of personal jurisdiction that the Supreme Court has consistently maintained is protected by the Due Process Clause of the Fourteenth Amendment.

Stephen E. Jones
VII. Torts

A. Extending a New Form of Absolute Immunity from Tort Liability to Government Contractors

In Mangold v. Analytic Services, Inc., the United States Court of Appeals for the Fourth Circuit created a new form of federal absolute immunity. The court held that a government contractor and its employees were "absolutely immune from state tort liability based on any statements made and information given in response to queries made in the course of [an] Air Force[ ] investigation." With this ruling, the court effectively bridged the gap between two similar but separate immunities that support each form of absolute privilege based on solid policy foundations.

1. The Case.—In the summer of 1993, the Air Force Office of Special Investigations and the Inspector General launched an official investigation into the activities of Colonel Sanford D. Mangold, head of the Air Force's Resource Allocation team at the Pentagon. The investigation, led by Air Force Brigadier General Raymond Huot, focused on allegations that Colonel Mangold "improperly exerted his influence to pressure a government contractor . . . to hire a Mangold family friend," Betsy Worrell, to provide consulting services to the Air Force's Resource Allocation team.

As part of the investigation, General Huot and his staff questioned executive officers of the contractor, Analytic Services, Inc. (ANSER). Three of ANSER's executives responded to the questions and "presented cassette tapes of telephone messages left by Colonel Mangold on ANSER's telephone answering machine in November and December 1992." ANSER's Chief Executive Officer, Dr. John M. Fabian, told General Huot that Colonel Mangold requested the use of ANSER's consulting services in the fall of 1992 and that "Mangold suggested that ANSER hire Mrs. Worrell to provide those services." Dr. Fabian told Colonel Mangold that Worrell did not meet the minimum

1. 77 F.3d 1442 (4th Cir. 1996).
2. See id. at 1449-50.
3. Id. at 1450.
4. Id. at 1444.
5. Id.
6. Id. ANSER is a private company that contracts with the U.S. government to provide engineering, analysis, and consultative services concerning government acquisitions. Id.
7. Id.
8. Id.
requirements for the job. However, Colonel Mangold implied that whether or not his team used ANSER's services hinged directly on ANSER's decision to employ Worrell. Paul Adler, ANSER's vice president, confirmed Dr. Fabian's testimony, and the transcripts of Colonel Mangold's telephone messages corroborated the statements of both men. When ANSER refused to hire Worrell, "[Colonel] Mangold canceled the Air Force's request for contract support from ANSER." Colonel Mangold's immediate subordinate, Lieutenant Colonel James Rooney, reported the Colonel's actions to superior officers, prompting the internal Air Force investigation of the Colonel's dealings with ANSER. The Air Force subsequently transferred Colonel Mangold "from his position as head of the Resource Allocation team." Colonel Mangold and his wife later filed a complaint against ANSER, its executives, and Lieutenant Colonel Rooney in state court in Virginia. Lieutenant Colonel Rooney removed the case to federal court, and "the United States substituted itself for Lt. Col. Rooney as the party defendant." The United States moved for summary judg-

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9. Id. at 1444-45. To provide the services requested by Colonel Mangold, ANSER required that the candidate possess a college degree—a qualification that Mrs. Worrell did not possess. Id. at 1445.
10. Id. at 1444.
11. Id. at 1445.
12. Id.
13. Id.
14. Id.
15. Id. The Mangolds filed the complaint in Arlington County Circuit Court for the Commonwealth of Virginia. See Mangold v. ANSER Corp., 842 F. Supp. 202, 203 (E.D. Va. 1994), rev'd sub nom. Mangold v. Analytic Servs., Inc., 77 F.3d 1442 (4th Cir. 1996). In the seven-count complaint, the plaintiffs alleged "defamation (counts I and II), civil conspiracy to damage plaintiff Colonel Mangold's career (count III), tortious interference with an employment contract (count IV), intentional infliction of emotional distress (counts V and VI), and an overarching allegation that [the foregoing conduct] was done willfully, wantonly, and maliciously (count VII)." Id.
16. Mangold, 77 F.3d at 1446. Removal was effected under 28 U.S.C. § 2679(d)(2) (1994). Id. The statute provides in pertinent part:
   Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
28 U.S.C. § 2679(d)(2). Though the United States apparently could have substituted itself for Lieutenant Colonel Rooney under section 2679(d)(2), which encompasses both re-
ment, alleging that the court lacked subject matter jurisdiction. In response, the Mangolds voluntarily dismissed all claims against the United States.

ANSER and its employees filed a summary judgment motion claiming absolute immunity from state tort liability arising out of their answers to questions posed to them during the official federal investigation into their contractual dealings with the Air Force. ANSER alternatively claimed that the information provided to Air Force investigators was "privileged as statements spoken during a judicial proceeding.”

The district court held that it retained jurisdiction "solely for the purpose of deciding whether defendants' actions [were] entitled to an absolute immunity because the allegedly defamatory statements were made within the context of an Air Force investigation." Relying primarily on the Fourth Circuit's decision in Becker v. Philco Corp., the district court decided that there was "no contractual provision" between ANSER and the federal government requiring ANSER to disclose information and that, in the absence of such a provision, ANSER could not "clothe" its discretionary responses in absolute immunity. After denying ANSER's absolute immunity defense, the district court decided to remand the action to the Virginia state court under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction.

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17. Mangold, 77 F.3d at 1446 n.2 (“The United States contended that Col. and Mrs. Mangold failed to exhaust their administrative remedies by filing an administrative claim with the Air Force; that the United States had not waived its immunity from the torts alleged in the complaint; and that the Mangolds' claims were barred by the [Supreme Court's] decision in Feres v. United States . . . .” (citation omitted)).
18. Id. at 1446.
19. Id.
21. Id. at 203.
22. 372 F.2d 771 (4th Cir. 1967). In Becker, the Fourth Circuit found that the terms of the contract required a report made by a government contractor. Id. at 772-74. Absolute immunity, therefore, exempted the contractor from liability. Id. at 776. Nevertheless, the court posed the question of the necessity of the contractual provision to its extension of federal absolute immunity to a government contractor, but refused to resolve this issue because no doubts existed as to the right of the contractor to make the communications. Id. at 774.
24. See infra note 27.
25. Mangold, 842 F. Supp. at 204. After dismissal of the federal defendant, diversity of citizenship no longer existed between the remaining parties. Id. at 203.
In reviewing the decision of the district court, the Fourth Circuit considered both its ability to review remand decisions invoking section 1447(c) and the defendants' substantive claims of absolute immunity.26

2. Legal Background.—

a. Review of Remand Decisions Under Section 1447(c).—A federal district court has two bases for remand to a state court according to 28 U.S.C. § 1447(c): (1) a defect in removal procedure and (2) a lack of subject matter jurisdiction at any time before a final judgment in federal court.27 Section 1447(d) provides, in part, however, that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."28 The term "otherwise" prohibits higher court review by mandamus.29 Therefore, this section appears to serve as a general ban on reconsideration of federal district court remand decisions.

