The Maryland Survey: 2004-2005

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# THE MARYLAND SURVEY: 2004-2005

## Table of Contents

### Recent Decisions: The Court of Appeals of Maryland

<table>
<thead>
<tr>
<th>I. Civil Procedure</th>
<th>..........................................................</th>
<th>980</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Ross v. State Board of Elections—Misapplication of “Inextricably Intertwined” Standard Expands the Appellate Court Standard of Review to Consider Grounds Not Relyed on by the Circuit Court When Granting Summary Judgment</td>
<td>..............................................</td>
<td>980</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. Criminal Law</th>
<th>..................................................................</th>
<th>992</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Roary v. State—An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland</td>
<td>.............................................</td>
<td>992</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>III. Criminal Procedure</th>
<th>..................................................................</th>
<th>1018</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Smith v. State—Permitting Unsubstantiated Own-Race Bias Arguments in Summation Invites Juror Confusion and Irrelevant Racial Considerations into Criminal Trials</td>
<td>............................................</td>
<td>1018</td>
</tr>
<tr>
<td>B. Cotton v. State—The Acceptance of Detention Without Probable Cause</td>
<td>..................................</td>
<td>1039</td>
</tr>
<tr>
<td>C. Fitzgerald v. State—A Missed Opportunity to Protect the Individual’s Right to Privacy in His Home Under the Maryland Declaration of Rights</td>
<td>..................................</td>
<td>1068</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IV. Evidence</th>
<th>..................................................................</th>
<th>1085</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Young v. State—In Changing How Experts May Present DNA Match Evidence at Criminal Trials, the Court of Appeals Burdens Prosecutors and Leaves Key Issues Unresolved</td>
<td>.......................................</td>
<td>1085</td>
</tr>
<tr>
<td>B. Weitzel v. State—An Unexplained Exception to the Admissibility of Pre-Arrest Silence</td>
<td>..................................</td>
<td>1111</td>
</tr>
</tbody>
</table>

978
C. Spain v. State—A Missed Opportunity to Clearly Articulate an Impact-on-Verdict Test for Harmless Error Analysis: Allowing Appellate Courts to Assume the Role of the Jury While Failing to Restrict the Improper Comments of Prosecutors .................................................. 1136

V. FAMILY LAW .............................................. 1150
A. Horridge v. St. Mary's County Department of Social Services—Beyond the Traditional Realm of State Entity Liability and into a New Era of Unchartered Territory: The Court of Appeals of Maryland Extends the Scope of Government Liability .................................................. 1150
B. McDermott v. Dougherty—Failing to Temper the Natural Parent Presumption in Third-Party Custody Cases Undermines the Best Interest of the Child .................. 1177

VI. LABOR LAW ................................................ 1202
A. Gleneagles v. Hanks—Maryland Employers Lose Again: The Maryland Court of Appeals's Interpretation of the Maryland Workers' Compensation Act and Other Relevant Statutes .................................................. 1202

VII. LEGAL ETHICS ............................................ 1222
A. Gatewood v. State—Public Prosecutors and the Appearance of Justice: How the Court of Appeals Erred in Gatewood by Treating a State's Attorney as an Ordinary Advocate .................................................. 1222

VIII. STATUTORY INTERPRETATION ..................... 1254
A. Johnson v. Baltimore—Interpretive Shift Weakens the Rule of Liberal Construction Applied to Ambiguities in Workers' Compensation Legislation .................................. 1254

IX. TORTS .................................................... 1276
A. Polakoff v. Turner—A Blemished Construction of Lead-Based Paint Poisoning Negligence Jurisprudence Thwarts the Prospective Application of Judicial Decisionmaking .... 1276
B. Lightolier v. Hoon—Maintaining an Unrealistic Standard: Maryland Holds It Is Not Reasonably Foreseeable for Consumers to Fail to Follow Product Warnings .................................................. 1303
Recent Decisions
THE COURT OF APPEALS OF MARYLAND

I. CIVIL PROCEDURE

A. Misapplication of “Inextricably Intertwined” Standard Expands the Appellate Court Standard of Review to Consider Grounds Not Relied on by the Circuit Court When Granting Summary Judgment

In *Ross v. State Board of Elections*,¹ the Court of Appeals of Maryland considered whether section 9-209² or section 12-202³ of the Election Law Article applied to a post-election challenge seeking the disqualification of the election winner. The Court of Appeals determined that the Circuit Court of Baltimore City erroneously relied upon section 9-209 in granting summary judgment for the State.⁴ Nevertheless, the Court of Appeals affirmed the judgment, holding that the challenge, filed three days after the election, was barred under both section 12-202 and the doctrine of laches.⁵ The *Ross* court failed to adhere to the long-standing rule requiring Maryland appellate courts to consider only the grounds upon which the trial court based its judgment.⁶ In so acting, the *Ross* court effectively disregarded precedent and important policy considerations.⁷ Furthermore, the court redefined the Election Code when it ruled that sections 9-209 and 12-202 are inextricably intertwined and that one could not be determined independently from the other.⁸ The Court of Appeals should have remanded the case for the circuit court’s review under section 12-202 and the doctrine of laches, which would have protected the appellate standard of review and preserved the separate and distinct claims under sections 9-209 and 12-202.⁹

I. The Case.—On June 30, 2003, Paula Johnson Branch filed a certificate of candidacy for the Baltimore City Council seat in the

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³. *Id.* § 12-202.
⁴. *Ross*, 387 Md. at 667, 876 A.2d at 702.
⁵. *Id.* at 667-68, 876 A.2d at 703.
⁷. *See infra* Part 4.b.
⁸. *See infra* Part 4.c.
Thirteenth Councilmanic District. After Branch won the Democratic primary, the Baltimore City Board of Elections listed Branch as the Democratic candidate on the general election ballot. Her opponent was Green Party candidate Glenn L. Ross.

On or around October 13, 2004, the Baltimore Sun reported that one of Branch’s campaign finance entities had failed to file reports required under section 13-304 of the Election Law Article. Ross’s campaign contacted the State Board to request Branch’s disqualification under section 13-332 during their next meeting. On October 26, 2004, the State Board declined to rule on Branch’s disqualification, reasoning that the State Board should not “make any statements that would somehow jeopardize the candidacies for [election day] next week.” The State Board further suggested bringing the matter before either the courts or the General Assembly.

Branch and Ross remained on the ballot. In the November 2, 2004 general election, Branch defeated Ross by capturing 79.79% of the vote. On December 9, 2004, Branch took the oath of office to become a Baltimore City Councilwoman.

Three days after the election, Ross challenged the election results, claiming that Branch was ineligible to be a candidate. Ross filed a petition for injunctive relief and declaratory judgment in the Circuit Court for Baltimore City. The circuit court denied Ross’s petition and then denied Ross’s subsequent motion for a temporary restraining order to enjoin Branch from assuming office.

10. Ross, 387 Md. at 654, 876 A.2d at 694.
11. Id. at 655-56, 876 A.2d at 695-96.
12. Id.
13. Md. Code Ann., Elec. Law § 13-304 (LexisNexis 2002). Section 13-304 requires that a campaign finance entity report all contributions received and all expenditures made by or on behalf of the campaign finance entity. Id.
14. Ross, 387 Md. at 655, 876 A.2d at 695.
15. Md. Code Ann., Elec. Law § 13-332 (LexisNexis 2002). Section 13-332 prohibits an individual from becoming a candidate for any public or party office if the individual failed to properly file any campaign finance reports. Id.
16. Ross, 387 Md. at 655, 876 A.2d at 695.
17. Id., 876 A.2d at 695-96.
18. Id. at 655-56, 876 A.2d at 696.
19. Id. at 656, 876 A.2d at 696.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
Ross also filed two sequential motions for summary judgment against Branch and the State Board. In response, both Branch and the State Board filed motions to dismiss or, in the alternative, for summary judgment. They argued that sections 9-209 and 12-202 barred Ross’s claim because he failed to satisfy the required time limit of either statute. On January 19, 2005, the circuit court granted summary judgment in favor of Branch and the State Board because Ross did not file a timely complaint under section 9-209.

Ross directly petitioned the Court of Appeals of Maryland pursuant to section 12-203(a). The Court of Appeals granted certiorari to decide, inter alia, whether the circuit court correctly determined that Ross’s complaint was properly brought under section 9-209, and if so, whether his claim was untimely under section 9-209.

2. Legal Background.—Generally, Maryland appellate courts will only consider the grounds upon which the trial court relied in its grant of summary judgment. An appellate court may, however, affirm a case based on other grounds as long as those grounds are so inextricably intertwined that they cannot be considered separate and distinct. Maryland courts have strictly adhered to this rule and have

25. Id.
26. Id.
27. Section 9-209 permits a registered voter to seek judicial review of the content and arrangement of a ballot or to correct any other error on the ballot within three days after the ballot is publicly displayed. Md. Code Ann., Elec. Law § 9-209 (LexisNexis 2002).
28. If no other timely and adequate remedy is provided by the Election Law Article, section 12-202 permits "a registered voter" to "seek judicial relief from any act or omission relating to an election" either (1) within \"[ten] days after the act or omission or the date the act or omission became known to the petitioner\" regardless of whether or not the election has been held, or (2) within [seven] days after the election results are certified." Md. Code Ann., Elec. Law § 12-202 (LexisNexis 2002). A registered voter may seek relief "on the grounds that an act or omission: (1) is inconsistent with [the Election Law Article] or other law applicable to the elections process; and (2) may change or has changed the outcome of the election." Id.
29. Ross, 387 Md. at 656-57, 876 A.2d at 696.
30. Id. at 657, 876 A.2d at 696-97. Branch’s motion for summary judgment was argued before a new circuit court judge. Id. at 656, 876 A.2d at 696. During the hearing, Branch also asserted that Ross’s claim was barred under the doctrine of laches because he caused prejudice to her by bringing his claim after the election when he could have brought his claim prior to the election. Id. at 657, 876 A.2d at 696.
31. Ross, 387 Md. at 657, 876 A.2d at 697; Md. Code Ann., Elec. Law § 12-203(a) (LexisNexis 2002). Under section 12-203(a), "an appeal shall be taken directly to the Court of Appeals within [five] days of the date of the decision of the circuit court." § 12-203(a).
32. Ross, 387 Md. at 657-58, 876 A.2d 697.
33. See infra Part 2.a.
34. See infra Part 2.b.
only invoked an exception once.\(^{35}\) Sections 9-209 and 12-202 of the Election Code indicate two distinct grounds for relief from alleged errors relating to an election.\(^{36}\) Although both sections allow registered voters to seek judicial relief for post-election disputes, section 9-209 limits judicial review to the content and arrangement of the ballot, while section 12-202 permits voters to seek relief from any act or omission relating to an election when no other timely and adequate remedy is provided by law.\(^{37}\)

\(\text{a. Maryland Appellate Courts Generally Restrict Their Review of Summary Judgment Appeals to the Grounds upon Which the Trial Court Relyed.}\)—Maryland appellate courts generally adhere to the long-established principle of limiting review of summary judgment to the grounds upon which the trial court relied.\(^{38}\) Maryland appellate courts have repeatedly refused to speculate that summary judgment might have been granted on grounds not reached by the trial court.\(^{39}\) The principle maintains the role of appellate courts by limiting their decisions to issues of law and ensures that trial judges are not deprived of their "discretion to deny or defer until trial on the merits the entry of judgment."\(^{40}\) The principle also allows trial courts to use their unique ability to judge both the credibility of witnesses and the weight of the evidence.\(^{41}\)

\(\text{b. The Court of Appeals Has Created an Exception to the General Rule Where the Appellate Court May Consider New Grounds When Those Grounds Are Inextricably Intertwined with the Grounds Relied upon by the Trial Court.}\) In Eid v. Duke,\(^{42}\) the Court of Appeals of Maryland ap-

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36. See infra Part 2.c.
40. Henley v. Prince George’s County, 305 Md. 320, 333, 503 A.2d 1333, 1340 (1986); see also Gresser, 349 Md. at 554, 709 A.2d at 746 (noting the importance of a clear record on appeal and remanding the case to the Court of Special Appeals with instructions to remand to the trial court for a full hearing).
41. Urban Site Venture II Ltd. P’ship v. Levering Assoc. Ltd. P’ship, 340 Md. 223, 229-30, 665 A.2d 1062, 1065 (1995); see also Johnson v. Baltimore, 387 Md. 1, 5-6, 874 A.2d 439, 442 (2005) (asserting that the role of the appellate court is to decide if the trial court’s grant of summary judgment was correct as a matter of law).
42. 373 Md. 2, 816 A.2d 844 (2003).
plied a limited exception to the principle requiring appellate courts to consider only the grounds upon which the trial court relied in granting summary judgment. After stating the general rule against taking up new grounds on appeal, the court added that this principle was only applicable when the trial court relied on one of two or more separate and distinct grounds.43 The Eid court upheld summary judgment on new grounds because the new grounds were inextricably intertwined with the grounds on which the trial court relied.44 Two issues are inextricably intertwined when each cannot be applied or determined independently from the other.45 To determine that the issue of a patient-physician relationship in a medical malpractice action was inextricably intertwined with an ERISA preemption question,46 the Court of Appeals cited a Supreme Court decision that had already determined that the two issues were indeed inextricably intertwined, as well as the patient’s argument, which had consistently used the two issues interchangeably.47 The Court of Appeals therefore affirmed summary judgment under its newly created exception.48

c. Registered Voters May Challenge Post-Election Contests Under Section 9-209 or Section 12-202.—Sections 9-209 and 12-202 both govern judicial review of challenges arising under the Election Code.49 While Maryland courts have not yet considered any post-election challenges under section 9-209, courts have applied and interpreted section 12-202 in a few cases.50 Section 9-209 and section 12-202 have not previously been considered together in the same case.

43. Id. at 10, 816 A.2d at 849.
44. Id. at 10-11, 816 A.2d at 849.
45. Id. at 15-16, 816 A.2d at 852.
46. The trial court had entered summary judgment in favor of the defendant holding that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempted the plaintiff's state-law medical malpractice tort claim. Id. at 9, 816 A.2d at 848. The Court of Special Appeals affirmed the ERISA preemption relying on the alternate ground that the plaintiff failed to prove the requisite patient-physician relationship in a medical malpractice action. Id. The Court of Appeals upheld summary judgment, reasoning that the United States Supreme Court in Pegram v. Herdrich, 530 U.S. 211, 236 (2000), determined that the issue of a patient-physician relationship in a medical malpractice case was a necessary and inextricably intertwined topic in the ERISA preemption analysis. Id. at 14-15, 816 A.2d at 851-52.
47. Id. at 14-15, 816 A.2d at 851-52.
48. Id. at 17, 816 A.2d at 853.
Sections 9-209 and 12-202 are substantially and procedurally distinct. Section 9-209 allows registered voters to seek judicial review of the content and arrangement of a ballot. On the other hand, section 12-202 serves as a broad fall-back provision and permits registered voters to seek judicial relief for any act or omission relating to an election as long as no other timely and adequate remedy is provided in the Election Code. Therefore, under the plain language of the statute, section 12-202 designates a remedy only when all other provisions in the Code are unavailable.

Section 9-209 and section 12-202 also set forth different timing requirements. Under section 9-209, a valid challenge must be made within three days after the ballot is publicly displayed. In contrast, under section 12-202, a general election challenge must be made either ten days after the act or omission was made or became known to the challenger or seven days after the election results are certified.

Finally, the two sections have different relief provisions. Under section 9-209, the court "may require the local board to: (1) correct an error; (2) show cause why an error should not be corrected; or (3) take any other action required to provide appropriate relief." Under section 12-202, "a registered voter may seek judicial relief from" an unlawful act or omission "relating to an election." The courts have interpreted judicial relief to include "the voidance of an already-held election as well as a judicially instituted new election."

3. The Court's Reasoning.—In Ross v. State Board of Elections, the Court of Appeals upheld the circuit court's entry of summary judgment in favor of the State Board of Elections and Paula Johnson Branch. The Ross court found that the circuit court erroneously relied on section 9-209 to grant summary judgment. The court nonetheless upheld the decision under section 12-202 and the common-law doctrine of laches, a ground also raised at trial by the election challenger.

51. § 9-209(a).
52. § 12-202(a).
53. Id.
54. § 9-209(a).
55. § 12-202(b)(1)-(2).
56. § 9-209(b)(1)-(3).
57. § 12-202(a).
59. 387 Md. at 673, 876 A.2d at 706.
60. Id. at 667, 876 A.2d at 702.
61. Id. at 667-68, 876 A.2d at 702-03.
The court began its analysis by exploring the scope and meaning of section 9-209. Upon reviewing the legislative history of that section, the court recognized the ability of registered voters to seek judicial redress for errors on a ballot. The court interpreted the plain language of section 9-209 to permit judicial review of the content and arrangement of a ballot. The court found that this review was limited to general facial aspects of the ballot and did not include candidate qualifications. Because Ross was challenging a substantive aspect of Branch’s qualification as the Democratic candidate, the Court of Appeals held that the circuit court erroneously granted summary judgment based on the timing provision of section 9-209(a).

After determining that the circuit court incorrectly granted summary judgment under section 9-209, the Court of Appeals concluded that Ross failed to file a timely petition because section 12-202(b) was intertwined with section 9-209. The court reasoned that because Ross attached the October 13, 2004 Baltimore Sun article to his November 5 petition, Ross was aware, on October 13, of Branch’s failure to file campaign finance reports. Under section 12-202(b), the court found that Ross filed his petition more than ten days after October 13 and thereby failed to file a timely petition under section 12-202.

The court further found that even if “the ten-day time period under section 12-202 began to run on October 26th,” Ross’s action remained barred by the doctrine of laches. The court reasoned that Ross’s delay in bringing his claim three days after the election prejudiced Branch, the State Board, and the residents of the Thirteenth Councilmanic District. Relying on Eid v. Duke, the court then concluded that because sections 9-209 and 12-202 were “similar and intertwined,” the court would affirm summary judgment under sec-

62. Id. at 661-65, 876 A.2d at 699-701.
63. Id. at 662-63, 876 A.2d at 700.
64. Id. at 665, 876 A.2d at 701.
65. Id.
66. Id. at 666-67, 876 A.2d at 702.
67. Id. at 667-68, 876 A.2d at 702-03.
68. Id. at 668, 876 A.2d at 703.
69. Id.
70. Id. at 668 n.8, 876 A.2d at 703 n.8. Ross filed his claim on November 5, 2004. Id. at 668, 876 A.2d at 703. Under section 12-202, Ross would have met the requisite ten-day time period if the time began to run on October 26, 2004, when the State Board refused to rule on Branch’s disqualification. Id. at 668 n.8, 876 A.2d at 703 n.8.
71. Id. at 672-73, 876 A.2d at 706.
72. Id. at 667-68, 876 A.2d at 703.
tion 12-202 and the doctrine of laches, new grounds not considered by the circuit court.73

In his dissent, Chief Judge Bell disagreed with the majority's grounds for reviewing Ross's claim under section 12-202 and the doctrine of laches.74 Chief Judge Bell rejected the court's application of Eid, reasoning that the majority failed to demonstrate the similarity between sections 9-209 and 12-202 or the doctrine of laches.75 In particular, Chief Judge Bell was concerned with the court's usurpation of the trial court's role.76 He feared that the court's broad application of the Eid exception would swallow the rule requiring appellate courts to limit review only to grounds considered by the trial court.77

4. Analysis.—In Ross v. Board of Elections, the Court of Appeals upheld summary judgment on grounds not relied on by the circuit court.78 In so holding, the court failed to adhere to the well-settled rule limiting appellate review of summary judgment only to those grounds relied on by the circuit court.79 The court also disregarded precedent and important policy considerations.80 Furthermore, the majority's decision to consider sections 9-209 and 12-202 as inextricably intertwined redefined the Election Code, which treats the two sections as separate and distinct.81 The Court of Appeals should have remanded the case to the circuit court with instructions to reconsider the case under section 12-202, which would have protected the appellate standard of review and preserved the separate and distinct claims for judicial review under sections 9-209 and 12-202 of the Election Code.82

a. The Court of Appeals Failed to Adhere to the General Rule Limiting Appellate Court Review Only to the Grounds on Which the Trial Court Relied in Granting Summary Judgment.—In Ross v. Board of Elections, the court failed to follow clear precedent when it affirmed summary judgment on grounds not relied on by the circuit court.83 Maryland appel-
late courts generally follow the principle that they will review a grant of summary judgment only on the grounds relied upon by the trial court. But the Ross court diverged from this precedent, thereby disturbing a settled rule of law.

The principle limiting appellate review only to the grounds on which the trial court relied maintains the roles of the circuit court to determine the record of fact and the appellate court to review only the law as applied to the record of fact. These distinct roles permit trial courts to determine facts and appellate courts to limit their review based on the trial court’s findings. In addition, the separate roles ensure that the trial court retains its discretion “to deny or to defer until trial on the merits the entry of judgment.”

In Ross, remand would have not only protected the appellate standard of review, but also would have preserved the separate and distinct claims under sections 9-209 and 12-202 of the Election Code. Instead, the Court of Appeals affirmed summary judgment under the new grounds of section 12-202. In so doing, the Court of Appeals blurred the roles of appellate and trial courts, undermined the principle of stare decisis, and deprived the circuit court of the discretion to apply the merits of section 12-202 to Ross.

b. The Court of Appeals’s Broad Application of the Exception Permitting Appellate Courts to Consider Grounds Not Relied on by the Circuit Court Violates Precedent and Important Policy Considerations.—When the Ross court failed to demonstrate that sections 9-209 and 12-202 were inextricably intertwined, the court expanded an exception to the general rule that limits appellate courts to review grounds relied upon by trial courts. The narrow exception had previously been applied by the court in Eid because the new grounds and the grounds relied on by the trial court were inextricably intertwined. Two issues are inextricably intertwined when one issue cannot be determined indepen-
The Ross court applied Eid's narrow exception, finding that sections 9-209 and 12-202 are inextricably intertwined, despite the plain language of the sections indicating that they are two separate and distinct provisions for judicial review. In so doing, the court broadened the exception and defied precedent at the expense of the policy preferences that preserve the separate roles of trial courts, which determine the facts, and appellate courts, which apply law to facts.

In Ross, the court concluded that the circuit court erroneously applied section 9-209 in granting summary judgment. Upon recognizing the error, the appeals court could have adhered to precedent and remanded the case to the circuit court. In so doing, the court would have followed stare decisis and maintained the separate and distinct claims of sections 9-209 and 12-202 of the Election Code.

In contrast to Eid, which relied upon a Supreme Court ruling that the disputed issues were inextricably intertwined, the Ross court did not cite any precedent or demonstrate how sections 9-209 and 12-202 are inextricably intertwined. In applying the Eid exception without finding such entwinement, the court expanded a rare and narrow exception to the general rule. This broader exception will deprive trial judges of their discretion to deny or defer many judgments until trial. Furthermore, because appellate court review is limited to the record of facts determined by the trial court, appellate courts are not in the best position to make the factual determinations underlying separate and distinct claims. Thus, the application of the Eid exception in Ross dangerously departs from precedent that requires narrow exception and protects the separate roles of trial courts to determine facts and appellate courts to apply the law.

c. The Court's Application of the Eid Exception Despite the Failure to Prove the Entwinement of Sections 9-209 and 12-202 Frustrates the Intent of the Election Code.—In upholding summary judgment on grounds not relied upon by the trial court, the Ross court improperly concluded

94. Id. at 15-16, 816 A.2d at 852.
96. See supra Part 2.a.
97. 387 Md. at 667, 876 A.2d at 702 (majority opinion).
98. See, e.g., Henley v. Prince George's County, 305 Md. 320, 333, 503 A.2d 1333, 1340 (1986).
99. See supra Part 2.c.
101. See Ross, 387 Md. at 667-68, 876 A.2d at 703.
102. Id. at 680-81, 876 A.2d at 711 (Bell, C.J., dissenting).
103. Id. at 674, 876 A.2d at 707.
that sections 9-209 and 12-202 were inextricably intertwined.\textsuperscript{104} Two issues are inextricably intertwined when one issue cannot be determined independently of the other.\textsuperscript{105} In contrast to \textit{Eid}, where the court determined that two issues were inextricably intertwined based on a Supreme Court holding and the petitioner's interchangeable use of the two issues, the Court of Appeals in \textit{Ross} neither cited nor explained their reasoning for concluding that sections 9-209 and 12-202 were entwined.\textsuperscript{106} In fact, sections 9-209 and 12-202 cannot be inextricably intertwined because section 12-202(a) requires that a registered voter may only seek relief under section 12-202 when "no other timely and adequate remedy is provided by [the Election Law article]."\textsuperscript{107} Because the scope of section 12-202 is defined in terms of the absence of other remedies, section 12-202 must be mutually exclusive from section 9-209.\textsuperscript{108} Therefore, section 12-202 cannot be inextricably intertwined with section 9-209 or any other section in the Election Code. Indeed, prior to considering \textit{Ross}, Maryland courts had upheld or dismissed election challenges based on the provisions of section 12-202, without considering any other Election Code sections providing judicial relief.\textsuperscript{109} Both statutory language and Maryland jurisprudence indicate that section 12-202 is not inextricably intertwined with section 9-209.\textsuperscript{110}

The court in \textit{Ross} also failed to recognize that sections 12-202 and 9-209 are distinct in their time requirement, scope of review, and remedies.\textsuperscript{111} Registered voters therefore have two separate and distinct means to seek judicial relief from any act or omission relating to an election.\textsuperscript{112} Courts should base their decisions on one section or the other, not both. Therefore, to conclude sections 9-209 and 12-202 are inextricably intertwined not only departs from precedent, but frustrates the intent of the Election Code.\textsuperscript{113}

5. \textit{Conclusion}.—The \textit{Ross} court upheld summary judgment under section 12-202 of the Election Law Article and the doctrine of

\textsuperscript{104} See supra Part 2.c.
\textsuperscript{105} \textit{Eid}, 373 Md. at 15-16, 816 A.2d at 852.
\textsuperscript{106} \textit{Ross}, 387 Md. at 667-68, 876 A.2d at 703.
\textsuperscript{107} \textsc{Md. Code Ann., Elec. Law} § 12-202(a) (LexisNexis 2002).
\textsuperscript{108} \textit{Id}.
\textsuperscript{110} See supra Part 2.c.
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} See supra Part 2.c.
laches, grounds not relied upon by the trial court. In so doing, the court failed to adhere to the long-standing rule requiring Maryland appellate courts to consider only the grounds on which the trial court relied when granting summary judgment. It also effectively disregarded precedent and important policy considerations. Furthermore, the court redefined the Election Code when it found that sections 9-209 and 12-202 could not be determined independently from one or the other. The Court of Appeals should have remanded the case for the circuit court’s review under section 12-202 and the doctrine of laches, thereby protecting the appellate standard of review and preserving the separate and distinct claims under sections 9-209 and 12-202 of the Election Code.

Amy Sandra Lee

114. Ross, 387 Md. at 673, 876 A.2d at 706.
115. See supra Part 4.a.
116. See supra Part 4.b.
117. See supra Part 4.c.
118. See supra Part 4.
II. CRIMINAL LAW

A. An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland

In *Roary v. State*, the Court of Appeals of Maryland considered for the first time whether the common-law second-degree felony-murder rule applies in cases where felonious assault is the underlying felony. In a 4-3 decision, the court held that first-degree assault is a proper predicate felony for second-degree felony murder. The effective result of the court’s broad holding is that any participant in an assault, regardless of whether she struck the fatal blow or foresaw a deadly result, can be convicted of second-degree murder. Thus, the court’s decision unwisely and unnecessarily extends the scope of second-degree common-law felony murder in Maryland.

In reaching its decision, the court rejected the merger doctrine, which precludes felonious assault as a predicate for felony murder. Instead, the court mistakenly relied on a deterrence rationale that emphasized conduct rather than intent. The court’s deterrence justification was flawed, however, because it incorrectly presumed that rejecting the merger doctrine would deter dangerous assaults. Moreover, by focusing on conduct rather than intent, the court failed to consider individual culpability and proportionality, two cornerstones of modern criminal law. This misguided approach renders the statutory punishment scheme for homicide largely ineffective and will, as it did in *Roary*, lead to illogical, disproportionate punishments. Finally, the court’s decision to allow assault as a predicate to felony murder permits prosecutors to circumvent the requirement to prove

3. *Roary*, 385 Md. at 222, 867 A.2d at 1098.
4. See id. at 255, 867 A.2d at 1117 (Raker, J., dissenting) (questioning the application of the felony-murder rule to an accomplice who did not intend to kill, did not inflict the fatal blow, and was unaware that the actual killer had a deadly weapon).
5. See infra Part 4.c.
6. The merger doctrine limits the underlying felonies in felony murder to those that are independent of the resulting homicide. See infra notes 75-102 and accompanying text. The merger doctrine in the felony-murder context is different from the merger principle that applies in sentencing. *Roary*, 385 Md. at 232 n.14, 867 A.2d at 1103 n.14.
7. *Roary*, 385 Md. at 235-36, 867 A.2d at 1105-06.
8. See infra Part 4.a.
9. See infra notes 181-188 and accompanying text.
10. See infra notes 176-199 and accompanying text.
intent to kill and subsumes much of Maryland's second-degree murder and manslaughter law into felony murder.\textsuperscript{11} The court should have instead followed the lead of a number of other states and adopted the merger doctrine to preclude assault as a predicate for felony murder.\textsuperscript{12} In doing so, the court would have imposed a reasonable limitation on the felony-murder doctrine while preserving an appropriate punishment scheme for homicide in Maryland.\textsuperscript{13}

1. The Case.—On December 27, 2001, while Michael Roary, his cousin Charles Peters, and a friend, Charles Lucas, were standing on a street corner in Baltimore, Lucas mistakenly identified Charles Banks, III, as someone who had previously robbed Lucas.\textsuperscript{14} Upon seeing Banks leave a nearby house, Peters chased Banks and fired several shots at him.\textsuperscript{15} Banks fled with Roary, Peters, and Lucas in pursuit.\textsuperscript{16} Randolph Sheppard, who was standing on a nearby street, heard cries to stop Banks.\textsuperscript{17} Sheppard tripped Banks and began kicking and punching him.\textsuperscript{18} When Roary, Peters, and Lucas arrived, they joined Sheppard in beating Banks.\textsuperscript{19}

At some point during the beating, two of the assailants dropped a large, heavy boulder\textsuperscript{20} on Banks's head.\textsuperscript{21} Although the record did not clearly indicate which two of the four attackers dropped the boulder, Roary was undisputably not one of them.\textsuperscript{22} Roary's role in the beating was limited to kicking Banks's leg.\textsuperscript{23} When the attack ended,
Roary and Lucas recovered the gun. Sheppard and Peters arrived in a car, picked up Roary and Lucas, and attempted to flee. The police chased and subsequently apprehended the four men.

Banks died ten months later from injuries sustained during the beating. Roary was tried in Baltimore City and convicted of involuntary manslaughter, first- and second-degree assault, conspiracy, transporting a handgun in a vehicle, and second-degree felony murder with first-degree assault as the predicate felony. The jury acquitted him of first-degree murder, second-degree "intent to kill" murder, and transporting a handgun on his person. The judge sentenced Roary to thirty years for felony murder, five years consecutive for conspiracy, and three years concurrent for the handgun charge.

Roary filed a timely appeal in the Maryland Court of Special Appeals; however, before the court could consider his case, the Maryland Court of Appeals, on its own motion, granted certiorari to consider whether the trial court erred in ruling that first-degree assault is a proper underlying felony for common-law second-degree felony murder.

2. Legal Background.—The felony-murder doctrine has its roots in the common law of England. Although England abolished the

24. Id.
25. Id. at 224, 867 A.2d at 1098-99.
26. Id., 867 A.2d at 1099.
27. Id. at 222, 867 A.2d at 1097-98.
28. Id., 867 A.2d at 1097.
29. The trial court granted a motion for judgment of acquittal for the first-degree murder count before the case went to the jury. Id. at 224 n.5, 867 A.2d at 1099 n.5.
30. Id. at 224, 867 A.2d at 1099.
31. Id. The State sought a sentence of thirty years for felony murder, twenty-five years consecutive for conspiracy, and three years consecutive for the handgun charge—a total sentence of fifty-eight years. Id. at 245 n.20, 867 A.2d at 1111 n.20. The Maryland sentencing guidelines prescribed twenty to thirty years for second-degree felony murder, eight to fifteen years for conspiracy, and one to five years for transporting a handgun in a vehicle. Id. Two of the other assailants, Sheppard and Peters, pled guilty to second-degree murder and conspiracy to commit first-degree assault and were each sentenced to twenty-five years with all but fifteen years suspended. Id. at 224, 867 A.2d at 1099. Because Lucas's trial was scheduled after Roary's, the outcome of Lucas's trial was not indicated in the record of Roary's trial. Id.
33. Roary, 385 Md. at 222, 867 A.2d at 1098. The court also considered two other issues: whether the trial court erred in its instructions to the jury regarding second-degree felony murder and whether the trial court impermissibly considered Roary's refusal to testify against his co-conspirators in determining his sentence. Id. at 222, 867 A.2d at 1098.
felony-murder rule in 1957, most states, including Maryland, still retain it in some form. Under the felony-murder rule, if a homicide occurs during the commission of or attempt to commit a felony, the actor may be punished for murder, whether or not she intended to kill her victim. To prove felony murder, the prosecution must first establish the elements of the underlying felony and then show that death occurred during the commission of that felony. There is no requirement to prove intent to kill because proving every element of the felony establishes, by operation of law, the malice that elevates the offense to murder. Therefore, the felony-murder rule is an exception to the modern criminal law principle that a crime requires an actus reus coupled with a specific mens rea for every element of the crime. Because the prosecution does not have to prove the intent element of murder, felony murder is a strict liability offense with respect to the homicide.

a. Maryland Homicide Law.—In Maryland, criminal homicide that is not excused or justified is either murder or manslaughter. Murder and manslaughter are two distinct crimes, not merely different degrees of felonious homicide. Murder is the unjustified, unexcused killing of a human being with malice aforethought. The

35. See Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1 (providing that a killing that occurs during the commission of a felony is not murder unless the malice aforethought otherwise required for murder exists).
36. Aaron, 299 N.W.2d at 314. Only Hawaii and Kentucky have expressly abolished the rule. Id.
39. Id. at 268-69, 373 A.2d at 267. There are two views of how the felony-murder rule operates. The first is a variation on transferred intent, sometimes referred to as constructive malice, in which the intent to commit the felony is transferred to the homicide. E.g., Commonwealth v. Scott, 564 N.E.2d 370, 377 (Mass. 1990). The second view, which appears to be the one accepted by the Maryland courts, is that the felony-murder rule makes the commission of a felony a distinct form of implied malice. See, e.g., Jackson v. State, 286 Md. 430, 435, 408 A.2d 711, 715 (1979) (stating that the fact that a person was engaged in perpetrating or attempting to perpetrate a felony is sufficient to supply the element of malice).
40. See Brooks v. State, 104 Md. App. 203, 217, 655 A.2d 1311, 1317 (1995) (stating that in Maryland, a person convicted of felony murder may receive a death sentence without a specific finding of mens rea that accompanied the homicide); People v. Aaron, 299 N.W.2d 904, 917 (Mich. 1980) (observing that in felony murder, there is no need to prove a relationship between the defendant’s mental state and the homicide).
43. Id. at 28 n.2, 553 A.2d at 234 n.2.
malice requirement for murder is satisfied by either express malice or one of three types of implied malice: (1) intent to cause grievous bodily harm, (2) depraved heart (willful and wanton disregard for the value of human life), and (3) felony murder. The first two types of implied malice permit a jury to infer the malice necessary to elevate a homicide to murder. In felony murder, the malice required for murder is imputed upon proof of commission of the underlying felony and the resultant homicide. Therefore, when felony murder is the basis for implied malice, the jury decides the issue of intent with respect to the underlying felony but not with respect to the intent to commit murder.

In 1809, Maryland adopted a statute that defined degrees of murder. The purpose of this statute was not to alter the common-law definition of murder but rather to allocate appropriate punishments according to the severity of the crime. In the 1809 Act, first-degree murder was defined as murder that was willful, deliberate, or premeditated; murder committed by means of poison or lying in wait; and murder that occurred during the commission of or attempt to commit certain enumerated felonies. All other murders were classified as second-degree murder. The present statute retains the same definitions of murder, although the list of enumerated felonies qualifying as first-degree murder has expanded to include statutory felonies such as escape and kidnapping.

Manslaughter is the unjustified, unexcused killing of a human being without malice aforethought. There are two forms of man-
slaughter: voluntary and involuntary. Voluntary manslaughter is an intentional killing committed in the heat of passion with adequate provocation and before a reasonable opportunity for a "cooling off" period. Although voluntary manslaughter, like murder, is intentional killing, the mitigating circumstances—heat of passion, adequate provocation, and no "cooling off" period—cancel out the malice that would otherwise make the killing murder. In contrast, involuntary manslaughter is an unintentional killing without malice that results from an unlawful act that endangers life, a negligent but lawful act, or a negligent omission to perform a legal duty.

b. Development of First- and Second-Degree Felony Murder in Maryland.—At common law, there were only a few felonies, nearly all of which were punishable by death, and the felony-murder rule applied to all of them. When Maryland adopted a statutory scheme defining degrees of murder, the legislature classified homicides occurring during certain enumerated felonies as first-degree murder. Unlike the clear statutory basis for first-degree felony murder, the origins of second-degree felony murder are more obscure. Because Maryland adheres to the common-law definition of murder and the felony-murder rule, second-degree murder based on a felony other than those enumerated in the first-degree murder statute has always existed, at least implicitly, in Maryland law. It was not until 2001, however, that the Maryland Court of Appeals, in Fisher v. State, unequivocally recognized second-degree felony murder as a criminal offense in Maryland. In Fisher, a nine-year-old girl died of malnutrition and dehydration result-

56. Id.
59. Id. at 332, 761 A.2d at 342.
60. People v. Aaron, 299 N.W.2d 304, 310 (Mich. 1980); see State v. Anderson, 666 N.W.2d 696, 698-99 (Minn. 2003) (noting that despite its apparent breadth, the common-law felony-murder rule was inevitably limited in scope because there were so few felonies recognized at the time).
61. Act of 1809, ch. 138, § 3, 1809 Md. Laws 458, 459. In 1809, the felonies that served as predicates for felony murder were arson, rape, robbery, burglary, sodomy, and mayhem. Id.
62. See Fisher v. State, 367 Md. 218, 238 n.4, 786 A.2d 706, 718 n.4 (2001) (suggesting that, except for manslaughter, other inherently dangerous felonies not listed in the first-degree murder statute could serve as predicates for felony murder, and if so, the offense would be second-degree murder).
63. Id. at 251, 786 A.2d at 726. In Fisher, the trial judge, on his own initiative, introduced the possibility of a jury instruction on second-degree felony murder. Id. at 237, 786 A.2d at 717. Before Fisher, the Court of Special Appeals had been the only Maryland court
ing from severe and continuous child abuse. The child’s mother and older sister, along with the older sister’s boyfriend, were convicted of felony murder with felony child abuse as the underlying felony. The mother and sister appealed, claiming that felony child abuse was not a proper underlying felony for felony murder. In upholding the conviction, the Court of Appeals concluded that Maryland recognizes common-law second-degree felony murder in cases where the underlying felony is not one of those enumerated in the first-degree murder statutes. The court also held that the predicate felonies for felony murder are not limited to felonies that existed at common law and implied that any inherently dangerous felony would suffice. Moreover, in another decision filed the same day as Fisher, the court expressly stated that its holding in Fisher applied not just to felony child abuse but to other inherently dangerous felonies not listed in the first-degree murder statute.

**c. The Merger Doctrine as a Limitation on Felony Murder.**—The felony-murder doctrine has been widely criticized as a harsh, anachronistic, and unnecessary rule. Courts and legislatures have responded to the expansion of the felony-murder doctrine by imposing limitations on its operation. The most common limitations require that the felonious act must (1) be one that is inherently dangerous to human life, (2) proximately cause the death, (3) have a temporal
connection to the resulting death (res gestae requirement),\textsuperscript{79} and (4) be independent of the homicide.\textsuperscript{74} The last of these limitations is known as the merger doctrine.\textsuperscript{75} The merger doctrine is a judicially created limitation that precludes assault from serving as the basis for a felony-murder charge when the victim of the assault is also the victim of the homicide.\textsuperscript{76} Assault was not a felony at common law,\textsuperscript{77} but most states now have at least some form of felonious assault in their statutes.\textsuperscript{78} In Maryland, first-degree assault is a statutory felony defined as intentionally causing or attempting to cause serious physical injury, or committing an assault with a firearm.\textsuperscript{79}

The merger doctrine was first enunciated and applied in 1878 in \textit{State v. Shock}.\textsuperscript{80} In \textit{Shock}, a young boy died several days after receiving a severe beating from the defendant.\textsuperscript{81} The trial court convicted the
defendant of first-degree murder based on felony murder with assault as the underlying felony. The Missouri Court of Appeals reversed the conviction, holding that the defendant's acts of violence against the boy were necessary elements of the homicide that merged into it. Thus, the beating did not constitute a distinct offense and could not serve as a predicate felony for a first-degree felony-murder conviction.

After Shock, most of the development of the merger doctrine occurred in New York, where the rule was first enunciated in People v. Huter. In Huter, the New York Court of Appeals reversed a conviction for felony murder based on assault with a handgun. The court held that "the [assault] may constitute a part of the homicide, yet the other elements constituting the felony ... must be so distinct from that of the homicide as not to be an ingredient of the homicide." Thus, if the act that caused death was an assault that resulted in the death of the victim, the assault "merged" with the homicide.

The Huter court distinguished assault from acts committed with a "collateral and independent felonious design," such as rape and robbery, that result in death. In crimes such as rape, robbery, and kid-

82. Id. at 556. The jury was instructed that if it found that the defendant intended to inflict great bodily harm and death resulted, then those findings were sufficient to establish first-degree murder. Id. at 558. This instruction was based on a similar instruction from an earlier case, which had been approved under Missouri's felony-murder statute. Id. The felony-murder statute at that time provided that "[h]omicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree." Id. at 559. Another statute made acts inflicting great bodily harm on another person a felony. Id. Therefore, assault could serve as a predicate to felony murder under the Missouri statutes at that time.

83. Id. at 561.
84. Id. at 561-62.
85. 77 N.E. 6 (N.Y. 1906). When Huter was decided, New York, like Missouri at the time of Shock, had a statute that classified as first-degree murder a killing that occurred during the attempt or commission of any felony. Id. at 7. After Huter, the New York Court of Appeals continued to develop and apply the merger doctrine in subsequent cases. See, e.g., People v. Moran, 158 N.E. 35 (N.Y. 1927) (reversing a first-degree murder conviction that was based solely on felony murder, where the felony was shooting a police officer); People v. Wagner, 156 N.E. 644, 646 (N.Y. 1927) (stating that the law requires that the predicate felony must be independent of and not included within the resulting homicide).

86. Under the New York murder statute in effect at the time, any felony could serve as the underlying felony for felony murder. Huter, 77 N.E. at 7.
87. Id. at 8.
88. Id. at 8-9.
89. Id. at 9. While an assaultive act often occurs during a rape or robbery, and arguably must occur for those offenses to result in death, the assault is not an essential ingredient that defines the entire crime. People v. La Marca, 144 N.E.2d 420, 428 (N.Y. 1957); Buel v. People, 78 N.Y. 492, 497 (1879).
napping, an element other than assault forms the basis of the crime.\footnote{90} When a felony-murder charge is based on the underlying felony of rape, the intent to commit rape substitutes for the intent to kill.\footnote{91} The intent to commit rape, which forms the basis for the felony-murder charge, is distinct from the accompanying intent to commit the assaultive behavior that causes death, such as choking or beating.\footnote{92} In contrast, when a single assaultive act results in homicide, the only intent is the intent to commit the assault.\footnote{93} Thus, there is no intent based on a separate, collateral felony, in addition to the assaultive intent, to supply the necessary intent to kill.\footnote{94}

While New York developed and applied the merger doctrine in the context of first-degree felony murder, other states, notably California, have applied the doctrine to preclude assault as a predicate felony for second-degree felony murder.\footnote{95} In \textit{People v. Ireland}, the California Supreme Court decided that assault with a deadly weapon could not serve as the predicate felony for second-degree felony murder.\footnote{96} In \textit{Ireland}, the defendant, who was suffering from depression and marital troubles, fatally shot his wife.\footnote{97} The court held that second-degree felony murder could not be predicated upon a felony that was an integral part of the homicide and that was an included offense within the homicide.\footnote{98} In later decisions, the California Supreme Court modi-

\begin{footnotes}
\footnote{90} See, e.g., \textit{Buel}, 78 N.Y. at 497 (stating that carnal knowledge is the essence of rape); \textit{La Marca}, 144 N.E.2d at 428 (stating that the essence of child kidnapping is the intent to conceal the child from her parent or to extort or obtain money or a reward for the child's return).


\footnote{92} \textit{Buel}, 78 N.Y. at 497.

\footnote{93} \textit{Id}.

\footnote{94} \textit{Id}.

\footnote{95} In addition to Maryland, states that recognize common-law second-degree felony murder include California, Massachusetts, and Nevada. \textit{People v. Robertson}, 95 P.3d 872, 878 (Cal. 2004); \textit{Commonwealth v. Matchett}, 436 N.E.2d 400, 407 (Mass. 1982); \textit{Sheriff of Clark County v. Morris}, 659 P.2d 852, 859 (Nev. 1983). Other states have expressly declined to recognize second-degree felony murder absent legislative action. See, e.g., \textit{Sawyer v. People}, 478 P.2d 672, 674 (Colo. 1970) (concluding that statutory scheme foreclosed existence of second-degree felony murder in Colorado); \textit{State v. Randolph}, 676 S.W.2d 943, 946 (Tenn. 1984) (declining to adopt a judicially created second-degree felony-murder rule). In 1980, the Michigan Supreme Court judicially abrogated common-law felony murder, declaring that the mental element of murder may not be satisfied by proof of the underlying felony. \textit{People v. Aaron}, 299 N.W.2d 304, 329 (Mich. 1980).


\footnote{97} 450 P.2d at 582.

\footnote{98} \textit{Id} at 590.
\end{footnotes}
fied its version of the merger doctrine to require an independent felonious purpose, bringing it closer to the New York approach.99

A number of other states have adopted the merger doctrine, often citing the reasoning in New York or California cases as their basis for doing so.100 As a result, there is no single expression of the merger doctrine.101 However, although courts applying the merger doctrine have expressed the rule in different ways, the net result is always that assaultive conduct merges with the homicide.102

d. Rationales for Limiting the Felony-Murder Doctrine.—The origin and original purpose of the felony-murder doctrine are unclear.103 The original common-law justification for felony murder apparently hinged on general moral blameworthiness: because a felon was generally viewed as a “bad person with a bad state of mind,” when she committed an act with a bad result, it was unimportant whether she actually intended that result.104 With time, the concept of mens
rea evolved from a vague notion of criminal disposition to a specific mental state requirement.\textsuperscript{105} As a result, the justification for the felony-murder doctrine shifted to deterrence. The more common deterrent rationale suggests that the purpose of the felony-murder rule is to prevent accidental or negligent killings during felonies.\textsuperscript{106} Another rationale is to deter the underlying felonies themselves.\textsuperscript{107}

At early common law, virtually all felonies were punishable by death.\textsuperscript{108} Thus, application of the felony-murder doctrine made no practical difference and caused no injustice because the punishment was the same whether a person was convicted of the felony itself or of felony murder.\textsuperscript{109} Over time, however, states began to enact statutory felonies, many of which were not as severe as the common-law felonies.\textsuperscript{110} As a result, courts began to view the felony-murder rule as an unacceptably harsh doctrine that unfairly broadened the scope of murder.\textsuperscript{111} Courts also noted the apparent harshness of the felony-murder doctrine's conflict with modern notions of liability in proportion to moral culpability.\textsuperscript{112}

In \textit{People v. Moran}, in an opinion written by Judge (later Justice) Cardozo, the New York Court of Appeals articulated one of the most cited reasons for applying the merger doctrine.\textsuperscript{113} In \textit{Moran}, the defendant was convicted of first-degree felony murder for shooting a police officer.\textsuperscript{114} The appellate court reversed, holding that the element then operate to punish the would-be felon as if she had successfully carried out her crime.\textsuperscript{115}

\textit{Id.}

\textsuperscript{105} See Morissette v. United States, 342 U.S. 246, 250 (1952) (stating that the requirement that an injury be intentional to be considered a crime is a “universal and persistent notion in mature systems of law”); \textit{Aaron}, 299 N.W.2d at 318 (stating that at early common law, mens rea was a vague concept encompassing any intentional wrongdoing); Regina v. Cunningham, (1957) 2 Q.B. 396 (Crim. App.) (indicating that general wicked nature no longer sufficed to provide requisite mental element of murder).

\textsuperscript{106} E.g., People v. Hansen, 885 P.2d 1022, 1027 (Cal. 1994); State v. Williams, 24 S.W.3d 101, 110 (Mo. App. 2000); People v. Miller, 297 N.E.2d 85, 87-88 (N.Y. 1973).


\textsuperscript{108} \textit{Aaron}, 299 N.W.2d at 310.

\textsuperscript{109} \textit{Id.} at 310-11.

\textsuperscript{110} See Jenkins v. State, 250 A.2d 262, 268 n.7 (Del. 1967) (noting that an unqualified felony-murder rule would be incongruous with statutory felonies such as forgery, counterfeiting, embezzlement, pandering, and pimping).

\textsuperscript{111} E.g., In \textit{re} Personal Restraint of Andress, 56 P.3d 981, 983 (Wash. 2002).

\textsuperscript{112} See Solem v. Helm, 463 U.S. 277, 284 (1983) (stating that the principle of proportionality is “deeply rooted” in the common law); Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975) (stating that degree of culpability, not just guilt or innocence, is a concern in criminal law). Furthermore, in \textit{Enmund v. Florida}, the Supreme Court emphasized the importance of individual culpability in the context of felony murder. 458 U.S. 782, 798 (1982).

\textsuperscript{113} 158 N.E. 95, 36 (N.Y. 1927).

\textsuperscript{114} \textit{Id.}
of intent should not be eliminated simply because a felony was committed or because a homicide occurred during its commission.\textsuperscript{115} Because nearly every homicide originates in an assault, the court reasoned that without the merger doctrine there would never be a need to prove intent to kill, deliberation, and premeditation.\textsuperscript{116} Many courts have echoed Judge Cardozo's view, explaining that the merger limitation was necessary to prevent the extinction of second-degree murder and manslaughter.\textsuperscript{117}

Courts have advanced similar arguments in second-degree felony-murder cases. For example, in \textit{People v. Ireland}, the California Supreme Court stated that if the merger doctrine did not apply, juries would not be able to consider the issue of malice whenever a homicide occurs as a result of a felonious assault—the vast majority of cases.\textsuperscript{118} Subsequently, the California Supreme Court explained that to elevate all felonious assaults resulting in death to second-degree murder would usurp much of the law of homicide and would frustrate the legislature's intent to create punishments proportional to culpability.\textsuperscript{119} The California Supreme Court has also justified its application of the merger doctrine based on its view that the purpose of the felony-murder rule—to deter accidental or negligent killing during felonies—is not realized when the felony-murder rule is applied to assault cases.\textsuperscript{120}

Finally, although some state courts have refused to apply the merger doctrine, they have usually done so to comply with legislative intent or specific statutory language that expressly includes assault as a predicate felony for felony murder.\textsuperscript{121} Moreover, in several states where statutory language precludes adoption of the merger doctrine, courts have nonetheless approved of it as an appropriate limitation on felony murder.\textsuperscript{122}

\begin{thebibliography}{99}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{118} 450 P.2d 580, 590 (Cal. 1969).
\item \textsuperscript{119} \textit{People v. Hansen}, 885 P.2d 1022, 1028 (Cal. 1994).
\item \textsuperscript{120} \textit{People v. Mattison}, 481 P.2d 193, 198 (Cal. 1971). In \textit{Mattison}, the court suggested that the felony-murder rule will not deter an assailant from carrying out an assault, nor will it deter negligent or accidental killing in the case of an assault. \textit{Id.} at 198-99. The court explained that only when a felony has a separate purpose other than assault can a deterrent effect be realized. \textit{See id.} at 198.
\item \textsuperscript{122} \textit{See, e.g.}, \textit{Lawson}, 64 S.W.3d at 401 (Cochran, J., concurring) (recognizing that the common-law felony-murder rule was overbroad and that the merger doctrine was a reasonable means of limiting it); \textit{Williams}, 24 S.W.3d at 117 (approving the state appellate courts'
3. The Court's Reasoning.—In Roary v. State, the Court of Appeals of Maryland held that first-degree assault committed in a manner that is inherently dangerous to human life may serve as the predicate felony for second-degree felony murder in Maryland. After first addressing a procedural matter, Judge Greene, writing for the majority, began by discussing the doctrine of felony murder and its application in Maryland. After defining the common-law felony-murder rule, Judge Greene stated that the purpose of the modern felony-murder rule is to deter violent conduct by punishing homicide resulting from dangerous felonies such as murder, recognizing that society views a felony that results in death as more serious than one that does not. Then, quoting language from an earlier case, Judge Greene explained that in felony murder, participation in the felony supplies the element of malice necessary to elevate the offense to murder.

prior endorsement of the doctrine as a means of keeping the felony-murder rule within its logical bounds, while noting its present duty to enforce the felony-murder statute as written); State v. Wanrow, 588 P.2d 1320, 1320-21 (Wash. 1978) (recognizing the harshness of the felony-murder rule but stating that it could not adopt the merger doctrine without invading the legislature's province of defining crimes).

123. Roary, 385 Md. at 236, 867 A.2d at 1106. The court also found no error in the two additional questions Roary raised on appeal regarding the jury instructions and the criteria used in sentencing. Id. at 222, 867 A.2d at 1098. With respect to the jury instructions, the court's holding that first-degree assault was a proper underlying felony for second-degree felony murder negated Roary's argument that the judge's felony-murder instruction was improper. Id. The court also held Roary's additional arguments that the jury instructions were prejudicial to be without merit. Id. at 237-38, 867 A.2d at 1106-07. Finally, the court held that the trial court did not use impermissible criteria in determining Roary's sentence and rejected his contention that the judge penalized him for refusing to testify against his co-conspirators. Id. at 242, 248, 867 A.2d at 1109, 1113.

124. The court first addressed whether Roary had properly preserved the issue of whether first-degree assault could serve as the underlying felony for second-degree felony murder. Id. at 225, 867 A.2d at 1099. Under Rule 8-131(a), the appellate court will not ordinarily decide issues other than subject matter jurisdiction or personal jurisdiction unless the trial record shows that the issue was clearly raised in or decided by the trial court. Id., 867 A.2d at 1100 (citing Md. R. 8-131(a) (LexisNexis 2005)). However, the court may decide an issue that was not clearly raised to provide guidance for the trial court or in the interest of economy and efficiency. Id. at 225-26, 867 A.2d at 1100. Although the court concluded that Roary had not properly preserved the issue, the court nevertheless exercised its discretion under Rule 8-131(a) to consider the issue on the merits. Id. at 225, 867 A.2d at 1099-1100.

125. Id. at 226-27, 867 A.2d at 1100-01. Judges Cathell, Harrell, and Battaglia joined in the majority opinion. Id.

126. Id. at 227, 867 A.2d at 1100.

127. Id., 867 A.2d at 1100-01 (citing Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979)).
The majority then restated the three conclusions pertaining to second-degree felony murder that the court had reached in *Fisher*. First, predicate felonies for felony murder are not limited to those enumerated in the first-degree murder statute. Second, underlying felonies for felony murder are not restricted to those offenses which were felonies at common law. Finally, a felony must be dangerous to life, either by its nature or by the manner and circumstances in which it was committed, to serve as an underlying offense to felony murder. The majority also explained the accomplice liability rule as it applies to felony murder in Maryland: if a felon commits homicide during a felony, all participating co-felons are guilty of murder.

After reviewing the statutory definition of first-degree assault, the majority applied the *Fisher* standard to Roary's case and concluded that first-degree assault qualifies as a felony that is dangerous to life. Based on this conclusion, the majority held that first-degree assault is a proper underlying felony for second-degree felony murder.

The majority then considered and ultimately rejected Roary's proposal that it adopt the merger doctrine, which would preclude assault as a predicate to felony murder. First, the majority noted a distinction between the common-law evolution of Maryland's felony-murder law and that of other states that have adopted codes in lieu of common-law crimes. The court stated that Maryland has ameliorated the harshness of the felony-murder rule by limiting the underlying felonies to those that are dangerous to human life, but otherwise the rule still operates to supply the element of malice to elevate the

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128. *Id.* at 227-29, 867 A.2d at 1101-02 (citing *Fisher* v. *State*, 367 Md. 218, 786 A.2d 706 (2001)). The *Roary* court referred to *Fisher*, the case in which the Court of Appeals first recognized common-law second-degree felony murder as an offense in Maryland, as the "seminal case in Maryland regarding common law second-degree felony murder." *Id.* at 227, 867 A.2d at 1101.

129. *Id.* at 228, 867 A.2d at 1101.

130. *Id.* at 228-29, 867 A.2d at 1101.

131. *Id.* at 229, 867 A.2d at 1101.

132. *Id.*, 867 A.2d at 1102.

133. *Id.* at 230, 867 A.2d at 1102. The court found first-degree assault to be dangerous both by its nature, as a crime that "creates a substantial risk of death," and under the particular circumstances of this case, an assault by four men in which a twenty- to thirty-pound boulder was dropped on the victim's head. *Id.*

134. *Id.*

135. *Id.* at 232-36, 867 A.2d at 1103-06.

136. *Id.* at 231, 867 A.2d at 1102-1103. The majority noted that the delineation of murder into degrees in the Acts of 1809 was intended to create different punishments, but "did not alter the common law felony murder doctrine." *Id.* at 231 n.12, 867 A.2d at 1103 n.12.
homicide to murder. The court then reviewed several cases from other jurisdictions that discuss the merger doctrine and considered the arguments in favor of the merger doctrine. The court then reiterated its position that the felony-murder doctrine is justified if the felonious acts are sufficiently dangerous to human life and stated that its focus in applying the felony-murder doctrine was on the participants' conduct in committing or attempting to commit the felony. The majority asserted that rejecting the merger doctrine would deter would-be felons whose acts create a foreseeable risk of death, either inherently or under the particular circumstances of their actions. In rejecting the merger doctrine, the court recognized that its position is contrary to that of a number of other states who have adopted merger.

Judge Raker dissented, joined by Chief Judge Bell and Judge Williams. In Judge Raker's view, the predicate felony for felony-murder must be independent of the homicide and therefore must be independent of the assault that merges into the homicide. Although Judge Raker agreed with the majority that Maryland jurisprudence includes the felony-murder doctrine in both common-law and statutory form, she objected that the majority's holding extended the felony-murder rule in contrast with the trend around the country. Judge Raker noted that such an extension is unwarranted in light of the history of the felony-murder rule and modern trends in criminal law.

The dissent made three arguments against the majority's position that assault is a proper underlying felony for felony murder. First, Judge Raker contended that the merger doctrine is necessary because if assault is a proper underlying felony, the different grades of homicide would be obliterated. She then asserted that adopting the merger doctrine would not preclude second-degree murder prosecutions when warranted because Maryland homicide law provides three other modalities for establishing second-degree murder aside from felony murder. Thus, Judge Raker concluded, in many cases, a
"dangerous to life" assault that results in death will implicate the defendant under one of the other theories of second-degree murder. In such cases, she argued, felony murder is unnecessary to establish intent.

Finally, the dissent suggested that allowing first-degree assault to serve as the predicate felony does not advance the purpose of the felony-murder doctrine. Judge Raker stressed that in Fisher, the court made clear that the primary purpose of the modern felony-murder rule is to deter dangerous conduct. She argued that the purpose of deterring accidental or negligent killings is not served by finding murder when the defendant intentionally commits a dangerous, life-threatening assault. Judge Raker also questioned the deterrent effect when the rule is applied to an accomplice who did not intend to commit murder and did not know that the ultimate killer had a deadly weapon.

4. Analysis.—In Roary v. State, the Court of Appeals of Maryland held that first-degree assault is a proper predicate felony for second-degree felony murder. In so holding, the court declined to adopt the merger doctrine, which would have precluded crimes such as assault, that are inherently part of the resulting homicide, from serving as the underlying felony. The court's refusal to adopt the merger doctrine inappropriately broadens the scope of felony murder in Maryland.

In reaching its decision, the Roary court failed to consider several negative consequences that flow from its rejection of the merger doctrine. First, the court's decision will not serve the majority's purported deterrent goals because allowing assault to serve as a predicate

147. Id.
148. Id.
149. Id. at 254, 867 A.2d at 1116.
150. Id. Judge Raker elaborated further, quoting a commentator's description of several deterrent purposes of felony murder: to deter accidental or negligent killing, to reduce the risk that homicide will occur during commission of a felony, and to deter intentional killing. Id. at 254-55, 867 A.2d at 1116 (citing James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law, 51 WASH & LEE L. REV. 1429, 1448-49 (1994)).
151. Id. at 255, 867 A.2d at 1117.
152. Id.
153. Id. at 222, 867 A.2d at 1098 (majority opinion).
154. See supra notes 80-94 and accompanying text.
155. See infra Part 4.c.
felony will not deter would-be assailants from committing assaults.\footnote{156} Second, in choosing to adhere to an outdated view of criminal law in which the focus is on a defendant's conduct instead of her culpability, the court has adopted a rule that will result in unfair, illogical, and disproportionate punishments.\footnote{157} Finally, the court's decision allows prosecutors to circumvent the intent requirement for second-degree murder, thus effectively eliminating the entire scheme of second-degree intent-to-kill murder from Maryland law.\footnote{158}

The Roary court should have followed the lead of a number of other states and adopted the merger doctrine to limit the scope of second-degree felony murder.\footnote{159} Adopting the merger doctrine would also have been a better policy decision in terms of modern criminal justice principles that emphasize individual culpability and proportionality of punishment.\footnote{160} Moreover, such a decision would have maintained control over prosecutorial discretion in charging felony murder and protected the statutory scheme of homicide gradations adopted by the General Assembly.\footnote{161}

\textbf{a. Allowing Assault as a Predicate Felony Will Not Deter Dangerous Assaults.}—In Roary, the court justified its rejection of the merger doctrine by citing the goal of deterring dangerous felonies.\footnote{162} However, the majority's conclusion that allowing assault to serve as a predicate offense for felony murder will deter potential criminals from committing dangerous felonies is misguided in several respects. First, the court failed to realize that a punishment intended as a deterrent will be more effective when it is directed at the intended harm rather than at an unintended, greater result.\footnote{163} Second, the court neglected the fact that Maryland law already provides a significant penalty, up to twenty-five years in prison, for first-degree assault.\footnote{164} The penalty for

\begin{footnotesize}
\footnote{156. See infra Part 4.a. According to the majority, the purpose of the felony-murder rule is to deter dangerous conduct, and it does so by punishing such conduct as murder when it occurs during a felony.\textit{Roary}, 385 Md. at 226-27, 867 A.2d at 1100.}
\footnote{157. See infra notes 176-199 and accompanying text.}
\footnote{158. See infra Part 4.c.}
\footnote{159. See supra notes 75-102 and accompanying text.}
\footnote{160. See infra notes 176-199 and accompanying text.}
\footnote{161. See Davis v. State, 39 Md. 355, 375 (1874) (recognizing that murder includes offenses that differ in degree of atrocity and stating the intent of the Maryland homicide statute to differentiate punishments for murder according the specific circumstances of commission).}
\footnote{162. 385 Md. at 236, 867 A.2d at 1106.}
\footnote{164. MD. CODE ANN., CRIM. LAW § 2-302(b) (LexisNexis 2005).}
\end{footnotesize}
second-degree murder, including felony murder, is thirty years. If the threat of twenty-five years in prison does not by itself deter assaults that are dangerous to life, it is unlikely that the threat of an additional five years will do so either.

Finally, the deterrent effect of felony murder on the commission of felonies lacks empirical support. The deterrence rationale depends on the premise that a disproportionate number of deaths occur during felonies, but statistics reveal that it is highly unlikely that commission of a felony will result in death. For instance, in Enmund v. Florida, the Supreme Court considered whether an accomplice whose role in a robbery that resulted in homicide was limited to driving the getaway car could be sentenced to death after being convicted of felony murder. The Court concluded that imposing the death penalty for felony murder was not a justifiable deterrent for the felony itself. The Court based its conclusion on an examination of national crime statistics from 1980 which indicated that the rates of homicides occurring during robberies, rapes, and burglaries were extremely low. Recent data from 2004 show similarly low rates, reaffirming the Court’s conclusion that a significantly harsher penalty will not deter dangerous felonies. Although these data did not include

165. Id. § 2-204(b).
166. See Russell R. Barton, Comment, Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle, 42 Baylor L. Rev. 535, 544 (1990) (arguing that assault statutes already provide adequate deterrence for dangerous acts causing death). One author has even suggested that if the penalty for the underlying felony is nearly as severe as the penalty for felony murder, a felon may be encouraged to kill in order to prevent a victim from later identifying him. Jeanne Siebold, Comment, The Felony-Murder Rule: In Search of a Viable Doctrine, 23 Cath. Law. 133, 152 (1978).
167. See Tomkovicz, supra note 150, at 1460.
169. Enmund v. Florida, 458 U.S. 782, 800 n.24 (1982) (citing statistics which indicated that only 0.43% of robberies resulted in homicide); Model Penal Code § 210.2 cmt. n.96 (1959) (citing statistics from Philadelphia in 1948-1952 indicating that the rates of homicides occurring during dangerous felonies were 0.50% for robbery, 0.35% for rape, and 0.0036% for burglary).
170. 458 U.S. at 799.
171. Id.
172. Id.
173. U.S. Dept. of Justice, Fed. Bureau of Investigation, Crime in the United States 2004: Uniform Crime Reports 18, 22 (2004) (presenting data on the circumstances of 14,121 of the estimated 16,137 murders that occurred in United States. Of the 2089 homicides that occurred during felonies, 36 occurred during rapes, 988 occurred during robberies, and 71 occurred during burglaries. Id. at 22, tbl.2.12. In 2004, there were 94,635 rapes, 401,376 robberies, and 2,143,546 burglaries in the United States. Id. at 22, 37, 45. Thus, the rates of homicides occurring during these felonies were 0.038% for rape (36 of
assaults, there is no reason to believe that the deterrent effect on assaults would be any different.\textsuperscript{174}

In summary, the Roary court's rejection of the merger doctrine under a deterrence rationale is not justified. It is much more likely that the deterrent goal would be realized through the certainty and severity of punishment for first-degree assault, which in Maryland may be up to twenty-five years in prison.\textsuperscript{175}

\begin{itemize}
\item \textbf{b. The Court's Refusal to Adopt the Merger Doctrine Promotes Illogical Results and Punishments Disproportionate to Culpability.---}As Roary illustrates, the Court of Appeals's refusal to apply the merger doctrine is likely to lead to illogical results. In Roary, the jury acquitted the defendant of second-degree murder based on intent to kill and intent to cause grievous bodily harm.\textsuperscript{176} Therefore, the jury must have found that Roary lacked the intent to kill and the intent to commit serious bodily harm. However, the jury found Roary guilty of second-degree felony murder with first-degree assault as the underlying felony.\textsuperscript{177} To convict Roary on this charge, the jury had to find that he met the intent requirement for first-degree assault, which is the intent to commit serious bodily harm.\textsuperscript{178} Therefore, in the same case, on the same facts, the jury findings led to two incongruous results: Roary did not commit second-degree murder under a traditional second-degree murder theory because he did not intend to cause serious bodily harm, yet Roary did commit second-degree murder under the theory of felony murder based on assault because he intended to cause serious bodily harm. This illogical outcome in Roary follows directly from the court's application of the felony-murder doctrine to a predicate felony of assault.\textsuperscript{179}
\end{itemize}

\textsuperscript{174} This is especially true because there are already significant deterrents to assault, including the possibility of being charged with murder if the victim dies. See infra notes 202-204 and accompanying text.

\textsuperscript{175} See Tomkovicz, supra note 150, at 1456 (arguing that very few of the already small number of deaths that occur during felonies are not already subject to a significant criminal sanction, making it even less likely that the additional risk of a murder conviction will influence prospective felons).

\textsuperscript{176} 385 Md. at 224, 867 A.2d at 1099. Intent to commit serious bodily harm is also one of the types of implied malice that can be used to elevate homicide to murder. Evans v. State, 28 Md. App. 640, 696, 349 A.2d 300, 335 (1975).

\textsuperscript{177} Roary, 385 Md. at 224, 867 A.2d at 1099.


\textsuperscript{179} In an assault case, unlike rape or robbery, there is no separate felonious conduct, in addition to the assaultive act causing death, that elevates the crime to murder. See supra notes 89-94 and accompanying text. Because the assault is the only felonious conduct,
In rejecting the merger doctrine, the Roary court mistakenly focused on the result of the participants' conduct without considering each person's individual culpability.\textsuperscript{180} This misplaced emphasis on conduct will likely lead to disproportionate punishments, as it did in Roary's case.\textsuperscript{181} While conduct is a consideration in determining culpability, the court appears to have completely ignored the more important factor of the defendants' individual states of mind.\textsuperscript{182} In doing so, the court reverted to the outdated view of culpability that prevailed when the felony-murder rule was first developed and mens rea was a nebulous and general concept.\textsuperscript{183} Thus, the majority's approach in Roary contrasts sharply with the modern understanding of criminal law that emphasizes individual culpability and proportional punishment.\textsuperscript{184} Even those who have argued for the felony-murder doctrine acknowledge that proportionality is a critical consideration and that the merger doctrine supports the objective of proportional punishment.\textsuperscript{185}

The Roary majority also failed to recognize that the felony-murder rule, which holds a defendant strictly liable for a homicide without considering his state of mind, violates proportionality principles that require assessment of individual culpability.\textsuperscript{186} Applying strict liability in the context of murder conflicts with the modern notion that strict liability is acceptable only for offenses that carry minor moral stigmas and punishments.\textsuperscript{187} Unlike public welfare and regulatory offenses

\begin{itemize}
\item applying the felony-murder rule when assault is the predicate felony results in inappropriate and illogical bootstrapping. People v. Ireland, 450 P.2d 580, 590 (Cal. 1969).
\item See id. at 236, 867 A.2d at 1106.
\item See id. at 224, 867 A.2d at 1099 (imposing a sentence of thirty-five years where more culpable accomplices received sentences of fifteen years).
\item See Tamu Sudduth, Note, The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments, 72 CAL. L. REV. 1299, 1314 (1984) (stating that the predominant factors in determining criminal culpability are the offender's mental state and the magnitude of the harm). In homicides, the magnitude of harm—loss of life—does not vary from case to case. Therefore, a defendant's mental state is the major factor in assessing culpability. Id.
\item This theory focuses on the harm resulting from an unlawful act rather than the felon's intent. Id.
\item See supra note 112 and accompanying text.
\item Roth & Sundby, supra note 163, at 458. The theory that a felon's evil mind justified severe punishment originated in the seventeenth and eighteenth centuries. Id. This theory focuses on the harm resulting from an unlawful act rather than the felon's intent. Id.
\item See supra note 112 and accompanying text.
\item MODEL PENAL CODE § 210.2 cmt. (1980) (stating that the homicide in felony murder is a strict liability offense because liability for murder is based on culpability for the underlying felony without proof of culpability for the resulting death); see also People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (stating that the felony-murder rule "erodes the relation between criminal liability and moral culpability").
\item See Tomkovicz, supra note 150, at 1452-53.
\end{itemize}
for which strict liability is considered appropriate, murder carries one of the worst stigmas and the highest penalties.\(^8\)

Likewise, the *Roary* court did not account for the far-reaching implications when felony murder is combined with accomplice liability.\(^8\) When the killer is one of a group of co-felons, the felony-murder rule ignores the extent of an individual’s particular misconduct when determining culpability.\(^9\) The result is a double application of strict liability that can lead to unfair and disproportionate outcomes such as the result in *Roary*.\(^1\) Roary’s individual bad conduct during the assault was limited to kicking the victim in the leg,\(^2\) while two of the other assailants dropped a twenty-five- to thirty-pound boulder on the victim’s head, directly causing his death.\(^3\) During Roary’s sentencing, the trial judge recognized that Roary was not the killer\(^4\) and that the two killers had received sentences of only fifteen years each.\(^5\) Nevertheless, Roary was held responsible for the acts of his co-felons and sentenced to thirty-five years in prison.\(^6\) This outcome, in which the least culpable actor received the most severe punishment, defies modern criminal law concepts of individual culpability and proportionality of punishment.\(^7\)

The court could have avoided this result if it had adopted the merger doctrine. Although Roary’s conviction for felony murder would have been overturned, his conviction for involuntary manslaughter would not have been affected.\(^8\) Thus, he would have been

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188. *Id.* at 1454.
189. It is well-established under Maryland law that an accomplice is responsible for the natural and probable results of her acts and the acts of her co-felons in furtherance of a common scheme. Campbell v. State, 293 Md. 438, 443-44, 444 A.2d 1034, 1038 (1982).
190. People v. Aaron, 299 N.W.2d 304, 317 (Mich. 1980); see People v. Burroughs, 678 P.2d 894, 909 (Cal. 1984) (Bird, C.J., concurring) (suggesting that applying vicarious liability to an accomplice who did not commit the act causing death is the most objectionable aspect of the felony-murder doctrine).
191. *See* Siebold, *supra* note 166, at 153 (arguing that all felons involved in an intentional or reckless killing can be found criminally responsible without the need to implicate mens rea through agency).
192. *Roary*, 385 Md. at 223, 867 A.2d at 1098.
193. *See* Brief of Appellee at 20, *Roary*, 385 Md. 217, 867 A.2d 1095 (No. 25) (stating that blunt force injury to the head was the cause of death).
194. *Roary*, 385 Md. at 246, 867 A.2d at 1112 (stating that “the truth in this case is that this Defendant, Roary, is not the killer”).
195. *Id.* at 224, 867 A.2d at 1099.
196. *Id.*
197. *See infra* notes 181-188 and accompanying text.
198. *See Roary*, 385 Md. at 255, 867 A.2d at 1117 (Raker, J., dissenting) (noting that the jury found Roary guilty of second-degree felony-murder and two counts of involuntary manslaughter).
held responsible for his actions, but under a sentence much more in line with his culpability.\textsuperscript{199}

Finally, the result in \textit{Roary} conflicts with the General Assembly's desire to punish different crimes according to both their severity and the culpability of each defendant.\textsuperscript{200} This desire is reflected in the homicide statute, which assigns punishments for the crimes of first-degree murder, second-degree murder, first-degree assault, and involuntary manslaughter according to the severity and seriousness of the crimes.\textsuperscript{201} Moreover, in designating a twenty-five-year maximum sentence for first-degree assault, the legislature recognized the potential severity of that offense.\textsuperscript{202} Because the difference in maximum sentences for first-degree assault and second-degree murder is only five years, even if the merger doctrine precludes a felony-murder prosecution, a judge can assign a nearly identical penalty for a first-degree assault conviction. Therefore, had the \textit{Roary} court adopted the merger doctrine, a first-degree assault resulting in death could still be severely punished. Additionally, the merger doctrine will not preclude murder liability in homicide cases where an assailant truly intends to kill or to cause serious bodily harm. As the dissent in \textit{Roary} emphasized, there is no need to broaden the scope of felony murder because the other types of implied malice allow a prosecutor to bring charges of second-degree murder under appropriate circumstances.\textsuperscript{203} Therefore, felony murder with assault as a predicate felony is a redundancy in Maryland's well-established second-degree murder jurisprudence.\textsuperscript{204}

c. The \textit{Roary} Court's Decision Inappropriately Permits Prosecutors to Circumvent the Intent Requirement and Subsumes Second-Degree Murder.—The \textit{Roary} court's decision inappropriately gives prosecutors over-

\textsuperscript{199} The maximum penalty for involuntary manslaughter is ten years. \textsc{Md. Code Ann.}, \textit{Crim. Law} § 2-207(a)(1) (LexisNexis 2005). Since the more culpable co-conspirators received fifteen years in prison, a ten-year sentence for \textit{Roary} would have been more appropriate than the grossly disproportionate thirty-five-year sentence that he actually received.


\textsuperscript{201} \textit{See id.} First-degree murder is punishable by life in prison, \textit{id.} § 2-201, while second-degree murder carries a maximum sentence of thirty years. \textit{Id.} § 2-204. Manslaughter is punishable by up to ten years in prison. \textit{Id.} § 2-207.

\textsuperscript{202} \textsc{Md. Code Ann.}, \textit{Crim. Law} § 2-302 (LexisNexis 2005).

\textsuperscript{203} 385 Md. at 253, 867 A.2d at 1116 (Raker, J., dissenting); \textit{see Model Penal Code Commentary} § 210.2 cmt. (1980) (stating that in the vast majority of cases, killings that occur during felonies probably amount to murder independent of the felony-murder rule); Frederick J. Ludwig, \textit{Foreseeable Death in Felony Murder}, 18 U. Pitt. L. Rev. 51, 61 (1956) (stating that in many felony-murder cases the evidence would support conviction under depraved heart or other implied malice theories).

\textsuperscript{204} \textit{Roary}, 385 Md. at 253, 867 A.2d at 1116 (Raker, J., dissenting).
broad discretion to charge second-degree felony murder for any felonious assault that results in death. Because virtually every homicide involves an assaultive act, the practical effect of the court's decision is to subsume all second-degree murder, along with voluntary manslaughter and, in some cases, involuntary manslaughter, into felony murder. To prove felony murder, a prosecutor must establish only that the defendant committed the underlying felony and that death occurred during its commission. There exists no requirement to prove intent to commit murder under a traditional theory of actual intent to kill, intent to cause grievous bodily harm, or a depraved heart. Therefore, under the majority's holding in Roary, when a felonious assault results in death, a prosecutor can circumvent the requirement to prove intent to commit murder by charging a defendant with second-degree felony murder. The court's decision invites prosecutors to follow the easier path of a felony-murder prosecution to obtain a conviction rather than undertaking the more difficult task of proving specific intent to kill. Because prosecutors are often vul-

205. See People v. Ireland, 450 P.2d 580, 590 (Cal. 1969) (concluding that applying the felony-murder rule to a felonious assault would preclude the jury from considering intent in the vast majority of homicides); cf. Commonwealth v. Wade, 697 N.E.2d 541, 545 (Mass. 1998) (drawing the analogous conclusion, in the context of first-degree murder, that without merger, all second-degree murder and manslaughter could be charged as first-degree murder with assault as the predicate felony).

206. In Maryland, a defendant may be charged with involuntary manslaughter if a homicide results from her unlawful act or her lawful but grossly negligent act. Selby v. State, 361 Md. 319, 332, 761 A.2d 335, 342 (2000). An assault would be an expected precedent to unlawful-act involuntary manslaughter.

207. See supra notes 117-119 and accompanying text.

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

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

210. See People v. Robertson, 95 P.3d 872, 885 (Cal. 2004) (Moreno, J., concurring) (questioning whether prosecutors should be allowed to use felony murder as a "backdoor route" to a second-degree murder conviction). One can also argue that first-degree felony murder allows prosecutors to circumvent the requirement to prove that a homicide was willful, deliberate, and premeditated. However, in Maryland, first-degree felony murder cannot subsume the entire realm of first-degree murder because first-degree felony murder is limited to a handful of enumerated felonies which are independent of the homicide. See Md. Code Ann., Crim. Law § 2-201 (LexisNexis 2005) (defining the felonies that comprise first-degree murder in Maryland). There will still be homicides that qualify as first-degree murder which do not occur during armed robbery, rape, arson, burglary, and the other predicate felonies listed in the first-degree murder statute.

211. See State v. Wanrow, 588 P.2d 1320, 1327 (Wash. 1978) (Utter, J., dissenting) (contending that prosecutors will abandon the statutory provision requiring intent to kill when they can instead simply prove assault and resulting death). State v. Thompson, a Washington case decided a year before Wanrow, illustrates the potential injustice that could result from overbroad prosecutorial discretion in light of the Roary court's failure to adopt the merger doctrine. 558 P.2d 202 (Wash. 1977). In Thompson, the defendant shot her husband, who had been drinking heavily and taking drugs, after he drove recklessly with the defendant
and two passengers in the car, and then hit and threatened to kill the defendant in front of the passengers. *Id.* at 203-04. The prosecutor charged the defendant with second-degree felony murder with assault as the predicate felony, and the jury convicted her. *Id.* at 203. Although the language of the homicide statute required it to uphold the verdict, the Washington Supreme Court acknowledged that the felony-murder rule in this case led to overly harsh results, *id.* at 205, and a strong dissent emphasized the injustice of the felony-murder rule under the circumstances. *Id.* at 206 (Utter, J., dissenting).

212. *See* Tomkovicz, *supra* note 150, at 1463-64 (arguing that the life of an innocent crime victim has political power that outweighs the interest in fair and proportional treatment of felons).

213. *See* Thompson, 558 P.2d at 210 (Utter, J., dissenting) (arguing that failure to apply the merger doctrine creates the possibility of unequal treatment if prosecutors have broad discretion to bring either felony murder or intentional murder charges).


216. *In re* Personal Restraint of Andress, 56 P.3d 981, 987 (Wash. 2003). In *Hook v. State*, the Court of Appeals reversed a first-degree murder conviction on fairness grounds when the jury was presented with an “all-or-nothing” choice either to convict of first-degree murder or to acquit. 315 Md. 25, 40, 553 A.2d 233, 241 (1989).

217. *Id.* Murder has a greater social stigma than manslaughter, and a more severe punishment as well. In Maryland, the maximum sentence for second-degree murder is thirty years. *Md. Code Ann.*, CRIM. LAW § 2-204 (LexisNexis 2005). In contrast, the maximum sentence for manslaughter is only ten years. *Id.* § 2-207.
5. Conclusion.—In Roary v. State, the Court of Appeals of Maryland unwisely expanded the scope of felony murder in Maryland when it refused to adopt the merger doctrine and allowed first-degree assault to serve as a predicate felony for second-degree felony murder. The court’s decision is troubling for several reasons. First, the court’s stated policy goal of deterring dangerous assaults is unlikely to occur. Second, the court’s refusal to adopt the merger doctrine is likely to yield unfair and illogical results. Moreover, the court’s decision in Roary defies modern criminal law principles of individual culpability and proportionality of punishment and undermines the proportional gradation of homicide punishments adopted by the Maryland General Assembly. Finally, the court’s decision permits prosecutors to circumvent the requirement to prove intent as an element of murder. This loophole increases the likelihood that second-degree felony murder will subsume second-degree intent-to-kill murder and voluntary manslaughter.

The court should instead have followed the lead of a number of other states and adopted the merger doctrine as a means of limiting the felony-murder rule. The severe statutory penalties for first-degree assault ensure that, even with the merger doctrine, there would be adequate deterrence and sufficient punishment for dangerous assaults that result in death but which do not reach the level of intentional murder. Furthermore, in most cases, the express and implied malice theories of intentional murder provide ample foundation for second-degree murder convictions without the felony-murder rule. Therefore, had the court adopted the merger doctrine, it would have imposed a reasonable limitation on the felony-murder doctrine while preserving an appropriate punishment scheme for criminal homicide in Maryland.

MARCIA J. SIMON

218. 385 Md. at 223, 867 A.2d at 1098.
219. See supra notes 162-175 and accompanying text.
220. See supra notes 176-199 and accompanying text.
221. See supra notes 181-199 and accompanying text.
222. See supra notes 200-204 and accompanying text.
223. See supra notes 205-213 and accompanying text.
224. See supra notes 205-217 and accompanying text.
225. See supra notes 75-102 and accompanying text.
226. See supra notes 164-202 and accompanying text.
227. See supra notes 203-204 and accompanying text.
III. CRIMINAL PROCEDURE

A. Permitting Unsubstantiated Own-Race Bias Arguments in Summation Invites Juror Confusion and Irrelevant Racial Considerations into Criminal Trials

In Smith v. State, the Court of Appeals considered for the first time whether a defense counsel may attack a white victim's identification of two black defendants with unsupported own-race bias (ORB) arguments during summation. The court held that the criminal defendant's right to effective advocacy entitled him to attack the credibility of the cross-racial identification. The court stated that adversarial summations promote the objectives of the criminal justice system by aiding the jury in ascertaining the guilt or innocence of the accused. The implications of the court's decision, however, contradict this goal. By failing to require an evidentiary basis for ORB arguments, the court mistakenly treats ORB as a matter of common knowledge, thereby increasing the risk of juror confusion. Until science can provide a means to differentiate between affected and non-affected cross-racial identifications, the Smith court invites jurors, attorneys, and trial courts to focus on potentially irrelevant racial considerations at all stages of trial. To mitigate the problematic consequences of the Smith decision, the Court of Appeals should adopt a factor-based test and evidentiary threshold that would ensure that when ORB arguments are relevant, they are effective.

1. The Case.—On the evening of May 8, 2002, two black men approached Christine Crandall, a white woman, as she parked her car near her Baltimore City residence. One of the men held her at gunpoint while the other attempted to pry the car keys from her fist.

2. Social science research suggests that some eyewitnesses have difficulty identifying someone of another race, a phenomenon described as own-race bias (ORB). See John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 211 (2001).
3. Smith, 388 Md. at 488-89, 880 A.2d at 300. A cross-racial identification occurs when an eyewitness of one race must identify a person of a different race. Rutledge, supra note 2, at 211.
5. See infra Part 4.a.
7. See infra Part 4.c.
8. Smith, 388 Md. at 470, 880 A.2d at 289.
9. Id.
Crandall tried to reason with her attackers before yelling for a neighbor to call the police. The gunman turned to point his weapon at Crandall one last time before both men fled.

Crandall gave a description of her attackers to law enforcement officials as they arrived at the scene. Two days after the attack, detectives provided Crandall with six photographs based on her description, but she did not make an identification. Two weeks later, detectives produced two additional photo arrays from which Crandall identified James Smith and Jason Mack. Soon after Crandall's identification, both men were arrested.

At trial, Crandall testified that she was certain that Smith and Mack were her attackers because her background in art and painting enhanced her ability to remember faces and physical characteristics. She consistently articulated specific characteristics about both of the defendants and noted that Mack had altered his hairstyle between the time of the photo identification and their confrontation at trial. Crandall did not indicate that she had difficulty discerning the features of other races. On cross-examination, the defense questioned Crandall on her ability to view the perpetrators, but never questioned her about the cross-racial nature of the identification.

Before closing argument, the defense counsel requested permission to argue that ORB affected Crandall's identification. The court denied their request, citing a lack of evidentiary support. The court did, however, give the defense permission to state that the defendants
are black and the witness is white, but the defense counsel declined to do so. The jury found both defendants guilty of assault, attempted robbery, and attempted theft. Smith and Mack filed a joint appeal to the Court of Special Appeals.

The Court of Special Appeals affirmed the trial court's decision to prohibit the defense from referencing ORB during closing argument, reasoning that defense was given ample opportunity to discredit Crandall's identification with legitimate arguments. The court noted that studies of eyewitness identification are inherently general in their applicability, making them potentially irrelevant in any individual case. Accordingly, the court approved of the trial court's efforts to prevent an express appeal to racial biases in this case, as there was no evidence that Crandall experienced difficulty discerning the features of other races. Nevertheless, the court realized that courts might have difficulty determining the propriety of ORB arguments in other cross-racial identification cases. The court suggested that the Court of Appeals provide guidance for future cases and offered a list of factors for consideration.

Smith and Mack petitioned the Court of Appeals, which granted certiorari to consider whether the trial judge erred in preventing the defense from discussing ORB during closing argument.

22. Id. at 476, 880 A.2d at 293.
23. Id.
24. Id. at 477, 880 A.2d at 293.
26. The defense argued that Crandall's identification of the defendants was unreliable for the following reasons: (1) the brevity of Crandall's encounter with the assailants, (2) Crandall's unfamiliarity with the assailants, (3) the lighting on the street, (4) Crandall's stress level, (5) the length of time between the crime and the identification, and (6) the skin complexion and hair style of the individuals in the photo arrays. Smith, 158 Md. App. at 705-06, 857 A.2d at 1217. As for the final factor, Smith's counsel argued that his client had the darkest complexion in his array, as well as a receding hairline, suggesting that this combination made Smith's picture conspicuous. Id. Mack's counsel also argued that his client's photo was significantly darker than the other four photos in his array. Id.
27. Id. at 702, 857 A.2d at 1215.
28. Id. at 707-08 & n.11, 857 A.2d at 1217-18 & n.11.
29. Id. at 703, 857 A.2d at 1215.
30. Id. at 703, 708, 857 A.2d at 1215, 1218. The factors included whether the identification was equivocal or recanted, whether the witness had no exposure to people outside of her race, and whether the witness was unable or had very little time to see the perpetrator. Id. at 708, 857 A.2d at 1218.
31. Smith, 388 Md. at 477, 880 A.2d at 293. The court also granted certiorari to consider whether the trial judge erred in refusing to give a special jury instruction on cross-racial identification. Id.
2. Legal Background.—The criminal defendant's constitutional right to counsel incorporates the opportunity for closing argument. Closing argument plays a critical part in the adversarial criminal justice system by aiding the jury in ascertaining the guilt or innocence of the accused. While advocating for their client, attorneys are free to comment on the facts in evidence and to reference matters of common knowledge. To prevent attorneys from distorting the issues of the case, trial courts retain the discretion to prohibit arguments that are irrelevant, unsubstantiated, or racially inflammatory.

a. Closing Argument Precedent Balances the Criminal Defendant's Right to Effective Advocacy with the Trial Court's Discretion to Limit the Scope of Closing Arguments.—In Herring v. New York, the Supreme Court of the United States considered the constitutionality of a state statute granting trial judges the discretion to fully deny counsel the opportunity of closing arguments in bench trials. The Court stated that the criminal defendant's constitutional right to counsel requires a full opportunity to participate in the adversarial fact-finding process, including closing argument. The Court elaborated that closing argument serves to clarify the facts and issues of the case for the jury before deliberation. According to the Court, effective advocacy by both the state and the accused supports the primary objective of the criminal justice system: that "the guilty be convicted and the innocent go free."