Nevertheless, in Thermtron Products, Inc. v. Hermansdorfer,30 the Supreme Court found that a remand order, not explicitly issued pursuant to section 1447(c), is not barred from review by section 1447(d).31 The Court also found, however, that section 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ."32

Subsequent federal circuit court decisions have qualified the seemingly broad language of Thermtron, which bars any review of federal district court remand decisions issued pursuant to section 1447(c).33 These courts based their decisions on the Supreme Court's

26. Mangold, 77 F.3d at 1450.
27. The relevant text of section 1447(c) provides:
A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal .... If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
28. Id. § 1447(d).
30. Id.
31. Id. at 343-45. This is commonly known as the "Thermtron exception." See infra notes 78-89 and accompanying text.
32. Thermtron, 423 U.S. at 343.
33. See, e.g., Clorox Co. v. United States Dist. Court, 779 F.2d 517, 521 (9th Cir. 1985) (holding remand itself ineffective due to erroneous pronouncement of substantive law); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 277 (9th Cir. 1984)
reasoning in *City of Waco v. United States Fidelity & Guaranty Co.* that no appeal lies from the order of remand, but if in logic and in fact the substantive decree precedes that of remand, the order may be the subject of an appeal.

Additionally, courts have apparently differed over whether the mere citation of section 1447(c) operates as "magic words," precluding review of the remand order itself by appeal or mandamus, or whether appellate courts may look behind the face of the remand order to ensure that it is motivated by one of the permitted bases for remand. In *Gravitt v. Southwestern Bell Telephone Co.*, the Supreme Court distinguished the *Thermtron* formula conceived in the preceding year. The Court determined that section 1447(c) remand orders are not reviewable when a district court "determines that 'the case was removed improvidently and without jurisdiction.'" Although the Supreme Court refused to review the remand order, it did not indicate that a bare citation to section 1447(c) would be dispositive. In fact, the Court's own inquiry into the reason behind the district court's remand order served as a model for deeper inquiry in future cases. For example, in *Kunzi v. Pan American World Airways, Inc.*, the Ninth Circuit stated: "Remand orders issued pursuant to 28 U.S.C. § 1447(c) and based on the grounds specified therein, i.e. that removal was improvident and without jurisdiction, are immune from appellate review." This two-part test, framed in the conjunctive, left open the possibility of review of district court remand decisions invoking section 1447(c), that were not actually based on the grounds specified therein.

(holding federal district court's substantive decision on the merits, separate from the jurisdictional issue, was appealable despite remand under section 1447(c)).

34. 293 U.S. 140 (1934).
35. Id. at 143.
36. Compare Kunzi v. Pan Am. World Airways, Inc., 833 F.2d 1291, 1294 (9th Cir. 1987) (involving appeals court inquiry into actual grounds for remand despite district court's invocation of section 1447(c)), with Volvo of Am. Corp. v. Schwarzer, 429 U.S. 1331, 1332 (Rehnquist, Circuit Justice 1976) ("[W]hile the District Court may have been wrong in its [jurisdictional] analysis, it clearly stated, citing to § 1447(c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with § 1447(c) .... Review of this order, therefore, is presumptively barred ....").
37. 430 U.S. 723 (1977) (per curiam).
38. Id. at 724 (citing *Thermtron* as being not to the contrary, because it was based "'on grounds wholly different from those upon which § 1447(c) permits remand'" (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976))).
39. Id. at 723 (quoting 28 U.S.C. § 1447(c)).
40. 833 F.2d 1291 (9th Cir. 1987).
41. Id. at 1293 (emphasis added).
b. The Growth of Absolute Immunity and Its Extension to Government Contractors.—In Barr v. Matteo,42 the Supreme Court upheld a government official's defense of absolute immunity to an action for libel based on the release of an allegedly damaging public statement.43 A plurality of the Court applied a balancing test,44 concluding that although there may be "occasional instances of actual injustice which will go unredressed,"45 government officials should be free to carry out their duties without fear of state damage suits arising from acts done "in the course of those duties."46 In discussing what would be within a government official's course of duty such that the immunity defense would apply, the plurality referred to an "outer perimeter" of the petitioner's duty.47 As a result of its balancing test, the Court found that the petitioner's actions were within the outer perimeter,48 without attempting to define the "perimeter," or systematize this determination for future cases.49

The Supreme Court moved closer to a systematic process for adjudicating claims of absolute immunity in Westfall v. Erwin.50 As in Barr, the Court recognized the need for lower courts to strike a balance between the national interest in "effective government" and a private citizen's interest in bringing a cause of action against a government official under state tort law.51 In conducting this balancing test, the Westfall Court admonished lower courts to "consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens."52 The Court added, however, that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature."53

More recently, the Supreme Court extended a form of federal immunity to private companies contracting with the government. In

42. 360 U.S. 564 (1959) (plurality opinion).
43. Id. at 574. The statement, issued by William G. Barr, acting director of the Office of Rent Stabilization, publicly announced that two members of the agency would be suspended. Id. at 567 n.5.
44. See id. at 564-65.
45. Id. at 576.
46. Id. at 571.
47. Id. at 575.
48. Id.
49. In fact, Justice Stewart, dissenting in Barr, disagreed with the determination of the plurality that the actions of the public official in question were within the "outer perimeter" of his duty. Id. at 592 (Stewart, J., dissenting).
51. Id. at 299.
52. Id.
53. Id. at 297-98.
Boyle v. United Technologies Corp., the Court compared the alleged liability of the outside contractor in question with the analogous liability of government employees performing the same function. The Court found: "The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done." The Court ultimately found the contractor immune from state tort liability based on its actions on behalf of the federal government. The Court justified the immunity, however, by finding a superseding federal interest in direct conflict with a state interest, not by explicitly extending federal absolute immunity from state tort liability to a government contractor. Furthermore, to the extent that the Boyle majority altered existing law, it did so sparingly, drawing only narrow conclusions of law.

3. The Court's Reasoning.—In Mangold, the Fourth Circuit justified its power to review the district court's remand order before reaching the merits of the defendants' absolute immunity defense. The majority examined the remand order to ensure that one of the two grounds under section 1447(c) served as "the actual basis being invoked as authority for remand." Citing Kunzi for support, the majority reviewed the district court proceedings and order, concluding that "the district court remanded in the end not on the assumption that there was a 'lack of jurisdiction' so that remand was compelled, but that though there was jurisdiction, there was discretion to remand."