Notwithstanding the important function served by summation, the Court articulated the role of the trial judge in controlling excessive closing arguments:

[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair

32. U.S. CONST. amend. VI; Md. CONST. DECL. OF RTS. art. 21.
33. See infra Part 2.a.
34. See infra Part 2.a.
35. See infra Part 2.b.
36. See infra Part 2.c.
37. 422 U.S. 853, 865 (1975).
38. Id. at 858.
39. Id. at 862.
40. Id.
and orderly conduct of the trial. In all these respects he must have broad discretion.\textsuperscript{41}

Turning back to the facts of the case, the Court concluded that the interest in expedient criminal adjudication was no justification for a statute providing the trial judge the discretion to deprive the defendant of any opportunity for closing argument.\textsuperscript{42}

In Maryland, the right to closing argument had already been defined in \textit{Yopps v. State},\textsuperscript{43} a decision cited by the \textit{Herring} majority.\textsuperscript{44} In \textit{Yopps}, the Court of Appeals held that the trial court's refusal to allow defense counsel the opportunity to present closing argument on the facts and evidence of the case resulted in a denial of the defendant's right to counsel.\textsuperscript{45} The court rejected the argument that a defendant loses this right in non-jury trials or in cases with overwhelming evidence of guilt and concluded that the right to counsel applies equally in all cases.\textsuperscript{46} The court expressed, however, that trial courts have the discretion to restrain redundant and irrelevant arguments.\textsuperscript{47}

Accordingly, appellate courts review the trial judge's restrictions on closing argument on an abuse of discretion standard.\textsuperscript{48} The trial court's decision will be upheld unless the argument results in prejudice to the accused, thereby denying the defendant of his constitutional right to a fair trial.\textsuperscript{49} Although this constitutional right is most frequently implicated by prosecutorial comments, the Court of Appeals has also acknowledged the need to prevent prejudicial comments by the defense.\textsuperscript{50}

\textit{b. In Constructing Closing Arguments, Advocates Are Permitted to Draw Inferences from the Facts in Evidence and Comment on Matters of Common Knowledge.}—Attorneys are generally given great leeway in advocating for their client during closing argument.\textsuperscript{51} Counsel may draw inferences from the facts in evidence, highlight the testimony more favorable to their client's side of the story, criticize the parties' alleged

\textsuperscript{41} Id.
\textsuperscript{42} Id. at 863-65.
\textsuperscript{43} 228 Md. 204, 178 A.2d 879 (1962).
\textsuperscript{44} 422 U.S. at 859-60.
\textsuperscript{45} 228 Md. at 208, 178 A.2d at 882.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 207, 178 A.2d at 881. The court also noted that trial courts may place reasonable time limits on closing argument. \textit{Id.}
\textsuperscript{48} See, \textit{e.g.}, \textit{Wilhelm v. State}, 272 Md. 404, 413, 326 A.2d 707, 714-15 (1974) (describing the traditional deference afforded to trial judges in establishing the scope of trial).
\textsuperscript{49} \textit{E.g.}, \textit{Donnelly v. DeChristoforo}, 416 U.S. 637, 638 (1974).
\textsuperscript{50} \textit{Wilhelm}, 272 Md. at 438, 326 A.2d at 728.
actions, and attack witnesses' character.\textsuperscript{52} In addition to arguments on the evidence, counsel may comment on facts that are not in evidence, yet are of such general notoriety that they are considered to be within the jury's common knowledge.\textsuperscript{53}

The Court of Appeals established the boundaries of common knowledge arguments in \textit{Wilhelm v. State}, holding that an attorney's reference to murder statistics not in evidence was permissible during closing arguments.\textsuperscript{54} In his summation, the prosecutor commented that 330 murders were committed in Baltimore City during the previous year, information that was widely publicized in newspaper headlines nineteen days before.\textsuperscript{55} For this reason, the statistical argument was not a comment on facts not in evidence, but rather a mere reminder of a fact that the jury already knew.\textsuperscript{56} As such, the court concluded that these facts could be referenced in closing argument without evidentiary support.\textsuperscript{57}

The \textit{Wilhelm} court noted, however, that the murder statistics would not have been common knowledge if they had not been the subject of newspaper headlines during the previous weeks.\textsuperscript{58} Thus, arguments are not common knowledge if there is no data to support the statement or if the subject matter is not of such public notoriety as to be within the jury's cognizance.\textsuperscript{59}

c. Trial Courts Prevent Irrelevant Racial Considerations and Appeals to Racial Prejudice from Influencing the Jury.—Trial courts must balance the defendant's right to closing argument with the courts' duty to insulate all stages of trial from racial biases.\textsuperscript{60} Accordingly, attor-

\textsuperscript{52} Wilhelm, 272 Md. at 412-13, 326 A.2d at 714.
\textsuperscript{53} \textit{Id.} at 438, 326 A.2d at 728-29. Along these lines, basic jury instructions provide that the jury should "use their own common sense, their own experiences in life and their own knowledge of the ways and affairs of the world." \textit{Id.} at 439, 326 A.2d at 729.
\textsuperscript{54} \textit{Id.} at 445, 326 A.2d at 732.
\textsuperscript{55} \textit{Id.} at 439, 326 A.2d at 729.
\textsuperscript{56} \textit{Id.} at 440, 326 A.2d at 729.
\textsuperscript{57} \textit{Id.} at 438, 326 A.2d at 728-29. As another example, the court suggested that it would be an appropriate common knowledge argument for an attorney to state that Baltimore is "a big crime area." \textit{Id.} at 442, 326 A.2d at 730. Similarly, counsel is permitted to argue on matters that are clear to the jury from observation. \textit{Id.} at 445, 326 A.2d at 731. For example, the court found the prosecutor's reference to the defendants as "young toughs"—an allusion to the defendants' testimony on homicide and robbery—was appropriate, as the comment was referencing information that was generally observable to the jury during the course of the trial. \textit{Id.} at 442, 326 A.2d at 730.
\textsuperscript{58} See \textit{id.}
\textsuperscript{59} \textit{Id.} at 440-41, 326 A.2d at 729.
\textsuperscript{60} \textit{Cf.} Jackson v. State, 364 Md. 192, 201-02, 772 A.2d 273, 278-79 (2001) (finding that a sentencing judge's use of phrases such as "ghetto," "jungle," and people "from [Balti-
neys may not use closing arguments to make improper comments designed to inflame racial prejudices in the jury.\textsuperscript{61} For example, in \textit{Contee v. State}, the Court of Appeals criticized a prosecutor's use of racial comments in the trial of a black man charged with raping a white woman.\textsuperscript{62} During cross-examination, Contee admitted having extramarital affairs with numerous women, to which the prosecutor questioned, "Other white girls?"\textsuperscript{63} After Contee replied that he had only one previous affair with a white woman, the prosecutor further interrogated the defendant on the issue, asking, "How many other white girls do you have intercourse with?"\textsuperscript{64} The judge denied the defense's request for a mistrial, yet did not reprimand the prosecutor for his race-based line of questioning.\textsuperscript{65} As the trial continued, the court similarly turned a blind eye to the prosecutor's additional reference to the victim as a "white girl," and again, the court denied defense counsel's objections.\textsuperscript{66} The prosecutor, apparently encouraged by the court's failure to correct him, continued his irrelevant racial remarks for the remainder of the trial.\textsuperscript{67} The jury returned a guilty verdict.\textsuperscript{68} The Court of Appeals found the prosecutor's irrelevant line of questioning prejudicial and criticized the trial court's failure to correct the prosecutor's conduct.\textsuperscript{69} The court reiterated the trial court's responsibility to prevent unwarranted appeals to racial prejudices.\textsuperscript{70}

Most recently, the Court of Appeals addressed improper racial comments in the civil context. In \textit{Tierco Maryland, Inc. v. Williams}, the court held that the trial court abused its discretion by failing to grant a new trial after the plaintiffs' attorney's overt attempts at exploiting racial prejudice caused the jury to reach a verdict based on irrelevant considerations.\textsuperscript{71} Although the parties' races appeared nowhere in the complaint, race was mentioned sixty-three times over the three-day trial.\textsuperscript{72} The racial overtones began when the plaintiffs' counsel

\textsuperscript{61. See infra notes 62-80 and accompanying text.}
\textsuperscript{62. 223 Md. 575, 165 A.2d 889 (1960).}
\textsuperscript{63. \textit{Id.} at 582, 165 A.2d at 894.}
\textsuperscript{64. \textit{Id.}}
\textsuperscript{65. \textit{Id.} at 583, 165 A.2d at 894.}
\textsuperscript{66. \textit{Id.}}
\textsuperscript{67. \textit{Id.}}
\textsuperscript{68. \textit{Id.} at 577-78, 165 A.2d at 891.}
\textsuperscript{69. \textit{Id.} at 584, 165 A.2d at 895. The Court of Appeals reversed on other grounds. \textit{Id.}, 165 A.2d at 894-95.}
\textsuperscript{70. \textit{Id.}}
\textsuperscript{71. 381 Md. 378, 849 A.2d 504 (2004).}
\textsuperscript{72. \textit{Id.} at 384, 849 A.2d at 508.}
and witnesses referred to the parties' races twenty-five times in the
plaintiffs' case-in-chief.\footnote{Id. at 404, 849 A.2d at 520.} Realizing these tactics, the defense attorneys
asked thirteen race-related cross-examination questions.\footnote{Id.} Plaintiffs'
counsel continued his race-based arguments in summation.\footnote{Id.}

By the end of the trial, racial issues had overwhelmed the ma-
terial issues of the case.\footnote{Id. at 408, 849 A.2d at 522.} The jury awarded the plaintiffs $1,000,000 in
compensatory damages and $1,500,000 in punitive damages.\footnote{Id. at 406-07, 849 A.2d at 521.} The
court subsequently found that the damage awards were excessive, con-
sidering the plaintiffs' failure to provide any evidence of permanent
injury.\footnote{Id. at 384, 849 A.2d at 508.} In holding that the trial court abused its discretion by deny-
ing the defendant's request for a new trial, the Court of Appeals ex-
pressed its disapproval of the attorney's overt tactic of using race to
prejudice an opponent.\footnote{Id. at 408, 849 A.2d at 522.} Once again, the court cautioned against
unsubstantiated appeals to racial prejudice, noting their potential to
undermine the integrity of the judicial system.\footnote{Id. at 414, 849 A.2d at 526.}

Despite the general impropriety of race-based arguments, some
jurisdictions have created an exception in cross-racial identification
cases. In these jurisdictions, attorneys are permitted to reference
ORB as a matter of common knowledge.\footnote{Id.} Additionally, some courts
permit ORB jury instructions.\footnote{See, e.g., United States v. Thompson, 31 M.J. 125, 128 (C.M.A. 1990) (permitting an
ORB jury instruction if the cross-racial identification is a critical issue in the case). But see,
et al., State v. Hadrick, 523 A.2d 441, 444 (R.I. 1987) (determining ORB jury instructions to
be inappropriate judicial commentary on the nature and quality of the evidence). Maryland's pattern jury instructions do not include a cross-racial identification instruction and no Maryland case has held that such an instruction is required. See Md. R. 4-825 (2005).} Most of these jurisdictions, however, permit trial courts to use their discretion in limiting the use of ORB
instructions to appropriate cases. For example, in State v. Cromedy, the New Jersey Supreme Court considered the propriety of a cross-racial identification jury instruction where no scientific evidence was produced to support the instruction. Cromedy, a black man, was convicted of the rape and robbery of D.S., a white woman. There was no forensic evidence linking Cromedy to the crime. Cromedy's defense counsel requested an ORB jury instruction in light of the severity of the crimes, the cross-racial nature of the identification, D.S.'s failure to identify Cromedy in the initial photo array five days after the crime, and the eight-month time lapse between the crime and the identification. The trial court denied the request. The New Jersey Supreme Court reversed Cromedy's conviction, holding that, based on these facts, the trial court erred in failing to instruct the jury on cross-racial identification. The court reasoned that, while ORB research is elusive, it was not the basis of Cromedy's requests; rather, Cromedy's request was based on the "widely held commonsense view" that it is more difficult to identify someone of another race. Nevertheless, the Cromedy court minimized the potential for misuse of the jury instruction by stressing that the unrestricted use of the ORB instructions would have detrimental effects on the judiciary, and that trial courts must be cautious of "base appeals to racial prejudice."

3. The Court's Reasoning.—In Smith v. State, the Court of Appeals held that the defense counsel was entitled to attack a cross-racial iden-

83. For example, Massachusetts does not require trial courts to give ORB instructions in all cross-racial identification cases. See, e.g., Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995) (finding no abuse of discretion where trial judge denied ORB jury charge); Commonwealth v. Charles, 489 N.E.2d 679, 684 (Mass. 1986) (commenting that, because the problems with cross-racial identification are not well established, the trial court may use its discretion to deny a request for an ORB instruction); Commonwealth v. Engram, 686 N.E.2d 1080, 1082 (Mass. App. Ct. 1997) (determining that an ORB instruction was unnecessary where the facts of the case made it unlikely that the cross-racial nature of the identification affected the witness).

85. Id. at 459.
86. Id.
87. Id. at 460.
88. Id.
89. Id. at 459.
90. Id. at 462, 466-67 (Bezeton, C.J., concurring) (quoting United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972)). The Cromedy court also considered the New Jersey Task Force on Minority Concerns' recent recommendation for a cross-racial identification jury instruction. Id. at 465-66.
91. Id. at 467. The court rejected the notion that the mere scenario of a white victim and a black defendant requires an ORB instruction. Id. Instead, the court suggested that an appropriate jury instruction would detail the specific context in which jurors are to consider racial issues. Id.
tification with ORB arguments during summation without producing evidentiary support. Judge Battaglia delivered the opinion of the court, which began by surveying the field of developing ORB research. The court acknowledged the scientific debate over the origins of ORB, its effect on different races, and the applicability of ORB studies to criminal context. Turning to the law of closing argument, the court expressed its uncertainty over whether ORB was a matter of common knowledge. Nevertheless, the court rested its decision on the importance of the defendant's right to effective advocacy at summation, as well as its role in promoting the ultimate purpose of our criminal justice system: the ascertainment of the defendant's true guilt or innocence. And, because Crandall's identification of Smith and Mack was the State's primary piece of evidence, the court determined that the defense counsel was entitled to use ORB arguments to attack Crandall's testimony about her artistic background and ability to remember faces.

Judge Harrell dissented, arguing that the trial court correctly prohibited the defense counsel from making unsupported ORB arguments. The dissent noted the defense counsel's failure to produce any evidence on either the general existence of ORB or its specific effects on Crandall's identification of Smith and Mack. Judge Harrell reiterated that under Wilhelm, the scope of closing argument is limited to the evidence admitted at trial and reasonable inferences drawn therefrom. Additionally, the dissent criticized the majority opinion for implying that ORB is common knowledge. Even if it

92. 388 Md. at 470, 880 A.2d at 289. The court did not reach the question of whether the trial court erred in denying defense counsel's request for a special ORB jury instruction. Id.
93. Id. at 469, 880 A.2d at 289. Chief Judge Bell, and Judges Cathell and Raker joined Judge Battaglia.
94. Id.
95. Id.
96. Id. at 486, 880 A.2d at 298-99.
97. Id. at 488-89, 880 A.2d at 300.
98. Id. at 489, 880 A.2d at 300 (Harrell, J., dissenting). Judges Wilner and Greene joined the dissent. Id.
99. Id. at 491, 880 A.2d at 301.
100. Id. at 490-91, 880 A.2d at 301.
101. Id. at 491-92, 880 A.2d at 302.
102. Id. at 492, 880 A.2d at 302. Judge Harrell did not reject ORB arguments in all cases, but suggested that the research be subjected to a Frye-Reed type of review before permitting its use in criminal trials. Id. at 496 & n.11, 880 A.2d at 304 & n.11 (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and Reed v. State, 283 Md. 374, 391 A.2d 364 (1978)). Under the Frye-Reed test, before expert testimony on a novel area of science is admitted into evidence, scientists within that field must generally accept the foundation of the expert's opinion. Id. at 496 n.11, 880 A.2d at 304 n.11.
was, Judge Harrell found no nexus between the ORB studies and Crandall’s statements about her artistic background. Finally, the dissent criticized the majority’s apparent sanction of unnecessary race-based inquiries whenever an eyewitness testifies about the certainty of her cross-racial identification.

4. Analysis.—In Smith v. State, the Court of Appeals held that the defendant’s right to an adversarial summation entitled the defense counsel to attack a cross-racial identification with unsupported ORB arguments. The court stated that adversarial summations promote the objectives of the criminal justice system by aiding the jury in ascertaining the guilt or innocence of the accused. The implications of the court’s decision, however, contradict this goal. By failing to require an evidentiary basis for ORB arguments, the court mistakenly treats ORB as a matter of common knowledge. Until science can provide a means to differentiate between affected and non-affected cross-racial identifications, Smith invites jurors, attorneys, and trial courts to focus on potentially irrelevant racial considerations at all stages of trial. To mitigate the problematic consequences of the Smith decision, the Court of Appeals should have established a framework that would allow trial courts to determine whether ORB is an issue before permitting ORB arguments during summation.

a. By Failing to Require Evidentiary Support for ORB Arguments, Smith Improperly Treats ORB as Common Knowledge and Increases the Risk of Jury Confusion.—The court’s decision to permit unsubstantiated arguments on a developing area of social science will ultimately undermine its goal of effective advocacy. If scientists cannot yet explain how, why, and in what situations ORB occurs, it is unreasonable to assume that jurors can correctly interpret its effect on a particular case. Nevertheless, while expressing its uncertainty as to whether

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103. Id. at 492, 880 A.2d at 302.
104. Id. at 495, 880 A.2d at 304.
105. Id. at 488-89, 880 A.2d at 300.
106. Id. at 486, 800 A.2d at 298-99.
107. See infra Part 4.a.
108. See infra Part 4.b.
109. See infra Part 4.c.
110. See, e.g., United States v. Telfaire, 469 F.2d 552, 561-62 (D.C. Cir. 1972) (Leventhal, J., concurring) (expressing uncertainty as to the appropriateness of an ORB jury instruction in light of the “meager” state of research on the topic); People v. Bias, 475 N.E.2d 253, 257 (Ill. App. Ct. 1985) (concluding that the conflicting research on ORB suggests that determining its appropriateness in jury instructions is a task for bar committees, rather than reviewing courts); Jeremy C. Bucci, Article: Revisiting Expert Testimony on the Reliability of Eyewitness Identification: A Call for a Determination of Whether It Offers Common Knowledge, 7
ORB is common knowledge, the Court of Appeals treats ORB as such by permitting attorneys to make ORB arguments without evidentiary support.\textsuperscript{111} This decision may distort the facts of the case and lead jurors to faulty conclusions.\textsuperscript{112} Until science provides definite criteria to aid jurors in evaluating the accuracy of a cross-racial identification, ORB arguments will likely fail to aid the jury in ascertaining the guilt or innocence of the accused.

The \textit{Smith} court failed to reconcile the inconclusive state of ORB research with its goal of effective advocacy. Despite over thirty years of research, scientists remain divided as to the individuals and situations affected by ORB.\textsuperscript{113} Specifically, three unresolved issues in ORB science will lead to jury confusion: (1) whether ORB studies are applicable to actual eyewitnesses, (2) whether ORB affects all races to the same degree, and (3) whether other variables can mitigate the effects of ORB on an individual identification.

First, the dramatic differences between ORB studies and actual identifications make imputing laboratory findings to witnesses of crimes, especially the victims of violent crimes, questionable.\textsuperscript{114} For example, study participants usually view a number of faces in a short period of time before identifying those faces in a second sample.\textsuperscript{115} In a criminal lineup, however, the eyewitness attempts to recognize

\begin{footnotesize}
111. Smith, 388 Md. at 488, 880 A.2d at 300.
112. See Telfaire, 469 F.2d at 561-62 (D.C. Cir. 1972) (Leventhal, J., concurring) (explaining that more research into the nature of ORB is necessary to prevent ORB jury instructions from distorting the facts and promulgating erroneous verdicts).
115. E.g., Sheri Lynn Johnson, \textit{Cross-Racial Identification Errors in Criminal Cases}, 69 \textit{Cornell L. Rev.} 934, 938 (1984). In some studies, participants have only seconds to study the faces before identifying them. \textit{See}, \textit{e.g.}, MacLin et al., \textit{supra} note 114, at 138 (measuring participants' ability to recognize faces after a maximum exposure time of five seconds).}
\end{footnotesize}
only one face: the perpetrator's. Moreover, eyewitnesses, especially victims, have a personal stake in identifying the true criminal. Similarly, the consequences of falsely identifying a criminal suspect, i.e., incarceration and death, may cause eyewitnesses to make prudent identifications. In contrast, study participants are typically students who receive cash or class credit for merely participating in the experiment. If ORB studies do not accurately reflect the abilities of real eyewitnesses, Smith permits irrelevant arguments to distort rather than clarify the facts of the case in the minds of the jury.

Second, even if scientists conclude that ORB findings are applicable to the criminal context, they have not conclusively determined whether ORB affects all races, and if so, whether it affects all races equally. Moreover, the degree of the bias exhibited by a racial group may vary depending on the race of the face identified. For instance, studies suggest that Hispanic witnesses can more accurately identify white faces than black faces, and Asian witnesses can more accurately identify black faces than white faces.

Finally, scientists have not yet determined how other variables influence ORB. Some studies suggest that ORB can be mitigated by factors such as the witness's interracial contacts, the length of time...
between the crime and the identification,128 and the presence of distinct features on the suspect or defendant such as scars, tattoos, or birthmarks.129 But the extent to which these and other variables might reduce ORB remains unclear,130 and findings suggest that same and cross-racial identifications are affected differently.131

The Smith court further failed to acknowledge that even if scientists could adequately predict the accuracy of a cross-racial identification, the public's ignorance of ORB precludes its characterization as common knowledge.132 Over fifty-five percent of jurors believe that cross-racial identifications are just as reliable, if not more reliable, than same-race identifications.133 Among those jurors cognizant of the phenomenon, ORB arguments are often dismissed as irrelevant because they fail to adequately explain why the eyewitness identified the defendant over the other fillers in the line-up.134 In many cases, jurors are reluctant to accept the controversial idea of racial biases and are loathe to consider whether their own ability to remember faces decreases in cross-racial situations.135 Thus, the Court of Appeals failed to recognize that the ambiguous state of ORB research

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128. See Wells & Olson, supra note 127, at 232 (noting that identifications are less likely to be accurate as the time between the crime and the identification increases). But see MacLin et al., supra note 114, at 141 (finding that the amount of time between viewing and identification did not influence the accuracy of Hispanic participants).


130. See MacLin et al., supra note 114, at 135 (assessing the need for more research on the extent to which different variables moderate facial recognition in other-race identifications).

131. See id. at 138 (finding differences in the manner in which stress levels affect same and other-race identifications). For example, in one study of Hispanic participants, the presence of a gun in the photograph with the Hispanic faces decreased the accuracy of these same-race identifications. Id. at 147-48. In contrast, the presence of the gun during the presentation of black faces had no effect on the accuracy of the identifications. Id.

132. See, e.g., Johnson, supra note 115, at 946-49 (surveying three studies on ORB comprehension which found that, on average, only twenty-four percent of laymen and twenty-two percent of attorneys were able to comprehend the phenomenon).


134. E.g., Wells & Olson, supra note 127, at 240. The case of McKinley Cromedy illustrates jurors' reluctance to accept the existence of ORB. See State v. Cromedy, 727 A.2d 457 (N.J. 1999). The New Jersey Supreme Court reversed Cromedy's conviction after the trial court denied defense counsel's request for a special jury instruction on cross-racial identification. Id. at 467. The inclusion of an ORB jury charge in Cromedy's second trial did not change the outcome of the case; Cromedy was convicted a second time. Natarajan, supra note 129, at 1845.

135. O'Toole et al., supra note 133, at 31.
and the public’s ignorance of the phenomenon prevent ORB from being a topic of common knowledge that can be referenced in closing arguments without evidentiary support. Consequently, the unsubstantiated ORB arguments permitted by Smith will not aid the jury in reaching an informed decision as to the guilt or innocence of a criminal defendant.\footnote{136. E.g., Doyle, supra note 110, at 259.}

\textbf{b. Smith Permits Irrelevant Race-Based Arguments in Cases Where ORB Is Not an Issue by Providing Little Guidance for Future Cross-Racial Identification Cases.}—By not requiring evidentiary support for ORB arguments, the court’s decision unnecessarily makes race a consideration for jurors, attorneys, and trial courts in cross-racial identification cases, even in those cases where the ORB is unlikely to be a factor.\footnote{137. See Bartolomey, supra note 116, at 247 (describing the detrimental effects of ORB arguments on credible witnesses).} The court’s decision in Smith thus departs from precedent and further contradicts its goal of effective advocacy by inviting potentially irrelevant racial considerations into all aspects of trials.\footnote{138. For example, the voir dire process seeks to protect the defendant’s right to an impartial jury by expunging any racially biased jurors. \textit{E.g.}, Aldridge v. United States, 283 U.S. 308, 314 (1931); Hernandez v. State, 357 Md. 204, 211-12, 221, 742 A.2d 952, 955-56, 961 (1999). After Smith, the same jurors screened for racial prejudices may consider race bias when reaching a verdict. \textit{See} Joy L. Lindo, \textit{Note, New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification}, \textit{30} \textit{SETON HALL L. REV.} 1224, 1250 n.137 (2000) (finding the New Jersey Supreme Court’s decision in \textit{Cromedy} to allow cross-racial identification jury instructions surprising in light of the constitutional restrictions on using race as a determining factor in jury selection).}

The Court of Appeals’s decision in Smith increases the likelihood that attorneys will construct arguments around race, a result inconsistent with the court’s precedent in \textit{Contee} and \textit{Tierco}. In \textit{Contee v. State}, the court criticized a trial judge for permitting the prosecutor’s repeated statements about the black defendant’s relationships with white women.\footnote{139. 223 Md. 575, 582-83, 165 A.2d 889, 894 (1960).} Yet after Smith, the trial court may have to tolerate similar comments. For example, if the defense counsel makes an ORB argument, the prosecution may choose to rebut this argument with arguments based on mitigating factors, including the witness’s interactions with people outside of her race.\footnote{140. See United States v. Telfaire, 469 F.2d 552, 562 (D.C. Cir. 1972) (Leventhal, J., concurring) (expressing concern over subjecting witnesses to an examination of their interracial contacts and personal prejudices); Bartolomey, supra note 116, at 247 (criticizing the use of ORB in criminal trials as unnecessarily demeaning to witnesses, whose only fault is being a different race than the accused).} This would require eliciting facts about the witness’s interactions with people of different
races for improper reasons: precisely what the court prohibited in Contee.\textsuperscript{141}

Moreover, the Court of Appeals's decision in Smith is difficult to reconcile with its decision in Tierco \textit{v. Williams}, where it held that the trial court abused its discretion by permitting improper racial issues to overwhelm the material facts of a personal injury action.\textsuperscript{142} In Tierco, the plaintiff's attorney's tactic of suggesting that racial prejudice caused the defendant's behavior resulted in the defendant's counsel countering with additional race-related arguments.\textsuperscript{143} Paradoxically, Smith permits attorneys to employ similar tactics under the guise of ORB arguments.

The court's sanction of unsubstantiated ORB arguments is particularly problematic because the possibility of racial issues distorting the juror's understanding of the material issues of the case—the reasoning employed in Tierco—is more damaging in the criminal context.\textsuperscript{144} Frequently, trial courts are the only check on improper defense arguments, as these arguments are rarely subject to appellate review.\textsuperscript{145} This is because the Constitution prohibits the retrial of acquittals, even those based on irrelevant racial considerations.\textsuperscript{146} Prosecutors facing improper defense arguments frequently respond with improper rebuttals, realizing there may be no opportunity to appeal if the defense's improper comments sway the jury's decision.\textsuperscript{147} Considering the jury's general rejection of the ORB phenomenon, however, this tactic may cause both attorneys to lose credibility with the jury for attempting to "play the race card."\textsuperscript{148} Regardless of whether the jury accepts the ORB argument or merely considers it a blatant appeal to racial prejudice, these tactics harm both the state and the accused by hindering the ability of the jury to ascertain guilt or innocence on race-neutral considerations.\textsuperscript{149}

\textsuperscript{141} 233 Md. at 582-83, 165 A.2d at 894.
\textsuperscript{142} 381 Md. 378, 414, 849 A.2d 504, 526 (2004).
\textsuperscript{143} Id. at 404, 849 A.2d at 520.
\textsuperscript{144} Nidiry, \textit{supra} note 120, at 1315.
\textsuperscript{145} Id. at 1300.
\textsuperscript{146} See Sheri Lynn Johnson, \textit{Racial Imagery in Criminal Cases}, 67 TUL. L. REV. 1739, 1748 n.28 (1993) (proposing that defense arguments may be more susceptible to improper racial comments because the Double Jeopardy Clause bars retrial after an acquittal).
\textsuperscript{148} See id. at 101 (noting that attorneys' improper arguments may unnecessarily endanger their client's case if the arguments offend the jury); Johnson, \textit{supra} note 146, at 1741 (proposing that using race as a factor seldom sways the jury and may even backfire, benefiting the subject of race-related comments).
\textsuperscript{149} See Nidiry, \textit{supra} note 120, at 1317-18 (describing the divisiveness of implicit racial appeals in closing arguments made by defense attorneys).
Not only does the *Smith* court permit attorneys to draw undue attention to the race of the parties, it also inappropriately forces trial courts to delve into the controversial task of racial classifications. Because the Court of Appeals offered little guidance as to how to apply their decision, trial courts will have to spend time assigning racial classifications to the witness and the accused, particularly in cases where an individual's race is ambiguous. New Jersey courts faced this problem in the aftermath of *Cromedy*, as trial courts attempted to define race in cross-racial identification cases. Similarly, Maryland trial courts will have trouble applying *Smith* because it gave no guidance as to biracial witnesses or cross-ethnic identifications (e.g., a Chinese eyewitness and a Korean defendant). The Court of Appeals also did not explain whether attorneys will be permitted to use ORB to bolster a same-race identification, a divisive tactic vehemently rejected in other jurisdictions. Because of these ambiguities, trial courts are now in a conflicted position in which they face reversal for permitting improper racial comments under *Contee* and *Tierco* or for preventing counsel from making race-based comments on ORB under *Smith*.

150. See United States v. Telfaire, 469 F.2d 552, 562 (D.C. Cir. 1972) (Leventhal, J., concurring) (advising that the judiciary should carefully consider the effects of involving itself in an area “as sensitive as race relations”); Hernandez v. State, 357 Md. 204, 230, 742 A.2d 952, 966 (1999) (expressing that the appropriate role of the court is not to assign a race to a criminal defendant); cf. Jackson v. State, 364 Md. 192, 206-08, 772 A.2d 273, 281-82 (2001) (criticizing the statements of a trial judge during a sentencing hearing for giving the inappropriate impression that race was a factor in the court’s decision).

151. See *Smith*, 388 Md. at 496-97, 880 A.2d at 304-5 (Harrell, J., dissenting) (rejecting the majority’s treatment of race as a “well-defined issue”).

152. Compare State v. Walton, 845 A.2d 1257, 1262 (N.J. Super. Ct. App. Div. 2004) (holding that the trial court erred when it refused to give a cross-race effect jury instruction in a case where the defendant and one identifying witness were black and another identifying witness was Hispanic), with State v. Valentine, 785 A.2d 940, 944-45 (N.J. Super. Ct. App. Div. 2001) (finding no reversible error in failing to give a cross-racial identification instruction where defendant was black and identifying victim was part Hispanic and part African American, as Hispanics are not a race).

153. See *Smith*, 388 Md. at 497, 880 A.2d at 305 (Harrell, J., dissenting) (questioning the implications of the *Smith* decision on multi-racial witnesses).

154. Id.; see also Johnson, supra note 115, at 941 (discussing a study of Asian participants, which found insignificant differences in the ability of Japanese and Chinese witnesses to identify Japanese and Chinese faces).

155. See, e.g., People v. Alexander, 727 N.E.2d 109, 110 (N.Y. 1999) (finding the prosecution’s argument about the greater reliability of same-race identifications to be a prejudicial error).

156. See *Smith*, 388 Md. at 496, 880 A.2d at 304 (Harrell, J., dissenting) (suggesting that trial courts may have difficulty implementing the *Smith* decision); Tierco v. Williams, 381 Md. 378, 414, 849 A.2d 504, 526 (2004) (holding that the trial judge abused her discretion by failing to grant a new trial where attorneys commented on the race of the parties sixty-three times in a personal injury case).
c. The Court of Appeals Should Have Established a Test for Determining When ORB Arguments Are Appropriate to Limit Unnecessary Juror Confusion and Irrelevant Racial Arguments.—To limit unnecessary juror confusion and irrelevant racial arguments, the Court of Appeals should have adopted a threshold standard for determining when ORB arguments are appropriate, similar to the factor test proposed by the Court of Special Appeals.157 By restoring the deference traditionally afforded to trial courts in determining the scope of closing argument, the framework balances the trial court's interest in insulating trials from irrelevant appeals to racial bias with the Smith court's objective of protecting the defendant's right to effective advocacy at closing argument.158 Similarly, the standard would alleviate the court's treatment of ORB as common knowledge by requiring the defense to produce evidentiary support before introducing ORB arguments in summation.

To illustrate, if the defense counsel requests permission to make an ORB argument, the court should then consider its relevance in light of various factors: (1) the line-up or photo array procedure, (2) the witness's exposure to other-race faces, (3) the witness's ability to give a specific description of the perpetrator, (4) the amount of time the witness viewed the perpetrator, (5) the lighting at the scene of the crime, (6) the delay between the crime and the identification, (7) the potential for the defense to attack the eyewitness's credibility with race-neutral arguments, and (8) the presence of any other factors that might mitigate the effect of ORB on the identification.159 When some or all of these factors are present, the court should then require coun-

157. See Smith v. State, 158 Md. App. 673, 707-08, 857 A.2d 1198, 1218 (2004) (suggesting the adoption of a framework that would allow trial courts to determine whether ORB was a legitimate factor in a particular case before permitting reference to race at trial).

158. See id. at 707, 857 A.2d at 1218 (asserting that trial courts have the discretion to prevent subtle appeals to prejudice); State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999) (instructing trial courts to be cautious of overt appeals to racial prejudice).

159. These factors are similar to those courts in other jurisdictions use in determining the relevancy of cross-racial identification issues. See, e.g., Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995) (affirming trial court's denial of cross-racial identification jury instruction where the witness was victimized for fifteen to twenty minutes, the crime occurred in broad daylight, the victim was face to face with the attacker, and the defense produced no relevant studies relating to the reliability of cross-racial identifications in crimes with such characteristics); Commonwealth v. Engram, 686 N.E.2d 1080, 1082 (Mass. App. Ct. 1997) (finding no error in precluding cross-racial identification jury instruction where five identifying witnesses described the robber as having a distinctive eye problem, the witnesses saw the robbery in good light, all were within close proximity to the robber, four of the five witnesses identified the defendant in the initial photo array, and, at trial, all five identifying witnesses noted that the defendant appeared to have gained weight since the crime had occurred, which the defendant admitted was correct).
sel to produce evidence, including experts or scientific studies, to support an ORB argument during summation. However, if the court concludes that ORB evidence will not aid the jury in reaching a decision on the issues in a case, it may prohibit ORB arguments to protect the trial from unnecessary racial considerations.

Where the evidence presented allows for a reasonable inference that ORB was an issue in the identification, the court should grant counsel the discretion to introduce the evidence and make the argument. The evidentiary threshold will ameliorate the Smith court’s decision to treat ORB as common knowledge since effective ORB arguments require attorneys to reference research that is typically inadmissible without the support of expert testimony. Although an evidentiary requirement may restrict the scope of some closing arguments, the restriction is necessary to ensure an appropriate balance between the defendant’s right to a fair trial and the need for jurors to understand the potential impact of ORB before weighing ORB as a factor in their deliberations.

Applying this test to the facts of the Smith case, the trial court would have been within its discretion to prohibit ORB comment because many of the balancing factors weighed against introducing the topic. First, Crandall rejected six photographs of black male suspects during the first photo array. In contrast, D.S., the white victim in Cromedy, failed to identify a picture of Cromedy in the first photo array she was shown. Additionally, Crandall’s identification mirrored that of a multiple line-up procedure, in which the witness views multiple line-ups, the first line-up comprised of only innocent people. Studies suggest that the rate of misidentification is very low when the multiple line-up procedure is used. Second, Crandall gave a spe-

160. See Smith, 158 Md. App. at 708, 857 A.2d at 1218. But cf. Wells & Olson, supra note 127, at 240-41 (discounting the effectiveness of expert testimony on eyewitness identification issues as it lengthens trials, increases costs, and fails to help the jury differentiate between accurate and inaccurate cross-racial identifications while providing no incentive for the criminal justice system to prevent mistaken identifications at the time of the initial identification).


162. Introducing the ORB argument before summation will increase the likelihood that it will be effective, since most jurors make their decision about the guilt or innocence of the defendant before closing arguments. E.g., Tucker Ronzetti & Janet L. Humphreys, Avoiding Pitfalls in Closing Arguments, FLA. B.J., Dec. 2003, at 36.

163. E.g., Natarajan, supra note 129, at 1843.

164. See id.

165. Smith, 388 Md. at 470-71, 880 A.2d at 289.

166. See supra note 87 and accompanying text.

167. Wells & Olson, supra note 127, at 233-34, 239.

168. Id.
cific description of the perpetrators, including details about their clothes and hairstyles. Third, Crandall was able to view the defendants at a close distance for four minutes, an exposure time much longer than that used in many ORB studies. Fourth, Crandall identified the defendants within two weeks of the crime, distinguishing *Smith* from cases like *Cromedy*, where the eight-month lapse between the crime and the identification increased the potential for ORB. Fifth, the defense had race-neutral arguments to impeach Crandall’s statement that her artistic background gave her enhanced memory skills. Sixth, Crandall’s potential for ORB may have been mitigated by other variables, such as the fact that Crandall resided in a city with a sixty-four percent black population, which made it unlikely that she was unfamiliar with other-race faces. If the trial court, even in light of all the factors discussed above, found that ORB was permissible, the trial court should still have denied the defense counsel’s request because the defense did not produce any, let alone sufficient, evidence in support of their ORB argument.

As illustrated above, to prevent irrelevant race-based arguments from misleading the jury, the Court of Appeals should adopt a flexible framework and limit *Smith* to those cases where the trial court determines that ORB affected the identification of the defendant. Such an evidentiary threshold maintains the *Smith* court’s objective of protecting the defendant’s right to effective advocacy by ensuring that when ORB arguments are relevant, they are effective.

5. Conclusion.—In *Smith v. State*, the Court of Appeals held that the criminal defendant’s right to an adversarial summation entitled the defense counsel to attack a cross-racial identification with ORB arguments without producing evidentiary support. The court’s decision, however, subverts effective advocacy by mistakenly treating ORB as a matter of common knowledge and permitting potentially

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170. *Id.* at 676, 857 A.2d at 1200.
172. For example, the defense counsel could have drawn inferences from the police officer’s testimony that when the officers arrived at the scene of the crime, Crandall told them that she could only sketch one of the perpetrators. *Smith*, 388 Md. at 476, 880 A.2d at 292.
175. 388 Md. at 470, 880 A.2d at 289.
irrelevant race-based arguments to mislead the jury.\textsuperscript{177} To mitigate the detrimental effects of Smith, the Court of Appeals should adopt a factor-based standard for determining the relevancy of ORB arguments and should require an evidentiary basis for ORB arguments, as they are not a matter of common knowledge.\textsuperscript{178}

\textit{Melanie Gart}

\textsuperscript{177} See supra Part 4.b.
\textsuperscript{178} See supra Part 4.c.
B. The Acceptance of Detention Without Probable Cause

In Cotton v. State, the Court of Appeals of Maryland considered whether police detention of an individual violated his right to be free from unreasonable searches and seizures under the Fourth Amendment. In a 4-3 decision, the court upheld the individual’s detention and found that narcotics seized from his person were admissible at trial. In reaching its decision, the majority misapplied the detention standard articulated by the Supreme Court in Michigan v. Summers. The court stretched this standard beyond its intended purpose in authorizing the detention of all visitors found on the property of a household subject to a search and seizure warrant.

In so holding, the court improperly favored a police officer’s interest in executing a valid search warrant over an individual’s right to be free from unreasonable seizures. This decision is irreconcilable with both the history and jurisprudence of the Fourth Amendment. More troubling, however, is that this ruling approves a disturbing expansion of law enforcement authority that directly undermines the assumption that detention constitutes an exceptional practice. As a result, the court’s decision grants law enforcement officials a broad power to detain individuals at will.

1. The Case.—In February 2002, Detective James Henning of the Caroline County Drug Task Force (Task Force) secured a no-knock warrant to search Don Antonio Jones’s residence. The warrant authorizing the search was based on probable cause that narcotics were present at the residence. The warrant was executed without announcing the presence of law enforcement officials. The search resulted in the seizure of narcotics from the residence.

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1. 386 Md. 249, 872 A.2d 87 (2005).
2. The Fourth Amendment reads:
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. The Fourth Amendment was applied to the states by the Supreme Court in Mapp v. Ohio. 367 U.S. 643, 660 (1961).

3. Cotton, 386 Md. at 251, 267, 872 A.2d at 88, 98.
5. Cotton, 386 Md. at 267, 872 A.2d at 98 (Battaglia, J., dissenting).
7. See infra Part 4.b.
8. See infra Part 4.c.
10. A “no-knock” warrant empowers law enforcement officials to enter a suspect’s residence without announcing their presence. Davis v. State, 383 Md. 394, 418 n.18, 859 A.2d 1112, 1126 n.18 (2004).
11. Cotton, 386 Md. at 267-68, 872 A.2d at 98 (Battaglia, J., dissenting).
 thorized the police to search individuals named in the warrant\textsuperscript{12} and other persons on the premises suspected of conducting illegal drug activities.\textsuperscript{13} The warrant also sanctioned the seizure of any evidence recovered during those searches and the arrest of individuals violating controlled substance statutes on the premises.\textsuperscript{14}

On February 21, 2002, twenty to twenty-five police officers executed the warrant.\textsuperscript{15} When the police arrived, Steven Cotton stood in the front yard of the house alongside Jones and several other individuals, including Steven Aldredge and Grace Johnson.\textsuperscript{16} Jones fled.\textsuperscript{17} Cotton, however, remained in the yard.\textsuperscript{18} An officer handcuffed Cotton and allowed him to sit down.\textsuperscript{19}

Meanwhile, Detective Henning secured the premises and returned to the yard to interview all of the individuals who had been detained but not yet arrested.\textsuperscript{20} Henning first spoke with Aldredge.\textsuperscript{21} Henning next approached Cotton, who remained sitting and handcuffed.\textsuperscript{22} Ten to twenty minutes elapsed between Cotton’s initial detention and Henning’s interrogation.\textsuperscript{23}

Henning advised Cotton of his \textit{Miranda} rights and asked him if he had any dangerous weapons or sharp objects.\textsuperscript{24} In response, Cotton admitted that he was in possession of a bag of marijuana.\textsuperscript{25} Henning then frisked Cotton and recovered marijuana from him.\textsuperscript{26} At that point, Cotton was formally arrested.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{12} The warrant also named Calvin Edgar Bolden and Calvileen Bolden, Jones’s grandfather and mother respectively, as residents of Jones’s household. \textit{Id.} at 251-52, 872 A.2d at 88-89 (majority opinion).
\item \textsuperscript{13} \textit{Id.} at 252, 872 A.2d at 89.
\item \textsuperscript{14} \textit{Id.} After conducting a four-year investigation into Jones’s drug-trafficking activities, Henning and the Task Force presented a sixty-eight page application for a search warrant of Jones’s home. \textit{Id.}, 872 A.2d at 88.
\item \textsuperscript{15} \textit{Id.} at 253, 872 A.2d at 89; \textit{id.} at 267, 872 A.2d at 98 (Battaglia, J., dissenting).
\item \textsuperscript{16} Brief for the Petitioner at 5, \textit{Cotton}, 386 Md. 249, 872 A.2d 87 (No. 29).
\item \textsuperscript{17} \textit{Cotton}, 386 Md. at 253, 872 A.2d at 89.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.} at 254, 872 A.2d at 90.
\item \textsuperscript{21} \textit{Id.} Henning had a brief conversation with Aldredge and received Aldredge’s consent to search his person and his car. \textit{Id.} Henning’s search of Aldredge did not reveal any contraband, and Aldredge was released. \textit{Id.}
\item \textsuperscript{22} Brief for the Petitioner, \textit{supra} note 16, at 7.
\item \textsuperscript{23} \textit{Cotton}, 386 Md. at 267, 872 A.2d at 97; \textit{id.} at 268, 872 A.2d at 98 (Battaglia, J., dissenting).
\item \textsuperscript{24} \textit{Id.} at 268, 872 A.2d at 98 (Battaglia, J., dissenting).
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} Henning found no weapons on Cotton during the pat-down. \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\end{itemize}
The State charged Cotton with marijuana possession in the Circuit Court for Caroline County. Cotton moved to suppress the marijuana evidence, alleging that his detention was illegal and contravened the Fourth Amendment. Cotton argued that there was no reasonable articulable basis for his detention and frisk by the police and that no exception to the Fourth Amendment's protections pertained to uphold the search and seizure.

On August 28, 2002, the circuit court held a suppression hearing. The court denied Cotton's motion, finding that the search and seizure warrant authorized his detention. Alternatively, the court observed that a legal pat-down search of Cotton would have inevitably resulted in the seizure of marijuana from his person.

Cotton was subsequently convicted of marijuana possession and sentenced to two years in prison. The Court of Special Appeals affirmed the circuit court's decision. The intermediate appellate court stressed the dangers faced by police in executing a narcotics search warrant and observed that Cotton stood close to one of the individuals named in the warrant as officers arrived. The court also noted that at least one of those named individuals had previously threatened the officers. The court held that under the totality of the circumstances, the police had the authority to detain Cotton for a limited duration while they secured the premises.

Cotton petitioned the Court of Appeals, which granted certiorari to determine whether the police, while executing a no-knock search and seizure warrant, can lawfully detain and then search an individual standing in the front yard of a residence that is the subject of the search when the individual is not named in the warrant.

29. Brief for the Respondent at app. 49, Cotton, 386 Md. 249, 872 A.2d 87 (No. 29).
30. Id. at app. 48-49.
31. Id. at app. 1, 5.
32. Id. at app. 70.
33. Id. at app. 70-71.
34. Cotton, 386 Md. at 251, 872 A.2d at 88. Cotton received an enhanced sentence because he was a repeat offender. Id.
36. Id. at 6.
37. Id. at 6-7. The court also pointed to Jones's flight as an additional basis for Cotton's detention. Id. at 8.
38. Id. at 7.
40. Cotton, 386 Md. at 251-55, 872 A.2d at 88-90.
2. Legal Background.—The Fourth Amendment protects individuals from unreasonable searches and seizures.\textsuperscript{41} Indeed, the Supreme Court has stressed that the reasonableness of the police action is the proper inquiry in Fourth Amendment jurisprudence.\textsuperscript{42} Although the Court typically requires probable cause to legally seize an individual under the Fourth Amendment, several cases following \textit{Terry v. Ohio} have authorized detentions under a less exacting standard.\textsuperscript{43} Nonetheless, the Supreme Court has emphasized that \textit{Terry}-based exceptions must be narrowly drawn and ought not impede on the liberty guarantees of the Fourth Amendment.\textsuperscript{44} In identifying the scope of reasonableness, the Court has stressed that such an analysis must place equal importance on the interests of law enforcement officials and an individual's right to personal liberty.\textsuperscript{45} Maryland's jurisprudence, consonant with the Fourteenth Amendment,\textsuperscript{46} has followed suit, extending \textit{Terry} to interactions between police and citizens.\textsuperscript{47} In following this approach, the Court of Appeals has balanced the needs of law enforcement personnel with individual liberty.\textsuperscript{48}

\textbf{a. United States Supreme Court Jurisprudence Regarding the Fourth Amendment.}—The Supreme Court has considered the probable cause requirement of the Fourth Amendment central to its analysis of any search and seizure. In several isolated instances, however, the Court has approved narrowly drawn exceptions to this requirement.

\textbf{(1) The Probable Cause Requirement of the Fourth Amendment and the Development of the Exclusionary Rule.}—In \textit{Johnson v. United States},\textsuperscript{49} the Court reversed an individual's narcotics conviction because law enforcement officials failed to obtain a warrant before executing the search. The majority deemed the search unconstitutional, resting its conclusion on an interpretation of the Fourth Amendment's warrant requirement.\textsuperscript{50} The Court explained that although the warrant requirement was not designed to deny officers the use of

\begin{itemize}
  \item 41. U.S. CONST. amend. IV.
  \item 42. Terry v. Ohio, 392 U.S. 1, 19 (1968).
  \item 43. See, \textit{e.g.}, Michigan v. Summers, 452 U.S. 692 (1981).
  \item 44. See, \textit{e.g.}, Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion).
  \item 45. \textit{Terry}, 392 U.S. at 20-21.
  \item 46. U.S. CONST. amend. XIV.
  \item 47. Maryland courts recognized the applicability of the exclusionary rule immediately following the Supreme Court's decision in \textit{Mapp v. Ohio}. Belton v. State, 228 Md. 17, 23, 178 A.2d 409, 412 (1962).
  \item 49. 333 U.S. 10 (1948).
  \item 50. \textit{Id.} at 13-14.
\end{itemize}
their reasoned judgment and experience, it nonetheless requires them to present their judgments to a neutral magistrate who has the decisionmaking authority to find probable cause. The Court observed that the desire to prevent crime must be reconciled with society's right to security in their own homes and that the warrant requirement provided an objective basis for doing so. The Court also rejected the government's additional argument that the search was lawful as incident to a valid arrest. In doing so, the Court stressed that an officer seeking entry into a private dwelling must have a sound legal basis for the intrusion.

The Court developed the probable cause requirement more extensively in Henry v. United States. In Henry, the majority reversed a defendant's conviction for possession of stolen goods because law enforcement officials lacked probable cause to search him. In explaining its rationale, the Court focused on the historical and doctrinal importance of probable cause to the enactment of the Fourth Amendment. The Court explained that this historical background placed probable cause, not mere suspicion or rumor, at the forefront of Fourth Amendment analysis. Relying on Johnson, the Court firmly rejected the idea that probable cause can derive from evidence found in a warrantless search. The Court thus concluded that mere suspicion is insufficient to invade the personal security of a citizen.

While the Court heightened the probable cause requirement in its Fourth Amendment analysis, it also employed the exclusionary rule to provide a practical remedy for Fourth Amendment violations.

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51. Id. The Court's focus on the magistrate's neutrality stems from its finding that officers are "engaged in the often competitive enterprise of ferreting out crime." Id. at 14. 52. Id. at 14. 53. Id. at 15-17. 54. Id. at 17; accord Sibron v. New York, 392 U.S. 40, 64 (1968). 55. Henry, 361 U.S. 98 (1959). 56. Id. at 104. 57. Id. at 100-01. The majority opinion referred to the Maryland Declaration of Rights as an example of the colonial reaction to general warrants, i.e., warrants based on suspicion. Id. at 101. Article 26 of the Maryland Declaration of Rights states:

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 to be granted.

Md. Const. Decl. of Rts. art. 26. 58. Henry, 361 U.S. at 101. 59. Id. at 104. 60. Id. Justice Douglas, writing for the majority, observed that "[i]t is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." Id.
Boyd v. United States,\(^6\) the Court suggested that evidence seized pursuant to an unconstitutional search could not be admitted at trial to establish guilt. The Court relied on an influential English common-law decision\(^6\) condemning the use of general warrants to discover evidence for a libel conviction.\(^6\) In the Court’s view, the decision stood for the principle that evidence improperly seized for use at trial amounted to self-incrimination and constituted an impermissible invasion into an individual’s personal security and property.\(^6\) Although the Court found the circumstances of the case innocuous,\(^6\) it stressed that upholding the defendants’ convictions would effectively endorse the depreciation of the defendants’ constitutional rights.\(^6\) Unwilling to take this step, the Court reversed the convictions, holding that the search for evidence and its use at trial was unconstitutional.\(^6\)

In Weeks v. United States,\(^6\) the Court formally announced that it would employ the exclusionary rule to protect Fourth Amendment rights. The defendant’s conviction in that case was based on a warrantless search of his home, which uncovered incriminating papers and envelopes.\(^6\) Relying on the Boyd decision, the Court deemed evidence seized as a result of an unconstitutional search inadmissible to sustain the defendant’s conviction.\(^6\)

In Mapp v. Ohio,\(^6\) the Court formally recognized that its Fourth Amendment exclusionary rule was applicable to the states through the Fourteenth Amendment. The Court felt that the disparate constitutional protections afforded defendants in state and federal courts defied common sense and encouraged law enforcement officials to flout constitutional rights.\(^6\) To support its argument, the Court pointed to its interpretation of other constitutional protections, such as freedom of speech and the press, where it had held the states to the same standards as the federal government.\(^6\) Consequently, the Court rectified this discrepancy by holding state law-enforcement officials to the same

\(^{61}\) 116 U.S. 616 (1886).
\(^{63}\) Boyd, 116 U.S. at 626-29.
\(^{64}\) Id. at 630.
\(^{65}\) Id. at 630.
\(^{66}\) The Boyd defendants were convicted of illegally importing thirty-five cases of plate glass. Id. at 617-18.
\(^{66}\) Id. at 635.
\(^{67}\) Id. at 638.
\(^{68}\) 232 U.S. 383 (1914).
\(^{69}\) Id. at 387-88.
\(^{70}\) Id. at 398.
\(^{71}\) 367 U.S. 643 (1961).
\(^{72}\) Id. at 657.
\(^{73}\) Id. at 656.
exclusionary rule as their federal counterparts. After Mapp, both the probable cause protections guaranteed in the written text of the Fourth Amendment and the practical remedy of the exclusionary rule shielded citizens from unwarranted police intrusion into their personal liberty.

(2) Exceptions to Probable Cause.—In Terry v. Ohio, the Court recognized that in some circumstances, searches and seizures based on less than probable cause were still constitutionally permissible. There, a police officer observed Terry and several others engaged in a repeated pattern of walking by a store window, peering in, and conferring with each other. This behavior aroused the suspicion of the officer, who then approached the men and asked them to identify themselves. After the men mumbled incoherent responses, the officer grabbed Terry and patted down the outer layer of his clothing. The officer discovered a gun in Terry's jacket pocket and arrested him. Terry was later convicted of carrying a concealed weapon.

The Terry Court affirmed the conviction, recognizing a narrow exception to the probable cause requirement in encounters between citizens and police officers. The Court expressed the usefulness of the exclusionary rule in its Fourth Amendment jurisprudence both as a deterrent to inappropriate police conduct and as a method for upholding judicial integrity. The Court recognized that the Fourth Amendment inquiry primarily assesses the reasonableness of the government's invasion of an individual's personal security. The majority explained that this inquiry focuses on whether the governmental interest asserted by the officer is reasonable to justify the intrusive action. Although the Court concluded that the officer did not need probable cause to frisk Terry, the Court nevertheless stressed that the underpinnings of the probable cause requirement still applied to

74. Id. at 657.
75. Id. at 6.
76. Id. at 6-7.
77. Id. at 7.
78. Id. at 7.
79. Id.
80. Id. at 7-8.
81. Id. at 30.
82. Id. at 12.
83. Id. at 19.
84. Id. at 20-21.
85. Id. at 27.
the seizure. The Court reasoned that an inquiry unmoored from this standard invites constitutional intrusions based on mere suspicion, a result that it had long rejected as unconstitutional. Instead, this lower standard is based on an officer’s reasonable articulable suspicion of criminal activity. In the Court’s view, requiring officers to draw on their law enforcement experience, rather than hunches, simultaneously protected officers from harm and individuals from unconstitutional intrusions into their personal liberty. The majority stressed that since the sole purpose of the search in this situation was to protect the officer and bystanders from harm, the scope of the search must be limited to ascertaining whether the suspect is armed and dangerous.

Relying on Terry, the Court recognized an additional exception to the probable cause requirement in Michigan v. Summers. In Summers, the Court upheld the detention and search of the owner of a residence where he was found on the front steps of the home during the execution of a valid search warrant. The majority examined Terry and its progeny and concluded that certain seizures are reasonable even without probable cause. The Court reasoned from these cases that an officer’s reasonable articulable suspicion of criminal activity could suffice to detain an individual. In the Court’s view, such suspicion served as the basis for its reasonableness inquiry under the Fourth Amendment.

86. Id. at 20-21.
87. Id. at 21-22.
88. Id. at 21.
89. Id. at 27.
90. Id. at 29. In concurrence, Justice Harlan explained that the proper inquiry for on-the-street encounters is the reasonableness of the frisk under the circumstances. Id. at 31 (Harlan, J., concurring). For Justice Harlan, an officer’s right to frisk a suspect is directly related to the reasonableness of that officer’s articulable suspicion of criminal activity. Id. at 33. If the suspicion is reasonable, the officer is automatically authorized to stop and frisk the suspect. Id.
92. Id. at 705.
93. Id. at 698-99; see, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (authorizing customs officials on the U.S.-Mexico border to stop vehicles briefly if they have a reasonable articulable suspicion that the vehicles contain illegal aliens); Adams v. Williams, 407 U.S. 143 (1972) (finding informant’s tip to police officer reliable indicia to search and seize an individual in his car).
94. Summers, 452 U.S. at 699. The Court also observed that considerable law enforcement interests outweighed the minimal intrusiveness of the detentions in these cases. Id.
95. Id. at 699-700. Justice Stevens’s majority opinion stressed that reasonableness was the key basis to understanding the Fourth Amendment. Id.; accord Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring).
The Court then addressed the factual background of the detention. Just as officers were about to execute a search warrant for drugs on a residence, Summers descended from the front steps. The officers identified themselves and asked Summers to let them in the house. Summers replied that he had left his keys inside, so the officers forced open the door and executed the warrant. The officers detained Summers and led him back inside the residence during the search. Officers found narcotics in the basement and formally arrested Summers once they learned that he lived there.

The Supreme Court in *Summers* held that the defendant's detention did not violate the Fourth Amendment. The Court stressed that the search warrant authorized the police to search Summers's residence. The majority then noted the law enforcement interests that supported the detention: the desire to prevent the defendant's flight, the minimization of harm to officers, and the orderly execution of the search. The Court upheld the detention, balancing these law enforcement interests with the intrusion on Summers's liberty. The Court also observed that police officers can minimize the risk of harm to both themselves and bystanders if they exercise absolute control of the situation. Moreover, the Court observed that officers would not prolong or abuse the detention because the recovery of contraband would result from a search of the residence, not from the defendant's detention. Alternatively, the Court noted that the connection between Summers and the residence specified in the search warrant gave the officers a justifiable basis for his detention. That is, the Court held that the search warrant contained the implicit authority to detain Summers be-

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97. Id. at 693.
98. Id.
99. Id. at 693 n.1.
100. Id.
101. Id.
102. Id. at 705.
103. Id. at 701.
104. Id. at 702-03.
105. Id. at 701-03, 705.
106. Id. at 702-03.
107. Id. at 702.
108. Id. at 701.
109. Id. at 703-04.
cause he was an "occupant" and "resident" of the home subject to a lawful search.\footnote{110}

Recently, the Court applied the Summers rationale in \textit{Muehler v. Mena}.\footnote{111} In that case, police investigating a gang shooting uncovered information linking a residence to a gang member.\footnote{112} Based on this knowledge, Officer Muehler obtained a search warrant for the residence for weapons and gang-related paraphernalia.\footnote{113} Muehler and other officers executed the warrant at 7:00 a.m., rousing Iris Mena, a resident unconnected with the criminal activity specified in the warrant, from sleep in her bedroom.\footnote{114} Officers handcuffed Mena and transported her to a garage on the premises, where she was guarded for two to three hours.\footnote{115} Mena brought a civil rights claim against Muehler and other officers,\footnote{116} arguing that the scope and duration of her detention was unreasonable under the Fourth Amendment.\footnote{117}

The Supreme Court found that Summers authorized Mena's detention.\footnote{118} For the Court, the warrant legitimized the search of the residence, sweeping Mena, who was physically present at the time of the warrant's execution, within its reach.\footnote{119} Under the Court's view of Summers, Mena's occupation of the residence covered by a search warrant explicitly authorized her detention.\footnote{120} Ultimately, although the Court has drawn several exceptions to the probable cause requirement of the Fourth Amendment, it has applied them narrowly and only in rare circumstances warranting immediate police action.

\textbf{b. Court of Appeals Jurisprudence Regarding Illegal Detentions.—}
In Maryland, the Court of Appeals has complied with the Supreme Court's careful consideration of detention based on less than proba-

\footnote{110. Id. at 705 & n.21.}
\footnote{111. 125 S. Ct. 1465 (2005).}
\footnote{112. Id. at 1468.}
\footnote{113. Id.}
\footnote{114. Id.}
\footnote{115. Id. at 1468, 1471. The length of detention, although generally not dispositive of whether the search and seizure is reasonable under the Fourth Amendment, may provide reliable indicia that the detention is in fact illegal. \textit{See}, \textit{e.g.}, \textit{United States v. Sharpe}, 470 U.S. 675, 693 (1985) (Marshall, J., concurring) (asserting that an initially valid \textit{Terry} stop becomes illegal if it lasts too long); \textit{Florida v. Royer}, 460 U.S. 491, 500 (1983) (plurality opinion) (noting that investigative seizures must be temporary and restricted in duration to the amount of time necessary to complete the search).}
\footnote{117. Id.}
\footnote{118. Id. at 1470.}
\footnote{119. Id.}
\footnote{120. Id.}
ble cause. In Stanford v. State, the court directly addressed the implications of the Summers Court's "resident" and "occupant" language to Maryland detainees but found that the defendant's detention was unreasonable under any definition. In Stanford, a confidential informant told police that individuals in an apartment were selling drugs. Officers arranged for the informant to purchase cocaine from the individuals, during which time the informant learned the names of the men living in the apartment. Based on this information, officers then obtained a no-knock search and seizure warrant for the apartment. The warrant named three individuals: the two individuals whose identities were known to police at the time of the execution of the warrant, and another man believed to be the supplier. Before executing the warrant, Detective Keith Williams recognized one of the men named in the warrant and saw him exit the common stairwell to the apartment building and get into an automobile. Williams radioed other officers to stop the car and detain the individuals. One of the men, Richard Stanford, was unknown to Williams and did not match the informant's description of the supplier. The officers frisked the men for weapons, handcuffed them, and returned to the apartment. Once inside, officers recovered cocaine from Stanford after a search of his person.

The Court of Appeals recognized that Stanford's Fourth Amendment claim rested on Summers. The court noted that the Summers majority referred to searched individuals as both residents and occupants without defining either term. As a result, state and federal

122. Id. at 529, 727 A.2d at 939-40.
123. Id. at 530, 727 A.2d at 940.
124. Id. at 529, 727 A.2d at 939. The issuance of a no-knock search and seizure warrant itself is insufficient to supply the reasonable articulable suspicion necessary for a Terry stop. Dashiell v. State, 374 Md. 85, 90, 821 A.2d 372, 375 (2003). But if the affidavit provided by officers to obtain this warrant includes information suggesting that violent individuals will be present when the warrant is executed, officers may frisk individuals found inside the residence for weapons to protect themselves. Id.
125. Stanford, 353 Md. at 530, 727 A.2d at 940. Based on the informant's description, the warrant described the other individual as an African-American man standing five feet, eight inches tall and weighing 175 pounds. Id.
126. Id.
127. Id.
128. Id. at 530-31, 727 A.2d at 940. Stanford is six feet tall and 210 pounds. Id. at 531, 727 A.2d at 940.
129. Id. at 530, 727 A.2d at 940.
130. Id. at 531, 727 A.2d at 940-41.
131. Id. at 535, 727 A.2d at 942.
132. Id.
courts created their own definitions, and the Stanford court grouped these decisions into three categories.\textsuperscript{133}

For the court, the first category of cases limited Summers to actual residents of the searched location.\textsuperscript{134} The court noted that language in Summers supported this interpretation given the Supreme Court’s emphasis on the link between the detention of a resident and the search of the resident’s possessions.\textsuperscript{135} Next, the court explained that the second line of cases recognized that visitors fell outside the scope of Summers, unless officers executing the warrant had reasonable articulable suspicions linking the visitors to the home or the criminal activity contained in the warrant.\textsuperscript{136} Finally, the third group of decisions upheld the detention of visitors found at a residence, so long as law enforcement interests outweighed the intrusion on the visitors’ Fourth Amendment rights.\textsuperscript{137}

The Court of Appeals declined to adopt any of these definitions because it found Stanford’s detention unreasonable under all of them.\textsuperscript{138} The court found no significant law enforcement interests in Stanford’s case as Stanford could not assist the officers in the search of the apartment since he did not live there.\textsuperscript{139} Moreover, the court stressed that officers could not detain a nonoccupant of the residence for a search when that individual is not named in the warrant and has no known association with the residence.\textsuperscript{140} Additionally, the court observed that Stanford’s detention was impermissible in duration.\textsuperscript{141} Consequently, the court vacated Stanford’s conviction as evidence seized from him was the result of an illegal detention.\textsuperscript{142} Stanford illustrates the court’s due regard for a detaine’s personal liberty interest in light of the authority afforded law enforcement officials to exercise valid search and seizure warrants.

c. Examination of the “Occupant” and “Resident” Terminology of Summers.—

(1) Only Actual Residents May Be Detained.—As explained by the Stanford court, federal and state courts have interpreted the

\begin{thebibliography}{100}
\bibitem{133} Id. at 535-38, 727 A.2d at 942-44.
\bibitem{134} Id. at 535, 727 A.2d at 942.
\bibitem{135} Id. at 535-36, 727 A.2d at 942-43.
\bibitem{136} Id. at 536, 727 A.2d at 943.
\bibitem{137} Id. at 537-38, 727 A.2d at 943-44.
\bibitem{138} Id. at 538, 727 A.2d at 944.
\bibitem{139} Id. at 539, 727 A.2d at 944.
\bibitem{140} Id. at 542, 727 A.2d at 946.
\bibitem{141} Id. at 543, 727 A.2d at 946.
\bibitem{142} Id.
\end{thebibliography}
"occupant" and "resident" language in *Summers* both narrowly and broadly. In *United States v. Reid*, the United States Court of Appeals for the District of Columbia Circuit found that *Summers* did not apply to the detention of a visitor seen leaving an apartment on which police were about to execute a search warrant. As officers ascended the stairwell of the apartment, Carlton Reid, the visitor, exited its front door and proceeded down the stairs. This activity aroused the suspicion of one officer, who detained Reid, frisked him, and recovered a large bag of cocaine from his front pocket. The government argued that Reid's case fell under the scope of *Summers*, urging the court to extend its holding to authorize searches of anyone found on the premises at the time the warrant is executed. The court rejected this idea, noting that Reid never lived at the apartment and was not inside the premises to be searched. The court viewed Reid's detention as being more analogous to the Supreme Court's Fourth Amendment jurisprudence concerning searches in public places than to the circumstances in *Summers*. Notwithstanding its interpretation of *Summers*, the court upheld Reid's detention because the officer voiced articulable concerns for his safety in the confined hallway.

(2) Visitors with an Articulable Connection to the Residence or the Activity Contained in the Search Warrant May Be Detained.—In *Baker v. Monroe Township*, the United States Court of Appeals for the Third Circuit upheld under *Summers* the detention of a mother and her family who were headed to visit her son at the same time officers executed a warrant on her son's home. When Inez Baker and her family arrived at the steps to the residence, they were surprised by armed officers running past and ordering them to get down on the ground. The officers handcuffed the Bakers and emptied the contents of Inez Baker's purse onto the ground. The officers detained the Bakers for twenty-five minutes, releasing them only once it was established

143. 997 F.2d 1576 (D.C. Cir. 1993).
144. *Id.* at 1577.
145. *Id.*
146. *Id.* at 1579.
147. *Id.*
148. *Id.* at 1578-79; see *Ybarra v. Illinois*, 444 U.S. 85 (1979) (finding the search and seizure of all bar patrons unreasonable where warrant was specifically issued for the bartender).
149. *Reid*, 997 F.2d at 1579.
150. 50 F.3d 1186 (3d Cir. 1995).
151. *Id.* at 1188-89.
152. *Id.* at 1189.
that they were relatives of the apartment's occupant. The Bakers sued the officers and the township, claiming that their seizure violated the Fourth Amendment and that the officers used excessive force.

The court first addressed the Bakers' complaint that the officers' order to drop to the ground violated their Fourth Amendment rights. The court held that *Summers* authorized officers to detain occupants of a residence to be searched. Although the majority observed that *Summers* only applied to residents, it noted that *Summers* implicitly authorized officers to question people entering or leaving the house to establish if they lived there. Because the Bakers were ascending the steps to enter the residence at the time officers executed the warrant, the officers' order was reasonable under the Fourth Amendment.

The court subsequently addressed the search of Inez Baker's purse. The court observed that although Ms. Baker's detention was valid under both *Summers* and *Terry*, neither case authorized the officers' search of her personal effects. The court stated that searches authorized under these cases were limited to weapons, and in Ms. Baker's case, the police had overstepped these boundaries by looking for other evidence. The majority found the searches overbroad in scope and lacking in probable cause and therefore unreasonable under the Fourth Amendment.

(3) Visitors to the Residence May Be Detained.—In *Burchett v. Kiefer*, the United States Court of Appeals for the Sixth Circuit upheld under *Summers* the detention of an individual for three hours while officers executed a search warrant on a neighboring home. In that case, officers wearing black clothes arrived in unmarked vehicles to execute a search warrant on a residence in mid-afternoon. Charles Burchett, whose brother owned the residence, lived next door and was concerned about the unidentified officers' behavior.

153. *Id.*
154. *Id.*
155. *Id.* at 1191.
156. *Id.*
157. *Id.* at 1192.
158. *Id.*
159. *Id.* at 1194-95.
160. *Id.* at 1194.
161. *Id.*
162. *Id.*
163. 310 F.3d 937 (6th Cir. 2002).
164. *Id.* at 939-40.
165. *Id.* at 939.
Burchett approached the property line between the homes and officers ordered him to drop to the ground.\textsuperscript{166} Fearing for his family's safety, Burchett ran back to his house.\textsuperscript{167} Officers pursued and caught Burchett and handcuffed him.\textsuperscript{168} Burchett was then placed in one of the unmarked vehicles for three hours while officers executed the warrant.\textsuperscript{169} During Burchett's detention, officers turned off the vehicle and rolled up the windows, even though the temperature outside was ninety degrees.\textsuperscript{170}

Burchett sued the officers, alleging that his detention violated the search and seizure protections of the Fourth Amendment.\textsuperscript{171} The Sixth Circuit held that Burchett's detention was authorized under \textit{Summers}.\textsuperscript{172} The court first noted that the occupants as discussed in \textit{Summers} included any nonresident present during the execution of a search warrant on the home.\textsuperscript{173} In the court's view, this was justified because such a detention prevents flight and enhances officer safety.\textsuperscript{174}

Second, the court observed that its reading of \textit{Summers} authorized officers to detain any individual who arrives at a residence during the execution of a search warrant.\textsuperscript{175} The court conceded that while Burchett's detention failed to fall under either of these categories, it nonetheless fell under the \textit{Summers} rule because of Burchett's evasive actions.\textsuperscript{176} The officers therefore never violated Burchett's Fourth Amendment rights by detaining him.\textsuperscript{177} In sum, a court's view of the scope of "occupant" or "resident" has a determinative impact on whether a detainee was impermissibly held in violation of the Fourth Amendment.

\section*{3. The Court's Reasoning.---In Cotton, the Court of Appeals affirmed the lower court's decision that Cotton was not unlawfully detained and arrested during the execution of the Caroline County Sheriff Office's warrant.\textsuperscript{178} Judge Wilner, writing for the majority,\textsuperscript{179}
determined that the police legally seized marijuana from Cotton during a proper investigative seizure that did not require probable cause.\textsuperscript{180}

The court began by observing that the Fourth Amendment only prohibits unreasonable searches and seizures.\textsuperscript{181} In the court's view, reasonableness in Cotton's case hinged on whether his initial detention constituted an arrest that requires probable cause or an investigative seizure that does not.\textsuperscript{182}

Relying on \textit{Michigan v. Summers} at the outset of its analysis,\textsuperscript{183} the court observed that \textit{Summers} refuted the notion that police executing warrants were limited to the type of stops upheld in \textit{Terry v. Ohio} and its progeny.\textsuperscript{184} The court interpreted \textit{Summers} to mean that when assessing the legality of searches and seizures during the execution of a search warrant, the court should balance the acknowledged restraint on the individual detainee's personal liberty with legitimate law enforcement interests.\textsuperscript{185} The majority noted that the \textit{Summers} Court referred to legitimate detainees as either occupants or residents.\textsuperscript{186} The court explained that this loose terminology created debates over the proper scope of the exception.\textsuperscript{187} The court noted, however, that the Supreme Court in \textit{Muehler v. Mena} viewed \textit{Summers} as dealing with occupants.\textsuperscript{188}

The court explained that, in \textit{Stanford v. State}, it had grouped the decisions interpreting \textit{Summers} into three categories.\textsuperscript{189} The categories ranged from (1) a narrow view of a residence's occupants, including only actual inhabitants of the premises, (2) a broader approach that included visitors who had a reasonable connection to the residence or the activity contained in the search warrant, and (3) an all-encompassing view authorizing the detention of all visitors.\textsuperscript{190} The court surveyed decisions interpreting \textit{Summers} since its \textit{Stanford} deci-
sion and found that courts had generally tended toward the broader interpretation of legal detainees to include nonresidents or visitors.\textsuperscript{191}

The majority adopted that broad approach, reasoning that its view accorded with recent jurisprudence and focused on the basis for the warrant and its execution.\textsuperscript{192} The court held that employing this approach protected police and private citizens during the execution of a search warrant.\textsuperscript{193} Furthermore, the court observed that the residence constituted an open-air drug market known to harbor dangerous and potentially violent individuals.\textsuperscript{194} The court explained that it would be unreasonable to force officers in that environment to discern which individuals on the premises posed threats.\textsuperscript{195} For the majority, the reputation of the residence and Cotton's presence there during the authorized search satisfied \textit{Summers}.\textsuperscript{196} Thus, the court found Cotton's initial detention legal.\textsuperscript{197}

After upholding the legality of Cotton's initial detention, the court then assessed whether the length of his detention violated the Fourth Amendment.\textsuperscript{198} The court observed that although the duration of an individual's detention is significant, it is not dispositive.\textsuperscript{199} In the court's view, the judiciary should not second-guess police actions in rapidly developing situations like drug raids.\textsuperscript{200} The majority explained that courts must instead determine whether the police reasonably failed to pursue a method of investigation other than detention.\textsuperscript{201} The court noted that given the increasing acts of violence against police, officers need to protect themselves as they execute their duties.\textsuperscript{202} Based on these views, the court held that the length of Cotton's detention was not unreasonable because it served to protect the police officers and the community.\textsuperscript{203}

Finally, the court addressed Cotton's alternative argument that the reading of his \textit{Miranda} rights evinced that his detention constituted an arrest requiring probable cause.\textsuperscript{204} The court noted that the

\begin{itemize}
  \item \textsuperscript{191} \textit{Id.}, 872 A.2d at 92.
  \item \textsuperscript{192} \textit{Id.} at 257-58, 872 A.2d at 92.
  \item \textsuperscript{193} \textit{Id.} at 258, 872 A.2d at 92.
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Id.} at 258-59, 872 A.2d at 92-93.
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{Id.}
  \item \textsuperscript{198} \textit{Id.} at 259, 872 A.2d at 93.
  \item \textsuperscript{199} \textit{Id.} at 260, 872 A.2d at 93-94.
  \item \textsuperscript{200} \textit{Id.} at 259, 872 A.2d at 93.
  \item \textsuperscript{201} \textit{Id.}
  \item \textsuperscript{202} \textit{Id.} at 265, 872 A.2d at 96.
  \item \textsuperscript{203} \textit{Id.}
  \item \textsuperscript{204} \textit{Id.}, 872 A.2d at 96-97.
\end{itemize}
warnings themselves do not transform a temporary detention into an arrest. The court explained that this result is necessary because without Miranda warnings, any incriminating evidence recovered during an investigation could be deemed inadmissible. Consequently, the court found that reading Cotton his Miranda warnings did not indicate he was under arrest.

In dissent, Judge Battaglia argued that the majority had misinterpreted Summers by finding that persons present anywhere on the premises where a valid search warrant is being executed may be detained without probable cause or reasonable articulable suspicion. Judge Battaglia observed that the Supreme Court has created exceptions to the probable cause requirement necessary for a lawful search and seizure. She explained that although Summers was part of this line of cases, in her view, the majority’s reasoning had taken the exception too far. Judge Battaglia argued that the majority set forth a standard that presumed the guilt of persons present on the premises. She asserted that this standard forced those individuals to prove their innocence to avoid detention. Judge Battaglia contended that the majority failed to adhere to Summers’ directive to balance the threat to police with the individual’s liberty interest against warrantless seizures. Judge Battaglia concluded that it was apparent in Cotton’s case that he posed little threat to the police and, therefore, was impermissibly detained.

After finding Cotton’s detention illegal, Judge Battaglia explained that Cotton was subject to a de facto arrest. In so concluding, she pointed to the large number of police in the operation, the small size of the premises, and the fact that Cotton had aroused no

205. Id. at 265-66, 872 A.2d at 97.
206. Id. at 266-67, 872 A.2d at 97.
207. Id. at 267, 872 A.2d at 97.
208. Id., 872 A.2d at 98 (Battaglia, J., dissenting). Judge Battaglia’s dissenting opinion was joined by Chief Judge Bell and Judge Greene. Id.
209. Id. at 268-69, 872 A.2d at 98-99.
210. Id. at 271, 872 A.2d at 100.
211. Id. at 272, 872 A.2d at 101.
212. Id. Judge Battaglia was also concerned that the majority did not limit the boundaries of its interpretation of Summers. Id. at 273, 872 A.2d at 101. She observed that while the Supreme Court had upheld detentions of residents when the potential for violence was high, Cotton, a visitor to the residence, displayed no outward signs of carrying weapons or contraband. Id. at 274-75, 872 A.2d at 102. Judge Battaglia insisted that Cotton’s mere presence at the residence was insufficient to uphold his detention. Id. at 275, 872 A.2d at 102.
213. Id. at 273, 872 A.2d at 101.
214. Id. at 275, 872 A.2d at 102.
215. Id. at 279, 872 A.2d at 105.
suspicion as a basis for his detention. Judge Battaglia reasoned that the length of the detention and the fact that Cotton was read his *Miranda* rights also were indicative of his arrest. Judge Battaglia noted that the police did not know Cotton was carrying any contraband until after he was arrested and lacked probable cause to justify the arrest. Warrantless arrests must be based on probable cause, and in Cotton's case, Judge Battaglia concluded that this prerequisite to arrest was absent. Consequently, she found that Cotton's motion to suppress the evidence should have been granted.

4. Analysis.—In *Cotton*, the Court of Appeals held that Cotton's detention did not violate his right to be free from unreasonable searches and seizures. To arrive at this result, the majority misapplied the *Summers* balancing test at the expense of Cotton's freedom. The court's expansive ruling contravenes the history of the Fourth Amendment and its own jurisprudence. This weakens individual personal liberty interests and creates an exception to probable cause that threatens to swallow the rule.

a. The *Cotton* Court Misapplied the *Summers* Balancing Test.—In upholding Cotton's detention, the *Cotton* majority failed to properly apply the balancing test established in *Summers*. This misapplication effectively undermined a court's central inquiry regarding detentions: weighing valid law enforcement interests against an individual's right to be free from unreasonable searches and seizures. The law enforcement interests of preventing flight, minimizing harm to officers, and methodically completing the search were notably lacking in Cotton's case and, if properly examined, weighed in favor of his release, not his detention.

In *Cotton*, the court failed to explain why a nonresident displaying no outward signs of fleeing the scene ought to be detained. The

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216. Id.
217. Id. at 280-82, 872 A.2d at 105-07.
218. Id. at 283, 872 A.2d at 107.
219. Id. at 287, 872 A.2d at 109-10.
220. Id., 872 A.2d at 110.
221. Id. at 258-59, 872 A.2d at 92-93 (majority opinion).
222. See infra Part 4.a.
223. See infra Part 4.b.
224. See infra Part 4.c.
226. Id.
228. Id. at 272-73, 872 A.2d at 101 (Battaglia, J., dissenting).
Summers Court designed its exception to probable cause to meet the exigencies of a narcotics search, where suspects threaten flight or the destruction of evidence.\textsuperscript{229} Thus, in \textit{Cotton}, this law enforcement interest authorized officers to detain Jones, the known owner of the home and an individual who fled the premises as police arrived there.\textsuperscript{230} Cotton, on the other hand, remained in the yard and calmly obeyed the officers’ commands.\textsuperscript{231} The \textit{Cotton} majority, however, inferred that because Summers authorized officers to exert unquestioned control of the situation, officers could legally detain Cotton.\textsuperscript{232} The majority overextended Summers, as officers should be confined to enforcing control through limited means, rather than detaining all individuals acting calmly and without any known connection to the premises being searched.\textsuperscript{233}

The \textit{Cotton} majority similarly failed to explain how Cotton’s detention served to protect officer safety.\textsuperscript{234} Detective Henning arrived with at least twenty officers to secure a location that he described as being rather small, making the danger that officers would be ambushed by any individuals found at Jones’s residence minimal.\textsuperscript{235} Henning also conceded that in four years of surveillance on the property, he had never seen Cotton,\textsuperscript{236} thereby making Cotton’s detention even more unreasonable. The \textit{Cotton} majority pointed out that officers executing a warrant cannot forecast who will be on the scene when they arrive.\textsuperscript{237} Although this is undoubtedly true, the majority’s categorical extension of detention to any visitors found on the premises was far more expansive than was needed to address the court’s concern for officer safety.\textsuperscript{238}

Moreover, the \textit{Cotton} court’s sweeping application of the Summers test forces individuals to instantly prove their innocence, rather than requiring officers to ascertain whether the individuals have a connec-

\textsuperscript{229} 452 U.S. at 702.  
\textsuperscript{230} 386 Md. at 253, 872 A.2d at 89.  
\textsuperscript{231} \textit{Id.} Cotton did not act evasively so as to arouse officer suspicion. \textit{See} Burchett v. Keifer, 310 F.3d 937 (6th Cir. 2002) (upholding an individual’s detention under Summers because he sprinted away from officers upon their arrival at a neighboring home).  
\textsuperscript{232} 386 Md. at 258, 872 A.2d at 92.  
\textsuperscript{233} \textit{See} Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion) (holding that law enforcement officials may detain individuals for no longer than is necessary to effectuate an investigative detention).  
\textsuperscript{234} \textit{Cotton}, 386 Md. at 273, 872 A.2d at 101 (Battaglia, J., dissenting).  
\textsuperscript{235} Brief for the Respondent, \textit{supra} note 29, at app. 35. Henning described the premises as “not that very big.” \textit{Id}.  
\textsuperscript{236} \textit{Id}. at app. 33.  
\textsuperscript{237} 386 Md. at 258-59, 872 A.2d at 92-93.  
\textsuperscript{238} \textit{Id}. at 272-73, 872 A.2d at 101 (Battaglia, J., dissenting).
Because Cotton displayed no erratic behavior, had no known association with the residence, and officers outnumbered individuals present on the premises by at least five to one, the Cotton majority erred in finding that officer safety would have been compromised by inquiring whether Cotton had a connection to the premises.

The Cotton majority simply failed to address whether Cotton's detention could help law enforcement officials complete their search in an orderly fashion. Since Cotton was not a resident of the property, officers did not, and could not, claim that his detention was necessary to complete the search. The Cotton majority instead concluded that courts should not second-guess police decisions.

The Cotton court's overly deferential approach further departs from Summers because it weakens the protections afforded to individuals. Indeed, under Cotton, officers may effectively ignore a defendant's liberty interests under the guise of a "balancing" approach. The Cotton majority failed to consider the restraint on Cotton's liberty in light of his status as a nonresident of the premises to be searched. This approach removes any weight given to Cotton's visitor status and impermissibly tilts the scales in favor of law enforcement interests in contravention of the Summers balancing test. Cotton's detention occurred outside the home that was the subject of the warrant, and he had no ownership interest in that home. This action elevated the public stigma and the restraint on his liberty associated with the incident. Furthermore, since Cotton's detention cannot be linked to his association with the residence, the potential for law enforcement to exploit this rule exceeds the risk associated with a Terry search.

239. See id. (explaining the burden on detainees to prove their lack of wrongdoing). Judge Battaglia asserted that this burden shift was impermissible in light of the balancing test central to the Fourth Amendment reasonableness inquiry. Id.

240. Id. at 258-59, 872 A.2d at 92-93 (majority opinion).


242. Cotton, 386 Md. at 252 n.1, 872 A.2d at 89 n.1.

243. Id. at 259, 872 A.2d at 93.

244. Judge Battaglia described the majority's approach as paying "lip service" to the Summers balancing test. Id. at 272, 872 A.2d at 101 (Battaglia, J., dissenting).

245. The majority acknowledged that Cotton was not a resident and was never seen in several years of surveillance of Jones's residence. Id. at 252 n.1, 872 A.2d at 89 n.1 (majority opinion); Brief for Respondent, supra note 29, at app. 36.

246. 452 U.S. at 702-03.

247. Cotton, 386 Md. at 275, 872 A.2d at 102 (Battaglia, J., dissenting).

248. See Summers, 452 U.S. at 702 (noting the minimal public stigma of a search or seizure within one's own home).
where the individual himself has raised the officer's suspicion.\textsuperscript{249} In contrast to the limited \textit{Terry} exception, the \textit{Cotton} rule allows officers to draw into a web of suspicion anyone near a house that is the subject of a search warrant.\textsuperscript{250} Thus, the risk for a mistake is much higher than a search of the defendant's person.\textsuperscript{251} The weak law enforcement interests supporting \textit{Cotton}'s detention, coupled with the impermissible character of the intrusion, should have tilted the scales in \textit{Cotton}'s favor and resulted in the invalidation of his detention.\textsuperscript{252}

\textbf{b. A Historical and Jurisprudential View of the Fourth Amendment Reveals That Cotton's Visitor Status Required His Release.—}In \textit{Cotton}, the majority acknowledged that the \textit{Summers} Court's description of legal detainees as either occupants or residents created confusion among the lower state and federal courts.\textsuperscript{253} Despite this confusion, the court concluded that \textit{Summers} covered all individuals, including visitors, subject to detention during the execution of a search warrant on a residence.\textsuperscript{254} In so finding, the majority failed to consider the context of the \textit{Summers} decision, thus misrepresenting the meaning of the terms "occupants" and "residents."\textsuperscript{255} The historical underpinnings of the Fourth Amendment and the court's own jurisprudence support the view that \textit{Cotton}'s visitor status necessitated his release.\textsuperscript{256}

The Framers adopted the Fourth Amendment in reaction to the overreaching writs of assistance employed by British customs offi-

\begin{itemize}
\item \textsuperscript{249} See 392 U.S. 1, 24 (1968) (analyzing the reasonableness of an investigative search in light of an officer's impression of the suspect's activity).
\item \textsuperscript{250} 386 Md. at 272-74, 872 A.2d at 101 (Battaglia, J., dissenting).
\item \textsuperscript{251} The majority noted that the probable cause to arrest \textit{Cotton} stemmed from the frisk during his detention, not from any contraband found in the residence that was linked to \textit{Cotton}. \textit{Id}. at 254, 872 A.2d at 90 (majority opinion).
\item \textsuperscript{252} See \textit{id}. at 273, 872 A.2d at 101 (Battaglia, J., dissenting).
\item \textsuperscript{253} \textit{Id}. at 256-57, 872 A.2d at 91-92 (majority opinion).
\item \textsuperscript{254} \textit{Id}. at 257-58, 872 A.2d at 92.
\item \textsuperscript{255} Cf. Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again, 54 CATH. U. L. REV. 53, 66-72 (2004) (explaining that when courts analyzing general jurisdiction casually apply the phrase "continuous and systematic" instead of "substantial" to the contacts at issue, they are mistakenly employing the specific jurisdiction test and consequently are eviscerating the distinction between the two terms).
\item \textsuperscript{256} Past scholarship, however, has stressed the Supreme Court's aversion to employing historical context in analyzing the Fourth Amendment. \textit{See, e.g.,} Anthony G. Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 MINN. L. REV. 349, 395 (1974) ("Its language is no help and neither is its history."). Nevertheless, recent research has focused on the historical intent of the Framers. \textit{See, e.g.,} Akhil Reed Amar, \textit{Fourth Amendment First Principles}, 107 HARV. L. REV. 757, 775-77 (1994) (exploring the historical linkage between the Fourth and Seventh Amendments); David A. Sklansky, \textit{The Fourth Amendment and Common Law}, 100 COLUM. L. REV. 1739, 1780-84 (2000) (critiquing Justice Scalia's application of text and history in his Fourth Amendment decisions).}
\end{itemize}
These writs authorized nearly limitless searches and seizures by officials on any premises deemed suspicious, and the Framers rejected them in enacting the Fourth Amendment. During the Constitutional Convention, many of the delegates argued that the Constitution as written did not afford individuals sufficient protections from discretionary sovereign power. The Fourth Amendment was enacted along with the rest of the Bill of Rights to assuage these concerns.

These historical findings suggest that the Cotton court erroneously assumed that visitors to a residence subject to a search warrant should be detained. A search is reasonable where there is a strong connection between a residence's visitors and the criminal activity or individuals named in a warrant; but where there is no known link between the visitor and the residence or crime, an ensuing search is decidedly unconstitutional. An inquiry by officers of visitors found on the searched premises can quickly dispel or confirm the officers' suspicions of any connection to the residence and activity in the warrant.

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258. Id. at 54, 120.
259. Id. at 94. Patrick Henry of Virginia urged:
   I feel myself distressed, because the necessity of securing our personal rights seems not to have pervaded the minds of men; for many other valuable things are omitted: —for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken in the most arbitrary manner without any evidence or reason. Everything the most secret may be searched and ransacked by the strong arm of power.

Id.
261. See Sklansky, supra note 256, at 1784 (discussing Justice Scalia’s expressed doubt regarding whether the Framers would have even subjected themselves to a frisk for weapons on less than probable cause).
262. Compare Baker v. Monroe Twp., 50 F.3d 1186 (3d Cir. 1995) (invalidating the search of a mother and her three children on the way to dinner at a family member’s apartment), with United States v. Reid, 997 F.2d 1576 (D.C. Cir. 1993) (upholding the detention and frisk of an individual seen exiting an apartment as police approached up a narrow stairwell to execute a search warrant).
263. See Baker, 50 F.3d at 1192 (finding that although Summers only applied to actual residents of the house to be searched, officers could ascertain whether individuals exiting from and arriving to the residence actually lived there).
But a categorical rule that all visitors may be detained incident to a warranted search crosses the outer boundaries of reasonableness.\textsuperscript{264}

The \textit{Cotton} court's decision skirts the edges of reasonableness given that Cotton was neither a resident nor an occupant of the premises to be searched.\textsuperscript{265} Cotton simply stood in the front yard of the house as officers arrived.\textsuperscript{266} Cotton was not observed exiting, as in \textit{Summers},\textsuperscript{267} or approaching the residence, as in \textit{Baker},\textsuperscript{268} and he was certainly not inside the residence, as in \textit{Muehler}.\textsuperscript{269} The strongest police evidence indicating that Cotton was not associated with Jones's residence is that the police had never observed Cotton in several years of surveillance of the residence.\textsuperscript{270} Although the police could have reasonably asked Cotton whether he had any connection to the residence,\textsuperscript{271} they were decidedly unreasonable in detaining him for ten to twenty minutes without making any attempt to determine his status.\textsuperscript{272}

The \textit{Cotton} court erroneously employed \textit{Summers} as controlling precedent even though Cotton was a mere visitor.\textsuperscript{273} The \textit{Summers} Court stressed that the warrant issued on the home was an objective justification for detaining the occupants found inside.\textsuperscript{274} This objective factor, however, was tied to the fact that Summers actually lived in the residence to be searched.\textsuperscript{275} The facts in \textit{Cotton} preclude the application of this objective standard. Although a warrant was issued for the residence, Cotton could not be linked to the home in any way at

\textsuperscript{264} As Justice White observed, "the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests." Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring).
\textsuperscript{265} 386 Md. at 252 n.1, 872 A.2d at 89 n.1.
\textsuperscript{266} Brief for the Respondent, \textit{supra} note 29, at app. 32.
\textsuperscript{267} See 452 U.S. 692, 693 (1981) (detainee seen descending the front steps); \textit{accord Reid}, 997 F.2d at 1577.
\textsuperscript{268} 50 F.3d at 1188-89 (detainees approaching the front door).
\textsuperscript{269} 125 S. Ct. 1465, 1468 (2005) (detainee asleep in her bedroom when police arrived).
\textsuperscript{270} Brief for the Respondent, \textit{supra} note 29, at app. 33.
\textsuperscript{271} \textit{See Baker}, 50 F.3d at 1192.
\textsuperscript{272} Cotton did not act erratically or flee the scene so as to arouse the suspicion of officers and authorize a prolonged detention. \textit{See United States v. Sharpe}, 470 U.S. 675, 699-700 (1985) (Marshall, J., concurring) (concluding that a lengthy detention was authorized when an individual driving an automobile sought to evade officers after they asked him to pull over); \textit{Florida v. Royer}, 460 U.S. 491, 502 (1983) (plurality opinion) (finding that the detained individual's demeanor, appearance, and behavior were reliable indicia of suspicious criminal activity).
\textsuperscript{274} Michigan v. Summers supports the view that only actual residents may be detained.
\textsuperscript{275} \textit{Id.} at 705 & n.21.
the time the warrant was executed.\textsuperscript{276} This removes the objective justification offered by the \textit{Summers} Court and exempts Cotton from its purview.\textsuperscript{277}

Alternatively, the \textit{Cotton} court might have applied the \textit{Terry} rule rather than the \textit{Summers} balancing test.\textsuperscript{278} But \textit{Terry}'s scope is limited to frisks of individuals thought to be armed and dangerous.\textsuperscript{279} Here, the officers had no reason to suspect that Cotton was dangerous simply because he stood next to Jones when they arrived.\textsuperscript{280} The circumstances in \textit{Cotton} are more akin to Fourth Amendment cases addressing overbroad search warrants in public places.\textsuperscript{281} Although those cases dealt with searches rather than seizures,\textsuperscript{282} they apply here where Cotton's only connection to the residence was the person standing next to him.\textsuperscript{283} As a result, Cotton's detention was illegal.\textsuperscript{284}

The \textit{Cotton} court also failed to draw a proper analogy between Cotton's case and \textit{Stanford v. State}. Like Stanford, who the court found had been improperly detained,\textsuperscript{285} Cotton did not live at the residence to be searched and was not named in the warrant, and officers had no evidence that Cotton had ever been inside the residence prior to his detention.\textsuperscript{286} Unlike the officers in \textit{Stanford} who immedi-

\begin{itemize}
\item \textsuperscript{276} See Brief for the Respondent, \textit{supra} note 29, at app. 33.
\item \textsuperscript{277} The \textit{Summers} Court focused on the magistrate's neutral belief that criminal activity took place inside the home. 452 U.S. at 708.
\item \textsuperscript{278} See United States v. Sharpe, 470 U.S. 675, 690 (1985) (Marshall, J., concurring) (noting that a reviewing court must determine that an investigative stop is not overly intrusive before the \textit{Summers} balancing test even applies).
\item \textsuperscript{279} \textit{Terry} v. Ohio, 392 U.S. 1 (1968); see also 2 \textsc{Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment} \textsection 4.9(e), at 729-30 (4th ed. 2004) (arguing that \textit{Terry} presents a different set of factual circumstances than \textit{Summers}-type detentions).
\item \textsuperscript{280} \textit{Cotton}, 386 Md. at 273, 872 A.2d at 101 (Battaglia, J., dissenting) (asserting that there was no justification for Cotton's detention other than his presence on the property).
\item \textsuperscript{281} See, \textit{e.g.}, \textit{Ybarra v. Illinois}, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").
\item \textsuperscript{282} See \textit{Summers}, 452 U.S. at 695 n.4 (observing that while \textit{Ybarra}-type "search" issues concern the scope of police action, "seizure" issues address the legitimacy of an individual's detention). The \textit{Cotton} court referred to search cases in its decision. \textit{Cotton}, 386 Md. at 258, 263, 872 A.2d at 92, 95 (citing Maryland v. Buie, 494 U.S. 325 (1990) (protective sweep); United States v. Maddox, 388 F.3d 1356 (10th Cir. 2004) (same)).
\item \textsuperscript{283} \textit{Cotton}, 386 Md. at 273-74, 872 A.2d at 101-02 (Battaglia, J., dissenting).
\item \textsuperscript{284} See \textit{Amsterdam}, \textit{supra} note 256, at 411 (asserting that a fundamental principle of the Fourth Amendment is that individuals are entitled to security of their persons unless an adequate justification for disturbing that security is shown).
\item \textsuperscript{286} \textit{Cotton}, 386 Md. at 252-53, 872 A.2d at 89-90; Brief for Respondent, \textit{supra} note 29, at app. 33.
\end{itemize}
ately ascertained Stanford’s identity,287 Detective Henning and the Task Force made no attempt whatsoever to inquire as to Cotton’s connection with the residence until after the residence was secured.288 A careful precedential analysis by the majority should have led the court to determine that Cotton’s detention was illegal under the court’s reasoning in *Stanford*.

If the court had properly found that Cotton was illegally detained, law enforcement officials would still have authority to detain suspected criminals during the execution of search and seizure warrants. There should be a tight fit between the officers’ reasonable articulable suspicion of inhabitants arriving on the scene and the individuals and criminal activity named in the warrant.289 This refutes the notion that “unquestioned command of the situation”290 should mean detaining everyone, including bystanders, while executing a search warrant.291 Law enforcement officials may inquire into the names and addresses of individuals found at the scene to use them as witnesses at trial.292 Twenty to twenty-five officers converged on Jones’s residence to execute the warrant.293 It would be a small imposition on officer safety to have one of the officers briefly question individuals at the scene about their link to the residence.294 This type of assessment is both reasonable and necessary to enforce the Fourth Amendment.295

c. The Cotton Court’s Detention Presumption Unreasonably Broadens the Reach of *Terry.*—The *Cotton* court justified Cotton’s detention by noting that it occurred during the execution of a narcotics search warrant and was not overly lengthy.296 If no additional facts had been before the court, the detention would not be controver-

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287. The *Stanford* majority stressed that once officers discovered that Stanford was not one of the individuals named in the warrant, he should have been released. 353 Md. at 541-42, 727 A.2d at 945-46.
288. *Cotton*, 386 Md. at 254, 872 A.2d at 90.
289. See *Muehler v. Mena*, 125 S. Ct. 1465 (2005) (upholding the detention of a resident of a household where the warrant authorized a search for weapons and a gang member suspected in a shooting actually lived there).
291. *Cotton*, 386 Md. at 272-73, 872 A.2d at 101 (Battaglia, J., dissenting).
292. See 2 LAFAVÉ, supra note 279, § 4.9(e), at 719-20.
293. *Cotton*, 386 Md. at 253, 872 A.2d at 89.
294. Detective Henning appears to have had this role but delegated the actual detention of individuals found on the premises to other officers. Brief for the Respondent, supra note 29, at app. 15-16.
295. Professor Amsterdam asserted: “[T]he authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit.” Amsterdam, supra note 256, at 400.
296. 386 Md. at 263, 872 A.2d at 95.
But the *Cotton* rule unreasonably extends Fourth Amendment exceptions to all detentions of visitors outside a home subject to a warrant without any additional indicia to support the detention.\(^{297}\) In its decision, the *Cotton* court did not heed the *Terry* Court’s concern for expanded law enforcement authority at the expense of individual rights.\(^{299}\) As the Supreme Court has continued to extend the *Terry* exception to border patrols,\(^{300}\) informant communications,\(^{301}\) and search warrants,\(^{302}\) something has been lost—an individual’s right to be truly free from unreasonable searches and seizures. This trend, which the court categorically accepts in upholding Cotton’s detention, threatens to become the rule rather than the exception.\(^{303}\)

An analogy to the investigation of a bank robbery further reveals the danger in the *Cotton* court’s ruling.\(^{304}\) Unless the culprits have already fled the scene, police may hold bank customers until they determine who committed the crime.\(^{305}\) But these customers would not be handcuffed, guarded under watch of gun, and read their *Miranda* rights as befell Cotton.\(^{306}\) As officers arrived, he stood in the front yard of the residence with Jones, an individual named in the warrant.\(^{307}\) Cotton did not subsequently try to flee the scene but calmly


\(^{298}\) See David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 958, 963 (2002) (comparing the "war on terrorism" to the "war on drugs" and discussing governmental support for detentions based on less than probable cause).

\(^{299}\) See *Terry v. Ohio*, 392 U.S. 1, 15 (1968) (stressing that the decision does not detract from the judiciary's role to protect citizens against unconstitutional police activity); *id.* at 21-22 (observing that its decision is rooted in principles of probable cause); *id.* at 30 (narrowing the scope and applicability of the exception); see also *id.* at 38-39 (Douglas, J., dissenting) (analogizing Fourth Amendment decisions to the balancing of hydraulic pressures and asserting that the majority's decision "water[ed] down" constitutional guarantees).


\(^{302}\) *Summers*, 452 U.S. at 705.

\(^{303}\) See Gus G. Sentementes, *O'Malley Backs Use of Stop and Frisk*, Balt. Sun, Nov. 17, 2005, at 1B, 7B (explaining that although Baltimore police officers are required by Maryland law to file a report for each frisk, official police records of frisk activity are vastly underreported).

\(^{304}\) This example comes from an anecdote told by the presiding judge at Cotton’s suppression hearing. Brief for the Respondent, *supra* note 29, at app. 62-63.

\(^{305}\) *Id.*; see Md. State Police, Patrol Manual, ch. 33, § XIII, subsecs. 2-1 to -6, at 33-43 to -44.1 (2d ed., rev. vol. 2000) (establishing the guidelines for law enforcement investigation of bank robberies at the scene).

\(^{306}\) *Cotton*, 386 Md. at 253-54, 872 A.2d at 89-90; see Md. State Police, *supra* note 305, at ch. 27, § II, subsec. A(f)(6) (2d ed., rev. vol. 2005) (explaining that in circumstances with a large number of witnesses, speed and accuracy are paramount); *id.* at ch. 28, § V, subsec. H (describing situations when a stop-and-frisk is appropriate).

\(^{307}\) *Cotton*, 386 Md. at 253, 872 A.2d at 89.
remained and obeyed the officers' commands.\textsuperscript{308} Like many of the bank customers, Cotton was simply in the wrong place at the wrong time.\textsuperscript{309} Cotton and the banking customers are both deemed automatically suspicious by their presence on the property.\textsuperscript{310} But the Cotton majority's decision to favor detention rather than to weigh the competing interests of police and individuals produces disparate results: while the banking customers are released after brief police inquiries, Cotton is still searched and detained.\textsuperscript{311}

The Cotton court's failure to limit its detention presumption magnifies the impact of its decision. In dissent, Judge Battaglia decries the absence of any spatial boundaries in the majority's overextension of Summers.\textsuperscript{312} More importantly, she emphasizes that it is virtually impossible for a visitor to rebut the detention presumption because it shifts the inquiry of reasonable detentions from the judiciary to the police.\textsuperscript{313} As the Terry majority clarified, a vital role of the judiciary is to protect citizens from oppressive police conduct.\textsuperscript{314} In contravention of the Terry holding, the Cotton court's decision inappropriately elevates the detention presumption while sublimating individual rights.

As the ongoing concern over military detainees at Abu Ghraib and Guantanamo Bay attests,\textsuperscript{315} the Cotton court's grant of significant leeway to officials without effective supervision may produce less than desirable results.\textsuperscript{316} It is not enough to casually assert that judges can-

\textsuperscript{308} Id.

\textsuperscript{309} Police investigating a bank robbery could often find customers with drugs or other contraband if all customers are seized and searched for evidence. But just because officers may uncover evidence that permits a customer to be charged does not mean that they had probable cause to search in the first place. Similarly, officers were not authorized to conclude that they had probable cause to search Cotton because marijuana was found on his person. See Johnson v. United States, 333 U.S. 10, 16-17 (1948) (explaining that police cannot justify an unconstitutional search by what it uncovers); United States v. Barrios-Moriera, 872 F.2d 12, 16 (2d Cir. 1989) ("'[T]he proof of the pudding is in the eating' has no application to Fourth Amendment law.").

\textsuperscript{310} See Cotton, 386 Md. at 272, 872 A.2d at 101 (Battaglia, J., dissenting); Brief for the Respondent, supra note 29, at app. 62-63.

\textsuperscript{311} 386 Md. at 267, 872 A.2d at 97 (majority opinion).

\textsuperscript{312} Id. at 273, 872 A.2d at 101 (Battaglia, J., dissenting).

\textsuperscript{313} Id. at 272, 872 A.2d at 101.

\textsuperscript{314} 392 U.S. 1, 15 (1968).


\textsuperscript{316} See David A. Super, Are Rights Efficient? Challenging the Managerial Critique of Individual Rights, 93 CAL. L. REV. 1051, 1137 (2005) (posing that the abuses at the Abu Ghraib prison facility in Iraq stemmed from the sublimation of the stated goal of humane treatment to the practical need to extract reliable intelligence).
not second-guess police officers.\textsuperscript{317} The Supreme Court has made clear that it is the role of the judiciary to protect constitutional rights.\textsuperscript{318} Cotton’s detention is symptomatic of a larger problem, the acceptance of detention without probable cause.\textsuperscript{319}

5. \textit{Conclusion}.—The Cotton court broadened the scope of law enforcement interests at the expense of individual liberty.\textsuperscript{320} As a result, persons found anywhere on the premises to be searched may be viewed with a suspicious gaze, regardless of their demeanor or connection to the criminal activity detailed in the search warrant.\textsuperscript{321} This contradicts the historical underpinnings of the Fourth Amendment and imperils individual freedom.\textsuperscript{322} Such an expansive ruling tilts the scales away from the protections afforded by the Fourth Amendment and threatens to make categorical detentions the norm rather than the exception.\textsuperscript{323} Indeed, the Cotton court’s misapplication of the Summers balancing test severely weakened Fourth Amendment protections in Maryland.

Michael A. Lamson

\textsuperscript{317} Cotton, 386 Md. at 259, 872 A.2d at 93.
\textsuperscript{318} Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").
\textsuperscript{319} See Thomas K. Clancy, \textit{What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?}, 48 VILL. L. REV. 129, 178 (2003) (arguing that seizures, i.e., detentions, must be tied to an officer’s belief of probable cause to arrest or at least some reasonable articulable suspicion of criminal activity).
\textsuperscript{320} See supra Part 4.
\textsuperscript{321} See supra Part 4.a.
\textsuperscript{322} See supra Part 4.b.
\textsuperscript{323} See supra Part 4.c.
C. A Missed Opportunity to Protect the Individual's Right to Privacy in His Home Under the Maryland Declaration of Rights

In Fitzgerald v. State, the Court of Appeals of Maryland considered for the first time whether a canine sniff of the exterior of an apartment constitutes a search under the Fourth Amendment of the United States Constitution and Article 26 of the Maryland Declaration of Rights. The court held that a dog sniff of the exterior of a residence is not a search under the Fourth Amendment, provided that law enforcement officers conduct it from a location where they have a right to be. The court declined to decide the issue under the Maryland Declaration of Rights and held that, even if the sniff was a search, it was justified under the reasonable, articulable suspicion standard employed by a majority of state courts holding a sniff to be a search under their constitutions.

While Supreme Court precedent may have compelled the court's conclusion on the Fourth Amendment issue, the Court of Appeals missed a chance to rule differently under Article 26 of the Maryland Declaration of Rights. The Court of Appeals should have taken this opportunity to hold that a canine sniff of a residence requires reasonable, articulable suspicion under Article 26 because such a holding would have resolved an open question of law. Furthermore, requiring reasonable, articulable suspicion is a better standard for canine sniffs of residences because it protects the privacy of the home without significantly impeding law enforcement.

1. The Case.—In February 2002, an anonymous source informed Detective Leeza Grim of the Howard County Police Department Criminal Investigation Bureau that Matthew Thomas Fitzgerald and his girlfriend Allison Mancini shared an apartment at 3131 Normandy Woods Drive, drove a white pick-up truck, and frequently sold marijuana. Grim confirmed that the couple lived at that location and that the truck was registered to a relative of Mancini. Grim also discovered that Fitzgerald had a juvenile record of separate arrests in 1998

1. 384 Md. 484, 864 A.2d 1006 (2004) [hereinafter Fitzgerald II].
2. Id. at 503, 864 A.2d at 1017.
3. Id. at 509, 864 A.2d at 1020.
5. See infra Part 4.a.
7. Fitzgerald II, 384 Md. 487, 864 A.2d at 1008.
8. Id.
for distribution of marijuana near a school and for three first-degree burglaries.9

Based on her findings, Grim then requested the aid of Officer Larry Brian of the Howard County Police Department’s K-9 unit on March 19, 2002.10 Brian visited the apartment at 3131 Normandy Woods Drive with his certified drug-detecting dog, Alex.11 Brian and Alex entered the building through unlocked glass doors leading to the stairwell and mailboxes.12 Brian then prompted Alex to scan apartment doors A, B, C, and D.13 After sniffing all four apartments, Alex alerted to the presence of narcotics only at apartment A, Fitzgerald and Mancini’s apartment.14 On March 20, the anonymous source informed Grim that Fitzgerald and Mancini continued to sell marijuana.15

The next day, March 21, District Court Judge JoAnn Ellinghaus-Jones issued a search and seizure warrant for apartment A at 3131 Normandy Woods Drive pursuant to Grim’s affidavit.16 On April 2, Grim executed the warrant and seized a considerable amount of marijuana as well as evidence of use and distribution.17 Fitzgerald and Mancini were then arrested and charged with possession of marijuana with intent to distribute and other related offenses.18

The case proceeded to the Circuit Court for Howard County, where Fitzgerald moved to suppress the evidence obtained from the search and seizure warrant.19 In two hearings on September 18 and October 3, 2002, he argued that a canine sniff constituted a warrantless search of his apartment and that without the sniff, the police would not have had probable cause for a search warrant.20 On October 21, 2002, Judge Lenore Gelfman denied the motion, holding first that the apartment hallway was open to the public and second that precedent establishes that dog sniffs are not searches.21

9. Id. at 487-88, 864 A.2d at 1008.
10. Id. at 488, 864 A.2d at 1008.
11. Id.
12. Id.
13. Id.
14. Id. In describing Alex’s method of alerting, Brian noted that he first presents an area to Alex. Id. at 488 n.2, 864 A.2d at 1008 n.2. Alex then sits in that area and he looks at Brian. Id. The look is Alex’s indication that he smells a narcotic. Id.
15. Id. at 488, 864 A.2d at 1008.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 488-89, 864 A.2d at 1008.
21. Id. at 489, 864 A.2d at 1008.
The case went before the circuit court, where Fitzgerald entered a plea of not guilty. Fitzgerald was found guilty of possession of marijuana with intent to distribute. He was sentenced to two years incarceration and a $1000 fine, but the entire sentence was suspended except for a $250 fine and two years probation.

Fitzgerald appealed Judge Gelfman's denial of his motion to suppress to the Court of Special Appeals. The Court of Special Appeals affirmed the decision, holding that a canine alert establishes probable cause for a search. The Court of Special Appeals further held that the common area of the apartment building was not entitled to Fourth Amendment protection and was thus a legitimate place for the police to conduct their investigation. The Court of Special Appeals then held that a canine sniff of any protected place, including a residence, conducted from an area where law enforcement have the right to be, is not a "search" under the Fourth Amendment.

The Court of Special Appeals concluded that a canine alert supported the issuance of a warrant. The court held that the common area of Fitzgerald's building, which was open to the public, was not entitled to Fourth Amendment protection and that the police were not required to justify their presence there. The court reasoned that because sniffs detect only the presence or absence of contraband, in which there is no legitimate privacy interest, a sniff does not invade society's reasonable expectation of privacy guaranteed by the Fourth Amendment. The court found the location of the sniff irrelevant to the application of this rule.

Fitzgerald petitioned the Court of Appeals on April 8, 2004. The Court granted certiorari to address, inter alia, whether a dog sniff constitutes a search under the Fourth Amendment of the United

22. Id.
24. Fitzgerald II, 384 Md. at 489, 864 A.2d at 1008-09.
25. Id., 864 A.2d at 1009.
27. Id. at 666-67, 837 A.2d at 1025-26. The court explained that the Fourth Amendment only applies within the property line of the apartment itself. Id.
28. Id. at 682, 837 A.2d at 1035.
29. Id. at 619, 837 A.2d at 998.
30. Id. at 664-67, 837 A.2d at 1024-26.
31. Id. at 668, 674, 679, 837 A.2d at 1026, 1030, 1033.
32. Id. at 674, 837 A.2d at 1030.
States Constitution or Article 26 of the Maryland Declaration of Rights.34

2. Legal Background.—The Supreme Court has extensively adjudicated the issue of what constitutes a search under the Fourth Amendment.35 Only those investigations that qualify as searches receive the protection of the Fourth Amendment's guarantee against unreasonable searches and seizures.36 This guarantee historically protected the individual's right to "personal security, personal liberty, and private property," regardless of guilt or innocence, from all government invasions into the "sanctity of a man's home and the privacies of life."37 In Katz v. United States, the Court simplified the definition of a search by deciding that a search occurred whenever an investigation invaded the individual and society's legitimate, reasonable expectations of privacy.38 The Court has since stressed that the individual's expectation of privacy in his home is reasonable,39 and it has preserved the legitimacy of this privacy interest when confronted with unconventional search methods.40 In United States v. Place, however, the Court created an exception to the traditional definition of a search for limited-scope investigatory methods, finding that a search does not occur unless the investigation risks uncovering something in which the individual had a right to privacy.41 The Supreme Court has since applied the Place exception to canine sniffs in various factual scenarios,42 although the Court has not considered whether the exception applies to sniffs of residences.

In considering Maryland's protection against unlawful searches and seizures, the Court of Appeals has held that Article 26 of the Maryland Declaration of Rights is interpreted in pari materia with the Fourth Amendment.43 The Court of Appeals has not yet decided,

34. Id. The court also considered whether the sniff in question was an unlawful search. Id. Moreover, if the sniff was unlawful and its results struck from the record, the court considered whether the remaining information would establish the requisite probable cause for the warrant. Id.
35. See Part 2.a-b.
40. See infra Part 2.a.
42. See infra notes 61-67 and accompanying text.
43. See infra notes 68-70 and accompanying text.
however, whether a canine sniff of a residence constitutes a search under the Maryland Declaration of Rights, and other state courts have split over the issue.

a. Katz v. United States Establishes That a Search Occurs Anytime an Investigation Invades an Individual's Reasonable Expectation of Privacy.—In Katz v. United States, the Supreme Court relied on significant historical precedent to determine that the Fourth Amendment's protections do not turn upon a physical intrusion into an area. Rather, the Court established that the Amendment's protections often depend on the defendant's objectively reasonable and subjectively expressed expectation of privacy in the subject of the investigation. The Court emphasized that the Amendment applies to persons, rather than to specific constitutionally protected places.

In his concurring opinion, Justice Harlan articulated a two-part test for constitutionality under the Fourth Amendment: first, the individual expressed a subjective expectation of privacy in the subject of the investigation; and second, society recognizes that expectation as reasonable. Although not included in the majority opinion, this test has become representative of the Katz decision.

The Supreme Court went on to apply Katz's reasoning to various investigatory contexts, including less invasive methods applied to the residence. In United States v. Karo, the Supreme Court expanded the holding in Katz to establish that an individual's reasonable expectation of privacy in his residence transforms less invasive investigations into searches. The Court determined that the individual's privacy interest outweighs the government's indiscriminate monitoring of the interior of the home even if the method used is less invasive than a

44. See infra notes 65-67 and accompanying text.
45. 389 U.S. 347, 353 (1967). The Court held that monitoring the person's conversation in a public phone booth constituted a search under the Fourth Amendment. Id.
46. See id. at 352.
47. Id. at 351. "What a person knowingly exposes to the public, even in his 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 (internal citations omitted).
48. Id. at 361 (Harlan, J., concurring).
49. See, e.g., California v. Ciraolo, 476 U.S. 207 (1986) (applying Justice Harlan's two-part inquiry in Katz to find that a homeowner's expectation that his garden was protected from aerial observation was unreasonable; therefore, a warrantless observation of it did not violate the Fourth Amendment).
50. 468 U.S. 705, 714-16 (1984). In Karo, the Court held that the monitoring of a beeper inside an individual's home constituted a search under the Fourth Amendment. Id.
The Court found that less invasive methods still revealed crucial information about the interior of the premises that the government could not have otherwise obtained without a warrant.52

The Court continued to find that less invasive methods constituted searches in *Kyllo v. United States.*53 In *Kyllo,* the Court found that the use of sense-enhancing technology to gain information about the interior of the home constituted a search, even if the methods were designed to disclose limited information about the residence.54 The Court established that the use of technology not in general public use to obtain information about the interior of a residence, which would otherwise be unobtainable without physical intrusion, constituted a search and is presumptively unreasonable without a warrant.55 The Court stressed that the individual’s expectation of privacy in the home has never been determined by the quality or quantity of information obtained because in the home, “all details are intimate details.”56

b. The Supreme Court Created an Exception to the Definition of a Search for Limited-Scope Methods by Focusing on Whether an Individual Possessed a Legitimate Expectation of Privacy in the Item Searched for.—In *United States v. Place,*57 the Supreme Court contemplated whether a canine sniff of luggage located in a public place was a search under the Fourth Amendment. The Court recognized that an individual has a protected privacy interest in the contents of his luggage, but ultimately held that a canine sniff did not violate that privacy interest.58 In so holding, the Court emphasized that a sniff does not require opening the luggage and thus reveals only the presence or absence of contraband.59 The limited manner and scope of a sniff, therefore, make it sui generis as an investigatory technique and not a search within the Fourth Amendment.60

Less than a year later, the Supreme Court continued to develop this exception in *United States v. Jacobsen.*61 In *Jacobsen,* the Court found that limited investigations designed to reveal only the presence

51. *Id.*
52. *Id.*
54. *Id.* at 40. In *Kyllo,* the sense-enhancing technology was a thermal-imaging device used to measure the interior temperature of the residence. *Id.*
55. *Id.*
56. *Id.* at 37.
58. *Id.* at 707.
59. *Id.*
60. *Id.*
or absence of contraband did not invade a legitimate privacy interest under the Fourth Amendment. As in Place, the Jacobsen Court found that the chance that the investigation would invade any legitimate interest of privacy was too low to treat the investigation as a search under the Fourth Amendment.

Place and Jacobsen together establish that limited-scope investigations are not searches under the Fourth Amendment if they do not disclose any information in which an individual has a legitimate privacy interest. Nonetheless, many lower courts have been reluctant to apply this rule to the home. A small number of courts have found the cases emphasizing the protections of the home, like Kyllo, controlling and said that the limited-scope investigation exception in Place does not apply to the residence. Many courts have recognized that sniffs are not Fourth Amendment searches under Place, but have found that sniffs constitute searches under their state constitutions.

c. The Court of Appeals Has Yet to Decide Whether a Sniff of a Residence Is a Search Under the Maryland Declaration of Rights.—The Court of Appeals has yet to address the specific issue of whether a canine sniff of a residence constitutes a search under Article 26 of the Declaration of Rights. Having generally interpreted Article 26 in pari materia with the Fourth Amendment, the court has said that the provisions have similar but not necessarily identical purposes and effects.

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62. Id. at 123-24. In this case, the Court considered whether testing the contents of a package to determine whether powder found inside was cocaine was a search under the Fourth Amendment. Id. at 122.

63. Id. at 124.

64. Subsequent application of this rule has expanded it beyond the facts of Place and Jacobsen. See Illinois v. Caballes, 543 U.S. 405, 408-09 (2005) (holding that Place and Jacobsen dictate that dog sniffs of vehicles are not constitutionally protected searches under the Fourth Amendment); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (noting that walking a drug-detecting dog around a vehicle stopped at a checkpoint does not constitute a search).

65. See, e.g., United States v. Beale, 674 F.2d 1327 (9th Cir. 1982) (holding unanimously that a canine sniff was a Fourth Amendment search), aff'd, 731 F.2d 590 (9th Cir. 1983) (upholding the decision that a sniff is a Fourth Amendment search despite the ruling in Place), rev'd en banc, 736 F.2d 1289 (9th Cir. 1984) (holding, in accordance with Place, that a sniff is not a Fourth Amendment search).

66. See United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) (applying Kyllo to hold that a canine sniff of an apartment is a Fourth Amendment search based on the heightened expectation of privacy in the home); accord State v. Rabb, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006); State v. Ortiz, 600 N.W.2d 805 (Neb. 1999).

and has subjected Article 26 to similar but not identical interpretations. 68 Thus, although Supreme Court decisions on the Fourth Amendment are not binding on the Court of Appeals, they are highly persuasive. 69 This respect does not mean, however, that the Court of Appeals cannot rule differently on state constitutional issues; although persuasive, the provisions remain independent and subject to individual interpretations. 70

d. Terry v. Ohio Created a Balancing Test to Determine Whether the Circumstances of a Search Require Compliance with the Usual Warrant Requirements.—The Fourth Amendment does not protect citizens from all searches and seizures, only those that are unreasonable. 71 In Terry v. Ohio, the Supreme Court determined that certain types of limited searches are reasonable and thus legitimate under the Fourth Amendment absent a warrant if they are based on reasonable, articulable suspicion. 72 To determine whether reasonable, articulable suspicion is present, the Court set up a balancing inquiry, weighing the government's interest in the investigation against the individual's privacy interest. 73 For the search to be reasonable, the Court required that the government justify its interest by pointing to specific and articulable facts in the investigation that would alert a reasonable person to the possibility of the crime suspected. 74 Requiring anything less than reasonable, articulable suspicion, the Court said, would invite searches based on "inarticulate hunches" and weaken the protections of the amendment. 75

3. The Court's Reasoning.—In Fitzgerald v. State, the Court of Appeals affirmed the Court of Special Appeals, holding that: (1) a canine

70. Id. at 322, 430 A.2d at 55.
73. Terry, 392 U.S. at 21. The Court determined in Terry that an officer had the right to frisk the defendant for weapons without a warrant because the alleged government interest in the investigation outweighed the intrusion on the individual's constitutionally protected interests. Id. at 27.
74. Id. at 21.
75. Id. at 22. A Terry inquiry is appropriate to determine whether a specific kind of search, under particular circumstances, required a warrant under state law, but not to determine whether a search occurred. Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987).
sniff of the exterior of an apartment does not constitute a search under the Fourth Amendment; and (2) even if a sniff constituted a search under Article 26 of the Maryland Declaration of Rights, the officer had reasonable, articulable suspicion to conduct the sniff.76

The court supported its canine-sniff ruling by emphasizing Supreme Court precedent, specifically Place and its progeny’s emphasis on the limited nature of the sniff.77

The court next ruled that investigations that expose only contraband items and are conducted from a place where government officials are permitted to be are not searches because no legitimate privacy interest exists in contraband.78 The court thus affirmed the Supreme Court’s emphasis on the content of the sniff, rather than its context, to determine whether a Fourth Amendment search occurred.79

In considering whether a sniff remained a nonsearch when performed on the exterior of an apartment, a question of first impression in Maryland, the court applied the Place exception to determine that an individual had no reasonable expectation of privacy in contraband in any location, including the home.80 The court distinguished Karo because that case revealed information obtainable only from the inside of the residence, while canine sniffs reveal information obtained outside of the residence.81 Had Alex crossed the property line into the residence, the court reasoned, the officer would have conducted a search and violated the reasonable expectation of privacy in one’s home.82 Furthermore, the investigatory method in Karo was not meant to detect contraband, as was the sniff in Place.83 The court also noted that the search method present in Karo was an electronic device rather than a dog.84

Further distinguishing the case from Karo and Kyllo, the court ruled that the concern with the advancement of sense-enhancing technology did not pertain to sniffs.85 “A dog,” the court wrote, “is

76. Fitzgerald II, 384 Md. at 503, 864 A.2d at 1017.
77. Id. at 512, 864 A.2d at 1022-23.
78. Id. at 493, 503, 864 A.2d at 1011, 1017.
79. Id. at 493-94, 864 A.2d at 1011.
80. Id. at 495, 864 A.2d at 1012.
81. Id. at 498, 864 A.2d at 1014 (citing United States v. Karo, 468 U.S. 705 (1984)).
82. Id.
83. Id. (citing Karo, 468 U.S. at 705; United States v. Place, 462 U.S. 696 (1983)).
84. Id.
85. Id. at 499-500, 864 A.2d at 1014-15.
not technology—he or she is a dog." Technology, the court reasoned, does not have the limited scope and nature of a dog sniff.

Having determined that canine sniffs of residences were subject to the Place exception, the court rejected the defendant’s attempts to distinguish Place by emphasizing the increased privacy in the home. The court emphasized that the Place exception focuses on the limited nature of the sniff, rather than its location, dictating that a canine sniff of the exterior of a residence is not a Fourth Amendment search. The court declined, however, to decide whether a canine sniff is a search under Article 26 of the Maryland Declaration of Rights based on its decision that even if it was a search, it would have been valid under the reasonable, articulable suspicion standard of Terry v. Ohio.

In his dissent, Judge Greene argued that a canine sniff is a search under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights and requires a warrant supported by probable cause. He argued that holding that a sniff is not a search weakens the protections of the Fourth Amendment and Article 26 and leads to selective law enforcement.

Judge Greene maintained that the higher expectation of privacy in the home dictates that the search of a home should be provided the highest level of protection under the Fourth Amendment. He argued that sniffs should only be conducted when probable cause sufficient to issue a warrant exists.

Judge Greene also argued that the majority’s holding could lead to the random scanning of residences with sniffs, which prejudices persons who cannot afford to live in homes with no surrounding common space. This ruling, he wrote, will lead to selective law enforce-

86. Id. at 500, 864 A.2d at 1015.
87. Id. at 501, 864 A.2d at 1016.
88. Id. at 502, 864 A.2d at 1016 (citing Place, 462 U.S. at 696).
89. Id. at 502-03, 864 A.2d at 1016-17.
90. Id. at 506-09, 864 A.2d at 1019-21 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). The court found that reasonable suspicion would justify a warrantless sniff based on the sniff’s minimal intrusiveness, and a majority of state holdings apply that standard. Id. at 510-11, 864 A.2d at 1021-22. The court also declined to consider the argument that Alex’s sniff was made a search because of his ability to detect non-contraband medications, finding that the issue was not properly preserved for appeal. Id. at 504-05, 864 A.2d at 1018.
91. Id. at 514-15, 864 A.2d at 1024 (Greene, J., dissenting). Chief Judge Bell joined in the dissent. Id. at 512, 864 A.2d at 1023.
92. Id. at 513, 864 A.2d at 1023.
93. Id.
94. Id. at 514-15, 864 A.2d at 1024.
95. Id. at 515, 864 A.2d at 1024.
at the expense of the poor and will infringe traditional notions of freedom. 96 He maintained that traditional notions of privacy become meaningless when the government is free to conduct wholesale random drug detection, so long as they do so from a place where they have a right to be. 97

Judge Greene argued that the majority should have instead ruled that the Fourth Amendment requires probable cause and a warrant for sniffs. 98 If the majority was unable to rule on the Fourth Amendment, however, he noted that they could have done so under Article 26 to ensure Maryland residents greater protections surrounding the home. 99

4. Analysis.—In Fitzgerald v. State, the Court of Appeals missed an opportunity when it ruled in accordance with Supreme Court precedent that a canine sniff of the exterior of a residence was not a Fourth Amendment search so long as the police conduct the sniff from a place where they have a legal right to be. 100 Instead of declining to rule on whether such an investigation was a search under the Declaration of Rights, the Court of Appeals could have settled an undecided area of state law and held that canine sniffs were searches requiring reasonable, articulable suspicion under Article 26. 101 Furthermore, requiring reasonable, articulable suspicion for sniffs of residences is a better reasoned standard to protect the traditional right to privacy in the home and prevent selective law enforcement, while still preserving the ability of law enforcement officers to conduct sniffs where reasonable suspicion is present. 102

a. The Court of Appeals Should Have Taken This Opportunity to Hold That a Canine Sniff of a Residence Requires Reasonable, Articulable Suspicion Under Article 26 Because Such a Holding Would Provide Guidance for Maryland Courts on an Unresolved Issue.—The Court of Appeals is the authority on questions of state law and, as such, should have decided in Fitzgerald whether a canine sniff of a residence is a search under Article 26. The court had the opportunity to hold that a sniff was a search requiring reasonable, articulable suspicion under the Declaration of Rights because the parties identified the conflicting federal

96. Id.
97. Id. at 515-16, 864 A.2d at 1025.
98. Id. at 519, 864 A.2d at 1027.
99. Id. at 518, 519-20, 864 A.2d at 1026-27.
100. Id. at 503, 864 A.2d at 1017.
101. See infra Part 4.a.
102. See infra Part 4.b.
precedents of *Place* and *Kyllo* as central to the issue of whether a canine sniff constituted a search.\(^{103}\) Because this issue is one of first impression in Maryland, lower courts will look to *Fitzgerald* for guidance and, in its absence, will refer to conflicting federal precedent, as well as the split of authority in other states, to resolve this issue.\(^{104}\)

The conflicting federal precedent over whether a canine sniff of a residence constitutes a search provides little guidance to Maryland courts.\(^{105}\) Courts that apply *Place*’s exception for limited-scope investigatory methods to Article 26 would find that sniffs do not invade legitimate privacy interests, are never searches, and never require reasonable suspicion, regardless of their location, so long as law enforcement conducts the investigation from a location where they were legally permitted to be.\(^{106}\) Courts that apply *Kyllo*, however, would likely find that the exception for limited-scope investigatory methods does not apply to residences because of the increased expectation of privacy in the home.\(^{107}\) Rather than forcing courts to choose between these two conflicting lines of precedent, the Court of Appeals should have settled the issue and provided guidance for lower courts by finding that warrantless canine sniffs of residences are only permissible under Article 26 when reasonable, articulable suspicion is present.\(^{108}\)

\(^{103}\) Petitioner’s Brief and Appendix at 2, *Fitzgerald II*, 384 Md. 484 (No. 8); Brief of Respondent at 2, *Fitzgerald II*, 384 Md. 484 (No. 8). Fitzgerald argued that *Place*’s exception for limited investigational procedures was not applicable to investigations of the home. Petitioner’s Brief, supra, at 8-9. In contrast, the State argued for application of *Place*’s exception for limited investigational methods to canine sniffs of residences. Brief of Respondent, supra, at 15-17. Furthermore, the Court of Appeals has adopted the *Terry* reasonable suspicion standard in the context of stop-and-frisks. See, e.g., Quince v. State, 319 Md. 430, 434, 572 A.2d 1086, 1088 (1990) (applying *Terry’s* “established principles of law”).

\(^{104}\) The Court of Appeals is not confined by Fourth Amendment precedent because Article 26, although *in pari materia* with the Fourth Amendment, is not identical to it and does not require identical interpretation. Davis v. State, 383 Md. 394, 408, 859 A.2d 1112, 1120 (2004).

\(^{105}\) See, e.g., State v. Ortiz, 600 N.W.2d 805, 814-17 (Neb. 1999) (looking to various states’ constitutional precedent as well as conflicting federal precedent to determine the appropriate standard for canine sniffs under the Nebraska constitution).

\(^{106}\) E.g., Rodriguez v. State, 106 S.W.3d 224 (Tex. 2003) (applying *Place* to hold that a canine sniff of the exterior of a residence does not violate the Fourth Amendment or the Texas Constitution).

\(^{107}\) E.g., State v. Rabb, 990 So. 2d 1175 (Fla. Dist. Ct. App. 2006) (holding that a sniff of a residence is a search despite *Place* and *Caballes* because of the protections of the home expressed in *Kyllo*).

\(^{108}\) Should a lower court rule that a canine sniff of a residence is a search, the court could then follow the *Fitzgerald* court’s determination that if a sniff was a search under Article 26, it would require only reasonable suspicion. *Fitzgerald II*, 384 Md. at 512, 864 A.2d at 1022-23.
b. Requiring Reasonable, Articulable Suspicion Is a Better Standard for Canine Sniffs of Residences Because It Protects the Privacy of the Home While Not Significantly Impeding Law Enforcement.—The Fitzgerald court should have protected civil rights and found that Article 26 dictated that canine sniffs of residences are searches requiring reasonable, articulable suspicion absent a warrant. This standard would protect citizens where their privacy interests are highest without compromising the government’s interest in conducting searches.109 Finding that a canine sniff of a residence is not a search under the exception articulated in *Place* sacrifices the legitimate privacy interests of citizens and creates the possibility of subjective law enforcement.110

Contrary to the Fitzgerald court’s holding, the *Place* exception for limited-scope investigations should not apply to canine sniffs. The *Place* exception dictates that limited-scope investigations designed to detect only the presence or absence of contraband can be justified on less than reasonable, articulable suspicion because such investigations run no risk of invading a legitimate privacy interest.111 Canine sniffs, however, should not fall into this limited category.112 Although intended to detect only the presence or absence of contraband, canine sniffs often detect noncontraband items in which the individual has an expectation of privacy.113 Dog sniffs regularly return false positives; one study found that a dog considered “generally reliable” alerted falsely anywhere from 12.5% to 60% of the time.114 A trained dog can also accurately alert to a variety of things in which the individual has a legitimate privacy interest.115 For example, a large amount of circulating currency contains enough drug residue to cause a narcotics dog to alert, but an individual certainly has a privacy interest in the money she keeps in her home.116 Trained narcotics dogs are fallible; sniffs always run a risk of invading a legitimate privacy interest

109. See infra notes 126-136 and accompanying text.
110. See infra notes 126-136 and accompanying text.
113. See Caballes, 543 U.S. at 411 (Souter, J., dissenting) (noting that “the infallible dog . . . is a creature of legal fiction”); see also Fitzgerald II, 384 Md. at 517, 864 A.2d at 1026 (Greene, J., dissenting) (noting that errors made by drug dogs can significantly encroach on legitimate expectations of privacy). *Contra Place*, 462 U.S. at 707.
116. Id. at 412; see, e.g., United States v. $242,484.00, 351 F.3d 499, 511 (11th Cir. 2003) (noting that as much as eighty percent of currency is tainted with drug residue, making a dog alert of minimal value).
and cannot fit into an exception for limited-scope investigational methods.\textsuperscript{117}

Because the likelihood of false alerts by trained narcotics dogs implicates legitimate privacy interests anytime the government conducts a canine sniff, the question of whether a sniff of a residence is a search must be considered under a traditional expectation-of-privacy inquiry and not the \textit{Place} exception.\textsuperscript{118} The proper inquiry considers first whether the individual had a subjective expectation of privacy in the object of the canine sniff, and second, whether society considers the individual's expectation reasonable.\textsuperscript{119} When evaluated under this expectation-of-privacy inquiry, a dog sniff of a residence must be classified a search.\textsuperscript{120} Individuals manifest an expectation of privacy when they place items out of sight in their residences. Furthermore, society has long considered this expectation of privacy in the home reasonable and also essential to our liberty.\textsuperscript{121}

After establishing that a canine sniff is a search under Article 26, the \textit{Fitzgerald} Court should have determined whether this type of search is legitimate by applying the balancing inquiry in \textit{Terry v. Ohio}.\textsuperscript{122} \textit{Terry}'s balancing inquiry demands that the government justify its interest in conducting the sniff by demonstrating reasonable, articulable suspicion—that is, by pointing to specific, articulable facts

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117. See \textit{Caballes}, 543 U.S. 405, 412-13 (Souter, J., dissenting) (arguing that recognition of a dog's fallibility destroys the justification for applying the \textit{Place} exception to canine sniffs).

118. See \textit{United States v. Jacobsen}, 466 U.S. 109, 142 (1984) (Brennan, J., dissenting) (arguing for an investigation emphasizing whether the context in which an item is concealed supports a reasonable expectation of privacy, rather than the content-based inquiry used by the majority). \textit{Contra Place}, 462 U.S. at 707.

119. \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); accord \textit{California v. Ciraolo}, 476 U.S. 207 (1986). Without the \textit{Place} exception, this inquiry is required by precedent; however, as Justice Brennan notes in his dissent in \textit{Jacobsen}, this inquiry also correctly considers the context in which the item is concealed, not the identity of the item or whether it is contraband, in determining whether a legitimate privacy interest exists. \textit{Jacobsen}, 466 U.S. at 139 (Brennan, J., dissenting). The inquiry presented in \textit{Place} and \textit{Jacobsen} reverses the proper inquiry by focusing on whether the individual has a legitimate privacy interest in what the search might reveal. \textit{Id.} at 140.


121. \textit{See, e.g., Silverman v. United States}, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

122. \textit{See United States v. Place}, 462 U.S. 696, 723 (1983) (Blackmun, J., concurring) (suggesting that a dog sniff may be a minimally intrusive search that could be justified under \textit{Terry} upon reasonable suspicion).
that would alert a reasonable person to the possibility of illegality.\textsuperscript{123} The requirement of reasonable, articulable suspicion is essential because, like the police stops in \textit{Terry}, warrantless canine sniffs of residences may invade an individual’s legitimate expectation of privacy, but sometimes the government’s interest in conducting these sniffs outweighs this risk.\textsuperscript{124} A reasonable, articulable suspicion requirement ensures that the individual’s right to privacy will not be jeopardized unless the government need substantially outweighs her privacy interest.\textsuperscript{125}

A reasonable, articulable suspicion requirement, like that considered by the \textit{Fitzgerald} court, represents the most logical standard for canine sniffs of residences because it affords a degree of protection to citizens’ privacy interests without impairing the ability of law enforcement to employ sniffs where the government’s interest is substantial.\textsuperscript{126} The government’s interest in conducting a canine sniff is highest where the demonstrated risk of the suspected activity is substantial or immediate.\textsuperscript{127} When law enforcement employs a drug-detection dog to sniff for narcotics, the demonstrated risk is often significant, but not always substantial or immediate, depending on the additional facts known by law enforcement.\textsuperscript{128} In contrast, when law enforcement employs bomb-sniffing dogs to investigate threats, the demonstrated risk clearly is both substantial and immediate and requires only a minimal showing of articulable facts to be deemed reasonable.\textsuperscript{129} This flexibility ensures that law enforcement can act when the perceived risk is great.\textsuperscript{130}

\textsuperscript{123} \textit{Terry} v. \textit{Ohio}, 392 U.S. 1, 20-21 (1968).

\textsuperscript{124} See, e.g., \textit{State v. Pellicci}, 580 A.2d 710, 717 (N.H. 1990) (recognizing that officers may conduct investigative stops on reasonable, articulable suspicion provided that the intrusion on the individual’s rights is small and the legitimate state interest is great).

\textsuperscript{125} See supra Part 2.b. A reasonable suspicion requirement would not entirely remove the risk of a canine sniff invading an individual’s legitimate privacy interests because a law enforcement officer’s reasonable suspicion sometimes will prove incorrect. By preventing sniffs from occurring in the absence of independent reasonable suspicion, however, the opportunity for false alerts will be greatly reduced. LAFAVE, supra note 64, § 2.2(g).

\textsuperscript{126} \textit{Illinois v. Caballes}, 543 U.S. 405, 419-21 (2005) (Ginsburg, J., dissenting) (noting that the \textit{Terry} test provides a situation-sensitive balancing test to assess Fourth Amendment interests).

\textsuperscript{127} Id. at 417 n.7 (Souter, J., dissenting).

\textsuperscript{128} See id. at 423-25 (Ginsburg, J., dissenting) (suggesting that the Court distinguish between the general interest in crime control and more immediate threats to public safety).

\textsuperscript{129} See id. at 417 n.7 (Souter, J., dissenting) (noting that “unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material”); id. at 423 (Ginsburg, J., dissenting) (finding that a dog sniff for explosives would be an entirely different matter from a dog sniff for narcotics).

\textsuperscript{130} Id. (Ginsburg, J., dissenting).
A reasonable, articulable suspicion requirement is also a better standard for canine sniffs of residences because it prevents wholesale, random sniffing and selective law enforcement. If a sniff of a home is not a search requiring reasonable, articulable suspicion, law enforcement may conduct sniffs from any place they have a right to be. These places include sidewalks, parking lots, and apartment buildings, so long as the corridors are open to the public or the landlord has granted permission. This lack of restraint grants law enforcement officers nearly absolute discretion in who and what they choose to subject to canine sniffs, which inevitably invites intrusions into individual privacy interests based upon nothing more than inarticulate hunches and personal prejudices. Such unmonitored discretion jeopardizes the rights of often marginalized people, such as members of minority groups and those who reside in less affluent neighborhoods. The risk of selective law enforcement is heightened by the fact that sniffs must be conducted from a place where law enforcement have a right to be; thus, those who cannot afford a home with a surrounding private area or an apartment in a locked or gated community lack the protections of those who can.

5. Conclusion.—In Fitzgerald v. State, the Court of Appeals considered for the first time whether a canine sniff of the exterior of a residence was a search under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights. Applying the Place exception for limited-scope investigational methods, the court held that a canine sniff of the exterior of a residence was not a Fourth Amendment

131. See Fitzgerald II, 384 Md. at 516, 864 A.2d at 1025 (Greene, J., dissenting) (noting that the majority's decision not to rule on the Maryland constitutional issue makes possible wholesale random drug detection in almost any public gathering place, which will subject lower income groups to selective law enforcement); see also Caballes, 543 U.S. at 422 (Ginsburg, J., dissenting) (finding that the majority's decision to allow the police to conduct sniffs of vehicles without reason to suspect contraband opens the door for random, suspicionless sniffs of parking lots and sidewalks); Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987) (noting the necessity of a reasonable suspicion requirement because "a free society will not remain free if police may use this, or any other crime detection device, at random and without reason").

132. Fitzgerald II, 384 Md. at 516, 864 A.2d at 1025 (Greene, J., dissenting).

133. Id. at 515-16, 864 A.2d at 1024-25; see also Caballes, 543 U.S. at 422 (Ginsburg, J., dissenting).

134. Fitzgerald II, 384 Md. at 517-18, 864 A.2d at 1026 (Greene, J., dissenting); see also Terry v. Ohio, 392 U.S. 1, 22 (1968) (stressing that a requirement less than reasonable suspicion "invite[s] intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches").

135. Fitzgerald II, 384 Md. at 517-18, 864 A.2d at 1026 (Greene, J., dissenting).

136. Id.

137. Id. at 484, 864 A.2d at 1006.
The court declined to determine whether a canine sniff of a residence was a search under Article 26 of the Maryland Declaration of Rights, finding it not necessary to rule on the issue because reasonable, articulable suspicion was present to justify the sniff regardless of their decision. In declining to decide the issue, the court missed the opportunity to settle an undecided area of Maryland law. The court should have held that a canine sniff is a search under Article 26 requiring reasonable, articulable suspicion because this decision would have provided guidance to lower courts. Furthermore, requiring reasonable, articulable suspicion is a better reasoned standard for protecting the right of citizens to be secure in their homes and preventing selective law enforcement. At the same time, this requirement does not impede the ability of law enforcement to conduct sniffs where the government's interest is legitimate, since in those cases reasonable, articulable suspicion will be present.

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138. See supra notes 76-77 and accompanying text.
139. See supra note 90 and accompanying text.
140. See supra Part 4.a.
141. See supra Part 4.b.
142. See supra Part 4.b.
IV. EVIDENCE

A. In Changing How Experts May Present DNA Match Evidence at Criminal Trials, the Court of Appeals Burdens Prosecutors and Leaves Key Issues Unresolved

In *Young v. State*, the Court of Appeals of Maryland considered whether an expert may testify that a DNA sample matches a defendant’s profile, and that the defendant was the source of the sample, without providing random match statistics. The court answered in the affirmative, holding that where the probability of a random DNA match is infinitesimal, an expert may testify that there was a DNA match without offering random match statistics. The court further held that the expert may explain the meaning of that match to the jury by identifying the defendant as the source of the DNA sample.

In reaching this holding, the court neglected to supply a probability standard explaining when an expert may omit random match statistics, and this failure will unduly impair prosecutors and could eliminate incentives to pursue advances in DNA forensics. The court should have followed the example of other courts in setting forth an explicit standard for when experts may forego providing random match statistics. The *Young* court also failed to clarify whether DNA experts may still provide random match statistics if they identify a defendant as the source of a DNA sample. Finally, the court failed to address whether DNA expert opinion testimony might encroach on the factfinding role of the jury.

1. The Case.—On September 27, 2001, Anthony Eugene Young used a computer to access an Internet chat room entitled “Gay Twenties.” Young, then thirty-seven years old, contacted a thirteen-year-old boy who was also participating in this chat room and set up a meeting at the boy’s apartment. Young came to the boy’s house the next day and the two had oral and anal sex.
On October 2, Young allegedly returned to the boy's home, and the two engaged in anal intercourse. While Young was still at the boy's home, the boy's mother came home from work. After Young left, the boy eventually related to his mother what had transpired. That same night, the two called the police.

The boy was brought to a hospital, and a forensic nurse obtained a DNA sample from him by taking a swab of his rectal area. An officer of the Prince George's County Police Department subsequently procured a DNA sample from Young, with his consent, by taking two swabs of his mouth. A forensic DNA analyst, Rupert Page, examined and tested these DNA samples on behalf of the State. Page compared the DNA profile obtained from the nurse's anal swab to Young's profile from the oral swabs. Examining DNA markers along thirteen short tandem repeat (STR) loci and a gender identification locus, Page concluded that the two DNA samples matched.

A grand jury for Prince George's County charged Young with three counts of second-degree sexual offense and other related charges. The primary issue at Young's trial was whether he could be identified as the perpetrator of the offenses. The State presented three forms of evidence to establish that Young was the culprit. First, the State submitted testimony from the boy and his mother. Young challenged this evidence by noting that the boy and his mother could not pick Young's picture out of a police photo array and by attacking the boy's credibility. Second, the State offered evidence that Young participated in the "Gay Twenties" chat room. Third, Page testified on behalf of the State that the DNA sample recovered from the boy matched the sample taken from Young. Page did not explain his conclusion beyond stating that he reached it

11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 102, 879 A.2d at 45.
16. Id.
17. Id. The circuit court "received Page as an expert in profiling and forensic serology." Id.
18. Id.
19. Id. at 123, 879 A.2d at 58.
20. Id. at 101, 879 A.2d at 45.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id. at 101-02, 879 A.2d at 45-46.
after comparing the two samples. The State did not ask Page about the likelihood that a random person's DNA profile could have matched the profile taken from the boy nor did Page mention any statistics when he presented the results of his analysis. Young's counsel objected to this evidence, arguing that under Armstead v. State, Page had to accompany his testimony with random match probability statistics.

The court allowed Page to testify that Young's DNA profile matched the one recovered from the victim, but declined to permit Page to say that the DNA obtained from the anal swab came from Young. The court did, however, allow the State to enter into evidence Page's DNA report despite defense counsel's objection. The report's conclusion was that, to a reasonable degree of scientific certainty, Young was the source of the DNA obtained from the sperm fraction of the anal swab, assuming Young had no identical twin. This conclusion was not supported by any statistical data. On cross-examination, counsel for Young failed to elicit any testimony about statistics from Page.

Throughout Young's trial, the State repeatedly asserted that the DNA sample taken from the child matched the sample taken from Young. In its opening statement, the State claimed that the DNA evidence showed a "perfect match" and would prove that Young was the source of the semen recovered from the victim, conclusively proving Young's guilt. In his summation, the prosecutor argued that the DNA comparison produced "an exact match." On rebuttal, the State declared that the defense counsel's attacks on the reliability of the State's non-DNA identification evidence were immaterial to the

27. Id. at 102, 879 A.2d at 46. Page "did not identify which DNA sequences he reviewed, and only on cross-examination did he note that he employed the polymerase chain reaction ('PCR') method" to examine the DNA samples. Id.


29. Young, 388 Md. at 102, 879 A.2d at 46 (citing Armstead v. State, 342 Md. 38, 673 A.2d 221 (1996)).

30. Id. at 103, 879 A.2d at 46.

31. Id. Page's report noted that he used the PCR-STR method to examine DNA markers along a combined thirteen loci and a gender identification locus. Id.

32. Id. Young conceded that he had no identical twin. Id. at 103 n.4, 879 A.2d at 46 n.4.

33. Id. at 103, 879 A.2d at 46.

34. Id.

35. Id. at 103-04, 879 A.2d at 46-47.

36. Id. at 103, 879 A.2d at 46.

37. Id. at 103-04, 879 A.2d at 46.
question of Young’s guilt or innocence because the DNA match testimony alone was sufficient to identify Young as the culprit.  

The jury reached a guilty verdict on one count of second-degree sexual offense, and the court imposed a twenty-year sentence on Young.  

Young appealed his conviction to the Maryland Court of Special Appeals, which affirmed his conviction.  

In an unreported opinion, the Court of Special Appeals distinguished Armstead v. State, where the Court of Appeals had declared that statistics must accompany DNA evidence. The Court of Special Appeals explained that a DNA match based on a comparison of one locus, like the one at issue in Armstead, is basically meaningless without accompanying statistical testimony. By contrast, the court reasoned, a match at thirteen different loci is so unlikely to produce a random match that accompanying statistical data is unnecessary. The court also stated that even if statistical evidence was required, declaring the match was harmless beyond a reasonable doubt. 

The Court of Appeals granted Young’s petition for a writ of certiorari to consider whether the trial court erred in admitting the State’s expert testimony that there was a match between Young’s DNA sample and that of the boy. 

2. Legal Background.—A forensic scientist can use DNA analysis to determine whether a tissue sample recovered from a crime scene came from a particular individual, as scientists have developed ever more precise DNA analysis methods, the probability of a DNA comparison producing a “random match”—that is, incorrectly identifying a defendant as the source of a DNA sample—has become extremely low. Maryland courts have considered whether statistics indicating this random match probability must accompany DNA match evidence on several occasions since 1989. Federal and state courts outside Maryland have examined this same issue and have reached divergent conclusions. Where an expert does not provide random match sta-
tistics, but simply identifies a defendant as the source of a DNA sample, she could usurp the factfinding role of the jury, which Maryland courts have held to be improper under certain circumstances.49

a. DNA Evidence.—Deoxyribonucleic acid (DNA)50 can be used for forensic identification because it does not vary within an individual, and no two individuals, save identical twins, have the same total DNA configuration.51 DNA contains around three billion base pairs of amino acids bound together.52 Large strings of these base pairs form genes, which are located at specific sites—loci—on the DNA molecule.53 About ninety-nine percent of these genes have the same form in every individual.54 The remaining one percent are known as polymorphic genes because they are different in each individual.55 DNA identification is based on comparisons of these variations between two DNA molecules.56 An analyst compares two DNA samples at a certain number of loci, and if they have the same base pair sequences at each locus, then it is possible that the samples could have come from the same individual.57

The most common method of DNA comparison employed in criminal trials during the mid-1990s was restriction fragment length polymorphism (RFLP) analysis.58 In recent years, however, the majority of forensic scientists have adopted polymerase chain reaction-short tandem repeat (PCR-STR) for DNA typing as it is more accurate and less time-consuming than RFLP analysis.59 A DNA analyst could not conclude with absolute certainty that a DNA sample comes from a

49. See infra Part 2.d.
50. DNA contains the genetic code that defines all individual hereditary characteristics.
53. Id.
54. Id.
55. Id.
58. Armstead v. State, 342 Md. 38, 53, 673 A.2d 221, 228 (1996). RFLP involves treating both DNA molecules with restriction enzymes, which cut into smaller fragments at specific sites that are present in all DNA molecules. Keirsey, 106 Md. App. at 562-63, 665 A.2d at 705. An analyst then compares the lengths of the resulting fragments because these lengths would be equal if the two DNA molecules came from the same individual. Id. at 564-65, 665 A.2d at 706. If the analyst finds that the lengths of all the fragments are equal, she concludes that the suspect is a potential source of the DNA evidence. Tankersley, 956 P.2d at 490.
particular individual unless she compared the two DNA molecules along their entire length.\textsuperscript{60}

Since both RFLP and PCR-STR analysis examine only part of the DNA molecule, when an analyst finds that a suspect's DNA sample matches a crime scene DNA sample at a certain number of loci, she declares that the suspect is merely a possible source of the DNA material.\textsuperscript{61} It may be that two individuals could be unrelated but nevertheless share the same DNA patterns at the loci examined, which would manifest itself as a DNA match.\textsuperscript{62} Consequently, for a DNA match to have any meaning, an expert must calculate the probability that a randomly suspected individual would match the suspect's DNA at the loci examined, generally known as the random match probability.\textsuperscript{63}

Random match probability is calculated using a two-step process.\textsuperscript{64} First, an initial calculation is made regarding the random match probability of each polymorphic locus (the "individual allele frequency").\textsuperscript{65} Second, the individual allele frequencies are combined to determine the overall probability of an individual possessing the entire matched DNA segment.\textsuperscript{66} Analysts have employed various statistical methodologies to combine individual allele frequencies.\textsuperscript{67} Today, probability calculations are often made using the "product rule."\textsuperscript{68} The use of the product rule, and the calculation of random match probability generally, have been the subjects of some recent scientific dispute.\textsuperscript{69}

\textbf{b. Maryland's Approach to the Presentation of DNA Evidence.—}

Maryland's legislature and judiciary have both played roles in determining how DNA evidence may be presented at criminal trials. In

\begin{itemize}
\item \textsuperscript{60} Nelson v. State, 628 A.2d 69, 75 (Del. 1993).
\item \textsuperscript{61} Tankersley, 956 P.2d at 490.
\item \textsuperscript{62} Nelson, 628 A.2d at 75-76.
\item \textsuperscript{63} \textit{Id}.
\item \textsuperscript{64} Watts v. State, 733 So. 2d 214, 224-25 (Miss. 1999).
\item \textsuperscript{65} \textit{Id}.
\item \textsuperscript{66} \textit{Id} at 225.
\item \textsuperscript{67} See Armstead v. State, 342 Md. 38, 70-72, 673 A.2d 221, 236-37 (1996) (describing alternative methods of aggregating allele frequencies).
\item \textsuperscript{68} \textit{Id} at 69-70, 683 A.2d at 236. The product rule states that the likelihood of a match occurring for an entire DNA segment can be determined by calculating the match probability for each polymorphic allele and then multiplying those probabilities together. \textit{Id}. For example, if a matching DNA sample contains two independent alleles, and there is a ten-percent chance of a random match of the first allele and a twenty-percent chance of a random match of the second, the product rule would suggest that there was a two-percent chance that a random person in the population shared the same DNA profile (.10 x .20 = .02). \textit{Id}.
\item \textsuperscript{69} \textit{Id} at 69-74, 683 A.2d at 236-39.
\end{itemize}
1989, the Maryland legislature enacted a statute, now codified at section 10-915 of the Courts and Judicial Proceedings Article, permitting the admission of DNA evidence in any criminal proceeding, provided certain requirements are met.\textsuperscript{70} The original version of this statute neither required nor prohibited the presentation of population genetics statistics in conjunction with DNA evidence.\textsuperscript{71} A 1991 amendment to the statute\textsuperscript{72} referred to population statistics, which suggests that the legislature intended for them to be admissible, yet the statute remained silent on which specific methods of DNA analysis that expert witnesses should employ.\textsuperscript{73}

In 1991, the Court of Special Appeals examined the role of probability statistics in DNA evidence in \textit{Jackson v. State}.\textsuperscript{74} In \textit{Jackson}, the defendant appealed from convictions that resulted from two separate trials.\textsuperscript{75} In the first trial, defendant was convicted of first- and second-degree sexual offenses, burglary, and assault with intent to rape.\textsuperscript{76} The convictions arose out of an incident in 1988 in which Jackson allegedly forced his way into the home of his former wife's sister, kicked and beat her, and forced her to perform oral sex upon him.\textsuperscript{77} Jackson was arrested over a year later, and at trial, an expert testified that his DNA matched two samples taken from semen found on the victim's clothing and person.\textsuperscript{78} At his second, separate trial, Jackson was convicted of assault and battery and breaking and entering,\textsuperscript{79} charges stemming from an attack on a different victim in 1990.\textsuperscript{80} The victim was opening her door when a man forced his way through and punched her.\textsuperscript{81} The victim managed to reach a pair of scissors, which she used to stab the attacker in the face.\textsuperscript{82} The attacker fled, and three days later, Jackson visited a police station to discuss an unrelated matter with officers, one of whom observed puncture

\begin{footnotesize}
\footnotetext[71]{71. Id.; Armstead, 342 Md. at 77, 673 A.2d at 240.}
\footnotetext[73]{73. Armstead, 342 Md. at 81, 673 A.2d at 242.}
\footnotetext[74]{74. 92 Md. App. 304, 608 A.2d 782 (1992).}
\footnotetext[75]{75. Id. at 307, 608 A.2d at 783.}
\footnotetext[76]{76. Id.}
\footnotetext[77]{77. Id. at 308, 608 A.2d at 784.}
\footnotetext[78]{78. Id. at 308-09, 608 A.2d at 784.}
\footnotetext[79]{79. Id. at 307-08, 608 A.2d at 783.}
\footnotetext[80]{80. Id. at 309, 608 A.2d at 784.}
\footnotetext[81]{81. Id.}
\footnotetext[82]{82. Id.}
\end{footnotesize}
wounds on his face.\textsuperscript{83} Jackson's DNA matched DNA samples recovered from blood found in the victim's home.\textsuperscript{84}

On appeal from his convictions, Jackson challenged the trial court's admission of an expert witness's testimony that his DNA matched samples lifted from the crime scene.\textsuperscript{85} The expert witness had also testified that, in her opinion, the defendant was the source of both DNA samples.\textsuperscript{86} The defendant argued on appeal that the declared match had no relevance because the expert did not present probability calculations.\textsuperscript{87} The Court of Special Appeals held that the defendant waived this argument.\textsuperscript{88} However, the court nevertheless declared that the State was not required to offer additional evidence, such as probability statistics, to establish the reliability of its DNA testing method.\textsuperscript{89}

Five years later, the Court of Appeals examined the role of probability statistics in DNA evidence in \textit{Armstead v. State}.\textsuperscript{90} Armstead was convicted of first- and second-degree rape and twenty-three other offenses, stemming from his attack on a female victim.\textsuperscript{91} Armstead broke into the victim's home, demanded money from her, and then raped her.\textsuperscript{92} The State offered evidence showing that the DNA contained in a semen sample taken from the victim matched DNA from the defendant's blood\textsuperscript{93} and accompanied this testimony with the probability of a random DNA match.\textsuperscript{94} Armstead challenged the admissibility of the DNA evidence, through an in limine motion, on a variety of constitutional and statutory grounds.\textsuperscript{95}

\begin{thebibliography}{99}
\bibitem{83} Id.
\bibitem{84} Id.
\bibitem{85} Id. at 321, 608 A.2d at 790.
\bibitem{86} Id. at 324, 608 A.2d at 791.
\bibitem{87} Id.
\bibitem{88} Id. The court stated that although defense counsel timely objected to the testimony of the State's first DNA expert, he failed to object when a second expert offered the same opinion as the first. \textit{Id.}, 608 A.2d at 791-92. Because the arguments raised on appeal were not raised at trial, they were waived pursuant to Md. R. 4-323(a) (1992). \textit{Id.}, 608 A.2d at 792.
\bibitem{89} Id. at 324-25, 608 A.2d at 792. The court made this statement, possibly to provide guidance to lower courts in determining the admissibility of DNA evidence, despite the fact that defense counsel failed to preserve the issue at trial, and the issue was not properly before the court. \textit{See supra} note 88 and accompanying text.
\bibitem{90} 342 Md. 38, 673 A.2d 221 (1996).
\bibitem{91} Id. at 44-45, 673 A.2d at 223-24.
\bibitem{92} Id. at 44, 673 A.2d at 223.
\bibitem{93} Id., 673 A.2d at 224.
\bibitem{94} Id. at 46, 673 A.2d at 224.
\bibitem{95} Id. at 45, 673 A.2d at 224.
\end{thebibliography}
On appeal, Armstead reiterated these challenges and also argued that the trial court erred by admitting expert testimony of random match statistics.\(^9\text{6}\) The Court of Appeals held that the trial court properly admitted the testimony.\(^9\text{7}\) According to the court, by permitting the admission of DNA evidence,\(^9\text{8}\) the legislature intended to make random match statistics admissible to support the evidence.\(^9\text{9}\) The court reasoned that DNA match evidence presented without accompanying statistics would be meaningless,\(^1\text{0}\text{0}\) and the legislature could not have meant for juries to receive DNA evidence that they could not evaluate in a logical manner.\(^1\text{0}\text{1}\) The court declared that the DNA match and the statistics should be treated "as inseparable components of DNA evidence."\(^1\text{0}\text{2}\)

The Armstead court also approved the use of the product rule for calculating random match statistics.\(^1\text{0}\text{3}\) The court noted that section 10-915 did not explicitly approve this method.\(^1\text{0}\text{4}\) It declared that the legislature refrained from prescribing any specific statistical methodologies because it did not want to have to rewrite the law every time there was an advance in DNA technology.\(^1\text{0}\text{5}\) The court explicitly re-

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96. Id. at 48-49, 673 A.2d at 225-26.
97. Id. at 83, 673 A.2d at 243.
99. Armstead, 342 Md. at 81, 673 A.2d at 242.
100. Id. at 78-79, 673 A.2d at 240-41. If an expert testified that two DNA samples matched, the court reasoned, but did not provide the random match probability, jurors would not know whether such matches are "as common as pictures with two eyes, or as unique as the Mona Lisa." Id. at 78, 673 A.2d at 241 (quoting United States v. Yee, 134 F.R.D. 161, 181 (N.D. Ohio 1991)).
101. Id. at 79, 673 A.2d at 241. The court declared that if the legislature had specified the precise method to be used for each critical step in DNA analysis, laboratories would not have been able to utilize the most effective tests without legislative change, thereby inhibiting the development of forensic science. Id. at 81-82, 673 A.2d at 242-43.
102. Id. at 79, 673 A.2d at 241. The court declared that it disapproved of Jackson to the extent it was inconsistent with Armstead. Id. at 79 n.32, 673 A.2d at 241 n.32. Maryland Rule 8-131(b) provides that when the Court of Appeals reviews a decision rendered by the Court of Special Appeals, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review. Md. R. 4-325(a) (2004). The Armstead court was presented with the issue of whether random match statistics were admissible, not whether the statistics were required, but it nevertheless reached a holding on the latter issue. 342 Md. at 43, 79, 673 A.2d at 225, 241. The court appears to have determined that the case was one that warranted searching beyond the matters before the court, perhaps to provide additional guidance to lower courts with respect to the complicated and relatively novel area of DNA evidence. See, e.g., State v. Parker, 334 Md. 576, 597, 640 A.2d 1104, 1114 (1994) ("This Court possesses the discretion to consider issues that were not necessarily raised in the petition or order for a Writ of Certiorari.").
103. 342 Md. at 82-83, 673 A.2d at 243.
104. Id. at 81, 673 A.2d at 242.
105. Id. at 81-82, 673 A.2d at 242-43.
jected the defendant’s challenge to the scientific validity of the product rule. The court noted that some scientists had previously disputed the method’s validity, but declared that it was now widely accepted.

c. DNA Match Evidence in Other Jurisdictions.—Other states have taken a variety of approaches to the role of statistics in DNA evidence. The overwhelming majority of courts hold that random match statistics are admissible under the proper circumstances. In fact, at the time Armstead was decided in 1996, most states required statistical evidence with the admission of DNA evidence.

Defense challenges to the admission of random match statistics in other jurisdictions have focused primarily on the potential prejudicial effects of such statistics. Minnesota courts, in particular, have examined the prejudicial harm that presenting random match probabilities to juries could cause. In State v. Boyd, for instance, Boyd was charged with criminal sexual conduct for having intercourse with a fourteen-year-old girl, and the prosecution sought to offer blood test results indicating that Boyd was the father of a child born to the victim. The State’s expert planned to express these results in terms of a statistical probability that the defendant was the child’s father.

106. Id. at 82-83, 673 A.2d at 243.
107. Id. at 72, 673 A.2d at 238.
111. See, e.g., State v. Joon Kyu Kim, 398 N.W.2d 544, 548 (Minn. 1987) (holding that the danger of population frequency statistics misleading a jury outweighed any probative value of the statistics).
112. 331 N.W.2d 480, 480 (Minn. 1983).
113. Id. at 481. The expert compared their blood types with respect to fifteen different gene systems and concluded that 1121 unrelated men would have to be randomly selected from the general population of men before another man would be found with all the
The court held that although the expert could describe the analysis he performed and state that it showed that Boyd could not be excluded as the father, he could not offer a statistical probability of the child being Boyd's.\textsuperscript{114} The court based this conclusion on its concern that testimony expressing opinions or conclusions in terms of statistical probabilities could make uncertain facts seem all but proven and suggest, by quantification, satisfaction of the requirement that guilt be established beyond a reasonable doubt.\textsuperscript{115}

Minnesota courts subsequently applied the \textit{Boyd} rule to a variety of different forensic identification methods, holding that expert testimony about the results of a forensic comparison could not be accompanied with statistics showing the likelihood of a positive match.\textsuperscript{116}

Minnesota's Supreme Court created an exception to the \textit{Boyd} rule in \textit{State v. Bloom}.\textsuperscript{117} The \textit{Bloom} court held that DNA statistical probability evidence in criminal prosecutions could be used to establish identity if calculated using the "ceiling method" of calculating the statistics.\textsuperscript{118} The court, however, reaffirmed that courts should ensure that DNA identification evidence is not presented in a misleading or unfairly prejudicial way.\textsuperscript{119}

Accordingly, in \textit{State v. Roman Nose},\textsuperscript{120} the Supreme Court of Minnesota held that the State did not present a random match probability statistic in a "prejudicial or misleading manner" and that the trial court properly admitted the statistics. The court observed that the jury could mistake the random match probability for the likelihood of the defendant's guilt or innocence, thereby detracting from the presumption of innocence,\textsuperscript{121} especially because the probability was very appropriate genes to have fathered the child in question, which meant that the likelihood that the defendant was the father of the child was 99.911%. \textit{Id.}

\textsuperscript{114} \textit{Id.} at 483.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{See, e.g., Joon Kyu Kim,} 398 N.W.2d 544 (holding that a prosecution expert would not be permitted to express his opinion as to the probability that semen found on an alleged rape victim's bed sheet was the defendant's, but could testify about the basic theory underlying the blood type comparison he performed, that none of his tests excluded the defendant as a source of the semen, and that the scientific evidence was consistent with the defendant having been the source of the semen).
\textsuperscript{117} 516 N.W.2d 159 (Minn. 1994).
\textsuperscript{118} \textit{Id.} at 160. The ceiling method is a modified application of the product rule that results in more conservative random match statistics than the standard product rule. \textit{State v. Johnson,} 922 P.2d 294, 298 (Ariz. 1996).
\textsuperscript{119} \textit{Bloom,} 516 N.W.2d at 168-69.
\textsuperscript{120} 667 N.W.2d 386 (Minn. 2003).
\textsuperscript{121} \textit{Id.} at 397. If a juror believes that innocence was highly improbable, given the low random DNA match probability, he might discount as unreasonable any doubts he has about the defendant's guilt. \textit{Id.}
Yet, since the State did not highlight this statistic at trial, but offered the number as part of its overall presentation of DNA results, the court admitted the probability.\textsuperscript{123}

Two federal courts have examined concerns with respect to the presentation of DNA statistics, ultimately concluding that the potential probative value of random match statistics outweighs the possible prejudice they pose to criminal defendants.\textsuperscript{124} In United States v. Shea, the government charged Shea with robbery and proposed to introduce into evidence expert testimony of a match between Shea’s DNA and DNA extracted from bloodstains left by one of the robbers inside the bank and a vehicle believed to have been used by the robber.\textsuperscript{125} The government’s expert would also testify that the likelihood of a random DNA match was 1 in 200,000.\textsuperscript{126} Shea moved to exclude the random match probability, arguing that it would mislead the jury, which would fail to distinguish the probability of a random match from the potentially different probability that Shea did not leave DNA at the crime scene.\textsuperscript{127} The court acknowledged the possibility of jury confusion,\textsuperscript{128} but concluded that the risk would be tolerable if the concept was properly explained.\textsuperscript{129} The court stated that the estimate could help the jury understand the potential meaning of a DNA match and that the estimate should be admitted even if it required explanation.\textsuperscript{130}

The Ninth Circuit Court of Appeals also examined the potential prejudicial harm of random match statistics in United States v. Chischilly.\textsuperscript{131} Chischilly was convicted of aggravated sexual abuse and mur-
der. The jury heard expert testimony of a DNA match between a sample of Chischilly's blood and sperm found on the victim. The government's expert witness further testified that 1 in 2563 would be a "conservative" estimate of the probability of a similar match between the DNA of a randomly selected American Indian and either the evidentiary sample or the defendant's DNA. Chischilly argued on appeal that the district court erred by admitting this random match probability testimony. The Ninth Circuit noted that a jury could confuse random match statistics with both the probability that the defendant left the sample at the crime scene and with the likelihood of guilt or innocence. But, the court also declared that the statistics are probative of a defendant's guilt or innocence. The court concluded that so long as a district court provides careful oversight, the potential prejudice of random match statistics can be reduced to the point where it is outweighed by its probative value.

d. Maryland Case Law on Expert Witness and Opinion Testimony.—Maryland courts have generally permitted expert and lay witnesses to offer opinion testimony only if their conclusions do not encroach upon the factfinding role of the jury. In Turner v. State Roads Commission, the Court of Appeals articulated its standard for determining when trial courts should admit expert opinion testimony. The Court of Appeals applied this standard in the criminal context in Yudkin v. State. Yudkin was charged with selling an obscene book. The trial court refused to allow him to offer testimony from expert witnesses, who would have testified that the book in question would not arouse the prurient interests of the average person or meet other required elements for being considered an obscene work. The trial court concluded that it was the jury's responsibility to determine whether the book would stimulate the prurient interests of the

132. Id. at 1146.
133. Id. at 1152.
134. Id. at 1158.
135. Id. at 1146.
136. Id. at 1156.
137. Id. at 1158.
138. Id. In Chischilly, the Ninth Circuit noted that the Government had portrayed its expert's DNA profiling statistics as the probability of a random DNA match, not of Chischilly's innocence. Id.
140. 229 Md. 223, 182 A.2d 798 (1962).
141. Id. at 224, 182 A.2d at 799.
142. Id. at 228, 182 A.2d at 801.
average individual.\textsuperscript{143} The Court of Appeals reversed, declaring that the test as to the admissibility of expert opinion is not whether the jury can decide the particular issue without expert help, but whether the jury can receive appreciable help from the particular witness on the subject.\textsuperscript{144}

In \textit{Bohnert v. State},\textsuperscript{145} the Court of Appeals held that expert opinion testimony was not admissible where it required the expert to resolve contested facts. The court examined whether the trial court erred in permitting a social worker to offer her opinion that a child who had accused the defendant of sexually abusing her was telling the truth.\textsuperscript{146} The court answered in the affirmative.\textsuperscript{147} Because the opinion was tantamount to a declaration by the expert that the child was telling the truth and that the defendant was lying, it usurped the jury's tasks of weighing the credibility of the witnesses and resolving contested facts.\textsuperscript{148}

In \textit{Braxton v. State}, the Court of Special Appeals applied the \textit{Yudkin} standard for admitting expert testimony to the question of whether the admission of a firearms expert's testimony that a weapon recovered from the defendant's house constituted a handgun under Maryland law invaded the province of the jury.\textsuperscript{149} The court upheld the admission of the expert's testimony, noting that the definition of a handgun under Maryland law is complex, and the distinction between fact and opinion is hard to discern.\textsuperscript{150} The court concluded that this was surely the kind of subject matter that an expert could help the jury understand.\textsuperscript{151}

The Court of Special Appeals reached a similar conclusion in \textit{Cook v. State}.\textsuperscript{152} The State charged Cook with possession of cocaine with intent to distribute and an array of related offenses.\textsuperscript{153} At trial, a police officer testified that, in his opinion, Cook was the head of the

\begin{thebibliography}{99}
\item \textsuperscript{143} \textit{Id.} at 226-27, 182 A.2d at 800.
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} 312 Md. 266, 539 A.2d 657 (1988).
\item \textsuperscript{146} \textit{Id.} at 276-77, 539 A.2d at 662.
\item \textsuperscript{147} \textit{Id.} at 279, 539 A.2d at 663.
\item \textsuperscript{148} \textit{Id.} at 278-79, 539 A.2d at 663.
\item \textsuperscript{149} 123 Md. App. 599, 649-50, 720 A.2d 27, 51-52 (1998). The jury convicted appellant of, inter alia, unlawful use of a handgun in the commission of a felony or crime of violence and unlawful wearing, carrying, or transporting a handgun. \textit{Id.} at 609 n.2, 720 A.2d at 32 n.2.
\item \textsuperscript{150} \textit{Id.} at 652, 720 A.2d at 53.
\item \textsuperscript{151} \textit{Id.} at 653, 720 A.2d at 53.
\item \textsuperscript{152} 84 Md. App. 122, 578 A.2d 283 (1990).
\item \textsuperscript{153} \textit{Id.} at 126, 578 A.2d at 285.
\end{thebibliography}
cocaine distribution organization located at that dwelling.\textsuperscript{154} He based this conclusion on his experience and training, stating that when a person at a drug distribution area carries a weapon, as Cook did, he is the head of that area.\textsuperscript{155} Cook denied that he was involved in drug distribution and claimed he was merely an invited guest at the dwelling in question.\textsuperscript{156} The trial court permitted this testimony and convicted Cook.\textsuperscript{157}

The Court of Special Appeals reversed on appeal.\textsuperscript{158} The court noted that the expert testimony is admissible if the factfinder can receive appreciable help from the expert on the subject matter.\textsuperscript{159} The court observed that the jury had to determine whether Cook participated in the drug organization, and the officer’s opinion was not of appreciable help in making that judgment.\textsuperscript{160} The court reasoned that the jury would have been just as capable of concluding that Cook was the head of the conspiracy had the officer merely described how drug operations typically are conducted and in that case, would not have had its role in deciding guilt or innocence clouded by an expert witness, which was highly prejudicial to Cook.\textsuperscript{161}

3. The Court’s Reasoning.—In Young \textit{v.} State, the Court of Appeals of Maryland upheld unanimously the circuit court’s admission of evidence that the defendant was the source of a DNA sample and that the sample matched his DNA profile, even though the evidence was not accompanied by statistics showing the probability that the DNA match was random.\textsuperscript{162}

Judge Raker, writing for a unanimous Court of Appeals, acknowledged that under Armstead \textit{v.} State, evidence of a DNA match is inadmissible unless that evidence includes statistics that indicate the probability of the match being random.\textsuperscript{163} According to the court, it reached this holding in Armstead because without these statistics, a statement that two DNA profiles matched would be scientifically meaningless.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{154} \textit{Id.} at 135-36, 578 A.2d at 290.
\item \textsuperscript{155} \textit{Id.} at 136, 578 A.2d at 290.
\item \textsuperscript{156} \textit{Id.} at 139, 578 A.2d at 291.
\item \textsuperscript{157} \textit{Id.} at 126, 135, 578 A.2d at 285, 290.
\item \textsuperscript{158} \textit{Id.} at 144, 578 A.2d at 294.
\item \textsuperscript{159} \textit{Id.} at 138, 578 A.2d at 291.
\item \textsuperscript{160} \textit{Id.} at 139, 578 A.2d at 291.
\item \textsuperscript{161} \textit{Id.} at 139-40, 578 A.2d at 291-92.
\item \textsuperscript{162} Young, 388 Md. at 100, 879 A.2d at 44-45.
\item \textsuperscript{163} \textit{Id.} at 113 n.8, 879 A.2d at 52 n.8 (citing Armstead \textit{v.} State, 342 Md. 38, 673 A.2d 221 (1996)).
\item \textsuperscript{164} \textit{Id.}}
The court observed, however, that at the time of Armstead, experts could not explain to a jury the meaning of a DNA match by testifying that the sample came from a specific individual.\textsuperscript{165} Such a conclusion, the court observed, could only be stated with certainty if the DNA molecules were compared along their entire lengths.\textsuperscript{166} The DNA methods in use at the time of Armstead examined only a relatively small number of sites on the molecule, thus experts could not offer this evidence for the purpose of identifying the source of the DNA.\textsuperscript{167}

The court then observed that DNA analysis technology has advanced in the nine years since Armstead and that DNA examiners can now use the PCR-STR method, which is more precise and examines DNA molecules at more loci than previous methods.\textsuperscript{168} The court noted that a DNA match still cannot identify the source of the DNA sample with absolute certainty unless the expert examines the entire DNA molecule.\textsuperscript{169} The court, however, declared negligible the possibility that a thirteen-loci PCR-STR analysis could indicate that a DNA sample matched an individual’s profile when the sample did not in fact come from that individual (a random match).\textsuperscript{170}

In deciding whether to revisit Armstead, the court examined reports from the National Research Council (NRC) regarding source attribution and statistics.\textsuperscript{171} The court observed that the NRC’s 1992 report cautioned its experts to avoid stating that a DNA sample is unique.\textsuperscript{172} The court noted that in 1996, the NRC revised its position, concluding that a DNA profile “might be said to be unique if it is so rare that it becomes unreasonable to suppose that a second person in the population might have the same profile.”\textsuperscript{173} This conclusion made it clear, according to the court, that once the probability of random DNA matches becomes infinitesimal, no scientific basis exists for

\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id. at 110, 879 A.2d at 50.
\item \textsuperscript{167} Id. at 115, 879 A.2d at 53.
\item \textsuperscript{168} Id. at 113-14, 879 A.2d at 52.
\item \textsuperscript{169} Id. at 113, 879 A.2d at 52.
\item \textsuperscript{170} Id. (“Under certain circumstances, however, new technologies result in infinitesimal random match probabilities that would be deemed conclusive by all but mathematicians and philosophers.”).
\item \textsuperscript{171} Id. at 114-17, 879 A.2d at 53-55. The NRC is an association of leading scientists, the members of which are drawn from the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. Commonwealth v. Fowler, 685 N.E.2d 746, 748 n.6 (Mass. 1997).
\item \textsuperscript{172} Young, 388 Md. at 115, 879 A.2d at 53. According to the court, the NRC reached this conclusion because the then-prevailing methods of DNA analysis examined only a small number of loci. Id.
\item \textsuperscript{173} Id. at 115-16, 879 A.2d at 53-54 (quoting COMM. ON DNA FORENSIC SCIENCE, NAT’L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 136 (1996)).
\end{itemize}
requiring an expert to mention that probability when testifying as to a DNA match.174

The court observed that the NRC's shift of position prompted the Washington Supreme Court to revise its treatment of DNA match testimony.175 The Young court discussed State v. Cauthron, where the Washington Supreme Court held that experts could not testify to the uniqueness of a DNA sample and had to accompany their match testimony with statistics.176 The Court of Appeals noted that while the Washington court upheld the rule of Cauthron in State v. Buckner, it reconsidered its decision after the release of the 1996 NRC report and repudiated its earlier opinion.177

The court then concluded that DNA comparisons can now be performed with such precision that they result in extremely low probabilities of random matches.178 The court stated that a PCR-STR test that examines thirteen loci has such a low probability of producing a random match, even for related individuals, that the DNA may be characterized as unique.179 In this case, the court held, an expert may testify that a DNA match exists without contextual statistics.180 Instead of offering these statistics, the expert can explain to the jury that the match is one of a kind by declaring that the individual whose DNA matched the sample recovered at the crime scene was the source of that evidence.181 Because this is what the State's witness did at Young's trial, the court concluded that the circuit court properly admitted his testimony and report.182

The court also explained that the new standard does not render the defendant incapable of challenging an expert witness's source attribution testimony.183 The court declared that a defendant retains the right and opportunity to cross-examine the expert and attack her
The court also noted that a party seeking to introduce DNA evidence is required to provide data to the other party upon request. Finally, the court noted that a defendant may challenge the weight of DNA evidence by asking the expert about contamination and errors.