55. Id. at 505.
56. Id.
57. Id. at 514.
58. Id. at 505 n.1.
59. The Court set three conditions for the displacement of state tort law in similar cases:
   Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.
Id. at 512.
60. Mangold, 77 F.3d at 1446. Judge Niemeyer delivered the opinion of the court with respect to parts I, III, and IV, and Judge Niemeyer joined Senior Circuit Judge Phillips's concurring opinion on the issue of subject matter jurisdiction. Id. at 1444.
61. Id. at 1450.
62. See supra notes 40-41 and accompanying text.
63. Mangold, 77 F.3d at 1451. The majority relied, in part, on the district court's query while discussing jurisdiction: "But it's purely discretionary with the Court whether to hold
Viewed as a discretionary order, the majority found the district court's exercise of discretion "sufficiently egregious in error," that it would be proper to treat the defendants' notice of appeal as a petition for a writ of mandamus. The majority then determined that the district court's discretionary remand was not permitted. Therefore, the Fourth Circuit's grant of mandamus, and vacatur of the remand order, would render the district court's immunity ruling sufficiently final to be reviewable by the appellate court as a collateral order denying absolute immunity.

Having thus reached the merits of the defendants' absolute immunity defense, the Fourth Circuit reviewed the development of federal absolute immunity from state tort liability. Reasoning that the scope of federal absolute immunity is defined by the nature of the function being performed, the Fourth Circuit concluded: "Extending such immunity to the private sector, in the narrow circumstances where the public interest in efficient government outweighs the costs of granting such immunity, comports with the principles underlying the immunity recognized in Barr and Westfall." As support for this extension of federal absolute immunity to government contractors, the majority cited Boyle v. United Technologies Corp. and Yearsley v. W.A. Ross Construction Co. However, the validity of these cases as precedent for the extension of absolute immunity to contractors has been
disputed.\textsuperscript{71} Ultimately, with the "interest in efficient government" in mind, the Fourth Circuit found that the government must be allowed to investigate thoroughly its contracts with private companies to discover "fraud, waste, and mismanagement."\textsuperscript{72}

The majority quickly recognized, however, that this legal foundation did not resolve the issue of whether persons cooperating with official investigations would be protected from state tort liability.\textsuperscript{73} Consequently, the appellate court turned to the common law privilege to testify with absolute immunity in courts of law for a second "root" justification for extending absolute immunity to persons inclined to cooperate with official investigations.\textsuperscript{74} According to the majority, this form of absolute immunity would be applied "only insofar as necessary to shield statements and information, whether truthful or not, given by a government contractor and its employees in response to queries by government investigators engaged in an official investigation."\textsuperscript{75}

4. Analysis.—In \textit{Mangold}, the Fourth Circuit created an unprecedented hybrid variety of absolute immunity from two familiar forms: (1) federal absolute immunity from state tort liability and (2) the common law privilege to testify with immunity in courts of law.\textsuperscript{76} To exercise the power to review the decision of the district court, the Fourth Circuit had to align itself with the disputed position that remand orders under section 1447(c) may be reviewed to determine the "actual" basis for remand.\textsuperscript{77} In both extending immunity and exercising review, the positions taken by the \textit{Mangold} majority are properly justified by policy considerations.

\textbf{a. Remand Orders Invoking Section 1447(c).—}A key dispute between the majority and dissent in \textit{Mangold} centers on the interpretation of the \textit{Thermtron} exception to nonreviewability of remand orders

\begin{itemize}
  \item \textsuperscript{71} For a discussion of \textit{Boyle} as an extension of immunity to government contractors, see \textit{supra} notes 57-59 and accompanying text. In his dissent in \textit{Boyle}, Justice Brennan questioned the applicability of \textit{Yearsley} as an extension of federal absolute immunity to government contractors. See \textit{Boyle v. United Techs. Corp.}, 487 U.S. 500, 524 (1988) (Brennan, J., dissenting). He wrote that it was unlikely the \textit{Yearsley} Court intended that its extension of immunity to a government contractor apply outside the context of the Takings Clause of the Fifth Amendment. \textit{Id.} at 525.
  \item \textsuperscript{72} \textit{Mangold}, 77 F.3d at 1448.
  \item \textsuperscript{73} \textit{See id.}
  \item \textsuperscript{74} \textit{Id.} at 1448-49.
  \item \textsuperscript{75} \textit{Id.} at 1449.
  \item \textsuperscript{76} \textit{See id.} at 1450.
  \item \textsuperscript{77} \textit{See supra} note 96 and accompanying text.
\end{itemize}
pursuant to section 1447(c). The dissent interprets Thermtron as a prohibition against all efforts to look behind the face of a remand order merely citing the title of section 1447(c). Such a rigid rule would purportedly "avoid long, technical disputes about whether cases should be heard in state or federal court."

There are, however, several reasons to broadly construe the Thermtron exception and to permit appellate review of remand orders. In City of Waco v. United States Fidelity & Guarantee Co., the Supreme Court upheld the petitioner's right to appeal a determination of substantive law that preceded a remand order "in logic and in fact." Technically, the remand order itself was not the subject of review; rather, the Court reviewed the substantive law determination that preceded the remand order. Since City of Waco, however, even this rule—that a substantive law determination must precede the remand order—has eroded to some extent, due to the desire of some circuit courts to review and correct potential errors of substantive law that exist in actions remanded to state court.

In fact, the Mangold exception to nonreviewability of remand orders is the latest step in the steady erosion of Thermtron. First, Gravitt focused the determination of reviewability on the language of section 1447(c), instead of on the mere invocation of the statute. Then, Kunzi interpreted the language in Gravitt to allow a determination of whether or not the decision to remand was actually "based on the grounds" of section 1447(c). Finally, citing Kunzi, the Mangold majority confidently writes:

[[I]t must be the case, as some courts have had the occasion to recognize, that neither the citation of § 1447(c) nor the failure to cite it as presumed authority for a remand is conclusive of the real question: whether one of its two grounds is the actual basis being invoked as authority for remand.]

78. See Mangold, 77 F.3d at 1455 (Michael, J., dissenting) ("The scope of the Thermtron exception is extremely narrow.").
79. See id. at 1458.
80. Id. at 1455.
81. 293 U.S. 140 (1934).
82. Id. at 143.
83. Id.
84. See supra note 33 and accompanying text.
85. See supra note 39 and accompanying text.
87. Mangold, 77 F.3d at 1450.
The entirely valid principle behind this trend is that restrictions on a litigant's right to appeal and restrictions on a circuit court's right to review substantive determinations of law should be drawn narrowly.

Furthermore, the *Thermtron* holding was based on a remand order that was not issued, either actually or purportedly, under section 1447(c). Therefore, "any language [in *Thermtron*] about a situation where a remand order purports to be issued under § 1447(c) but is not actually based on a ground specified therein is dictum." In this light, the Fourth Circuit's decision in *Mangold* is consistent with the holding of *Thermtron*.