4. Analysis.—In Young v. State, the Court of Appeals held that where an expert uses a DNA analysis method that produces infinitesimal random match probabilities, the expert may testify to a match between a defendant’s DNA profile and a DNA sample without addressing the random match probability. Under these circumstances, the Young court held, the expert may also identify the defendant as the source of the DNA sample. In so holding, the court failed to provide a probability standard governing when random match statistics may be omitted, and this failure will unduly burden prosecutors and could impede future advances in DNA forensics. The court should have emulated other courts in setting forth a bright-line standard for when experts may forego providing random match statistics. The Young court also failed to state whether DNA experts may still provide random match statistics if they identify a defendant as the source of a DNA sample. Finally, the court failed to address whether DNA expert opinion testimony might encroach on the jury’s role as factfinder.

a. The Court Failed to Provide a Probability Standard Governing When Random Match Statistics May Be Omitted, and This Failure Will Unduly Burden Prosecutors and Could Impede Future Advances in DNA Forensics.—In Young v. State, the Court of Appeals did not expressly state how low a random match probability must be before experts may testify to a DNA match without addressing that probability. The court held that the expert in Young, Page, was not required to support his testimony with statistics, based largely on his use of a PCR-STR analysis along thirteen loci. The court observed that this method results in

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184. Id.
185. Id.
186. Id.
187. Id. at 100, 879 A.2d at 44-45.
188. Id.
189. See infra Part 4.a.
190. See infra Part 4.b.
191. See infra Part 4.c.
192. See infra Part 4.d.
193. Young, 388 Md. at 100, 879 A.2d at 44-45.
infinitesimal random match probabilities, yet did not state explicitly what it considered to be an “infinitesimal” probability.\footnote{194}

The court’s omission would pose fewer problems if it were clear from the circumstances of the case how low the probability of random match must be before an expert can omit this information from her DNA match testimony, but this information cannot be discerned from the opinion.\footnote{195} The random match probability resulting from the specific test Page performed in Young’s case might have answered that question, but this statistic was not available to the court.\footnote{196} The court could have implied an answer to this question by mentioning an estimate of the random probability that a PCR-STR match generally produces. However, the court referred to two widely divergent estimates of the random match probability that a PCR-STR comparison examining thirteen loci could produce.\footnote{197} Because the court did not define “infinitesimal,” and the meaning cannot be discerned from the case, courts in the future will not know when to insist that experts provide random match probability statistics testimony.\footnote{198}

Young could be interpreted to stand for the proposition that a particular method of DNA analysis—a PCR-STR comparison along thirteen loci—will result in infinitesimal random match probabilities.\footnote{199} However, this guidance will not apply whenever a DNA expert employs an alternative method of DNA comparison, which the Young court acknowledged was a possibility.\footnote{200} Additionally, by endorsing one particular means of DNA analysis, the Young court risks impeding

\footnote{194} Id.\footnote{195} The court pronounced the random match probability in Young’s case to be infinitesimal despite not even knowing what that probability was. It appears to have simply assumed that the probability was so low as to be infinitesimal.\footnote{196} See id. at 102, 879 A.2d at 46 (“Page did not testify to the probability that a random person’s profile would have matched the profile taken from the boy.”); see also id. at 103, 879 A.2d at 46 (“Page’s report contained no statistical data to support his conclusion . . . . Young did not ask Page any questions about statistics.”).\footnote{197} See id. at 122, 879 A.2d at 57-58 (noting that the thirteen STR loci selected by the FBI yield an average random match probability of one in 180 trillion, but also citing another source for the proposition that thirteen loci produce a one in one trillion random match probability).\footnote{198} The court declared that not all DNA analysis techniques produce infinitesimal random match probabilities, which means that matches produced by those methods would have to be accompanied by random match statistics. Id. at 112, 879 A.2d at 52. However, the court did not elaborate as to the circumstances under which the statistics would be required.\footnote{199} Id. at 122-23, 879 A.2d at 58.\footnote{200} Id. at 112, 879 A.2d at 52. Such a situation could arise where a DNA sample is so old or degraded that a PCR-STR comparison must be made at a number of loci fewer than thirteen, or where, as with State v. Bailey, 677 N.W.2d 380, 411 (Minn. 2004), some of the loci examined cannot be interpreted with the required level of precision.
scientific development. The *Armstead* court held that the statute permitting the admission of DNA evidence at criminal trials does not require any specific means of comparison, allowing experts to use the most advanced scientific methods available without the legislature having to change the law.\(^{201}\) To the extent that *Young* is read to imply that a particular method will always result in sufficiently infinitesimal random match probabilities, the State’s experts will have little incentive to adopt newer, more accurate DNA testing procedures.

The *Young* court’s assertion that a thirteen-loci PCR-STR comparison results in infinitesimal random match probabilities also fails to account for cases where the test produces an abnormally high random match probability. In a situation where a close relative of the defendant could have left the DNA sample, the likelihood of a random match can increase to 1 in 40,000.\(^{202}\) Additionally, in a case where there is other non-DNA evidence indicating that a defendant could not have left the DNA sample, a reasonable expert would adjust upward the probability that the DNA comparison produced a random match.\(^{203}\) Despite the *Young* court’s silence, defendants can argue forcefully that in such cases a thirteen-loci PCR-STR comparison does not produce infinitesimal random match probabilities within the meaning of *Young*\(^{204}\).

The *Young* court’s failure to define fully what it considered to be an infinitesimal random match probability will create uncertainty for prosecutors who must decide when to provide random match statistics along with DNA evidence. A prosecutor could offer expert testimony that two DNA samples matched following a thirteen-loci PCR-STR analysis, without providing statistics, presuming that this satisfies the *Young* standard.\(^{205}\) However, the defendant could then insist that, in her case, the DNA comparison resulted in an abnormally high random match probability that the *Young* court would not have considered infinitesimal. Prosecutors could err on the side of caution by providing statistics in every case, following the *Armstead* holding.\(^{206}\) However, that policy could unnecessarily expose the State to a variety of evidentiary challenges. The most common recent challenges to

\(^{201}\) *Armstead* v. State, 342 Md. 38, 81-82, 673 A.2d 221, 242-43 (1996).
\(^{202}\) *Young*, 388 Md. at 122, 879 A.2d at 58.
\(^{204}\) See *Young*, 388 Md. at 112, 879 A.2d at 52 (rejecting the State’s argument that all DNA comparisons result in infinitesimal random match probabilities).
\(^{205}\) See *id.* at 122, 879 A.2d at 58 (holding that when thirteen STR loci are used, the random match probability is generally low enough as to be designated unique).
\(^{206}\) See supra notes 90-102 and accompanying text.
DNA evidence are attacks on random match statistics. Defendants have asserted that the presentation of infinitesimally small probabilities is prejudicial and insisted that the experts can confuse juries into believing that random match statistics reflect the probability of guilt or innocence. The *Young* decision forces prosecutors to choose between providing random match statistics, thereby exposing their DNA evidence to one of these challenges, and omitting the statistics, which could run afoul of the court's new standard.

*b. The Court of Appeals Should Have Followed Other Courts in Adopting a Bright-Line Standard for When Experts May Omit Random Match Statistics.*—The Court of Appeals could have mitigated the confusion surrounding DNA evidence by creating a bright-line rule regarding when an expert may omit random match statistics. The court recognized that this was an option, as it noted that determining under what circumstances and with less than what probability a DNA profile could be deemed unique was a task for courts and legislatures, not scientists. Furthermore, the court noted that the FBI has a policy of permitting its experts to testify to a DNA match without offering statistics when the random match probability is less than 1 in 260 billion. Finally, the *Young* court cited *Buckner*, where the Washington Supreme Court suggested that wherever a random match probability was one in a number greater than the earth’s population, the DNA profile at issue could be deemed unique, and the defendant identified as the source of the relevant sample. This standard could apply regardless of how many loci are tested in a PCR-STR comparison and in situations where the PCR-STR method is not used.

There are three possible objections to setting forth a numerical standard, but they do not justify the court’s failure to provide a clear standard. First, the court’s task was complicated by the fact that the probability at issue in *Young* was not in evidence. However, that lack of information did not stop the court from asserting that the

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208. E.g., State v. Joon Kyu Kim, 398 N.W.2d 544, 547 (Minn. 1987).
209. E.g., United States v. Chischilly, 30 F.3d 1144, 1156 (9th Cir. 1994).
210. *Young*, 388 Md. at 114-17, 879 A.2d at 54-55.
211. *Id.* at 119, 879 A.2d at 56.
213. *See* 388 Md. at 102, 879 A.2d at 46 (“Page did not testify to the probability that a random person’s profile would have matched the profile taken from the boy.”); *see also id.* at 103, 879 A.2d at 46 (“Page’s report contained no statistical data to support his conclusion. . . . Young did not ask Page any questions about statistics.”).
probability was "exceedingly small." The court could have simply adopted one of its estimates of the average random match probability produced by the PCR-STR method as its definition of "infinitesimal." Second, one could argue that if the court explicitly specified a random match probability, above which experts could present match testimony without statistics, then the court would be subject to criticism for endorsing a particular method of presenting that probability.

The disputes over how to calculate random match statistics, however, have been resolved in favor of the product rule, which could be used to determine whether the random match probability in a given case satisfies the requisite standard.

Thirdly, Maryland appellate courts adhere to the doctrine of avoidance and will not decide any issue unless it plainly appears on the record to have been raised in or decided by the trial court. The Young court's failure to set a bright-line standard could be interpreted as adherence to avoidance principles, but Maryland courts have not followed these principles in their previous DNA evidence cases. For example, in Jackson v. State, the Court of Special Appeals held that Jackson waived his argument that DNA evidence had to be accompanied by random match statistics. However, the court nevertheless reached the substantive issue, declaring that the State could establish the reliability of its DNA testing method without presenting random match statistics. The Court of Appeals followed a similar course in Armstead, as the question before the court in that case was whether the trial court improperly admitted random match statistics. The court held that the statistics were admissible, but also went further by declaring that they would henceforth be a necessary component of DNA match evidence. Maryland's appellate courts, perhaps due to the complex and technical nature of DNA evidence, have fashioned rules for presenting DNA evidence that range beyond the issues raised in the particular cases, and the Court of Appeals should have followed this pattern in Young. Given the rapidly changing and highly techni-

214. Id. at 122, 879 A.2d at 57.
216. See id. at 72, 673 A.2d at 238 ("The debate over the product rule essentially ended in 1993, with the announcement in the scientific journal Nature that the 'DNA fingerprinting wars are over.'").
219. Id., 608 A.2d at 792-93.
221. Id. at 79, 673 A.2d at 241.
cal nature of DNA match evidence, *Young* should have followed *Jackson* and *Armstead* and offered trial courts more guidance even at the risk of resolving issues not presented to them.

c. *The Young Court Inappropriately Neglected to State Whether DNA Experts May Still Provide Random Match Statistics If They Identify a Defendant as the Source of a DNA Sample.*—The *Young* court also declined to state whether the State may attribute a DNA sample to a defendant and still provide random match statistics. In *Armstead*, the Court of Appeals rejected a defendant’s challenge to the admission of random match statistics. But that holding was based on the assumption that a DNA match would be meaningless without the statistics. Most jurisdictions have held that the vital role played by random match statistics—providing the meaning of a DNA match—warrant their inclusion despite the prejudice they could cause defendants.

Under *Young*, source attribution testimony fills the role previously held by random match statistics; an expert may provide the meaning of a DNA match by identifying a defendant as the source of a DNA sample, sharply reducing the relevance of the statistics. When this reduced relevance is weighed against the random match statistics’ undiminished potential to prejudice defendants, it is unclear whether courts should permit prosecutors to present both source attribution testimony and random match statistics or force them to choose between one or the other.

d. *The Court of Appeals Failed to Address Whether DNA Expert Opinion Testimony Might Encroach on the Jury’s Role as Factfinder.*—The *Young* court modified how experts may present DNA evidence at criminal trials without examining how this new standard affects the jury’s role as factfinder. The court declared that an expert witness may offer her opinion that a DNA sample recovered from a crime scene came from a particular defendant, provided she finds a match between the two DNA profiles after employing a method that results in infinitesimal random match probabilities. At trial, Young’s counsel objected to this form of testimony on the basis that permitting the State’s expert to opine that the crime scene DNA sample came from Young

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222. *Id.*
223. *Id.* at 78, 673 A.2d at 241.
225. *Young*, 388 Md. at 119-20, 879 A.2d at 56.
226. *Id.* at 100, 879 A.2d at 44-45.
would invade the province of the jury.\textsuperscript{227} Young’s counsel argued that the jury should have the chance to discern the significance of the DNA match from the statistical information, yet the Court of Appeals did not address this argument.\textsuperscript{228} Maryland case law provides a basis for this argument, as under the standard set forth in \textit{Yudkin}, expert opinion testimony may be inadmissible where it invades the province of the factfinder to resolve contested issues.\textsuperscript{229} However, the \textit{Young} court did not refer to these precedents. The court’s failure to address Young’s concerns over the role of expert opinion testimony leaves defendants free to raise these concerns, and the court provided scant guidance as to how to resolve them.

In assessing whether expert opinion testimony encroaches on the factfinder’s role, cases since \textit{Yudkin} have placed great weight on the consideration of whether the jury could reach the expert’s conclusion on its own, based on the facts offered by the expert, or whether the testimony concerns technical expertise so complicated that the jury needs the expert’s opinion to render a judgment on the issue in question.\textsuperscript{230} The Court of Special Appeals’s decision in \textit{Braxton} suggests that courts in the future will permit source attribution testimony; the \textit{Braxton} court permitted an expert to offer his conclusion relating to the definition of a handgun because it involved a complicated topic.\textsuperscript{231} DNA comparisons, especially random match statistics, are similarly difficult for jurors to understand.\textsuperscript{232}

However, that an expert testifies about a complex subject does not automatically render his opinions admissible. The Court of Special Appeals in \textit{Cook v. State} held that it was error to admit an expert’s conclusions with respect to how a cocaine distribution organization was conducted.\textsuperscript{233} The \textit{Cook} court found that the State’s expert could have conveyed the same information to the jury in a less prejudicial and suggestive manner.\textsuperscript{234} Similarly, under \textit{Armstead}, experts can explain the meaning of a DNA match by testifying to the match and

\begin{itemize}
\item \textsuperscript{227} Petitioner’s Brief at 11, \textit{Young}, 388 Md. 99, 879 A.2d 44 (No. 99).
\item \textsuperscript{228} Id. at 10.
\item \textsuperscript{230} See, e.g., Harper v. Higgs, 225 Md. 24, 38, 168 A.2d 661, 667 (1961). \textit{But see} \textit{LYNN McLAIN, MARYLAND EVIDENCE} § 702.1 (1987) (noting that for expert opinion to be admissible in Maryland, a juror need not find an expert witness’s area of expertise so difficult that he cannot comprehend the particular issue without the expert’s assistance).
\item \textsuperscript{231} \textit{Braxton}, 123 Md. App. at 652, 720 A.2d at 55.
\item \textsuperscript{233} 84 Md. App. 122, 139-40, 578 A.2d 283, 291-92 (1990).
\item \textsuperscript{234} \textit{Id.} at 139-40, 578 A.2d at 291-92.
\end{itemize}
offering random match statistics, a method that allows the jury to conclude for itself whether the DNA sample in question came from the individual whose profile it matched. Cook thereby suggests that to be held admissible, source attribution testimony must not merely be of appreciable help, but must provide more help to the jury than the Armstead method of presenting DNA evidence.

The Young court hinted that source attribution testimony is the superior method, by referring to an NRC report that endorsed source attribution testimony as a simpler means of presenting DNA evidence than providing random match statistics. However, the Young court did not explicitly agree with the NRC’s judgment or otherwise state a preference for one method of presenting DNA evidence over the other. In fact, by declaring that DNA testing now produces random match probabilities that would be considered “conclusive” by everyone except mathematicians and philosophers, the court suggested that lay jurors can decide on their own that a DNA sample came from an individual based on testimony of a DNA match and an extremely low random match probability.

A prosecutor could argue that the Young court meant to exclude all subsequent defense challenges to source attribution testimony, including claims that it intrudes on the jury’s role as factfinder, by endorsing the use of source attribution testimony in Young’s case. However, a defendant could respond that under Bohnert v. State, source attribution is inadmissible wherever it requires the DNA expert to resolve contested facts. In Bohnert, the court held that an expert invaded the province of the jury by declaring that the State’s witness was credible and the defendant was not. Young, unlike Bohnert, did not attempt to refute the conclusion of the State’s expert in his case; although Young’s counsel argued that the State’s expert could not present testimony of a DNA match without statistics, Young’s counsel did not attack the reliability of the PCR-STR test or otherwise challenge the conclusion that Young was the source of the DNA sam-

236. See Petitioner’s Brief at 11-12, Young, 388 Md. 99, 879 A.2d 44 (including the objection of Young’s counsel at trial that it is the jury’s province to make conclusions with respect to a DNA match).
237. Young, 388 Md. at 116, 879 A.2d at 54; see Comm. on DNA Forensic Science, Nat’l Research Council, DNA Technology in Forensic Science 194-95 (1992) (“Opinion testimony about uniqueness would simplify the presentation of evidence by dispensing with specific estimates of population frequencies or probabilities.”).
238. Young, 388 Md. at 113, 879 A.2d at 52.
239. 312 Md. 266, 279, 539 A.2d 657, 663 (1988).
240. Id. at 278-79, 539 A.2d at 663.
However, where a defendant does present evidence that she did not leave her DNA at a crime scene, the State’s DNA expert can conclude that she was the source of the DNA only by resolving contested facts, which is impermissible under Bohnert. The Young court could have preempted disputes over this question by the simple expedient of declaring that source attribution does not intrude on the factfinding role of the jury.

5. Conclusion.—The Court of Appeals left unresolved three key issues in reaching its holding. First, by failing to specify a numerical benchmark for when a random match probability can be considered infinitesimal, the court left the door open for defendants to challenge an expert witness’s omission of the random match probability. This uncertainty forces prosecutors to choose between omitting the statistics, and taking the risk that the defense will challenge this omission, and offering the statistics and confronting the possibility of defense challenges to their admission. Second, the court failed to state whether experts may attribute a DNA sample to a defendant and also provide random match statistics. Finally, the court did not explain whether an expert who testifies that a defendant was the source of a DNA sample impermissibly encroaches on the jury’s role as factfinder, permitting defendants to challenge source attribution testimony on this basis.

JOHN J. LOVEJOY

242. Bohnert, 312 Md. at 279, 539 A.2d at 663. The defendant could attack the expert’s conclusion either by criticizing the DNA comparison procedures used by the expert, or by presenting non-DNA evidence that suggests he was not the culprit.
243. See supra notes 193-204 and accompanying text.
244. See supra Part 4.a.
245. See supra Part 4.b.
246. See supra Part 4.c.
247. See supra Part 4.d.
B. An Unexplained Exception to the Admissibility of Pre-Arrest Silence

In Weitzel v. State, the Court of Appeals of Maryland considered whether pre-arrest silence in the presence of a police officer could be offered in evidence as a tacit admission of guilt. The court held that such evidence was inadmissible as substantive evidence of guilt. The court failed to explain or justify the necessity of an exception to the tacit admission rule, left little guidance for future application of the prerequisite analysis, and missed an opportunity to eliminate all tacit admissions as substantive evidence of guilt.

1. The Case.—On March 17, 2002, Baltimore County police responded to a 911 call at the Holabird East Apartments, where they found Darla Effland laying at the bottom of a stairwell unconscious and injured. At the scene were Thomas Crabtree and Mark Weitzel. Officer Frederick Johnson arrested Weitzel after an on-scene investigation.

Weitzel was indicted for attempted murder and first-degree assault. The State intended to present evidence at trial of a "tacit admission" when Weitzel remained silent after hearing Crabtree tell Officer Johnson that Weitzel pushed Effland down the stairs. Weitzel filed a motion in limine to prohibit the State from offering such evidence.

At the hearing on the motion, Crabtree testified that he punched Weitzel repeatedly in the face ten minutes before Officer Johnson arrived on the scene. Crabtree also testified that Weitzel had been smoking cocaine and drinking vodka earlier that day. Crabtree went

2. A tacit admission occurs when one faces an accusation that, if untrue, would naturally call for a denial. See id. at 453, 863 A.2d at 1000.
3. Id. at 461, 863 A.2d at 1005. Pre-arrest silence is the common term for when an individual does not speak before being arrested or read his Miranda rights. Id. at 455, 862 A.2d at 1001.
4. See infra Part 4.a.
5. See infra Part 4.b.
6. See infra Part 4.c.
7. Weitzel, 384 Md. at 453, 863 A.2d at 1000.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
on to state that during questioning by Officer Johnson, Crabtree pointed at Weitzel—who stood four feet away and appeared conscious—and told Officer Johnson that Weitzel pushed Effland down the stairs.\textsuperscript{15}

Officer Johnson corroborated Crabtree's story that Johnson questioned Crabtree in the presence of Weitzel and that Weitzel appeared conscious, cognizant, and not intoxicated.\textsuperscript{16} When Officer Johnson told Weitzel that he was being arrested for assaulting Effland, Weitzel remained silent but followed Officer Johnson's command to stand up, turn around, and be handcuffed.\textsuperscript{17} At the police station, Weitzel answered some general questions but remained silent when Officer Johnson asked if he comprehended the \textit{Miranda} warning.\textsuperscript{18}

The Circuit Court for Baltimore County denied Weitzel's motion in limine, finding him to be alert and aware at the time of the incident.\textsuperscript{19} At trial, the State presented Weitzel's pre-arrest silence as a tacit admission, to which Weitzel objected.\textsuperscript{20} Weitzel was subsequently convicted of second-degree assault and sentenced to ten years in prison.\textsuperscript{21} The Court of Special Appeals affirmed the judgment in an unreported opinion.\textsuperscript{22}

The Court of Appeals of Maryland granted Weitzel's petition for certiorari to consider, inter alia, (1) whether police presence—together with a defendant who has recently engaged in an illegal activity separate from the subject of the police investigation—renders the pre-arrest silence too ambiguous to be admissible, and (2) whether police presence—together with a defendant who is possibly mentally impaired—renders pre-arrest silence too ambiguous to be admissible.\textsuperscript{23}

2. \textit{Legal Background}.—There is no national consensus concerning the admissibility of pre-arrest silence as substantive evidence of guilt. Although the Supreme Court's jurisprudence on evidence of silence has evolved, it has not addressed whether pre-arrest evidence offered as substantive evidence of guilt is a constitutional violation.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.} at 453-54, 863 A.2d at 1000.
\item \textsuperscript{17} \textit{Id.} at 454, 863 A.2d at 1000.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}, 868 A.2d at 1000-01.
\item \textsuperscript{23} \textit{Id.} at 454-55, 862 A.2d at 1001. The court also considered whether the circuit court abused its discretion in allowing evidence of Weitzel's pre-arrest silence as a tacit admission when there were other explanations for the silence. \textit{Id.}
\item \textsuperscript{24} \textit{See infra} Part 2.a.
\end{itemize}
Maryland has a long history of admitting evidence of pre-arrest silence as a tacit admission, if there was an accusation that was heard, understood, and if untrue, would naturally call for a reply.\textsuperscript{25} The rules for admissibility of pre-arrest silence significantly vary across the federal courts\textsuperscript{26} and from state to state.\textsuperscript{27}

\textit{a. The Admissibility of Silence at the Supreme Court.}—The Supreme Court has yet to rule on the constitutionality of pre-arrest silence offered as substantive evidence of guilt. The Court's jurisprudence dealing with evidence of silence has evolved over the last century and has overwhelmingly involved post-arrest silence. More recently the Court has ruled that the admission of silence after an arrest and a \textit{Miranda} warning is unconstitutional, regardless of whether the evidence of silence is offered for impeachment or as substantive evidence of guilt.\textsuperscript{28} The Court has also held that silence occurring post-arrest but prior to a \textit{Miranda} warning can be used for impeachment and does not violate due process.\textsuperscript{29} The Court has only addressed pre-arrest silence as it relates to credibility and has allowed such evidence for the limited purpose of impeachment.\textsuperscript{30}

The Fifth Amendment to the U.S. Constitution guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."\textsuperscript{31} The Supreme Court narrowly interpreted this right in \textit{Raffel v. United States},\textsuperscript{32} holding that the right against self-incrimination can be waived by voluntarily taking the stand. The Court upheld the prosecutor's cross-examination of Raffel on his decision not to testify in an earlier trial, as it related to his credibility.\textsuperscript{33} The Court noted that the waiver of immunity is not partial, and that once a defendant offers himself as a witness, he is subject to cross-examination and impeachment of credibility through his prior silence.\textsuperscript{34}

In \textit{Griffin v. California},\textsuperscript{35} the Supreme Court extended to the states the prohibition against commenting on a defendant's decision to remain silent and not testify. After a jury trial in which Griffin did not take the stand, the prosecutor highlighted his failure to deny or

\begin{itemize}
  \item \textsuperscript{25} See infra Part 2.b.
  \item \textsuperscript{26} See infra Part 2.c.
  \item \textsuperscript{27} See infra Part 2.d.
  \item Doyle v. Ohio, 426 U.S. 610, 611 (1976).
  \item U.S. Const. amend. V.
  \item 271 U.S. 494 (1926).
  \item Id. at 496-97.
  \item Id. at 497.
  \item 380 U.S. 609 (1965).
\end{itemize}
explain the circumstances surrounding his involvement with the victim.\textsuperscript{36} The jury was instructed that it may consider Griffin’s failure to deny or explain facts within his knowledge when evaluating the truthfulness of such facts.\textsuperscript{37} The Supreme Court reversed the murder conviction, holding that a prosecutor could not comment on a defendant’s decision not to testify and that the jury could not be instructed that silence evinced guilt.\textsuperscript{38} The Court reasoned that the standards of the Fifth Amendment’s Self-Incrimination Clause should extend to the states through the Fourteenth Amendment, and any comment at federal or state court regarding a defendant’s silence should be unconstitutional.\textsuperscript{39}

One year later in the landmark decision of \textit{Miranda v. Arizona},\textsuperscript{40} the Supreme Court expanded the application of the Fifth Amendment outside of the courtroom. \textit{Miranda} consisted of four separate cases where each defendant was taken into police custody and interrogated without being advised of his constitutional rights.\textsuperscript{41} All of the defendants made admissions that were used at trial, and all were ultimately convicted.\textsuperscript{42} The Court held that a defendant must be fully informed to properly exercise his constitutional rights and established that law enforcement officials prior to an interrogation must advise the person in custody of the right to remain silent.\textsuperscript{43} The Court clarified that its ruling did not apply to general fact-finding or to on-scene questioning related to a criminal investigation because the person questioned is not in custody or under arrest and therefore not subject to these inherent compelling pressures found in an interrogation.\textsuperscript{44}

In an expansion of \textit{Raffel} and consistent with \textit{Miranda}, the Supreme Court in \textit{United States v. Hale}\textsuperscript{45} held that a defendant who exercises the right to remain silent during an interrogation cannot be cross-examined about his silence despite later taking the stand in his own defense. The Court found inadmissible evidence of the defendant’s silence at the time of his arrest because it lacked significant probative value and was substantially prejudicial.\textsuperscript{46} The Court noted

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} at 610-11.
\item \textsuperscript{37} \textit{Id.} at 609-10.
\item \textsuperscript{38} \textit{Id.} at 615.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} 384 U.S. 436 (1966).
\item \textsuperscript{41} \textit{Id.} at 445.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 467-68.
\item \textsuperscript{44} \textit{Id.} at 477-78.
\item \textsuperscript{45} 422 U.S. 171 (1975).
\item \textsuperscript{46} \textit{Id.} at 180. Because the Court ruled on evidentiary grounds, it did not reach the constitutional claims. \textit{Id.} at 175 n.4.
\end{itemize}
that a court must first determine if the two statements being used for impeachment purposes are actually inconsistent. Because a defendant in custody has been informed of the right to remain silent, his motivation for remaining silent is not necessarily inconsistent with his later reason for testifying. The Court distinguished Raffel by comparing the possible inconsistency in Hale of remaining silent in custody and then later testifying at trial, with the clear inconsistency in Raffel of remaining silent at an initial trial and then later testifying at the subsequent trial. The Court also noted the potential probative value of silence specifically in the face of an accusation because “it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.”

One year later in Doyle v. Ohio, the Court expanded Hale and held that admitting post-arrest silence following the Miranda warning for any purpose violates due process. The prosecutor in Doyle attempted to impeach the credibility of Doyle, who offered an explanation for his actions while on the stand but had remained silent at the time of his arrest. The Court explained that allowing evidence of silence that occurred after the Miranda warning was a violation of due process under the Fourteenth Amendment, even if the prosecutor’s questions were meant to impeach the credibility of a witness and not to imply that the silence was substantive evidence of guilt.

However, the Supreme Court’s rationale from Doyle has been qualified. In Fletcher v. Weir, the Court held that silence occurring post-arrest but prior to the Miranda warning can be used for impeachment and does not violate due process. The Court in Fletcher reasoned that because the police had not yet given Fletcher the Miranda warning, Fletcher’s silence was not induced by the government and such evidence would not invoke the fundamental unfairness present in Doyle.

The Supreme Court also found no violation of due process when pre-arrest silence was used to impeach a defendant who took the stand. In Jenkins v. Anderson, the Court reasoned that Jenkins’s deci-
sion to testify constituted a waiver of the Fifth Amendment right to remain silent. The Court distinguished *Doyle* because the defendant's silence in *Jenkins* occurred before being taken into custody and informed of his *Miranda* rights.\(^{57}\) The fundamental unfairness and ambiguity discussed in *Doyle* was not present when the silence occurred prior to an arrest.\(^{58}\) The Court also noted that any lack of probative value of pre-arrest silence was a question of state evidentiary law\(^{59}\) and that "[e]ach jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."\(^{60}\)

\textit{b. The Admissibility of Pre-Arrest Silence in Maryland.}\textemdash The Court of Appeals of Maryland has generally prohibited the use of pre-arrest silence as substantive evidence of guilt because such evidence is too ambiguous to be probative.\(^{61}\) One narrow exception where pre-arrest silence may be deemed probative and admissible as substantive evidence of guilt is in the limited circumstances of a tacit admission.\(^{62}\) A tacit admission arises when a person makes a statement in the presence of a party that, if untrue, the party would naturally be expected to explain or deny but remains silent.\(^{63}\) The failure to explain or deny the statement can be offered as evidence of the party's belief in the statement.\(^{64}\)

Maryland has a long history of allowing tacit admissions by a defendant as an exception to the hearsay rule under Maryland Rule 5-803(a)(2).\(^{65}\) In *Kelly v. State*,\(^{66}\) the Court of Appeals in a bastardy proceeding against Watson Kelly allowed evidence that Kelly's father promised the baby's mother, in Kelly's presence, to do everything to help the mother's family, including making weekly child support payments. The court reasoned that Kelly would have protested his fa-

\begin{itemize}
  \item\(^{57}\) Id. at 240.
  \item\(^{58}\) Id.
  \item\(^{59}\) Id. at 239 n.5.
  \item\(^{60}\) Id. at 240. Justice Stevens's concurring opinion made explicit that a decision to remain silent does not implicate the Fifth Amendment when there is no official compulsion to speak. Id. at 241 (Stevens, J., concurring).
  \item\(^{62}\) Id. at 254, 718 A.2d at 217.
  \item\(^{63}\) Ewell v. State, 228 Md. 615, 618, 180 A.2d 857, 859 (1962).
  \item\(^{64}\) Id.
  \item\(^{65}\) See Key-El v. State, 349 Md. 811, 816, 709 A.2d 1305, 1307 (1998) (outlining the history of tacit admissions in Maryland). Maryland Rule 5-803(a)(2) creates an exception to the hearsay rule by making admissible "[a] statement that is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth." Md. R. 5-803.
  \item\(^{66}\) 151 Md. 87, 133 A. 899 (1926).
\end{itemize}
ther's promises if he was not the baby's father, citing the maxim *qui tacet consentire videtur:* a party that is silent appears to consent. In *Zink v. Zink,* the Court of Appeals restricted the admissibility of pre-arrest silence and held that remaining silent can signify the adoption of another person's statement only when there is no other equally consistent explanation for the silence. Evidence was presented that Zink had been accused by his wife, in his niece's presence, of not living together as man and wife. The court ruled that such evidence was not sufficient to infer that Zink adopted the statement as true because a husband and wife do not normally discuss their intimate relationship in the presence of a third party.

However, the presence of a third party does not automatically render pre-arrest silence inadmissible. In *Ewell v. State,* evidence was offered at trial that someone with Ewell stated "we just yoked a man," and Ewell did not deny the assertion. The Court of Appeals upheld Ewell's conviction for robbery and first degree murder, stating that when one is accused of a crime that he did not commit, it is more natural to deny it, even in the presence of friends and the commission of crime is a common occurrence. Consistent with the rationale in *Zink,* the court explained that because there was no reason for Ewell to remain silent—such as fear, intoxication, or the presence of a stranger—it would have been natural to reply under the circumstances.

In *Williams v. State,* the Court of Special Appeals expanded the limits of admissibility to allow evidence of pre-arrest silence occurring in the presence of a third party who is a police officer. Evidence was admitted at trial that Williams had stood silent while a woman told a police officer that she was on the street buying a skirt from Williams. The court upheld Williams's conviction for peddling without a license, reasoning that the admissibility of the evidence depended on whether the statement was one that the defendant would naturally be expected to deny. The court noted that the defendant was not in

67. *Id.* at 97, 133 A. at 903.
69. 215 Md. 197, 137 A.2d 139 (1957).
70. *Id.* at 202, 137 A.2d at 142.
71. *Id.* at 203, 137 A.2d at 143.
72. 228 Md. 615, 180 A.2d 857 (1962).
73. *Id.* at 617, 180 A.2d at 859.
74. *Id.* at 620-21, 180 A.2d at 861.
75. *Id.*
77. *Id.* at 347, 242 A.2d at 816.
78. *Id.* at 348 & n.6, 242 A.2d at 816-17 & n.6.
custody at the time the statement was made and found nothing exceptional about the police officer's mere presence.79

In Henry v. State,80 the Court of Appeals outlined a series of prerequisites necessary to qualify silence as a tacit admission:

(1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's position, who disagreed with the statement, would have voiced that disagreement. The party must have had first-hand knowledge of the matter addressed in the statement.81

This analysis for admitting evidence of pre-arrest silence was applied in Key-El v. State,82 where the presence of a police officer was considered as part of the court's evaluation of the prerequisites, but did not automatically render the evidence of silence inadmissible as a violation of the Fifth Amendment.83 Key-El had been accused of assault by his wife in the presence of a police officer prior to being arrested.84 In upholding the admission of the pre-arrest silence, the court noted that Key-El was not in custody or being interrogated, had not been given the Miranda warning, and had every opportunity to reply to his wife's accusation.85 Because Key-El was under no official compulsion to remain silent or to speak, the evidence had some probative value and did not violate his constitutional rights.86

Less than a year later, in Grier v. State,87 the Court of Appeals declined to expand the admissibility of pre-arrest silence absent an accusation. The prosecution offered evidence of Grier's guilt when he left the scene of a robbery while being followed by a police officer.88 The Court of Appeals reversed the conviction, reasoning that

79. Id.
81. Id. at 241-42, 596 A.2d at 1043 (quoting 6 L. McLAIN, MARYLAND EVIDENCE § 801(4) (1987)). In Henry, the Court of Appeals affirmed the murder conviction of Ian Henry, who had laughed and cheered as his co-conspirators recalled how the victim pleaded for his life. Id. at 240-42, 596 A.2d at 1042-43. The court reasoned that Henry went beyond a tacit admission and had adopted the statements through his clear approval. Id. at 242, 596 A.2d at 1043.
83. Id. at 824-25, 709 A.2d at 1311.
84. Id. at 813-14, 709 A.2d at 1306.
85. Id. at 818, 709 A.2d at 1308.
86. Id. at 824-25, 709 A.2d at 1311.
88. Id. at 253 n.2, 718 A.2d at 217 n.2.
there is no affirmative duty to approach the police and that without an accusation, evidence of silence would lack probative value.\textsuperscript{89}

c. The Admissibility of Pre-Arrest Silence in Federal Court.—Federal courts are split on the admissibility of pre-arrest silence as substantive evidence of guilt. The First, Sixth, Seventh, and Tenth Circuits have all held that a defendant’s pre-arrest, pre-\textit{Miranda} silence is inadmissible as evidence of guilt.\textsuperscript{90} However, the Fifth, Ninth, and Eleventh Circuits have found admissible the same evidence.\textsuperscript{91}

In \textit{Coppola v. Powell},\textsuperscript{92} the First Circuit overturned Coppola’s conviction for rape, reasoning that he had relied on the \textit{Miranda} rights guaranteed to a defendant despite not being arrested or Mirandized. Coppola was questioned by police as part of a rape investigation.\textsuperscript{93} When asked if he would answer questions, Coppola stated that he was no country boy but grew up on the streets, that the police were crazy if they thought he was going to confess, and that he wanted to speak with a lawyer.\textsuperscript{94} Because Coppola had relied on the \textit{Miranda} rights, the First Circuit held that it was unconstitutional for the prosecution to comment on his pre-arrest silence.\textsuperscript{95}

In \textit{Combs v. Coyle},\textsuperscript{96} the Court of Appeals for the Sixth Circuit reasoned that the potential for incriminating evidence existed in both the pre- and post-arrest setting, necessitating the availability of the privilege against self-incrimination in either circumstance. A police officer approached Combs after a shooting and asked him what happened, to which Combs replied that the officer could talk to Combs’s lawyer.\textsuperscript{97} In overturning Combs’s murder conviction, the court reasoned that it would eviscerate the privilege against self-incrimination if a distinction could be drawn between silence occurring before and after an arrest.\textsuperscript{98}

The Seventh Circuit in \textit{United States ex rel. Savory v. Lane}\textsuperscript{99} found that the right to remain silent exists prior to formal charges and attaches during a preliminary investigation. The police wanted to interview Lane during a murder investigation, but Lane stated that he did

\begin{itemize}
  \item\textsuperscript{89} \textit{Id.} at 254, 718 A.2d at 218.
  \item\textsuperscript{90} \textit{See infra} notes 92-106 and accompanying text.
  \item\textsuperscript{91} \textit{See infra} notes 107-119 and accompanying text.
  \item\textsuperscript{92} 878 F.2d 1562 (1st Cir. 1989).
  \item\textsuperscript{93} \textit{Id.} at 1563.
  \item\textsuperscript{94} \textit{Id.}
  \item\textsuperscript{95} \textit{Id.}
  \item\textsuperscript{96} 205 F.3d 269 (6th Cir. 2000).
  \item\textsuperscript{97} \textit{Id.} at 278-79.
  \item\textsuperscript{98} \textit{Id.} at 285.
  \item\textsuperscript{99} 832 F.2d 1011 (7th Cir. 1987).
\end{itemize}
not want to talk or make any statements. The Seventh Circuit explained that Griffin, and not Jenkins, applied because Lane did not take the stand. The court reasoned that comment by the prosecution on Lane's pre-arrest silence would be analogous to the comment prohibited by Griffin on a defendant's decision not to testify.

In United States v. Burson, the Tenth Circuit found it impermissible to comment on a defendant's decision to remain silent. In Burson, Internal Revenue Service agents tried to interview Burson about financial dealings with a business associate. Burson refused to cooperate with their investigation or answer any questions, instead recording the conversation and asking the agents about their authority. The Tenth Circuit found that it was irrelevant that Burson was not in custody or given the Miranda warning, reasoning that Burson invoked the privilege because he was aware that the questions were part of a criminal investigation and refused to give any answers.

In contrast, the Court of Appeals for the Fifth Circuit in United States v. Zanabria held that the Fifth Amendment does not prohibit a prosecutor from commenting on any circumstances of a defendant's incriminating pre-arrest silence. Zanabria had been arrested for having cocaine in his luggage. While the defense presented a duress defense and Zanabria did not take the stand, Zanabria's wife testified that he had smuggled the drugs to raise money to pay off a loan shark who was threatening his daughter. The prosecution presented a customs agent who testified that Zanabria never mentioned the threats against his daughter. The Fifth Circuit reasoned that the Fifth Amendment was not violated because the silence had not been induced by any action of a government agent.

Similarly, in United States v. Oplinger, the Court of Appeals for the Ninth Circuit held that the privilege against self-incrimination does not apply to a citizen who remains silent and is not under any

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100. Id. at 1015.
101. Id. at 1017.
102. Id.
103. 952 F.2d 1196 (10th Cir. 1991).
104. Id. at 1200.
105. Id.
106. Id. at 1200-01.
107. 74 F.3d 590 (5th Cir. 1996).
108. Id. at 592.
109. Id.
110. Id. at 593.
111. Id.
112. 150 F.3d 1061 (9th Cir. 1998).
official compulsion to speak. Oplinger was the supply coordinator at a bank and was accused by his supervisor of over-purchasing supplies and then keeping the cash refunds. Oplinger did not respond after being informed that the FBI would be notified about the fraudulent activity. The Ninth Circuit upheld Oplinger's conviction for bank fraud, reasoning that Oplinger's silence was not protected by the Fifth Amendment because he was under no official compulsion to remain silent.

In *United States v. Rivera*, the Eleventh Circuit found no error when a prosecutor commented on the defendant's silence before the defendant was arrested or received a *Miranda* warning. Customs agents testified at trial about Rivera's failure to respond to interview questions at Miami International Airport and his lack of a reaction after cocaine was found in his suitcase. The Eleventh Circuit cited *Jenkins* in finding that the government may comment on a defendant's silence if the silence occurs prior to an arrest and the *Miranda* warning.

d. The Admissibility of Pre-Arrest Silence in State Court.—State courts are also split on the admissibility of pre-arrest silence as substantive evidence of guilt. Some have found pre-arrest silence inadmissible because the probative value, if any, is outweighed by prejudice to the defendant. In *People v. DeGeorge*, the Court of Appeals of New York noted that silence is not necessarily consistent with guilt because of the many explanations for not speaking, including an awareness of one's *Miranda* rights or a distrust of the police. Some courts, such as the Alabama Supreme Court in *Ex parte Marek*, have abolished the tacit admission rule because there are many reasons that one might remain silent in response to an accusation.

Alternatively, other state courts have ruled that pre-arrest silence can be admissible and does not implicate the Fifth Amendment. The
Supreme Court of Missouri in *State v. Kinder*\(^{124}\) noted that evidence of silence is generally admissible as long as the silence occurred before the defendant was in custody.\(^{125}\)

3. The Court's Reasoning.—In *Weitzel v. State*, the Court of Appeals of Maryland overruled the recent decision in *Key-El v. State* and held that pre-arrest silence of a defendant in the presence of a police officer is too ambiguous to be probative and therefore is inadmissible as evidence of guilt.\(^{126}\) Because the court could not conclude beyond a reasonable doubt that admitting evidence of Weitzel's silence was harmless, it reversed the decision and remanded for a new trial.\(^{127}\)

Writing for the majority, Judge Raker\(^{128}\) noted the split in authority in both federal and state courts as to whether pre-arrest silence of a defendant in the presence of a police officer can be used as an admission of guilt.\(^{129}\) The court observed that a majority of the federal courts have held that such evidence is inadmissible as part of the government's case-in-chief.\(^{130}\) The court also noted that since the 1998 decision in *Key-El*, more courts across the country have found evidence of pre-arrest silence inadmissible, either as a violation of the Fifth Amendment or because such evidence is too ambiguous to be probative.\(^{131}\)

The majority noted the Supreme Court's recognition of the ambiguity and lack of probative value of a defendant's post-*Miranda* silence during a police interrogation, as the silence could be the result of reliance on the right to remain silent, intimidation, confusion, incomprehension, or fear.\(^{132}\) The court also acknowledged Supreme Court precedent finding some probative value in silence as a response to an accusation because the accused will likely deny a false accusation.\(^{133}\) Judge Raker concluded by mentioning the influence of the media on the public, including the familiarity of the *Miranda* warning and the

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124. 942 S.W.2d 313 (Mo. 1996).
125. *Id.* at 326; *accord* *State v. Leecan*, 504 A.2d 480 (Conn. 1986); *State v. Helgeson*, 303 N.W.2d 342 (N.D. 1981).
126. *Weitzel*, 384 Md. at 461, 863 A.2d at 1005. The court did not reach the issue of whether admitting evidence of pre-arrest silence would violate the privilege against self-incrimination under the Fifth Amendment. *Id.* at 456-57 n.2, 863 A.2d at 1002 n.2.
127. *Id.* at 462, 863 A.2d at 1005.
128. Judge Raker was joined by Chief Judge Bell and Judges Wilner, Harrell, and Greene. *See id.* at 452, 463, 863 A.2d at 1000, 1006.
129. *Id.* at 456, 863 A.2d at 1001-02.
130. *Id.*
131. *Id.*, 863 A.2d at 1002.
132. *Id.* at 457-58, 863 A.2d at 1002-03.
133. *Id.*
notion that any statement made in police presence can and will be used against an arrestee in a court of law.\textsuperscript{134}

Judge Battaglia, in a dissent joined by Judge Cathell, reasoned that the judgment of the Court of Special Appeals should be affirmed and the recent decision in \textit{Key-El} should not be overruled.\textsuperscript{135} The dissent noted that while the majority relied on \textit{United States v. Hale} as establishing that a defendant's silence was ambiguous and lacked probative value, \textit{Hale}—unlike \textit{Weitzel}—involved in-custody interrogation of a defendant who had been informed of his \textit{Miranda} rights.\textsuperscript{136} Further, the dissent pointed out that \textit{Hale} was already considered when \textit{Key-El} was decided in 1998.\textsuperscript{137} The dissent also noted that many courts have found probative value in evidence of pre-arrest silence and that such evidence is only one piece of all evidence presented in a trial.\textsuperscript{138}

Judge Battaglia concluded by indicating that the majority ignored the probative value of pre-arrest silence recognized by the \textit{Key-El} court only six years earlier and failed to decide whether Weitzel's silence was properly admitted as an exception to the hearsay rule as a tacit admission.\textsuperscript{139} The dissent observed that adequate safeguards exist to regulate the admission of pre-arrest silence even if it occurs in police presence.\textsuperscript{140}

\textsuperscript{134} Id. at 461, 863 A.2d at 1004-05. The majority also decided whether the error by the Court of Special Appeals was harmless, stating that the court must believe beyond a reasonable doubt that the evidence did not influence the decision. \textit{Id.}, 863 A.2d at 1005. The only direct evidence of Weitzel's guilt was the eyewitness testimony of Crabtree, and the only significant evidence corroborating Crabtree's testimony was the silence of Weitzel. \textit{Id.} at 461-62, 863 A.2d at 1005. Without the evidence of Weitzel's silence, and because Crabtree had a clear motivation to lie if he was the person who actually committed the crime, the jury easily could have questioned the credibility of Crabtree and found that Weitzel's guilt was not proven beyond a reasonable doubt. \textit{Id.} at 462, 863 A.2d at 1005.

\textsuperscript{135} Id. at 463, 863 A.2d at 1006 (Battaglia, J., dissenting). The dissent cited to Justice Stevens's concurring opinion in \textit{Jenkins v. Anderson}, which implies some probative value of pre-arrest, pre-\textit{Miranda} silence by noting the difference between the constitutional right to remain silent during a police interrogation and silence before contact with the police. \textit{Id.} at 464 n.1, 863 A.2d 1006 n.1 (citing \textit{Jenkins v. Anderson}, 447 U.S. 231, 243 (1980) (Stevens, J., concurring)).

\textsuperscript{136} Id. at 463-64, 863 A.2d at 1006 (citing \textit{United States v. Hale}, 422 U.S. 171, 177 (1975)).

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.} at 464, 863 A.2d at 1006. The dissent also noted that some courts that find pre-arrest silence inadmissible have ruled that the admission of such evidence is harmless error when viewed in totality with the other evidence. \textit{Id.} at 464 n.2, 863 A.2d at 1007 n.2.

\textsuperscript{139} \textit{Id.} at 465, 863 A.2d at 1007.

\textsuperscript{140} \textit{Id.} Judge Battaglia also remarked that there are serious consequences anytime recent precedent is overruled, including a loss of stability, efficiency, predictability, and confidence in the legal system. \textit{Id.} at 466, 863 A.2d at 1007.
4. Analysis.—In *Weitzel v. State*, the Court of Appeals held that evidence of pre-arrest silence in the presence of a police officer is inadmissible as substantive evidence of guilt. In creating an exception to the tacit admission rule, the court gave no explanation for its necessity, left little guidance for future application and exceptions to the prerequisite analysis, and missed an opportunity to eliminate all tacit admissions.

   a. A Tacit Admission Exception Specifically for Police Presence is Unjustified and Unnecessary.—In creating an exception to the tacit admission rule specifically for police presence, the Court of Appeals fails to explain how the motivations for silence in police presence are unique to police, ignores that the prerequisite analysis for a tacit admission allows for consideration of any reason for remaining silent, and creates an exception that has been specifically considered and rejected in recent jurisprudence.

   The Court of Appeals in *Weitzel* failed to explain how the motivations for silence in police presence are unique to the police when compared to any other third party. The court has suggested several instances that might exclude any inference of guilt, including shock, injury, deafness, intoxication, fear, advice of counsel to remain silent, or a desire to exercise a perceived right against self-incrimination. All of these factors that the court envisions inducing a person to remain silent in police presence could motivate silence in the presence of almost any third party. As evidenced in *Zink v. Zink*, the assertion that a husband and wife do not normally discuss their intimate relationship in the presence of a third party has nothing to do with the presence of law enforcement, but reflects the assumption that Zink’s silence was an emotional response to the presence of his niece. The reasons that the Court of Appeals has offered as motivating silence in the presence of the police are not unique to police presence as opposed to any other third party. Yet the court in *Weitzel* made no attempt to explain why the same factors inducing silence in

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141. *Id.* at 461, 863 A.2d at 1005 (majority opinion).
142. *See infra* Part 4.a.
143. *See infra* Part 4.b.
144. *See infra* Part 4.c.
145. *See* 384 Md. at 456, 863 A.2d at 1001-02.
147. 215 Md. 197, 203, 137 A.2d 139, 143 (1957).
front of the police are not too ambiguous when applied in other third-party situations.\textsuperscript{149}

The court in \textit{Weitzel} also failed to recognize that the prerequisites for a tacit admission in Maryland account for the many reasons that a person might remain silent when accused in the presence of police. Consideration for a defendant's shock, injury, deafness, or intoxication is reflected in the first prerequisite for a tacit admission, which requires that an accused party both hear and understand an accusation.\textsuperscript{150} A defendant's fear, advice of counsel to remain silent, or a desire to exercise the right against self-incrimination is considered under the third prerequisite for a tacit admission, which requires that "under the circumstances, a reasonable person in the party's position" would have disagreed with the statement.\textsuperscript{151}

The court in \textit{Weitzel} downplayed the fact that an exception specifically for police presence has been previously considered and rejected by both the Court of Special Appeals and the Court of Appeals. The Court of Special Appeals in \textit{Williams v. State} found that although a police officer was present, evidence of silence was admissible as a tacit admission because the defendant was not in custody.\textsuperscript{152} Further, the Court of Appeals in \textit{Key-El v. State} found that pre-arrest silence in the presence of a police officer was properly admitted at trial.\textsuperscript{153} The court made clear that "the admissibility of such silence should depend on an evaluation of the required prerequisites for the use of a tacit admission that have been established over the years by this Court."\textsuperscript{154} The court went on to say that if "such an evaluation by the court discloses that the police officer's presence together with the other circumstances demonstrate that a reasonable person in the defendant's position would not be expected to deny or explain the accusation, then the defendant's silence would be excluded from evidence."\textsuperscript{155}

The Court of Appeals noted that the circumstances in \textit{Key-El}—where the accused had an opportunity to respond; was in the presence of a police officer; and was not in custody, interrogated, arrested, or given the \textit{Miranda} warning—was a "text-book example of the wisdom of judging the effect of pre-arrest silence on a case by case basis."\textsuperscript{156} Yet

\begin{itemize}
\item \textsuperscript{149} See 384 Md. at 456, 863 A.2d at 1001-02.
\item \textsuperscript{150} Henry v. State, 324 Md. 204, 242, 596 A.2d 1024, 1043 (1991).
\item \textsuperscript{151} \textit{Id.} (emphasis added).
\item \textsuperscript{152} 4 Md. App. 342, 348 & n.6, 242 A.2d 813, 816-17 & n.6 (1968).
\item \textsuperscript{153} 349 Md. 811, 813, 709 A.2d 1305, 1305 (1998).
\item \textsuperscript{154} \textit{Id.} at 819, 709 A.2d at 1308.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} at 818, 709 A.2d at 1308.
\end{itemize}
the Weitzel court made no attempt to explain why the reasoning in Key-El is faulty six years later.

The Weitzel court attempted to justify its decision on the ground that other jurisdictions have invoked a similar rule.157 This reasoning overlooked the fact that the determination for admissibility of pre-arrest silence in other courts might be predicated on different considerations and not based on the same prerequisite analysis found in Maryland jurisprudence. The court cited the Alabama Supreme Court's decision in Ex parte Marek, where the tacit admission rule was abolished because the underlying assumption that an accused always objects to an untrue accusation is incorrect, as there are numerous reasons that an accused might remain silent.158 These numerous reasons are addressed through the prerequisites required for a tacit admission in Maryland.159 The court also noted the decision in People v. DeGeorge, which reasoned that "silence is the natural reaction of many people," and that an innocent person might have a multitude of reasons for not speaking.160 While New York employs a very general and objective reasonable person test, Maryland evaluates the behavior of "a reasonable person in the party's position" and "under the circumstances," adding a subjective element to the test, or at the least using a more narrow objective standard than New York.161 The Court of Appeals has also previously established that a tacit admission only occurs if the statement is something that the accused would naturally be expected to deny and that remaining silent can signify the adoption of another person's statement only when there is no other equally consistent explanation for the silence.162 The Weitzel court failed to note that the prerequisite analysis and other safeguards in Maryland case law are not necessarily present in other jurisdictions that allow tacit admissions.

The Weitzel court's reliance on the Miranda rights as a justification for a tacit admission exception ignores an important distinction between an investigation and an interrogation due to the inherent pressures and compelling atmosphere unique to an in-custody setting.163

157. 384 Md. at 456, 863 A.2d at 1002.
158. Id. at 458-59, 863 A.2d at 1003-04 (citing Ex parte Marek, 556 So. 2d 375, 382 (Ala. 1989)).
160. Weitzel, 384 Md. at 460, 863 A.2d at 1004 (emphasis added) (citing People v. DeGeorge, 541 N.E.2d 11 (N.Y. 1989)).
161. Henry, 324 Md. at 242, 596 A.2d at 1043 (emphasis added).
163. See 384 Md. at 461, 863 A.2d at 1004-05.
The court in *Weitzel* cited the Alabama Supreme Court in *Ex parte Marek* for the premise that one motivation for remaining silent could be that the accused believes he has the right to remain silent because that right has been extensively publicized by the news media.\(^{164}\) The court also noted the New York Court of Appeals’s decision in *People v. DeGeorge*, which recognized that one of the reasons a person would remain silent is the knowledge that a statement can and will be used against him at trial.\(^{165}\) The court looked further to the Court of Appeals for the Sixth Circuit in *Combs v. Coyle*, which held that admitting evidence of pre-arrest silence as a tacit admission violates the privilege against self-incrimination.\(^{166}\) The court in *Weitzel* concluded by implying that knowledge of the *Miranda* rights might cause a person to remain silent.\(^{167}\)

The Supreme Court in *Miranda*, however, began by noting the importance of the nature and setting of an in-custody interrogation.\(^{168}\) *Miranda* makes clear that “the accused must be adequately and effectively apprised of his rights... to permit a full opportunity to exercise the privilege against self-incrimination.”\(^{169}\) The *Miranda* Court also explicitly stated that its decision did not apply to general fact-finding or on-scene investigations because, in those situations, the compelling atmosphere of an in-custody interrogation is not present.\(^{170}\) The Supreme Court even noted that “it is an act of responsible citizenship” to give information to the police during an investigation.\(^{171}\) Yet the *Weitzel* court’s concerns for *Miranda* rights extended the compelling pressures of an interrogation to an investigation, ignoring the atmospheric distinction stressed in *Miranda*.

**b. The Court Missed an Opportunity to Clarify the Rules of Admissibility.**—In giving little explanation for straying from the prerequisite analysis approach and creating a bright-line exception for police presence,\(^{172}\) the court in *Weitzel* left little guidance for future application of the prerequisite analysis.\(^{173}\) The nature of the prerequisite analysis

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164. *Id.* at 459, 863 A.2d at 1003-04 (citing *Ex parte Marek*, 556 So. 2d 375, 382 (Ala. 1989)).
165. *Id.* at 460, 863 A.2d at 1004 (citing *DeGeorge*, 541 N.E.2d at 13).
166. *Id.* at 460-61, 863 A.2d at 1004 (citing *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000)).
167. *Id.* at 461, 863 A.2d at 1004-05.
169. *Id.* at 467.
170. *Id.* at 477-78.
171. *Id.*
173. 384 Md. at 456, 863 A.2d at 1002.
as “essentially ad hoc, factual inqur[y]” will continue to present the same difficulty in application as seen in takings jurisprudence.\textsuperscript{174} The root of this problem may be the ambiguity of the third prerequisite for a tacit admission, where a court must determine that “under the circumstances, a reasonable person in the party’s position, who disagreed with the statement, would have voiced that disagreement.”\textsuperscript{175} In each case, the court must haphazardly decide what constitutes an accusation and under what circumstances a reasonable person would respond with a denial.

The flaw in this approach was illustrated in \textit{Zink v. Zink}, where the dissent noted that the majority “finds it unlikely that a husband would feel called upon to deny the charge for adultery. I think that is an unwarranted assumption.”\textsuperscript{176} Similarly, in \textit{Ewell v. State}, the court reasoned that Ewell would have naturally denied an exclamation by his friend about a specific crime that they had committed, even if committing crime was a regular occurrence.\textsuperscript{177} The three-member dissent in \textit{Ewell} noted that the assertion was more likely a teenage boast than an accusation that Ewell committed a crime.\textsuperscript{178} Without clarifying what constitutes an allegation and which circumstances demand a response, the court risks future decisions like \textit{Ewell}, where upholding or reversing a murder conviction may hinge on one judge’s interpretation of the difference between boasting and blaming.\textsuperscript{179}

If the \textit{Weitzel} court believed that silence in police presence is too ambiguous to be probative, and if the motivations for remaining silent in police presence also induce silence in other third-party situations, then there seems to be little justification for allowing any tacit admissions in the State of Maryland.\textsuperscript{180} But the court carved a bright-line exception only for pre-arrest silence in the presence of police, leaving all other tacit admissions to be evaluated through prerequisite analysis.\textsuperscript{181} The Supreme Court in \textit{Miranda}, however, specifically refused to evaluate whether a defendant was already aware of his constitutional rights.\textsuperscript{182} The Court remarked that “[a]ssessments of the knowledge the defendant possessed, based on information as to his

\begin{itemize}
  \item \textsuperscript{176} \textit{Zink v. Zink}, 215 Md. 197, 204, 137 A.2d 139, 144 (1957) (Henderson, J., dissenting).
  \item \textsuperscript{177} \textit{Ewell v. State}, 228 Md. 615, 620, 180 A.2d 857, 860 (1962).
  \item \textsuperscript{178} \textit{Id.} at 623, 180 A.2d at 862 (Horney, J., dissenting).
  \item \textsuperscript{179} See \textit{id}.
  \item \textsuperscript{180} 384 Md. at 456, 863 A.2d at 1002.
  \item \textsuperscript{181} \textit{Id}.
  \item \textsuperscript{182} \textit{Miranda v. Arizona}, 384 U.S. 436, 468 (1966).
\end{itemize}
age, education, intelligence, or prior contact with authorities, can never be more than speculation.” Yet instead of eliminating all tacit admissions, the court in Weitzel only created an exception to the rule and failed to provide any explanation or criteria for when an accusation should be denied.

**c. Tacit Admissions Should Not Be Admissible in Maryland.**—The Weitzel court missed an opportunity to eliminate all tacit admissions as substantive evidence of guilt. Such a holding is prudent because Supreme Court jurisprudence has been misconstrued as supporting the admission of pre-arrest silence as substantive evidence of guilt, many other jurisdictions have held that there is a right to remain silent prior to an arrest, and recent Confrontation Clause interpretations raise doubts as to the admissibility of tacit admissions.

The court in Weitzel ignored a significant factual distinction between cases such as Weitzel and Supreme Court jurisprudence evaluating evidence of silence: the evidence of pre-arrest silence in Weitzel was offered in the prosecution's case-in-chief as substantive evidence of guilt. Jurisdictions such as the Eleventh Circuit, which allow evidence of pre-arrest silence as substantive evidence of guilt, cite Jenkins v. Anderson for support. However, the Supreme Court limited its holding in Jenkins to the use of a defendant's pre-arrest silence to impeach credibility on cross-examination. Relying on Jenkins as precedent for admitting tacit admissions ignores this explicit limitation.

There is support from other circuit courts that Jenkins is limited to instances where a defendant takes the stand and is subject to cross-examination. As noted by the Seventh Circuit in United States ex rel. Savory v. Lane, Griffin—and not Jenkins—is the applicable precedent when the prosecution offers silence as evidence of guilt and not for impeachment purposes. The court distinguished cases such as Jenkins v.

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183. Id. at 468-69.
184. See 384 Md. at 456, 863 A.2d at 1002.
185. See infra notes 188-198 and accompanying text.
186. See infra notes 199-223 and accompanying text.
187. See infra notes 224-243 and accompanying text.
188. See 384 Md. at 454, 863 A.2d at 1000.
191. See id.
192. 832 F.2d 1011 (7th Cir. 1987).
193. Id. at 1017.
kins and Fletcher v. Weir because unlike the defendants in those cases, Lane did not testify on his own behalf.194

The Court of Appeals disregarded the fact that the statement in Jenkins, leaving jurisdictions free to define rules where evidence of silence is more prejudicial than probative, was discussed in the context of impeachment and not in relation to the prosecution's case-in-chief.195 This limitation is consistent with the Supreme Court's analysis in United States v. Hale,196 where the Court reasoned that silence at the time of arrest was not probative of credibility and had significant prejudicial effect.197 Further, allowing jurisdictions to cite Jenkins in an attempt to extend the use of pre-arrest silence to the prosecution's case-in-chief would essentially permit evidentiary rules to supersede constitutional guarantees in violation of the Supremacy Clause.198

The court in Weitzel also ignores recent case law that supports the existence of a right to remain silent prior to an arrest or custodial interrogation. While courts finding pre-arrest silence admissible in the prosecution's case-in-chief have reasoned that there is no constitutional right to remain silent when the silence occurs without government compulsion,199 this logic is based on an overly strict reading of the Fifth Amendment.

The Fifth Amendment guarantees the privilege against self-incrimination in criminal cases.200 The Supreme Court has consistently held that the prosecution may not comment on a defendant's decision not to testify because that decision would not be probative of any fact at issue.201 Even though no government compulsion exists to compel a defendant's silence at trial, such silence is clearly protected by the Fifth Amendment.202 Admitting pre-arrest silence simply because there was no government action compelling the silence conflicts with Supreme Court jurisprudence prohibiting any comment on a defendant's decision not to testify even though there is no govern-

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194. Id.
195. See Jenkins, 447 U.S. at 240-41.
197. Id. at 180.
198. U.S. CONST. art. VI; see also Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989) (noting that a rule of evidence inferring guilt cannot trump a constitutional guarantee).
199. United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); see also United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (finding no violation of the privilege against self-incrimination or due process because the silence occurred prior to an arrest or the Miranda warning).
200. U.S. CONST. amend. V.
203. Zanabria, 74 F.3d at 593; Oplinger, 150 F.3d at 1067.
ment compulsion involved. This logic was recognized by the United States Court of Appeals for the Seventh Circuit in *Savory*, where the court prohibited comment by the prosecution on the defendant's pre-arrest silence because such a comment was analogous to commenting on a defendant's decision not to testify.

The court in *Weitzel* also takes no notice of other courts that have found pre-existing knowledge of the *Miranda* rights sufficient to invoke *Miranda*'s constitutional protections prior to an arrest. In *Coppola v. Powell*, the First Circuit held that the prosecution could not comment on evidence of Coppola's silence, even though the silence was pre-arrest and pre-*Miranda*. The court reasoned that Coppola had relied on his *Miranda* rights when he told the police that he would not confess to anything and that he wanted to speak with a lawyer. Similarly in *United States v. Burson*, the Tenth Circuit reasoned that Burson invoked the privilege against self-incrimination when he knew he was being investigated by IRS agents and indicated that he would not answer any questions. The Sixth Circuit in *Combs v. Coyle* also noted that the right to remain silent applies prior to arrest. The court in *Combs* agreed with the logic outlined by the dissenting opinion in *Jenkins* that the right to be free from self-incrimination cannot be limited to silence compelled by the government, because if there is a civil duty to report a crime then reporting a self-committed crime would unconstitutionally compel self-incrimination. The Court of Appeals of Maryland even concludes its opinion in *Weitzel* by observing that the *Miranda* warnings have become common knowledge as a result of the media and technology. This observation must be considered in tandem with the Supreme Court's articulation in *Doyle* that a defendant's silence after receiving the *Miranda* warning is insolvably ambiguous.

The court in *Weitzel* also makes no note of the fact that the prerequisite analysis for a tacit admission in other states supports the proposition that a defendant may exercise his *Miranda* rights prior to an arrest. The process of determining the admissibility of a tacit admission in California is very similar to the analysis articulated by the Court

204. See Griffin, 380 U.S. at 615.
205. 832 F.2d 1011, 1017 (7th Cir. 1987).
206. 878 F.2d 1562 (1st Cir. 1989).
207. Id. at 1567.
208. 952 F.2d 1196, 1200-01 (10th Cir. 1991).
209. 205 F.3d 269, 283-85 (6th Cir. 2000).
210. Id. at 284 n.9 (citing Jenkins v. Anderson, 447 U.S. 231, 250 n.4 (1980) (Marshall, J., dissenting)).
211. See 384 Md. at 461, 863 A.2d at 1004.
of Appeals of Maryland in *Henry v. State*,\(^{213}\) a California court must determine if the silence of the defendant occurred under circumstances such that the defendant heard, understood, and would reply to the accusation.\(^{214}\) California goes a step further, however, and asks whether the circumstances "do not lend themselves to an inference that [the defendant] was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution."\(^{215}\) This criterion reflects the importance given to knowledge of the *Miranda* rights prior to an arrest and adds an additional burden to limit the admissibility of pre-arrest silence.

The court in *Weitzel* ignores the principle that if there is a constitutional right to remain silent prior to an arrest, offering evidence of such silence in the prosecution's case-in-chief would violate the constitutional rights of a defendant. *Jenkins* uses an impermissible burden test to evaluate whether a defendant's Fifth Amendment rights have been violated.\(^ {216}\) The court looks at the legitimacy of the challenged governmental practice to evaluate whether the defendant's rights have been impermissibly burdened.\(^ {217}\) The *Jenkins* Court reasoned that a defendant who decides to testify waives his Fifth Amendment rights and is not impermissibly burdened by cross-examination because such questioning tests credibility and enhances the reliability of the criminal process.\(^ {218}\) If the defendant does not take the stand, he remains safe from self-incrimination.\(^ {219}\)

As noted in *Jenkins*, evidence of pre-arrest silence of a defendant who does not testify on his own behalf would fail to test his credibility, and would impermissibly burden his right against self-incrimination.\(^ {220}\) Proponents of admitting evidence of pre-arrest silence reason that the government has a significant interest in presenting all relevant evidence to a jury.\(^ {221}\) This reasoning ignores the fact that the probative value of evidence of silence has consistently been confined by the Supreme Court to cross-examination\(^ {222}\) and that federal and

\(^ {214}\) E.g., People v. Preston, 508 P.2d 300, 304 (Cal. 1973).
\(^ {215}\) Id.
\(^ {217}\) Id.
\(^ {218}\) See id.; see also Doyle v. Ohio, 426 U.S. 610, 634-35 (1976) (Stevens, J., dissenting) (noting that a prosecutor may comment on a defendant's silence as it relates to credibility and prior inconsistency, but may not ask a juror to infer guilt from silence).
\(^ {220}\) See 447 U.S. at 238.
\(^ {221}\) E.g., Doyle, 426 U.S. at 617.
\(^ {222}\) See Jenkins, 447 U.S. at 238.
state evidentiary rules prohibit even probative evidence if it is unfairly prejudicial or will mislead the jury.\textsuperscript{223}

The court in \textit{Weitzel} also made no attempt to reconcile recent Confrontation Clause interpretations that support restricting tacit admissions. The Supreme Court's decision in \textit{Crawford v. Washington}\textsuperscript{224} suggests a further restriction on tacit admissions and their possible elimination. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right \ldots to be confronted with the witnesses against him."\textsuperscript{225} In \textit{Crawford}, the Court held that the Sixth Amendment requires the declarant of testimonial hearsay to be unavailable and to have been subject to prior cross-examination for the hearsay to be admissible.\textsuperscript{226} The Court did not define "testimonial" but cited various examples, including statements taken by police during interrogation, pretrial statements the speaker could reasonably expect to be used prosecutorially, and statements that an objective witness believes would be used at a later trial.\textsuperscript{227} While Confrontation Clause jurisprudence has not applied to statements that are made by a declarant who is also the defendant,\textsuperscript{228} unique circumstances arise when the statement is a tacit admission.

As explained by the Court of Appeals, a tacit admission occurs when a statement is made that the defendant heard, understood, and under the circumstances would be expected to deny.\textsuperscript{229} A tacit admission is admissible under a common hearsay exception as "[a] statement that is offered against a party and is \ldots a statement of which the party has manifested an adoption or belief in its truth."\textsuperscript{230} If a tacit admission is literally the statement of a third party offered against the defendant, then regardless of any acquiescence, \textit{Crawford} suggests that the defendant has a right of confrontation unless the prosecution can establish that the declarant was unavailable and there was a prior opportunity for cross-examination.\textsuperscript{231} The Supreme Court showed some support for this application of \textit{Crawford} to tacit admissions in vacating a conviction based on an adoptive admission admitted without the opportunity for cross-examination.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{223} \textit{FED. R. EVID.} 403; Md. R. 5-403.
\item \textsuperscript{224} 541 U.S. 36 (2004).
\item \textsuperscript{225} \textit{U.S. CONST. amend. VI.}
\item \textsuperscript{226} 541 U.S. at 68.
\item \textsuperscript{227} \textit{Id.} at 51-52.
\item \textsuperscript{228} \textit{Id.} at 52 & n.3.
\item \textsuperscript{229} Henry v. State, 324 Md. 204, 241-42, 596 A.2d 1024, 1043 (1991).
\item \textsuperscript{230} Md. R. 5-803; \textit{see} \textit{FED. R. EVID.} 801(d)(2)(B).
\item \textsuperscript{231} \textit{See Crawford}, 541 U.S. at 68.
\end{itemize}
A prosecutor might try to avoid *Crawford* and argue that a tacit admission is a statement by the defendant and not the actual third-party declarant, rendering the Confrontation Clause inapplicable. But such an interpretation either ignores the specific definition of a tacit admission as manifesting an adoption or belief in someone else's statement rather than the defendant's own statement or attempts to use a hearsay exception to circumvent a constitutional right. *Crawford* specifically noted that the latter is impermissible and would render the Confrontation Clause powerless. *Crawford* made clear that the Sixth Amendment does not allow courts to create exceptions to a constitutional guarantee. Further, if a statement is admitted as an adoptive admission by the defendant, this arguably results in a defendant being forced to choose between unconstitutionally compelled self-incrimination or forgoing the constitutional right to confrontation. Unlike the hearsay exception for a forfeiture by wrongdoing—where the defendant procures the unavailability of a witness and loses the right of confrontation—a defendant who refuses to testify is exercising a constitutional right. As seen in Fifth Amendment jurisprudence, no adverse inference can be made by the prosecution from that decision.

Alternatively, the prosecution might argue that a tacit admission is nontestimonial in nature. This is problematic in three regards. First, consider a defendant who remains silent in response to an accusation and claims to remain silent because of her knowledge of the *Miranda* rights. If a defendant's silence explicitly represents her desire not to make a statement later available for trial, it does not follow that her action of remaining silent should be considered nontestimonial. Second, it would be illogical to declare that tacit admissions are nontestimonial statements—thereby avoiding the protections of the Confrontation Clause—and then allow the prosecution to argue in its case-in-chief that the tacit admission is a confession, which is a testi-

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233. See, e.g., Ohio v. Lloyd, 2004 Ohio 5813 para. 16 (Ohio Ct. App. 2004) (rejecting defendant's argument that his lack of an opportunity to cross-examine his own prior statement to police violated the Confrontation Clause).


236. 541 U.S. at 51.

237. Id. at 54. While the Court noted that dying declarations have been an historical exception, they do not apply to this discussion. Id. at 55 n.6.

238. For a discussion of this scenario, see Daniel J. Capra, 2004 Update for Evidence: The Objection Method 28 (2d ed. 2004).

239. *Crawford*, 541 U.S. at 62.

monial statement. 241 Lastly, while the Court in *Crawford* did not define what constitutes a testimonial statement, the Court in *Davis v. Washington* recently held that statements made in the course of police interrogation are testimonial when there is no emergency requiring police interrogation to render assistance, and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 242 Under this definition, the statements in *Weitzel* by Crabtree to Officer Johnson appear testimonial, as they were given in response to police questions trying to ascertain only who specifically pushed Effland down the stairs and was thus criminally responsible. 243

5. Conclusion.—In *Weitzel v. State*, the Court of Appeals held inadmissible all evidence of pre-arrest silence in the presence of police as substantive evidence of guilt. 244 In so doing, the Court failed to explain the need for an exception to the tacit admission rule, 245 missed an opportunity to provide guidance for future application of the prerequisite analysis, 246 and neglected to find all tacit admissions inadmissible as substantive evidence of guilt. 247

Scott J. Richman

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243. *See* 384 Md. at 453, 863 A.2d at 1000.
244. *Id.* at 461, 863 A.2d at 1005.
C. A Missed Opportunity to Clearly Articulate an Impact-on-Verdict Test for Harmless Error Analysis: Allowing Appellate Courts to Assume the Role of the Jury While Failing to Restrict the Improper Comments of Prosecutors

In Spain v. State, the Court of Appeals of Maryland addressed whether a prosecutor's comments that a police officer would risk his career by lying constituted reversible error. The court held that the comments constituted improper vouching, but did not rise to the level of reversible error. While correct in finding improper vouching, the court's reversible error analysis sets forth three inconsistent tests, creating an unclear standard for future courts to use in determining whether an error merits reversal. The court should have applied only an impact-on-verdict test to prevent appellate courts from overstepping their authority and becoming triers of fact. Lastly, the court failed to realize that a relaxed standard encourages prosecutors to make damaging comments knowing that reversal is unlikely. Instead of articulating inconsistent tests to evaluate reversible error, the Spain court should have applied an impact-on-verdict test to ensure both that reviewing courts do not assume the role of the jury and that prosecutors refrain from making improper comments.

1. The Case.—On February 3, 2002, Jesse Spain, Jr. was arrested after fleeing the scene of a narcotics transaction. At trial, the State's sole witness was Officer Cornelius Williams, who arrested Spain on the steps of a nearby house several minutes after the transaction. The defense also had only one witness, Spain's sister, who testified that Spain planned to attend a Super Bowl party that evening near the location of the narcotics transaction.

During closing arguments, the prosecutor extensively discussed the credibility of Officer Williams. The judge allowed the prosecution to present, over a defense objection, the argument that Officer

2. See infra Part 4.a.
4. See infra Part 4.c.
5. See infra Part 4.d.
6. Spain, 386 Md. at 149, 872 A.2d at 27.
7. Id. at 149-50, 872 A.2d at 27-28.
8. Id. at 150, 872 A.2d at 28.
9. Id. at 151-52, 872 A.2d at 28-29.
Williams had no motive to lie and would suffer adverse employment consequences if he did so.\textsuperscript{10}

After closing arguments, on March 6, 2003, the jury returned a guilty verdict on all counts, including distribution of a controlled dangerous substance (CDS), using a minor to distribute a CDS, possession of a CDS, possession of a CDS with intent to distribute, and three counts of conspiracy involving the distribution of a CDS.\textsuperscript{11} Spain appealed to the Court of Special Appeals, claiming that the trial court erred in allowing the State to bolster the credibility of Officer Williams during closing arguments.\textsuperscript{12} The Court of Special Appeals, however, affirmed Spain's conviction.\textsuperscript{13} In an unreported opinion, the court found that the trial judge did not abuse his discretion when he allowed the State's closing argument and that the State's argument did not warrant reversal.\textsuperscript{14}

Spain then petitioned the Court of Appeals, which granted certiorari to determine whether reversible error occurred when the trial court allowed the prosecution to argue that Officer Williams had "no motive to lie and would risk his career by testifying falsely."\textsuperscript{15}

2. Legal Background.—During closing arguments, prosecutors are prohibited from commenting on facts outside of the evidence presented at trial.\textsuperscript{16} If a prosecutor's comments exceed reasonable inferences drawn from the evidence, they are deemed improper and may be considered grounds for reversal.\textsuperscript{17} But not every improper comment made by the prosecution warrants reversal.\textsuperscript{18} Courts will not overturn a verdict for what they deem to be harmless error.\textsuperscript{19} Maryland case law, however, does not provide a consistent test for determining whether an error is harmless.\textsuperscript{20}

a. Courts Prohibit Prosecutors from Improperly Vouching for the Credibility of Witnesses and Discussing Information Outside the Scope of Evi-
- During closing argument, prosecuting attorneys are generally given great leeway to comment on the action of the accused, provided their arguments do not exceed the scope of evidence presented at trial or reasonable inferences drawn therefrom.\textsuperscript{21} When prosecutorial comments exceed reasonable inferences that could be drawn from the evidence, courts have consistently found such comments improper.\textsuperscript{22} Specifically, when a prosecutor expresses personal knowledge or vouches for the veracity of a witness’s testimony, comments are found to improperly go beyond the scope of evidence.\textsuperscript{23}

In \textit{Walker v. State}, for example, the prosecution undermined testimony favorable to the defendant and conveyed to the jury her personal belief that the defendant was guilty by suggesting that the defendant threatened one of the State’s witnesses into testifying in a manner favorable to the defense.\textsuperscript{24} The court found that the prosecutor’s conduct constituted improper vouching.\textsuperscript{25} Additionally, the court stated that it is “improper for a prosecutor to make suggestions, insinuations, and assertions of personal knowledge” because this vouching can obstruct the defendant’s right to a fair trial.\textsuperscript{26}

While Maryland courts have not ruled on the issue before, other jurisdictions have consistently concluded that it is improper for a prosecutor to argue that a law enforcement officer would risk his or her career by lying unless the statement is supported by the evidence. In \textit{United States v. Martinez}, a prosecutor stated in closing argument that a police officer would not risk his eighteen-year career by testifying falsely.\textsuperscript{27} The Sixth Circuit found this to be improper vouching as it referred to evidence outside the record.\textsuperscript{28} Likewise, in \textit{United States v. Pungitore}, a prosecutor argued that testifying law enforcement officers would not script witness testimonies because they had sworn oaths of office and would jeopardize their careers by doing so.\textsuperscript{29} Pointing to

\textsuperscript{22} \textit{E.g.}, Hill v. State, 355 Md. 206, 222, 734 A.2d 199, 208 (1999).
\textsuperscript{23} Walker v. State, 373 Md. 360, 396, 818 A.2d 1078, 1099 (2003). The Supreme Court has noted two problems that prosecutorial vouching can cause: (1) a prosecutor’s vouching may lead the jury to believe that the prosecutor knows of additional evidence supporting the defendant’s guilt, but not presented to the jury, and, therefore, can interfere with the defendant’s right to be tried solely on evidence presented to the jury; and (2) a prosecutor’s statement has the credibility of the government behind it so the jury may be inclined to trust the government’s judgment over its own. United States v. Young, 470 U.S. 1, 18-19 (1985).
\textsuperscript{24} 373 Md. at 404-05, 818 A.2d at 1103-04.
\textsuperscript{25} \textit{Id.} at 404, 818 A.2d at 1104.
\textsuperscript{26} \textit{Id.} at 396, 818 A.2d at 1099.
\textsuperscript{27} 981 F.2d 867, 871 (6th Cir. 1992).
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} 910 F.2d 1084, 1123 (3d Cir. 1990).
the lack of evidence supporting such a claim, the United States Court of Appeals for the Third Circuit ruled that the statements improperly bolstered the credibility of the police officers.30

b. A Prosecutorial Impropriety Mandates Reversal If It Prejudices the Defendant.—After a court finds that improper vouching occurred, it must then determine whether the statement prejudiced the defendant or was simply harmless error.31 A complaining party must demonstrate prejudice to the defendant as well as error to obtain reversal.32 However, Maryland uses several tests to determine whether an improper statement constitutes reversible error.

(1) The Federal Harmless Error Rule Has Shifted Back and Forth from Focusing on the Weight of Evidence Against the Accused to the Effect of an Error on the Verdict.—Maryland’s harmless error rule, like that of other states, was created in response to federal judicial reform in the early 1900s.33 Thus, a brief history of the federal harmless error rule bears directly on the rationale underlying Maryland’s rule. While useful, the federal harmless error rule is not controlling in Maryland as the states are principally responsible for trying state criminal cases and the only requirement these trials must meet is that they comply with the Constitution.34

Before the early 1900s, U.S. courts, wary of unjustly imposing harsh criminal penalties, applied the English rule that “any error of substance required a reversal.”35 In response to increasing dissatisfaction with the English rule, under which guilty verdicts were often overturned for errors having no impact on the verdict,36 Congress passed § 269 of the Judicial Code in 1919.37 The statute, known as “the harmless error statute,” mandates that a reviewing court examine the entire record, disregarding technical errors and defects that do not affect a defendant’s substantial rights.38 This ensured that appellate courts

30. Id. at 1125.
32. Id.
34. Id. at 47-48.
35. Id. at 48.
36. Kotteakos v. United States, 328 U.S. 750, 759 (1946). The court stated that “[s]o great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.” Id.
38. Kotteakos, 328 U.S. at 757.
would not have to, as one trial judge phrased it, "tower above the trials of criminal cases as impregnable citadels of technicality."39

In one of the earliest Supreme Court cases applying the harmless error rule, Kotteakos v. United States, the Court held that in determining whether there has been harmless error, a reviewing court must look to the effect the error may have had on the jury's verdict.40 In Kotteakos, certain defendants were convicted of a single conspiracy to fraudulently obtain credit under the National Housing Act.41 Despite being indicted for only one count of conspiracy, evidence was presented at trial to prove at least eight conspiracies committed by different groups of defendants with no direct connection to each other.42 The Court concluded that in assessing whether the defendants were prejudiced by this error, the proper inquiry is not simply whether there was enough evidence to support the result, but whether the error substantially influenced the jury.43

Later, in Chapman v. California, the Supreme Court held that an appellate court must be able to declare that an error was harmless beyond a reasonable doubt to be considered harmless.44 In Chapman, two murder defendants had been convicted after both the prosecutor and judge implied that the defendants' failure to testify mandated that the jury draw inferences from evidence in favor of the State.45 Applying the rule that an error must be harmless beyond a reasonable doubt to be deemed harmless, the Court found that the error was not harmless and that the defendants were entitled to a new trial.46

39. Id. at 759 (quoting Marcus A. Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A. J. 217, 222 (1925)). The Supreme Court explained the importance of a harmless error rule when it stated:

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences.... These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.


40. 328 U.S. 750, 764 (1946).

41. Id. at 752.

42. Id. at 754. The only connection between many of the defendants was that their conspiracies were of a like nature and involved the same key figure. Id. at 754-55.

43. Id. at 764-65.

44. 386 U.S. 18, 24 (1967).

45. Id. at 25.

46. Id. at 24, 26.
The Court focused its harmless error analysis on whether there was overwhelming evidence of guilt against the accused in Harrington v. California. In Harrington, a murder defendant was denied his right to confront witnesses who testified against him. The Court held that since the evidence of the defendant's guilt was overwhelming, the conviction should not be reversed. However, since Harrington, the Court has consistently resumed focusing on the effect of the error on the jury's verdict when conducting harmless error analysis.

(2) Maryland Precedent Provides Conflicting Tests for Determining Whether an Error Is Harmless.—As with the federal harmless error rule, there are inconsistencies in the harmless error rule in Maryland. The Court of Appeals has articulated harmless error tests that range from inquiring into the weight of the evidence against the accused, to mandating reversal unless it can be found that the error in no way influenced the verdict, to prohibiting reversal unless the trial judge abused her discretion. Maryland also requires appellate courts to avoid weighing the evidence of guilt against the accused because that is the jury's function.

Maryland courts often rely on the harmless error standard articulated in Wilhelm v. State. The court in Wilhelm cited the Supreme Court's Kotteakos decision for the proposition that a reviewing court must examine the entire record to ensure that the error did not influence the verdict. The court then added that in deciding whether there is reversible error, a reviewing court should evaluate "the closeness of the case," the importance of the issue affected by the error, and any curative measures taken by the trial court to mitigate the effects of the improper comment.

Another standard, which focuses solely on the effect of the error on the jury's verdict, was articulated in Dorsey v. State. The Dorsey court held that an error cannot be deemed harmless unless a court concludes beyond a reasonable doubt that the error in no way influenced the verdict. The court sought to determine whether a trial

48. Id. at 252.
49. Id. at 252-54.
51. See infra notes 64-66 and accompanying text.
53. Id.
54. Id.
56. Id.
court erred in allowing a detective to answer questions regarding the percentage of convictions resulting from his arrests. After finding error, the court stated that a "uniform test" should be applied to determine the extent of error in all criminal cases and adopted the impact-on-verdict harmless error rule set forth in Chapman.

A conflicting standard was articulated in Degren v. State, in which the Court of Appeals held that an error is reversible only if the trial judge abused her discretion to allow improper comments. In Degren, a prosecutor’s closing argument included a statement that no one in the country had more motive to lie than a defendant in a criminal trial. The Court of Special Appeals found the comment inappropriate, but held that the trial court did not abuse its discretion in allowing the comments to be made. Upon review, the Court of Appeals recognized that a conviction should only be reversed if the prosecutor’s remarks “actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.” The court therefore concluded that absent both prejudice to the accused and clear abuse of discretion, an appellate court should not reverse the judgment of the trial court.

While there are many inconsistent tests for determining whether an error is harmless under Maryland law, the role of an appellate court is quite clear. Maryland law empowers only the jury, as opposed to the judge, to determine whether evidence is credible and what weight certain evidence should be given. Therefore, appellate courts are not permitted to assume the role of the jury by weighing the evidence against the accused. Such a rule is consistent with a defendant’s constitutionally protected right to be tried by an impartial jury.

57. Id. at 641-42, 350 A.2d at 667-68.
58. Id. at 658-59, 350 A.2d at 677-78. Specifically, the court stated that once error is established, “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.” Id. at 659, 350 A.2d at 678; accord Ragland v. State, 385 Md. 706, 726-27, 870 A.2d 609, 621 (2005); Weitzel v. State, 384 Md. 451, 461, 863 A.2d 999, 1005 (2004).
60. Id. at 428-29, 722 A.2d at 901.
61. Id. at 429, 722 A.2d at 901.
62. Id. at 431, 722 A.2d at 902 (quoting Jones v. State, 310 Md. 569, 580, 530 A.2d 743, 748 (1987)).
63. Id.
66. See, e.g., Jenkins v. State, 375 Md. 284, 299, 825 A.2d 1008, 1017 (2003) (stating that both the United States Constitution and the Maryland Declaration of Rights provide de-
3. The Court's Reasoning.—In Spain v. State, the Court of Appeals of Maryland affirmed the judgment of the Court of Special Appeals and held that the admission of improper comments made by a prosecutor during closing argument constituted harmless error, which did not unduly prejudice the defendant.67

Writing for the majority, Judge Harrell found that the prosecutor improperly vouched for a witness by commenting that Officer Williams did not testify falsely because if he did so, he would suffer adverse career consequences.68 Explaining that the State never introduced evidence at trial from which to infer that Officer Williams risked his career by testifying falsely, the court deemed these comments improper.69 Furthermore, the court declared that even if such evidence were admitted at trial, the prosecutor's comments still would have constituted improper vouching because they would have implied that a police officer's testimony should be considered more credible than those of any other witnesses.70

After establishing that the prosecutor's comments were improper, the court cited Degren v. State for the rule that reversal is only appropriate if the comments misled or likely misled the jury.71 Emphasizing that not all improper remarks merit reversal, the court cited Degren's explanation that appellate courts must determine whether the defendant was prejudiced to decide if reversal is appropriate.72 The court also cited Degren for the rule that an appellate court should only reverse a criminal conviction if the trial court clearly abused its discretion to the prejudice of the accused.73

The Court of Appeals then set out several factors to determine whether a reversible error occurs, including: (1) the severity of the remarks, (2) how the court cured any potential prejudice, and (3) the amount of evidence against the accused.74 Applying these factors to
the case, the court found the remarks were not severe, describing them as "an isolated event that did not pervade the entire trial."75 Furthermore, the court found the judge's reminder to the jury that the comments were only attorneys' arguments and the subsequent jury instructions regarding the credibility of witnesses mitigated any potential prejudice.76 The court acknowledged that the weight of the evidence against Spain was not strong, but nonetheless found that Spain was not unduly prejudiced.77 The court concluded that it was convinced beyond a reasonable doubt that the error did not influence the jury's verdict.78

In his dissent, Chief Judge Bell agreed that the prosecution improperly vouched for Officer Williams's credibility, but disagreed with the majority's holding that the error was harmless.79 He explained that the court should have applied the Dorsey test, which mandates reversal if an appellate court cannot declare beyond a reasonable doubt that the error did not affect the verdict.80 Under this standard, Chief Judge Bell argued, the court could not be persuaded beyond a reasonable doubt that the comments did not contribute to the guilty verdict and, therefore, the error was not harmless.81

4. Analysis.—In Spain v. State, the Court of Appeals of Maryland held that a prosecutor's comments during closing argument were improper, but did not warrant reversal.82 While the court correctly found the prosecutor's comments improper,83 its harmless error analysis will be difficult for future courts to implement.84 Instead of articulating three different harmless error tests,85 the court should have applied an impact-on-verdict test to guarantee that courts do not assume the role of the jury.86 Doing so would have provided future courts with a clear standard, and it would have ensured that prosecutors are not afforded too much leeway to make improper comments.87

75. Id.
76. Id.
77. Id. at 161, 872 A.2d at 34.
78. Id.
79. Id. at 165, 872 A.2d at 37 (Bell, C.J., dissenting).
80. Id.
81. Id. at 177, 872 A.2d at 44.
82. Id. at 158-61, 872 A.2d 33-35 (majority opinion).
83. See infra Part 4.a.
84. See infra Part 4.b.
85. See infra Part 4.b.
86. See infra Part 4.c.
87. See infra Part 4.d.
a. The Court Followed Precedent in Finding That the Prosecutor's Comments Were Improper.—The Spain court followed precedent to find improper the prosecutor’s comment that Officer Williams would not testify falsely because he would risk his career. The argument went beyond the scope of evidence presented at trial and reasonable inferences drawn therefrom and was thus prohibited under Maryland law. Members of the jury could have interpreted the prosecutor’s statements as personal knowledge of the credibility of Officer Williams, thereby threatening Spain’s right to be tried solely on the evidence presented at trial.

In addition to being consistent with Maryland law, the Spain court’s rationale is widely accepted in other jurisdictions. The facts of Spain are indistinguishable from United States v. Martinez, in which a prosecutor stated in closing argument that a police officer would risk his eighteen-year career by testifying falsely. Both the Martinez and Spain courts correctly found that such a statement improperly vouches for the witness by referring to evidence outside the record. The court’s decision also accords with United States v. Pungitore, in which a prosecutor argued that officers would not script witness testimony because they had sworn oaths of office and would jeopardize their careers by doing so. In Pungitore, the United States Court of Appeals for the Third Circuit correctly held that the prosecutor attempted to bolster the credibility of the police officers improperly. The court in Spain was correct in acting similarly.

There are also important policy reasons for the Spain court’s decision to find the prosecutor’s comments improper. As discussed in United States v. Young, such prosecutorial vouching can lead the jury to believe that the prosecutor knows of additional evidence that was not presented at trial, but which supports the defendant’s guilt, interfering with the defendant’s right to be tried solely on the evidence presented at trial. Additionally, a prosecutor’s statement bears the credibility of the government. The jury may therefore trust the gov-

90. 981 F.2d 867, 871 (6th Cir. 1992).
91. Id.; Spain, 386 Md. at 156, 872 A.2d at 31.
92. 910 F.2d 1084, 1123 (3d Cir. 1990).
93. Id. at 1125.
94. 386 Md. at 156, 872 A.2d at 31.
95. 470 U.S. 1, 18 (1995).
96. Id.
ernment's interpretation of the facts over its own judgment. The court in Spain thus acted correctly in at least taking some steps to censure the prosecutor's behavior.

b. The Court Provided Three Different Tests for Determining Whether an Error Merits Reversal.—Instead of articulating a clear standard for reversible error, the Spain court provided conflicting tests to determine whether an error warranted reversal and provided no insight into how the tests should be applied. First, the court relied on Degren for the proposition that a reviewing court should only reverse when the improper comments misled or likely misled the jury. This standard is more relaxed than the Dorsey standard, incorporated later in the opinion, which requires a reviewing court to be convinced "beyond a reasonable doubt that the error in no way influenced the verdict." The Dorsey test requires a higher level of certainty than the Degren test. Therefore, two different results could be reached depending on which standard a court chooses to apply. Not only do these conflicting tests allow for different results for similarly situated defendants, but the tests may also provide future courts with unfettered discretion to choose which one to apply.

Additionally, the court in Spain, partly relying on the factors first articulated by the Court of Appeals in Wilhelm v. State, set forth factors to consider in determining whether there has been reversible error, including the severity of the improper remarks, the steps taken to cure prejudice, and the weight of evidence against the accused. The court's application of these factors, however, provides little insight as to whether the factors comprise yet another test or are intended to be considered under either the Dorsey test or the Degren test. The Spain court should have articulated a clear test to provide other appellate courts with a definitive standard to apply in the future. A clear test would ensure both that similarly situated defendants are

97. Id. at 18-19.
98. 386 Md. at 156-58, 872 A.2d at 31-33.
99. Id. at 158-61, 872 A.2d at 33-34.
100. Id. at 159, 872 A.2d at 33 (citing Degren v. State, 352 Md. 400, 430-31, 722 A.2d 887, 902 (1999)).
101. Id. at 161, 872 A.2d at 34.
102. Id. at 167, 872 A.2d at 38 (Bell, C.J., dissenting).
103. Such a result is particularly problematic considering judges are prohibited from substituting their judgment for the judgment of the jury. Dykes v. State, 319 Md. 206, 224, 571 A.2d 1251, 1260 (1990); Haslup v. State, 30 Md. App. 230, 239, 351 A.2d 181, 186 (1976).
104. 383 Md. at 159, 872 A.2d at 33.
treated equally and that an appellate court is not able to simply apply the test that provides the preferred outcome.

c. The Court Should Have Applied Only an Impact-on-Verdict Test.—Despite the Spain court's articulation of different standards of review, it only applied to the facts of the case the factors that require a reviewing court to consider the severity of the remarks, the steps taken to cure any prejudice, and the weight of the evidence against the accused.\textsuperscript{105} The court's approval of these factors is problematic because an appellate court should not itself weigh the evidence against the accused.\textsuperscript{106} Allowing the reviewing court to assess the evidence of guilt puts appellate judges in the position of the jury, but only the jury should be a trier of fact.\textsuperscript{107}

The Spain court should have relied solely on an impact-on-verdict test,\textsuperscript{108} which assesses whether the prosecutorial error could have influenced the verdict, instead of invoking an evidence-of-guilt test.\textsuperscript{109} In his authoritative work on harmless error, former California Supreme Court Chief Justice Roger J. Traynor explained that the impact-on-verdict test for harmless error is superior to the evidence-of-guilt test.\textsuperscript{110} Traynor stated that even if there is overwhelming evidence against the accused, an error may still have contributed significantly to the verdict.\textsuperscript{111} The appropriate test, he reasoned, does not focus on whether there is enough evidence to support a conviction, but whether the error affected the verdict.\textsuperscript{112} Accordingly, the court should have avoided usurping the jury's function, and it should have instead used an impact-on-verdict test like the one set out in Dorsey.

\begin{itemize}
\item \textsuperscript{105} Id.
\item \textsuperscript{106} See, e.g., Haslup v. State, 30 Md. App. 230, 239, 351 A.2d 181, 186 (1976) ("The weight to be given evidence is within the exclusive prerogative of the fact finder and is beyond the [appellate courts'] power to review.").
\item \textsuperscript{107} See, e.g., Dykes v. State, 319 Md. 206, 225, 571 A.2d 1251, 1261 (1990) (instructing the jury that it is "the sole judge of facts in a criminal case").
\item \textsuperscript{108} See Kotteakos v. United States, 328 U.S. 750, 764 (1946) (focusing on the effect the error may have had on the jury's verdict).
\item \textsuperscript{109} See Harrington v. California, 395 U.S. 250, 254 (1969) (focusing on whether there is overwhelming evidence of guilt against the accused).
\item \textsuperscript{110} ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 28 (1970).
\item \textsuperscript{111} Id. at 22. Specifically, he stated that [e]ven overwhelming evidence in support of a verdict does not necessarily dispel the risk that an error may have played a substantial part in the deliberation of the jury and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.
\item \textsuperscript{112} Id. at 28.
\end{itemize}
d. The Spain Court's Theory Affords Prosecutors Too Much Leeway to Make Improper Comments.—While the Spain opinion clarifies little, it does provide prosecutors with great leeway to make improper comments. The case turned on the credibility of two opposing witnesses, and the credibility of one of them was improperly enhanced by the prosecution.113 Considering the limited information an appellate court has concerning the jury's deliberation process, the court was not positioned to conclusively determine that the bolstering of witness testimony had no impact on the verdict.114 The court's classification of such a significant error as nonprejudicial reveals the court's reluctance to reverse due to error, as well as the extremely high threshold the error must reach to be considered grounds for reversal.115 The court's high tolerance for error will likely lead to unjust convictions of defendants who otherwise would have been found innocent if judged solely on the basis of evidence presented at trial.116

If comments as severely prejudicial as those in Spain are allowed by the court, prosecutors may feel confident that they can make other improper comments without the threat of reversal looming. Such a loose standard could burden the court system with increased appeals based on improper prosecutorial comments and further erode the right to a fair trial.

5. Conclusion.—In Spain v. State, the Court of Appeals held that a prosecutor's comments during closing arguments were improper, but did not rise to the level of reversible error.117 While correct in declaring the comments improper,118 the court failed to take the opportunity to articulate a clear standard for determining what constitutes harmless error.119 Instead of perpetuating the confusion in Maryland law concerning harmless error, the court should have applied an impact-on-verdict test.120 Creating a clear standard would have ensured that prosecutors are not given too much leeway to make

113. Spain, 386 Md. at 149-52, 872 A.2d at 27-29.
114. See Traynor, supra note 110, at 22-23 (stating that it is impossible for a reviewing court to determine what evidence a jury considered and how heavily they relied on such evidence).
115. See Spain, 386 Md. at 176-77, 872 A.2d at 44 (Bell, C.J. dissenting) (emphasizing the majority's failure to recognize that improper argument can still mislead the jury).
116. See id. at 177, 872 A.2d at 44 (discussing the difficulty of determining which particular arguments affect a jury's verdict, thereby making it difficult to discount improper arguments).
117. Id. at 158-161, 872 A.2d 33-35 (majority opinion).
118. See supra Part 4.a.
119. See supra Part 4.b.
120. See supra Part 4.c.
improper comments at the expense of a defendant’s right to a fair trial.\textsuperscript{121}

CARRIE TIMLIN

\textsuperscript{121} \textit{See supra} Part 4.d.
V. FAMILY LAW

A. Beyond the Traditional Realm of State Entity Liability and into a New Era of Unchartered Territory: The Court of Appeals of Maryland Extends the Scope of Government Liability

In *Horridge v. St. Mary’s County Department of Social Services*, the Court of Appeals of Maryland considered whether a state entity owed a duty of care to a child after someone reported to the Department of Social Services that the child was being abused. For the first time, the court held that a state entity owes a duty of care when a statute mandates a specific obligation to an identified class of persons, and legislative intent expressly provides that a duty exists.

By holding that the state may be liable for acting negligently, the court correctly extended the scope of government liability. The court’s decision accords with the nationwide trend of holding that state entities owe a duty when child abuse is at issue. Underlying social policy implications influenced the *Horridge* court’s extension of the law. However, in justifying its ruling, the Court of Appeals failed to fully distinguish *Horridge* from prior cases addressing similar issues, and it did not create clear guidelines for when this ruling will apply in the future. Consequently, it is not clear under what circumstances the Maryland courts will hold a state agency liable for breaching a duty to the public.

1. The Case.—When someone reports child abuse to a state agency, Maryland law requires the local Department of Social Services (DSS) to immediately investigate the child’s health and safety. If the report alleges sexual or physical abuse, the DSS must, within twenty-four hours, visit the child and determine whether to remove her from her current home.

Between December 1999 and February 2000, Eric Horridge filed eight reports with the DSS of St. Mary’s County, charging that Tiffany Fairris, or her boyfriend, Daniel Fowkes, physically abused nineteen-

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2. *Id.* at 189, 193, 854 A.2d at 1243, 1245.
4. *See infra* Part 4.c.
5. *See infra* Part 4.c.
7. *Horridge*, 382 Md. at 174, 854 A.2d at 1234.
month-old Collin. Collin was born to Horridge and Fairris in Texas in June 1998. A year later, Fairris moved to St. Mary's County with Collin and her boyfriend, while Horridge remained in Texas. Shortly after the move, Horridge contacted the DSS of St. Mary's County to report the abuse of his son. He stated that the abuse arose during a series of phone conversations with Fairris during which she would physically abuse Collin while threatening Horridge that he would never see Collin again. Horridge also informed the DSS of Fairris's history of drug and child abuse.

On January 28, 2000, four days after Horridge's phone call, Briana Shirey and Deborah Walsh, two DSS social workers, visited Collin's home. Although Shirey observed on Collin circular bruising not consistent with normal toddler play, she declined to act to ensure his safety. Instead, the DSS workers relied on a statement that Collin made in front of his mother that the injuries resulted from his play activities. In early February 2000, the State closed the case.

Because of Horridge's reports to DSS, Fairris told him that she would continue to abuse Collin. Although Horridge reported these statements to the DSS, the State did not investigate the situation. Horridge continued to make reports of child abuse, as did a concerned neighbor aware of the situation. In response, Shirey accused Horridge of being a "disgruntled parent" and stated that she would not listen to his complaints regarding Collin because she had closed the case.

On February 25, 2000, either Fairris or her boyfriend beat Collin to death. The autopsy showed that Collin had suffered multiple

9. Horridge, 382 Md. at 175, 854 A.2d at 1234.
10. Id. at 176, 854 A.2d at 1235.
11. Id.
12. Id.
13. Id. On one occasion, Collin was screaming in the background because Fairris had pushed him into a wall. Id.
14. Id. A Texas court had previously restricted Fairris's visitation rights with another one of her children, whom she also abused. Id.
15. Id. at 175-76, 854 A.2d at 1234-35. The DSS made an on-site visit four days after Horridge reported abuse, in spite of the policy requiring the DSS to visit within twenty-four hours of a reporting. Id. at 176, 854 A.2d at 1235.
16. Id. at 176-77, 854 A.2d at 1235.
17. Id. at 177, 854 A.2d at 1235.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id. at 177, 854 A.2d at 1236.
blunt force injuries, had serious wounds all over his body, and had been struck by an adult's hand or knuckles. These wounds were consistent with Horridge's reports of abuse.

Subsequently, Horridge filed a complaint in the Circuit Court for Anne Arundel County, alleging two counts of negligence against the State and two counts of negligence against Shirey and Walsh. In the first complaint against the State, Horridge claimed that sections 5-702 through 5-706 of the Family Law Article created a duty that required the DSS to investigate a report of child abuse and protect that child from further danger. Horridge argued that the DSS owed a specific duty to Collin because Collin was a member of a class that the legislature intended the statute to protect. He stated that the DSS breached this duty when it failed to protect Collin from the reported abuse, properly investigate the reports as the statute required, ensure that there was no continued abuse after the first visit, and investigate reports after the case was closed.

The second count alleged that the DSS was negligent based on a special relationship with Collin. Horridge claimed that this relationship arose from the State's affirmative actions, which intended to protect Collin from danger resulting from child abuse. Count five charged the DSS with negligent selection, retention, and supervision of Shirey and Walsh.

The circuit court dismissed all counts of the complaint as failing to state a claim upon which relief could be granted. Specifically, it held that none of the defendants owed a duty to Collin and that, even

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24. Id. at 177-78, 854 A.2d at 1236.
25. Id. at 178, 854 A.2d at 1236.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 179, 854 A.2d at 1236.
33. Id. at 175, 854 A.2d at 1234. In counts three and four, Horridge charged Shirey and Walsh with gross negligence as a result of breaching their duty by willfully, wantonly, and recklessly disregarding Collin's rights. Id. at 178-79, 854 A.2d at 1236. In counts six and seven, Horridge pled that the State violated Articles 19 and 24 of the Maryland Declaration of Rights. Id. at 179, 854 A.2d at 1237. Count eight alleged that the DSS, Shirey, and Walsh intentionally inflicted emotional distress on Collin through their indifferency to his needs. Id. Horridge brought counts one through eight as the personal representative of Collin's estate. Id. In count nine, Horridge sued on his own behalf for the wrongful death of Collin, incorporating all of the allegations previously pled. Id. at 179-80, 854 A.2d at 1237.
if they did, "the breach of that duty was not the proximate cause of the harm that ensued." Horridge subsequently appealed.

On appeal, Horridge abandoned six of the counts and only asserted the negligence claims against the State: counts one, two, and five. Horridge argued that (1) the DSS had a duty to protect Collin upon receiving a credible report that he was being abused, (2) the circuit court erred in determining the issue of proximate cause on a motion to dismiss, and (3) the negligent supervision claims were sufficient to state a cause of action.

Prior to the commencement of proceedings in the Court of Special Appeals, the Court of Appeals of Maryland granted certiorari to determine (1) whether the statutory obligation to thoroughly investigate a report of child abuse and protect the child created a duty on the DSS to the abused child, and if so, (2) whether the State or the individual social workers were liable if harm ensued to the identified child because of a negligent breach of that duty.

2. Legal Background.—Historically, the State of Maryland enjoyed immunity from tort liability for the acts of its employees. However, through the enactment of the Maryland Tort Claims Act, the state legislature abrogated sovereign immunity. To allow an action against the state for negligence, the state must owe an individual duty to the plaintiff. Although the mere existence of a statute does not impose a specific duty on state entities to the general public, the Maryland Family Law Article enumerates the state’s obligations for when a person reports child abuse. The courts have developed the rule that statutory regulations do not impose a duty on government entities unless a special relationship exists. Across the country, courts have confronted similar statutes governing child abuse protection and con-

34. Id. at 175, 854 A.2d at 1234.
35. Id. at 180, 854 A.2d at 1237.
36. Id.
37. Id.
39. Horridge, 382 Md. at 174-75, 854 A.2d at 1234. If someone sues the State, the claim is still subject to the State Tort Claims Act. Id.
40. Md. Code Ann., State Gov’t § 12-104 (LexisNexis 2004). Specifically, the statute provides that "the immunity of the State and of its units is waived as to a tort action, in a court of the State . . . ." Id. § 12-104(a)(1).
41. See infra Part 2.a.
42. See infra Part 2.b.(2).
43. See infra Part 2.b.(3).
strued them to find that a special relationship exists between the state and a specific class of abused children.\textsuperscript{44}

\textbf{a. Negligence.—}To allege negligence, a plaintiff must prove four elements: that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached her duty of care, (3) the defendant’s breach of duty caused the type of harm the plaintiff suffered, and (4) there was actual injury to the plaintiff.\textsuperscript{45}

Whether a state owes a duty to its citizens depends on the circumstances.\textsuperscript{46} The Court of Appeals of Maryland has defined “duty” to require an actor to conform to a specified standard of conduct to protect others against unreasonable risks.\textsuperscript{47} A duty may be created expressly, by statute or contract, or by implication.\textsuperscript{48} In general, however, a person does not have an affirmative duty to protect another from harm.\textsuperscript{49} Similarly, the state does not have a duty to protect an individual against harm from a third party.\textsuperscript{50} However, a duty may arise by virtue of a statute that creates a special relationship which requires the state to protect a person from third parties.\textsuperscript{51}

\textbf{b. The Child Protection Statute.—}

(1) \textit{Evolution of the Statute.}\—In 1987, the Maryland legislature amended the Family Law Article and changed the title of sections 5-701 through 5-710 from “Neglected Children” to “Child Abuse and Neglect.”\textsuperscript{52} In 1994, the legislature expanded the definition of abuse to include mental as well as physical injury.\textsuperscript{53} The legislature also amended the statute in 1994 to broaden what constitutes abuse, stat-

\textsuperscript{44} See infra Part 2.b.(4).
\textsuperscript{45} Remsburg v. Montgomery, 376 Md. 568, 582, 831 A.2d 18, 26 (2003).
\textsuperscript{46} Williams v. Baltimore, 359 Md. 101, 142, 753 A.2d 41, 63 (2000).
\textsuperscript{47} See Remsburg, 376 Md. at 582, 831 A.2d at 26 (adopting Prosser and Keeton’s definition of torts as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another”) (quoting \textsc{William Lloyd Prosser \\& Page Keeton}, \textsc{Prosser and Keeton on the Law of Torts} § 53 (W. Keeton 5th ed. 1984)).
\textsuperscript{48} Id. at 583-84, 831 A.2d at 27.
\textsuperscript{49} Scott v. Watson, 278 Md. 160, 166, 359 A.2d 548, 552 (1976); \textsc{Restatement (Second) of Torts} § 315 (1965).
\textsuperscript{50} Ashburn v. Anne Arundel County, 306 Md. 617, 628, 510 A.2d 1078, 1083 (1986).
\textsuperscript{51} Id.; \textsc{Restatement (Second) of Torts} §§ 315-320 (1965). A special relationship may arise when a plaintiff can prove that she relied on the defendant’s affirmative act to protect the specific victim. \textit{Ashburn}, 306 Md. at 630-31, 510 A.2d at 1085. Other examples of when a special relationship exists are as between parent and child, master and servant, and those who have custody of others. \textit{Id.} at 630 n.2, 510 A.2d at 1085 n.2.
\textsuperscript{53} Act of May 26, 1994, ch. 729, 1994 Md. Laws 3246. The bill also deleted the qualifier “significantly” that modifies the word “harmed” in the definitions of child abuse and neglect. \textit{Id.} at 3244.
ing that abuse includes not only when a child's health actually is harmed, but when there is a risk that the child's health will be harmed.\textsuperscript{54} These initiatives reflect the acts of the Maryland legislature to eliminate obstacles to protecting abused children.\textsuperscript{55} Furthermore, these actions reflect the trend of the state toward adopting a more stringent attitude to protect children.\textsuperscript{56}

(2) \textit{The Statute in 2004}.—Under Maryland law, to protect children subject to abuse and neglect,\textsuperscript{57} the DSS or an appropriate law enforcement agency must "make a thorough investigation of a report of suspected" physical or sexual abuse.\textsuperscript{58} Within twenty-four hours of the receipt of such a report, an investigator must observe the child and attempt to interview the child's caretaker.\textsuperscript{59} In addition, within twenty-four hours, the investigator shall determine whether the child is safe at her current location.\textsuperscript{60} The investigator shall also assess the safety of any other children in the household or in custody of the suspected abuser.\textsuperscript{61} During the investigation, the DSS shall determine the cause, extent, and nature of the abuse.\textsuperscript{62} The investigating agency must report initial findings to the local office of the state's attorney within ten days of the receipt of the report and complete the investigation within sixty days.\textsuperscript{63}

(3) \textit{Statutory Regulations Do Not Impose a Duty on Government Entities Unless a Special Relationship Exists}.—Generally, an individual may not assert a duty arising from a statute that obligates a state agency to protect the general public.\textsuperscript{64} However, this doctrine does

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\textsuperscript{54} MD. CODE ANN., FAM. LAW § 5-701(b) (LexisNexis 2004).
\textsuperscript{55} At Governor Schaefer's Memorial Service for Victims of Domestic Violence, the governor stressed that family violence would not be tolerated and there would be a stricter policy on such violence. Letter from Susan C. Mize, Executive Director, Maryland Network Against Domestic Violence, to Senator Baker, Chairman, Senate Judicial Proceedings Committee (Apr. 1, 1994) (on file with author).
\textsuperscript{56} Id.
\textsuperscript{57} § 5-702.
\textsuperscript{58} Id. § 5-706(a)(1). DSS must investigate a report of neglect within five days. Id. § 5-706(b).
\textsuperscript{59} Id. § 5-706(b)(1)-(2).
\textsuperscript{60} Id. § 5-706(b)(3).
\textsuperscript{61} Id. § 5-706(b)(4).
\textsuperscript{62} Id. § 5-706(c)(1). In addition, if an investigator verifies the suspected abuse or neglect, section 5-706 requires the investigator to determine the identities of the suspected abuser and other children in the household as well as an evaluation of the environment and the parents' fitness. Id. § 5-706(c)(3).
\textsuperscript{63} MD. CODE REGS. tit. 07, § .02.07.09 (1977).
\textsuperscript{64} Muthukumarana v. Montgomery County, 370 Md. 447, 486, 805 A.2d 372, 395 (2002). This rule is known as the public duty doctrine. Id.
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not apply if the court determines that a statute has created a specific obligation to a particular class of persons, rather than to the public at large. The Court of Appeals has considered several cases where it analyzed whether a statutory regulation created an individual duty upon a state entity.

First, in *Lamb v. Hopkins*, the Court of Appeals of Maryland considered whether a public entity was liable for an injury that resulted when a probation officer failed to carry out his statutorily mandated obligation. In *Lamb*, Russell Newcomer had violated his probation on several occasions. On one of these occasions, the Division of Parole and Probation did not report the violation to the sentencing judge. Subsequently, Newcomer, driving under the influence of alcohol, collided with the Lambs' vehicle, paralyzing their infant daughter. The Lambs sued the Division alleging that the probation officers were negligent for not reporting the probationer's misconduct to the court. Instead, it stated that the statute created a duty from the supervising officer to the court. As a result, the court held that the Division was not liable and that the plaintiff did not show the existence of a special relationship between the probation officers and the plaintiff.

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65. *Id.* at 487, 805 A.2d at 396.
66. 303 Md. 236, 492 A.2d 1297 (1985). This obligation required the Division of Parole and Probation to supervise the conduct of the identified probationer and report to the court whether the individual is faithfully complying with the conditions of the probation. *Id.* at 252-53, 492 A.2d at 1305-06.
67. *Id.* at 239-40, 492 A.2d at 1299.
68. *Id.* at 240, 492 A.2d at 1299.
69. *Id.*
70. *Id.*
71. *Id.* at 251, 492 A.2d at 1305. Specifically, the Code states:

> Whenever any court shall suspend the sentence of any person convicted of crime, and shall direct such person, to continue, for a certain time, or until otherwise ordered, under the supervision of the Division, it shall be the duty of the said Division to supervise, when so requested by said court, the conduct of such person and to ascertain and report to said court whether or not the conditions of such probation or suspension of sentence are being faithfully complied with by such person.

72. *Lamb*, 303 Md. at 252, 492 A.2d at 1305.
73. *Id.* at 253, 492 A.2d at 1306.
74. *Id.*
A few years later, in *Ashburn v. Anne Arundel County*, the Court of Appeals once again evaluated whether a duty existed to a member of the general public when a police officer's violation of a statutory requirement resulted in injury to an individual. In *Ashburn*, an Anne Arundel County police officer discovered an intoxicated man in the driver's seat of a running automobile in the parking lot of a convenience store. Instead of detaining the man, as required under Maryland law, the officer simply instructed him not to drive. When the officer left the area, the man resumed driving and hit and injured Ashburn, a pedestrian. Ashburn brought a negligence suit under the theory that the State owed an individual duty to protect him from the criminal acts of a drunk driver, pursuant to a Maryland statute mandating that police officers detain suspected drunk drivers.

The Court of Appeals rejected Ashburn's argument. In so doing, the court developed a loose, two-prong test for determining when the state owes a duty. First, the court stated that a statute must assert mandatory acts to protect a specific class of persons. However, the court stated that the statute in *Ashburn* was for the protection of the general public. Second, a statute may only create such an individual duty when there is express legislative intent to create it. This case therefore laid the foundation for when a statute may create an individual duty.

In *Willow Tree Learning Center, Inc. v. Prince George's County*, the court further defined the two-prong test it created in *Ashburn*. In *Willow Tree*, the court considered whether the State owed an individual duty of care to a child injured on a playground, arising from a statute

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75. 306 Md. 617, 510 A.2d 1078 (1986).
76. *Id.* at 619, 510 A.2d at 1079.
78. *Ashburn*, 306 Md. at 620, 510 A.2d at 1079.
79. *Id.*
80. *Id.*
81. *Id.* at 634-35, 510 A.2d at 1087.
82. *Id.* at 626-35, 510 A.2d at 1082-87.
83. *Id.* at 634-35, 510 A.2d at 1087.
84. *Id.* at 635, 510 A.2d at 1087.
85. *Id.* at 625, 634-35, 510 A.2d at 1082, 1086-87. The court stated that it would only impose civil liability on an officer who failed to abide by the Maryland Code if the legislature expressly stated such an intent. *Id.*
requiring safety inspections of playground equipment. The court analyzed whether the statute in question required actions for the protection of a specific class of persons. The court noted that although the statute identified the need to protect children, children did not constitute a class. Instead, the court determined that there had to be a more specific and identifiable group of plaintiffs. The court feared that if it found a duty, then the state would become liability insurers of day care centers. Consequently, the court held that the State did not owe an individual duty merely because of the enactment of a statute. The court then analyzed the second prong of the test to determine whether legislative intent imposed an individual duty. The court found that the regulations did not expressly intend to impose such liability on the state or its agencies. The court stated that its decision was consistent with previous cases in Maryland and the general reluctance to infer this type of duty on state entities.

Recently, the Court of Appeals further clarified the law when it combined two cases to address the issue of a state’s liability to its citizens. In *Muthukumarana v. Montgomery County*, the court considered whether to shield the state from liability for negligent acts committed by 911 operators providing emergency services. In one of the cases, a Harford County 911 operator failed to relay the correct information about the location of an unconscious assault victim. As a result, the officer was unable to find the victim, who consequently died from hypothermia. The mother of the victim instituted a wrongful death action against Harford County and the State of Maryland, alleging a failure of the government agencies to carry out their statutory duties with reasonable care.

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88. *Id.* at 513-15, 584 A.2d at 160-61. The statute stated that group daycare center playgrounds were to be free from conditions that may endanger a child. *Prince George's County Code § 5-125 (a)(24) (1987).*
90. *Id.* at 519 n.8, 584 A.2d at 162 n.8. The court noted that the day care centers had a capacity of over 121,000 children statewide. *Id.*
91. *Id.* at 519, 584 A.2d at 162-63.
92. *Id.* at 515, 584 A.2d at 160.
93. *Id.,* 584 A.2d at 160-61.
94. *Id.* at 520-22, 584 A.2d at 163-64.
95. *Id.* at 515-16, 584 A.2d at 161.
96. *Id.* at 516, 584 A.2d at 161.
98. *Id.* at 456, 805 A.2d at 377.
99. *Id.* at 460, 805 A.2d at 379-80.
100. *Id.* at 460-61, 805 A.2d. at 380.
101. *Id.* at 461, 805 A.2d at 380.
In the second case, a woman called 911 from her home to report that her husband attacked her. The woman informed the Montgomery County 911 operator that her husband was still in the house and was armed, but the operator failed to instruct the woman to flee the location. The woman’s husband saw her speaking on the phone and fatally shot their children. The woman filed a wrongful death and survival suit against the Montgomery County operator, alleging the failure to exercise reasonable care in executing her duty to provide emergency assistance.

Assessing the first prong of the public entity liability test, the Court of Appeals found that the operators did not owe a duty to individuals, but rather to the public at large. The court further reasoned that policy concerns justified the use of the public duty doctrine to protect 911 operators. The court expressly extended the protection of the public duty doctrine to 911 operators because of the nature of emergency services and the importance of flexibility in making instantaneous decisions. The court stated that because these decisions sometimes are incorrect, subjecting 911 personnel to liability for discretionary mistakes would be dangerous and could potentially diminish the state’s resources. As a result, the Muthukumarana court did not discuss the second prong.

Although neither Lamb, Ashburn, Willow Tree, nor Muthukumarana found that the government owed a public duty, these cases illustrated that there are exceptions when a statute may impose a duty if a special relationship exists between the state or county and an individual. This exception applies when a statute requires the state to protect a specific class of persons and a legislative statement imposes liability for failure to meet that statutory obligation.

102. Id. at 465, 805 A.2d at 382-83.
103. Id. at 466-68, 805 A.2d at 383-84.
104. Id. at 467 n.12, 805 A.2d at 384 n.12. After shooting the two children, the woman’s husband turned the gun on himself. Id.
105. Id. at 468, 805 A.2d at 384.
106. Id. at 490, 805 A.2d at 397.
107. Id.
108. Id. at 490-91, 805 A.2d at 397-98.
109. Id., 805 A.2d at 398.
110. Id. at 500-01, 805 A.2d at 404.
111. See, e.g., Ashburn v. Anne Arundel County, 306 Md. 617, 630-31, 510 A.2d 1078, 1085 (1986) (noting that a plaintiff may assert a negligence claim against the state if the state creates a “special relationship”).
112. Id. at 635, 510 A.2d at 1087.
113. See id. at 634, 510 A.2d at 1087 (rejecting the argument that a special relationship exists absent legislative intent).
(4) Nationwide, Courts Are Expanding State Liability in Child Abuse Cases.—A nationwide trend has developed to broaden the scope of liability in child abuse cases. This movement has gained momentum because of the tens of thousands of children injured under the protection of a social service agency.\textsuperscript{114} An increasing number of studies have tracked the correlation between children identified to a social service agency as abused or neglected and those dying from abuse and neglect.\textsuperscript{115} Recent studies have estimated that approximately twenty-five percent of children killed from abuse or neglect were previously identified and reported to a child protective agency.\textsuperscript{116} A medical study, "The Battered-Child Syndrome,"\textsuperscript{117} has increased the awareness and concern about protecting abused children.\textsuperscript{118} Such increased awareness and heightened concern has led further to an increasing amount of litigation regarding the negligent handling of child abuse cases and the increasing number of courts holding social service agencies responsible.

For example, in \textit{Brodie v. Summit County Children Services Board},\textsuperscript{119} the Supreme Court of Ohio rejected the public duty doctrine and held that a Children Services Board (CSB) owed a statutory duty to protect an abused child identified to the CSB. The complaint alleged that the CSB failed to properly investigate the physical and mental abuse of Tara Cook when her father and his female friend starved her, chained her to a bathroom sink, and burned her.\textsuperscript{120}

The Ohio court created a test to determine the applicability of the public duty doctrine.\textsuperscript{121} This test stated that a special relationship exists when the municipality promises to affirmatively act on behalf of the injured party, knows that inaction could lead to harm, has direct contact with the injured party, and knows that the party relied on its undertaking.\textsuperscript{122}


\textsuperscript{116} \textit{Resource Center, supra note 114}; \textit{Case Management, supra note 114}.


\textsuperscript{118} 41 AM. JUR. \textit{Trials} § 1 (1990). The publication of Dr. Kempe's work has led to an increase in public concern about child abuse and a tightening of the laws protecting children. \textit{Id}.

\textsuperscript{119} 554 N.E.2d 1301 (Ohio 1990).

\textsuperscript{120} \textit{Id. at} 1308.

\textsuperscript{121} \textit{Id. at} 1308.

\textsuperscript{122} \textit{Id.}
The court used the above test to determine that the statute intended to protect an abused child identified to the social service department, not the general public. The statute mandated action within twenty-four hours and created an obligation to act affirmatively on behalf of the identified child. The court also noted that the General Assembly expressly intended for the CSB to take responsibility when investigating a report of child abuse.

Similarly, in *Turner v. District of Columbia*, the District of Columbia Court of Appeals examined whether a public agency, the Child Protective Services (CPS), could be held liable under a child abuse statute for failing to act after being notified of the abuse. In *Turner*, a mother sued the city for negligence in failing to fulfill its statutory duty under the Prevention of Child Abuse and Neglect Act when the father killed her child. The court reversed the lower court’s grant of summary judgment, noting that the State owed the plaintiffs a special duty of care beyond the general duty owed to the public at large. The State’s duty arose by virtue of a special relationship established by the Child Abuse Act that required the CPS to protect a narrow and otherwise helpless class of identified abused children. The court noted that if the CPS was negligent in carrying out its duty, then the statutorily protected class would suffer differently from the public at large.

The Supreme Court of South Carolina similarly addressed the issue of a social service agency’s duty to an identified abused child in *Jensen v. Anderson County Department of Social Services*. In *Jensen*, a plaintiff sued the state and county alleging that they negligently failed to prevent the death of an abused child. The appellate court found that the Child Protection Act imposed a special duty upon the DSS to

123. *Id.*
124. *Id.*
125. *Id.*
127. D.C. CODE §§ 6-2102, 6-2121, 6-2122 (1981) (current version at D.C. CODE §§ 4-1301.01 to 1301.04 (2001)).
129. *Id.* at 675.
130. *Id.* at 667-68.
133. *Id.* at 616.
act in child abuse cases and that a failure to act reasonably could result in a negligence claim. In its reasoning, the court reaffirmed the notion that while there is no common-law duty to act, a statute may create an affirmative legal duty. The court noted that while state officials are usually immune from negligence claims under the public duty doctrine, they are not immune when they owe a duty to individuals rather than to the general public. The court formulated a six-part test to determine when a statute creates a special duty and the public duty doctrine does not apply. The court noted that the test incorporated the issue of whether the legislature intended for such a duty to exist. In applying this test, the court determined that the child abuse statute imposed a special duty on the state agency and that the public duty doctrine was therefore not applicable.

Courts across the country are expanding state liability in cases involving claims of child abuse. Although Maryland courts have not adopted a rigid test for determining when a special relationship and an individual duty exist, they have adopted a broad test that enables them to evaluate the issues on a case-by-case basis.

3. The Court's Reasoning.—In Horridge v. St. Mary's County Department of Social Services, the Court of Appeals of Maryland held that the circuit court erred in dismissing the plaintiff's complaint, which alleged that the State negligently handled a report of child abuse. Writing for the majority, Judge Wilner divided the negligence actions against the State into three issues: (1) negligent supervision, (2) negligence as it relates to duty, and (3) proximate cause.

134. Id. at 617.
135. Id.
136. Id.
137. Id. To create a special duty, the court will look to see if (1) the statute protects against a particular type of harm, (2) the statute mandates a specific public agent to guard against the harm, (3) the statute is intended to protect a specific and identifiable class, (4) the plaintiff constitutes a member of the protected class, (5) the public agent knows or should know that failure to act reasonably will cause harm to the specific class, and (6) that the agent is given authority to act on his own account in the scope of his position. Id.
138. Id. at 618.
139. Id. at 617-18.
140. See supra Part 2.b.(4).
142. 382 Md. at 195-96, 854 A.2d at 1246.
143. Judge Wilner was joined by Chief Judge Bell and Judges Raker, Harrell, and Greene. Id. at 174, 196, 854 A.2d at 1234, 1247.
144. Id. at 180-95, 854 A.2d at 1237-46.
a. Negligent Supervision.—The majority rejected Horridge's first argument, which charged the State with negligent selection, training, and retention of its social workers.\(^{145}\) In coming to this conclusion, Judge Wilner surveyed a series of cases outlining the rebuttable presumption that an employer used due care before hiring an employee.\(^{146}\)

The majority stated that Horridge's allegation of negligent supervision was unsupported because he failed to show evidence that Shirey and Walsh were professionally or personally unqualified for their positions.\(^{147}\) Rather, the majority stated that the evidence demonstrated the opposite was true because Shirey and Walsh were licensed social workers.\(^{148}\) Consequently, such evidence supported the impression that Shirey and Walsh were professionally competent.\(^{149}\)

The Court of Appeals maintained that Horridge's argument failed to identify all of the elements of a negligence claim and only stated that the DSS improperly trained or supervised its employees.\(^{150}\) Therefore, the majority held that the lower court properly dismissed the negligent supervision claim.\(^{151}\)

b. Negligence as It Relates to Duty.—The court next held that the State had a duty to protect Collin and could be liable for negligence if it breached that duty.\(^{152}\) To prove negligence, the court stated, a plaintiff must prove that (1) the defendant had a duty to protect the plaintiff, (2) the defendant breached this duty, (3) the plaintiff suffered actual injury, and (4) the injury resulted from the defendant's breach of duty.\(^{153}\) The issue before the court rested on the first element: whether the defendant had a duty to protect the plaintiff.\(^{154}\)

In examining this issue, the majority assessed prior case law to evaluate when a duty exists.\(^{155}\) The court quoted its opinion in Rem-
Horridge argued that the relationship between the parties was established by sections 5-701 through 5-714 of the Family Law Article, which created a duty to protect children subject to abuse or neglect. The statute requires an immediate investigation when there is a report of abuse to protect the health and safety of the child. Specifically, within twenty-four hours of a report, the DSS must (1) see the child, (2) interview the child's caretaker at the location where the abuse is reported, (3) and decide on the safety of the child. The court also noted that the Department of Human Resources adopted these statutory requirements in COMAR 07.02.07.05. The majority determined that COMAR obligated the DSS to acquire additional information about the reported abuse if the reports were incomplete and assess the immediate safety of the child.

The court rejected the State's defense that because the legislature did not expressly create a specific duty to individuals, the State did not owe them one. The majority stated that the legislature had expressly created a duty to protect abused children identified to the DSS. The State's argument was based on the notion of a "public duty doctrine," which immunizes the state from tort liability when a statute imposes a duty to the general public. However, the majority asserted that the public duty doctrine does not apply when a statute mandates a specific obligation to an identified class of persons. The court stated that section 5-706 imposed a specific obligation because it required the DSS to protect an identifiable class of children suspected of being abused. The Court of Appeals of Maryland first distinguished the facts of Horridge from prior cases that evaluated duty

156. Id., 854 A.2d at 1239.
158. Horridge, 382 Md. at 183, 854 A.2d at 1239.
159. Id. at 185-86, 854 A.2d at 1239-41.
160. Id. at 184-85, 854 A.2d at 1240.
161. Id. at 185-86, 854 A.2d at 1240-41; Md. Code Regs. tit. 07, § .02.07.05 (1977).
162. Horridge, 382 Md. at 186, 854 A.2d at 1241. Horridge filed eight reports with the DSS and a neighbor filed one report. Id. at 175, 854 A.2d at 1234.
163. Id. at 186, 854 A.2d at 1241.
164. Id. at 186-87, 854 A.2d at 1241.
165. Id. at 187, 854 A.2d at 1241.
166. Id. at 186-87, 854 A.2d at 1241.
167. Id.
as it related to government regulations, noting that the statutes did not identify a specific class of persons to which the state owed a duty.\textsuperscript{169}

The majority then noted the trend among courts across the country that interpreted similar statutes or regulations and came to the same conclusion that a state entity owes a duty to an identified child reported of abuse.\textsuperscript{170} The Court of Appeals then compared the number of reportedly abused children in Maryland in 2003 with the number of children who died of abuse or neglect in the United States in 2002.\textsuperscript{171} After making this comparison, the majority stated that the harm to a child is foreseeable when a social service agency does not act upon a report of child abuse.\textsuperscript{172} Consequently, the court maintained that the legislature created these regulations to protect children suspected of being abused or neglected from a specific kind of harm likely to occur if the DSS ignores its statutory duty.\textsuperscript{173}

Finally, the court also cited legislative intent to support its finding that there was a statutory duty to act because of the policy implications of preventing future harm to abused children.\textsuperscript{174} The court found that state employees may be liable when they fail to act reasonably, resulting in harm to a child previously reported as subject to abuse.\textsuperscript{175}

c. Proximate Cause.—The court next assessed whether the circuit court correctly held that the negligence of the DSS was not the proximate cause of Collin's death.\textsuperscript{176} The majority reversed the lower court and stated that when the statutory duty is to protect an individual from harm, then the foreseeability of the harm will determine the issue of proximate cause.\textsuperscript{177}

The Court of Appeals also rejected the circuit court's finding that the negligence of Fairris or her boyfriend was a superseding cause because the harm that resulted from the intervening act was foresee-

\textsuperscript{169} Horridge, 382 Md. at 187-88, 854 A.2d at 1241-42.
\textsuperscript{170} Id. at 190-92, 854 A.2d at 1243-44.
\textsuperscript{171} Id. at 192, 854 A.2d at 1244-45. In 2003, the Department of Human Resources reported that there were nearly 7300 child abuse cases in Maryland. Id., 854 A.2d at 1244. In 2002, approximately 1400 children died of abuse or neglect in the United States. Id., 854 A.2d at 1244-45.
\textsuperscript{172} Id. at 192-93, 854 A.2d at 1245.
\textsuperscript{173} Id., 854 A.2d at 1244-45.
\textsuperscript{174} Id. at 193, 854 A.2d at 1245.
\textsuperscript{175} Id. at 192-93, 854 A.2d at 1245.
\textsuperscript{176} Id. at 193, 854 A.2d at 1245. The circuit court stated that Fairris or her boyfriend caused Collin's death. Id.
\textsuperscript{177} Id. at 193-94, 854 A.2d at 1245.
The court noted that only if the breach of duty increases the likelihood of a criminal event will a private defendant be liable. As a result, the court held that the DSS and the social workers could have proximately caused injury because their breach of duty enhanced the likelihood that Collin was in danger and would be hurt.

Judge Cathell dissented and questioned the majority's intention of changing present law to create a duty as a means of reducing the death of abused children. He contended that by establishing a duty, the majority created a broad cause of action against the state.

Judge Cathell also stated that the majority changed Maryland case law such that, for the first time, government officials may be liable for making discretionary decisions that turn out to be incorrect. Consequently, the dissent argued that this change will have a devastating effect on governmental and administrative entities that are guided by statutes and regulations. Judge Cathell noted that if the legislature intended to create an actionable duty, they could have changed the law. Judge Cathell also wrote that although the majority cited Maryland cases that set the negligence standard with respect to duty, they did not follow the standard. The dissent refuted the majority's treatment of the cases they used to support their holding. As a result, the dissent stated that the ruling was incompatible with prior case law. Instead, the dissent contended that the majority should have

178. Id. at 194, 854 A.2d at 1245. The court noted that it would be illogical to deny a person recovery from harm caused by someone violating a duty designed to prevent the type of harm that occurred. Id. at 194-95, 854 A.2d at 1246.
179. Id. at 195, 854 A.2d at 1246.
180. Id.
181. Judge Cathell was joined by Judge Battaglia. Id. at 196, 854 A.2d at 1247.
182. Id. (Cathell, J., dissenting).
183. Id. at 197, 854 A.2d at 1247. As a result, the dissent predicted, the State will be forced to overreact every time a report is made for fear of being sued in the future. Id. The dissent opined that this would require the DSS to involve themselves in the affairs of divorced couples fighting over the custody of their children and accusing one another of child abuse. Id. at 198, 854 A.2d at 1248.
184. Id. at 197, 854 A.2d at 1247.
185. Id. at 209-17, 854 A.2d at 1254-59. Judge Cathell stated that human beings are bound to make mistakes in their discretionary actions and will now be held liable in tort law. Id. at 209-10, 214, 854 A.2d at 1254-55, 1257. Judge Cathell presented several examples where civil tort liability exists where it previously had not. Id. at 210-17, 854 A.2d at 1255-59. For example, he referred to the Health-General Article, section 14-407, which governs summer camps. Id. at 211, 854 A.2d at 1255-56. He said that as a result of the majority's holding, when a child is injured at camp, she may claim there was a mistake in the inspection of the facility for which the government entity is liable. Id.
186. See id. at 210-11, 854 A.2d at 1255.
187. Id. at 199, 854 A.2d at 1248.
188. Id. at 198-204, 854 A.2d at 1248-54.
189. Id. at 200, 854 A.2d at 1249.
simply overruled prior case law as opposed to distinguishing cases that were not properly distinguishable.\textsuperscript{190}

4. Analysis.—In \textit{Horridge v. St. Mary's County Department of Social Services}, the Court of Appeals correctly broke away from the previous notion that state entities may not be liable for failing to act reasonably and held that the DSS owed a duty of reasonable care to an identified child who died as a victim of abuse or neglect.\textsuperscript{191} Several justifications explain the Court of Appeals's decision: first, a nationwide trend emerged toward holding agencies liable in similar circumstances;\textsuperscript{192} second, surrounding social and policy implications encouraged the decision;\textsuperscript{193} and third, past cases addressing this issue outlined the circumstances for an exception.\textsuperscript{194}

The Court of Appeals of Maryland, however, failed to properly explain its reasoning and define why this case differed from previous Maryland cases addressing the same issue.\textsuperscript{195} Because the court did not identify clear guidelines for when to hold that a state owes a duty to a class of persons, it is not clear what standard the court will apply in future cases.\textsuperscript{196}

\textit{a. The Court of Appeals Correctly Followed the Nationwide Trend by Rejecting the Public Duty Doctrine as a Defense.}—The Court of Appeals's decision in \textit{Horridge} to hold the DSS liable is consistent with the nationwide trend to broaden the scope of liability in child abuse cases\textsuperscript{197} and limit the public duty doctrine.\textsuperscript{198} Indeed, courts are now more willing to broaden liability in child abuse cases by finding that a special relationship exists between the state and victims of child abuse.\textsuperscript{199}

In accordance with the trend, the \textit{Horridge} court adopted an exception to the public duty doctrine by finding that a special relation-
ship existed. The Horridge court relied on Brodie v. Summit County Children Services Board as an example of limiting the applicability of the doctrine. The court in Brodie asserted that the public duty doctrine does not apply when a statutory requirement mandates a specific action towards an identified child. The Brodie court took this exception one step further by abrogating the doctrine as a defense in child abuse cases. If the Horridge court had similarly adopted a clearer standard as to when the public duty doctrine applies, future courts and litigants would benefit from guidelines to prevent confusion as to its applicability.

Similarly, the Horridge court correctly cited to the District of Columbia Court of Appeals, which followed the same trend and rejected the public duty defense in Turner v. District of Columbia. The court in Turner stated that a statute creates a special duty when a class of plaintiffs constitutes an otherwise helpless group and the individuals rely on the agency's duty to act.

In accordance with courts around the country confronting the complex issue of how to determine when a special relationship exists and when an individual may assert a claim of negligence against the state, the Horridge court rejected the adoption of a rigid test to determine the existence of a special relationship. This contrasts with Jensen v. Anderson County, where that court created a six-factor test to determine when a special relationship exists.

Although the interpretation of child abuse statutes vary according to each court, the Court of Appeals of Maryland acted consistently with the trend of courts nationwide creating a cause of action when interpreting such statutes. Therefore, in ruling that a state entity may be liable when the disputed issue involves abused children, Mary-

200. Horridge, 382 Md. at 189-90, 854 A.2d at 1243.
201. Id.
203. This, supra note 198, at 716.
204. 532 A.2d 662 (D.C. 1987).
205. Id. at 668.
206. See Susan Lynn Abbott, Liability of the State and Its Employees for the Negligent Investigation of Child Abuse Reports, 10 ALASKA L. REV. 401, 402 (1993) (noting that due to a rising awareness of child abuse cases involving governmental agencies, the issue of state liability has become an increasingly litigated issue in recent years).
207. Horridge, 382 Md. at 192, 854 A.2d at 1244.
209. Hudson, supra note 197, at 712.
land joined other courts around the country in taking a proactive role to combat child abuse.210

b. Far-Reaching Policy Implications Drove the Horridge Court's Decision to Create a Duty to Protect a Vulnerable Population.—The Horridge court found a duty requiring the state to protect an identified class of plaintiffs who constitute a vulnerable and helpless group of young children.211 The court adjudicated this case during a time of increasing concern around the nation regarding the high number of deaths of abused and neglected children.212 Each year, approximately 20,000 Maryland children are reportedly abused or neglected.213 Half of them are seven years old or younger.214 Horridge will have significant, long-lasting ramifications because it will improve the way the DSS operates in Maryland.215

Therefore, the court in Horridge recognized that there should be an enforceable duty when the protection of a specific class of persons depends on the government.216 One reason for creating a duty is because the state agency is best situated to help this class of children and prevent future abuse and neglect.217 The state has the ability to take an aggressive stance and protect this otherwise helpless group because it is the only entity with the resources to prevent continued abuse.218 Furthermore, a child has no other advocate and therefore requires a higher level of protection or duty owed.219

210. See Horridge, 382 Md. at 190-92, 854 A.2d at 1243-44.
211. Id. at 189-90, 854 A.2d at 1243.
212. Id. at 190-93, 854 A.2d at 1243-45.
214. Id.
215. See This, supra note 198, at 719 (noting that as a result of Brodie, Ohio's "government agencies will be more conscious of their actions, and children services boards will better serve the children who are meant to be protected by the statute").
216. See Pub. Justice Ctr. Brief, supra note 213, at 26-27 (noting the uniqueness and specificity of a class of children who are victims of abuse or neglect and reported to the state).
217. See id. at 9 (noting that the State's failure to act reasonably would endanger the safety of thousands of children). Collin's mother or boyfriend killed him when he was only nineteen months old. Horridge, 382 Md. at 177, 854 A.2d at 1235. Collin is just one example of an infant who was under the protection of a state's social service agency. Young children nationwide age three and younger, are the most frequent victims of child fatalities because they are the most vulnerable. Press Release, Nat'l Adoption Info. Clearinghouse, Child Abuse and Neglect Fatality: Statistics and Intervention 2 (April 2004).
218. Pub. Justice Ctr. Brief, supra note 213, at 8 (noting the state's indispensable role in addressing the problem because only the state government has the resources, institutional capacity, and legal authority to protect large amounts of children from abuse).
219. Id. (noting that victims of abuse and neglect are often defenseless).
A second reason for creating a duty is because if the government fails to act reasonably in preventing abuse, the cost will eventually burden society.\textsuperscript{220} Studies have found that child abuse and neglect victims are more prone to antisocial and physically aggressive behavior, as well as drug abuse, teen pregnancy, juvenile delinquency, and adult criminality.\textsuperscript{221} One study estimated that the economic cost of child abuse and neglect in the United States is $94 billion annually.\textsuperscript{222}

A third reason the \textit{Horridge} court correctly acted to enforce the will of the legislature is because the court must hold someone accountable, and a child who is already in a disadvantaged position deserves recourse.\textsuperscript{223} Therefore, the \textit{Horridge} court correctly utilized its position by interpreting the statutes created by the legislature as mandating an intervention when an individual reports a case of child abuse, reversing the common-law rule.\textsuperscript{224} The court stated that the legislature did not intend to merely reprimand DSS workers when their failure to act reasonably results in the death of a child.\textsuperscript{225} The wording of the statute reveals the legislature's intent to create a special relationship between the DSS, its workers, and abused children, thereby requiring the DSS to immediately respond to a report of child abuse.\textsuperscript{226} Therefore, the court in \textit{Horridge} correctly determined that the DSS owes a duty to abused children and that the DSS may be liable when social workers fail to satisfy their statutory obligation.\textsuperscript{227}

c. The Evolution of State Liability.—In surveying prior case law, the \textit{Horridge} court correctly established that the facts in \textit{Horridge} differed from former cases evaluating a state's liability to an individual.\textsuperscript{228} \textit{Lamb v. Hopkins}, the first case to which the \textit{Horridge} court cited as establishing state liability,\textsuperscript{229} noted that a statutory obligation mandating state action did not create a general duty to the public at

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\item \textsuperscript{220} \textit{Id.} at 7.
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.} The estimated amount combined included such costs as immediate and long-term health care for the victim, an increase in juvenile delinquency and adult criminality, and the administrative costs of the child welfare system. \textit{Id.} at 8.
\item \textsuperscript{223} See Jessica K. Heldman, Comment, \textit{Court Delay and the Waiting Child}, 40 SAN DIEGO L. REV. 1001, 1031 (2003) (noting that social service systems have been held accountable for failing to comply with laws to protect children in foster care).
\item \textsuperscript{224} See Pub. Justice Ctr. Brief, \textit{supra} note 213, at 3 (noting the requirement enacted by the Maryland legislature to report cases of child abuse to the DSS, reversing the general common-law rule that an individual owes no duty to report a crime).
\item \textsuperscript{225} \textit{Horridge}, 382 Md. at 193, 854 A.2d at 1245.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 187-88, 854 A.2d at 1241-42.
\item \textsuperscript{229} \textit{Id.} at 188, 854 A.2d at 1242.
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Both Lamb and Horridge evaluated whether a state entity owed a duty of care to a specific individual when a statute mandated certain obligations for the benefit of the plaintiff. Although the court correctly distinguished these cases, it failed to explain fully their differences. The court should have strengthened its reasoning to clarify the law by noting that the two cases were different partly because of the agencies involved. Police have a very different duty to society than social service workers. Social service workers must protect a specific class of individuals that are unable to help themselves. In comparison, police have a general duty to the public. If the court would have come full circle in its conclusion, it would have set a standard for the types of agencies that could be liable in the future.

The Horridge court should also have noted the difference in the statute referred to in Lamb, compared to the statute in Horridge. The statute and regulations referred to in Horridge mandated specific and detailed guidelines for how the state should act when an individual suspects abuse of a child and reports it to the DSS. For example, the child abuse statute in Maryland obligates the DSS to visit the identified child within twenty-four hours and act to ensure the child's safety. In comparison, the statute in Lamb merely imposed a duty from the supervising officer to the court, not to the general public. Therefore, to guide future litigants, the Court of Appeals should have acknowledged the distinction that the statute in Horridge mandated a specific duty to a specific individual and was not for the general public.

231. Horridge, 382 Md. at 188, 854 A.2d at 1242.
232. Id.
233. Compare id. at 174-75, 854 A.2d at 1234 (Department of Social Services), with Lamb, 303 Md. at 240, 492 A.2d at 1299 (Parole and Probation Division).
234. Ashburn v. Anne Arundel County, 306 Md. 617, 628, 510 A.2d 1078, 1084 (1986); see also 63 C.J.S. Municipal Corporations § 492 (1999) (noting that a police officer's duty involves the enforcement of laws, the prevention of crime, the assisting in the detection of crime and regulating traffic).
235. See Robert Barnhart, Principled Pragmatic Stare Decisis in Constitutional Cases, 80 Notre Dame L. Rev. 1911, 1922 (2004-2005) (stating that courts are obligated to explain why they are departing from precedent and why their precedent should be followed in the future).
236. Horridge, 382 Md. at 184-86, 854 A.2d at 1240-41.
238. Lamb v. Hopkins, 303 Md. 236, 253, 492 A.2d 1297, 1306 (1985). The statute referred to in Lamb stated that when a person is under the supervision of the Division, the Division must report to the court if the individual is not complying with the conditions of the probation. Id. at 252-53, 492 A.2d at 1306.
239. Horridge, 382 Md. at 187, 854 A.2d at 1241.
The Horridge court should also have evaluated the difference in the type of relationship between the parties involved in Lamb and the parties involved in Horridge. In Lamb, there was no special relationship between the parole officer and the child injured because the two parties had no interaction before the incident.\textsuperscript{240} In Horridge, a special relationship existed between the abused child and the DSS because the plaintiff had ongoing communication with the state entity.\textsuperscript{241} In concluding that the cases were different, the court should have strengthened its reasoning by clarifying the difference and further defining the type of special relationship that must exist to declare when a state entity owes a duty to a class of persons.\textsuperscript{242} By not establishing these differences, the Horridge court failed to demonstrate why it properly departed from Lamb.\textsuperscript{243}

The Horridge court correctly acknowledged the similar theme in Ashburn as evaluating whether a state entity owed a special duty of care to a specific individual arising from a statute mandating the state to act.\textsuperscript{244} The Court of Appeals however, failed to show that the Ashburn case was symbolic of how the law is evolving.\textsuperscript{245} In establishing the principles of when an exception to the general rule of no duty applies, the Ashburn case set the stage for the transformation of the law.\textsuperscript{246} The Ashburn case helped form the exception to the rule that there is no general duty for a state entity to control a third party’s conduct to prevent harm to another unless a “special relationship” exists between the state and the person injured.\textsuperscript{247} The court in Ashburn stated that a special relationship may exist: (1) if a statute mandates certain actions for the protection of a specific class of persons\textsuperscript{248} and indicates an express legislative intent stating that such a duty exists,\textsuperscript{249} or (2) if the state entity affirmatively acted to protect the specific victim and the victim relied on the state’s actions.\textsuperscript{250}

\textsuperscript{240} See Lamb, 303 Md. at 241, 492 A.2d at 1300 (noting that no special relationship exists between the Division and the Lambs).
\textsuperscript{241} See Horridge, 382 Md. at 175, 854 A.2d at 1234 (noting that Horridge made eight reports to the DSS alleging abuse of his son).
\textsuperscript{242} Id. at 187, 854 A.2d at 1241.
\textsuperscript{243} Barnhart, supra note 235, at 1922.
\textsuperscript{244} Horridge, 382 Md. at 192, 854 A.2d at 1244.
\textsuperscript{245} See Ashburn, 306 Md. at 635, 510 A.2d at 1087 (noting how to make an exception to the standard no duty rule).
\textsuperscript{246} Id.
\textsuperscript{247} Id. at 630-31, 510 A.2d at 1085.
\textsuperscript{248} Id. at 635, 510 A.2d at 1087. The court in Ashburn stated that a statute must require specific acts be taken for the protection of an identified class of persons, not the general public. Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id. at 631, 510 A.2d at 1085.
To strengthen its reasoning, the Horridge court should have highlighted how the decision in Ashburn allowed the court to rule that the DSS owed a duty to an abused child. Although the facts of the Ashburn case did not fall into the exceptions created by the special relationship, the Horridge case fell into the exceptions because the DSS was obligated to protect a specific class of identified children subject to abuse, and legislative intent indicated that a duty existed.\textsuperscript{251} If the court clarified how it reached its decision, it would have correctly provided explicit guidance for how future cases should apply the law.\textsuperscript{252}

The Horridge court also erred when it cited Willow Tree Learning Center Inc. v. Prince George's County\textsuperscript{253} without properly explaining why the two cases resulted in different outcomes.\textsuperscript{254} In Willow Tree, the court stated that its holding was consistent with the overall reluctance of Maryland courts to infer a duty by statute.\textsuperscript{255} However, the Horridge court should have clarified its reasoning and distinguished the cases to clarify the circumstances under which courts will infer a duty by statute.\textsuperscript{256}

The Horridge court should have indicated in its reasoning how specific the class must be to constitute an identifiable class of persons. An important difference between Horridge and Willow Tree is that in Willow Tree, the statute at issue failed to specify an identifiable class of persons.\textsuperscript{257} However, Willow Tree was a significant case because it allowed the Horridge court to conclude that abused children identified to the state constituted a specific class of persons.\textsuperscript{258} The Willow Tree court refined the law when it defined what does not constitute an identifiable class.\textsuperscript{259} For example, the court noted that the word “children” alone in a statute is not sufficiently specific to constitute an identifiable class because this general language could create thousands of potential plaintiffs.\textsuperscript{260} Although this determination allowed the Horridge court to conclude that previously reported abused

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\item \textsuperscript{251} Horridge, 382 Md. at 192-93, 854 A.2d at 1244-45.
\item \textsuperscript{253} 85 Md. App. 508, 584 A.2d 157 (1991).
\item \textsuperscript{254} Horridge, 382 Md. at 188, 854 A.2d at 1242.
\item \textsuperscript{255} Willow Tree, 85 Md. App. at 516, 584 A.2d at 161.
\item \textsuperscript{256} See State v. Gunwall, 720 P.2d 808, 811-12 (Wash. 1986) (criticizing courts that do not explain or justify their departure from federal constitutional interpretations for failing to guide counsel in future cases).
\item \textsuperscript{257} Willow Tree, 85 Md. App. at 519, 584 A.2d at 162.
\item \textsuperscript{258} Horridge, 382 Md. at 188-90, 854 A.2d at 1242-43.
\item \textsuperscript{259} 85 Md. App. at 519 & n.8, 584 A.2d at 162 & n.8.
\item \textsuperscript{260} Id. at 519 n.8, 584 A.2d at 162 n.8.
\end{itemize}
children constitute an identifiable class, the future impact of the ruling is unclear. By not stating what comprises an identified class, the court left unclear whether other vulnerable groups identified to the state may constitute a protected class, such as battered women, the elderly, and handicapped individuals.

To strengthen its conclusion in Horridge, the Court of Appeals also should have noted Willow Tree’s significance in reinforcing the importance of legislative intent. The court in Willow Tree noted that absent an explicit statement by the legislature creating a specific type of duty, it is not the court’s responsibility to create a cause of action.

In ruling that the plaintiff has a cause of action, the Horridge court correctly rejected the public duty doctrine as a defense. The Horridge court relied on Muthukumarana v. Montgomery County to explain when the doctrine applies. But the Horridge court failed to distinguish clearly why the public duty doctrine applied in Muthukumarana, yet was not applicable to Horridge. The court in Muthukumarana stated that part of its motivation for applying the public duty doctrine to 911 personnel was to prevent state employees from becoming liable for discretionary acts on behalf of the state. The Horridge court, however, failed to distinguish how this outcome would not similarly subject the state to civil suits for discretionary acts by state employees.

The Horridge court’s failure to explain its departure from Muthukumarana is especially problematic because Muthukumarana was the most recent case, prior to Horridge, that confronted the issue of state entity liability and the public duty doctrine. The Horridge court simply stated that the doctrine does not apply when a statute has.

261. Horridge, 382 Md. at 189-90, 854 A.2d at 1243.
262. See Elizabeth M. Schneider, Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights, 38 NEW ENG. L. REV. 689, 711 (2004) (noting arguments that in some instances, battered women constitute a protected class); Lauren R. Sturm, Fair Housing Issues in Continuing Care Retirement Communities: Can Residents Be Transferred Without Their Consent?, 6 N.Y. Cty L. REV. 119, 121 (2003) (noting that the handicapped and elderly often constitute a protected class).
263. Willow Tree, 85 Md. App. at 522, 584 A.2d at 164.
264. Id.
265. Horridge, 382 Md. at 187, 854 A.2d at 1241.
266. Id., 854 A.2d at 1241-42.
267. Id. at 187-88, 854 A.2d at 1241-42.
269. Horridge, 382 Md. at 198, 854 A.2d at 1248 (Cathell, J., dissenting).
270. The Court of Appeals adjudicated Muthukumarana in 2002. 370 Md. at 447, 805 A.2d at 372.
created a special duty or specific obligation to an identified class and the legislative intent expressed a duty to children identified to the DSS. Simply stating when the doctrine does not apply does not set a clear standard for future courts and attorneys.

Instead, the Horridge court should have set clear guidelines and exceptions for when the public duty doctrine may be a defense. One motivation for the rejection of the doctrine may relate to the government agency asserting its protection. In the Horridge case, the DSS was the agency asserting the doctrine after failing to comply with a statutory obligation mandating that the DSS protect abused children. In Muthukumarana, by contrast, the agency asserting the doctrine was the county police, after acting within the scope of its police duty. Police officers' duties extend across a broad range of obligations from patrolling the streets to responding to a threat of violence. Police officers' roles are to maintain order in society. There is an inherent difference between protecting society at large and acting for the protection of abused children because abused children often have no other outlet to turn to and are already in a vulnerable position. Although the Muthukumarana court stated that the public duty doctrine is not limited to police officers, the court in Horridge should have plainly stated that the public duty doctrine does not apply to social service workers once someone identifies an abused child to the department. Because the Court of Appeals created an unclear standard and did not outline when a special relationship exists, the Horridge decision may create a bottomless pit for when the court will hold that the state owes a duty to the public.

5. Conclusion.—In Horridge v. St. Mary's County Department of Social Services, the Court of Appeals of Maryland correctly held that a state entity owes a duty of care to an identified child subject to abuse if

271. Horridge, 382 Md. at 187, 854 A.2d at 1241.
272. Id. at 193, 854 A.2d at 1245.
273. Id. at 186-87, 854 A.2d at 1241.
274. Muthukumarana, 370 Md. at 486-87, 805 A.2d at 395.
275. See supra note 234 and accompanying text.
276. See supra note 234 and accompanying text.
277. See Pub. Justice Ctr. Brief, supra note 215, at 19-20 (noting that when the state receives a child abuse report, "it enters into a relationship with that child fundamentally different from its relationship with members of the public generally").
278. Muthukumarana, 370 Md. at 488, 805 A.2d at 396.
279. See Brodie v. Summit County Children Serv. Bd., 554 N.E.2d 1301, 1308 (Ohio 1990) (holding that a statutorily imposed duty to investigate reports of child abuse created a specific duty abrogating the public duty doctrine of immunity).
it fails to act reasonably in protecting that child. In arriving at its decision, the court correctly conformed to the nationwide trend of holding state entities to a higher duty when there is a report of child abuse than when interacting with the general public. The Horridge court also correctly recognized the unique obligation that a state owes to society and the importance of holding a state accountable due to its ability to prevent a child's death resulting from abuse. Therefore, the Horridge court correctly extended the traditional realm of state entity liability. However, the court failed to follow through in its reasoning and explain why the outcome of this case was different than previous cases addressing the same issue. Consequently, the court failed to make clear for future litigants when a state entity may be liable. Instead, the court should have set clear guidelines for determining when a state agency owes a duty to an individual plaintiff. It is therefore not clear to what extent the Horridge decision will apply in the future.

Margalit A. Weinblatt

281. See supra Part 4.a.
282. See supra Part 4.b.
283. See supra Part 4.c.
284. See supra Part 4.c.
285. See supra Part 4.c.
286. See supra Part 4.c.
B. Failing to Temper the Natural Parent Presumption in Third-Party Custody Cases Undermines the Best Interest of the Child

In *McDermott v. Dougherty*, the Court of Appeals of Maryland considered the appropriate standard to determine custody in third-party custody cases. The court joined the majority of jurisdictions and adopted for third-party custody cases a natural parent presumption, which can be rebutted by demonstrating either that the natural parent is unfit or that extraordinary circumstances exist. The court overzealously applied the natural parent presumption when it omitted crucial exceptional circumstance findings of the lower court, and it failed to adequately consider the exceptional circumstance factors in light of Maryland case law. In so doing, the court failed to evaluate the third-party standard in its totality and therefore allowed the natural parent presumption to be determinative. The court also should have tempered the natural parent presumption with a psychological parent exception to protect the best interest of the child by elevating a third party that the child emotionally regards as a parent to equal status as the natural parent. The *McDermott* court allowed its unsubstantiated fear of judicial social engineering to influence its decision. By failing to adequately apply the exceptional circumstance factors, failing to adopt a psychological parent exception, and allowing its fear of social engineering to influence its decision, the court neglected the best interest standard, which is always determinative in Maryland custody cases.

1. *The Case.—McDermott* arose out of a custody dispute over Patrick Michael McDermott (Patrick), the child of Charles David McDermott (Mr. McDermott) and Laura A. Dougherty (Ms. Dougherty). Patrick’s parents separated soon after his birth and began custody proceedings in the Circuit Court for Harford County on September 29, 1995.
From 1995 through 2005, the parties engaged in substantial litigation, including various custody, divorce, and child support pleadings, briefs, and petitions. In November 2001, Ms. Dougherty was convicted of her fourth drinking and driving offense, which resulted in her incarceration. At that time, Ms. Dougherty had primary residential custody of Patrick, and she signed a power of attorney to her parents, Hugh and Marjorie Dougherty (the Doughertys), giving them the power to care for Patrick and make decisions on his behalf during her incarceration. On January 8, 2002, Mr. McDermott filed a motion for a temporary modification of a November 8, 2001 custody order and an additional notarized letter the following day. Through these documents, Mr. McDermott requested that physical custody be given to the Doughertys and that both the Doughertys and the McDermotts, Patrick's paternal grandparents, be given the power to make decisions on Patrick's behalf.

Prior to January 10, 2002, Mr. McDermott entered into a six-month seaman's contract. Mr. McDermott was at sea from the first half of January through the middle of 2002. After Mr. McDermott's departure, the formerly cooperative relationship between him and the Doughertys deteriorated.

On February 12, 2002, the Doughertys and the McDermotts filed a complaint against their adult children in the Circuit Court for Harford County, seeking to share joint legal custody of Patrick. The complaint stated that Patrick had lived with the Doughertys for approximately one-third of his life and that the McDermotts were also extremely involved with his life. On February 13, 2002, the court ordered both sets of grandparents to share temporary joint legal custody of Patrick, with the Doughertys having residential custody.

9. Id. at 326-27, 869 A.2d at 754-55.
10. Id. at 327, 869 A.2d at 755.
11. Id.
12. McDermott v. McDermott, No. 12-C-95-23852, slip op. at 7 (Harford County Cir. Ct. Sept. 8, 2003). Under the November 8, 2001 custody order, Mr. McDermott and Ms. Dougherty were granted joint legal custody and Ms. Dougherty received primary custody, with Mr. McDermott receiving visitation. Id. at 7-8.
13. Id. at 8. The motion was granted on January 16, 2002. Id.
14. McDermott, 385 Md. at 327, 869 A.2d at 755.
15. Id. at 327-28, 869 A.2d at 755.
16. Id. at 328, 869 A.2d at 755.
17. The paternal grandparents are not party to this appeal. Id. at 324, 869 A.2d at 753.
18. Id. at 324, 869 A.2d at 753. Furthermore, Ms. Dougherty is not a party in this case. Id. at 324 n.1, 869 A.2d at 753 n.1.
20. McDermott, 385 Md. at 328, 869 A.2d at 756.
court granted the parents visitation rights at the mutual approval and convenience of the grandparents.\textsuperscript{21}

Upon Mr. McDermott’s return in early July 2002, the Doughertys voluntarily returned Patrick to him, and Patrick remained with him throughout 2002.\textsuperscript{22} On July 25, 2002, Mr. McDermott filed a complaint seeking permanent primary residential and legal custody of Patrick.\textsuperscript{23} The Doughertys moved to dismiss the complaint because they were not confident in Mr. McDermott’s ability to care for Patrick and because they felt that a change in custody was not in the child’s best interest.\textsuperscript{24} Furthermore, the Doughertys believed that they had provided the only stable presence in Patrick’s life.\textsuperscript{25}

The trial occurred on July 1 and 2, 2003, at which all parties presented testimony regarding Mr. McDermott’s and Ms. Dougherty’s fitness as parents.\textsuperscript{26} Mr. McDermott testified that he intended to establish permanent residence in Maryland if he obtained full custody of Patrick and that he and Patrick were currently residing with another family in a harmonious living arrangement.\textsuperscript{27}

On September 8, 2003, the circuit court awarded the Doughertys sole legal and physical custody of Patrick.\textsuperscript{28} The court determined that Ms. Doughtery was an unfit parent.\textsuperscript{29} Although the court found Mr. McDermott fit to parent, it noted that a psychological evaluation concluded that Mr. McDermott has disturbances in his cognitive thinking that promoted faulty judgment and that he is inflexible.\textsuperscript{30}

The court declined to award Mr. McDermott custody, however, because it found exceptional circumstances sufficient to rebut the natural parent presumption after considering seven factors.\textsuperscript{31} The court first found that the Doughertys had custody of Patrick for several extended periods of time.\textsuperscript{32} Second, the court determined that Patrick was six when the Doughertys received temporary custody and was cur-

\textsuperscript{21} Id. at 329, 869 A.2d at 756.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. Patrick’s paternal grandparents, who shared legal custody with the Doughertys, agreed with Mr. McDermott that a change in legal custody to him was proper. Id.
\textsuperscript{25} Id. at 330, 869 A.2d at 757.
\textsuperscript{26} Id., 869 A.2d at 756. In the interim, Mr. McDermott worked as a seaman to earn money to pay for a custody attorney. Id.
\textsuperscript{27} Id., 869 A.2d at 756-57.
\textsuperscript{28} Id., 869 A.2d at 757.
\textsuperscript{29} Id.
\textsuperscript{30} McDermott v. McDermott, No. 12-C-95-23852, slip op. at 14, 22 (Harford County Cir. Ct. Sept. 8, 2003).
\textsuperscript{31} McDermott, 385 Md. at 330-31, 869 A.2d at 757.
\textsuperscript{32} McDermott, No. 12-C-95-23852, slip op. at 17.
Third, the court found that Patrick had a strong emotional attachment to all parties, and he was doing well in school. The court also determined that the Doughertys provided Patrick with stability and that Mr. McDermott’s “propensity for using Patrick as a pawn in the conflict between him and Ms. Dougherty” could obstruct a relationship with Patrick’s maternal side of the family.

Turning to the fourth factor, the court found that when Mr. McDermott relinquished custody of Patrick, it was generally due to his employment at sea. Fifth, the court observed that Patrick was very close to his grandparents. As for the sixth factor, the court determined that Mr. McDermott believed he had a genuine interest in raising Patrick. But the court also found that Mr. McDermott’s interest in custody was motivated in part by his desire to control Patrick’s mother, and the court found that Mr. McDermott has made decisions that prioritize his needs over his son’s.

Finally, the court also found that Patrick lacked a stable father because of Mr. McDermott’s lengthy work-related absences. All this was evident through Patrick’s misbehavior at school during these periods and the fact that Mr. McDermott did not have his own residence or a job and exhibited inflexible and narcissistic tendencies. Mr. McDermott also once left Patrick with Ms. Dougherty at a halfway house and further testified that he would place Patrick with his parents in Alabama should he return to sea for a long period of time. The Doughertys, by contrast, lived in the same home throughout the many proceedings and willingly provided Patrick with care when his parents could not.

On September 16, 2003, Mr. McDermott filed a motion to alter or amend judgment, in which he contended that the circuit court ruled contrary to state and federal case law. The circuit court de-

33. Id. at 17.
34. Id. at 18.
35. Id.
36. Id.
37. Id.
38. Id. at 18-19.
39. Id. (relying on the testimony of Ms. Carlevaro, a social worker involved in the case).
40. Id.
41. Id.
42. Id.
43. Id. at 19, 22-23.
44. McDermott, 385 Md. at 331, 869 A.2d at 757.
nied Mr. McDermott’s motion. He also filed a Notice of Appeal to the Court of Special Appeals.

On April 5, 2004, the Court of Special Appeals affirmed the lower court’s decision. On May 21, 2004, the Court of Special Appeals denied Mr. McDermott’s motion for reconsideration. On August 25, 2004, the Maryland Court of Appeals granted Mr. McDermott’s request for certiorari to decide whether Mr. McDermott’s employment was an exceptional circumstance under Maryland law.

2. Legal Background.—In Maryland custody disputes, “the best interest of the child standard is always determinative.” In third-party custody disputes, the best interest of the child is presumed to be in custody with the natural parent; therefore, Maryland courts apply a natural parent presumption that may be overcome by a showing of parental unfitness or exceptional circumstances. Maryland considers seven exceptional circumstance factors to protect the best interest of the child, but not all seven need be present. However, a concern for judicial social engineering has influenced a recent Court of Appeals custody case, thus indicating a higher level of protection for natural parents. Nationally, courts employ one of three standards in third-party custody cases. First, some jurisdictions apply a pure best interest standard. Second, some jurisdictions employ a hybrid of the natural parent presumption and the best interest standard. Third, a majority of courts apply a natural parent presumption that the best interest of the child is satisfied by custody in the natural parent.

45. Id.
46. Id.
47. Id. The Court of Special Appeals determined that the lower court had not abused its discretion in finding that Mr. McDermott’s employment constituted exceptional circumstances that overcame the natural parent presumption. McDermott v. Dougherty, No. 1103, slip op. at 4 (Md. Ct. Spec. App. Apr. 5, 2004).
48. McDermott, 385 Md. at 331, 869 A.2d at 757.
49. Id. at 324-25, 869 A.2d at 753-54. The court also granted certiorari to decide whether Mr. McDermott’s employment was enough of a concern to satisfy the “only to prevent harm or potential harm” standard required by the United States Supreme Court in Troxel v. Granville, 530 U.S. 57 (2000), and whether the order violated the holding of Schaefer v. Cusack, 124 Md. App. 288, 722 A.2d 73 (1998), which requires custody determinations to be based upon present circumstances and not future or past behavior. Id.
51. See infra Part 2.a(1).
52. See infra Part 2.a(2).
53. See infra Part 2.a(3).
55. See infra Part 2.b(1).
56. See infra Part 2.b(2).
57. See infra Part 2.b(3).
a. Maryland Third-Party Custody Jurisprudence.—

(1) Ross v. Hoffman.—The best interest standard is strongly entrenched in Maryland and is critical to custody considerations. The standard is determinative in all Maryland custody cases.

In Hoffman, the Court of Appeals of Maryland espoused the standard for third-party cases. In such cases, the court applies a presumption in favor of the natural parent, which can be rebutted by a finding of either parental unfitness or exceptional circumstances, because the best interest of the child is presumed to be served by custody in the natural parent. A rebuttal of the natural parent presumption triggers a best interest analysis. The court articulated that in all custody disputes, the best interest standard is determinative, but in third-party disputes, the court presumes that the child’s best interest is in custody with the parent, and thus the natural parent enjoys a presumption of custody. Therefore, in third-party custody disputes, only when an equity court determines that the parent is unfit or that exceptional circumstances exist does it inquire into the best interest of the child.

The Hoffman court outlined seven factors indicative of exceptional circumstances:

[T]he length of time the child has been away from the biological parent, the age of the child when care was assumed by

61. Id. In third-party cases, the best interest factors are explicitly considered only when the natural parent presumption is rebutted by either a finding of parental unfitness or of exceptional circumstances. Id. at 179, 372 A.2d at 587. In contrast, when a custody dispute is between two biological parents, the court begins its analysis by considering the following factors in determining the best interest of the child: (1) the fitness of the parents; (2) the character and reputation of the parties; (3) the desire of the natural parents and any agreements between them; (4) the potential for maintaining natural family relations; (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment; (6) material opportunities affecting the future life of the child; (7) the age, health, and sex of the child; (8) the residences of the parents and opportunities for visitation; (9) the length of the separation of the parties; and (10) whether there was a prior voluntary abandonment or surrender of custody of the child. John F. Fader, II & Richard J. Gilbert, Maryland Family Law § 6-3 (3d ed. 2000) (1990). If adultery of one of the parties is proven, trial courts are also instructed to consider whether it has a detrimental effect on the child. Id. § 6-3(b)(1).
63. Id.
64. Id.
the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and the strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent’s desire to have custody of the child, the stability and certainty as to the child’s future in the custody of the parent.65

Hoffman involved a third-party dispute between a natural mother, Mrs. Ross, and the Hoffmans, who were not consanguinely related to the ten-year-old child, Melinda.66 Mrs. Hoffman served as full-time caregiver for over eight-and-a-half years, with Mrs. Ross visiting Melinda and paying minimal child support.67 The court awarded the Hoffmans custody because exceptional circumstances overcame the natural parent presumption.68 The court found that nearly all of the exceptional circumstances were present because Melinda was separated from her natural mother for several years, starting in infancy, and Melinda had a strong attachment to the Hoffmans.69 Furthermore, Melinda had a strong emotional reaction to a possible change in custody, Mrs. Ross waited for over eight years to reclaim Melinda, and Mrs. Ross’s motives for wanting custody were unclear.70

(2) Post-Hoffman Cases.—Several cases following Hoffman have reinforced the notion that the best interest of the child is the overarching concern in all custody disputes.71 Courts grant custody to third parties upon a showing of exceptional circumstances, particularly where the child has established a significant relationship with a third party.

One such third-party case, Pastore v. Sharp, involved a dispute between the natural mother, Margaret Pastore (Ms. Pastore) and the paternal aunt and uncle, Nancy and William Sharp (the Sharps), over Ms. Pastore’s five-year-old son, Nicholas.72 Because both of Nicholas’s parents were addicted to drugs, the Sharps cared for him for two of his first five years.73 The court awarded custody to the Sharps because exceptional circumstances existed.74 Specifically, the court found that

65. Id. at 191, 372 A.2d at 593.
66. Id. at 179, 372 A.2d at 587.
67. Id. at 181-82, 372 A.2d at 588-89.
68. Id. at 192, 372 A.2d at 594.
69. Id.
70. Id.
71. See supra note 59 and accompanying text.
73. Id. at 316, 322, 567 A.2d at 510, 513.
74. Id. at 322, 567 A.2d at 513.
the Sharps had custody for more than two years, during which Ms. Pastore had essentially relinquished custody. The court also determined that Nicholas was well-cared for by the Sharps, but lacked stability when in his mother's care. Further, the court noted that Ms. Pastore's apartment was not large enough for her son and that Ms. Pastore had very indefinite future plans.

In Newkirk v. Newkirk, the court affirmed the chancellor's finding of exceptional circumstances and upheld an award of custody to a third party. Upon the death of the mother, the legal custodian, the natural father, Richard, and an adult half-brother, Derek, both requested custody of the two children. In her will, the mother requested that Derek receive custody. The court awarded Derek custody because it found that the children's relationship with their father was distant, whereas their relationship with Derek was strong. The court further determined that the teenaged children did not want to live with their father and that they were emotionally well-adjusted with Derek.

Likewise, in Shurupoff v. Vockroth, the court upheld an award of custody to the grandparents, the Vockroths, instead of the biological father, Mr. Shurupoff. The court based its decision on an examination of the seven exceptional circumstance factors. The child, Kimberly, had only lived with her father for nine months and had minimal contact with him since then. Although Kimberly was ten when the Vockroths assumed full-time care of her, they had been very involved in her life since her birth. Kimberly was very emotionally attached to her grandparents, and a change of custody to her father would have had a detrimental effect because her father's family viewed her with suspicion, whereas the Vockroths viewed Kimberly very positively. Lastly, Mr. Shurupoff had not been a parent to

75. Id.
76. Id.
77. Id.
79. Id. at 590, 535 A.2d at 948.
80. Id.
81. Id. at 594-96, 535 A.2d at 950-51.
82. Id. at 594-95, 535 A.2d at 950.
84. Id. at 646-48, 814 A.2d at 547-49.
85. Id. at 646, 814 A.2d at 548.
86. Id. at 647, 814 A.2d at 548.
87. Id. at 647-48, 814 A.2d at 548.
Kimberly, which led the court to doubt the stability of her family life should Mr. Shurupoff receive custody.88

The court in Shurupoff clarified the Hoffman standard by observing that Hoffman should not have required that a court inquire into the best interest of the child only if there is first a determination that the parent is unfit or that exceptional circumstances exist.89 The court determined that judges in all custody cases must examine the child's best interest because that is the critical inquiry.90 The Shurupoff court, however, continued to recognize a presumption in favor of the natural parent in third-party cases, which may be overcome by demonstrating that the parent is unfit or that exceptional circumstances exist.91

In sum, the best interest of the child is always determinative in Maryland. In third-party cases, the best interest of the child is presumed to be in custody with the natural parent. However, the natural parent presumption is rebuttable by a showing of parental unfitness or exceptional circumstances. Further, Maryland courts have awarded custody to third parties pursuant to a finding of exceptional circumstances, particularly when the third party has had custody, and the child has developed a significant attachment to the third party.

(3) The Court's Fear of Social Engineering.—A recent case demonstrates the Court of Appeals's concern about the opportunity for courts to engage in social engineering. In In re Adoption/Guardianship Nos. J9610436 & J9711031,92 the court granted custody to the natural father, Mr. F., in a termination of parental rights (TPR) proceeding. The majority found that, although Mr. F. had cognitive limitations, he could care for his children with properly tailored state

88. Id. at 648, 814 A.2d at 548-49.
89. Id. at 661-62, 814 A.2d at 557.
90. Id. at 661, 814 A.2d at 557.
91. Id. at 661-62, 814 A.2d at 557.
92. 368 Md. 666, 796 A.2d 778 (2002). Although this was a termination of parental rights (TPR) proceeding and not a third-party custody case, the decision remains relevant because the McDermott majority based its decision partly on a fear of judicial social engineering. McDermott, 385 Md. at 435, 869 A.2d at 818-19. In TPR proceedings, the state initiates an adversarial proceeding that, if successful, permanently severs the parent-child relationship. M.L.B. v. S.L.J., 519 U.S. 102, 103 (1996). In contrast, private custody proceedings determine who will make legal decisions and provide day-to-day care for the child. Taylor v. Taylor, 306 Md. 290, 296-97, 508 A.2d 964, 967 (1986). In almost all cases, an award of custody to one parent does not permanently sever the other parent's relationship with the child because the noncustodial parent receives visitation. Boswell v. Boswell, 352 Md. 204, 220, 721 A.2d 662, 669 (1998).
reunification services. Furthermore, the majority asserted concerns that parental rights may only be terminated when the parent, regardless of financial means or education, cannot care for the child in the future, even with proper assistance. Next, the court cautioned that the best interest analysis should not be a search for a better situation and that except in extreme cases, a parent’s financial circumstances should be irrelevant.

The dissent maintained that the majority overlooked specific facts in favor of furthering specific societal, moral, and legal values. For example, the Department of Social Services (DSS) noted that, despite Mr. F.'s desire to care for his children, he would never have the ability to do so, regardless of DSS assistance. The dissent observed that the majority improperly concluded that Mr. F. was capable of supporting his two children because his job paid $6.50 an hour, he was renting a two-bedroom townhouse without a phone, and his only means of transportation was a bicycle. The dissent argued that the majority disregarded the trial court's findings, cherry-picked certain facts, and discovered new facts when it was convenient, which therefore led to an improper award of custody to the father. In conclusion, in In re Adoption/Guardianship Nos. J9610436 & J9711031, the Court of Appeals demonstrated its concern for judicial social engineering when the dispute is between a natural parent and a non-parent.

b. National Third-Party Custody Standards.—

(1) Minority View: Pure Best Interest Standard.—A handful of states focus solely on the best interest of the child in third-party cases, and these states permit this consideration alone to overcome the natural parent presumption. For example, in Colorado, Delaware, Michigan, New Hampshire, and Pennsylvania, courts will permit the natural parent presumption to be rebutted if custody in the third party is in the child's best interest, regardless of whether the parent is unfit.
(2) The Hybrid View: The Natural Parent Presumption in Conjunction with the Best Interest Standard.—A small number of jurisdictions recognize the natural parent presumption, but make the best interest of the child controlling in third-party cases.¹⁰² For example, in Washington, courts award third parties custody upon a showing of detriment to the child, although parental unfitness is not required.¹⁰³ In In re the Marriage of Allen, a stepmother was granted custody of a deaf child, rather than the natural father, because she knew sign language and the child’s educational progress was a result of her efforts.¹⁰⁴ The court found that to grant a third party custody, there must be a showing of detriment to the child less than parental unfitness, but more than simply the best interest of the child.¹⁰⁵

(3) The Majority Standard: A Rebuttable Natural Parent Presumption.—When determining third-party cases, the majority of jurisdictions employ a rebuttable natural parent presumption of custody.¹⁰⁶ The reason is two-fold: first, parents have a well-established fundamental liberty interest in parenting their children that third parties lack,¹⁰⁷ and second, there is a presumption that fit parents act in the best interest of their child.¹⁰⁸ Jurisdictions find that this presumption may be rebutted by proof that the parent is unfit.¹⁰⁹

In addition, most jurisdictions find that the presumption may be rebutted by demonstrating exceptional circumstances.¹¹⁰ What constitutes an exceptional circumstance varies widely between jurisdictions and appears to be fact-dependent.¹¹¹ Some jurisdictions take such a narrow view of exceptional circumstances that the approach is comparable to a TPR standard; they will only award custody to a third party if there is a showing of harm to the child.¹¹² In other jurisdictions, surrender, abandonment, neglect, and other factors establish an exceptional circumstance.¹¹³

Some jurisdictions in the majority find that the natural parent presumption may be overcome if the third party is considered a “psy-

¹⁰². Id. at 567 (majority opinion).
¹⁰⁴. Id. at 23.
¹⁰⁵. Id. Such determinations are made on a case-by-case basis. Id.
¹⁰⁶. Watkins, 748 A.2d at 565.
¹⁰⁷. Id. at 563-64.
¹⁰⁹. Watkins, 748 A.2d at 565.
¹¹⁰. Id.
¹¹¹. Id. at 589 (Stein, J., dissenting).
¹¹². Id. at 574-75.
¹¹³. Id. at 587.
psychological parent," which triggers a best interest standard. The adult becomes a psychological parent of a child by daily interaction, shared experiences, and companionship. The role can be satisfied by any adult, regardless of biological or legal status. The psychological parent theory involves two main principles: normal child development requires a relationship with a loving adult and disruptions of this relationship may cause immediate and lasting harm to the child. Thus, the psychological parent theory emphasizes the importance of continuity of relationships, surroundings, and environment in a child's life, and supports the preservation of the child's bond with whatever adult is the psychological parent. 