Finally, the formidable problem to be avoided by a mechanical remand statute is an unnecessary and costly shifting of cases between state and federal courts. In this respect, it makes more sense to read section 1447(d), prohibiting review of remand orders under section 1447(c), as an attempt to quickly and easily decide jurisdictional issues before contentious substantive issues arise. The *Mangold* decision is precisely the sort of complex substantive review that, whatever the outcome, should not be precluded by an artificially mechanical remand statute.

b. Extension of Absolute Immunity to Contractors.—Despite the Fourth Circuit's characterization of its extension of immunity to the ANSER defendants as a "small step," it is a step supported primarily by policy, not precedent. Neither of the Supreme Court's decisions in *Yearsley* and *Boyle* can be read to cover even a simple extension of federal absolute immunity to government contractors. In fact, aside from these two cases, the majority in *Mangold* cites no prior example of an extension of federal absolute immunity to government contractors. Additionally, responding to the questions of investigators is clearly not within the "scope" of ANSER's duties. Yet the existence of discretionary action within the scope of official duties is an element of the *Westfall* formulation of federal absolute immunity. Similarly, the majority's citations to common law extensions of testimonial immu-

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90. See id. at 414-15.
91. *Mangold*, 77 F.3d at 1448.
93. See *Mangold*, 77 F.3d at 1442.
nity in judicial contexts do not support such immunity in quasi-judicial contexts.\textsuperscript{95}

Despite this lack of direct precedent, Supreme Court decisions on absolute immunity increasingly emphasize a balancing test of policy considerations.\textsuperscript{96} This may reflect an increasing societal concern with efficient government. This balancing of interests in \textit{Mangold} supports the extension of absolute immunity. Chief Justice Warren, dissenting in \textit{Barr v. Matteo}, opined that "[r]eleases to the public from the executive branch of government imply far greater dangers to the individual claiming to have been defamed than do internal libels."\textsuperscript{97} In the case of internal investigations, as in \textit{Mangold}, the internal nature of the communication is less likely to do harm than a "public" release. Furthermore, statements volunteered in this type of investigation can be weighed accordingly, and if discredited by other facts, the statements would remain clothed in confidentiality and have no reputation-damaging impact.

Similarly, the same policy considerations that support absolute immunity for testimony in a judicial setting support the extension of absolute immunity in a quasi-judicial internal investigation.\textsuperscript{98} Without absolute tort protection, witnesses in official investigations might either decline to testify or alter their testimony to avoid perceived liability.\textsuperscript{99} Also, as in the instant case, the general shroud of confidentiality that covers many governmental activities may produce fewer people who are able or willing to testify. Therefore, those in a position to cooperate with internal investigations must be encouraged to volunteer testimony. Additionally, contractors that depend to a large extent on continued employment with the government may view cooperation in an official investigation as a duty, whether contractually required or not, thereby creating an expectation of immunity from suit and naturally encouraging truthful responses.

Absolute immunity cases, however, do not lend themselves to bright line rules. Therefore, the \textit{Mangold} majority properly created a narrow holding that applies only to federal contractors' responsive

\textsuperscript{95} See \textit{Mangold}, 77 F.3d at 1448.
\textsuperscript{96} In \textit{Barr v. Matteo}, 360 U.S. 564 (1959) (plurality opinion), the Supreme Court's balancing test of federal and private interests was implicit only. However, in \textit{Westfall}, the Court more explicitly weighed the interests at stake: "Courts should . . . consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens." \textit{Westfall}, 484 U.S. at 299.
\textsuperscript{97} \textit{Barr}, 360 U.S. at 583 (Warren, C.J., dissenting).
\textsuperscript{98} The majority, in discussing immunity for testimony, emphasized the underlying policy considerations. See \textit{Mangold}, 77 F.3d at 1449.
\textsuperscript{99} See id.
statements made in the course of official internal governmental inves-
tigations. Absolute immunity cases can be adjudicated fairly only by
applying balancing tests to the particular factual contexts in question.

5. Conclusion.—The Mangold decision represents a circuitous path toward a more efficient federal government. It first stretches the Thermtron exception to nonreviewability of cases remanded to state court purportedly under section 1447(c), thus ensuring important substantive issues a second hearing on appeal. It then construes the policy behind existing case law on federal employee absolute immunity as authorizing the extension of absolute immunity to contractors. Finally, it uses the long-recognized privilege of absolute immunity for witnesses testifying in judicial settings as a mandate for the similar protection of statements made to governmental investigators by government contractors in the course of official investigations. The result is an unprecedented leap toward a new brand of absolute immunity for government contractors.

SEAN L. BROHAWN
Supreme Court Cases

I. EMPLOYMENT LAW

A. Providing Title VII Protections to Former Employees

In *Robinson v. Shell Oil Co.*, the United States Court of Appeals for the Fourth Circuit, sitting en banc, held that a former employee could not bring a claim of retaliation against his employer, pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), for retaliatory actions that took place after his termination from employment. The Fourth Circuit's decision to interpret the term "employee," as used in Title VII's anti-retaliation provision, to mean current employees constituted a departure from the trend among other Federal Circuit Courts of Appeals to read the provision more broadly to include former employees. Subsequently, however, the Supreme Court, in a unanimous decision, reversed the Fourth Circuit's decision in *Robinson.* Applying well-established canons of statutory interpretation, the Supreme Court found the language of Title VII's anti-retaliation provision ambiguous and, taking into consideration the important overall remedial goals of Title VII, appropriately rejected the Fourth Circuit's narrow interpretation.

1. *The Case.*—Shell Oil Company (Shell) terminated Charles Robinson (Robinson) from his position as a territory sales representative on October 13, 1991. Immediately following his termination, Robinson filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), alleging that

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2. 42 U.S.C. § 2000e-3(a) (1994). Section 704(a) provides, in pertinent part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [regarding a Title VII discrimination charge]." *Id.*
3. *Robinson,* 70 F.3d at 327.
4. *Id.*
6. *Id.* at 848.
8. The EEOC is charged with the enforcement of Title VII. *See* 42 U.S.C. § 2000e-5 (1994).

1178
Shell had fired him because of his race, in violation of Title VII. While that charge was pending, Robinson applied for a position with the Metropolitan Life Insurance Company (Metropolitan). Metropolitan had indicated that it would hire Robinson for the position, contingent upon a favorable employment reference from Shell. Shell, using Metropolitan's reference form, rated Robinson as "poor" in all areas.

Robinson subsequently filed suit against Shell, alleging that Shell gave the negative reference in retaliation for his having filed an EEOC charge, thereby violating section 704(a) of Title VII. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Shell moved to have Robinson's retaliation claim dismissed, arguing that Robinson, as a former employee, was not protected by Title VII's anti-retaliation provision. The United States District Court for the District of Maryland granted Shell's motion and dismissed Robinson's complaint. Robinson appealed to the Fourth Circuit, where a divided panel reversed the district court's dismissal. The Fourth Circuit subsequently vacated the panel decision, however, and after a rehearing en banc affirmed the district court's action. The Supreme Court unanimously reversed, holding that former employees may state a cognizable Title VII claim for post-employment retaliation.