Jurisdictions that have an explicit psychological parent exception often do so because the natural parent presumption results in custody in the natural parent, who has often served either no or a small parental role, as opposed to the parental substitute. Upon a finding that a third party functions as a psychological parent, courts elevate the third party to natural parent standing because the third party has taken such a role. The courts then apply a best interest standard to the custody dispute.

114. See, e.g., In re the Marriage of Huber, 723 N.E.2d 973, 975 (Ind. Ct. App. 2000) (permitting three extraordinary circumstances to overcome the natural parent presumption: if the parent is unfit, if the child has lived with the third party for a lengthy duration, or if the natural parent voluntarily relinquished custody to a third party allowing the affections of the child and the third party to become so interwoven that a separation would have detrimental effects on the child); Watkins, 748 A.2d at 565 (noting that psychological parenthood is not specifically limited to cases in which the natural parent was found unfit); Hamers v. Guttormson, 610 N.W.2d 758, 759-60 (N.D. 2000) (allowing psychological parenthood to rebut the natural parent presumption, but noting that such an exception has only been employed when the child had been in physical custody of the third party for a lengthy amount of time); In re the Adoption of J.J.B., 894 P.2d 994, 1009 (N.M. 1995) (allowing a psychological parent to overcome the natural parent presumption, even in the absence of neglect or abandonment, when the psychological harm of removal on the child is extremely severe).


116. Id.

117. See id. at 18-19.

118. Id. at 31-32.


122. Id.
In conclusion, jurisdictions employ one of three standards in third-party cases. First, some courts apply only a best interest standard. Second, some jurisdictions employ a hybrid of the best interest standard and the natural parent presumption. Third, a majority of jurisdictions apply a natural parent presumption, which can be overcome by a demonstration of parental unfitness or exceptional circumstances. Some courts in the majority of jurisdictions also allow the natural parent presumption to be overcome if the third party functions as a psychological parent, which elevates the third party to the same legal standing as the natural parent and triggers a best interest analysis.

3. The Court's Reasoning.—In McDermott, the Court of Appeals granted custody of Patrick to the natural father, Mr. McDermott, and held that the proper standard in third-party custody cases is a natural parent presumption that may be rebutted by a demonstration of parental unfitness or extraordinary circumstances. Writing for the majority, Judge Cathell aligned Maryland with the majority of states by clarifying that, in third-party cases, the court does not reach the best interest standard unless the parent is first found unfit or extraordinary circumstances are present. Under this rule, the court held that because Mr. McDermott was not unfit, and his employment in the merchant marines did not present an extraordinary circumstance, custody in Mr. McDermott was proper.

The court observed that parents have a fundamental constitutional right to raise their children. Judge Cathell then turned to Maryland jurisprudence, which also grants a fundamental constitutional right to parent, and noted that Maryland courts consider the parent-child relationship important. The court also observed that the parties in third-party disputes do not assert equal rights because

123. 385 Md. 320, 869 A.2d 751.
124. Chief Judge Bell and Judges Harrell, Raker, Battaglia, and Green joined this opinion. Id. at 436, 869 A.2d at 819.
125. Id. at 374-75, 869 A.2d at 783.
126. Id. at 435, 869 A.2d at 818-19.
127. Id. at 331-53, 869 A.2d at 757-70. The court found Troxel v. Granville, 530 U.S. 57 (2000), persuasive because the Supreme Court held that a Washington statute permitting grandparents to petition for visitation was unconstitutional insofar as it interfered with a parent's fundamental constitutional right to parent. Id. at 349-51, 869 A.2d at 767-69.
128. Id. at 352, 869 A.2d at 770.
the parent invokes a fundamental constitutional right, whereas the
private third party has no such right to raise the children of others.129

Next, the court grouped the standards employed by other state
courts in third-party cases into three categories: the minority view, the
hybrid view, and the majority view.130 The court noted that until Mc-
Dermott, Maryland was likely in the hybrid category.131 The courts ad-
hering to the minority view apply the best interest standard as the only
consideration in third-party cases.132 The McDermott court noted that
jurisdictions in the hybrid category follow contradictory standards or
have differing intermediate appellate decisions.133 The court ex-
pressed its concern that a recent Court of Appeals case, Shurupoff v.
Vockroth, placed Maryland in the hybrid category.134 Shurupoff modi-
fied Ross v. Hoffman by emphasizing that the court must always inquire
into the child’s best interest because that is the definitive factor.135
The court then overruled the language in Shurupoff that modified
Hoffman.136 In doing so, the court found that Maryland was closer to,
but not within, the majority view.137

To obviate any remaining confusion, the court held that in pri-
ivate actions in which third parties are disputing custody with natural
parents, a court must first find that the parent is unfit or that ex-
traordinary circumstances exist before applying the best interest stan-
dard.138 The court thus definitively established Maryland’s position as
consistent with the majority view.139 The court then discussed the ju-
risdictions falling within this category.140

The court ruled that the circuit court inappropriately found that
the absences necessitated by Mr. McDermott’s job as a merchant
marine constituted an exceptional circumstance.141 The court noted
that the circuit court did not find Mr. McDermott unfit and that it

129. Id. at 353, 869 A.2d at 770. The court stated that this principle does not alter the
application of the best interest standard in custody or visitation disputes between fit par-
ents. Id. at 354, 869 A.2d at 770.
130. Id. at 356-57, 869 A.2d at 772.
131. Id. at 361, 869 A.2d at 775. The court noted that there is some ambiguity within
the courts in this category, such as Vermont. Id.
132. Id. at 357-58, 869 A.2d at 773.
133. Id. at 361, 869 A.2d at 775.
134. Id. at 374, 869 A.2d at 782 (citing Shurupoff v. Vockroth, 372 Md. 639, 662, 814
A.2d 543, 557 (2003)).
135. Id. (discussing Ross v. Hoffman, 280 Md. 172, 372 A.2d 582 (1977)).
136. Id. at 374-75, 869 A.2d at 783.
137. Id. at 375, 869 A.2d at 783.
138. Id. at 374-75, 869 A.2d at 783.
139. Id. at 375, 869 A.2d at 783.
140. Id. at 375-417, 869 A.2d at 783-808.
141. Id. at 422, 869 A.2d at 811.
failed to defer to his fundamental constitutional right to parent.\textsuperscript{142}

The court analyzed the seven exceptional circumstance factors and concluded, unlike the lower court, that they did not overcome the natural parent presumption.\textsuperscript{143}

To so hold, the court observed that Mr. McDermott, like many other parents, is involved in a line of work that requires extended absences from his home and family.\textsuperscript{144} The court noted that it did not want to jeopardize a parent’s right to custody because the parent’s job requires lengthy absences.\textsuperscript{145}

In his concurring opinion, Judge Wilner agreed with the majority that the trial court erred in granting custody to the Doughertys.\textsuperscript{146} However, Judge Wilner did not concur with the court’s sudden and unnecessary rejection of the \textit{Hoffman} standards that he believed had been consistently applied.\textsuperscript{147} Judge Wilner argued that the majority’s holding sows uncertainty in an area that requires clear and accessible guidelines because at least seven cases following \textit{Hoffman} have restated and confirmed those principles.\textsuperscript{148}

Judge Wilner also suggested that underlying the majority’s holding is a concern that the best interest standard in third-party cases could result in judges engaging in social engineering by placing children with whichever party is more advantaged.\textsuperscript{149} But Judge Wilner further found that the best interest standard does not allow this approach and that the trial court did not intend to engage in social engineering by placing Patrick with the Doughertys.\textsuperscript{150}

\textbf{4. Analysis.}—In \textit{McDermott}, the Court of Appeals rearticulated its third-party custody standard by adopting a natural parent presumption that can be overcome by exceptional circumstances or a showing that the natural parent is unfit.\textsuperscript{151} The court overzealously applied the natural parent presumption, which directly contradicts the ulti-

\begin{itemize}
\item 142. \textit{Id}. at 422, 431-32, 869 A.2d at 811, 816.
\item 143. \textit{Id}. at 420-22, 869 A.2d at 809-11.
\item 144. \textit{Id}. at 425-26, 869 A.2d at 813. The court listed maritime work, military deployments, ground transportation of goods, natural gas and oil production, offshore commercial fishing, United Nations jobs, and steel workers as examples of the countless vocations that require extended absences from home. \textit{Id}. at 426, 426 n.45, 869 A.2d at 813, 813 n.45.
\item 145. \textit{Id}. at 426, 869 A.2d at 813.
\item 146. \textit{Id}. at 436-37, 869 A.2d at 819 (Wilner, J., concurring).
\item 147. \textit{Id}. at 437, 869 A.2d at 819.
\item 148. \textit{Id}., 869 A.2d at 820. Judge Wilner also found that the majority chose an unnecessarily convoluted path in its decision. \textit{Id}. at 439, 869 A.2d at 821.
\item 149. \textit{Id}. at 439, 869 A.2d at 821.
\item 150. \textit{Id}.
\item 151. 385 Md. 920, 869 A.2d 751.
\end{itemize}
mate consideration in all custody cases—the best interest of the child.\textsuperscript{152} The court failed to accurately analyze its exceptional circumstances factors by omitting some of the lower court’s findings and by giving short shrift to some factors which, in other cases, were sufficient to overcome the natural parent presumption.\textsuperscript{153} The court also should have adopted an explicit psychological parent exception, which tempers the natural parent presumption and provides for the child’s best interests.\textsuperscript{154} Underlying the court’s 112-page slip opinion is an unfounded fear of judicial social engineering that Maryland’s case law neither permits nor has produced in the almost thirty years since \textit{Hoffman}.\textsuperscript{155} Although the court believed it had aligned Maryland with the majority of jurisdictions,\textsuperscript{156} the court applied the natural parent presumption without proper consideration of the third-party custody standard in its totality and, in doing so, undermined the ultimate goal in all custody proceedings—the best interest of the child.\textsuperscript{157}

\textit{a. The Court Failed to Adequately Consider Exceptional Circumstances and Allowed the Natural Parent Presumption to Be Determinative.}—The \textit{McDermott} court ignored the third-party custody standard it adopted by failing to fully consider whether exceptional circumstances were present because it did not discuss all of the trial court’s findings and it allowed the natural parent presumption, rather than the best interest of the child, to be determinative. In third-party cases, the natural parent presumption may be overcome by a demonstration that the parent is unfit or that exceptional circumstances exist.\textsuperscript{158} In its exceptional circumstance analysis, however, the court failed to mention many factors that the circuit court found exceptional,\textsuperscript{159} giving the impression that Mr. McDermott’s employment as a seaman was the only possible exceptional circumstance.\textsuperscript{160} Furthermore, the \textit{McDermott} court ignored its own jurisprudence, which has found facts similar to those in \textit{McDermott} to constitute exceptional circumstances.

\begin{itemize}
\item \textsuperscript{153} \textit{See infra} Part 4.a.
\item \textsuperscript{154} \textit{See infra} Part 4.b.
\item \textsuperscript{155} \textit{See infra} Part 4.c. In his concurrence, Judge Wilner noted that the \textit{Hoffman} standards do not permit judicial social engineering. \textit{McDermott}, 385 Md. at 439, 869 A.2d at 821 (Wilner, J., concurring).
\item \textsuperscript{156} \textit{McDermott}, 385 Md. at 374-75, 869 A.2d at 783 (majority opinion).
\item \textsuperscript{157} \textit{See infra} Part 4.a.
\item \textsuperscript{158} \textit{McDermott}, 385 Md. at 374-75, 869 A.2d at 783.
\item \textsuperscript{159} \textit{See} McDermott v. McDermott, No. 12-C-95-23852, slip op. at 17-19, 22-23 (Harford County Cir. Ct. Sept. 8, 2003).
\item \textsuperscript{160} \textit{McDermott}, 385 Md. at 425-28, 869 A.2d at 813-15.
\end{itemize}
The court in *McDermott* failed to mention several facts that were unfavorable to Mr. McDermott.\(^{161}\) The trial court's opinion analyzed each factor individually and concluded that exceptional circumstances were present based not only upon Mr. McDermott's employment, but upon several additional considerations.\(^{162}\) Specifically, Patrick had lived with the Doughertys for one-third of his life, and the court found that they were the only source of stability in Patrick's life.\(^{163}\) The lower court also found that Mr. McDermott's work-related absences had an adverse effect on Patrick, demonstrated by Patrick's in-school misconduct during his father's absences.\(^{164}\) At one point, Mr. McDermott also left Patrick with Ms. Dougherty in a halfway house.\(^{165}\) During trial, Mr. McDermott admitted that if he were to return to sea, he prefers to leave Patrick with his parents in Alabama.\(^{166}\) Further, the circuit court found that Mr. McDermott had no job, had no home, lived with another family rent-free, had abandoned Patrick on several occasions by choice to work, was highly inflexible and narcissistic, and was motivated to obtain custody by his desire to control Ms. Dougherty.\(^{167}\)

Although the *McDermott* court discussed all seven exceptional circumstance factors, it omitted several key findings that the lower court deemed relevant.\(^{168}\) For its analysis of the first five exceptional circumstance factors, the *McDermott* court quoted almost verbatim from the lower court's opinion.\(^{169}\) For the sixth and seventh factors, however, the court omitted several key findings. The *McDermott* court failed to discuss the trial court's finding that Mr. McDermott habitually prioritized his own needs over Patrick's.\(^{170}\) The court also did not discuss that Mr. McDermott is unemployed without his own residence and that a psychological evaluation found him to be inflexible and narcissistic.\(^{171}\) The court further failed to consider that Mr. McDermott left Patrick in a halfway house with Ms. Dougherty; that if Mr. McDermott ships out again, he would leave Patrick in Alabama; and

\(^{161}\) See *McDermott*, No. 12-C-95-23852, at 17-19, 22-23.
\(^{162}\) Id.
\(^{163}\) Id. at 17, 23.
\(^{164}\) Id. at 19.
\(^{165}\) Id.
\(^{166}\) Id. at 22.
\(^{167}\) Id. at 19, 22.
\(^{168}\) See id. 17-19, 22-23.
\(^{169}\) *McDermott*, 361 Md. at 420-21, 869 A.2d at 809-810; *McDermott*, No. 12-C-95-23852, at 17-18.
\(^{170}\) See *McDermott*, No. 12-C-95-23852, slip op. at 18-19.
\(^{171}\) See id. at 22.
that the Doughertys provide Patrick with constant stability. Because it omitted crucial circuit court findings, the Court of Appeals failed to adequately consider whether exceptional circumstances were present in McDermott.

The McDermott court also ignored Maryland case law, in which facts similar to those in McDermott were found to constitute exceptional circumstances. Maryland courts have found exceptional circumstances sufficient to rebut the natural parent presumption in several third-party cases.

For example, in Ross v. Hoffman, the court found that exceptional circumstances warranted custody in a third party. The Hoffman court found that the child, Melinda, who was separated from her natural mother for several years starting in infancy, had a strong attachment to the third party, and had a strong emotional reaction to a possible change in custody. Additionally, the mother waited for over eight years to reclaim Melinda, and her motives for wanting custody were unclear. Hoffman shares similarities to McDermott that the court should have fully considered in its analysis, such as Patrick’s length of separation from his father, his attachment to his grandparents, the effect a change of custody would have on him, and the trial court’s finding that Mr. McDermott sought custody partly to control Ms. Dougherty.

The McDermott court also failed to fully consider whether exceptional circumstances existed because it did not fully discuss Mr. McDermott’s living circumstances and his future plans. In Pastore v. Sharp, the court granted custody of a child to a third party because the Sharps had custody for two of the child’s five years, the mother had essentially relinquished custody for two years, the child was well-cared for by the Sharps, the child lacked stability with his mother, his mother’s apartment was not large enough for her son, and she had very indefinite future plans. The court should have followed Pastore and discussed the trial court’s finding that Mr. McDermott’s situation was less than ideal for a child, as well as the findings regarding the specifics surrounding Patrick’s care.

172. See id. at 19, 22-23.
174. Id. at 192, 372 A.2d at 594.
175. Id.
176. See McDermott, No. 12-C-95-23852, at 17-19.
177. See id. at 22-23.
179. See McDermott, No. 12-C-95-23852, at 22-23.
Specifically, the court should have recognized that Mr. McDermott lives rent-free with another family through an agreement subject to their good will and that his future plans are indefinite because he has no job. Further, the *McDermott* court should have thoroughly considered that Patrick had lived with the Doughertys for the past two years, that Patrick was well-cared for by the Doughertys, and that because Mr. McDermott surrendered custody of Patrick to the Doughertys on several occasions, Patrick acted out in school.

Similarly, the court in *McDermott* failed to fully consider Patrick’s relationship with the Doughertys and the stability they provided Patrick. In *Newkirk v. Newkirk*, the court considered similar factors in its analysis of exceptional circumstances. The *Newkirk* court noted that the children’s relationship with their father was distant, whereas their relationship with the third party was strong. The court in *Newkirk* also noted that the teenaged children did not want to live with their father and that they were emotionally well-adjusted when in the care of the third party. The trial court found that the Doughertys provided Patrick with stability and that Mr. McDermott testified that if he returned to sea, he would likely leave Patrick with his parents in Alabama.

As recently as 2003, in *Shurupoff v. Vockroth*, the Court of Appeals upheld an award of custody to grandparents because it found exceptional circumstances. The *Shurupoff* court found that the child, Kimberly, had minimal contacts with her father, and the grandparents had been very involved in her life since her birth. Additionally, the court found that she was very emotionally attached to her grandparents, that a change of custody to her father would have a detrimental effect, and that the father was not like a parent to her, which led the court to doubt her stability should he receive custody. The court in *McDermott* failed to adequately consider factors that were persuasive in *Newkirk* and *Shurupoff*. The court should have considered Patrick’s relationship with the Doughertys, whether he was emotionally well-adjusted with them, and his stability with his father. This last factor is

180. See id.
181. See id. at 17, 19.
183. Id. at 594-96, 535 A.2d at 950-51.
184. Id. at 594-95, 535 A.2d at 950.
185. See McDermott, No. 12-C-95-23852, at 19, 22-23.
187. Id. at 646, 814 A.2d at 548.
188. Id. at 647-48, 814 A.2d at 548.
189. See McDermott, No. 12-C-95-23852, at 18-19, 22-23.
particularly relevant because the trial court found that the Doughertys were the only source of stability in Patrick's life.\textsuperscript{190}

In sum, the court, in omitting several lower court exceptional circumstance findings and Maryland case law detailing their application, failed to adequately consider whether exceptional circumstances were present in \textit{McDermott}. Furthermore, the court’s overzealous standard renders the natural parent presumption determinative because it is difficult to imagine a case where the parent is not unfit and the exceptional circumstances alone can overcome the presumption.\textsuperscript{191} In \textit{McDermott}, Patrick had lived with the Doughertys for one-third of his life, and the Doughertys were the only stable presence in Patrick’s life.\textsuperscript{192} Mr. McDermott had no job, had no home, was living with another family rent-free, and had wilfully abandoned Patrick on several occasions to work.\textsuperscript{193} Moreover, a psychologist found Mr. McDermott highly inflexible and motivated to seek custody in part to control Ms. Dougherty.\textsuperscript{194} While the court’s new standard purports to consider more than unfitness by also allowing exceptional circumstances to rebut the natural parent presumption, if the court did not find the aforementioned factors to qualify as exceptional in \textit{McDermott}, it is difficult to imagine a case where such circumstances will be found.

The court failed to apply its third-party custody standard in its totality because it neglected to fully consider whether exceptional circumstances existed, and it chose to omit several relevant lower court findings. In doing so, the court ignored the fact that the natural parent presumption exists to serve the child’s interest insofar as it presupposes that custody with the natural parent is in the best interest of the child absent a showing of unfitness or exceptional circumstances.\textsuperscript{195} When the court failed to apply the third-party standard in its totality, the natural parent presumption became determinative in the custody assessment, rather than remaining a rebuttable presumption.\textsuperscript{196} The court failed to protect Patrick’s interest when it gave short shrift to its exceptional circumstance analysis because both the natural parent

\textsuperscript{190} See id. at 23.


\textsuperscript{192} McDermott, No. 12-C-95-23852, at 17, 23.

\textsuperscript{193} Id. at 22.

\textsuperscript{194} Id. at 15, 19.

\textsuperscript{195} See Ross v. Hoffman, 280 Md. 172, 178-79, 372 A.2d 582, 587 (1977) (stating that in all custody cases the best interest of the child standard is determinative, but in third-party cases, the child’s best interest is presumed to be with custody in the parent).

\textsuperscript{196} See generally id. (explaining that the natural parent presumption is rebutted by a showing of parental unfitness or extraordinary circumstances).
presumption and the exceptional circumstances rule exist to serve the child's best interest.\textsuperscript{197}

\textit{b. The Court Should Have Adopted a Psychological Parent Exception.}—While adopting a new third-party custody standard, the \textit{McDermott} court should have also adopted a psychological parent exception to grant more deference to the best interest of the child by considering to which party—regardless of biology—the child is psychologically attached. A psychological parent exception, employed by some jurisdictions in the majority, allows the third party to rise to the same legal standing as the natural parent if the child has formed a significant psychological attachment to the third party.\textsuperscript{198} Once the court determines a third party is a psychological parent, the court applies the best interest standard.\textsuperscript{199} In applying this standard, courts acknowledge that the welfare of the child is not always best served by custody in the natural parent, even when fit, because the child may suffer harm when removed from custody with her psychological parents.\textsuperscript{200}

Although the \textit{McDermott} court modeled its survey of other jurisdictions after \textit{Watkins v. Nelson}, it failed to mention that some jurisdictions in the majority, including New Jersey in \textit{Watkins}, have a psychological parent exception.\textsuperscript{201} Jurisdictions that adopt a psychological parent exception often do so because the use of the natural parent presumption sometimes results in custody in natural parents who have often served little to no parental role, as opposed to the adult who meets the child's emotional needs—the psychological parent.\textsuperscript{202} While protecting the constitutional right to parent and implementing a natural parent presumption, some courts recognize that when a child has been in the custody of a third party for a long time, the psychological harm of removing the child is severe, and the third party should have custody.\textsuperscript{203} The psychological parent exception properly defers to the child's interest by allowing a child to remain with the person she recognizes as her parent, regardless of whether that person is a biological parent.\textsuperscript{204} These courts have remained

\textsuperscript{197} See \textit{Watkins v. Nelson}, 748 A.2d 558, 587 (N.J. 2000) (Stein, J., dissenting) (noting that in third-party cases, the natural parent presumption exists because the child's best interest is presumed to be in custody with the natural parent, rather than the third party).

\textsuperscript{198} Id. at 564-65 (majority opinion).

\textsuperscript{199} Id. at 568-69 (Stein, J., dissenting).

\textsuperscript{200} Id. at 590; accord \textit{Warzynski}, \textit{supra} note 119, at 764-65.

\textsuperscript{201} \textit{Watkins}, 748 A.2d at 565 (noting that New Jersey has a psychological parent exception).

\textsuperscript{202} Bartlett, \textit{supra} note 120, at 41.

\textsuperscript{203} \textit{Goldstein et al.}, \textit{supra} note 115, at 19.

\textsuperscript{204} \textit{Warzynski}, \textit{supra} note 119, at 764-65.
within the majority and nevertheless allow a specific exception for psychological parents so as to account for the child’s interest.\footnote{205}{See supra note 114 and accompanying text.}

Although other jurisdictions in the majority have adopted a psychological parent exception, the \textit{McDermott} court did not consider whether adopting such an exception would be appropriate in Maryland.\footnote{206}{See Watkins, 748 A.2d at 565-67 (observing that courts in the majority employ a psychological parent exception to the natural parent presumption).} The court should have adopted a psychological parenthood exception because it safeguards the determinative standard in all Maryland custody proceedings, the best interest standard.\footnote{207}{See Ross v. Hoffman, 280 Md. 172, 178, 372 A.2d 582, 587 (1977).} Psychological parenthood allows the natural parent presumption to be overcome when the child and the third party form a parent-child bond that the natural parent and the child lack.\footnote{208}{See Watkins, 748 A.2d at 590 (Stein, J., dissenting).} Because the natural parent presumption aims to protect the child’s best interest by presupposing that custody in the parent is in the child’s best interest, when the natural parent and the child have not formed a psychological parent-child bond, custody with the parent is not in the best interest of the child.\footnote{209}{See Bartlett, supra note 120, at 41.} Thus, the natural parent presumption no longer serves the function of safeguarding the child’s best interest.

Because the \textit{McDermott} court failed to adequately apply its own exceptional circumstance factors, the court should have at least adopted a psychological parent exception to protect the child’s interest. In implementing this standard, if the court establishes that the third party is a psychological parent, the psychological parent would be treated as a biological parent in determining custody.\footnote{210}{See Watkins, 748 A.2d at 590.} The court would then evaluate the custody proceeding under a best interest standard.\footnote{211}{See id.}

The welfare of the child is not always best served by custody in the natural parent, even when fit, because the child may suffer substantial harm when removed from custody with her psychological parent(s).\footnote{212}{Warzynski, supra note 119, at 764-65.} Furthermore, experts find that successful child development depends on the continuation of the psychological relationship between the child and parent, rather than the biological parent.\footnote{213}{See generally id. at 765-66.} Thus, adopting an explicit psychological parent exception affords
proper deference to the child’s interests. Such a standard adequately considers which party the child psychologically views as her parent and ensures that the court considers the totality of the custody dispute’s impact on a child.

In McDermott, Patrick would have benefited from a psychological parent exception because the court could have considered whether Patrick was psychologically attached to the Doughertys. If the court had found that the Doughertys were psychological parents, the natural parent presumption would have been overcome, thus allowing the court to make its custody determination based solely upon Patrick’s best interest—with neither party having a presumption—rather than an exceptional circumstance analysis that affords Mr. McDermott a presumption of custody. A psychological parent exception therefore properly considers the child’s stake in the custody proceeding, and the McDermott court should have adopted such an exception.

c. The Court Allowed Its Unfounded Fear of Social Engineering to Influence Its Opinion.—In McDermott, the court allowed its unfounded fear of inappropriate judicial social engineering to affect its decision. The court feared that an unfettered application of the best interest standard would allow courts to remove children from poor or otherwise disadvantaged parents and give custody to wealthier, more advantaged third parties because the children would be better off with the latter. This fear is apparent in the court’s dictum in In re Adoption/Guardianship Nos. J9610436 & J9711031 and now in McDermott. The court’s fear is unfounded because neither Maryland’s third-party custody standard in Ross nor the modified approach found in Shurupoff permit third-party custody awards based upon wealth or other advantages. Furthermore, Maryland’s case law applying the

214. See generally id.
215. See generally id.
216. See McDermott, 385 Md. at 439-40, 869 A.2d at 821 (Wilner, J., concurring) (observing that the majority is unnecessarily concerned with inappropriate social engineering because the Hoffman approach does not allow for such usage, nor do the Maryland trial judges interpret the cases as such); see also id. at 380, 869 A.2d at 786 (majority opinion) (observing that adopting a standard outside the majority would give courts the opportunity to reallocate custody in a manner that victimizes the poor).
217. Id. at 439, 869 A.2d at 821 (Wilner, J., concurring).
218. 368 Md. 666, 796 A.2d 778 (2002).
219. See 385 Md. at 435, 869 A.2d at 818-19. The majority assumes that the lower courts awarded custody of Patrick to the Doughertys either because of social engineering or because the particular judge believed Patrick might be better off with them. Id.
220. McDermott, 385 Md. at 439-40, 869 A.2d at 821 (Wilner, J., concurring).
third-party standard does not permit judicial social engineering. The standard in *Hoffman* affords the natural parent a presumption rebuttable only upon a showing of parental unfitness or exceptional circumstances.\(^{221}\) Neither of these exceptions to the presumption permit a judge to base a custody decision upon whether a child might be better off with the third party who could give the child a more affluent upbringing.\(^{222}\) Maryland’s third-party standard examines seven specific factors that do not permit judicial social engineering.\(^{223}\)

The *McDermott* court’s fear of social engineering is further unfounded, despite a rise in third-party custody cases,\(^ {224}\) because in the almost thirty years since *Hoffman*, custody has not been awarded based upon wealth.\(^ {225}\) In the Maryland cases where a third party was awarded custody, the court so ruled because the natural parent presumption was rebutted and not because the third parties were more affluent. In *Ross v. Hoffman*, the child lived with the third parties, her babysitters, for more than eight years, during which the natural mother had made no attempt to reclaim her.\(^ {226}\) In *Pastore v. Sharp*, the court awarded custody to a third party who cared for a child for two of his first five years and who provided him with stability.\(^ {227}\) In *Newkirk v. Newkirk*, the court made no mention of the financial status of either party, and it awarded custody to an adult half-brother instead of the natural father because the children had lived with the half-brother, were emotionally well-adjusted to him, and preferred him to their father.\(^ {228}\) None of these cases granted custody to the third party

\(^{222}\) See *McDermott*, 385 Md. at 440, 869 A.2d at 821 (Wilner, J., concurring) (noting that the Maryland standard does not permit judges to engage in social engineering).
\(^{223}\) See *Hoffman*, 280 Md. at 191, 372 A.2d at 593.
\(^{225}\) Interestingly, the Court’s fear of social engineering could actually work against poor communities and minorities. See Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 905-07 (2003) (discussing the effects of the natural parent presumption on low-income families and families of color). In less affluent families, which are disproportionately African American or Latino, grandparents are more integral to the nuclear family and more parenting responsibilities are expected of them. *Id.* at 906. In such families, grandparent roles are indistinguishable from parental roles because the focus is on the community. *Id.* at 909-10. These communities do not subscribe to the traditional middle-class notion that the parent alone has a fundamental right in child-rearing. *Id.* at 910. At least one commentator argues that courts should consider such societal differences when determining custody standards. *Id.* at 909-10.
\(^{226}\) 280 Md. at 181, 372 A.2d at 588.
solely because of greater material opportunities. The third parties received custody because the court found extraordinary circumstances in that the custodians had previously cared for the children. Likewise, the trial court’s award of custody to the Doughertys was not a result of impermissible judicial social engineering, but rather was based upon a consideration of all of the exceptional circumstance factors. Therefore, the court’s fear of social engineering is unfounded because custody decisions based on material opportunities has not been a problem in Maryland in the almost thirty years since Hoffman.

5. Conclusion.—In McDermott, the Court of Appeals joined the majority of jurisdictions and held that the proper standard in third-party custody cases is to grant the biological parent properly a natural parent presumption. The court, however, failed to apply its third-party custody standard because it omitted several of the lower court’s relevant exceptional circumstance findings and gave short shrift to factors that in other cases were sufficient to rebut the natural parent presumption. In so doing, the court ignored the fact that the natural parent presumption exists to serve the child’s interest, not vice-versa. The court also failed to safeguard the best interest standard by not adopting a psychological parent exception. Further, the McDermott court allowed its unfounded fear of judicial social engineering to improperly influence its opinion. In neglecting to fully consider the exceptional circumstance factors, failing to adopt a psychological parent exception, and allowing its unsubstantiated fear of social engineering to influence its decision, the McDermott court allowed the natural parent presumption to be determinative and undermined the best interest standard.

LINDSEY A. WHITE

230. 385 Md. 320, 869 A.2d 751.
231. See supra Part 4.a.
232. See supra Part 4.a.
233. See supra Part 4.b.
234. See supra Part 4.c.
VI. LABOR LAW

A. Maryland Employers Lose Again: The Maryland Court of Appeals's Interpretation of the Maryland Workers' Compensation Act and Other Relevant Statutes

In *Gleneagles v. Hanks*, the Court of Appeals of Maryland considered whether it had the authority to stay a Workers' Compensation Commission award during an appeal. After considering two competing statutes, the court held that it did not have such authority and thus required employers to pay workers' compensation payments to employees throughout the process. Although this decision is consistent with Maryland precedent denying employers the ability to recover those payments should the employer be successful on appeal, the court missed an opportunity to correct the inequity created by its decisions. In so holding, the court disregarded the employer's right to restitution as an integral component of the right to appeal and allowed the employee to be unjustly enriched. The court should have created an avenue for restitution as courts in other jurisdictions have done, preventing future injustice for defendants who are successful on appeal.

1. The Case.—The Court of Special Appeals traces the path of Linda Hanks's claim, beginning with the initial filing of a workers' compensation claim, continuing through the procedures of the Workers' Compensation Commission, and finally the arrival in the Maryland courts. After losing its appeal in the Circuit Court of Harford County, Gleneagles, Inc. appealed to the Court of Special Appeals of Maryland.

   a. Proceedings Before the Workers' Compensation Commission.—On February 12, 1991, Linda Hanks sought benefits from her employer, Gleneagles, Inc., stemming from a disabling incident that had occurred one year earlier. Deeming her claim compensable, the
Workers’ Compensation Commission ordered Gleneagles to pay benefits for a period of two years, beginning on April 26, 1991. Hanks subsequently filed additional claims alleging a worsening of her condition together with a causally connected shoulder condition.

The Commission held a hearing on June 5, 1997, at which it established Hanks’s entitlement to medical treatment and payment of medical expenses. The Commission also effectively denied Gleneagles’s claims (1) that Hanks should be required to file a new claim for any new conditions and (2) that the statute of limitations on this new claim had expired.

Less than one year later, Hanks filed a new claim alleging another neck condition resulting from the original incident. In response to Hanks’s request for a hearing on her permanent partial disability issues, Gleneagles argued that the statute of limitations barred her claim. Hanks filed for permanent total disability in November 2001. The Commission determined that the limitations did not exclude Hanks’s additional claims and instead issued an award of compensation accruing from 1992.

b. Proceedings Before the Circuit Court of Harford County.—Following the Commission’s order, Gleneagles petitioned for judicial review on the grounds that the corporation would be unable to recoup funds should it ultimately prevail on the limitations issue. To prevent this loss, Gleneagles filed a request for an immediate temporary restraining order and a request for stay and/or preliminary injunction.

9. Id.
10. Id. at 547-48, 847 A.2d at 522. Hanks’s condition also included permanent partial disability to the left and upper right extremities, arms, shoulder, and hands. Id.
11. Id. at 548, 847 A.2d at 523.
12. Id.
13. Id.
14. Id.
15. Id. at 549, 847 A.2d at 523. Hanks filed after she had time to implead the Subsequent Injury Fund. Id. The Subsequent Injury Fund is a Maryland state agency that pays workers’ compensation benefits pursuant to § 9-802 of the Labor and Employment Article of the Maryland Code. This agency exists to encourage the hiring of workers with pre-existing disabilities by assuming financial responsibility for the combined effects of a pre-existing disability and an accidental workplace injury. Md. Code Ann., Lab. & Empl. § 10-204 to -219 (West 2005).
16. Gleneagles, 385 Md. at 494, 869 A.2d at 853-54. The Commission awarded Hanks $282 per week for 333 weeks from Gleneagles and $144 for 240 weeks from the Fund; reaching back to April 1992, damages totaled $93,906 and $34,560 respectively. Id.
18. Gleneagles, 385 Md. at 495, 869 A.2d. at 854.
The court initially granted Gleneagles’s requests and stayed Hanks’s awarded damages. However, the court overruled its previous decision, finding that it lacked authority to grant a stay of an award of compensation issued by the Commission, pursuant to Rule 7-205 and § 9-741 of the Labor and Employment Article of the Maryland Code, both of which govern compensation.

c. Proceedings Before the Court of Special Appeals of Maryland.—Gleneagles appealed to the Court of Special Appeals of Maryland, arguing that Rule 7-205 permits a stay of an order or action of an administrative agency and that the courts have plenary equity powers to issue such a stay. The appeal further supported Gleneagles’s contention that the Commission’s own rule can stay payment of an award, as Commission-ordered attorney fees are placed in escrow pending the appeal’s passing period or adjudication.

Hanks responded by arguing that § 9-741 of the Labor and Employment Article applied. She argued that the appellants were attempting to circumvent § 9-741’s no-stay provision and successfully doing so would effectively disregard the provision’s intent to ensure plaintiffs a speedy and certain recovery.

The court found the statutory language unambiguous and refused to respond to Gleneagles’s request to determine legislative intent or to analyze the provisions’ validity by interpreting the meaning of the interrelationship between Rule 7-205 and § 9-741. Furthermore, the court squashed Gleneagles’s second argument regarding the Commission’s rules by reiterating that the Commission’s rules pertain to attorneys’ fees, while § 9-741 involves payment of compensa-

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19. Id.
20. Id.
21. This rule states that “the filing of a petition does not stay the order or action of the administrative agency. Upon motion and after hearing, the court may grant a stay, unless prohibited by law, upon conditions as to bond or otherwise that the court considers proper.” Md. R. 7-205 (2003).
22. This rule reads, "An appeal is not a stay of: (1) an order of the Commission requiring payment of compensation; or (2) an order or supplemental order of the Commission requiring the provision of medical treatment." Md. Code Ann., Lab. & Empl. § 9-741 (West 2005).
24. Id.
25. Id. at 551-52, 847 A.2d at 525. Hanks argued that Labor and Employment Article § 9-741 prohibits appeals staying the Commission’s awards and trumps Maryland Rule 7-205. Id.
26. Id. at 552, 847 A.2d at 525. The court did not want to deny injured workers immediate benefits because an opposing party sought judicial review. Id. at 555, 847 A.2d at 527.
27. Id. at 553, 847 A.2d at 526.
tion and renders the two awards disparate concepts. Ultimately, concluding that the no-stay language would be essentially meaningless if the circuit court’s equity power directed payment of benefits, the Court of Special Appeals affirmed the circuit court’s decision and refused to circumvent the no-stay provision of § 9-741.

Gleneagles then sought review by the Court of Appeals, arguing that the circuit court did not have the authority to grant injunctive relief for a monetary award granted in a workers’ compensation case while an appeal is pending. The court granted certiorari to address the issue of which statute controlled: Rule 7-205 or § 9-741.

2. Legal Background.—Maryland courts have a long history of construing the Workers’ Compensation Act. Maryland courts have shown deference to employees, ruling that employers may not recover any awards paid out before or during the appeal process. Rather, the courts have made numerous appeals to the legislature to revisit the issue, expressing some discontent with this area of law. Although the right to restitution is judicially recognized, Maryland courts have not, however, done what courts in other jurisdictions have: recognize the right to restitution as part of the appeal process.

a. The Maryland Workers’ Compensation Act.—By enacting the Workers’ Compensation Act in 1914, Maryland created a mechanism through which employees could recover compensatory awards in place of wages lost from injury, disability, or death occurring in the course of employment. The Act provides injured employees with a definite and expedient method for compensation and protects employers from large monetary awards in civil suits filed by their employees. The Workers’ Compensation Commission (WCC) determines

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28. Id. at 554, 847 A.2d at 526.
29. Id. at 555-57, 847 A.2d at 527-28.
30. Gleneagles, 385 Md. at 495, 869 A.2d at 854.
31. Id.
32. See infra Part 2.a.
33. See infra Part 2.b.
34. See infra Part 2.c.
35. See infra Part 2.d.
36. See infra Part 2.e.
employees' claims. The Act also provides for an employer's right to appeal WCC decisions, enabling courts to construe the Act's provisions.

In so construing, the courts must constantly consider the Act's overall purpose to effectuate the legislature's intent. While a statute's actual language is the primary tool for ascertaining legislative intent, courts look beyond a statute's words and use statutory interpretation to determine legislative intent if the words are not free from ambiguity and do not express a definite and simple meaning. Maryland courts rely upon canons of statutory interpretation to determine the purpose of the Workers' Compensation Act.

Several Maryland court decisions trace the development of intent-based statutory interpretation of the WCC. In Branch v. Indemnity Insurance Co., the court determined that the Act's purpose was to provide speedy and certain relief, regardless of fault, for injured employees and their dependents. The court further explained that the WCC may under the police power circumvent the Due Process Clause and order payments even though an employer has not been in court. Next, in Polomski v. Baltimore, the court echoed Branch by opining that another goal of the Act is to protect employers from the unpredictable nature and expense of litigation. Finally, while the court determined in Lombardi v. Montgomery County that it must construe law liberally in a light favorable to the plaintiff in uncertain cases, the court also determined that it must not construe law to provide for more compensation than originally intended by the Act.

39. Egeberg, 190 Md. at 379.
40. MD. CODE ANN., LAB. & EMPL. § 9-737 to -745 (West 2005).
43. Chase, 360 Md. at 128-30, 756 A.2d at 991-92.
44. E.g., Polomski, 344 Md. at 72, 684 A.2d at 1340; Lombardi, 108 Md. App. at 697, 673 A.2d at 764; Branch, 156 Md. App. at 483, 144 A.2d at 697.
45. 156 Md. App. at 485-87, 144 A.2d at 697.
46. Id. at 487, 144 A.2d at 697.
47. 344 Md. at 76, 684 A.2d at 1340-41.
48. See 108 Md. App. at 703, 673 A.2d at 766 (describing a concept that parallels the Supreme Court's determination that parties be returned to the status quo following an appeals reversal).
b. The Court Denies Recovery-Back upon Successful Appeals.—
The court has also used the canons of statutory interpretation to determine whether the Act prohibits “recovery-back.” This term is used to describe the situation in which a defendant may recover an award previously paid to the plaintiff should the court overturn the award on appeal.49

The Court of Appeals has ruled that an employer cannot recoup any funds overpaid by the defendant during the appeal of an initial award, should the award ultimately be lowered.50 In Hoffman, an insurer made an overpayment to a claimant during an appeal.51 When the court ruled in favor of the insurer, the insurer tried to overturn the lien on the claimant’s attorney’s fees to help reimburse itself.52 The court refused to overthrow the lien and found that precedent required an employer to make payments during an appeal.53 The court added that the employee did not owe money to the employer because precedent prohibited a recoupment for funds overpaid during an appeal.54

In St. Paul Fire and Marine Insurance v. Treadwell, the court also held that the Act intended to preclude recovery-back, even in the face of the common-law theory of unjust enrichment.55 In Treadwell, an insurer made workers’ compensation payments to an employee pending an appeal of that award.56 The court reversed the WCC’s order upon finding that the Commission had erroneously conferred the award, but refused the insurer’s action to recover the payments.57 Because there is no specific language in the Act either allowing or denying recovery-back, the court reached its conclusion by reasoning that there was no way that the legislature simply missed the issue that payments made to plaintiffs could be subsequently reversed or vacated on appeal.58 Instead, the court determined that the absence of a provision—a statutory silence on the issue allowing for such recovery—indicated that the legislature considered and rejected such a provision.59 The court reasoned that instead of allowing the employer

50. Hoffman, 232 Md. at 56, 191 A.2d at 578.
51. Id. at 54, 191 A.2d at 577.
52. Id.
53. Id. at 54-57, 191 A.2d at 577-78.
54. Id. at 56, 191 A.2d at 578.
56. Id. at 430-31, 283 A.2d at 602.
57. Id. at 435-36, 283 A.2d at 604-05.
58. Id.
59. Id. at 437-38, 283 A.2d at 605.
to recover, the legislature expedited appeals under the Act above all noncriminal cases.\textsuperscript{60}

In \textit{Philip Electronics North America Corp. v. Wright}, the court held again that even if the court reduces or overturns Commission awards, an employer is not entitled to reimbursement, recovery, or credit to another payment.\textsuperscript{61} In \textit{Wright}, the court reduced the plaintiff's disability from fifty to forty percent, thus lowering the amount that the employer paid to the employee each week.\textsuperscript{62} The employer sought credit for the total sum overpaid, whereas the employee argued that the credit should be only for the number of weeks of benefits paid.\textsuperscript{63} The court stated that upon an award recalculated on appeal, the employer must essentially pay the new weekly amount, regardless of the fact that the employer has been paying a higher amount during the appeal.\textsuperscript{64} The court again refused to credit the overpayment of one award to a future separate award in \textit{Sealy Furniture of Maryland v. Miller}.\textsuperscript{65} When Sealy overpaid Miller for her temporary total disability payment, it sought credit towards its payments for her permanent partial disability.\textsuperscript{66} The court, however, refused such a credit, holding that the Act's silence on the issue indicated statutory intent to bar recovery to the employer.\textsuperscript{67}

c. \textit{The Court Alludes to Restitution and Asks the Legislature for Guidance}.—Although the court refused to allow recovery-back, it has also long recognized that the legislature should reevaluate the Act. In the 1970s, the court explicitly requested that the legislature correct the court if the court wrongly interpreted the Act as prohibiting an employer from recovering-back a vacated award.\textsuperscript{68} Later, in \textit{Montgomery County v. Lake}, the court invited the legislature to revisit "potential inequities" presented by the prohibition of a stay during an appeal.\textsuperscript{69} In \textit{Lake}, an employer sought to recover-back an overturned award by offsetting overpayment made on one award against the balance of a second award.\textsuperscript{70} The court refused the employer's request, specifying

\begin{itemize}
\item \textsuperscript{60} Id.
\item \textsuperscript{61} 348 Md. 209, 215, 703 A.2d 150, 153 (1997).
\item \textsuperscript{62} Id. at 213, 703 A.2d at 152.
\item \textsuperscript{63} Id. at 209-10, 703 A.2d at 150-51.
\item \textsuperscript{64} Id. at 223, 703 A.2d at 156-57.
\item \textsuperscript{65} 356 Md. 462, 740 A.2d 594 (1999).
\item \textsuperscript{66} Id. at 465, 740 A.2d at 596.
\item \textsuperscript{67} Id. at 466, 740 A.2d at 596-97.
\item \textsuperscript{68} St. Paul Fire & Marine Ins. v. Treadwell, 263 Md. 430, 439, 283 A.2d 601, 606 (1971).
\item \textsuperscript{69} 68 Md. App. 269, 280, 511 A.2d 541, 547 (1986).
\item \textsuperscript{70} Id. at 271, 511 A.2d at 542.
\end{itemize}
that the law in Maryland is firmly established that once an employer pays money out, the money is not recoverable under any theory except fraud. 71 However, the Lake court acknowledged the inequities presented: it admitted that a payment, absent legal vindication, should be recoverable—especially if the payment is made in a lump sum rather than weekly payments. 72 The Lake court addressed the need for further amendment in this area, determined the provisions to be inequitable, and invited the legislature to redress it. 73 Likewise, in State Retirement & Pension System of Maryland v. Thompson, the court acknowledged the inequities imposed by a lack of recovery-back, but refused to contravene the statutory mandate as previously interpreted. 74

Changing this trend, the court in General Motors Corp. v. Koscielski offered a viable remedy to the issue surrounding recovery-back when it alluded to concepts of restitution. 75 In Koscielski, the WCC awarded an employee workers’ compensation, including attorneys’ fees. 76 In an important shift from past rulings, the court held that it could stay attorneys’ fees and that the employer could recover the fees if the court did not stay them. 77 The court reasoned both that it did not want to make the workers’ compensation appeal proceedings complicated or costly and that under certain circumstances an employer should recover through restitution. 78 The court wrote that should it reverse a judgment on appeal, the court retains authority to require restitution to restore the parties to their previous positions. 79 Likewise, the court stated that it has authority to restore parties to the status quo by ordering restitution. The court also mentioned that this

71. Id. at 274, 511 A.2d at 544.
72. Id. at 279, 511 A.2d at 546. The court suggested that the burden would be even heavier when awards were granted in lump sums rather than weekly payments. Id.
73. Id. at 280, 511 A.2d at 547.
74. 368 Md. App. 53, 60, 792 A.2d 277, 284 (2002). The Thompson court, by refusing to deviate from the mandated statutory interpretation, followed precedent. Id. ; see Hebden v. Keim, 196 Md. 45, 49, 75 A.2d 126, 128 (1950) (valuing precedent). But see Aravanis v. Eisenberg, 237 Md. 242, 250, 206 A.2d 148, 161 (1965) (stating that stare decisis should not be an excuse for a decision where reason is lacking); accord White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966).
76. Id. at 456, 564 A.2d at 115. The court did not consider attorneys’ fees to be the same type of support as compensation payments. Id. at 462, 564 A.2d at 118.
77. Id. at 462, 564 A.2d at 119. The court wrote that the “trial court judge believed by virtue of legislative enactment and subsequent appellate decision that his hands were tied and the fees were not recoverable . . . we view the law differently than did the trial judge.” Id. at 460, 564 A.2d at 118.
78. Id. at 462, 564 A.2d at 119.
79. Id. at 463, 564 A.2d at 119.
power is inherent in every court, that it may undo what it originally had no authority to do and restore the parties to their former position.\textsuperscript{80}

The Court of Appeals also recognized the right to recovery in \textit{Podgurski v. One Beacon Insurance Co.}\textsuperscript{81} In \textit{Podgurski}, an employee fell during work in a hair salon that was part of a larger department store.\textsuperscript{82} The court determined that since the employee already recovered damages from the third-party department store, the employee must pay back the compensation the court earlier awarded to her from her employer, the hair salon.\textsuperscript{83} The court held that the employer was entitled to reimbursement, which was fair to everyone involved.\textsuperscript{84}

d. \textit{The Right to Restitution Is Judicially Recognized}.—The Supreme Court has determined several times that the right to restitution exists.\textsuperscript{85} Moreover, the right to recover what was lost by the enforcement of a judgment subsequently reversed is also well established.\textsuperscript{86} In \textit{Atlantic Coast Line Railroad v. Florida}, the Court examined restitution in the context of reversed judgments.\textsuperscript{87} The Court recognized as a general rule that in the event of a reversal, the Court shall restore what a litigant lost to an opposing party who unjustly benefited due to compulsion of a judgment.\textsuperscript{88} The Court determined that the question is not whether the law puts a party in possession of money in a new transaction, but whether the law takes money out of the possession of a plaintiff after he or she collected it from a defendant.\textsuperscript{89} In \textit{Arkadelphia Milling v. St. Louis Southwestern Railroad}, the Court stated that when the plaintiff is awarded judgment later reversed or vacated on appeal, he or she should restore the defendant who lost the award.\textsuperscript{90}

e. \textit{Other Jurisdictions Recognize Common-Law Restitution as Part of the Appeal Process}.—Courts in several states have recognized the right

\begin{itemize}
\item[80.] \textit{Id.}
\item[81.] 374 Md. 133, 821 A.2d 400 (2003).
\item[82.] \textit{Id.} at 138, 821 A.2d at 403.
\item[83.] \textit{Id.} at 155, 821 A.2d at 413.
\item[84.] \textit{Id.} at 154, 821 A.2d at 413.
\item[86.] Baltimore & Ohio R.R. Co. v. United States, 279 U.S. 781, 786 (1929).
\item[87.] 295 U.S. at 304.
\item[88.] \textit{Id.} at 309.
\item[89.] \textit{Id.} at 310.
\item[90.] 249 U.S. at 145.
\end{itemize}
of restitution and allowed employers to recover-back awards or benefits even when workers' compensation statutes are silent on the issue. The New Jersey Supreme Court has ruled that employers, as a matter of basic fairness, should be able to recover overpaid awards on the basis of unjust enrichment. In Hajnas v. Englehard, an employer attempted to recover compensation benefits from a widow who had remarried and thus was not entitled to receive benefits on behalf of her deceased spouse. The court determined that the employer was entitled to restitution, even though the statute did not specifically provide for such recovery.

The Pennsylvania Supreme Court relied on restitution to reimburse an employer who sought to recover an overpaid award. In Lucey v. Workmen's Compensation Appeal Board, the court awarded an employee compensation for medical expenses and then arranged a separate deal with his medical care provider to pay a lower amount than originally decided. The employer sought to recover-back the excess funds or to have the excess amount credited to the lower future payments upon realizing that it was overpaying the employee because of the employer's new deal. Although the Pennsylvania Workers' Compensation Act did not provide the statutory framework for such a recovery, the court cited the law of restitution and held that the employer was entitled to restitution.

In Reil v. State Compensation Mutual Insurance Fund, the Montana Supreme Court examined whether the Fund could recover compensation that it already paid to an employee after the court subsequently vacated the award on appeal. Although the employee argued that the Fund could not recover the payments because the Montana workers' compensation statute was silent on the issue, the court held that restitution applied regardless of the statute's absence of an applicable


92. Hajnas, 555 A.2d at 721. Unjust enrichment is defined as either the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. Richard F. Kline, Inc. v. Signet Bank of Md., 102 Md. App. 727, 731, 651 A.2d 442, 444 (1995).

93. Hajnas, 555 A.2d at 717.

94. Id. at 719.

95. Lucey, 732 A.2d at 1204.

96. Id. at 1202-03.

97. Id. at 1203-04.

98. Id. at 1205.

provision. Based solely on the importance of restitution, the court applied to the workers' compensation ruling the principle that an employer has the right to recover-back awards reversed or vacated on appeal.

3. The Court's Reasoning.—In Gleneagles, the Court of Appeals of Maryland decided whether § 9-741 or Rule 7-205 controlled the issue of whether or not an appeal grants a stay of an award. Writing for the court, Judge Greene began by noting that the court must interpret the Workers' Compensation Act in a light most favorable to the injured plaintiff. The court then quickly resolved the conflict between the competing statutes by clarifying that Rule 7-205 allows a court to grant a stay "unless prohibited by law," whereas the court held that § 9-741 prohibits stays of Workers' Compensation Commission orders awarding compensation. The court determined that § 9-741 takes precedence over Rule 7-205 and ultimately held that the circuit court cannot grant stays or injunctions for awards granted by the Workers' Compensation Commission while an appeal is pending.

Although Gleneagles attempted to argue that a stay is different from an injunction, the court disagreed and instead concluded that regardless of what Gleneagles called the action, Hanks would forfeit her compensation during the appeal process. The court implied that this outcome was exactly the result that the legislature designed the statute to avoid by limiting the general equitable powers of the court. In response to Gleneagles highlighting the injustice of overpayment and the inability to recover-back any payments should Gleneagles win on appeal, the court again disagreed and reasoned that the Act, as the court interpreted it, prohibited recovering overpayment. Although it empathized with Gleneagles's position, the

100. Id. at 1335.
101. Id. at 1337.
102. 385 Md. at 495, 869 A.2d at 854.
103. Id. at 496, 869 A.2d at 855. Chief Judge Bell, and Judges Cathell and Battaglia joined the majority opinion. Id. at 506, 869 A.2d at 861.
104. Id. at 497, 869 A.2d at 855.
105. Id.
106. Id. at 506, 869 A.2d at 861.
107. Id. at 497-99, 869 A.2d at 855-57.
108. See id. at 499-500, 869 A.2d at 857 (noting that according to Courts and Judicial Proceedings Article § 1-501, courts have equity powers "except where by law jurisdiction has been limited").
109. Id. at 501, 869 A.2d at 857.
110. Id. at 502, 869 A.2d at 858.
court deferred to the legislature and noted that the legislature likely foresaw this issue when it drafted the "no-stay" provision.\footnote{111} The court asserted that the legislature considered but disregarded this idea and that as a way of mitigating the employer's burden to make payments, the legislature instead gave appeals precedence over all other non-criminal cases.\footnote{112}

While the court noted that Gleneagles was in an especially difficult situation because Gleneagles was ordered to pay a lump-sum award, the court deferred to the Commission and stated that it could not assume that the Commission did not properly consider all of the circumstances before acting.\footnote{113} The court concluded by noting that it had discussed in previous cases the inequities of the Act and concluded that the legislature, and not the court, must correct any inequities in the Act.\footnote{114}

Judge Wilner, in dissent,\footnote{115} argued that § 9-741 severely limits, but does not prohibit, a court granting a stay of the Commission's monetary award pending an appeal.\footnote{116} The dissent placed more weight on the language in Rule 7-205, which allows the court to grant stays that it considers proper.\footnote{117}

While Judge Wilner agreed that no-stay provisions in workers' compensation cases are common,\footnote{118} he argued that courts should permit stays in appropriate cases, such as when an employer makes a strong showing of success on the merits.\footnote{119} Finally, Judge Wilner concluded by asserting that if the legislature had really intended to prohibit a court from granting such stays, it could have done so explicitly.\footnote{120}

4. Analysis.—In Gleneagles v. Hanks, the court held that appeals while pending do not stay awards granted by the WCC and determined that employers can not recover-back funds paid during the appeal should the award be overturned.\footnote{121} Although the Gleneagles

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\begin{itemize}
\item \footnoteref{111} Id. at 502-03, 869 A.2d at 858-59.
\item \footnoteref{112} Id. at 502, 869 A.2d at 858. The legislature, however, provided for recovery in cases of fraud. \textit{Id.} at 502, 869 A.2d at 858-59.
\item \footnoteref{113} Id. at 503-04, 869 A.2d at 859.
\item \footnoteref{114} Id. at 504, 869 A.2d at 860.
\item \footnoteref{115} Judges Raker and Harrell joined Judge Wilner's dissent. \textit{Id.} at 506, 869 A.2d at 861 (Wilner, J., dissenting).
\item \footnoteref{116} Id. at 506, 869 A.2d at 861.
\item \footnoteref{117} Id. at 507, 869 A.2d at 861.
\item \footnoteref{118} Id. at 508, 869 A.2d at 861.
\item \footnoteref{119} Id.
\item \footnoteref{120} Id. at 508-09, 869 A.2d at 861.
\item \footnoteref{121} Gleneagles, 385 Md. at 506, 869 A.2d at 861.
\end{itemize}
decision comports to the doctrine of stare decisis, the court missed an opportunity to rectify an inequity. The court in Gleneagles ignored the right to restitution and its importance to the appeal process, thus allowing one party to be unjustly enriched. The court should have recognized this right and created an avenue for restitution as courts in other jurisdictions have done.

a. The Court Missed an Opportunity to Correct a History of Inequity Created by Its Interpretation of the Workers' Compensation Act.—The court's decision in Gleneagles v. Hanks was consistent with Maryland courts' previous statutory interpretation of the Workers' Compensation Act denying employers who win on appeal the right to recover-back payments made before and during the appeal process. The Court of Appeals's strict construction of the Workers' Compensation Act thus prohibited Gleneagles from recovering an overturned or overpaid award. The court missed an opportunity to correct a history of inequity when it continued its trend of urging the legislature to revisit the issue. Instead, the Gleneagles court held consistent with Maryland case law in concluding that statutory silence indicates a legislative intent to not allow recovery-back. Although its decision to adhere to precedent posed certain inequities, the court was influenced and supported by the doctrine of stare decisis.

122. Stare decisis is a Latin term for the doctrine of precedent, literally translating to “to stand by things decided.” BLACK'S LAW DICTIONARY 1443 (8th ed. 2004) (“The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”).

123. See infra Part 4.a.
124. See infra Part 4.b.
125. See infra Part 4.c.
127. Gleneagles, 385 Md. at 505, 869 A.2d at 860.
130. According to this doctrine, once a court has created a principle of law that applies to a particular set of facts, the court should adhere to that principle and apply it to any future cases in which the facts are substantially the same. Hebden v. Keim, 196 Md. 45, 49, 75 A.2d 126, 128 (1950).
Hence, when the court in *Gleneagles* denied the ability of Gleneagles to recover-back payments,¹³¹ it did so in light of established precedent, as stare decisis discourages courts from deciding a case based solely on first impression and requires that courts take precedent into account as authority.¹³² Four significant cases—*Hoffman, Treadwell, Wright,* and *Sealy*—highlight the reasoning on which the *Gleneagles* court based its decision.¹³³ In all four cases, Maryland courts consistently denied each employer the ability to recover overpaid workers' compensation funds, whether the funds were overpaid because the award was subsequently lowered, reversed, or vacated, and refused to reimburse the employer, be it during the appeal proceeding or in a separate, subsequent civil suit for restitution.¹³⁴ Throughout these cases, the courts' justification for prohibiting recovery-back was that the legislature considered the possibility that an employer would fail to recover such funds and simply rejected the concept of recovery-back.¹³⁵ The *Gleneagles* court explicitly followed these previous decisions and gave no further indication as to how or why the legislature came to the conclusion rejecting recovery-back.¹³⁶ Instead, the court construed the Act as preventing recovery-back without additional explanation.¹³⁷

Stare decisis also influenced the *Gleneagles* court's decision to allude to the unfairness posed by denial of restitution and urge the legislature to reevaluate the law.¹³⁸ Rather than take action to correct the inequity, the *Gleneagles* court again followed previous Maryland courts, like *Podgurski* and *Koscielski,* which alluded to the inequity the denial of restitution imposed on defendants.¹³⁹ Furthermore, the

¹³¹. *Gleneagles,* 385 Md. at 502, 869 A.2d at 858.
¹³². See *BLACK'S LAW DICTIONARY,* supra note 122, at 1443 (“[I]t is necessary for a court to follow earlier judicial decisions.”).
¹³⁴. *Sealy,* 356 Md. at 466, 740 A.2d at 596-97; *Wright,* 348 Md. at 215, 703 A.2d at 153; *Treadwell,* 263 Md. at 434, 283 A.2d at 606; *Hoffman,* 232 Md. at 56, 191 A.2d at 578.
¹³⁵. See, e.g., *Treadwell,* 263 Md. 430, 437, 283 A.2d 601, 605 (explaining legislative silence).
¹³⁶. 385 Md. at 502, 869 A.2d at 858-59.
¹³⁷. Id.
¹³⁹. 385 Md. at 502, 869 A.2d at 858; see *Koscielski,* 80 Md. at 462, 564 A.2d at 119 (alluding to restitution by ruling that attorneys' fees in workers' compensation cases are recoverable should the employer prevail on appeal because the court had the authority to require restitution to restore the parties to their previous positions should it reverse judgment on appeal); *Podgurski v. One Beacon Ins. Co.,* 374 Md. 133, 154, 821 A.2d 400, 413 (2003)
Gleneagles court adhered to precedent, like Lake and Thompson, by addressing the legislature's need for further amendment in this area of law. The court in Gleneagles refused to address the seeming inequities presented by the statute and stated that the legislature should address any inequities presented by the case.

While stare decisis is well established, a court may take the opportunity to deviate from precedent if the principle established by the precedent is unreasonable. The Gleneagles court could have deviated from precedent because the precedent the Gleneagles court followed is unreasonable for three reasons. First, because the court in Gleneagles refused to address the inequities posed by its application of the Act, employers face uncertainty as they wait for one branch of government to address an inequity that both the legislature and the courts should know well. During the legislature's inaction, numerous cases pertaining to this issue have arisen to no resolve, and this will continue to happen until the legislature amends the Act or the court offers another remedy.

Second, decisions denying recovery-back are unreasonable because they are self-imposed. The legislature did not explicitly prohibit an employer from recovering overpaid awards; the court construed the legislature's silence to indicate a legislative intent to deny an employer the remedy. Because the court construed the statute in this manner, the court should fix its self-imposed inequity. Furthermore, in Lombardi, the court stated that the Act should not be resolved to provide for compensation beyond that authorized; yet this is exactly

(implying support of restitution by allowing an employer to recover-back an award when an employee received payments from both the employer and the third-party owner of the employer's premises).

140. See Lake, 68 Md. App at 279, 511 A.2d at 546 (addressing the potential inequities posed by the Act's lack of a recovery-back provision and the need for further amendment in this area of law); accord Thompson, 368 Md. App. at 60, 792 A.2d at 284. 141. 385 Md. at 505, 869 A.2d at 860. 142. Aravanis v. Eisenberg, 237 Md. 242, 250, 206 A.2d 148, 161 (1965) ("Stare decisis ought not be the excuse for decision where reason is lacking."); see White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966) (stating that courts may deviate from precedent when circumstances leave precedent inapplicable). 143. Maryland courts have been urging the legislature to address the Act's inequities for close to forty years. E.g., St. Paul Fire & Marine Ins. v. Treadwell, 263 Md. 430, 439, 283 A.2d 601, 606 (1971). 144. E.g., Sealy Furniture of Md. v. Miller, 356 Md. 460, 466, 740 A.2d 594, 596-97 (1999); Philip Elecs. N. Am. v. Wright, 348 Md. 209, 233, 703 A.2d 150, 156-57 (1997); Treadwell, 263 Md. at 430, 283 A.2d at 606; Hoffman v. Liberty Mutual Ins., 232 Md. 51, 56, 191 A.2d 575, 578 (1963). 145. Sealy, 356 Md. at 466, 740 A.2d at 596-97; Wright, 348 Md. at 233, 703 A.2d at 156-57; Treadwell, 263 Md. at 430, 283 A.2d at 606; Hoffman, 232 Md. at 56, 191 A.2d at 578.
what the court is doing. By denying employers the ability to recoup funds that are later vacated on appeal, the court is construing the Act in such a way that provides an employee with compensation beyond that which was authorized.

Third, the precedent to which the court in *Gleneagles* adheres is also unreasonable because the precedent operates as a disincentive for employers to seek appellate relief. With respect to statutory interpretation, the court has indicated that it should never read a statute in a way that is inconsistent with, or ignores, common sense or logic. Yet the court's interpretation of the Act prohibiting recovery-back ignores common sense: the court recognized a right to appeal, yet prohibited an effectuation of that right by interpreting the Act in such a way that denies the employer a right to recovery. Common experience suggests that a primary reason that an employer would exercise the right to appeal a WCC award is to recover money, especially in cases where the award was paid as a lump sum. In cases where the payment is made as a lump sum, the logical reason that an employer would appeal is to recover that payment. With respect to stare decisis, the principle that precedent must usually be followed is partly based on the assumption that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. As such, Maryland employers considering established precedent denying them the ability to recover-back have no real incentive to appeal and can be expected to regulate their conduct by not bothering to seek appellate relief.

147. *Gleneagles*, 385 Md. at 505, 869 A.2d at 860 (providing Hanks with compensation not authorized should the court vacate the Commission's order on appeal).
149. See *Gleneagles*, 385 Md. at 505, 869 A.2d at 860 (providing Gleneagles the ability to appeal but not to recoup its overpaid award).
150. In lump-sum cases, the full amount is paid out at once. See id. (defining lump-sum cases). Unlike payment cases where an appeal may prevent future harm by stopping payments, the harm is already done in lump-sum cases. See generally *Gleneagles*, 385 Md. at 505, 869 A.2d at 860 (discussing the greater hardship imposed on employers against which the Commission orders a lump-sum payment).
151. Id.
153. See id. (suggesting that parties acting according to established precedent is part of the principle of stare decisis).
b. The Court Ignored the Right to Restitution as an Integral Component of the Right to Appeal, Wrongly Allowing One Party to Be Unjustly Enriched.—The Gleneagles court’s decision ignores restitution’s importance to the appeal process.\(^{154}\) The court’s interpretation of the Workers’ Compensation Act confirms that both parties have a right to appeal.\(^{155}\) Part of that right includes the Court of Appeals’s ability to reverse lower court findings.\(^{156}\) The intended result of a reversed or vacated decision is that both parties return to the same posture they were in before the original judgment.\(^{157}\)

“Restitution” is a term used to denote this return to the status quo.\(^{158}\) A judicially recognized right, restitution is an integral component of the right to appeal.\(^{159}\) Often used in terms of financial reimbursement, a party obtains restitution when the court restores him to his previous condition, including the returning back of something to its rightful owner.\(^{160}\) As a result, a defendant, upon a vacated or reversed judgment, is entitled to what was taken from him following the judgment.\(^{161}\) In this view, restitution makes a direct appeal to the standards of equitable and conscientious behavior as a source of obligations that society will enforce with legal action.\(^{162}\) Thus, a defendant who pays money as part of an award to the plaintiff and subsequently wins the appeal should recover back the money already paid out to effectuate the goal of the appeal.\(^{163}\) The Gleneagles court,

\(^{154}\) See 385 Md. at 505, 869 A.2d at 860 (providing Gleneagles the ability to appeal but not to recoup its overpaid award and return to the status quo).


\(^{157}\) See Baltimore & Ohio R.R. Co. v. United States, 279 U.S. 781, 786 (1929) (discussing that the appeal process includes the well-established right to recover what was lost by the enforcement of a judgment subsequently reversed).

\(^{158}\) See Black’s Law Dictionary, supra note 122, at 1573-74 (“A body of substantive law in which liability is based not on tort or contract but on the defendant’s unjust enrichment . . . . Return or restoration of some specific thing to its rightful owner or status.”).


\(^{160}\) Restatement (Third) of Restitution and Unjust Enrichment: General Principles § 1 (Discussion Draft, 2000). The definition of restitution is that “a person who is unjustly enriched at the expense of another is liable in restitution to the other.” Id.

\(^{161}\) Atlantic, 295 U.S. at 309.

\(^{162}\) Restatement (Third) of Restitution and Unjust Enrichment § 1. This idea is consistent with Podgurski v. One Beacon Insurance Co., where the court held that if an employee recovers excess money above that awarded by the Commission, the insurer or employer has no further obligation to pay the employee as well as a right to full reimbursement. 374 Md. 133, 138, 821 A.2d 400, 403 (2003).

\(^{163}\) Arkadelphia, 249 U.S. at 145.
however, ignored the importance of restitution to the appeals process. If Gleneagles wins on appeal, Gleneagles will not be able to recover the award that it paid to Hanks in this proceeding or in a separate civil claim, thus allowing Hanks to be unjustly enriched.  

By ignoring the right to restitution, the Gleneagles court wrongly allowed one party to be unjustly enriched. The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law considers "unjust." An enrichment is unjust if the benefit conferred is the result of a non-consensual transfer—a court-ordered payment—that becomes void or voidable by an invalidating cause, such as enforced payments, which are later invalidated or overturned. In the same way, if a court reverses or vacates a workers' compensation award already conferred to the employee, and the employer cannot recover-back the funds based on restitution, then the employee is retaining a benefit the court has determined rightfully belongs to the employer. As such, a restitution claim based on unjust enrichment is valid if a court determines that a benefit belongs to the party that has already conferred it upon a second party. Thus, an employee, like Hanks, will be unjustly enriched if she retains an award paid by the employer, like Gleneagles, which the court has later reversed or vacated. Maryland courts should allow for an employer to recover-back payments made and later reversed on appeal based on restitution and unjust enrichment. Because the court ignored the right to restitution and continues to prohibit an employer from recovering-back overpaid money, Gleneagles loses the ability to be restored to the status quo it was in before the decision and Hanks stands to be unjustly enriched.

The Gleneagles court, however, believed that the legislature was the correct body to amend this area of law and refused to remedy the

164. See generally Gleneagles, 385 Md. at 505, 869 A.2d at 860 (noting that Gleneagles will not recover the amount paid to Hanks regardless of success on appeal).


166. Restatement (Third) of Restitution and Unjust Enrichment § 1.

167. Id.; see Gleneagles, 385 Md. at 501, 869 A.2d at 857 (applying the court's decision to deny recovery-back under the principle of unjust enrichment).

168. Restatement (Third) of Restitution and Unjust Enrichment § 1.

169. See generally Gleneagles, 385 Md. at 501, 869 A.2d at 857 (providing support for the proposition that Hanks will be unjustly enriched); accord Restatement (Third) of Restitution and Unjust Enrichment § 1.

170. See generally Gleneagles, 385 Md. at 501, 869 A.2d at 857; accord Restatement (Third) of Restitution and Unjust Enrichment § 1.

171. See generally Gleneagles, 385 Md. at 505, 869 A.2d at 860 (implying that even if Gleneagles is successful on appeal it is prohibited from recovering the funds paid during appeal).
unfairness unless some basic right was infringed, even if inequities were present.\textsuperscript{172} This rationale, however, ignored the fact that a successful appeal is not made to limit damage but to restore the status quo and disregarded the employer’s right to restitution as part of the appeal process.\textsuperscript{173} While the court may not consider the right to restitution a “basic right”—in \textit{Gleneagles}, the court refused to make changes to the controversy surrounding a defendant’s ability to recover-back unless it infringed on some basic right—the Supreme Court has recognized that restitution is integral to the right to an appeal and that the defendant is entitled to return to his original position.\textsuperscript{174} The court in \textit{Gleneagles} should have recognized that it would be well within its power to remedy the inequity imposed by its prior interpretation of the Act.

c. \textit{The Court Should Have Followed Other Jurisdictions That Have Recognized the Importance of Restitution}.—The court’s decision in \textit{Gleneagles} and its request to the legislature to revisit the recovery-back inequity posed by its interpretation of the Act is insufficient when compared to other states that actually provide a vehicle through which defendants can recover-back awards.\textsuperscript{175} After nearly forty years of deferring to the legislature to make changes,\textsuperscript{176} Maryland courts, like other jurisdictions, should recognize the importance of restitution. Maryland should join other jurisdictions that allow for restitution in the face of statutory silence instead of merely leaving it up to the legislature; doing so would prevent further inequities, including deterring employers from seeking appellate relief and unjust enrichment. For example, Montana, New Jersey, and Pennsylvania all allow employers to recover overpaid funds regardless of the fact that each state’s workers’ compensation statute is silent on the issue.\textsuperscript{177} The high court in each of those states could have deferred to the legislature and merely asked the legislature to revisit the statute.\textsuperscript{178} Instead, all three su-

\textsuperscript{172} \textit{Id.} at 505, 869 A.2d at 860.

\textsuperscript{173} \textit{See id.} (leaving \textit{Gleneagles} without restitution even though the company may win on appeal).


\textsuperscript{175} \textit{See generally id.} (noting its limited decision on recovery-back).


\textsuperscript{177} \textit{See Reil}, 837 P.2d at 1336; \textit{Hajnas}, 555 A.2d at 719; \textit{Lucey}, 732 A.2d at 1203.

\textsuperscript{178} \textit{Reil}, 837 P.2d at 1336; \textit{Hajnas}, 555 A.2d at 719; \textit{Lucey}, 732 A.2d at 1203.
preme courts recognized the importance of restitution.\textsuperscript{179} New Jersey, despite statutory silence, relied upon the principle of unjust enrichment in \textit{Hajnas v. Englehard} to hold that an employer was entitled to restitution.\textsuperscript{180} The Pennsylvania Supreme Court, likewise, relied upon the law of restitution in \textit{Lucey v. Workmen's Compensation Appeal Board} to hold that if an employer wrongly overpaid an employee, restitution was appropriate.\textsuperscript{181} Finally, the Montana Supreme Court, in a case very analogous to \textit{Gleneagles}, determined that restitution applied to cases where an employer, who paid funds to an employee, successfully appealed and the court overturned the employee's award.\textsuperscript{182} The Court of Appeals should follow the examples set by courts in jurisdictions like Montana, New Jersey, and Pennsylvania, and allow for common-law restitution as a remedy for employers to recover-back funds paid which are later overturned on appeal.\textsuperscript{183}

5. \textit{Conclusion}.—The court’s holding in \textit{Gleneagles v. Hanks} that it does not have the authority to stay a WCC award during an appeal means that employers cannot recover-back funds paid during the appeal should the award be overturned.\textsuperscript{184} Although the \textit{Gleneagles} decision comports with the doctrine of stare decisis, the precedent it adhered to was unreasonable, and the court missed the chance to resolve the inequity stemming from its interpretation of the Workers' Compensation Act.\textsuperscript{185} Instead, the court in \textit{Gleneagles} ignored the right to restitution and restitution's importance to the appeal process, thus allowing Hanks to be unjustly enriched should \textit{Gleneagles} ultimately win on appeal.\textsuperscript{186} The court should allow recovery-back based on the common-law principles of restitution and unjust enrichment as courts in other jurisdictions have done.\textsuperscript{187}

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\textsuperscript{179} \textit{Reid}, 837 P.2d at 1336; \textit{Hajnas}, 555 A.2d at 719; \textit{Lucey}, 732 A.2d at 1203.
\textsuperscript{180} 555 A.2d at 719-22.
\textsuperscript{181} 732 A.2d at 1203-04.
\textsuperscript{182} \textit{Reid}, 837 P.2d at 1336.
\textsuperscript{183} \textit{See id.}; \textit{Hajnas}, 555 A.2d at 719; \textit{Lucey}, 732 A.2d at 1203.
\textsuperscript{184} \textit{Gleneagles}, 385 Md. at 506, 869 A.2d at 861.
\textsuperscript{185} \textit{See supra} Part 4.a.
\textsuperscript{186} \textit{See supra} Part 4.b.
\textsuperscript{187} \textit{See supra} Part 4.c.
VII. LEGAL ETHICS

A. Public Prosecutors and the Appearance of Justice: How the Court of Appeals Erred in Gatewood by Treating a State's Attorney as an Ordinary Advocate

In Gatewood v. State,\(^1\) the Court of Appeals of Maryland considered whether a state's attorney should be disqualified from prosecuting a defendant he previously represented in an unrelated criminal matter. The court held that such a prosecutor did not have to be disqualified per se, and the appropriate response in such a situation is for the trial court to exercise its discretion after inquiring into potential prejudice to the defendant.\(^2\) The court specified that the trial court should examine whether the current and prior cases are substantially related and whether the defendant might be unfairly prejudiced in the case before it due to previous disclosure of confidential information.\(^3\) In so holding, the Court of Appeals rendered a decision consistent with attorney conflict-of-interest guidelines in the Maryland Lawyers' Rules of Professional Conduct.\(^4\) The court erred, however, by treating conflicts involving public prosecutors in the same manner as conflicts involving private attorneys.\(^5\) In particular, the court did not recognize or give sufficient weight to substantial legal authority that establishes a greater need for impartiality and disinterest by public prosecutors due to their unique role as state advocates for justice.\(^6\) Additionally, the court neglected to resolve whether the longstanding "appearance of impropriety" doctrine\(^7\) can still constitute grounds for attorney disqualification in Maryland, whether for public prosecutors or private attorneys. The court should have concluded that while the appearance of impropriety doctrine is perhaps unduly burdensome for private attorneys, the doctrine should apply

\(^1\) 388 Md. 526, 880 A.2d 322 (2005).
\(^2\) Id. at 532, 880 A.2d at 325.
\(^3\) Id.
\(^5\) See infra Part 2.c.
\(^6\) See infra Part 2.c.
\(^7\) MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1969). The American Bar Association's [hereinafter ABA] Model Code was replaced by the Model Rules of Professional Conduct in 1983, but is still looked to as a guide for ethical behavior. See infra notes 59-83 and accompanying text.
to prosecutors, just as it does for judges, because prosecutors possess a unique public role and high degree of discretion.

Accordingly, the Court of Appeals should have required that whenever a conflict is alleged due to prior representation of the defendant by a prosecutor, the trial court should inquire not just into potential prejudice from disclosed confidential information, but also into the prosecutor’s ability to act and appear impartial. If the judge concludes that the prior representation makes it significantly more difficult for the prosecutor to remain impartial, or makes the prosecution appear improper in a way that affects the public’s faith in the integrity of the judicial system, the prosecutor should be disqualified.

1. The Case.—In 2003, Troy Arness Gatewood was prosecuted in the Circuit Court for Cecil County for possession and distribution of a “controlled dangerous substance” (CDS). Just before trial, the defense moved to disqualify the prosecutor, state’s attorney Christopher Eastridge, because Eastridge had defended Gatewood in the past. Gatewood argued that the prior representation created a conflict and “the specter of impropriety” in that Eastridge might have gleaned confidential information he could use to impeach Gatewood during cross-examination. In a bench conference, the judge asked

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9. See infra notes 234-244 and accompanying text.
11. See infra Part 4.c.
12. Cecil County is located in Northeast Maryland. By Maryland standards, it is a medium-sized county with approximately 95,000 people. U.S. Census Bureau, U.S. Dep’t of Commerce, http://quickfacts.census.gov/qfd/states/24/24015.htm (last visited Nov. 12, 2006). At the time of Gatewood’s trial, the county state’s attorney’s office had one full-time state’s attorney and seven part-time assistant state’s attorneys. Telephone Interview with Cecil Co. State’s Attorney’s Office (Dec. 16, 2005).
13. Gatewood, 388 Md. at 530, 880 A.2d at 324. The CDS was cocaine. Id. at 532, 880 A.2d at 325.
14. Both the Court of Special Appeals and Gatewood’s appeal refer to Eastridge as an “Assistant State’s Attorney,” but the Court of Appeals notes this appears to have been an error. Id. at 530 n.1, 880 A.2d at 324 n.1.
15. Id. at 530-31, 880 A.2d at 324-25. Eastridge was an attorney for the Public Defender’s Office from 1986 through 1998 before being elected state’s attorney for Cecil County in 2002. Id. at 532 n.4, 535, 880 A.2d at 325 n.4, 327. Gatewood apparently did not recognize Eastridge as his former defense counsel until just after voir dire was complete, at which point he notified his defense attorney, who then raised the matter with the judge. Id. at 532, 880 A.2d at 325-26. The CDS indictments against Gatewood were obtained by Eastridge’s predecessor as state’s attorney. Id. at 532 n.4, 880 A.2d at 325 n.4.
16. Id. at 532, 880 A.2d at 326.
Eastridge if he recalled representing Gatewood or had any special knowledge that could be used in the pending case.17 Eastridge replied that he vaguely recalled Gatewood from his time at the Public Defender’s office but had “no specific recollection” of representing him.18 He added that he had no knowledge that would be useful in the current prosecution and would rely on other cases culled from the state’s attorney’s office files in impeaching Gatewood should he take the stand.19 The judge denied the defense motion.20

After opening arguments, Gatewood’s attorney checked the records and found that Eastridge had represented Gatewood in 1998 on burglary and drug distribution charges, which concluded with a *nolle prosequi* and guilty plea, respectively.21 The defense then renewed its motion to disqualify, arguing that the record clearly demonstrated there had been “some significant contact” between Eastridge and Gatewood.22 Eastridge responded by reiterating that he had no recollection of either case, adding that during his twelve years as a public defender, he had represented “hundreds if not thousands of individuals,” and as state’s attorney, he could not possibly disqualify himself from every case involving a former client.23 Eastridge also pledged that any cross-examination would be limited to the present case and information gleaned not from his prior representation of Gatewood, but from the state’s attorney’s office files.24 The judge denied the renewed motion to disqualify Eastridge, stating that while he recognized Gatewood’s concern, he did not see that it was prejudicial to have Eastridge remain as prosecuting attorney.25 The trial proceeded and, when Gatewood testified on his own behalf, Eastridge impeached him by citing two prior convictions for theft, but Eastridge did not raise either case in which he had represented Gatewood while a public defender.26 The jury convicted Gatewood of three counts of distribution of cocaine.27 Eastridge then submitted a sentencing recommendation of thirty-six to sixty years, arguing that because Gate-

17. *Id.* at 532-33, 880 A.2d at 326.
18. *Id.*
19. *Id.* at 533, 880 A.2d at 326.
20. *Id.* at 534, 880 A.2d at 326.
21. *Id.*, 880 A.2d at 327. *Nolle prosequi* is the voluntary withdrawal of the charges by the prosecutor. BLACK’S LAW DICTIONARY 1074 (8th ed. 2004). The guilty plea was for conspiracy to possess CDS. *Gatewood*, 388 Md. at 534, 880 A.2d at 327.
22. *Gatewood*, 388 Md. at 535, 880 A.2d at 327.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 536, 880 A.2d at 328.
wood had at least eleven prior convictions, he should be regarded as a prior adult criminal offender and receive a long sentence.\textsuperscript{28} The trial judge noted that Eastridge's sentencing recommendation was on the "high" side due to Gatewood's prior criminal record, but sentenced Gatewood to less than the maximum permitted because the judge concluded Gatewood was just a "low level dealer."\textsuperscript{29}

Gatewood appealed to the Court of Special Appeals, arguing, inter alia, that the trial court erred in not disqualifying the prosecutor.\textsuperscript{30} The Court of Special Appeals affirmed the trial court's ruling, holding that (1) the decision to disqualify counsel is left to the discretion of the trial court, (2) disqualification is not required per se in every instance involving prior representation by a prosecutor and only mandated when the two cases are "substantially related," and (3) Eastridge's prior representation did not involve matters substantially related to the prosecution at bar.\textsuperscript{31} Therefore, held the court, disqualification was not required.\textsuperscript{32}

Gatewood appealed to the Maryland Court of Appeals, which granted certiorari\textsuperscript{33} to rule on two issues: (1) whether a prosecutor should be disqualified because of the appearance of a conflict arising from prior representation in an unrelated criminal matter, and (2) whether the trial judge had abused his discretion in ruling there had been no prejudice to the defendant.\textsuperscript{34}

2. Legal Background.—Prosecutorial conflict of interest matters in Maryland are governed by the Maryland Lawyers' Rules of Professional Conduct (the Maryland Rules)\textsuperscript{35} and Maryland common law. Additional significant influences include federal case law and the ethical guidelines set forth in the American Bar Association's (ABA) Model Rules of Professional Conduct\textsuperscript{36} and its predecessors—the

\textsuperscript{28} Gatewood, 388 Md. at 552, 880 A.2d at 337.
\textsuperscript{29} Id. at 552 n.20, 880 A.2d at 337 n.20. The Maryland sentencing guidelines recommended a sentence of twelve to sixty years, depending on whether the sentences were to run consecutively or concurrently. \textit{Id}. The judge sentenced Gatewood to twenty years on each count with the sentences to run concurrently. \textit{Id}.
\textsuperscript{30} Id. at 531-32, 880 A.2d at 325.
\textsuperscript{31} Gatewood, 158 Md. App. at 466-68, 857 A.2d at 594.
\textsuperscript{32} Id.
\textsuperscript{34} Gatewood, 388 Md. at 531-32, 880 A.2d at 325.
\textsuperscript{35} MD. LAWYERS' RULES OF PROF'L CONDUCT (2006).
\textsuperscript{36} MODEL RULES OF PROF'L CONDUCT (1983).
Model Code of Professional Responsibility (the Model Code)\(^{37}\) and the Canons of Professional Ethics.\(^{38}\)

These authorities have established three essential principles for courts to consider and apply when evaluating prosecutorial conflicts of interest. The first is that no attorney, whether prosecutor or private advocate, should represent a client when the attorney has previously represented an adverse party in the same or a "substantially related" matter.\(^{39}\) The primary focus of this restriction, and its application by the courts, has been the potential prejudice to an adverse party due to prior disclosure of confidential information.\(^{40}\) The second consideration, and one given varying weight by various courts, is the appearance of impropriety and its impact on public confidence in the judicial system.\(^{41}\) Third, the Maryland Rules,\(^{42}\) Model Rules,\(^{43}\) and Maryland and federal case law have all also recognized that public prosecutors occupy a unique role that requires a higher degree of impartiality and disinterest than that demanded of private attorneys.\(^{44}\)

\[\text{a. The "Same or Substantially Related" Prohibition.} \]

The Maryland Rules of Professional Conduct 1.6,\(^{45}\) 1.7,\(^{46}\) and 1.9\(^{47}\) establish

\begin{enumerate}
\item[37.] \textit{Model Code of Prof'l Responsibility} (1969).
\item[38.] \textit{Canons of Prof'l Ethics} (1908).
\item[40.] Buckley, 908 F. Supp. at 304.
\item[41.] See, e.g., Peat, Marwick, Mitchell & Co. v. Los Angeles Rams Football Co., 284 Md. 86, 95-96, 394 A.2d 801, 806-07 (1978) (considering the appearance of impropriety but calling it a "general standard that serves solely as a warning" and not a strict rule); Sorci v. Iowa Dist. Ct. for Polk County, 671 N.W.2d 482, 493-94 (Iowa 2003) (noting that if the appearance of impropriety would undermine public trust in the legal system it could require attorney disqualification).
\item[42.] Md. Lawyers' Rules of Prof'l Conduct R. 3.8.
\item[43.] \textit{Model Rules of Prof'l Conduct} R. 3.8.
\item[45.] Md. Lawyers' Rules of Prof'l Conduct R. 1.6(a) provides, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . ." 
\item[46.] Md. Lawyers' Rules of Prof'l Conduct R. 1.7 provides,
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
\end{enumerate}
that an attorney should not represent a client in an adverse position to a former client if the two matters are the same or substantially related or if the prior representation provided the attorney with confidential information that could be used to the detriment of the former client. Additionally, Rule 1.10 states that if a lawyer who has a conflict associates with a private firm, ordinarily that entire firm may not represent a party whose interests are adverse to those of the conflicted attorney’s prior client.

The Maryland Rules of Professional Conduct became effective January 1, 1987, and since that date, Maryland courts have had few opportunities to apply them to conflict-of-interest cases involving prior representation. There are no published Maryland state cases since 1987 that specifically address the issue, whether involving a prosecutor or a private attorney. The United States District Court for the District of Maryland, however, applied the Maryland Rules to a prior representation conflict involving a private attorney in Buckley v. Airshield Corp.

(2) the client consents after consultation.

47. Md. Lawyers’ Rules of Prof’l Conduct R. 1.9 provides,

A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

48. Md. Lawyers’ Rules of Prof’l Conduct R. 1.10(a) provides,

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. . . . (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the newly associated lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

This rule does not apply to public prosecutors. Md. Lawyers’ Rules of Prof’l Conduct R. 1.11 cmt. 2 (2006).

49. Exceptions are sometimes available when either the former client consents or when a strict screening method is put in place to ensure that other attorneys at the firm do not come into contact with confidential information known to the conflicted attorney. Clinard v. Blackwood, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *54 (1999), aff’d, 46 S.W.3d 177 (Tenn. 2001). The use of screening arrangements, however, remains controversial. Id.


51. Id. at 299.
In *Buckley*, an attorney with a firm acting as Buckley's patent counsel left that firm and began representing Airshield. Buckley then sued Airshield for patent infringement and urged that the attorney be disqualified because he had worked on Buckley's previous patent enforcement cases and was privy to confidential information. The federal court relied on Maryland Rule 1.9 and analogous case law from other jurisdictions in holding that a private attorney should be disqualified if the current and prior cases were the same or "substantially related" because of concern that confidential information gleaned from the prior representation could be used to a former client's disadvantage. Because the current and prior representation in *Buckley* involved the same patent and similar litigation issues, the court concluded they were substantially related and the attorney should be disqualified.

The "same or substantially related" test for attorney disqualification cases has also been widely applied in other jurisdictions. Justifications generally cited for the same-or-substantially-related test are both the potential for misuse of client confidences, as well as the need to preserve public confidence in the integrity of attorneys and the judicial system.

b. The Appearance of Impropriety Doctrine.—The need to preserve public confidence in the legal system is also central to the "appearance of impropriety" doctrine, which continues to influence courts in Maryland and other states in evaluating whether an apparent conflict necessitates attorney disqualification. The doctrine traces its origins to ethical principles adopted by the ABA nearly a century ago.

52. *Id.* at 302. The switch occurred before Buckley sued Airshield, but while the two parties were negotiating with each other. *Id.* at 302-03.
53. *Id.* at 303. The attorney argued that he had not received any confidential information, but did not deny that he had done some patent work for Buckley. *Id.* at 306.
55. 908 F. Supp. at 306, 308.
57. Tessier, 731 F. Supp. at 728.
58. *Id.* at 729.
ago. In 1908, the ABA formulated its Canons of Professional Ethics, which laid out a series of principles, or Canons, regarding appropriate attorney conduct and situations involving conflicts of interest. These original Canons were guidelines and not bright-line rules, but were used and interpreted by courts and ethics committees when evaluating possible attorney ethical violations. The Maryland state bar association adopted the ABA Canons in 1922, and the influence of the Canons can be seen as early as Derlin v. Derlin, a 1923 case involving a private attorney who simultaneously represented two sides in a family estate negotiation. In Derlin, the Court of Appeals held that even though there was no evidence the attorney had improper motives or acted with prejudice toward one party, it was improper to represent adverse parties in the same case, “however slight such adverse interest may be.” The Derlin court noted that the principle barring attorneys from representing adverse parties was “a rigid one,” designed not just to prevent unethical practitioners from fraudulent behavior, but to preclude honest attorneys from putting themselves in awkward positions where they might have to choose between conflicting obligations.

The actual phrase “appearance of impropriety” was not expressly included in the original Canons, but first entered in the legal lexicon in 1932, when an ABA ethics committee interpreting the Canons opined that it would be inappropriate for a part-time public prosecutor to defend a client in a civil case while simultaneously prosecuting him on felony charges. The committee recognized that normally a private attorney might be permitted to represent adverse parties with the clients’ consent, but said that a public prosecutor had a duty “to be and remain above all suspicion” and thus should not only avoid all impropriety but also avoid “the appearance of impropriety.”

60. Maher, supra note 59, at 2.
63. See id. (stating that prior to the ABA Canons, the judiciary created common-law rules governing ethical legal conduct, but following 1908, the courts began to cite the Canons as authority for their decisions regulating attorney behavior).
65. 142 Md. 352, 121 A. 27 (1923).
66. Id. at 364, 121 A. at 31.
67. Id.
68. ABA Comm. on Prof’l Ethics & Grievances Formal Op. 77 (1932).
69. Id.
When the ABA formally revised its Canons in 1969, creating the Model Code of Professional Responsibility with its Canons, Ethical Considerations, and Disciplinary Rules, the drafters concluded that the appearance of impropriety principle was worth formally including and extending to all attorneys, not just prosecutors, and devised Canon 9, A Lawyer Should Avoid Even the Appearance of Professional Impropriety.\(^7\) Canon 9 was based not just on the need to guide attorneys in their conduct, but on the perceived need to maintain public confidence and trust in the legal system.\(^7\) A similar Canon was crafted for the judiciary and remains a guiding force to this day.\(^7\)

Maryland adopted the Model Code verbatim and in its entirety in 1970,\(^7\) and eventually, every state except California adopted a version of the Code recognizing the appearance-of-impropriety Canon.\(^7\)

Just as the original Canons of Professional Ethics had been guidelines and not bright-line rules,\(^7\) the Canons and Ethical Considerations of the Model Code were not binding rules, but rather aspirational principles that lawyers were encouraged to follow.\(^7\) The Model Code had an additional set of Disciplinary Rules meant to provide a basis for court disciplinary action and to establish a minimum standard for acceptable attorney conduct.\(^7\) Thus, even after a state formally adopted the Model Code, giving it the force and effect of law, attorneys were not necessarily subject to sanctions for failing to abide by the Canons and Ethical Considerations because they were mere "general concepts."\(^7\)

Even so, numerous courts, commentators, and

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70. **Model Code of Prof'l Responsibility** EC 9.1 (1969) provides that "[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession." EC 9-6 adds, "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety." *Id.*


75. *See supra* notes 61-67 and accompanying text.


78. *Peat, Marwick*, 284 Md. at 95, 394 A.2d at 806.
attorneys looked to the principles in the Canons and Ethical Considerations as guidelines for judging attorney conduct, and courts often disciplined or disqualified attorneys for violating the Canons and Considerations as well as the Disciplinary Rules. As a result, the line between the aspirational principles and actual disciplinary rules became somewhat blurred and led to the evolution of what became known as the “appearance of impropriety doctrine” with respect to attorney disqualification and misconduct. In evaluating whether an attorney need be disqualified because of a conflict, courts looked not only at whether an actual conflict existed, but at whether the public might perceive a particular action as inappropriate or “unseemly.”

Some courts held that the appearance of impropriety alone was sufficient to disqualify counsel, while others, including the Maryland Court of Appeals (in a case involving a private attorney), viewed it as one of several factors to consider when evaluating an attorney’s conduct.

(1) Applying the Doctrine to Prosecutors in Maryland.—The first published Maryland court case in which a prosecutor’s actions were judged under the appearance of impropriety standard was *Sinclair v. State*, an appeal of a conviction won by a prosecutor who had been simultaneously representing a party adverse to the defendant in a civil lawsuit. The trial judge had denied the defendant’s motion for prosecutorial disqualification without a hearing, stating that a prosecutor was by nature “hostile” to the defendant, so it mattered little whether he had additional incentive for aggressively prosecuting

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80. See supra note 59 and accompanying text.
83. *Peat, Marwick*, 284 Md. at 95-96, 394 A.2d at 806; see Bd. of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (holding that the appearance of impropriety alone is “too slender a reed on which to rest a disqualification order except in the rarest cases”).
84. 278 Md. 243, 252, 363 A.2d 468, 474 (1976). The state’s attorney was simultaneously representing a bank that held a note against the defendant and allegedly told the defendant that if he contested the note, he would be indicted for writing bad checks. *Id.* at 248, 363 A.2d at 471. The state’s attorney subsequently filed a criminal information against Sinclair and sought to prosecute the case. *Id.*
the case. The Court of Appeals reversed, declaring that the trial judge had misconstrued the obligations of a state's attorney.

The Sinclair court noted that a violation of the Model Code alone did not necessitate reversal of a criminal conviction, but required at least an inquiry by the trial judge into potential prejudice. The court held that whenever it is alleged a prosecutor may have a personal or pecuniary interest that might impair his or her ability to act impartially, the trial judge must hold a factual inquiry into whether there is a conflict. This is vital, noted the court, because a prosecutor is not an ordinary attorney, but rather is one vested with the sovereign's power of discretion as to whether to press forward with a prosecution. The court cited the Model Code's Canon 9 for the proposition that a prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. Therefore, the court continued, if a prosecutor has, or would appear to a reasonable observer to have, an interest which might impair that prosecutor's ability to act impartially toward the accused, the prosecutor should be disqualified. The court then remanded the case for an evidentiary hearing on whether the conviction should be vacated.

In Lykins v. State, the Court of Appeals considered whether a prosecutor's prior representation of the defendant in a marginally related civil matter created such an appearance of impropriety that the prosecutor should be disqualified and the indictment dismissed. The court held that while disqualification was not required per se because

85. Id. at 250, 363 A.2d at 472.
86. Id. at 254, 363 A.2d at 475.
87. Id.
88. Id. at 260, 363 A.2d at 479.
89. Id. at 257, 363 A.2d at 476.
90. Id. at 259, 363 A.2d at 477. The Sinclair court also cited the A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft, 1971) § 1.2(a). Id.
91. Id. at 254, 363 A.2d at 475. An inquiry into possible bias by the prosecutor was vital, declared the court, because a prosecutor's decisions regarding whether and how to prosecute must be impartial and "untainted by any contaminating influence." Id. at 260, 363 A.2d at 478. Because the trial judge in Sinclair had not conducted an inquiry into whether the prosecutor's impartiality was tainted, the Court of Appeals remanded the case and overturned the conviction. Id.
92. Id. at 260, 363 A.2d at 478.
93. 288 Md. 71, 84, 415 A.2d 1113, 1121 (1980). In private practice, the prosecutor had represented the client in her marital separation proceeding. Id. at 73, 415 A.2d at 1115. The criminal case involved a charge of attempted murder against a man the woman had been involved with prior to her separation and who presumably was one of the motivations for separating from her husband. Id. The prosecutor said he had handled over a thousand such separation agreements and could not recall any mention of the man Lykins was accused of stabbing. Id. at 74, 415 A.2d at 1116.
of the prior representation, the trial judge’s decision to remove the prosecutor was not an abuse of discretion.\footnote{Id. at 85, 415 A.2d at 1121.} However, the \textit{Lykins} court drew the line at extending the appearance of impropriety doctrine to require dismissal of the entire indictment, holding that the trial judge’s decision to dismiss the indictment was an error because the charge had not been brought with improper motives as in \textit{Sinclair}.\footnote{Id. at 85, 415 A.2d at 1121.}

The Court of Appeals again acknowledged the appearance of impropriety doctrine in 1983 in \textit{Young v. State}, a case involving imputed disqualification due to a defense attorney joining the state’s attorney’s office while it was prosecuting one of the attorney’s former clients.\footnote{297 Md. 286, 286-87, 465 A.2d 1149, 1149-50 (1983).} The prosecution involved the same criminal charge the attorney had been defending, but after joining the prosecutor’s office, the attorney had not been involved in the actual prosecution of his former client.\footnote{Id. at 288, 465 A.2d at 1150 (quoting Young v. State, 52 Md. App. 550, 450 A.2d 1323 (1982)).} The court noted the “important public interest of confidence in the impartiality of the prosecution,”\footnote{Id. at 288, 465 A.2d at 1150.} but went on to find that the appearance of impropriety doctrine did not extend so far as to require disqualifying an entire state’s attorney’s office.\footnote{Id. at 288, 465 A.2d at 1150.} The \textit{Young} court held that the appropriate action was for the trial court to inquire into prejudice to the defendant from the potential disclosure of confidential information between the defendant’s former counsel and his current colleagues in the state’s attorney’s office.\footnote{Id. at 298, 465 A.2d at 1151, 1155.} If the trial judge did not find potential prejudice, it was not an abuse of discretion to allow the other prosecutors to continue prosecuting the case.\footnote{See id.}

In rejecting imputed disqualification for the entire state’s attorney’s office, the \textit{Young} court noted with approval that other jurisdictions encountering similar matters had looked to the fact that public prosecutors are different in nature than private attorneys.\footnote{Id. at 295, 465 A.2d at 1154.} While a private law firm was traditionally “conflicted out of” (i.e., barred from) taking on a client if an attorney with that firm had previously represented a party with an adverse interest,\footnote{MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105(d) (1969). This bright-line rule was softened somewhat for private attorneys with the switch from the Model Code to the Maryland Rules. Rule 1.10 (c) permits other members of a firm to represent a client ad-}
because prosecutors are deemed impartial seekers of justice rather than interested advocates, vicarious disqualification of the entire office is not automatically required.104

(2) Dissatisfaction with the Appearance of Impropriety Doctrine and the Switch to the Model Rules.—Even as the Model Code reached near universal adoption in the United States, thus extending the appearance of impropriety Canon to nearly every attorney, the doctrine was often criticized by attorneys and commentators as vague and ill-defined because it neither explained what qualified as impropriety nor specified how to gauge whether an attorney's conduct appeared proper and to whom.105 Others complained that it unduly limited clients' choice of representation even when no conflict existed and unnecessarily restricted attorney job mobility.106 Eventually, the ABA reached a similar conclusion,107 and when it replaced the Model Code with the Model Rules of Professional Conduct in 1983, the appearance of impropriety standard was expressly omitted.108 The Model Rules also replaced the Model Code's three-part system of Canons, Ethical Considerations, and Disciplinary Rules with one set of brightline rules followed by notes and comments explaining the ethical principles underlying the rules.109 Instead of focusing on avoiding

verse to a new member's former client if the new member is screened from any participation and does not receive part of the fee from such representation. See infra note 48 and accompanying text.

104. Young, 297 Md. at 295-96, 465 A.2d at 1154.
105. Clinard v. Blackwood, 46 S.W.3d 177, 186 (Tenn. 2001); Innovative Fin. Servs. v. Angel, No. CV040834591, 2005 Conn. Super. LEXIS 2397, at *7 (2005); see Dennis A. Estis, Let's Not Be Sacrilegious, But Let Us Say a Very Loud, Amen!, THE MIDDLESEX ADVOCATE (Middlesex Co. Bar Ass'n, Middlesex, N.J.), Feb. 2004, available at http://www.mcbalaw.com/Feb2004a.html (calling the appearance of impropriety doctrine an "ambiguous, impossible standard which caused so many lawyers over the years to scratch their heads and wonder, 'Is the action that I am about to take or have taken in violation of the appearance of impropriety rule?'"); see also Bruce A. Green, Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—Or Revived Everywhere Else?, 28 SETON HALL L. REV. 315, 354 (1997) (stating that the appearance of impropriety standard as applied to private practitioners is too vague); Leonard E. Gross, The Public Hates Lawyers: Why Should We Care?, 29 SETON HALL L. REV. 1405, 1405-06 (1999) (asserting that there is little correlation between public dislike for lawyers and actual unethical conduct).

107. See MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. (1983) (noting that the appearance of impropriety standard could be construed too broadly to cover any representation that might make an attorney's former client nervous and left unclear what amounted to "impropriety" or the appearance thereof).
108. Id.
the appearance of impropriety, the Model Rules focus on preserving client confidentiality and avoiding positions directly adverse to a former client.\textsuperscript{110}

While Maryland did not adopt the Model Rules verbatim, the Maryland Lawyers' Rules of Professional Conduct are very similar to the Model Rules and likewise do not contain any mention of the appearance of impropriety standard.\textsuperscript{111} Since 1983, the vast majority of other states have adopted similar attorneys' rules omitting the phrase "appearance of impropriety."\textsuperscript{112}

Despite the switch to the Model Rules, however, many courts, attorneys, and commentators continue to look to the appearance of impropriety standard and other Canons and Ethical Considerations from the Model Code as persuasive authority when examining conflict of interest issues.\textsuperscript{113} In 2004, for instance, the Supreme Court of West Virginia, a state that had statutorily dropped the Model Code and replaced it with the Model Rules, held that the appearance of impropriety was independently sufficient to disqualify an attorney, even absent the existence of confidential information that could prejudice a former client, and despite the fact that the Model Rules does not contain a prohibition on the appearance of impropriety.\textsuperscript{114}

The remaining relevance of the appearance of impropriety doctrine in Maryland, whether for prosecutors or private attorneys, is unclear, but Maryland case law prior to adoption of the Maryland Rules established several holdings with respect to prosecutorial conflicts that have yet to be expressly disclaimed or overruled.\textsuperscript{115} These include that an allegation of prosecutorial conflict due to personal interest

\textsuperscript{110.} MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. (1983).

\textsuperscript{111.} Md. Lawyers' Rules of Prof'l Conduct (1987).


\textsuperscript{114.} State ex rel. Cosenza v. Hill, 607 S.E.2d 811 (W. Va. 2004). The court reasoned that judges have long been given broad discretion to disqualify an attorney when continued representation "threatens the integrity of the legal profession" in the eyes of the public. \textit{Id.} at 817.

\textsuperscript{115.} See supra notes 84-104 and accompanying text.
does not require disqualification per se;\textsuperscript{116} that the trial court judge has the discretion to determine whether there is a conflict after conducting an inquiry into the circumstances;\textsuperscript{117} that even if the trial court concludes that there is a prosecutorial conflict due to prior representation of the defendant, that is insufficient to require per se dismissal of the criminal indictment unless the indictment was brought with improper motives by the prosecutor;\textsuperscript{118} and that a conflict with one prosecutor does not require disqualification of other state's attorneys in the same office absent an exchange of confidential information between prosecutors.\textsuperscript{119} The Court of Appeals has also held that it can be a conflict for a prosecutor to simultaneously represent a party adverse to the defendant in a private civil matter.\textsuperscript{120}

Only one published Maryland case has examined the issue of whether a prosecutor's representation of the defendant in a prior criminal matter constitutes a conflict. In \textit{Green v. State}, the prosecutor, after the jury verdict and during discussion on the appropriate bond pending sentence, told the trial judge he had represented the defendant two years earlier on a petty larceny charge.\textsuperscript{121} The defendant did not raise an objection, either then, at the motion for new trial, or at sentencing, leaving him to argue on appeal that the conviction should be overturned due to "plain error."\textsuperscript{122} The Court of Special Appeals rejected the argument that the conviction was plain error and commented in dicta that the "mere fact" that the prosecutor had once represented the defendant in a completely unrelated criminal case did not, standing alone, constitute a conflict requiring the prosecutor's disqualification.\textsuperscript{123} The \textit{Green} court did not explain its rationale, discuss the appearance of impropriety doctrine, or cite any Maryland authority for its conclusion, instead pointing solely to the fact that the two cases were unrelated and there was no existing attorney-client re-

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\item[117.] Id.
\item[118.] Lykins v. State, 288 Md. 71, 415 A.2d 1113 (1980).
\item[120.] Sinclair, 278 Md. at 256, 363 A.2d at 474.
\item[122.] Id. The plain error standard requires a more glaring and damaging mistake by the trial court in order to merit appellate reversal. See State v. Hutchinson, 287 Md. 198, 209-19, 411 A.2d 1035, 1041-47 (1980) (Smith, J., dissenting) (discussing application of the plain error standard); Black's Law Dictionary, supra note 21, at 583 (defining plain error as an error "so obvious and prejudicial that an appellate court should address it despite the parties' failure to raise a proper objection").
\item[123.] Green, 49 Md. App. at 5, 430 A.2d at 1124.
\end{enumerate}
\end{footnotesize}
relationship at the time of prosecution. Green was never appealed so the Court of Appeals did not address the issue.

c. The Unique Role of The Prosecutor.—The Maryland Rules, and the Model Rules have long recognized the unique role of a state prosecutor. All emphasize that prosecutors possess the discretionary power of the state to decide what prosecutions to bring or maintain, and are therefore different in form and function than private advocates.

Furthermore, there is a long tradition of both Maryland and federal courts recognizing the unique power and corresponding heightened responsibility of a public prosecutor. In Brack v. Wells, the Court of Appeals said a court could not order a prosecutor to prosecute a case and noted that it is the prosecutor's responsibility not just to advocate for a conviction, but to render discretionary judgments about guilt and innocence. In Murphy v. Yates, the court held that a statute creating a new Office of State Prosecutor violated the Maryland Constitution because it infringed on the right of state's attorneys to decide when and whether

124. Id.

[t]he prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .

126. Model Rules of Prof'l Conduct R. 3.8 (1983) (rules 3.8(a) and (d) are identical to the Maryland Rules).
127. Model Code of Prof'l Responsibility (1969) EC 7-13 states that
[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because:
(1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

129. 184 Md. 86, 90, 40 A.2d 319, 321 (1944).
130. Id.
to prosecute a case.\textsuperscript{131} Then, in \textit{State's Attorney of Baltimore City v. Baltimore}, the court held that the judiciary could not order prosecutors to prosecute all violations of the law; rather they had the discretion to decide for themselves which violations to pursue.\textsuperscript{132} Based on this "awesome" discretionary power,\textsuperscript{133} the Court of Appeals in \textit{Sinclair} found an accompanying responsibility on the part of prosecutors to act impartially in deciding whether to pursue a criminal charge.\textsuperscript{134} The court cited with approval a Louisiana Supreme Court decision that referred to a prosecutor as a "quasi judicial officer" with an obligation to conduct a criminal case in a fair and impartial manner.\textsuperscript{135}

The Maryland view is consistent with federal rulings dating as far back as the \textit{Confiscation Cases} of 1869, when the U.S. Supreme Court established that a prosecutor had the discretionary power to enter a \textit{nolle prosequi} as he or she saw fit.\textsuperscript{136} The premise that with a prosecutor's great power comes a special ethical responsibility was perhaps most clearly articulated in \textit{Young v. United States ex rel. Vuitton et Fils S.A.}, in which the Court reversed a criminal contempt conviction because it had been prosecuted by a private prosecutor who was also representing an adverse party to the defendant in a related civil action.\textsuperscript{137} The Court called the use of a prosecutor with a private professional interest a fundamental error which violated the premise of the American legal system that the state "wield its formidable criminal enforcement powers in a rigorously disinterested fashion ...."\textsuperscript{138} The Court noted that while a prosecutor may be held to a somewhat less stringent standard of neutrality than a judge, the appointment of an "interested" prosecutor creates an appearance of impropriety that impacts the public's faith in the fairness and impartial nature of the courts.\textsuperscript{139} The Court went on to declare a categorical rule against appointing interested private prosecutors to preserve public confidence in the integrity of the justice system.\textsuperscript{140}

\textsuperscript{131} 276 Md. 475, 490, 348 A.2d 837, 845 (1975).
\textsuperscript{132} 274 Md. 597, 606, 337 A.2d 92, 98 (1975).
\textsuperscript{133} \textit{Murphy}, 276 Md. at 495, 348 A.2d at 837.
\textsuperscript{134} 278 Md. 243, 254, 363 A.2d 468, 475 (1976).
\textsuperscript{135} \textit{Id.} at 256, 363 A.2d at 476 (citing State v. Tate, 171 So. 108, 112 (La. 1936)).
\textsuperscript{136} 74 U.S. (7 Wall.) 454, 457 (1869).
\textsuperscript{137} 481 U.S. 787 (1987). The case involved infringement of the respondent's trademark and was prosecuted by the private attorney for the respondent, Louis Vuitton. \textit{Id.} at 789.
\textsuperscript{138} \textit{Id.} at 810.
\textsuperscript{139} \textit{Id.} at 811.
\textsuperscript{140} \textit{Id.}
3. The Court's Reasoning.—In *Gatewood v. State*, the Maryland Court of Appeals, in a 5-2 decision, upheld the defendant's conviction at trial even though the prosecuting attorney had previously represented the defendant in two criminal cases.\(^{141}\) Writing for the majority, Judge Harrell concluded that per se disqualification is not required every time a defendant alleges that a prosecutor may have a conflict of interest due to prior representation and that the mere "appearance of impropriety" is not the conclusive factor.\(^{142}\) Instead, the court held that disqualification is only required when the prior and current cases are the same or substantially related or when confidential information was divulged that is relevant to the current prosecution and "materially adverse" to the defendant.\(^{143}\) The court stated that this determination is left to the discretion of the trial judge, whose judgment is then reviewable under an abuse of discretion standard.\(^{144}\) The court then held that the trial judge in *Gatewood* had not abused his discretion in allowing the prosecutor to continue despite previously representing the defendant in an unrelated matter.\(^{145}\)

The court reached its conclusion by first citing *Sinclair* and *Lykins* for the proposition that automatic disqualification is not required when a prosecutor is alleged to have a conflict due to a personal interest or prior representation.\(^{146}\) Rather, the court noted that under *Sinclair* and *Lykins*, the proper response is for the trial court to exercise its discretion after an appropriate inquiry into the facts of the situation.\(^{147}\) The court then stated that under *Young*, abuse of discretion is the appropriate standard of review for a trial court's decision regarding disqualification of a prosecutor due to a conflict.\(^{148}\) The court noted that a trial court's exercise of discretion will not normally be questioned or overturned by an appellate court unless patently unreasonable.\(^{149}\)

Having established this threshold for overturning a trial court's exercise of discretion, the court held that the trial court decision in *Gatewood* did not stray far enough from the realm of acceptability to

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141. *Gatewood*, 388 Md. at 532, 880 A.2d at 325.
142. *Id.* at 546, 880 A.2d at 334. Judges Cathell, Greene, Raker, and Wilner joined the majority opinion. *Id.* at 554, 880 A.2d at 399.
143. *Id.* at 547, 880 A.2d 334.
144. *Id.*
145. *Id.* at 551, 880 A.2d at 337.
147. *Id.* at 538-39, 880 A.2d at 330.
148. *Id.* at 540, 880 A.2d at 330 (citing *Young v. State*, 297 Md. 286, 465 A.2d 1149 (1983)).
149. *Id.*
require reversal. The court reached this conclusion upon finding that Maryland conflict-of-interest jurisprudence requires disqualifying a prosecutor in two situations: (1) where the attorney had previously represented the client in the same case he or she was now prosecuting and (2) where the case before it was substantially related to the prior case or cases.

The court acknowledged that the appearance of impropriety is an important consideration a court may take into account when determining whether a conflict exists, but stated that Sinclair and Lykins had established that there was not a per se disqualification rule for prosecutors based on the mere appearance of impropriety. The court further pointed to Young, where the court had declined to disqualify an entire state's attorney's office due to an alleged conflict with one prosecutor, as an additional reflection of its "reluctance" to require disqualification solely due to an appearance of impropriety.

The court also cited Maryland Rules 1.7 and 1.9 as providing support for the principle that disqualification is required only in instances involving the same or substantially related matters. The concern when a prosecutor previously represented a criminal defendant, explained the court, is that he or she may become privy to confidential information that could jeopardize the client's defense when that attorney switches sides. Because this would be "directly adverse" to a prior client under Maryland Rule 1.7, possessing confidential information that could prove detrimental to a prior client amounts to a conflict requiring disqualification.

The court noted that Maryland Rule 1.9 states that an attorney shall not represent one client in the same or a substantially related matter in which that person's interests are adverse to the interests of a former client unless the former client consents. The court further noted that the Comment to Maryland Rule 1.9 states that subsequent representation of a position adverse to a former client may be permissible. As applied to a prosecutor, this means, according to the

150. Id. at 551, 880 A.2d at 337.
151. Id. at 540-45, 592, 880 A.2d at 331-33. The court also briefly noted the opinion of the Court of Special Appeals in Green that an unrelated prior representation does not create a prosecutorial conflict, but explained that the language was mere dicta. Id. at 543 n.11, 880 A.2d at 332 n.11.
152. Id. at 546, 880 A.2d at 334.
153. Id.
154. Id. at 541, 453, 880 A.2d at 331-32.
155. Id. at 541, 880 A.2d at 331.
156. Id.
157. Id. at 543, A.2d at 332.
158. Id.
court, that if an attorney who once represented a client later prosecutes that client for the state, the prosecuting attorney has a conflict if the two matters are the same or are "substantially related." The court therefore concluded that the trial judge must inquire into and decide whether the cases are substantially related. The court further explained that the term "substantially related" does not require the exact same facts, case, or victim, but rather a situation where confidential information would have been disclosed that could affect the pending case. A mere similarity in the types of offenses, however, would not be sufficient to create a substantial relationship.

Turning to the facts before it, the court noted that the case did not involve an attorney prosecuting a former client in the same matter he had formerly defended and that the trial judge had conducted an inquiry as to whether the current case had a substantial relationship to the prosecutor's prior representation, concluding in the negative. Because the trial judge conducted a proper inquiry in which he weighed the information, and the judge's decision was not outside the realm of acceptability, the Court of Appeals held that the trial court had not abused its discretion in rejecting the motion to disqualify.

Judge Battaglia, joined by Chief Judge Bell, dissented, stating that the trial court decision should have been reviewed de novo and reversed because disqualification is automatic under the circumstances. The more deferential abuse-of-discretion standard, wrote Judge Battaglia, should apply to their review of any penalty imposed by a trial judge after finding a conflict of interest, not to the trial judge's determination of whether a conflict existed.

Judge Battaglia contended that prior Court of Appeals decisions had established that when a state's attorney is alleged to have a conflict of interest resulting from prior representation of a defendant, the appearance of a conflict alone is sufficient to warrant disqualification, and the only remaining issues are whether the criminal indictment should be dismissed or the entire prosecutor's office disqualified as

159. Id. at 544, 880 A.2d at 332-33.
160. Id.
161. Id.
162. Id. at 548-49, 880 A.2d at 335-36. As support, the court cited the Arizona case In re Ockrassa (which was actually raised by Gatewood), noting that the Arizona Supreme Court stated that a prior DUI was not "substantially related" to a current DUI unless the previous crime was an element of the subsequent offense as part of a repeat offender charge. Id. (citing In re Ockrassa, 799 P.2d 1350, 1352 (Ariz. 1990)).
163. Id. at 547, 880 A.2d at 334-35.
164. Id. at 551, 880 A.2d at 337.
165. Id. at 555, 880 A.2d at 339 (Battaglia, J., dissenting).
166. Id.
well. Therefore, Judge Battaglia maintained that because the defense showed that Eastridge represented Gatewood on two occasions, and Eastridge acknowledged that he remembered him, a conflict of interest existed that merited disqualification. Judge Battaglia explained that she would have reversed the conviction and remanded the case for a new trial with a different prosecutor.

4. Analysis.—The court’s decision in Gatewood was consistent with the Maryland Rules and case law governing treatment of attorneys in conflict of interest cases. The Court of Appeals in Gatewood correctly interpreted the Maryland Rules and case authority as establishing that when evaluating whether an attorney has a conflict due to prior representation of an adverse party, the relevant consideration is ordinarily the disclosure of confidential information, and thus the inquiry is whether the two matters are the same or substantially related. The court also properly concluded that the appearance of impropriety standard alone is insufficient to disqualify a private attorney. However, the court erred by treating public prosecutors in the same manner as private attorneys. The court neglected to account for persuasive case authority and longstanding ethical principles that emphasize the unique role and responsibilities of a public prosecutor and the importance of maintaining the public’s faith in the legal system. The court also misinterpreted its precedent as establishing that the appearance of impropriety is insufficient to disqualify a prosecutor when in fact, prior case law had merely resolved narrow issues with respect to the appearance of impropriety doctrine and had not conclusively addressed its status in Maryland. The court thus missed an opportunity to settle what force, if any, the appearance of impropriety doctrine has in Maryland.

Had the court duly considered the unique role of the public prosecutor in conjunction with the rationale behind the appearance of impropriety doctrine, it would have recognized that the doctrine

167. Id., 880 A.2d at 339-40.
168. Id. at 559, 880 A.2d at 341.
169. Id. at 560, 880 A.2d at 342.
170. See infra Part 4.a.
171. See infra Part 4.a.
172. See infra notes 188-191 and accompanying text.
173. See infra notes 216-236 and accompanying text.
174. See Gatewood, 388 Md. at 542, 880 A.2d at 359 (Battaglia, J., dissenting) (arguing that prior case law had not established that the appearance of impropriety is insufficient to disqualify a prosecutor).
175. See infra notes 195-215 and accompanying text.
should be preserved as a necessary check on prosecutorial power.\textsuperscript{176} The court should not have settled for one inquiry by the trial court merely examining whether a prosecutor's prior representation disclosed confidential information that could functionally prejudice the defendant. Instead, the court should have required a second inquiry into the prosecutor's impartiality and whether the appearance of impartiality was compromised in a manner that undermines the goal of preserving public trust in the legal system.

\textit{a. The Court Correctly Interpreted the Maryland Lawyers' Rules of Professional Conduct and Prior Case Law Regarding Private Attorneys.---}The court in \textit{Gatewood} properly noted that Maryland Rules 1.6-1.10\textsuperscript{177} and case law\textsuperscript{178} establish that if a private attorney previously represented a party adverse to the defendant, per se disqualification is not required, and the attorney need only be disqualified if the two matters are the same or substantially related.\textsuperscript{179} In \textit{Buckley}, the federal court had required a sufficient similarity of the litigation issues for the cases to qualify as substantially related, focusing on whether confidences might have been disclosed during the prior representation.\textsuperscript{180} Applying that approach to \textit{Gatewood}, the Court of Appeals correctly determined that because the current drug possession charge was dissimilar to the previous burglary charge, it could not be viewed as substantially related.\textsuperscript{181} And while the previous drug distribution charge does share facial similarities with drug possession in terms of the type of crime, the cases lacked any relationship that might suggest that confidential information from the first case could impact the second one. The \textit{Gatewood} court's interpretation and application of the substantially related doctrine is also consistent with other states' treatment of private attorney conflict-of-interest cases.\textsuperscript{182}

Moreover, the policy rationale for using the substantially-related rule when considering private attorney conflicts makes sense when the competing considerations are weighed and evaluated.\textsuperscript{183} First, a client

\begin{itemize}
\item \textsuperscript{176} See infra notes 242-244 and accompanying text.
\item \textsuperscript{177} MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.6, 1.7, 1.9, and 1.10 (2006).
\item \textsuperscript{179} \textit{Gatewood}, 388 Md. at 544, 880 A.2d at 332.
\item \textsuperscript{180} Buckley, 908 F. Supp. at 304-06.
\item \textsuperscript{181} \textit{Gatewood}, 388 Md. at 547-48, 880 A.2d at 334-35.
\item \textsuperscript{183} MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.9 cmt. (2006).
\end{itemize}
must feel free to discuss confidential matters with his or her attorney.\textsuperscript{184} If a client fears that an attorney may switch sides and use confidential information to the client's detriment, that fear will lead to a reticence on the client's part that will both hamper the attorney's ability to adequately represent the client and impair the eventual realization of just and fair results.\textsuperscript{185}

In situations such as \textit{Gatewood}, where an attorney has the potential to use confidential information gleaned from prior representation of the defendant, clients would be far less likely to be forthcoming with their attorneys, fearing their attorneys might someday switch sides. Furthermore, clients might be reluctant to take the stand, fearing they could be impeached with their own divulged confidential communication.\textsuperscript{186} An unfortunate consequence might be that some attorneys would be deliberately kept in the dark by their clients.\textsuperscript{187}

At the same time, it is not in the interest of the legal system to unduly limit the freedom of attorneys and prevent them from filling different positions in different organizations.\textsuperscript{188} Overbearing restrictions on the mobility of attorneys to switch firms or positions could stunt professional development of attorneys; diminish their experience, knowledge, and abilities; and lead to more attorneys exiting the field.\textsuperscript{189}

These competing interests require a happy medium, which the "same or substantially related" test fosters by focusing the inquiry on actual potential prejudicial impact to an involved party when the opposing counsel has previously been the party's counsel.\textsuperscript{190} This approach also gives clear notice to attorneys about how to behave, and is more straightforward to apply than the "appearance of impropriety" model, with its imprecise standard and questions pertaining to what qualifies as "impropriety" and to whom.\textsuperscript{191} The same-or-substantially-related rule is thus properly applied to private attorneys and prior representation.

\textsuperscript{184} \textit{Id.} R. 1.6 cmt.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Lykins v. State}, 288 Md. 71, 73, 415 A.2d 1113, 1115 (1980).
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Md. Lawyers' Rules of Prof'l Conduct} R. 1.9 cmt. 4 (2006).
\textsuperscript{189} \textit{Md. Lawyers' Rules of Prof'l Conduct} R. 1.11 cmt. 4 (2006); \textit{see Innovative Fin. Servs. v. Angel}, No. CV040834591, 2005 Conn. Super. LEXIS 2397, at *6 (2005) (recognizing that it is common for attorneys to change firms and stating that disqualification rules should not unreasonably bar lawyers from taking on new clients).
\textsuperscript{190} \textit{See Md. Lawyers' Rules of Prof'l Conduct} R. 1.11 cmt. (2006) (discussing the reasons for limiting conflicts involving prior representation to matters substantially related to the matter sub judice).
\textsuperscript{191} \textit{See supra} notes 105-110 and accompanying text.
b. The Court Failed to Recognize That Prosecutors Demand More Scrutiny Than Private Attorneys.—While the Gatewood court correctly recognized that the substantially-related doctrine is appropriate for the majority of private attorney conflict-of-interest cases, \textsuperscript{192} the court misinterpreted its precedent as establishing the same-or-substantially-related rule as the sole test for prosecutorial conflicts. \textsuperscript{193} The court neglected to recognize that public prosecutors are vested with the sovereign’s power to restrict individual liberty; they have tremendous discretionary authority to exercise that power and thus have a greater responsibility than private attorneys to act and appear free of conflicts of interest. \textsuperscript{194}

\hspace{1cm}(1) The Court Misinterpreted Its Precedent as Holding That the Appearance of Impropriety Is Insufficient to Disqualify a Prosecutor.—As Judge Battaglia noted in her dissent, the majority in Gatewood incorrectly cited its precedent as holding that the mere appearance of impropriety alone is insufficient to merit disqualification of a prosecutor. \textsuperscript{195} Neither Lykins, Young, nor Sinclair establishes that principle. To the contrary, those cases indicate that the appearance of impropriety can be sufficient grounds for disqualification.

Instead of establishing that the appearance of impropriety due to prior representation is not grounds for disqualifying a prosecutor, Lykins merely established that the appearance of impropriety did not require dismissing an entire indictment. \textsuperscript{196} The Court of Appeals in Lykins specifically upheld the trial court’s decision to disqualify the prosecutor despite the lack of a crystal clear relationship between the current and prior representation, commenting that it was not an abuse of discretion by the trial judge to remove the prosecutor, even though the judge’s primary ground for removal was the appearance of impropriety. \textsuperscript{197} The court said that while the trial judge was not required to disqualify the prosecutor because of the appearance of impropriety, he had not abused his discretion by doing so. \textsuperscript{198} In Gatewood, the Court of Appeals reiterated its support for the decision by the trial judge in Lykins, commenting again that the trial court properly exercised its discretion to disqualify the prosecutor after finding a conflict

\begin{itemize}
  \item \textsuperscript{193} See Gatewood, 388 Md. at 554-60, 880 A.2d at 339-42 (Battaglia, J., dissenting).
  \item \textsuperscript{194} See supra Part 2.c.
  \item \textsuperscript{195} Gatewood, 388 Md. at 556-59, 880 A.2d at 340-42 (Battaglia, J. dissenting).
  \item \textsuperscript{196} 288 Md. 71, 85, 415 A.2d 1113, 1121 (1980).
  \item \textsuperscript{197} Id. at 84, 415 A.2d at 1121.
  \item \textsuperscript{198} Id. at 85, 415 A.2d at 1121.
\end{itemize}
due to prior representation. The two cases in *Lykins*, however, were only remotely related, and the trial judge made his decision without finding actual impropriety. Thus, in stating its approval of the disqualification in *Lykins*, the *Gatewood* court endorsed a prosecutorial disqualification that was based not on actual conflict but on the appearance of a conflict.

It is also worth noting a similarity between *Lykins* and *Gatewood* in that the prosecutor in both cases claimed he had represented a great many clients before joining the state’s attorney’s office and had no specific memory of confidential information that could be used against the defendant. This asserted inability to recall confidential information did not dissuade the judge in *Lykins* from disqualifying the prosecutor due to the appearance of impropriety, and there is little reason the *Gatewood* court should find such an assertion persuasive either.

The Court of Appeals’s reference to *Young* as reflecting its “reluctance” to require disqualification merely for an appearance of impropriety is also misplaced. *Young* provides little support for the argument that a prosecutor should not be disqualified solely due to an appearance of impropriety. The *Young* decision concerned whether an appearance of impropriety due to prior representation was sufficient to merit imputed disqualification of an entire state’s attorney’s office. *Young* said nothing about whether the appearance of impropriety was sufficient to disqualify the actual conflicted attorney. Clearly the burden of proof should be higher to require vicarious disqualification of an entire state’s attorney’s office because otherwise such offices would face the choice of either never hiring former defense attorneys or being conflicted out all the time. But this does not alter the analysis for a case involving a single state’s attorney who previously represented the defendant he or she is now prosecuting.

Despite assertions from the majority, *Sinclair* did not establish that disqualification is not required per se for prosecutors based on the mere appearance of impropriety. While the Court of Appeals in *Sinclair* remanded the case to the lower courts for a hearing (instead

199. *Gatewood*, 388 Md. at 546, 880 A.2d at 334.
200. *Lykins*, 288 Md. at 84, 415 A.2d at 1121.
201. Id. at 74, 415 A.2d at 1116; *Gatewood*, 388 Md. at 880 A.2d at 327.
202. 288 Md. at 84, 415 A.2d at 1121.
204. Id.
205. See id. at 295, 465 A.2d at 1154 (noting that if government lawyers were subjected to the same imputation restrictions as private attorneys, the government’s ability to function would be impaired).
of applying a per se disqualification rule), the hearing was meant to determine whether the conviction should be overturned, not whether the prosecutor should be disqualified.\footnote{206} The \textit{Sinclair} court clarified that the prosecutor should be replaced if there was an appearance of impropriety, stating that if a trial court found that it would appear to a reasonable person that a prosecutor had a personal interest that might impair his ability to act impartially toward the defendant, the prosecutor should be disqualified on the basis of public policy.\footnote{207} When \textit{Sinclair} was remanded, a special prosecutor was appointed to represent the state, and an evidentiary hearing was held not about disqualification, but regarding whether the conviction should be thrown out.\footnote{208}

Furthermore, the \textit{Gatewood} court correctly concluded that the Court of Special Appeals'\'s comment in \textit{Green} is simply dicta and thus provides no support for the argument that a prosecutor's former representation in an unrelated case cannot be grounds for disqualification.\footnote{209} The "plain error" standard of review created as a result of \textit{Green}’s attorney’s failure to properly preserve the issue altered the \textit{Green} court’s evaluation significantly and makes the \textit{Green} opinion almost irrelevant.\footnote{210}

Thus, prior to \textit{Gatewood}, the Court of Appeals had never clearly resolved the question of whether the appearance of impropriety should disqualify a prosecutor or a private attorney.\footnote{211} For prosecutors in particular, Maryland case law did not establish that the appearance of impropriety can never be grounds for disqualification and, if anything, suggests that it can.

These cases, however, were all decided under the Model Code standard\footnote{212} before the switch to the Maryland Rules, which lack the "appearance of impropriety" standard.\footnote{213} The extent to which the enactment of the Maryland Rules has diminished the authority of pre-enactment case law involving attorney conflicts of interest is unclear.

\footnote{206. 278 Md. 243, 260, 363 A.2d 468, 478 (1976).}
\footnote{207. \textit{Id.} at 254, 363 A.2d at 475.}
\footnote{208. \textit{Lykins v. State}, 288 Md. 71, 81 n.4, 415 A.2d 1113, 1119 n.4 (1980). No final decision was made on overturning the conviction because Sinclair chose to plead \textit{nolo contendere} to the charge before the hearing was concluded. \textit{Id.}}
\footnote{209. \textit{Gatewood}, 388 Md. at 543, 880 A.2d at 332.}
\footnote{210. 49 Md. App. 1, 5, 430 A.2d 1122, 1124 (1981).}
\footnote{211. Although the Court of Appeals did indicate in \textit{Peat, Marwick, Mitchell \& Co. v. Los Angeles Rams Football Co.} that even under the Model Code, in Maryland, the appearance of impropriety standard did not always \textit{require} disqualification of private attorneys. 284 Md. 86, 95-96, 394 A.2d 801, 806-07 (1978).}
\footnote{212. \textit{See supra} notes 70-71 and accompanying text.}
\footnote{213. \textit{See supra} notes 45-51 and accompanying text.}
While the appearance of impropriety doctrine is no longer expressly included in the Maryland attorney ethics rules, it is a longstanding principle with continuing influence in other jurisdictions, as demonstrated by West Virginia’s and other states’ reliance and invocation of the Model Code despite adoption of the newer Model Rules. The *Gatewood* court thus missed an opportunity to clarify whether the doctrine has continuing relevance in Maryland, either for private attorneys or for prosecutors. The result is that both prosecutors and private attorneys in Maryland will practice with a strong suspicion that the doctrine is no longer pertinent to their actions, but without the certainty that it will never be invoked in a particular situation.

(2) *The Court Failed to Account for the Unique Role of the Public Prosecutor.*—In neglecting to fully consider and evaluate the appearance of impropriety standard, the court also failed to recognize that a public prosecutor must be far more impartial and disinterested than a private attorney. As detailed in the Maryland Rules, Model Rules, and Model Code, and in case law such as *Brack v. Wells*, *Sinclair*, and *Young v. United States ex rel. Vuitton et Fils S.A.*, prosecutors have tremendous power and broad discretion when deciding whether to bring charges or pursue a prosecution. Thus, anything affecting a prosecutor’s impartiality can have a significant impact on a defendant’s right to a fair trial and on public confidence in the fairness of the trial.


217. See supra note 125 and accompanying text.

218. See supra note 126 and accompanying text.

219. See supra note 127 and accompanying text.

220. 184 Md. 86, 40 A.2d 319 (1944).


222. 481 U.S. 787 (1987); see Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868) (establishing that prosecutors have broad discretionary power).

223. *Sinclair*, 278 Md. at 252, 363 A.2d at 474.
In *Gatewood*, state's attorney Eastridge was not the prosecutor who initially brought the criminal charges, so it was not a situation analogous to *Sinclair* in that the indictment itself might have been tainted. Even so, Eastridge's prior representation of Gatewood could have influenced the prosecutor's opinion of Gatewood's character and thereby affected everything from Eastridge's decision to continue to pursue charges and/or accept a plea bargain to gauging Gatewood's potential credibility as a witness and the gravity of his offense. Additionally, as Gatewood himself argued, the prosecutor's prior representation may have influenced Eastridge's recommendation of sentence—a recommendation that the judge described as on the "high" side. The Court of Appeals rejected this argument because Eastridge had not requested the absolute maximum allowed under law, but the court failed to recognize that requesting less than the maximum does not mean that a more disinterested prosecutor would have requested the same high sentence. Even if Eastridge did not consciously consider his prior representation of Gatewood, the immense discretionary power of a state's attorney, combined with the fact that Gatewood's liberty was at stake, can make every influence on the prosecutor's sentencing recommendation significant.

Although private attorneys have to make many similar strategic trial decisions, such as whether to settle and how to approach a cross examination, they lack a prosecutor's unique power and discretionary authority that makes any misuse or improper influence so troublesome. This difference explains why in numerous situations, the Maryland Rules, the ABA, and the courts have emphatically declared that prosecutors are not ordinary advocates and instead fall somewhere between judges and private attorneys in terms of expected impartiality. The Court of Appeals in *Young* relied on this difference to preclude disqualification of an entire State's Attorney's Office

224. *Gatewood*, 388 Md. at 532 n.4, 880 A.2d at 325 n.4.
225. See supra note 84 and accompanying text.
226. *Gatewood*, 388 Md. at 552, 880 A.2d at 337.
227. *Id.*
228. *Id.* The judge attributed the high sentencing recommendation to Gatewood's prior record, but a prosecutor's broad discretion with respect to sentencing makes it impossible to know what factors influenced Eastridge's recommendation. *Id.*
229. MD. LAWYERS' RULES OF PROF'L CONDUCT R. 3.8 cmt. (2006) (referring to a prosecutor as a "minister of justice").
230. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1969) (stating that "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict").
231. See supra Part 2.c.
when one prosecutor was conflicted. The unique character of the prosecutor has also been cited as one of the justifications for exempting prosecutors from the general imputation rule that disqualifies other attorneys in the same firm if one has a conflict. It is at best problematic for a court to recognize the unique role of the prosecutor to justify not disqualifying a prosecutor, but then ignore the unique role when it might be a reason for disqualification.

The Gatewood court failed to follow Maryland's longstanding recognition of the prosecutor's unique quasi-judicial role and discretionary power, as well as the U.S. Supreme Court's recognition of it. In solely examining whether Eastridge's prior representation involved a same or substantially related matter to the case before it, the court in Gatewood incorrectly treated a prosecutorial conflict as though it were equivalent to that involving a private practitioner.

The Gatewood court's approach also failed to adequately consider the importance of maintaining the public's confidence in an impartial judicial system. As the district court noted in Buckley, while disqualification is a harsh result, the inconvenience of replacing an attorney is secondary to the court's obligation to maintain high ethical standards and "insure and preserve trust in the integrity of the bar."

From the facts of Gatewood, it is not clear how much of an inconvenience disqualification would truly have caused because the Cecil County State's Attorney's Office had seven other prosecutors. On the other hand, the seven apart from Eastridge were part-time attorneys, and as the only full-time elected prosecutor, Eastridge would be expected to shoulder the majority of the caseload. One could argue that if a medium-sized Maryland county with more than 95,000

233. Id.; MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.11 cmt. 2 (2006); see Clinard v. Blackwood, No. 01A01-9801-CV-00029, 1999 Tenn. App. LEXIS 729, at *54 (1999), aff'd, 46 S.W.3d 177 (Tenn. 2001) (noting that exceptions are sometimes available when either the former client consents or when a strict screening method is put in place).
236. See 388 Md. at 546, 880 A.2d at 334 (failing to recognize a difference between prosecutors and private attorneys with respect to conflicts of interest).
237. See Sinclair, 278 Md. at 252, 363 A.2d at 473-74.
240. Id.
people has only one full-time prosecutor, then imposing a stricter disqualification rule could entail a severe burden for smaller counties that may have even fewer prosecutors. Integrity, however, should outweigh inconvenience as a general matter.

Critics of the appearance of impropriety doctrine have noted that it is vague and difficult to apply with any consistency. Such criticism, however, is far less applicable to public prosecutors than to private attorneys. Questions about to whom conduct need appear proper are easily answered for prosecutors: the public. Questions about what is improper are also answerable: something that would likely create injustice. It is worth noting that the appearance of impropriety doctrine was initially created partly because of the importance of maintaining public trust in prosecutors and only later was the doctrine fully extended to private practitioners. While challenges and complexities in the doctrine's application may justify dropping the appearance of impropriety standard for private attorneys, there is still a valid foundation for maintaining the appearance of impropriety standard for state's attorneys, just as it remains in effect for judges in Maryland and nationwide.

c. One Solution Is to Require a Second Judicial Inquiry at the Trial Level.—The Gatewood court could have accounted for the higher standards for prosecutors if it had required a second test whenever prosecutors are alleged to have a conflict of interest. In addition to the currently required inquiry into actual or potential prejudice to the defendant from disclosure of confidential information, a second inquiry could ask: (1) whether anything in the prior representation may have affected the impartiality of the prosecutor even if little or no harmful confidential information had been disclosed and (2) whether allowing the prosecutor to remain despite the prior representation would appear improper to the public.

241. See supra note 12 and accompanying text.
242. See supra notes 105-110 and accompanying text.
243. See Green, supra note 105, at 315-18 (discussing the origin of the appearance of impropriety doctrine).
244. See Md. Code of Judicial Conduct Canon 2 (2005): “Avoidance of Impropriety and the Appearance of Impropriety—A judge . . . should avoid even the appearance of impropriety. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” See also Model Code of Judicial Conduct, Canon 2, A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities (2004); Jefferson-El v. State, 330 Md. 99, 107, 622 A.2d 737, 741 (1993) (commenting that the appearance of impropriety is a concern because the process must not only be fair, but also must appear to the public to be fair).
In *Gatewood*, for instance, the court could have required an inquiry into whether Eastridge harbored any animosity or critical opinion towards Gatewood that was formed during the prior representation. If so, the court could conclude that it might make it more difficult for him to possess the high degree of impartiality required of a public prosecutor and disqualify Eastridge even though he claimed not to possess confidential information he could use to the defendant's detriment. Even if no animus were found on Eastridge's part, if the court determined that the continued prosecution might raise red flags with the public, it could also require a different prosecutor to handle the case. Finally, even if the court concluded that neither situation required disqualification, the double inquiry would at the very least have provided more reassurance to the public that legitimate questions of judicial fairness had been thoroughly investigated and resolved.

5. Conclusion.—In *Gatewood v. Maryland*, the Court of Appeals of Maryland held that a prosecutor's prior representation of the defendant did not require disqualification, and the mere appearance of impropriety was insufficient to require removal absent evidence that the defendant had or could be unfairly prejudiced. The court stated that if the current and prior representation were on related matters, and the trial court held an inquiry into potential prejudice, then the decision regarding disqualification was soundly within the discretion of the trial judge. The Court's decision was consistent with the Maryland Rules and with prior treatment of private attorney conflict of interest issues, but did not sufficiently consider the different role and responsibilities of a public prosecutor. Because a prosecutor is invested with unique discretionary power to try, maintain, and discard a prosecution, the prosecutor must maintain a higher degree of impartiality than a private advocate. A more stringent level of scrutiny is therefore appropriate, both by the courts and the public. Accordingly, a prosecutor should avoid not just actual conflict, but also

245. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (holding that a prosecutor representing a party adverse to the defendant in a civil action was by nature too “interested” to act as an advocate for impartial justice in a criminal case); *Sinclair v. State*, 278 Md. 243, 252; 363 A.2d 468, 474 (1976) (same).

246. *Gatewood*, 388 Md. at 547, 880 A.2d at 334.

247. *Id.*

248. See supra Part 2.a.

249. See supra Part 4.b(2).


251. *Id.*; see *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (holding that a prosecutor must be more disinterested than a private attorney).
the appearance of conflict. Therefore, a trial court should be required to go beyond a mere inquiry into disclosure of confidential information and whether the two cases are substantially related.\textsuperscript{252} The trial court should also be required to examine the impartiality of the prosecutor, both to ensure he or she is sufficiently disinterested and to ensure that the public does not believe otherwise.\textsuperscript{253}

\textbf{Paul B. Spelman}
VIII. Statutory Interpretation

A. Interpretive Shift Weakens the Rule of Liberal Construction Applied to Ambiguities in Workers’ Compensation Legislation

In *Johnson v. Baltimore,* the Court of Appeals decided whether the combined-benefits provision of section 9-503 of the Labor and Employment Article applied to surviving dependents of deceased firefighters who qualified for such benefits while living. The court held that the statute unambiguously neglected to extend combined benefits to those surviving dependents.

In so deciding, the Court of Appeals failed to apply the rule of liberal construction to its interpretation of section 9-503. The Court of Appeals inappropriately weakened the rule of liberal construction by not applying it to the ambiguous Workers' Compensation Act provision at issue in *Johnson.* This departure from precedent will have deleterious effects on lower courts’ ability to consistently apply the rule of liberal construction and will reduce the ameliorative benefits of workers’ compensation legislation. The Court of Appeals should clarify its interpretation of the legislative purpose of the Act and explicitly state the degree of statutory ambiguity required for lower courts to use the rule of liberal construction.

1. The Case.—Ernest Johnson (Mr. Johnson), a Baltimore City firefighter, contracted colon cancer. Mr. Johnson’s cancer was

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3. The court only addressed the issue of whether the surviving dependents of deceased firefighters who qualified for a statutory presumption of compensability for occupational disease under section 9-503(c)(1) were eligible to receive combined benefits under section 9-503(e). *Johnson,* 387 Md. at 3, 874 A.2d at 441.
4. Id. at 22, 874 A.2d at 452.
5. The rule of liberal construction is a canon of statutory interpretation that the Court of Appeals applies to workers’ compensation legislation, resolving any statutory uncertainty in favor of the claimant. Lovellette v. Baltimore, 297 Md. 271, 282, 465 A.2d 1141, 1147 (1983).
6. See *Johnson,* 387 Md. at 30, 874 A.2d at 456-57 (Battaglia, J., dissenting) (stating that a liberal construction of section 9-503 requires finding in favor of the claimants).
8. See infra Part 4.a.
10. See infra Part 4.c.
11. *Johnson,* 387 Md. at 3, 874 A.2d at 441. Though not specifically listed in the statute, the parties agree that Mr. Johnson’s colon cancer qualifies as a compensable occupational
caused by repeated exposure to carcinogens that he encountered as a firefighter.12 While working as a firefighter, Mr. Johnson’s average weekly wage was $989.75.13 Mr. Johnson died from colon cancer on March 11, 1994, and his wife (Mrs. Johnson) was wholly financially dependent on him at the time of his death.14 After Mr. Johnson’s death, Mrs. Johnson received $603.90 per week from her husband’s Baltimore City pension plan.15

Daniel Luster (Mr. Luster) contracted pancreatic cancer16 while employed as a Baltimore City firefighter, also due to his employment as a firefighter.17 Mr. Luster’s average weekly wage was $821.52.18 He died from pancreatic cancer on August 8, 2000, and his wife (Mrs. Luster) was wholly dependent on his income at the time of his death.19 Mr. Luster’s Baltimore City pension plan paid Mrs. Luster $294.83 per week in death benefits.20

Mrs. Johnson and Mrs. Luster each filed claims for death benefits with the Workers’ Compensation Commission.21 The Commission determined that the combined-compensation provision of section 9-503 applied to the widows’ claims, and thus the widows were entitled to receive both workers’ compensation and pension benefits.22 The City of Baltimore appealed both cases to the Circuit Court for Baltimore City.23 In each case, both parties moved for summary judgment.24 The circuit court granted summary judgment in favor of the widows.25 The circuit court concluded that the legislature intended section 9-503 to apply to dependents of firefighters, partially because the court found it inconsistent to award combined workers’ compensation and

disease within the meaning of section 9-503(c)(1). Id. at 3 n.1, 874 A.2d at 441 n.1. The court has defined an occupational disease as an illness naturally caused by the inherent characteristics of a person’s occupation. Id. at 6 n.5, 874 A.2d at 442 n.5.
12. Id. at 3 n.1, 874 A.2d at 441 n.1.
13. Id. at 3, 874 A.2d at 441.
14. Id. at 3-4, 874 A.2d at 441.
16. Mr. Luster’s pancreatic cancer expressly qualifies as a compensable occupational disease within the meaning of section 9-503(c)(1). Johnson, 387 Md. at 4 n.2, 874 A.2d at 441 n.2.
17. Id. at 4, 874 A.2d at 441.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
pension benefits to firefighters while they were alive but deny the same benefits to firefighters' dependents upon death. The City appealed both cases to the Court of Special Appeals of Maryland.

The Court of Special Appeals held that the general setoff provision of section 9-610 of the Labor and Employment Article applies to dependents of deceased firefighters who, while alive, qualified for combined workers' compensation and pension benefits under section 9-503(c). In an unreported opinion, the Court of Special Appeals held that Mrs. Luster qualified for workers' compensation benefits subject to the setoff provision of section 9-610. The Court of Special Appeals emphasized that the text of section 9-503 is unambiguous and does not mention dependents. The court thus reasoned that judicial extension of the combined-benefits provision of section 9-503 to deceased firefighters' dependents was unacceptable because it would require the court to insert words into the statute.

Mrs. Johnson and Mrs. Luster both filed petitions for certiorari to the Court of Appeals of Maryland. The Court of Appeals consolidated the cases to decide whether the combined-benefits provision of section 9-503(e) applies to the dependents of deceased firefighters or whether their claims must be reduced according to the general setoff provision of section 9-610.

27. Johnson, 387 Md. at 4, 874 A.2d at 441.
29. Johnson, 156 Md. App. at 597, 847 A.2d at 1206. Mrs. Johnson was eligible to receive workers' compensation death benefits of $510.00 per week. Johnson, 387 Md. at 4 n.3, 874 A.2d at 441 n.3. Section 9-610 requires that payment of workers' compensation benefits be reduced by the amount paid in pension death benefits. § 9-610(a)(1). Since Mrs. Johnson's pension payments exceeded the amount of workers' compensation benefits she was eligible to receive, the application of the setoff provision of section 9-610 precluded her from receiving any workers' compensation benefits. Johnson, 387 Md. at 4 n.3, 874 A.2d at 441 n.3.
30. Baltimore v. Luster, No. 1059, slip op. at 9-10 (Md. App. June 25, 2004). Mrs. Luster was eligible to receive workers' compensation benefits of $510.00 per week. Johnson, 387 Md. at 5 n.4, 874 A.2d at 442 n.4. Section 9-610 requires that amount to be reduced by the amount of her pension death benefits. § 9-610(a)(1). Mrs. Luster thus received payment of $215.17 per week in workers' compensation death benefits. Johnson, 387 Md. at 5 n.4, 874 A.2d at 442 n.4.
31. Johnson, 156 Md. App. at 596-97, 847 A.2d at 1205-06.
32. Id. at 597, 847 A.2d at 1205-06.
34. Johnson, 387 Md. at 5, 874 A.2d at 442.
2. Legal Background.—The Court of Appeals interprets statutes to effectuate legislative intent. Accordingly, the court adopted the rule of liberal construction to effectuate the remedial purpose of the Workers' Compensation Act, resolving statutory ambiguity in favor of the claimant. However, the court has occasionally shifted its interpretation of the legislative purpose of the Workers' Compensation Act. The legislature crafted section 9-503 to mandate exceptions to general workers' compensation provisions, reducing the claimant's burden of proof and increasing benefits, in recognition of the greater hazards faced by firefighters and certain other government employees.

a. Statutory Interpretation Should Effectuate Legislative Intent.—The court's primary object in statutory interpretation is to ensure that its construction is consistent with the legislature's intent. To ascertain legislative intent, the court first examines the text of the statute. The court assigns words their common, everyday meaning if that construction results in a clear, unambiguous expression. However, the court does not read the words of the statute in isolation. The court determines whether or not the plain meaning of a provision qualifies as clear and unambiguous by examining its language within the context of the general purpose of the statutory scheme and the context of the specific statute as a whole. To determine the context of statutory language, the court may look to other persuasive evidence, including legislative history, that indicates the legislature's intent.

b. The Court of Appeals Uses the Rule of Liberal Construction to Effectuate the Legislative Purpose of Workers' Compensation Legislation.—

37. See infra Part 2.c.
39. See infra Part 2.d(2)-(4).
42. Id. at 261, 647 A.2d at 1206-07.
Section 9-102 of the Labor and Employment Article requires reviewing courts to construe workers' compensation legislation to effectuate its general purpose. The Court of Appeals has a long line of precedent interpreting that purpose as remedial to the hardships faced by employees and their families when a worker is injured at the workplace or contracts a work-related disease. Consistent with this interpretation of legislative purpose, the court instituted the rule of liberal construction to effectuate the benevolent purposes of the Workers' Compensation Act. When a workers' compensation provision is unclear, the rule of liberal construction requires courts to resolve any statutory uncertainty in favor of the claimant. The court has consistently stressed the remedial purpose of the Act in its analyses of workers' compensation claims.

The Court of Appeals emphasized the remedial purposes of the Workers' Compensation Act in Breitenbach v. N.B. Handy Co., in which it applied the rule of liberal construction to a provision of the Act. In Breitenbach, the court carefully explained the statutory interpretation methodology that it applies to the Act. First, the court examines the plain meaning of the statutory text in conjunction with both the overall purposes of the Workers' Compensation Act and the specific purpose of the portion of the Act in question. If the plain meaning of the statutory text is unclear, ambiguous, or inconsistent with either express general or specific statutory purposes, then the court examines other factors, such as legislative history and prior case

49. Id. The court's consistent application of the rule of liberal construction to ambiguous workers' compensation legislation is also valuable as a tool to ensure judicial predictability. See Livesay v. Baltimore County, 384 Md. 1, 14-15, 862 A.2d 33, 40-41 (2004) (valuing judicial predictability and consistency).
51. Id. at 484, 784 A.2d at 579. Section 9-660 of the Labor and Employment Article, the provision at issue in Breitenbach, required employers to pay employees' medical bills incurred as a result of treating workplace injuries or diseases. Md. Code Ann., Lab. & Empl. § 9-660 (LexisNexis 1999). The Breitenbach court applied the rule of liberal construction to interpret the statute as requiring employers to pay reasonable transportation costs to and from treatments, despite the absence of any reference in the statute to transportation costs. Breitenbach, 366 Md. at 484, 784 A.2d at 579.
52. Breitenbach, 366 Md. at 473, 784 A.2d at 572-73.
53. See id., 784 A.2d at 572 (noting that the court's exercise in statutory interpretation ends when the plain meaning of statutory text is consistent with the statutory scheme and the purpose of the examined provision).
law interpretation, to determine legislative intent. Finally, the court applies the rule of liberal construction to resolve any ambiguities in favor of the claimant.

c. The Court's Different Interpretations of the Legislative Purpose of Workers' Compensation Legislation.—On occasion, the court has posited purposes for the Workers' Compensation Act other than protecting injured or sick employees and their families. In Paul v. Glidden Co., the court stated that the Act was passed to promote the interests of Maryland's citizens, who otherwise would bear the brunt of caring for incapacitated employees and their families. The Glidden court explained the Act's purposes as it interpreted the statute to allow a favorable recovery for an injured employee. The court explained that though it might seem that the terms of the statute were inequitable to the employer, the legislature enacted workers' compensation legislation to redistribute the burdens of workplace injuries in a manner beneficial to society as a whole.

In addition to taxpayers, the court has occasionally named employers as beneficiaries of the remedial purposes of the Act. In Polomski v. Baltimore, the court stated that the purposes of the Act include providing certain relief from financial hardship for injured workers and their families, protecting employers from the unpredictability of tort liability, and preventing taxpayers from shouldering the burden of paying for injured workers and their dependents. The court recently reiterated this list of beneficiaries in Design Kitchen &

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54. Id.
55. Id., 784 A.2d at 572-73.
57. 184 Md. 114, 119, 39 A.2d 544, 546 (1944); accord B. Frank Joy Co., 333 Md. at 634, 636 A.2d at 1019; Liggett, 163 Md. at 80, 160 A. at 807.
58. 184 Md. at 119-20, 39 A.2d at 546. The Glidden court held that the statute at issue required the employer to pay the injured employee for a forty-five percent loss of the use of a hand, even though only five percent of that loss was due to the workplace injury. Id. at 120, 39 A.2d at 546.
60. E.g., Design Kitchen & Baths, 388 Md. at 732-33, 882 A.2d at 826; Polomski, 344 Md. at 76, 684 A.2d at 1341.
61. 344 Md. at 76, 684 A.2d at 1341.
Nonetheless, the court has maintained that applying the rule of liberal construction to Maryland workers' compensation legislation effectuates the Act's purposes.63

d. Section 9-503 Mandates Exceptions to General Workers' Compensation Provisions.—

(1) The General Setoff Provision of Section 9-610.—Section 9-610 directs government employers to reduce payment of workers' compensation benefits to an employee or a deceased employee's dependents by the amount of pension benefits paid.64 If the pension benefit is less than the workers' compensation benefit, then government employers must pay covered employees or their dependents the difference.65 Thus, the general rule of section 9-610 means that city and state employers reduce a government employee's workers' compensation payment dollar-for-dollar by any amount that the employee receives in pension benefits.66 In most cases, section 9-610 prevents covered government employees from recovering combined funds from workers' compensation and their pensions.67 Thus, the court has interpreted the purpose of section 9-610 as a legislative attempt to reduce outlay of public funds by preventing government employees from recovering combined funds from multiple sources.68

(2) The Scope and Function of Section 9-503.—Maryland law requires employers to compensate covered employees and their dependents for disability or death caused by an occupational disease.69 Employers are only liable if the covered employee's disability or death is caused by the occupational disease and the weight of the evidence indicates that the disease was contracted in the course of employment.70

The Maryland legislature created an alternative to the general weight-of-the-evidence standard that employees must meet to prove that an occupational disease was contracted as a result of employ-
ment. Section 9-503 contains four provisions, each of which address a different combination of type of employee and type of disease. The first two provisions contain identical language describing the severity of illness necessary to qualify for the presumption of compensability: the illness must result in partial or total disability or death. In contrast, section 9-503(c) requires a lesser standard. To qualify for the compensability presumption under section 9-503(c), firefighters need only show that their occupational disease has rendered them unable to perform their normal duties. If a firefighter meets the statutory criteria listed in sections 9-503(a), (b), or (c), the firefighter qualifies for a legal presumption that she suffers from a compensable occupational disease.

The legislature has exempted firefighters who meet the criteria of section 9-503 from the general setoff provision of section 9-610. Thus, under section 9-503, firefighters who are eligible for workers' compensation benefits receive both workers' compensation benefits and any pension benefits. The total amount of weekly compensation a firefighter may receive under section 9-503 is capped at the firefighter's former weekly salary.

(3) Legislative History of Section 9-503.—The Maryland legislature enacted the original version of section 9-503 to establish a presumption of compensable occupational disease for firefighters suffering from specific diseases. The preamble to the original enactment declared that the purpose of the provision was to provide the presumption for firefighters "sustaining temporary or total disability or death." Thus, the initial legislation included dependents within the scope of the presumption.

71. See id. § 9-502(d) (2) (requiring the Workers' Compensation Commission to decide if the weight of the evidence reasonably favors a conclusion that the claimant suffers from a disease caused by her employment).
72. See Md. Code Ann., Lab. & Empl. § 9-503(a) (LexisNexis 1999) (providing a presumption of compensability for firefighters with heart disease, hypertension, or lung disease); § 9-503(b) (providing a presumption of compensability for police officers); § 9-503(c) (providing a presumption of compensability for firefighters with several types of cancer); § 9-503(d) (providing a presumption of compensability for Department of Natural Resources officers with Lyme disease).
73. § 9-503(a)(2); § 9-503(b)(1)(ii).
74. § 9-503(c). Qualifying illnesses under section 9-503(c) include several types of cancers that are caused by contact with toxic substances that firefighters encounter in the line of duty. § 9-503(c)(1).
75. § 9-503.
77. § 9-503(e)(1).
78. § 9-503(e)(2).
80. Id. at 1485.
its terms by listing "death" as a qualifying condition for firefighters seeking workers' compensation under the predecessor of section 9-503. The statute has undergone several amendments that added new categories of qualifying employees and illnesses, and section 9-503 was codified as such without substantive change in 1991. The legislature has never added or deleted the word "dependents," though the preamble indicates that the legislature intended that surviving dependents be eligible for the benefits accruing to qualifying firefighters under this section.

(4) Maryland Precedent Interpreting Section 9-503.—The court has interpreted the terms of and purposes behind section 9-503 on several occasions. In Board of County Commissioners v. Colgan, the court upheld the constitutionality of the predecessor of section 9-503, holding that the legislature could constitutionally provide different compensation criteria for firefighters based on their higher levels of occupational exposure to health hazards. The court reaffirmed the legislature's intent to carve out a special category for firefighters who risk their health in the line of duty in Montgomery County Fire Board v. Fisher. The court noted that the legislature singled out firefighters for the presumption that their health problems were work-related because firefighters are consistently exposed to toxic substances.


83. See id.

84. 274 Md. 193, 334 A.2d 89 (1975).


86. Id. at 256, 468 A.2d at 630.
The court examined the intersection of the predecessors of both section 9-503 and section 9-610 in Harris v. Baltimore. The legislature had not yet amended section 9-503 to extend combined benefits to employees covered under its terms, so the court relied on the plain language of both statutes to conclude that the claimants' workers' compensation benefits must be offset by their pension benefits.

In Polomski v. Baltimore, the court rejected a claimant's section 9-503 argument that he was eligible for combined pension and workers' compensation benefits beyond his former weekly salary because section 9-610 only required a setoff for similar benefits. The court relied heavily on the fact that the legislature deleted the "similar benefits" language when it recodified section 9-610. The court did not apply the rule of liberal construction because the language of section 9-503 and section 9-610 was clear on its face. The court also characterized the purpose of the Workers' Compensation Act as a legislative attempt to balance the competing interests of injured employees, employers, and taxpayers. Consistent with this characterization, the court rejected Polomski's fairness argument because the legislature is not required to treat all employees equally with regard to their retirement benefits because it often must make compromises when it doles out public funds.

3. The Court's Reasoning.—In Johnson v. Baltimore, the Court of Appeals held that the language of section 9-503 clearly and unambiguously failed to extend combined benefits to dependents of deceased firefighters. The court noted that this interpretation of the statute aligned with legislative intent, as evidenced by the text of section 9-
503, the overall statutory scheme, and the purposes of the Workers’ Compensation Act.

The court stressed the absence of the word “dependents” in the text of section 9-503. The court emphasized that, according to the text of the statute, the combined benefits granted in section 9-503 accrue to the “individuals” who participated in the retirement system. The court contrasted the language of section 9-503 with the general setoff provision of section 9-610, which by its terms specifically applies to dependents of deceased employees. In addition, the court noted the existence of numerous other workers’ compensation provisions that specifically mention dependents and reasoned that these show the legislature’s capacity to explicitly provide benefits to dependents when that is its intent.

The court reasoned that a legislative decision to give combined benefits to certain living firefighters without extending the same benefits to their dependents upon death was not inconsistent with the overall statutory scheme. In support of this interpretation, the court noted that the general setoff provision of section 9-610 includes the dependents of firefighters who die as a result of injury in the line of duty or occupational disease other than those statutorily presumed compensable. The court also noted that the legislature is not constrained to provide the same benefits to employees and their dependents.

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95. See id. at 9, 874 A.2d at 444 (emphasizing that section 9-503 does not contain a reference to dependents).

96. See id. at 17-18, 874 A.2d at 449 (noting the inconsistency of giving enhanced benefits to dependents of deceased firefighters who succumb to specific occupational diseases while preserving the status quo for dependents of firefighters who died from different occupational diseases or accidentally in the line of duty).

97. See id. at 21, 874 A.2d at 451 (noting that the Workers’ Compensation Act is the result of the legislature’s judgment regarding the ideal management of public funds with respect to workers, employers, and taxpayers).

98. Id. at 9, 874 A.2d at 444.

99. Id.

100. Id. at 9-10, 874 A.2d at 444-45.

101. Id. at 16 n.9, 874 A.2d at 448 n.9. The court explained that the existence of explicit provisions for dependents indicated that the legislature had spent a great deal of time and effort providing for dependents in workers’ compensation legislation. Id. The court further reasoned that this indicated the legislature’s ability to provide for living dependents of deceased firefighters in section 9-503 if the legislature was so inclined. Id.

102. Id. at 17, 874 A.2d at 449.

103. Id.

104. Id. at 18, 874 A.2d at 449.
The court also emphasized the legislature's various purposes in enacting workers' compensation legislation.\textsuperscript{105} The court reasoned that construing section 9-503 to include dependents was equivalent to questioning legislative judgment regarding the optimum allocation of funds among employers, employees, and taxpayers.\textsuperscript{106} The court emphasized that the legislature bears sole responsibility for the correction of any perceived unfairness in employee benefit allocation.\textsuperscript{107}

Judge Battaglia dissented on the ground that the majority inappropriately failed to apply the rule of liberal construction to section 9-503.\textsuperscript{108} The dissent maintained that, properly construed, section 9-503 includes dependents as recipients of combined benefits.\textsuperscript{109} Judge Battaglia concluded that the majority relied too heavily on the bare language of the statute.\textsuperscript{110} She argued that the majority's construction of section 9-503 ignored the legislature's intent to bestow special benefits on firefighters who suffer from diseases inherent to their profession.\textsuperscript{111}

4. Analysis.—In Johnson v. Baltimore, the Court of Appeals held that the language of section 9-503 unambiguously failed to extend combined benefits to living dependents of deceased firefighters.\textsuperscript{112} The court inappropriately weakened the rule of liberal construction by not applying the rule to the interpretation of an ambiguous statute, section 9-503.\textsuperscript{113} This departure from Maryland precedent will have deleterious effects on lower courts' ability to consistently interpret statutes and apply the rule of liberal construction and will reduce the ameliorative benefits of workers' compensation legislation.\textsuperscript{114} If the Court of Appeals interprets the legislative purpose behind the Workers' Compensation Act as a balancing of interests, it should expressly limit or abrogate the rule of liberal construction as inapposite.\textsuperscript{115} If the Court of Appeals merely wishes to apply the rule more sparingly, it

\textsuperscript{105} Id. at 12-13, 874 A.2d at 446. The Court of Appeals has explained that workers' compensation legislation protects employees and their families from overwhelming expense, employers from unpredictable and expensive litigation, and the public from arduous tax burdens. \textit{Id.}

\textsuperscript{106} Id. at 21, 874 A.2d at 451.

\textsuperscript{107} \textit{Id.}, 874 A.2d at 452.

\textsuperscript{108} Id. at 25, 874 A.2d at 453-54 (Battaglia, J., dissenting).

\textsuperscript{109} See \textit{id.} (construing the statute with emphasis on the remedial nature of the Act and the purpose of the rule of liberal construction).

\textsuperscript{110} Id. at 25, 874 A.2d at 454.

\textsuperscript{111} Id. at 29-30, 874 A.2d at 456.

\textsuperscript{112} Id. at 22, 874 A.2d at 452 (majority opinion).

\textsuperscript{113} See \textit{infra} Part 4.a.

\textsuperscript{114} See \textit{infra} Part 4.b.

\textsuperscript{115} See \textit{infra} Part 4.c.
should explicitly state the degree of statutory ambiguity required for lower courts to use the rule of liberal construction.\footnote{116}

a. The Court of Appeals Inappropriately Weakened the Rule of Liberal Construction by Failing to Apply It to Section 9-503.—

(1) Section 9-503 Is Ambiguous.—The Johnson court failed to apply the rule of liberal construction to the ambiguous statutory text of section 9-503.\footnote{117} Maryland precedent dictates that courts apply the rule of liberal construction to any ambiguous provisions of the Workers’ Compensation Act.\footnote{118} The language of section 9-503 is sufficiently ambiguous to qualify for application of the rule of liberal construction when considered within the context of the entire statute and in light of the remedial purposes of the Act and the specific provision at issue.\footnote{119}

The Johnson court should have applied the rule of liberal construction in its interpretation of section 9-503 because section 9-503 is facially ambiguous. The court examined section 9-503(c), which is the provision applicable to Mr. Johnson and Mr. Luster.\footnote{120} To qualify for the presumption of compensability under section 9-503(c), a firefighter must be unable to perform her normal duties as a result of suffering from one of the types of cancers listed in section 9-503(c)(1).\footnote{121} Section 9-503 is facially ambiguous because it is unclear whether the requirement that a firefighter be unable to perform her duties incorporates or expands upon the requirement in sections 9-503(a) and (b) that the government employee be incapacitated to the point of severe disability or death.\footnote{122} On its face, the statute appears to require a lesser degree of affliction to qualify for the compensability presumption from firefighters suffering from one of the dis-

\footnote{116. See infra Part 4.c.}
\footnote{117. See 387 Md. at 30, 874 A.2d at 456-57 (Battaglia, J., dissenting) (dissenting because the majority did not liberally construe the statute in favor of the claimant).}
\footnote{118. Howard County Ass’n for Retarded Citizens, Inc. v. Walls, 288 Md. 526, 530, 418 A.2d 1210, 1213 (1980).}
\footnote{120. The parties agreed that both Mr. Johnson and Mr. Luster suffered from cancers included in the terms of section 9-503(c)(1). Johnson, 387 Md. at 3 n.1, 4 n.2, 874 A.2d at 441 nn.1-2.}
\footnote{121. Md. CODE ANN., Lab. & Empl. § 9-503(c)(1) (LexisNexis 1999).}
\footnote{122. Compare § 9-503(a)(2) (requiring disability or death for presumption of compensability), and § 9-503(b)(2) (same), with § 9-503(c)(3) (requiring inability to perform normal duties for presumption of compensability).}
eases listed in section 9-503(c)(1) than those who qualify for the compensability presumption under sections 9-503(a) and (b). The employees who qualify for the compensability presumption under section 9-503(a) or (b) must prove at least partial disability while firefighters who qualify under section 9-503(c) need only prove inability to perform normal duties. The court inappropriately classified section 9-503(c) as unambiguous because it is facially unclear whether the compensability presumption of section 9-503(c) incorporates the severely disabled and deceased categories of sections 9-503(a) and (b).

The Johnson court relied too heavily on the absence of the words "death" and "dependents" to conclude that the text of section 9-503 clearly did not include deceased firefighters. A deceased employee is necessarily unable to perform her normal duties. Therefore, despite the absence of the word "death" in section 9-503(c), the provision's requirement of inability to perform normal duties could include any deceased employee.

The Johnson court's reliance on the absence of "dependents" is inappropriate because that absence does not prove that the legislature intended to exclude deceased firefighters from section 9-503 qualification. The court has expressed in previous decisions that omitting a term in a statute is not necessarily sufficient indication that the legislature intended to exclude that term in the statute's application. In Breitenbach, the court held that section 9-660 implicitly provided for transportation costs to and from medical treatments, even though the statute made no mention of transportation costs. Similarly, in Johnson, there is no express provision for dependents in section 9-503(c). The Breitenbach court explained that the omission of an express provision for transportation costs in section 9-660 might be

123. Id.
124. Id.
125. Id.
126. See 387 Md. at 25, 874 A.2d 454 (Battaglia, J., dissenting) (implying that the majority's focus on the absence of the word "dependents" amounts to reading the statutory text in a vacuum).
127. Section 9-503(c) requires that claimants be unable to perform their normal job duties to qualify for the compensability presumption. § 9-503(c)(3).
128. See § 9-503(c)(3) (requiring inability to perform normal firefighting duties as a result of suffering from a listed type of cancer).
129. See 387 Md. at 9, 874 A.2d at 444 (noting at the outset of the court's discussion that section 9-503 does not include the word "dependents").
131. Id. at 484, 784 A.2d at 579.
132. See § 9-503(c) (omitting the word "dependents").
considered dispositive if the court read statutory language in a vacuum. However, when the court considered section 9-660 in light of the entire statutory scheme and relevant provisions of the Workers’ Compensation Act, it concluded that the omission of provisions for transportation costs was ambiguous within that context. The court concluded that the rule of liberal construction applied because of the remedial nature of both the Act as a whole and the specific provision of section 9-660.

The statute at issue in Johnson is analogous to the one at issue in Breitenbach because there is a similar omission of statutory language, in Johnson, “dependents.” Dependents of deceased employees who qualified under the terms of section 9-503(a) or (b) could be entitled to receive combined benefits, however, because deceased employees are expressly included within the terms of those two provisions. Section 9-503(e) could include dependents of deceased employees who qualified under sections 9-503(a) and (b). Therefore, even within section 9-503, the very same section of the Act that the court interprets in Johnson, certain surviving dependents should be entitled to benefits without being expressly named in the statutory language.

The Johnson court’s decision also departs from its credo to interpret statutes consistent with common sense. Under the court’s interpretation of section 9-503 in Johnson, a widow of a firefighter who died from lung cancer receives combined benefits under section 9-503(e). But widows like Mrs. Johnson and Mrs. Luster, whose spouses died from pancreatic or rectal cancer, would be barred from receiving combined benefits under section 9-503(e). There is a serious question as to why the legislature would favor the dependents of employees who died from one type of cancer over those who died from a different type of cancer. Thus, Johnson incorporates an illogi-

133. 366 Md. at 480, 784 A.2d at 577.
134. Id. at 484, 784 A.2d at 579.
135. Id.
136. Johnson, 387 Md. at 9, 874 A.2d at 439.
137. See § 9-503(a)(2) (requiring disability or death for the presumption of compensability); § 9-503(b)(1)(ii) (same).
138. See § 9-503(e) (qualifying anyone who meets the criteria established in sections 9-503(a), (b), (c), or (d) for combined workers’ compensation and pension benefits).
139. Id.
141. See § 9-503(a)(1).
142. Johnson, 387 Md. at 22, 874 A.2d at 452.
cal conclusion that violates the court’s stated goal of interpreting the law in a common sense manner.\textsuperscript{143}

(2) The Workers’ Compensation Act and Section 9-503 Have Remedial Purposes.—The Johnson court ignored the remedial nature of both the Workers’ Compensation Act and section 9-503 in its interpretation of the statute.\textsuperscript{144} The remedial nature of the Act is coextensive with the court’s adoption of the rule of liberal construction to resolve uncertainties in favor of the claimant whose hardships the Act seeks to remedy.\textsuperscript{145} Furthermore, the Johnson court’s failure to apply the rule of liberal construction is inconsistent with precedent because, like section 9-660 in Breitenbach,\textsuperscript{146} section 9-503 is explicitly remedial in nature.\textsuperscript{147} The court has repeatedly acknowledged that the legislature created the compensability presumption in section 9-503 because of firefighters’ continued exposure to toxic, life-threatening substances in the line of duty.\textsuperscript{148} Accordingly, the Johnson court should have applied the rule of liberal construction to its interpretation of the remedial legislation of section 9-503(c).

Additionally, the Johnson court should have incorporated the legislative history of section 9-503, which indicates that the statute’s remedial purpose was intended by the legislature to encompass both living and deceased firefighters.\textsuperscript{149} The original language used by the legislature in the preamble clearly states that dead firefighters qualify for the benefits of the predecessor to section 9-503.\textsuperscript{150} Thus, contrary to the majority’s assertion that the legislature has drawn lines excluding surviving dependents,\textsuperscript{151} legislative history indicates that the legisla-

\begin{itemize}
\item \textsuperscript{143} Serio, 384 Md. at 390-91, 863 A.2d at 962; see also Harris v. Baltimore, 306 Md. 669, 676, 511 A.2d 52, 56 (1986) (stating that plain meaning of statutory text controls the question of legislative intent if it is exact and sensible).
\item \textsuperscript{144} See 387 Md. at 25, 874 A.2d at 454 (Battaglia, J., dissenting) (stressing the need to read workers’ compensation legislation in light of the benevolent purposes of the Act).
\item \textsuperscript{146} Breitenbach v. N.B. Handy Co., 366 Md. 467, 484, 784 A.2d 569, 579 (2001).
\item \textsuperscript{147} See Johnson, 387 Md. at 25, 874 A.2d at 453 (Battaglia, J., dissenting) (noting the remedial nature of the Workers’ Compensation Act).
\item \textsuperscript{148} E.g., Montgomery County Fire Bd. v. Fisher, 298 Md. 245, 255, 468 A.2d 625, 630 (1983); Bd. of County Comm’rs v. Colgan, 274 Md. 193, 208, 334 A.2d 89, 97 (1975).
\item \textsuperscript{149} See Kaczorowski v. Baltimore, 309 Md. 505, 514-15, 525 A.2d 628, 652-33 (1987) (noting that the court may look to legislative history as evidence of the legislature’s intent when examining statutory language).
\item \textsuperscript{150} See Act of May 24, 1971, ch. 695, 1971 Md. Laws 1484, 1485 (declaring the compensability presumption of the predecessor of section 9-503 available to disabled or deceased firefighters).
\item \textsuperscript{151} Johnson, 387 Md. at 3, 874 A.2d at 440.
\end{itemize}
ture intended to include such dependents within the ambit of section 9-503.

b. The Inappropriate Weakening of the Rule of Liberal Construction Will Have Deleterious Effects.—

(1) Lower Courts Will Have Difficulty Consistently Applying the Rule of Liberal Construction.—The Court of Appeals inappropriately weakened the rule of liberal construction in its Johnson decision.\(^{152}\) This will have deleterious effects on the ability of lower courts to consistently and predictably interpret workers' compensation legislation. Lower courts will likely have particular trouble with interpreting challenges of statutory omissions. The court’s decision in Johnson contradicts its decision in Breitenbach because the court has now decided the question of whether an omission of a term constitutes a clear, unambiguous meaning in opposite ways.\(^{153}\) Lower courts that encounter arguments about omission of statutory terms will not know whether an omission may properly be considered ambiguous for purposes of application of the rule of liberal construction. This lack of clarity may result in judicial inconsistency and unpredictability.

Weatherly v. Great Coastal Express Co.\(^{154}\) illustrates the complications lower courts face when relying on the Johnson decision. The Court of Special Appeals decided Weatherly in accordance with the Johnson court’s ambiguity analysis.\(^{155}\) The Weatherly court examined a workers’ compensation claim for death benefits presented by a surviving dependent of a deceased employee.\(^{156}\) The surviving dependent lived with the deceased for thirty years before his death, though they never married.\(^{157}\) The Weatherly court ruled against the surviving dependent, relying heavily on the Court of Appeals’s reasoning in Johnson.\(^{158}\) The Weatherly decision repeated the Johnson court’s characterization of the purpose of the Workers’ Compensation Act as

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152. See id. at 30, 874 A.2d at 456-57 (Battaglia, J., dissenting) (arguing that applying the rule of liberal construction to section 9-503 should have led the court to the opposite result).

153. Compare Johnson, 387 Md. at 22, 874 A.2d at 452 (emphasizing that the omission of "dependents" in section 9-503(c) is clear and unambiguous), with Breitenbach v. N.B. Handy Co., 366 Md. 467, 484, 784 A.2d 569, 579 (2001) (holding that the omission of a provision for transportation costs was not conclusive proof that the legislature declined to extend payment for those costs).


155. Id. at 378, 883 A.2d at 938.

156. Id. at 359, 883 A.2d at 927.

157. Id. The statutory provision at issue extended special benefits to surviving "spouses" in one section and referred to surviving "dependents" in a similar, preceding section. Id. at 376-78, 883 A.2d at 937-38.

158. Id. at 378-79, 883 A.2d at 938-39.
threefold, protecting employees, employers, and taxpayers. Consistent with this characterization of the Act's purpose, the Weatherly court again relied on Johnson for its reply to the claimant's fairness argument. The Court of Special Appeals repeated the Johnson court's reasoning that the legislature faced the difficult task of balancing interests and drawing lines to exclude claimants and likewise repeated the Johnson decision's conclusory language that the legislature had already drawn a line excluding the claimant.

The Johnson decision created an analytical problem for the Weatherly court when it confronted the claimant's reliance on Breitenbach in her argument for liberal construction of the benefits provision. First, the Weatherly court stated in conclusory terms that the statute at issue in Breitenbach was ambiguous, while the one in Johnson was not. But the Weatherly court made no attempt to clarify why. Next, the Weatherly court attempted to distinguish Breitenbach from Johnson because the Breitenbach court found another provision in the Workers' Compensation Act that implied a general entitlement to payment of transportation costs. The Weatherly court failed to mention that the statutory provisions surrounding section 9-503 could have easily given rise to a similar implication of entitlement in Johnson. As exemplified by the Weatherly decision, the irreconcilable differences in the statutory interpretation of workers' compensation legislation in Breitenbach and Johnson will have deleterious effects on lower courts' ability to consistently apply the rule of liberal construction.

(2) Claimants Face Harsher Burden from Courts.—The weakening of the rule of liberal construction by the Johnson court also hampers the remedial effect of the Workers' Compensation Act. The Court of Appeals adopted the rule of liberal construction for the express function of judicially promoting the Act's ameliorative purposes. Whenever the court fails to apply the rule when interpreting provisions that call for its application, the court reduces the benevolent effects of the Act.

159. Id. at 379-80, 883 A.2d at 939.
160. Id. at 383-84, 883 A.2d at 941-42.
161. Id. at 383, 883 A.2d at 941.
162. See id. at 384, 883 A.2d at 942 (attempting to distinguish Johnson from Breitenbach).
163. Id.
164. Id.
165. Id.
166. See supra Part 4.a(2).
The *Johnson* decision's incongruity with the *Breitenbach* decision creates further uncertainty in that potential claimants will be unable to reliably predict judicial interpretation of statutory omissions in workers' compensation legislation. Thus, claimants not only face the burden of no longer having ambiguous statutes construed in their favor; they also may shy away from filing suit due to an inability to evaluate the success of their claims before the investment of litigation. Such a chilling effect would undermine the remedial purpose of the Workers' Compensation Act.\(^{168}\)

c. **The Court of Appeals Should Clarify Its Interpretation of Legislative Purpose of the Workers' Compensation Act and Its Standard for the Applicability of the Rule of Liberal Construction.**—The *Johnson* court missed the opportunity to clarify the Court of Appeals's interpretation of the general purpose behind the Workers' Compensation Act. Judicial clarity is desirable because the Maryland legislature requires courts to construe the Act according to its general purpose.\(^{169}\) However, the Court of Appeals has provided varying interpretations of that legislative purpose.\(^{170}\) To logically support the rule of liberal construction, the primary purpose of the Act must be the compensation of injured employees and their families.\(^{171}\) There is no need to construe the Act's provisions in favor of claimants if the legislature intended merely to balance coequal, competing interests in its workers' compensation legislation.\(^{172}\) Furthermore, the court's interpretation of legislative purpose becomes particularly salient when, as in *Johnson*, it is used to rationalize the court's failure to construe the provision liberally in accordance with the rule.\(^{173}\) Thus, the *Johnson* court should have taken

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\(^{168}\) See *id.* (requiring liberal construction in favor of the claimant to effectuate the Act's benevolent purpose).