2. Legal Background.—

a. Anti-retaliation Statutes.—Congress has enacted several statutes designed to eradicate employer retaliation against employees who attempt to assert their rights under federal labor statutes. Title VII prohibits discrimination against an employee who "has opposed . . . an unlawful employment practice . . . or because he has made a

9. Robinson, 70 F.3d at 327.
11. Id.
12. Id.
13. Robinson, 70 F.3d at 327. Robinson's race discrimination charge was resolved in favor of Shell in a separate proceeding. See Robinson v. Shell Oil Co., No. 95-1376, 1996 WL 341308, at *3 n.1 (1996). Thus, the only question before the court was whether Robinson, as a former employee, qualified for protection under Title VII.
14. Fed. R. Civ. P. 12(b)(6) (providing for dismissal of plaintiff's claim for failure to state a claim upon which relief can be granted).
15. Robinson, 70 F.3d at 327.
17. Robinson, 70 F.3d at 327.
18. Id.
19. Id. at 328.
charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”

Similarly, the Fair Labor Standards Act (FLSA) makes it unlawful “to discharge or . . . discriminate against any employee because such employee has filed [a] complaint or instituted . . . [a] proceeding under [the FLSA] or has testified . . . in any such proceeding.”

In addition, the Age Discrimination in Employment Act (ADEA) makes it “unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful” under the Act or because the individual has filed an ADEA charge or has “testified, assisted, or participated in any manner in an investigation, proceeding, or litigation” under the ADEA.

Several cases pre-dating Robinson indicate that the Supreme Court favors interpreting anti-retaliation provisions broadly, thereby effectuating Congress’s intent that employees report suspected violations of federal labor statutes. For example, in Mitchell v. Robert DeMario Jewelry, Inc., the Supreme Court held that, under the FLSA, courts may properly order employers to reinstate and “reimburse employees, unlawfully discharged or otherwise discriminated against, for wages lost because of that discharge or discrimination.” The Court noted that “[b]y the proscription of retaliatory acts set forth in [the FLSA], and its enforcement in equity . . ., Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.” Therefore, the Court concluded, it could not “read the Act as presenting those it sought to protect with what is little more than a Hobson’s choice.” Similarly, in NLRB v. Scrivener, the Supreme Court held that the National Labor Relations Act (NLRA)

23. Id. § 215(a)(3).
24. 29 U.S.C. § 623(d) (1994). The ADEA prohibits discrimination on the basis of age (forty-years-old and older) in employment. Id.
25. Id.
28. Id. at 296.
29. Id. at 292.
30. Id. at 293.
should be interpreted broadly to protect an employee who gives a sworn affidavit to federal investigators during an investigation of unfair labor practices and not just "to protect an employee against an employer's reprisal only for filing an unfair labor practice charge or for giving testimony at a formal hearing." In so ruling, the Court reasoned that to construe the NLRA's anti-retaliation provision "to protect the employee during the investigative stages, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section." Further, the Court noted prior cases in which it had firmly held: "'Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board.'"

The Supreme Court granted certiorari in Robinson to resolve a split among the Circuit Courts of Appeals as to whether a former employee may bring a Title VII retaliation claim for retaliatory acts taken by an employer after the employment relationship has ended. Prior to the Fourth Circuit's decision, six Circuit Courts of Appeals had held that Title VII plaintiffs were protected from post-employment retaliation. In Bailey v. USX Corp., the Eleventh Circuit concluded

33. Scrivener, 405 U.S. at 121.
34. Id.
35. Id. at 121 (quoting Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967)).
37. See Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir. 1994) (holding that a former employee may file a Title VII claim for former employer's retaliatory conduct that occurred after the employment relationship ended); EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (holding that a former employee may state a Title VII retaliation claim when a co-employee is dismissed for engaging in protected activity on the former employee's behalf); Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (holding that former employees may sue under Title VII for retaliatory conduct by a former employer); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982) (holding that former employees who alleged that former employer refused to rehire them and gave them bad recommendations because they filed EEOC charges stated cognizable Title VII retaliation claims), overruled on other grounds, Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (per curiam) (holding that Title VII's prohibition against retaliation for filing an EEOC charge applies to former employees); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165 (10th Cir. 1977) (holding that a former employee is protected under Title VII from retaliatory actions and that informing a former employee's prospective employer about a filing with EEOC constituted retaliatory conduct).

Several Circuit Courts of Appeals have similarly interpreted the anti-retaliation provisions of other labor and employment statutes broadly. See, e.g., Passer v. American Chem. Soc'y, 995 F.2d 322, 331 (D.C. Cir. 1991) (holding that the anti-retaliation provision in the ADEA includes former employees so long as the retaliation arises from the employment relationship); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088 (5th Cir. 1987) (holding that a former employee was protected under the ADEA's provision prohibiting retaliation against
that a former employee did state a cognizable claim under section 704(a), and the court reasoned that "a strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Title VII." Similarly, in *Rutherford v. American Bank of Commerce,* the Tenth Circuit held that a former employee stated a cognizable claim because "[a] statute which is remedial in nature should be liberally construed." The Tenth Circuit also noted that the problem of retaliation against former employees is very real because everyone needs to provide references to secure new employment.

Further, in *EEOC v. Ohio Edison Co.,* the Sixth Circuit held that a former employee stated a cognizable claim under section 704(a) because courts should interpret retaliation provisions in employment statutes "consistent with the objective of the Act which is to prohibit retaliation against protected activity."

In *Pantchenko v. C.B. Dolge Co.,* the Second Circuit held that former employees state cognizable section 704(a) claims because a literal reading of the statute would not give effect to Title VII's remedial goals. Commenting on Congress's explicit inclusion of "applicants for employment" in Title VII but omission of "former employees," the Second Circuit stated: "An applicant for employment, unlike a former employee, may not be described as an 'employee' . . . [but] once an employment relationship has been created, use of the term 'employee' in referring to a former employee, while colloquial, is not inappropriate."

Recognizing that its decision in *Robinson* ran contrary to the view of several other circuits, the Fourth Circuit attempted to garner support from the Seventh Circuit's decision in *Reed v. Shepard.* In *Reed,*

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"employees or applicants for employment"); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977) (holding that a former employee was protected by the FLSA's anti-retaliation provision).
38. 850 F.2d 1506 (11th Cir. 1988).
39. Id. at 1509.
40. 565 F.2d 1162 (10th Cir. 1977).
41. Id. at 1165.
42. Id. at 1166.
43. 7 F.3d 541 (6th Cir. 1993).
44. Id. at 545; see also Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir. 1994) (holding that a former employee may file a Title VII claim for former employer's retaliatory conduct that occurred after the employment relationship ended).
45. 581 F.2d 1052 (2d Cir. 1978) (per curiam).
46. Id. at 1055.
47. Id.
48. 989 F.2d 484 (7th Cir. 1991).
a former employee of a county correctional facility sued her former employer for violations of Title VII, alleging that she was fired because she had complained of gender discrimination. The former employee identified the post-employment retaliatory actions taken against her as “a mysterious attack on her person by a disguised assailant urging her to drop her case,” “disturbing late-night phone calls threatening her with reprisals for her lawsuit,” and “shooting at her car with a gun while she was driving.” The Seventh Circuit held that Reed had not been retaliated against under section 704(a) because “the alleged retaliatory activities took place after the termination of Reed’s employment.” In Robinson, the Fourth Circuit interpreted this holding to mean that section 704(a) does not cover former employees. The Seventh Circuit, however, later repudiated the Fourth Circuit’s interpretation of Reed in Veprinsky v. Fluor Daniel, Inc., stating that “Reed contains an important qualification...[that] excludes from the realm of actionable retaliation only those post-termination acts which are unrelated to the plaintiff’s employment.” Thus, the Seventh Circuit explained, it had dismissed the former employee’s retaliation claim in Reed because the acts of retaliation alleged were not related to employment, not because she was a former employee.

b. Interpreting the Term “Employee”.—In enacting Title VII, Congress attempted to address workplace discrimination in a comprehensive manner. Therefore, courts often rely on the interpretations of other federal labor law statutes, such as the FLSA, the NLRA, and the ADEA, to interpret Title VII. Courts have frequently interpreted

49. Id. at 485-86.
50. Id. at 492.
51. Id.
52. Robinson, 70 F.3d at 331.
53. 87 F.3d 881, 886 (7th Cir. 1996) (holding that Title VII anti-retaliation claims by former employees are cognizable so long as they relate to the employment relationship). Limiting the scope of former employees’ Title VII protections to prohibitions on retaliatory acts that arise out of the employment relationship has been a subject of debate among commentators. See Patricia A. Moore, Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation, 62 Fordham L. Rev. 205, 219 (1993) (arguing that Title VII’s anti-retaliation provision should only apply to post-employment retaliatory actions related to employment). But see Sandra Tafuri, Note, Title VII’s Antiretaliation Provision: Are Employees Protected After the Employment Relationship Has Ended?, 71 N.Y.U. L. Rev. 797, 800 (1996) (arguing that Title VII’s anti-retaliation provision must be interpreted broadly to achieve Title VII’s basic purpose—the elimination of employment discrimination).
54. Veprinsky, 87 F.3d at 888 (citations omitted).
55. Id. at 886.
56. See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 723-24 (1947) (stating that statutes enacted as “part of...social legislation...of the same general character” are persuasive when interpreting any of the statutes individually).
the term "employee" to include former employees under these statutes. For example, the term "employee" in the anti-retaliation provision of the FLSA has been interpreted to include former employees who have alleged post-employment retaliation. Additionally, the Fifth and D.C. Circuits have interpreted the term "employee" in the anti-retaliation provision of the ADEA to extend to former employees. The language of Title VII's section 704(a) is almost identical to the ADEA's anti-retaliation provision.

Significantly, prior to its decision in Robinson, the Supreme Court also interpreted the term "employee" in one federal labor statute broadly and in a manner consistent with its purpose. In NLRB v. Town & Country Electric, Inc., a case brought under the NLRA, the Court granted certiorari to decide whether a worker can be "a company's 'employee' within the terms of the [NLRA] if, at the same time, a union pays that worker to help the union organize the company." The plaintiff alleged that an employer's refusal to hire workers who were also paid union organizers violated the NLRA. The Eighth Circuit had held that the term "employee" did "not cover (and therefore the Act does not protect from antunion discrimination) those who work for a company while a union simultaneously pays them to organize that company." Also like Robinson, the Court used Town & Country Electric to resolve a disagreement among the circuits regarding the interpretation of the term "employees."
In *Town & Country Electric*, the Court established valuable guidelines for evaluating the proper scope of interpretation of labor statutes: (1) the term "employee," as used in federal labor statutes that provide workers with protections from discrimination and unfair labor practices, should be broadly construed; and (2) the agency responsible for enforcing the statute's provisions receives deference in defining the scope of employees entitled to protection.

3. The Court's Reasoning.—In reversing the Fourth Circuit's decision to exclude former employees from Title VII's protection, the Supreme Court first rejected the Fourth Circuit's finding that the meaning of the term "employee" was clear on its face. Looking to the "language [of the statute itself], the specific context in which that language is used, and the broader context of the statute as a whole," the Court found the meaning of the term "employee" ambiguous, thus requiring inquiry beyond the plain language of the statute. The Court offered three justifications for its finding that the term "employee," as used in Title VII, was ambiguous. First, the Court held, section 704(a) contains no "temporal qualifier" that clearly restricts that section's protections to only those individuals currently employed at the time the alleged retaliation took place. The Court rejected the argument that, because Congress could have used the phrase "former employees" in section 704(a), but chose not to, former employees were excluded from section 704(a) protections. The Court noted that the reverse argument could be made: that Congress could have used the phrase "current employees" in section 704(a) and other provisions of Title VII, but did not. The Court maintained that Congress's occasional, specific use of the term "employee" means only that Congress can use employees as an unqualified term, not that Congress did so in Title VII. The Court also distinguished its holding in *Wal-
ters v. Metropolitan Educational Enterprises, Inc.,\textsuperscript{75} in which the Court interpreted the term "employee," as used in section 701(b) of the Act, to refer only to current employees.\textsuperscript{76} Section 701(b) sets out the number of individuals an employer must employ before it will be subject to the provisions of Title VII.\textsuperscript{77} The Court concluded that because Title VII liability attaches only when an employer employs fifteen or more individuals, the most fair and accurate way to assess the number of employees an employer has is to count only those employees currently on the payroll.\textsuperscript{78} Because section 701(b) contains two temporal qualifiers, the Court concluded that only current employees should be counted for purposes of exposure to Title VII.\textsuperscript{79} By contrast, the Court noted, section 704(a) lacks any such temporal qualifier.\textsuperscript{80}

Second, the Court held that Title VII's definitional section, section 701(f), which defines the term "employee" for the purpose of reading Title VII, also lacks a temporal qualifier.\textsuperscript{81} The Court stated that section 701(f)'s definition of employee—"an individual employed by an employer"—could be read to mean either "is employed" or "was employed."\textsuperscript{82} Thus, Title VII can properly be read to apply to both current and former employees. In addition, the Court rejected the argument that the common meaning of the term "employed"—"[p]erforming work under an employer-employee relationship"\textsuperscript{83}—is the intended meaning of Title VII's definitional section.\textsuperscript{84} The Court concluded that relying on the common definition merely "begs the question by implicitly reading the word 'employed' to mean 'is employed.'"\textsuperscript{85} Instead, the Court maintained, the term "employed" "could just as easily be read to mean 'was employed.'"\textsuperscript{86}

Third, the Court held that several Title VII provisions "use the term 'employees' to mean something more inclusive or different than

\textsuperscript{75} 117 S. Ct. 660 (1997).
\textsuperscript{76} Id. at 664 (holding that for the purposes of section 701(b), "employees" refers only to persons who have an existing relationship with the employer).
\textsuperscript{77} Id. at 662-63. Section 701(b) states that Title VII applies to employers "who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Id. at 663.
\textsuperscript{78} Id.
\textsuperscript{79} Robinson, 117 S. Ct. at 846 n.2.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 846.
\textsuperscript{83} Robinson, 117 S. Ct. at 847.
\textsuperscript{84} BLA\textsuperscript{k}C'S LAW DICTIONARY 525 (6th ed. 1990).
\textsuperscript{85} Robinson, 117 S. Ct. at 847.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
“current employees.” The Court cited, for example, several sections of Title VII in which the term “employee” can only be read as referring to former employees. For instance, the Court observed:

Section 717(b) requires federal departments and agencies to have equal employment opportunity policies and rules, “which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder.” If the complaint involves discriminatory discharge, as it often does, the “employee” who must be notified is necessarily a former employee.

Likewise, the Court also cited to several Title VII provisions in which the term “employee” clearly refers only to current employees.

The Court stated that these instances only prove that “the term ‘employees’ may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts.” Thus, the Court concluded, “the term standing alone is necessarily ambiguous.” The Court determined that, because of these varying meanings of the term “employee,” courts must individually scrutinize each section of Title VII to determine whether its context limits the scope of the term “employee.”

The Court specifically rejected the Fourth Circuit’s position that if Congress intended to protect former employees, it would have done so expressly just as it had specifically protected “applicants” for em-

88. Id.
89. The Court also pointed to section 706(g)(1), which authorizes a court to order “affirmative remedial action,” including the “reinstatement . . . of employees,” if it finds that an employer intentionally engaged in an unlawful employment practice. Id. (quoting 42 U.S.C. § 2000e-5(g)(1) (1994)). Clearly, because an employer cannot be ordered to reinstate an individual whom it has never employed, this section necessarily refers to former employees. Similarly, section 717(b) authorizes the EEOC to order reinstatement as a remedy when a federal agency is the employer. Id. (citing 42 U.S.C. § 2000e-16(b) (1994)).
90. Id. (citation omitted).
91. Id. For example, the Court pointed to section 703(h), which states that merely varying compensation standards for “employees who work in different locations,” will not be a prohibited employment practice under Title VII, and section 717(b), which instructs federal agency and department heads to formulate training plans designed “to provide a maximum opportunity for employees to advance so as to perform at their highest potential.” Id. (quoting 42 U.S.C. §§ 2000e-2(h), 2000e-16(b)).
92. Id.
93. Id.
94. Id. The Court also rejected the argument that the use of the term “his” employees restricts the scope of protection offered by section 704(a). The Court stated that “his” provides no guidance as to the time frame in which the employment relationship must exist in order for an employee to be protected by section 704(a). Id. at 847-48.
ployment under section 704(a). The Court found this reasoning flawed because it improperly equates the term "applicants" for employment with "future employees." The Court observed that "the term 'applicants' would seem to cover many persons who will not become employees [including] unsuccessful applicants or those who turn down a job offer" and that "the term fails to cover certain future employees who may be offered and will accept jobs without having to apply for [them]." Thus, because the term "applicants" can be construed to include individuals other than employees, the Court held that "there is no basis for engaging in the further (and questionable) negative inference that inclusion of the term 'applicants' demonstrates intentional exclusion of former employees."

Having concluded that the term "employees" in section 704(a) is ambiguous, the Court next examined the context of the statute as a whole in order to determine the scope of the term "employee." The Court reasoned that resolving the ambiguity to include, rather than exclude, former employees is more consistent with the overall purposes of the Act. For example, the Court found that because section 703(a) prohibits discriminatory discharge, only a former employee could file for an alleged violation of section 703(a). Further, because section 704(a) "expressly protects employees from retaliation for filing a 'charge' under Title VII," the Court concluded that "it is far more consistent to include former employees within the scope of 'employees' protected by § 704(a)." The Court also found persuasive the EEOC's position that, if courts interpret the term "employees" to exclude former employees, much of the protection section 704(a) offers would be effectively eliminated. Specifically, the Court adopted the EEOC's argument that denying Title VII's protec-

95. Id. at 848.
96. Id. at 846-47. The Court found that "the use of the term 'individual' in § 704(a), as well as in § 703(a) ... provides no meaningful assistance in resolving this case." Id. at 848 (citation omitted). The Court reasoned that "individual" is a broader term than 'employee' and would facially seem to cover a former employee ... [and] would also encompass a present employee as well as other persons who have never had an employment relationship with the employer at issue." Id. For these reasons, the Court concluded that the term "individual" "provides no insight into whether the term 'employees' is limited only to current employees." Id.
97. Id. at 848.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
tions to former employees "would provide a perverse incentive for employers to fire employees who might bring Title VII claims." Moreover, the Court found that because the general purpose of anti-retaliation provisions in statutes is to maintain "unfettered" access to "statutory remedial mechanisms," it would be illogical and inconsistent to deny a remedy to former employees who experienced retaliation after the employment relationship had ended.

4. Analysis.—In Robinson, the Supreme Court correctly concluded that the Fourth Circuit ignored the proper rules of statutory interpretation. In light of the Fourth Circuit's heavy reliance on the rules of statutory interpretation in deciding the issue, the Supreme Court likewise devoted most of its opinion to demonstrating how the Fourth Circuit had co-opted the rules of statutory interpretation. Consequently, the Supreme Court failed to squarely address the important policy considerations that make the Fourth Circuit's decision untenable.

Specifically, in Robinson, the Fourth Circuit stated that it interpreted section 704 by looking only at the plain meaning of the statutory language. Nevertheless, had the Fourth Circuit actually heeded the rule pronounced by the Supreme Court in Estate of Cowart v. Nicklos Drilling Co., it could not have concluded that the term "employee" was unambiguous. Proper adherence to the rules of statutory interpretation would have forced the Fourth Circuit to examine the term "employee" in the broader context of Title VII, which implicitly includes both current and former employees and applicants for employment.

Indeed, the Fourth Circuit acknowledged that "[a]lthough the rules of statutory construction do not require us to proceed further, several other important considerations support our interpretation of the anti-retaliation provision." Thus, the Fourth Circuit not only

106. Id.
107. Id.
108. See supra notes 95-99 and accompanying text.
109. Robinson, 70 F.3d at 332.
110. Id. at 330.
111. 505 U.S. 469, 477 (1992) (stating that when the language of a statute is clear, judicial inquiry into the meaning of the statute ceases).
112. See, e.g., 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16(b) (providing for relief which includes reinstatement or hiring of employees).
113. Robinson, 70 F.3d at 330.
recognized that the broader context and purpose of a statute inform the court's interpretation of that statute—as the Court indicated in Cowart—but also that the Fourth Circuit's view that "employees" is an unambiguous term was tenuous at best, intellectually dishonest at worst.

Circuits that allow former employees to state cognizable claims under Title VII are merely allowing employees a forum in which to bring their concerns. Because such an approach is consistent with congressional intent, the Supreme Court correctly required the Fourth Circuit to conform to the guidelines for interpreting statutes generally, and labor statutes particularly.

a. Ignoring the Message of Town & Country Electric.—The Fourth Circuit erred not only in ignoring the decisions of its sister circuits, but the message sent by the Supreme Court as well. The Supreme Court has consistently interpreted remedial statutes in a manner consistent with their purpose. Although Town & Country Electric is distinguishable from Robinson, the Town & Country Electric Court sent clear signals to the lower courts that labor statutes affording protection to employees against retaliation should be broadly construed, a point patently disregarded by the Fourth Circuit.

b. EEOC Amicus Brief.—The Supreme Court largely adopted the arguments put forth by the EEOC in its Amicus Brief. The EEOC argued that the language of section 704(a) was ambiguous, "[a]nd in construing a statute, the Court should adopt that sense of its words which best promotes the policy and objectives of the legislature." The EEOC emphasized the varying meanings of the term "employee" within the context of Title VII and the need to interpret the term "with reference to the particular context in which it ap-

114. See supra notes 68-70.
115. See NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (holding that employer that discharged employees based on a belief that they gave sworn statements to NLRB investigator violated the NLRA); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (holding that an employer may be ordered to reimburse former employees for lost wages when they were discharged for alleging that their employer violated the FLSA).
116. In Town & Country Electric, the plaintiff-employee was still actively working for the defendant-employer at the time the suit was filed. Town & Country Electric, 116 S. Ct. at 452.
119. Id. at 16.
pears."\textsuperscript{120} The EEOC argued that the "[u]se of the word 'employee' to refer to a former employee is consistent with the common use of the term."\textsuperscript{121} The EEOC also noted the circularity in the definition of "employee" provided in Title VII's definitional section.\textsuperscript{122}

c. Policy Considerations.—At oral argument, an ongoing colloquy took place over the problems inherent in giving references regarding former and current employees to prospective employers.\textsuperscript{123} Counsel for Shell acknowledged that because many employers provide references for current employees when contacted by a prospective employer, the problems presented by allowing the issuance of a negative reference to constitute retaliation was not squarely before the Court in this case.\textsuperscript{124} Moreover, Shell's counsel conceded that many state legislatures are currently addressing the issue of liability for employers that provide negative references.\textsuperscript{125} Twenty-five states have enacted legislation to protect employers from the threat of having to defend a defamation action brought by an employee who disagrees with the reference provided.\textsuperscript{126} For example, in Maryland, employers are im-

\begin{itemize}
\item \textsuperscript{120} Id. at 11.
\item \textsuperscript{121} Id. at 12.
\item \textsuperscript{122} Id. at 14.
\item \textsuperscript{124} Id. at 40.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} In 1994, the Society for Human Resource Management (SHRM) in Washington, D.C., which represents 77,000 mid- to large-size employers, began a nationwide effort to urge states to pass legislation that would grant immunity to employers that provide good faith employment references. See Julie Forster, 25 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses from Liability, WEST'S LEGAL NEWS, July 2, 1996, available in 1996 WL 363324. As a result, in 1995 and 1996, half of the states enacted statutes granting employers job-reference immunity. Id. See, e.g., CAL. CIV. CODE § 47 (West 1996) (stating that under California's "common interest" privilege, a party is immune for statements made to another regarding a person of common interest to both parties); Quality in Hiring Act, 1996 Del. Laws ch. 367 (1996) (to be codified at DEL. CODE ANN. tit. 19, § 708) (granting civil immunity to an employer that, in good faith, discloses information about a current or former employee's job performance or work-related characteristics, actions which constitute a violation of law, and evaluations of ability to perform job duties that may include comparisons with other employees); FLA. STAT. ANN. § 768.095 (West Supp. 1997) (providing qualified civil immunity for an employer's good faith disclosures about a former employee's job performance made at the request of the former employee or the former employee's prospective employer); GA. CODE ANN. § 34-1-4 (Supp. 1996) (providing civil immunity to employers that make good faith disclosures about the job performance, unlawful conduct, or job-related capabilities of a current or former employee upon request of that employee or that employee's prospective employer); 1996 La. Sess. Law Serv. 632 (West) (to be codified at LA. REV. STAT. ANN. § 23:291) (granting civil immunity for an employer's good faith disclosure about a current or former employee's job performance made at the request of the employee); MICH. COMP. LAWS ANN. § 423.452 (West 1996)
mune from suit for their good faith disclosures about the job performance of a current or former employee or the reason for terminating a former employee.\textsuperscript{127} With the rest of the nation following suit, the argument that allowing former employees to bring a retaliatory action claim under Title VII destroys the vital exchange of honest information about employees is practically rendered moot. The important policy question that emerges from \textit{Robinson} is how soon after the employment relationship has ended must an alleged act of retaliation occur in order to be actionable under Title VII? Moreover, will the Court read Title VII to include protection from non-employment related forms of retaliation such as harassment, bodily harm, or property damage?

5. \textit{Conclusion}.—The Supreme Court correctly held—consistent with the rules of statutory interpretation and broad policy considerations—that former employees may bring claims of retaliation against their former employers under Title VII. The Fourth Circuit's holding to the contrary represented an attempt to co-opt the rules of statutory interpretation in order to limit employee access to the courts, contravening congressional intent. Although the Supreme Court appropriately reversed the Fourth Circuit's decision, significant policy issues remain.

\textbf{Tracey H. Cohen}

\(\text{(granting qualified civil immunity to employers that in good faith disclose job performance-related information contained in personnel files); 1996 Ohio Legis. Bull. 134 (Anderson) (to be codified at Ohio Rev. Code Ann. § 4113.71) (providing qualified civil immunity to employers that disclose job-related information about current or former employees); 1996 R.I. Pub. Laws 96-195 (to be codified at R.I. Gen. Laws § 28-6.4-1) (granting civil immunity to employers that, while acting in good faith and at the request of a current or former employee or that employee's prospective employer, disclose fair, unbiased information about that employee); 1996 S.C. Acts 281 (to be codified at S.C. Code Ann. § 41-1-65) (granting employers civil immunity for disclosure of dates of employment, pay level, and wage history to a prospective employer and for written responses to a prospective employer's request for written evaluations, official notices indicating the reason for separation, and information about the employee's job performance and reason for separation, so long as the employee has access to such information); Tenn. Code Ann. § 50-1-105 (1995) (providing civil immunity for employers that disclose performance-related information to a prospective employer). According to SHRM surveys, "the fear actually outweighs the number of lawsuits that have been filed against employers." Forster, \textit{supra}. Even in states that have enacted employer-immunity statutes, some businesses continue to refuse to give references for fear of being sued. See \textit{id}. SHRM predicts that, as companies become more aware of the protections these laws offer, the anxiety level about providing references will lessen, and information between employers will more freely be exchanged. See \textit{id}.}