\(^{171}\) See *Walls*, 288 Md. at 530, 418 A.2d at 1213 (stating that workers' compensation legislation should be construed as liberally as possible in favor of the claimant when statutory text is ambiguous).

\(^{172}\) See *Polomski*, 344 Md. at 76, 684 A.2d at 1341 (stressing the Act's purpose to protect employees, employers, and taxpayers).

\(^{173}\) See *Johnson*, 387 Md. at 2, 874 A.2d at 440 (discussing the legislature's task of balancing competing interests when enacting workers' compensation legislation). The court has
the opportunity to clarify whether the Act's purpose is primarily remedial in favor of workers so that lower courts may consistently comply with the legislature's mandate to interpret the Act in accord with its general purpose. 174

The Johnson court also missed the opportunity to promote judicial consistency and predictability by providing lower courts with specific standards for the application of the rule of liberal construction. If the Johnson decision indicates the court's intention to abandon or lessen its characterization of the Act as primarily an ameliorative remedy for injured employees and their families in favor of an interpretation of legislative intent that more closely resembles legislative balancing of competing, coequal interests, the court should have specified whether a different application of the rule of liberal construction or its abrogation altogether was warranted. If the Johnson interpretation of legislative purpose warrants a more stringent application of the rule of liberal construction, the court should explicitly acknowledge that and provide lower courts with clear standards as to when the rule of liberal construction should apply.

For example, the court has repeatedly stressed the importance of workers' compensation legislation as a device to protect taxpayers from the overwhelming burdens of caring for injured employees and their dependents. 175 If the Johnson court concluded that taxpayer protection was a legislative purpose of equal importance to that of employee protection, the court should have generated a stricter standard for the application of the rule of liberal construction when interpret-

previously used a broader characterization of legislative purpose with regard to workers' compensation to extend, rather than deny, its provisions to claimants. See, e.g., Design Kitchen & Baths v. Lagos, 388 Md. 718, 732-33, 882 A.2d 817, 826 (2005) (emphasizing the public policy aspects of workers' compensation legislation in interpreting statutory benefits provision to include undocumented alien workers); Belcher v. T. Rowe Price Found., Inc., 329 Md. 709, 737, 621 A.2d 872, 886 (1993) (emphasizing the theoretical underpinnings of workers' compensation legislation as a societal loss distribution tool in justifying expansion of the definition of "injury" to encompass psychological injury); Paul v. Glidden Co., 184 Md. 114, 120, 39 A.2d 544, 546 (1944) (interpreting the statute to allow an injured employee to recover loss of forty-five percent of his hand use when the workplace accident only caused five percent loss). The Polomski and Johnson decisions represent a recent departure in the court's use of legislative purpose to justify denying benefits to workers' compensation claimants. See Polomski, 344 Md. at 76, 79, 684 A.2d at 1341-42 (deciding that a setoff provision reduced claimant's combined injury-related workers' compensation and time-earned retirement benefits and stressing the Act's purpose to protect employees, employers, and taxpayers); Johnson, 387 Md. at 2-3, 874 A.2d at 440 (noting that the legislature must draw lines between competing interests in the realm of workers' compensation legislation).

ing workers' compensation provisions that implicate public finances.\(^{176}\) The Johnson court could have explicitly stated that a less lenient application of the rule of liberal construction is appropriate in cases in which the legislature has created another countervailing provision with the purpose of cutting public expenditures.\(^{177}\) However, if the general purpose of the Act is indeed primarily ameliorative with respect to employees and their dependents, the Johnson court should have promoted judicial consistency by explicitly stating necessary criteria to implicate use of the rule of liberal construction.\(^{178}\) The Court of Appeals's refusal to apply the rule of liberal construction to a claimed statutory omission in Johnson differed from its willingness to use the rule under similar circumstances in Breitenbach.\(^{179}\) Since the Johnson decision narrowed the application of the rule of liberal construction in cases involving statutory omissions, the Johnson court should have explicitly stated a narrower standard for lower courts to use when deciding whether the rule of liberal construction applies.\(^{180}\) Finally, the Johnson court should have provided further clarity by describing the degree of statutory ambiguity necessary for the interpreting court to apply the rule of liberal construction.\(^{181}\)

5. Conclusion.—The Court of Appeals inappropriately weakened the rule of liberal construction by failing to apply the rule to its interpretation of section 9-503 in Johnson.\(^{182}\) Section 9-503 is ambiguous, and the remedial purposes of the Act and the specific provision war-

\(^{176}\) See 387 Md. at 21, 874 A.2d at 451-52 (expressing concern about judicial intrusion into legislative decisionmaking regarding resource allocation).

\(^{177}\) The legislature expressed its desire to prevent combined source recovery in most instances and thus limit public expenditures in section 9-610. See Blevins v. Baltimore County, 352 Md. 620, 625, 724 A.2d 22, 24 (1999) (stating that the legislature intended a previous version of section 9-610 to reduce expenditure of public funds).


\(^{179}\) See supra notes 129-139 and accompanying text.

\(^{180}\) An explicit standard would enhance judicial consistency and predictability in lower court decisions involving workers' compensation legislation. See Livesay, 384 Md. at 14, 862 A.2d at 40-41 (valuing judicial predictability and consistency).

\(^{181}\) In deciding whether to apply the rule of liberal construction, the reviewing court must first determine if the statute is ambiguous. Jones v. State, 336 Md. 255, 261, 647 A.2d 1204, 1206 (1994). Because the Breitenbach and Johnson decisions differ on whether a statutory omission creates ambiguity, the Johnson court should have clarified how to determine whether an omission is ambiguous in the context of workers' compensation legislation. Compare Johnson, 387 Md. at 22, 874 A.2d at 452 (emphasizing that the omission of "dependents" in section 9-503(c) is clear and unambiguous), with Breitenbach v. N.B. Handy Co., 366 Md. 467, 484, 784 A.2d 569, 579 (2001) (holding that omission of provision for transportation costs was not conclusive proof that the legislature declined to extend payment for those costs).

\(^{182}\) See supra Part 4.a(1).
rant application of the rule of liberal construction. The weakening of the rule of liberal construction will have deleterious effects on lower courts' ability to apply the rule consistently and will reduce the ameliorative benefits of workers' compensation legislation. The Court of Appeals should state more clearly how it interprets the legislative purpose of the Workers' Compensation Act; if the court wishes to apply the rule more sparingly, it should explicitly state the degree of statutory ambiguity required for lower courts to use the rule of liberal construction.

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183. See supra Part 4.a(2).
184. See supra Part 4.b.
185. See supra Part 4.c.
IX. Torts

A. A Blemished Construction of Lead-Based Paint Poisoning Negligence Jurisprudence Thwarts the Prospective Application of Judicial Decisionmaking

In *Polakoff v. Turner,* the Court of Appeals of Maryland considered, inter alia, whether the modified negligence standard of *Brooks v. Lewin Realty III, Inc.*, based upon a landlord's violation of the Baltimore City Housing Code, applied retroactively to a tenant's negligence action. In affirming the judgment of the Court of Special Appeals, the Court of Appeals held that the ruling in *Brooks* applied retroactively to all cases pending when *Brooks* was filed. Thus, the *Brooks* holding applied to *Polakoff,* which was pending in the Court of Special Appeals when *Brooks* was issued. The court reasoned that *Brooks'* modified standard for establishing a prima facie case of negligence provided a new interpretation of the Housing Code rather than a change in the common law. Therefore, the court held that the statutory interpretation provided in *Brooks* should apply retroactively to all cases pending where the parties preserved the issue for appellate review.

2. 378 Md. 70, 835 A.2d 616 (2003). In *Brooks,* a tenant brought against her landlord a negligence action arising from consumption of lead-based paint found in the leased property, in violation of the local housing code. *Id.* at 72, 835 A.2d at 617. The *Brooks* court overruled precedent by holding that the tenant did not have to demonstrate a landlord's notice of Housing Code violations to establish a prima facie case of negligence.
3. See BALTIMORE, MD. HOUSING CODE §§ 702(a), 703(b)(3) (2000) (requiring that landlords continually keep occupied dwellings in good repair, clean and free of flaking, loose, or peeling paint).
4. *Polakoff,* 385 Md. at 473, 869 A.2d at 841. The court also examined: (1) whether it correctly decided *Brooks,* (2) whether the Court of Special Appeals mistakenly applied *Brooks* to the case before it, and (3) whether sufficient evidence existed to support the jury's conclusion that Polakoff and Chase Management did not act reasonably under the circumstances to ensure continued compliance with the Housing Code. *Id.*
7. *Id.* Additionally, the court held that (1) it correctly decided *Brooks,* (2) the Court of Special Appeals properly applied *Brooks* to the case before it, and (3) a jury could reasonably conclude based on the evidence that the landlord and the landlord's management company did not act reasonably under the circumstances to comply with the Housing Code. *Id.* at 473, 485, 489, 869 A.2d at 841, 848, 851.
8. *Id.* at 489 & n.16, 869 A.2d at 850-51 & n.16.
9. *Id.* at 488-89, 869 A.2d at 850-51.
In so reasoning, the court misconstrued Brooks's modified standard as a new interpretation of the Housing Code instead of as a simultaneous derogation of the common law and an expansion of the Housing Code’s jurisdiction. By failing to recognize the impact of Brooks on the common law and summarily dismissing its reasoning as statutory interpretation, the court inappropriately selected a retroactive application of the Brooks holding. Instead, the court should have applied Brooks prospectively, including to the parties before it so as not to undermine the true impact of Brooks.

1. The Case.—Jasmine Turner, a minor tenant, resided in a rental property located at 17 North Benthalou Street in Baltimore City. She lived with her mother, Crystal Whittington, and grandmother, Lelia Whittington, from her birth on April 3, 1990 until August 1994. In 1993, a routine physical examination demonstrated that Turner had an elevated blood lead level of twenty-two µg/dl (micrograms per deciliter). Crystal claimed that Turner suffered lead-based paint poisoning from exposure to lead-based paint while residing in the property. Accordingly, in 1994, Crystal filed a complaint against Polakoff on her daughter’s behalf in the Circuit Court for Baltimore City, asserting negligence, a violation of the Maryland Con-
sumer Protection Act, and strict liability. In 1998, the circuit court granted Polakoff’s motion for summary judgment on the negligence claim and denied Crystal’s request to add CFAS and Chase as defendants. As a result, Crystal appealed the entry of summary judgment and the Court of Special Appeals of Maryland reversed.

Subsequently, Crystal filed a separate action that contained multiple counts against CFAS and Chase. The court consolidated Crystal’s new suit with her prior action against Polakoff and tried the entire case in October 2002. The only claim that the jury reviewed was Crystal’s negligence claim against the three defendants. A jury awarded Crystal $500,000 against Polakoff and Chase but found in favor of CFAS. Polakoff and Chase then filed a motion for judgment notwithstanding the verdict and, alternatively, to apply the statutory cap on non-economic damages. Although the court denied the motion for judgment notwithstanding the verdict, it applied the statutory cap and reduced the initial judgment to $350,000. Polakoff and Chase appealed to the Court of Special Appeals to overturn the denial of their motion for judgment notwithstanding the verdict. Crystal cross-appealed to contest the circuit court’s use of the statutory damage cap.

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21. *Id.*, 841 A.2d at 408-09.
22. *Id.*, 841 A.2d at 409.
23. *Id.*
24. *Id.* At or before the start of the trial, all claims, except the negligence action, were either dismissed willingly or by court order. *Id.*
25. *Id.*
26. The circuit court determined that Polakoff and Chase were liable because they had reason to know of the flaking, loose, or peeling paint, and Polakoff, through his agent, should have been on notice of the Housing Code violations. *Polakoff*, 385 Md. at 489-90, 869 A.2d at 851.
31. *Id.*
32. *Id.*
Before the Court of Special Appeals considered the case, the Court of Appeals of Maryland decided *Brooks v. Lewin Realty III, Inc.*, which overruled, in part, *Richwind Joint Venture v. Brunson.* The jury in *Polakoff* relied upon *Richwind* in its assessment of the appellant's liability. Accordingly, on appeal, the Court of Special Appeals considered whether the holding in *Brooks* applied retroactively to *Polakoff*, as well as whether the statutory cap on non-economic damages that the circuit court imposed was constitutional.

The Court of Special Appeals rejected the appellants' claim that the holding in *Brooks* should only apply prospectively. The court distinguished between the retroactive effect of a judicial decision that renders a new interpretation of a constitutional or statutory provision and the prospective effect of a judicial decision that changes the common law of Maryland. In reaching its decision, the Court of Special Appeals reasoned that while *Brooks* overruled prior decisions, it did not change the common law. Thus, the intermediate appellate court affirmed the judgment of the circuit court and held that *Brooks* applied retroactively to *Polakoff*. The Court of Special Appeals also upheld the constitutionality of the statutory cap on non-economic damages.

*Polakoff* and Chase petitioned the Court of Appeals to consider four issues: (1) whether the Court of Appeals properly decided *Brooks*, (2) whether the circuit court erred in denying the defendant's motion for judgment notwithstanding the verdict due to insufficient evidence, (3) whether the Court of Special Appeals erred by retroactively applying *Brooks*, and (4) whether *Brooks* applies retroactively to *Polakoff*. The Court of Appeals granted certiorari on May 14, 2004.

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33. 378 Md. 70, 835 A.2d 616 (2003).
34. *Polakoff*, 155 Md. App. at 62, 841 A.2d at 408. In *Richwind*, the Maryland Court of Appeals sustained the now-defunct Maryland common-law principle that a landlord is not liable for a defective condition on the leased property unless she either knows or has reason to know of the condition and has a reasonable opportunity to correct it. 335 Md. 661, 676, 645 A.2d 1147, 1154 (1994).
36. *Id.* at 63, 841 A.2d at 408.
37. *Id.* at 70-71, 841 A.2d at 412-13. The appellants asserted that the retroactive application of *Brooks* was unjust because Baltimore City landlords relied on precedent like *Richwind*. *Id.*
38. *Id.* at 66-67, 841 A.2d at 410.
39. *Id.* at 69, 841 A.2d at 412.
40. *Id.* at 70-71, 841 A.2d at 412-13.
41. *Id.* at 71, 841 A.2d at 413.
42. *Polakoff*, 385 Md. at 473, 869 A.2d at 841.
43. *Id.*
2. **Legal Background.**—Maryland courts recognize the well-settled principle that remedial statutes in conflict with the common law, such as the Housing Code, should be strictly construed but should also effectuate the legislature's intent in enacting the statute.\(^{44}\) Moreover, once a court adopts a particular construction of a statute, that construction ordinarily applies retroactively to the case before it, as well as to issues in pending cases preserved for appellate review.\(^{45}\) Nevertheless, the Court of Appeals of Maryland has reasoned that the retroactive application of a judicial decision is generally inappropriate when the decision overrules precedent.\(^{46}\)

Additionally, over the past thirty years, Maryland law governing lead-based paint poisoning negligence actions has significantly changed because of the Maryland courts' increased willingness to eliminate the requirement that a landlord have notice and knowledge of the presence or risks of lead-based paint.\(^{47}\) Throughout this period, the Maryland legislature modified the common law of negligence, originally used to support lead-based paint poisoning claims, with statutory provisions that place landlords on notice of potentially hazardous conditions on their leased premises.\(^{48}\) Accordingly, private claims brought in the landlord-tenant lead-based paint poisoning context have become increasingly rooted in a violation of a statutory duty of care because such claims circumvent the notice requirement under traditional negligence theory.\(^{49}\) In particular, the past ten years have witnessed a notable change in how Maryland courts construe the interaction between statutory provisions of the Housing Code and the common law regarding a landlord's knowledge of a hazardous condition.\(^{50}\)

a. **Maryland Canons of Statutory Construction.**—To prevent the perpetuation of erroneous principles of law, courts may engage in

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46. *See*, *e.g.*, Julian v. Christopher, 320 Md. 1, 10-12, 575 A.2d 735, 739-40 (1990) (applying a change in the common law's interpretation of "silent consent" clauses prospectively to protect landlord-tenant contracts executed in reliance on the court's prior interpretation).
47. *See infra* Part 2.c(2)-(3).
48. *See infra* notes 85-86 and accompanying text.
49. *See infra* Part 2.c(3).
statutory interpretation.\textsuperscript{51} The fundamental goal of statutory interpretation is to determine the legislature's intent in enacting a statute, which may oftentimes conflict with the existing common law.\textsuperscript{52} To ascertain legislative intent, courts examine the statutory language and give effect to the statute as written, so long as its common meaning is explicit and conveys a plain meaning.\textsuperscript{53} Specifically, Maryland courts generally construe remedial statutes liberally.\textsuperscript{54} On the other hand, Maryland courts also abide by the principle that remedial statutes in derogation of the common law should be construed narrowly.\textsuperscript{55} Thus, Maryland courts face a judicial tension between effectuating remedial statutes and altering precedent.\textsuperscript{56}

Nevertheless, even in the case of a potentially ambiguous remedial statute,\textsuperscript{57} statutory construction seeks to ascertain legislative intent.\textsuperscript{58} For example, in \textit{Carolina Freight Carriers Corp. v. Keane}, the court interpreted the words "21 years old or younger" in the Maryland Wrongful Death Act to encompass everyone in their twenty-first year of life until the evening of their twenty-second year, in derogation of the common law.\textsuperscript{59} The court recognized that the Wrongful Death Act should be strictly construed.\textsuperscript{60} However, the court interpreted the statute in conflict with the common law because such an interpretation effectuated the legislature's purpose in enacting the statute.\textsuperscript{61}
Through statutory interpretation, the court altered the common law to eliminate precedent in conflict with the legislature's intent.62

b. The Operation of Judicial Decisions in Maryland.—Maryland courts generally apply well-established principles of law.63 Occasionally, however, a choice-of-law question arises when a court overrules precedent or renders a new interpretation of a statutory or constitutional provision.64 Under these circumstances, the parties to a pending case may have regulated their conduct and the case may otherwise be decided differently.65 The Supreme Court has identified three primary means of addressing the choice-of-law problem.66 First, and "overwhelmingly the norm," a decision may be given full retroactive effect to the parties before the court and to all others who may pursue allegations.67 Retroactivity comports with the roles of the courts to find law and legislatures to create it.68 Second, on rare occasions, a decision may apply purely prospectively, in which case the decision applies neither to the parties before the court nor to claims where the conduct occurred before that decision.69 Third, under modified or selective prospectivity, a court applies a new rule to the case before it but not to cases based on events arising prior to the decision.70 The Supreme Court largely deserted the latter method because it undermines the theory of judicial review and contravenes the notion that similarly situated parties receive similar treatment.71

In Linkletter v. Walker,72 the Supreme Court set forth factors to resolve whether a new interpretation of a constitutional or statutory provision ought to operate retroactively or prospectively. These fac-

62. Carolina Freight Carriers Corp., 311 Md. at 346, 534 A.2d at 1343.
63. See, e.g., Am. Trucking Ass'ns v. Goldstein, 312 Md. 583, 591, 541 A.2d 955, 958 (1988) (noting that most judicial decisions expound the rule of law that existed before and after the decision).
64. See id. at 591, 541 A.2d at 959 (describing the infrequency of a choice-of-law problem).
65. Id.
67. Id. at 535. The Court asserted that a retroactive application of a judicial decision adheres to "the traditional function of the courts to decide cases before them based upon their best current understanding of the law." Id.
68. Id.
69. Id. at 536. Courts seldom apply pure prospectivity because it tends to undermine the principle of stare decisis and allow courts to act in a legislative fashion. Id.
70. Id. at 537. The Court has primarily used selective prospectivity in the criminal context when the adoption of new procedural rules has enhanced the protection of criminal defendants. Id.
72. 381 U.S. 618 (1965).
tors include the purpose of the new interpretation, the parties' reliance on the rule's prior interpretation, and the equitable considerations of a retrospective application. The Court of Appeals of Maryland has adopted the *Linkletter* factors to decisions regarding the retrospective or prospective effect of a new interpretation of a statute or rule. If the *Linkletter* factors give rise to a prospective application, the Court of Appeals has held that the new interpretation of the statute or constitutional provision applies to the parties before the court, as well as any other cases pending on appellate review where the parties to the case preserved the matter.

When the Court of Appeals of Maryland delivers a decision that changes the common law, its application is prospective, except for the parties before the court. In *Boblitz v. Boblitz*, the court prospectively abrogated the doctrine of interspousal immunity in negligence cases by applying a revised rule to both the case before it and claims occurring after the decision. Similarly, in *Kelley v. R.G. Industries, Inc.*, the court held that a change in the common law regarding the imposition of strict liability on manufacturers and retailers of “Saturday Night Special” guns applied to the parties before the court and to all claims arising after the change, unless the plaintiff could prove that the first promotion of the Saturday Night Special to the public arose before the date of the ruling. Thus, *Boblitz* and *Kelley* both illustrate that the Court of Appeals recognizes that a holding that changes the common law applies retroactively to the parties before the court but prospectively to future claims.

c. The Development of a Statute-Based Legal Framework for Lead-Based Paint Poisoning Claims in Maryland.

73. Id.


75. *Am. Trucking*, 312 Md. at 592, 541 A.2d at 959.

76. Id.


78. 304 Md. 124, 497 A.2d 1143 (1985).

79. See, e.g., Gentry v. Ebersole, 378 Md. 612, 612, 837 A.2d 924, 924 (2003) (holding that *Brooks* applied retroactively to *Gentry* because the petition for certiorari was pending when *Brooks* was issued).
Common Law Origins.—A tenant’s claim of lead-based paint poisoning, caused by lead-based paint present in their leased property, traditionally arose under common-law negligence. To establish a prima facie case of lead-based paint poisoning through negligence, the tenant needed to prove that (1) the landlord owed the tenant a duty of care, (2) the landlord breached that duty, (3) the plaintiff suffered actual injury or loss, and (4) the tenant’s loss or injury proximately resulted from the defendant’s breach of duty. A landlord could not be liable for negligence unless she either knew or had “reason to know” of the hazardous condition on the leased premises and had a reasonable opportunity to correct it. The negligence doctrine also did not impute a duty upon a landlord to inspect her leased premises to determine whether the property retained defective conditions.

Integration of Statutory Provisions into the Common Law.—Because tenants found it difficult to establish a common-law claim that includes a notice requirement, the Maryland General Assembly in 1994 enacted comprehensive lead-based paint poisoning legislation. However, the “Reduction of Lead Risk in Housing” only applies to tenants diagnosed with an elevated blood lead level of twenty-five μg/dl or higher on or after February 24, 1996 or twenty μg/dl or higher on or after February 24, 2001. Thus, tenants diagnosed with an elevated blood level prior to the statutory cutoffs still need to seek redress under alternate means. Frustrated with their inability to

80. See, e.g., Caroline v. Reicher, 269 Md. 125, 304 A.2d 831 (1973) (holding that the liability resulting from a landlord’s negligence of allowing lead-paint chips to remain on his tenant’s property was not impacted by the tenant mother’s alleged contributory negligence in the lead-based paint poisoning of her tenant child). 81. Richwind Joint Venture v. Brunson, 335 Md. 661, 670, 645 A.2d 1147, 1151 (1994). Between 1973 and 1994, virtually no Maryland case law documented landlord-tenant, lead-paint poisoning negligence claims. As a result, the negligence standard expressed in Caroline remained unchanged during this period. 82. See, e.g., Brown v. Dermer, 357 Md. 344, 362, 744 A.2d 47, 57 (2000) (concluding that a tenant can satisfy the “reason to know” test by showing that there was flaking paint in the leased premises and that the landlord had notice of the flaking paint). 83. See, e.g., Scroggins v. Dahne, 335 Md. 688, 693, 645 A.2d 1160, 1162-63 (1994) (refusing to grant liability where a landlord neither had notice of flaking lead paint nor a reasonable opportunity to repair it). 84. Richwind, 335 Md. at 674, 645 A.2d at 1153. 85. See generally MD. CODE ANN., ENVIR. §§ 6-801 to -852 (LexisNexis 2005) (establishing the “Reduction of Lead Risk in Housing” Subtitle, which aims to reduce childhood lead-based paint poisoning while retaining an ample supply of affordable rental housing). 86. Id. § 6-828(b)(1). This Subtitle ultimately preempts the majority of landlord-tenant lead-based paint poisoning actions brought under a negligence theory. 87. See infra Part 2.c(3).
recoup damages for lead-based paint poisoning under negligence, Baltimore City tenants have utilized the preexisting municipal statutory framework to impute duties owed by Baltimore City landlords to their tenants.88

Maryland courts have consistently recognized that the legislature may prescribe a duty owed by a landlord to a tenant.89 Since its 1916 decision in Flaccomio v. Eysink, the Court of Appeals has held that a violation of a statutory duty is merely evidence of negligence, not negligence per se.90 Accordingly, to establish a prima facie case of negligence, lead-poisoned Maryland tenants must further demonstrate that an alleged statutory violation is the proximate cause of their injury.91 Proximate cause is established by demonstrating that the plaintiff is within the class of individuals that the statute intended to protect and that the injury is of the type that legislators designed the statute to prevent.92

The legislative history of the Housing Code reveals that its drafters expressly sought to protect Baltimore City children from lead-based paint poisoning.93 The Baltimore City Council recognized that the greatest source of childhood lead-based paint poisoning was flaking paint.94 Accordingly, in 1966, the Council codified provisions such as sections 702 and 703, which required leased properties to be free of flaking paint.95 Hence, the Council, through the Housing Code, wished to place Baltimore City landlords on notice of unsafe conditions that needed repair.96

88. See BALTIMORE, MD. HOUSING CODE §§ 702(a), 703(b)(3) (2000) (providing Baltimore City tenants with a basis for a claim against their landlord for injuries sustained from lead-based paint poisoning on their leased premises).
89. Brown v. Dermer, 357 Md. 344, 358, 744 A.2d 47, 55 (2000). Principally, the breach of a landlord's duty in a lead-based paint negligence action emanates from a violation of either an implied warranty of habitability or a statutory provision specifically governing the use or removal of lead-based paint, such as §§ 702(a) and 703(b)(3) of the Housing Code. Richwind, 335 Md. at 671-72, 645 A.2d at 1152.
92. Id.
93. Brown, 357 Md. at 367-69, 744 A.2d at 60-61 (discussing the historical context and purpose of the Housing Code).
94. Id. at 367-68, 744 A.2d at 60.
95. Id.; see also BALTIMORE, MD. HOUSING CODE §§ 702(a), 703(b)(3) (2000).
96. Brown, 357 Md. at 368, 744 A.2d at 60. The Brown court noted that if landlords could raise lack of knowledge that the flaking paint was lead-based as a defense against liability, the Housing Code's utility would diminish. Id. at 369, 744 A.2d at 61.
(3) *The Effect of the Housing Code on the Common Law.*—Because of statutory provisions designed to protect tenants from lead-based paint poisoning, the Court of Appeals began to interpret the effect of the Housing Code on the common law. In *Richwind Joint Venture v. Brunson*, a Baltimore City tenant brought a negligence action on behalf of her minor children against their landlord and the landlord's management company for lead-based paint poisoning injuries incurred because of paint on their leased premises.97 The court recognized that even in the absence of liability under a common-law negligence action, the Housing Code imposes a statutory obligation on Baltimore City landlords to abate flaking paint on their leased premises.98 However, the court noted that neither the common law nor the Housing Code imposes on Baltimore City landlords an affirmative duty to continually inspect their leased properties because the owner is not the "insurer" of its tenants.99

In analyzing the impact of the Housing Code on the common law, the *Richwind* court reasoned that the drafters of the Code did not intend for its provisions to alter the common law "absent any clear indication to the contrary."100 Consequently, the court construed the Housing Code and the common law to both require a landlord to have notice of a hazard on the property and a reasonable opportunity to fix it.101 The court asserted that the notice provisions of the Housing Code102 require the Commissioner of Housing and Community Development to provide the landlord with notice of a Code violation.103 In contrast, under the common law, a tenant or other person needed to provide the landlord with notice.104 The court held that the Housing Code did not preempt the common law's notice requirement, which holds a landlord liable for Code violations only if he either knew or had reason to know of the hazardous condition and had a reasonable opportunity to ameliorate the hazard.105 The court found that the landlord and management company received notice

97. 335 Md. 661, 669, 645 A.2d 1147, 1150 (1994).
98. Id. at 670-71, 645 A.2d at 1151.
99. Id. at 674-75, 645 A.2d at 1153; Ramsey v. D.P.A. Assocs., 265 Md. 319, 321, 289 A.2d 321, 323 (1972); Elmar Gardens, Inc. v. Odell, 227 Md. 454, 457, 177 A.2d 263, 265 (1962)).
100. 355 Md. at 672, 645 A.2d at 1152.
101. Id. at 674, 645 A.2d at 1153.
103. Richwind, 335 Md. at 675, 645 A.2d at 1153.
104. Id.
105. Id. at 676, 645 A.2d at 1154.
and were negligent because they failed to disclose knowledge about peeling lead-based paint in the tenant’s home.\textsuperscript{106}

Later that same day, the Court of Appeals decided \textit{Scroggins v. Dahne}, in which the court affirmed its reasoning in \textit{Richwind} by concluding that the Housing Code did not supersede the common-law requirement that a landlord must have knowledge or a reason to know of a hazardous condition on the leased premises to be liable for negligence.\textsuperscript{107} Here, because the court found that the landlords had neither notice of the flaking lead-based paint nor an opportunity to repair the condition, it held that the landlords were not liable for negligence to their injured tenants.\textsuperscript{108}

Six years later, in \textit{Brown v. Dermer}, the court modified the stringent common-law knowledge requirements set forth in \textit{Richwind}.\textsuperscript{109} The court established that a plaintiff merely needs to prove that his leased premises had flaking, loose, or peeling paint and that the landlord had notice of the flaking paint to establish the “reason to know” element of a negligence analysis.\textsuperscript{110} The court also stated that whether the flaking paint was actually lead-based was irrelevant.\textsuperscript{111} Because the landlords in \textit{Brown} received notice that their leased property contained flaking, peeling, or loose paint, the court held that even if they were unaware of the paint’s lead content, the landlords should have recognized the potentially dangerous condition presented by the defect and corrected the hazard.\textsuperscript{112}

In 2003, the Court of Appeals in \textit{Brooks v. Lewin Realty III, Inc.} fundamentally altered the nexus between the Housing Code and the common law of negligence by eliminating the prerequisite of a landlord’s notice of a hazardous condition prior to establishing his liability for negligence.\textsuperscript{113} \textit{Brooks} involved a tenant’s negligence action against her landlord for the tenant’s minor son’s consumption of flaking lead-based paint on the rental property.\textsuperscript{114} The court adhered to the common-law principle set forth in \textit{Brown} and numerous other cases that where a defendant’s duty is set forth by a statute or ordinance de-

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 678-80, 645 A.2d at 1155-56.
\item \textsuperscript{107} 335 Md. 688, 690, 645 A.2d 1160, 1161 (1994).
\item \textsuperscript{108} \textit{Id.} at 693, 645 A.2d at 1162-63.
\item \textsuperscript{109} 357 Md. 344, 362, 744 A.2d 47, 57 (2000).
\item \textsuperscript{110} \textit{Id.} The court divined that in enacting the Housing Code, the Baltimore City Council intended to put landlords on notice that any flaking paint is deemed a hazard. \textit{Id.} at 371, 744 A.2d at 62.
\item \textsuperscript{111} \textit{Id.} at 362, 744 A.2d at 57.
\item \textsuperscript{112} \textit{Id.} at 368-69, 744 A.2d at 60-61.
\item \textsuperscript{113} 378 Md. 70, 72, 835 A.2d 616, 617 (2003).
\item \textsuperscript{114} \textit{Id.}
\end{itemize}
signed to protect a specific class of persons, and the plaintiff is a member of that class, violation of that statute constitutes evidence of negligence. The court then acknowledged that to establish a prima facie case of negligence, an injured plaintiff need only demonstrate (1) a violation of a statute or ordinance designed to protect a class of persons, including themselves, and (2) that the violation proximately caused the injury. Thus, the court concluded that if the plaintiff establishes evidence that the statutory violation proximately caused his injury, then the court should submit this evidence to the jury to determine whether the defendant acted reasonably under the circumstances.

By emphasizing that prior precedent did not require the plaintiff to prove the defendant’s knowledge of his statutory violation to establish negligence, the Brooks court departed from the Court of Appeals’s holding in Richwind. Analyzing the Housing Code, the court referred to legislative history cited in Brown to illustrate that the purpose of the Code is to protect persons like the minor tenant plaintiff in Brooks from lead-based paint poisoning. Accordingly, the court reiterated that if the plaintiff can demonstrate that a Housing Code violation proximately caused his injuries, then Maryland law does not require him to prove that his landlord had notice of the violation. Interpreting the plain meaning of the Housing Code, the court then asserted that the Code imputes a continuous duty on Baltimore City landlords to ensure compliance with its provisions. The court explained that the trier of fact examines these efforts to determine whether the landlord acted reasonably under the circumstances.

115. Id. at 78, 835 A.2d at 620-21.
116. Id. at 79, 835 A.2d at 621.
117. Id.
118. Id. at 80, 835 A.2d at 622.
119. Id. at 86-87, 835 A.2d at 625-26.
120. Id. at 81, 835 A.2d at 622. The Brooks court also referred to the remedial objective of the Housing Code and the Mayor and City Council’s intention that the Code be “liberally construed to effectuate [its] purposes.” Id.
121. Id.
122. Id. at 83-84, 835 A.2d at 624. The court noted that the duty under the Housing Code did not equate compliance at the beginning of the tenant’s lease to continued Code compliance. Id. at 84, 835 A.2d at 624. The Housing Code grants landlords access to their leased premises “at all reasonable times” for conducting inspections and repairs needed to comply with the Code. Id. However, in a dissenting opinion joined by Judge Wilner, Judge Raker reasoned that the tenant is in a superior position to detect potential Code violations. Id. at 87, 835 A.2d at 623 (Raker & Wilner, JJ., dissenting). Thus, Judge Raker opined that the tenant should notify the landlord of the hazard, rather than the landlord having an affirmative duty to inspect the property. Id.; see also BALTIMORE, MD. HOUSING CODE § 909 (2000) (permitting landlords to conduct periodic inspections in their leased properties).
123. Brooks, 378 Md. at 86, 835 A.2d at 625.
Lastly, the court addressed the clash between its holding and its prior opinion in *Richwind.* The court recognized *Richwind's* acknowledgement that while a violation of a duty or implied warranty prescribed in the Housing Code can serve as the foundation for a tenant's negligence action against her landlord, a landlord's liability hinges upon his notice of the violation and a reasonable opportunity to repair it. Furthermore, the court criticized *Richwind's* proposition that notice provisions in the Housing Code do not supplant the common-law notice requirement. The court determined that the Housing Code requirement is solely an administrative provision unrelated to a liability requirement that tenants must provide their landlord with notice of a hazardous condition. Therefore, the court held that regardless of the landlord's notice of the hazardous condition, the plaintiff established a prima facie case of negligence by showing that he is a child injured by lead-based paint poisoning because of flaking, loose, or peeling paint consumed on the landlord's leased premises.

3. **The Court's Reasoning:**—In *Polakoff,* the Court of Appeals of Maryland held that the *Brooks* criterion for establishing a prima facie case of negligence based upon a Housing Code violation applied to all pending cases at the time that *Brooks* was filed. The court also held that (1) it correctly decided *Brooks,* (2) the Court of Special Appeals properly applied *Brooks* to the case before it, and (3) a jury could reasonably conclude based on the evidence that the landlord and the landlord's management company did not act reasonably under the circumstances to comply with the Housing Code. Therefore, the court affirmed the judgment of the Court of Special Appeals and upheld the retroactive application of *Brooks* to the case before it.

124. *Id.*
125. *Id.* at 86-87, 835 A.2d at 625-26.
126. *Id.* at 87, 835 A.2d at 626.
127. The court explains that notice requirements in sections 301 and 303 provide for a landlord's due process in administrative actions taken by the Commissioner of Housing and Community Development to order Housing Code compliance. *Id.* at 88, 835 A.2d at 626-27.
128. *Id.* at 87-89, 835 A.2d at 626-27.
129. *Id.* at 89, 835 A.2d at 627.
130. 385 Md. at 473, 869 A.2d at 841.
131. *Id.* at 473, 485, 489, 869 A.2d at 841, 848, 851.
132. *Id.* at 473, 869 A.2d at 841.
Writing for the majority, Judge Greene first addressed whether Brooks was properly decided. The court recognized that Brooks reaffirmed the well-established common-law rule that where a statutory framework intends to protect a class of persons, including the petitioner, a violation of the statute or ordinance is evidence of negligence. Citing Brooks, the Polakoff court also noted that to establish a prima facie case of negligence, the plaintiff must only demonstrate a statutory violation, as well as prove that the violation proximately caused the alleged injury. However, the Polakoff court recognized that Brooks found that once a tenant establishes a prima facie case of negligence against a landlord, liability hinges upon whether a landlord's actions to avoid a statutory violation are considered by a trier of fact as reasonable under the circumstances. Therefore, through its citations to Brooks, the Polakoff court aimed to determine that a defendant's knowledge of a statutory violation is no longer essential to prove liability.

The Polakoff court then addressed the nexus between the Housing Code and the common-law negligence rule set forth in Brooks. It reiterated that a violation of the Housing Code's affirmative duty upon landlords to continuously keep their properties free of any flaking, loose, or peeling paint equates to evidence of negligence rather than liability. The court in Polakoff noted that a landlord can avoid liability by proving that she acted reasonably under the circumstances despite her Housing Code violations. To illustrate the Housing Code's effect on the common law, the Polakoff court next discussed the impact of Brooks on Richwind. The court in Polakoff contrasted its Richwind opinion, where it found that the notice provisions in the

133. Chief Judge Bell and Judges Cathell, Harrell, Battaglia, and Greene comprised the majority. Id. at 471, 869 A.2d at 840.
134. Id. at 475, 869 A.2d at 842.
135. Id. at 476, 869 A.2d at 842.
136. Id., 869 A.2d at 843.
137. Id. at 476-77, 869 A.2d at 843.
138. Id. at 477, 869 A.2d at 843.
139. Id. at 477-80, 869 A.2d at 843-45.
140. Id.
141. Id. at 480, 869 A.2d at 845. The court offered a list of actions that may evidence to a trier of fact that a landlord was acting reasonably under the circumstances. Id. at 481, 869 A.2d at 845-46. These include: (1) removing lead paint from the property; (2) alerting the tenant of the potential incidence of, and health risks associated with, the existence of lead paint in the property; (3) suggesting that the tenants quickly warn the landlord or property manager if they notice a potential Housing Code violation; and (4) performing frequent inspections of the property throughout the tenancy to ensure Code compliance. Id.
142. Id. at 481-82, 869 A.2d at 846.
Housing Code\textsuperscript{143} did not preempt the common-law notice requirement to establish liability with the notice-free liability standard that it adopted in \textit{Brooks}.\textsuperscript{144} Remaining critical of \textit{Richwind}'s reasoning, the \textit{Polakoff} court emphasized that the notice provisions in the Housing Code do not modify the requirements needed to establish a prima facie case of negligence under \textit{Brooks}.\textsuperscript{145} Moreover, the \textit{Polakoff} court again endorsed \textit{Brooks}'s analysis regarding the required elements for a prima facie case of negligence based upon a violation of the Housing Code.\textsuperscript{146}

After reviewing the legal background and subsequent conflict regarding the required elements of a prima facie case in a lead-based paint negligence action, the \textit{Polakoff} court returned to the facts of the case before it to justify the jury's determination that Polakoff and Chase did not act reasonably under the circumstances.\textsuperscript{147} The court in \textit{Polakoff} noted that Crystal, on behalf of Turner, established a prima facie case of negligence under the \textit{Brooks} standard because she (1) produced testimony of Housing Code violations from flaking, loose, or peeling paint in the property and (2) demonstrated that the Code violations proximately caused Turner's lead-based paint poisoning because she is a member of the class of persons the Code is designed to protect and her injury is the type of harm that the Code aims to avert.\textsuperscript{148} Because Crystal established a prima facie case of negligence, the \textit{Polakoff} court reasoned that the circuit court properly submitted Turner's negligence action to the jury to resolve whether Polakoff and Chase acted as reasonable landlords under the circumstances.\textsuperscript{149} After considering Polakoff's testimony,\textsuperscript{150} the court determined that Polakoff did not act reasonably under the circumstances.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{143} Baltimore, Md. Housing Code §§ 301-303 (2000).
\item \textsuperscript{144} Polakoff, 385 Md. at 481-82, 869 A.2d at 846.
\item \textsuperscript{145} Id. at 482, 869 A.2d at 846. In a footnote, the court refuted Polakoff and Chase's argument that \textit{Brooks}'s interpretation of the Housing Code is flawed by citing the demise of City Council Bill 04-1276, a failed amendment to the Code that was introduced after \textit{Brooks}. \textit{Id.} at 482 n.10, 869 A.2d at 846 n.10. The bill, if enacted, would have expressly stated that the Housing Code did not modify the common-law notice requirement. \textit{Id.}
\item \textsuperscript{146} Id. at 483, 869 A.2d at 847.
\item \textsuperscript{147} Id. at 483-85, 869 A.2d 847-48.
\item \textsuperscript{148} Id. at 484, 869 A.2d at 847-48.
\item \textsuperscript{149} Id., 869 A.2d at 848.
\item \textsuperscript{150} Polakoff's testimony indicated that he was aware of the Housing Code requirements and the potential lead-paint hazard existing on the property. \textit{Id.} at 484-85, 869 A.2d at 848. Nevertheless, he opted to rely on notification by tenants of potential Housing Code violations in lieu of routine inspections. \textit{Id.}
\item \textsuperscript{151} Id. at 485, 869 A.2d at 848.
\end{itemize}
Finally, the Polakoff court addressed whether Brooks applied to the case before it.\textsuperscript{152} At the outset, the Polakoff court distinguished between the three predominant application classifications for judicial decisions: retroactive, purely prospective, and modified or selectively prospective.\textsuperscript{153} The Polakoff court then adopted the analysis of the U.S. Supreme Court in Linkletter v. Walker, which introduced factors to follow in applying a new interpretation of a constitutional provision, statute, or rule.\textsuperscript{154} However, the Polakoff court also noted that even if a Linkletter analysis yields prospective application, both federal and Maryland common law dictate that a new interpretation of a constitutional provision, statute, or rule retroactively includes the case before the court and all other pending cases where the relevant question remains preserved for appellate review.\textsuperscript{155}

Because the Polakoff court already decided that Brooks's modified standard for establishing a prima facie case of negligence provided a new interpretation of the Housing Code rather than a change in the common law,\textsuperscript{156} the court determined that the statutory interpretation provided in Brooks should apply retroactively to all pending cases where the issue is ripe for appellate review, including the case before the court.\textsuperscript{157} To further support this conclusion, the Polakoff court cited Gentry v. Ebersole, a case pending in the Court of Appeals of Maryland when Brooks was filed, in which the Court of Appeals, through a per curiam opinion, remanded for further proceedings consistent with Brooks.\textsuperscript{158} Lastly, the Polakoff court noted that even if Brooks did not apply retroactively to the case before the court, the circuit court determined that Polakoff and Chase had sufficient knowledge of the flaking, loose, or peeling paint to establish liability under the preexisting standard.\textsuperscript{159} Hence, the Polakoff court affirmed the circuit court's denial of Polakoff and Chase's motion for judgment notwithstanding the verdict due to a lack of evidence.\textsuperscript{160}

\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 487, 869 A.2d at 849.
\textsuperscript{155} Id. at 487-88, 869 A.2d at 849-50.
\textsuperscript{156} The Polakoff court noted that Court of Appeals of Maryland decisions that change the common law warrant what the Supreme Court identifies as selectively prospective application. Id. at 488 n.14, 869 A.2d at 850 n.14. Recognizing the confusion regarding various courts' interpretation of selective prospectivity, the court deferred to its own prior application of the term, which construed selective prospectivity to mean fully prospective, excluding the parties before the court. Id.
\textsuperscript{157} Id. at 489, 869 A.2d at 850-51.
\textsuperscript{158} Id., 869 A.2d at 851.
\textsuperscript{159} Id. at 489-90, 869 A.2d at 851.
\textsuperscript{160} Id. at 490, 869 A.2d at 851.
Judge Raker dissented\(^{161}\) to contend that *Brooks* only applied prospectively because Baltimore City landlords, like Polakoff, had a right to rely upon the Maryland common law described in *Richwind*.\(^{162}\) She argued that a retrospective application of *Brooks* was unfair to landlords who had no reason to anticipate the affirmative duty set forth in its ruling.\(^{163}\) Finally, Judge Raker referenced her dissenting opinion in *Brooks* to reiterate her belief that *Brooks* was wrongly decided.\(^{164}\)

4. Analysis.—In *Polakoff v. Turner*, the Court of Appeals reaffirmed its decision in *Brooks*, in which it overturned years of lead-based paint poisoning precedent by eliminating the common-law requirement that a landlord must receive notice of a Housing Code violation for a tenant to establish a prima facie case of negligence.\(^{165}\) In spite of *Brooks*’s potent impact on the common law, the court retroactively applied *Brooks* to *Polakoff* because it concluded that *Brooks* provided a new interpretation of the Housing Code.\(^{166}\) The *Polakoff* court correctly decided that before *Brooks*, the Court of Appeals of Maryland failed to recognize the legislature’s intent in enacting the Housing Code.\(^{167}\) The majority’s decision, however, was flawed for two principal reasons. First, the court misinterpreted its holding in *Brooks* as a revised interpretation of the Housing Code instead of as a belated, justified expansion of the Housing Code’s authority, which derogated the common law.\(^{168}\) Second, by misinterpreting *Brooks*, the majority erred in retroactively applying *Brooks*.\(^{169}\) The court should have prospectively applied *Brooks* to *Polakoff*, which would have produced the same result as a retroactive application, without undermining the true impact of *Brooks*.\(^{170}\)

a. A Misinterpretation of Brooks.—The *Polakoff* court correctly identified the Court of Appeals’s pre-*Brooks* inability to effectu-
ate the legislature’s intent in enacting the Housing Code. But it failed to properly interpret *Brooks* as the first Maryland lead-based paint poisoning negligence case in which the Court of Appeals effectuated the legislature’s intent in enacting the Housing Code.

(1) The Majority’s Interpretation of Maryland Lead-Based Paint Poisoning Jurisprudence Prior to *Brooks* Acknowledges the Court of Appeals’s Failure to Effectuate the Legislature’s Intent in Enacting the Housing Code.— The *Polakoff* court appropriately recognized that until its landmark decision in *Brooks*, the Court of Appeals erroneously refused to interpret the Housing Code’s provisions as an elimination of the common-law notice requirement needed to establish liability against a landlord in a lead-based paint poisoning negligence action.\(^{171}\) In 1966, the Baltimore City Council enacted the Housing Code to expressly eliminate the common-law notice requirement.\(^{172}\) Yet, as evidenced through the *Polakoff* court’s description of its 1994 *Richwind* decision,\(^{173}\) for more than thirty years following the Housing Code’s enactment, plaintiffs rarely established liability because of the common-law notice requirement.\(^{174}\)

By illuminating the difference between a landlord’s duties under the common law and under a statutory framework, *Polakoff* validates the legislature’s enactment of the Housing Code.\(^{175}\) The *Polakoff* court recited the *Brooks* court’s proposition that a landlord has no common-law duty to keep its rental properties free of flaking paint or to inspect them at any point during the lease.\(^{176}\) Accordingly, the *Polakoff* court understood that in the absence of a statute, a tenant could only establish liability by asserting that the landlord breached a duty of care owed to the tenant, that the tenant suffered actual injuries as a result of this breach, and that the landlord knew or had reason to know of a hazardous condition in the leased premises and had a rea-

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171. 385 Md. at 481-82, 869 A.2d at 846.
172. See supra notes 93-96 and accompanying text.
173. 385 Md. at 481-82, 869 A.2d at 846.
174. See, e.g., Scroggins v. Dahne, 335 Md. 688, 693, 645 A.2d 1160, 1162-63 (1994) (holding a landlord unaccountable for his tenant’s lead-based paint injuries because he had neither notice of flaking paint nor a reasonable opportunity to repair the hazard); Caroline v. Reicher, 269 Md. 125, 136, 304 A.2d 831, 837 (1973) (refusing to hold a tenant mother liable for her alleged contributory negligence in the lead-based paint poisoning of her tenant child while also demonstrating that the landlord would need to “negligently permit[ ]” the lead-paint chips to remain on the leased property to be liable for negligence).
175. 385 Md. at 475-76, 869 A.2d at 842-43.
176. *Id.*
The court effectively contrasted the less burdensome elements needed to establish a prima facie case of negligence when a landlord's duty is prescribed by statute with the more stringent elements required when the duty emerges solely from the common law. \( \text{(177)} \)

The court also correctly criticized the Maryland Court of Appeals's holding in \textit{Richwind}, which required a landlord's knowledge of a hazardous condition and a reasonable opportunity to abate it. \( \text{(178)} \)

In reviewing \textit{Brooks}, the majority aptly recognized the Court of Appeals's later disapproval of the \textit{Richwind} court's mistaken assertion that the Housing Code did not abrogate the common-law notice requirement. \( \text{(179)} \)

By realizing that \textit{Brooks} clashed with \textit{Richwind}'s flawed construction of the Housing Code, the \textit{Polakoff} court also acknowledged the precedential value of \textit{Richwind}, upon which the Court of Appeals relied heavily in subsequent cases. \( \text{(180)} \)

\text{(2) The Majority's Flawed Interpretation of Brooks Fails to Recognize the First Maryland Lead-Based Paint Poisoning Negligence Case in Which the Court of Appeals of Maryland Effectuated the Legislature's Intent in Enacting the Housing Code.—Polakoff undermines the Brooks court's overruling of \textit{Richwind}, which acknowledged that \textit{Richwind} and its progeny failed to properly construe the Housing Code. \( \text{(181)} \)

The majority cited to \textit{Brooks}'s reasoning, which abandoned \textit{Richwind}'s conclusion that the Housing Code changed the notice requirement needed to

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179. \textit{Polakoff}, 385 Md. at 476, 869 A.2d at 843. \textit{Compare} \textit{Brooks}, 378 Md. at 78-79, 835 A.2d at 621 (noting that to establish a prima facie case of negligence, a plaintiff must demonstrate that (1) she is a member of the class that the statute, which the landlord violated, is designed to protect, and (2) the violation proximately caused her injuries), \textit{with Richwind}, 335 Md. at 670, 645 A.2d at 1151 (explaining that to make out a prima facie case of negligence, the plaintiff must prove that (1) the landlord owed the tenant a duty of care, (2) the landlord breached that duty, (3) the tenant suffered actual injury or loss, and (4) the tenant's loss or injury proximately resulted from the defendant's breach of duty).
180. 385 Md. at 481-82, 869 A.2d at 846.
181. \textit{Id.} at 482, 869 A.2d at 486.
182. \textit{See supra} notes 107-113 and accompanying text.
establish a prima facie case of negligence based upon the Code.\textsuperscript{184} Moreover, the majority properly recognized that the \textit{Brooks} court adhered to principles of statutory construction,\textsuperscript{185} examined provisions in the Housing Code, and then effectuated the plain meaning of the statute to hold that the Code imputes a continuous duty on Baltimore City landlords to ensure compliance with the Code's provisions.\textsuperscript{186} As no Maryland case law prior to \textit{Brooks} interpreted the Housing Code in such a manner,\textsuperscript{187} the \textit{Polakoff} court clarified that \textit{Brooks} effectuated two key principles: (1) it eliminated the common-law notice requirement necessary to establish a prima facie case of negligence\textsuperscript{188} and (2) it expanded the Code's jurisdiction by imposing an affirmative statutory duty upon landlords.\textsuperscript{189} Nevertheless, the \textit{Polakoff} court ignored its own elucidation of \textit{Brooks}'s impact on the common law and, therefore, refused to view \textit{Brooks} as more than a reinterpretation of the Housing Code.\textsuperscript{190}

Instead, the majority should have deferred to the \textit{Brooks} court's incorporation of legislative intent into its decision\textsuperscript{191} by interpreting \textit{Brooks} as a change in the common law. While a statute is not intended to supersede the common law absent any clear indication to the contrary,\textsuperscript{192} the \textit{Brooks} court correctly emphasized the Housing Code's express declaration that due to the statute's remedial nature, the Code should be liberally construed.\textsuperscript{193} Accordingly, adhering to canons of statutory construction,\textsuperscript{194} the \textit{Brooks} court prudently justified its hold-

\begin{itemize}
  \item[\textsuperscript{184}] \textit{Polakoff}, 385 Md. at 482, 869 A.2d at 846.
  \item[\textsuperscript{185}] See Stearman v. State Farm Mut. Auto. Ins. Co., 381 Md. 436, 448, 849 A.2d 539, 546-47 (2004) (asserting that the effectuation of legislative intent, the primary purpose of statutory interpretation, can be achieved by examining the words of a statute and then construing the statute to convey its plain meaning); see also Garg v. Garg, 163 Md. App. 546, 592, 881 A.2d 1180, 1206 (2005) (noting that it is the judiciary's function to perform statutory interpretation).
  \item[\textsuperscript{186}] \textit{Polakoff}, 385 Md. at 478, 869 A.2d at 844.
  \item[\textsuperscript{187}] See supra notes 97-112.
  \item[\textsuperscript{188}] 385 Md. at 483, 869 A.2d at 847.
  \item[\textsuperscript{189}] Id. at 478, 869 A.2d at 844.
  \item[\textsuperscript{190}] Id. at 489, 869 A.2d at 851.
  \item[\textsuperscript{191}] Brooks v. Lewin Realty III, Inc., 378 Md. 70, 81, 835 A.2d 616, 622 (2003).
  \item[\textsuperscript{192}] E.g., Bradshaw v. Prince George's County, 284 Md. 294, 302, 396 A.2d 255, 260 (1979).
  \item[\textsuperscript{193}] 378 Md. at 81, 835 A.2d at 622; see also State v. Barnes, 273 Md. 195, 208, 328 A.2d 787, 745 (1974) (advocating a liberal construction of all remedial statutes, regardless of whether they include express declarations of their construction, as such statutes are intended to rectify the existing law and avert further exacerbation of flawed common-law precedent).
  \item[\textsuperscript{194}] See Arundel Corp. v. Marie, 383 Md. 489, 502, 860 A.2d 886, 894 (2004) (assessing the court's need to divine legislative intent in construing remedial statutes); see also Carolina Freight Carriers Corp. v. Keane, 311 Md. 335, 339-44, 534 A.2d 1337, 1339-42 (1988).  
\end{itemize}
ing by utilizing the legislative history of the Housing Code.\textsuperscript{195} In so doing, the \textit{Brooks} court clarified that if the Court of Appeals of Maryland considers a statute sufficiently ambiguous, then the court should adopt an alternate construction in accordance with the common law.\textsuperscript{196} Further, the \textit{Brooks} court directly incorporated into its decision the Housing Code's purpose of protecting a class of persons, including children like the plaintiff, from lead-based paint poisoning.\textsuperscript{197} Thus, the \textit{Polakoff} court's refusal to acknowledge \textit{Brooks}'s impact on the common law unconvincingly refutes \textit{Brooks}'s incorporation of the legislative history of the Housing Code and counterintuitively supports a strict construction of the statute, contrary to the legislature's intent.

Further, the \textit{Polakoff} court's conclusion that \textit{Brooks} did not change the common law\textsuperscript{198} directly attacks the \textit{Brooks} court's well-reasoned analysis that if a plaintiff can demonstrate that a Housing Code violation proximately caused her injuries, then Maryland law does not require her to prove that her landlord had notice of the violation.\textsuperscript{199} By construing the Housing Code to no longer require notice, \textit{Brooks}'s holding established a new interpretation of the Code as precedent, thereby changing the liability standard for tenants to prevail against their landlords in later lead-based paint poisoning actions.\textsuperscript{200} Because the \textit{Polakoff} court affirmed its holding in \textit{Brooks}, it reinforced its previous construction of the Housing Code and created additional precedent for the Court of Appeals of Maryland to bolster the overturning of \textit{Richwind} and its progeny by \textit{Brooks}.\textsuperscript{201} Hence, the \textit{Polakoff} court's contention that its decision in \textit{Brooks} corrected the \textit{Richwind} court's misreading of the Housing Code, instead of changing the common law,\textsuperscript{202} is incompatible with the \textit{Brooks} decision's effect on precedent.

\begin{itemize}
  \item \textsuperscript{195} 378 Md. at 81, 835 A.2d at 622.
  \item \textsuperscript{196} \textit{Id.; see also Witte v. Azarian}, 369 Md. 518, 525-26, 801 A.2d 160, 165 (2002) (explaining that for a potentially ambiguous statute, courts can look to other extrinsic sources, such as the statute's legislative history, to ascertain legislative intent).
  \item \textsuperscript{197} 378 Md. at 81, 835 A.2d at 622.
  \item \textsuperscript{198} 385 Md. at 489 n.16, 869 A.2d at 850 n.16.
  \item \textsuperscript{199} \textit{Brooks}, 378 Md. at 81, 835 A.2d at 622.
  \item \textsuperscript{200} \textit{Polakoff}, 385 Md. at 483, 869 A.2d at 847.
  \item \textsuperscript{201} \textit{Id.} at 473, 869 A.2d at 841.
  \item \textsuperscript{202} \textit{Id.} at 489 & n.16, 869 A.2d at 850 & n.16.
\end{itemize}
The Polakoff court’s reference to the failure of Baltimore City Council Bill 04-1276 further supports the argument that Brooks changed the common law and expanded the Housing Code’s jurisdiction. If Brooks did not change the common law, then the City Council would likely not have produced such a compelling statement, in the aftermath of Brooks, rejecting the notion that Brooks altered the common law of negligence. The bill likely died in committee because Maryland lawmakers acknowledged that the proposed amendment ran contrary to the intent of the legislature in enacting the Housing Code, as well as the aim of Brooks.

Moreover, the Polakoff court’s reference to City Council Bill 04-1276 is also distinguishable from the Hardy court’s refusal to preempt the common-law misdemeanor of attempted murder by Courts and Judicial Proceedings Article 27, section 12 of the Maryland Code. In Hardy, an amendment to the statute identified an alternate statutory construction. Therefore, the Hardy court effectuated the amendment’s intent by refusing to preempt the common law. In contrast to Hardy, no such contrary legislation exists in Polakoff. Hence, a lack of legislative opposition to the Brooks court’s construction of the Housing Code additionally supports the conclusion that Brooks appropriately construed the Housing Code and changed the common law.

b. The Majority’s Misinterpretation of Brooks Resulted in a Misapplication of Judicial Precedent.—The Polakoff court erred by retroactively applying Brooks. Although retroactive application is the most common means of addressing a choice-of-law problem, the Court of Appeals of Maryland in Polakoff appropriately recognized that prospective applications of judicial decisions are fitting when the court...
changes the common law.\textsuperscript{214} Maryland jurisprudence reveals that once the Court of Appeals selects a prospective application of a judicial decision because of its impact on the common law, it applies the judicial decision retroactively to the parties before the court.\textsuperscript{215} Therefore, despite criticism surrounding selective prospectivity,\textsuperscript{216} the Polakoff court conceded that even when the court adopts a purely prospective application of a judicial decision, its application is actually selectively prospective.\textsuperscript{217} Accordingly, because Brooks changed the common law, the Polakoff court should have prospectively applied the Brooks decision to the case before it.\textsuperscript{218} In adherence to precedent, a prospective application would prescribe that Brooks retroactively apply to Polakoff and any other parties before the court but prospectively to all other claims.\textsuperscript{219}

Instead, in retroactively applying the Brooks decision, the Polakoff majority unjustifiably relied on the factors set forth in Linkletter and adopted in American Trucking.\textsuperscript{220} The guidance provided by these cases is only appropriate when a court decides whether a new interpretation of a constitutional or statutory provision is to be given retroactive or prospective effect, not when the court changes the common law.\textsuperscript{221} Because the Polakoff court reasoned that Brooks presented a

\textsuperscript{214} 385 Md. at 488 n.14, 869 A.2d at 850 n.14; see, e.g., Julian v. Christopher, 320 Md. 1, 10-12, 575 A.2d 735, 739-40 (1990) (protecting landlord-tenant reliance on contracts executed under prior precedent by applying a change in the common-law interpretation of "silent consent" clauses prospectively).

\textsuperscript{215} E.g., Gentry v. Ebersole, 378 Md. 612, 612, 837 A.2d 924, 924 (2003) (applying retroactively the otherwise prospective Brooks holding because the petition for certiorari was pending when Brooks was decided); Kelley v. R.G. Indus., Inc., 304 Md. 124, 162, 497 A.2d 1143, 1162 (1985) (applying prospectively a modified imposition of strict liability on manufacturers and retailers of Saturday Night Special guns by subjecting the parties before the court and all claims arising after the decision to the new rule); Boblitz v. Boblitz, 296 Md. 242, 275, 462 A.2d 506, 522 (1983) (abrogating prospectively the doctrine of interspousal immunity in negligence cases while retroactively applying the modified standard to the parties before the court and claims occurring after the filing of the decision).

\textsuperscript{216} Polakoff, 385 Md. at 488 & n.15, 869 A.2d at 850 & n.15; see, e.g., Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94-95 (1993) (disparaging selective prospectivity in favor of retroactivity).

\textsuperscript{217} 385 Md. at 488, 869 A.2d at 850; see also supra note 70 and accompanying text.

\textsuperscript{218} See supra notes 76-79 and accompanying text.

\textsuperscript{219} See supra notes 76-79 and accompanying text.

\textsuperscript{220} Polakoff, 385 Md. at 487-88, 869 A.2d at 849-50.

\textsuperscript{221} See, e.g., Linkletter v. Walker, 381 U.S. 618, 636 (1965) (articulating factors to use when a court issues a new interpretation of a statute, rule, or constitutional provision); Am. Trucking Ass'ns v. Goldstein, 312 Md. 583, 592, 541 A.2d 955, 959 (1988) (adopting the Linkletter factors for use in Maryland cases where the question presented is whether a new interpretation of a statutory or constitutional provision should apply retroactively or prospectively).
"different interpretation of a statute," only in a short footnote did the majority distinguish the Linkletter and American Trucking analysis from the reasoning applicable for those cases in which the Court of Appeals of Maryland changes the common law. Ironically, in the same footnote, the court cited American Trucking, the same case that the court relied upon to fashion its flawed retroactive decision. Here, American Trucking provides appropriate direction for a selectively prospective application of the Brooks decision to the case at bar because it sets forth the rule that the Court of Appeals of Maryland should prospectively apply its ruling when it issues a decision that changes the common law.

Finally, the majority in Polakoff inappropriately bolstered its decision to apply Brooks retroactively to the case before it by citing Brooks's retroactive application to Gentry. Although the court remanded Gentry for further proceedings consistent with Brooks, the Polakoff court failed to recognize that a selectively prospective application of Brooks yields the same result as a retroactive application. Selective prospectivity applies a judicial decision retroactively to all pending cases at the time that the decision was filed. Hence, contrary to the Polakoff court's assertion, the court's decision in Gentry does not "make it clear that Brooks applies retroactively." Rather, because Gentry can be utilized to support the proposition that the court did not apply Brooks retroactively but instead in a selectively prospective manner, the Polakoff court's reliance on Gentry undermines the legitimacy of its determination to retroactively apply Brooks to the case before it.

c. By Foraging for the Judicial Reasoning Required for a Retroactive Application of Brooks, the Polakoff Court Diluted the Impact of the Court of Appeals's Landmark Decision in Brooks.—Polakoff fundamentally weakens Brooks's elimination of defunct precedent in conflict with the legislature's intent in enacting the Housing Code. Although the Maryland General Assembly enacted the Reduction of Lead Risk in

222. 385 Md. at 489, 869 A.2d at 851.
223. Id. at 488 n.14, 869 A.2d at 850 n.14.
224. Id.
225. 312 Md. at 592, 541 A.2d at 959.
226. 385 Md. at 489, 869 A.2d at 851.
227. Id.
229. 385 Md. at 489, 869 A.2d at 851.
230. Id.
231. See supra notes 113-129 and accompanying text.
Housing Act to reduce childhood lead-based paint poisoning on a state-wide level,\textsuperscript{232} tenants diagnosed with an elevated blood lead level prior to the statutory cutoffs remain at the mercy of the judiciary.\textsuperscript{233} Therefore, precedent set forth by Brooks and its progeny, such as Polakoff, provide Baltimore City tenants with the only legal means for redress.\textsuperscript{234} Because the Polakoff court erroneously refused to interpret Brooks as a change in the common law, plaintiffs can no longer rely upon the precedential value of the Brooks standard. The Polakoff court’s construction of Brooks as a new interpretation of the Housing Code fails to account for the Court of Appeals’ elimination of precedent in conflict with the Housing Code through the Brooks decision.\textsuperscript{235} By undermining the precedential value of Brooks, the Polakoff court has dangerously opened the door to a further erosion of Brooks by subsequent decisions. Such decisions could provide additional interpretations of the Housing Code that mirror the common-law notice requirement that Brooks specifically eliminated.

Paradoxically, the Polakoff court’s decision to retroactively apply Brooks, through its assertion that Brooks merely reinterpreted the common law, runs contrary to its justification for the application.\textsuperscript{236} A retroactive application of a judicial decision extends precedent to the furthest reaching segment of the population that the decision may affect.\textsuperscript{237} Yet the Polakoff court’s analysis of Brooks as a mere reinterpretation of the Housing Code yields the narrowest construction of Brooks’s influence.\textsuperscript{238}

While the dissent inappropriately contends that the Polakoff court should have prospectively applied Brooks because Baltimore landlords like Polakoff relied on prior, inconsistent precedent, the dissent’s argument maintains a subtle strength.\textsuperscript{239} Even those landlords who argue that they relied on the prior standard can still be held liable, like Polakoff and Chase, for unreasonable behavior under Richwind and its progeny.\textsuperscript{240} To subject the few pending cases in the Court of Appeals to a heightened standard of review, the court diluted the impact of Brooks and reinterpreted the Housing Code.\textsuperscript{241} The Polakoff court

\textsuperscript{232} See supra note 85.
\textsuperscript{233} See supra notes 86-88 and accompanying text.
\textsuperscript{234} See supra notes 86-88 and accompanying text.
\textsuperscript{235} 385 Md. at 481-82, 869 A.2d at 846.
\textsuperscript{236} Id. at 489, 869 A.2d at 850-51.
\textsuperscript{237} See id. at 485-86, 869 A.2d at 848 (explaining the pervasiveness of retroactivity).
\textsuperscript{238} Id. at 489, 869 A.2d at 850-51.
\textsuperscript{239} Id. at 491-92, 869 A.2d at 852 (Raker & Wilner, JJ., dissenting).
\textsuperscript{240} Id. at 490, 869 A.2d at 851 (majority opinion).
\textsuperscript{241} Id. at 489, 869 A.2d at 851.
could have instead elected a change in the common law as its eulogy. Ultimately, the court lost sight of the true implication of its construction of *Brooks* on a potential plethora of plaintiffs by excessively focusing on, inter alia, the already liable Polakoff and Chase.²⁴² A selectively prospective application of *Brooks* to *Polakoff* would have allowed injured plaintiffs bringing suit to fully profit from tenant-friendly Maryland lead-based paint negligence jurisprudence.

5. **Conclusion.**—In *Polakoff v. Turner*, the Court of Appeals held that its prior decision in *Brooks*, which eliminated the notice requirement from a tenant’s ability to hold her landlord liable for negligence in a lead-based paint poisoning action, applied retroactively to the case before it.²⁴³ The court’s retroactive application is problematic because its legal justification undercuts the bearing of the long-overdue *Brooks* decision.²⁴⁴ The court should have applied *Brooks* prospectively to arrive at the same result,²⁴⁵ highlight *Brooks*’s change in the common law,²⁴⁶ and deter future decisions from overruling its precedent.²⁴⁷

APRIL H. BIRNBAUM

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²⁴² *Id.* at 490, 869 A.2d at 851.
²⁴³ *Polakoff*, 385 Md. at 489, 869 A.2d at 851.
²⁴⁴ See supra Part 4.c.
²⁴⁵ See supra Part 4.b.
²⁴⁶ See supra Part 4.a(2).
²⁴⁷ See supra Part 4.c.
B. Maintaining an Unrealistic Standard: Maryland Holds It Is Not Reasonably Foreseeable for Consumers to Fail to Follow Product Warnings

In Lightolier v. Hoon, the Court of Appeals of Maryland considered whether a manufacturer may be held strictly liable under products liability for a design defect when a consumer fails to follow warnings. Upholding its prior interpretations of comment j to § 402A of the Restatement (Second) of Torts: Products Liability (1965), the court held that failure to follow warnings is a type of misuse, which under Maryland law, negates the element of defect in a products liability claim. Consequently, when a manufacturer provides adequate warnings that a consumer fails to follow, the product is not defective as a matter of law, the cause of the injury is the failure to follow the warnings, and the manufacturer is not liable for the consumer’s injury.

Although the Lightolier decision was consistent with precedent, the consequence of its standard is that proof of misuse bars a defective design claim. Under Maryland law, even if a product may be defectively designed, a consumer’s misuse precludes judicial examination of an alleged defect. As some jurisdictions have recognized, however, applying comment j as Maryland does is an improper standard because such an interpretation unrealistically assumes that consumers will always understand and follow product warnings. The Lightolier court’s construction of comment j permits manufacturers to substitute warnings for safer designs. A better approach is the standard advocated by the new Restatement, which recognizes that the law should put the burden on manufacturers to minimize injuries through safer designs, rather than on consumers to understand and heed warnings. In Lightolier, the Court of Appeals missed an opportunity to reevaluate its application of the comment j assumption and to bring Maryland law into conformity with the Restatement (Third) of Products Liability (1998).

1. 387 Md. 539, 876 A.2d 100 (2005).
2. Id. at 562, 876 A.2d at 114.
3. Id.
4. Id. at 553-54, 876 A.2d at 109.
5. Id.
7. See infra Part 4.b.
8. See infra Part 4.c.
9. See infra Part 4.c.
1. The Case.—In 1998, David and Texie Hoon renovated their home.\(^{10}\) Westwind Construction Company served as the general contractor and the electrical contractor for the renovation.\(^{11}\) As part of the renovation, Westwind installed light fixtures designed and manufactured by Lightolier.\(^{12}\)

The Hoons installed Lightolier's Model 1002P1, a non-IC-rated fixture.\(^{13}\) "IC," meaning "insulated ceiling," indicates that a fixture has been approved for use in an insulated ceiling.\(^{14}\) Because IC-rated fixtures are approved for use in areas with insulation, they are commonly used for recessed lighting in the upper level of a house, where insulation is heaviest.\(^{15}\) On the other hand, according to the National Electric Code (NEC),\(^{16}\) non-IC-rated light fixtures should not be used in such a manner because insulation may entrap heat around the fixture.\(^{17}\) The NEC guidelines further state that insulation should not be placed within three inches of a non-IC-rated fixture.\(^{18}\) On each of the non-IC-rated fixtures used in the Hoons' home and on the first page of the instruction booklet that came with each fixture, a warning in large red print cautioned that insulation should not be installed within three inches of the fixture.\(^{19}\)

The Lightolier model used by the Hoons was equipped with a self-heating thermal protector (SHTP).\(^{20}\) These safety devices monitor the temperature around the fixture so that when the SHTP detects a temperature above 90°C, it shuts off the light.\(^{21}\) When the temperature around the fixture cools below 90°C, the SHTP turns the light

\(^{10}\) Lightolier, 837 Md. at 545-46, 876 A.2d at 104.
\(^{11}\) Id. at 546, 876 A.2d at 104. David Hoon is part owner of Westwind. Id.
\(^{12}\) Id.
\(^{13}\) Id.
\(^{14}\) Id. at 545 n.1, 876 A.2d at 104 n.1. The court used the definitions of IC- and non-IC-rated fixtures as described in the July 2004 Luminaire Marking Guide, written by the Underwriters Laboratories Inc. Id.
\(^{15}\) Id.
\(^{16}\) The NEC is a set of safety guidelines provided by the National Fire Protection Association. Id. at 546 n.2, 876 A.2d at 105 n.2.
\(^{17}\) Id. at 546-47, 876 A.2d at 105.
\(^{18}\) Id.
\(^{19}\) Id. at 546, 876 A.2d at 104. Each Lightolier fixture specified the following: "WARNING—RISK OF FIRE: DO NOT INSTALL INSULATION WITHIN 3 INCHES OF FIXTURE SIDES OR WIRING COMPARTMENT NOR ABOVE FIXTURE IN SUCH A MANNER TO ENTRAP HEAT." Id.
\(^{20}\) Id. at 547, 876 A.2d at 105. The NEC requires thermal-protection devices on all non-IC-rated fixtures. Id. at 560, 876 A.2d at 113.
\(^{21}\) Id. at 547, 876 A.2d at 105.
back on.\textsuperscript{22} Lightolier advises consumers and installers that a blinking non-IC-rated fixture may indicate a problem with insulation.\textsuperscript{23} Thus, the SHTPs both monitor the heat around a non-IC-rated fixture and, with the blinking light, warn of a potential problem.\textsuperscript{24} Even with the SHTP on the model the Hoons used, Lightolier maintained that non-IC-rated fixtures are not intended for use in ceilings where insulation is installed.\textsuperscript{25}

Subsequent to Westwind's installation of the Lightolier fixtures, a subcontractor, Gede Insulation, installed blown-in cellulose insulation into the ceiling where the fixtures were placed.\textsuperscript{26} At some point after this, two of the Lightolier fixtures began to blink.\textsuperscript{27} The Hoons noticed the blinking lights, which were in the kitchen, and examined the area in the ceiling around the two lights.\textsuperscript{28} The Hoons found that Gede had installed the insulation in direct contact with the lights, contrary to the warnings on the fixtures.\textsuperscript{29} The Hoons removed the insulation around those lights.\textsuperscript{30} Neither the Hoons nor any one else, however, checked any of the other non-IC-rated fixtures after they found insulation around the kitchen lights.\textsuperscript{31}

On November 2, 1998, a fire started in the ceiling of the Hoons' home near one of the Lightolier non-IC-rated fixtures and caused substantial damage.\textsuperscript{32} The Hoons maintain that the fixture where the fire started never blinked.\textsuperscript{33} Investigators determined that direct contact between the fixture and insulation caused the fire.\textsuperscript{34}

The Hoons filed suit on November 15, 1999 in the Circuit Court for Kent County against Gede and Lightolier, among others.\textsuperscript{35} The Hoons brought claims against Lightolier alleging negligence, breach

\begin{thebibliography}{99}
\item \textsuperscript{22} Id. Although the SHTP will cycle the electrical current off and on as it monitors the temperature, the SHTP is not designed to permanently shut down an overheating fixture. \textit{Id.} at 547 n.5, 876 A.2d 105 n.5.
\item \textsuperscript{23} Id. at 547, 876 A.2d at 105. Besides the label warning against installing insulation within three inches of the fixture, each non-IC Lightolier fixture had another warning which read: "NOTICE—THERMALLY PROTECTED FIXTURE BLINKING LIGHT MAY INDICATE INSULATION TOO CLOSE TO FIXTURE, OR IMPROPER LAMP." \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} Brief of Appellants at 4, \textit{Lightolier}, 387 Md. 539, 876 A.2d 100 (No. 117).
\item \textsuperscript{26} \textit{Lightolier}, 387 Md. at 548, 876 A.2d at 105.
\item \textsuperscript{27} \textit{Id.}, 876 A.2d at 106.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 548-49, 876 A.2d at 106.
\end{thebibliography}
of warranty, and product liability/defective design. The Hoons' expert determined that there was more than one cause of the fire, including the direct contact of insulation with the non-IC-rated fixture and the defective design of Lightolier's SHTP.

On March 15, 2002, Lightolier filed for summary judgment. Lightolier argued that it was not liable to the Hoons because, under Maryland law, if a consumer acts contrary to clear warnings on a product, this constitutes misuse of the product, which precludes recovery. The Hoons responded that the failure of the SHTP to function properly was a concurrent cause of the fire. On April 15, 2002, the circuit court granted summary judgment for Lightolier, finding that the failure to heed the manufacturer's warning was the sole proximate cause of the fire.

The Court of Special Appeals reversed the lower court after considering the grounds on which the circuit court had based its summary judgment. First, the court reasoned that a reasonable jury could find that the Hoons had acted reasonably in not checking the light where the fire started because: (1) it was undisputed that the fixture where the fire started never blinked, (2) the instructions indicated that the fixture would blink if there was an over-heating problem, and (3) it was reasonable for the Hoons to think that the fixture would blink if there was an insulation problem because of the Hoons' experience with the other two fixtures in their home that had operated properly. Consequently, the court found that there was a jury issue as to the reasonableness of the Hoons' actions. Second, the court found that the Hoons' installation of the Lightolier fixture too close to the insulation was reasonably foreseeable to the manufacturer because Lightolier had in fact foreseen such a use when it equipped the fixtures with SHTPs and warned against contact with insulation.

36. Id. at 549, 876 A.2d at 106. The Hoons settled with Gede after suit was filed and before Lightolier moved for summary judgment. Id. at 549 n.6, 876 A.2d at 106 n.6.
37. Hoon v. Lightolier, 158 Md. App. 648, 654 n.4, 857 A.2d 1184, 1187 n.4 (2004). According to the Hoons' expert, Lightolier had defectively designed the fixture by locating the SHTP too far from the heat source. Id. The expert testified that insulation could come between the SHTP and the fixture and render the SHTP ineffective. Id.
38. Lightolier, 387 Md. at 549, 876 A.2d at 106.
40. Id., 857 A.2d at 1188.
41. Lightolier, 387 Md. at 550, 876 A.2d at 107.
42. Hoon, 158 Md. App. at 657-58, 857 A.2d at 1189. The Court of Special Appeals also considered the issue of contributory negligence, which will not be discussed in this Note. Id.
43. Id., 857 A.2d at 1188-89.
44. Id., 857 A.2d at 1189.
45. Id. at 668, 857 A.2d at 1195.
Thus, because there were possibly two concurrent causes of the injury, namely, Gede’s failure to heed the product warning and Lightolier’s defective design of the SHTPs, the Court of Special Appeals found that the lower court erred in granting summary judgment for Lightolier.\(^{46}\)

On December 17, 2004, the Court of Appeals granted Lightolier’s petition for certiorari to determine whether the failure to heed the manufacturer’s warning not to place the non-IC-rated fixtures within three inches of insulation was the sole proximate cause of the fire.\(^{47}\)

2. Legal Background.—Under its products liability régime, Maryland has adopted the defenses of misuse (comment h) and failure to follow warnings (comment j), which are enumerated in the comments to § 402A of the Restatement (Second) of Torts: Products Liability.\(^{48}\) As Maryland interprets comment j, consumers are presumed to read and heed product warnings; consequently, a product bearing an adequate warning, which makes it reasonably safe if followed, is not defective as a matter of law.\(^{49}\) A number of jurisdictions, however, have rejected this interpretation of comment j.\(^{50}\) Recognizing that consumers frequently either to fail to follow warnings or simply to misunderstand them, these jurisdictions and the Restatement (Third) reject an interpretation of comment j that would allow a manufacturer to substitute a warning for a safer design.\(^{51}\)

a. Strict Products Liability and the Doctrine of Misuse in Maryland.—In Phipps v. General Motors Corp.,\(^{52}\) the Court of Appeals of Maryland adopted strict products liability as defined in the Restatement (Second) of Torts: Products Liability § 402A. Concurrently, the court approved the defenses to manufacturer liability discussed in the official comments to § 402A, including the defenses of misuse and failure to heed product warnings.\(^{53}\)

In Phipps, a husband and his wife sued General Motors, alleging that the accelerator of an automobile he was test-driving suddenly became stuck, causing him to lose control of the car and veer off the

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46. Id. at 672, 857 A.2d at 1197.
47. Lightolier, 387 Md. at 544-45, 876 A.2d at 103-04. The court specifically granted certiorari to address whether a manufacturer may be held liable in strict products liability when a consumer improperly uses a product and fails to follow warnings. Id.
48. See infra Part 2.a.
49. See infra Part 2.b.
51. See infra Part 2.c.
52. 278 Md. 337, 363 A.2d 955 (1976).
53. Id. at 346, 363 A.2d at 959-60.
Phipps brought his action in the United States District Court for the District of Maryland, asserting a cause of action in strict products liability, citing recent Maryland decisions. The district court certified questions of law to the Court of Appeals of Maryland, asking whether Maryland had adopted strict products liability. The Court of Appeals replied in the affirmative: Maryland adopted § 402A and thus no longer required privity of contract for a consumer to bring an action against the manufacturer. Reasoning that the manufacturer is better able to prevent injury than the consumer, and acknowledging the substantial number of jurisdictions that had already adopted strict products liability, Maryland adopted § 402A. The pertinent part of § 402A provides:

402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In adopting strict products liability, the Court of Appeals reasoned that a manufacturer who places an unreasonably dangerous product on the market is better positioned to anticipate injuries from the product, take steps to avoid those injuries, and bear their cost. The Phipps court also set out the elements of a products liability claim, i.e., an injured consumer must prove that: (1) the product is defec-

54. Id. at 339, 363 A.2d at 956.
55. Id. at 339-40, 363 A.2d at 956.
56. Id. at 340, 363 A.2d at 956-57.
57. Id. at 349, 352-53, 363 A.2d at 961, 963.
58. Id. at 352-53, 363 A.2d at 963.
60. Phipps, 278 Md. at 352-53, 363 A.2d at 963.
tive, (2) the product is unreasonably dangerous, (3) the defect caused the injuries, and (4) the manufacturer expected the product to reach the consumer without significant change in its form and it did in fact reach the consumer without such a change.\(^{61}\) Notably, a consumer need not show that the manufacturer was negligent; rather, the focus is on the defect and whether the product is unreasonably dangerous.\(^{62}\)

In *Phipps*, the court also expressly approved the defenses set forth in the comments to § 402A.\(^{63}\) Among the defenses enumerated in the comments are abnormal use or handling (comment h) and failure to heed product warnings (comment j).\(^{64}\) More specifically, comment h, which describes the basis for the doctrine of misuse, states:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.\(^{65}\)

Along the same lines, language in comment j also provides a defense for a manufacturer under Maryland law based on the behavior of the consumer. Comment j provides:

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.\(^{66}\)

If either of these two defenses is applicable, i.e., if the consumer either misuses the product or fails to follow an adequate warning, the consumer cannot prove the element of defect, and consequently summary judgment for the manufacturer is proper.\(^{67}\)

Although jurisdictions differ on the definition of “misuse,” Maryland adheres to the “reasonable foreseeability” test, defining misuse as a use that is not reasonably foreseeable to a manufacturer.\(^{68}\) In sum,

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61. *Id.* at 344, 363 A.2d at 958.
62. *Id.*, 363 A.2d at 958-59.
63. *Id.* at 346, 363 A.2d at 959-60.
64. *Id.*
66. § 402A cmt. j.
under Maryland law, a manufacturer must offer a product that is not unreasonably dangerous when used in a foreseeable manner. If a product is not unreasonably dangerous for foreseeable uses, it is not defective as a matter of law.  

In applying the doctrine of misuse, jurisdictions are divided as to whether lack of misuse is an element of the plaintiff’s case or instead an affirmative defense. In *Ellsworth v. Sherne Lingerie, Inc.*, the Court of Appeals of Maryland specifically addressed this issue and held that because misuse either is applicable to the element of defect or is an issue of proximate cause, misuse is not an affirmative defense but is instead part of the plaintiff’s case. Misuse is, however, the functional equivalent of a defense because proof of it negates one or more essential elements of the claim and thus may preclude recovery.

b. Application of the Doctrine of Misuse in Maryland.—After the Court of Appeals adopted § 402A, it applied comments h and j to several cases. Under comment h, a consumer misuses a product when he uses it in a manner that is not reasonably foreseeable to the manufacturer, and such misuse precludes manufacturer liability. Under Maryland’s construction of comment j, consumers are presumed to read and heed adequate warnings and failure to do so may be seen by the court as negligence by the consumer or as misuse.

The Court of Appeals applied the reasonable foreseeability test in *Ellsworth v. Sherne Lingerie, Inc.* and held that the consumer’s action did not constitute misuse. In *Ellsworth*, the consumer was severely burned when the nightgown she was wearing ignited as she leaned over a stove. The manufacturer argued that the consumer misused the product by wearing it inside-out so that the pockets were on the outside and hung over the burner. The court disagreed, reasoning that it was reasonably foreseeable for a consumer to wear clothes in-

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69. *Id.* at 596, 495 A.2d at 355.
71. 303 Md. at 597, 495 A.2d at 356.
72. *Id.*
73. RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY § 402A cmt. h (1965).
74. See infra notes 79-101 and accompanying text.
75. 303 Md. at 581, 495 A.2d at 348.
76. *Id.* at 587, 495 A.2d at 350.
77. *Id.* at 587-88, 590-91, 495 A.2d at 351, 352-53.
side-out on occasion and that "[m]omentary inattention or carelessness on the part of the user" is not a misuse.  

Subsequent to the landmark *Ellsworth* decision, the Court of Special Appeals applied the doctrine of misuse in several other cases. In *Simpson v. Standard Container Co.*, a child and his parents sued the manufacturer of a gasoline container after the child was severely burned and another child was killed when the children tipped over and spilled a full gasoline container.  

The father of the deceased child had stored the gasoline container in his basement.  

The parents claimed that the container was defectively designed and unreasonably dangerous because it lacked a child-proof cap. However, warnings on two of the four sides of the gasoline container cautioned, "Keep Out of Reach of Children" and "Do Not Store in Vehicle or Living Space." The court held that failure to follow the warnings and storage of the full gasoline container within the home were misuse as a matter of law, thereby negating the element of defect. Consequently, because the parents could not prove the proper elements for a cause of action in products liability, the Court of Special Appeals affirmed the lower court's dismissal of the case.  

The court further noted that its decision was also based on comment j of the *Restatement (Second) of Torts* § 402A. The manufacturer had provided an adequate warning that, when followed, made the product not unreasonably dangerous. As a result, the product was neither defective nor unreasonably dangerous as a matter of law.  

Similarly, in *Halliday v. Sturm, Ruger & Co., Inc.*, the Court of Special Appeals found that the misuse of a product negated any products liability claim. In *Halliday*, the three-year-old son of Melissa Halliday was killed when the child found his father's gun, loaded it, and shot himself while playing with it. The child discovered the gun

78. *Id.* at 598, 495 A.2d at 357.  
80. *Id.* at 202, 527 A.2d at 1339.  
81. *Id.*  
82. *Id.* at 207, 527 A.2d at 1341.  
83. *Id.* at 206, 527 A.2d at 1341.  
84. *Id.* at 207, 527 A.2d at 1341.  
85. *Id.* at 206-07, 527 A.2d at 1341.  
86. *Id.* at 207, 527 A.2d at 1341.  
87. *Id.*  
88. 138 Md. App. 136, 770 A.2d 1072 (2001), aff'd in part, 368 Md. 186, 792 A.2d 1145 (2002). In affirming, the Court of Appeals considered whether Maryland should continue to use the "consumer expectation" test rather than the "risk-utility" test. 368 Md. at 193-208, 792 A.2d at 1149-58. The Court of Appeals did not address the lower court's finding of misuse. *Id.* at 193, 792 A.2d at 1149-50.  
89. 138 Md. App. at 141, 770 A.2d at 1075.
under his parents' mattress, found the ammunition that was stored separately from the gun, and allegedly knew how to load the gun from watching television. Melissa Halliday brought a defective design suit against the manufacturer, arguing that the gun was unreasonably dangerous and defective because it did not have a child-resistant trigger lock as a safety device. Warnings in the instruction manual specifically cautioned consumers to store the gun away from the ammunition and to prevent children from gaining access to it. The court found that the father had misused the gun in affirmatively not following the warnings, and that his misuse precluded recovery in products liability.

The Halliday court cited a Fourth Circuit decision applying Maryland products liability law, wherein the Fourth Circuit noted that Maryland does not require a manufacturer to assume that a consumer will fail to follow clear warnings. Finding that the manufacturer could not have reasonably foreseen that the child's father would ignore the explicit warnings supplied by the gun manufacturer, the court held that as a matter of law, the father's conduct was not reasonably foreseeable and hence was a misuse.

Finally, the Fourth Circuit has applied Maryland's definition of misuse in two cases and in each found a misuse of the product as a matter of law, negating any products liability claim. First, in Higgins v. E.I. DuPont de Nemours & Co., parents of children who were stillborn, prematurely aborted, or who had died shortly after birth brought survival actions against a paint manufacturer, alleging that the manufac-

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90. Id.
91. Id.
92. Halliday, 368 Md. at 189, 792 A.2d at 1147. More specifically, in a section of the manual entitled "WARNING—STORAGE," in red letters was printed "Firearms should always be stored securely and unloaded, away from children and careless adults." Id. In another section, in red capital letters, the manual read "FIREARMS SHOULD BE UN-LOADED WHEN NOT IN USE," and the further warning in that section stated:

Firearms and ammunition should be securely locked in racks or cabinets when not in use. Ammunition should be safely stored separate from firearms. Store your firearms out of sight of visitors and children. It is the gun owner's responsibility to be certain that children and persons unfamiliar with firearms cannot gain access to firearms, ammunition, or components.

Id.
94. Id. (citing Hood v. Ryobi Am. Corp., 181 F.3d 608, 612 (4th Cir. 1999)).
95. Id., 770 A.2d at 1094-95. The court noted that besides the doctrine of misuse, comment j (failure to heed warnings) might also be applicable; but because the lower court's grant of summary judgment was not based on comment j, the court did not consider the issue. Id. at 172 n.10, 770 A.2d at 1093 n.10.
96. 863 F.2d 1162 (4th Cir. 1988).
turer had sold paint that was defective and unreasonably dangerous. Each of the fathers was a city fireman who had used the manufactured paint at work.\textsuperscript{97} Labels on the paint cans warned that the paint was intended for industrial use only by trained professionals using eye protection, gloves, proper ventilation, and other protective measures.\textsuperscript{98} The court held that the parents had misused the paint in failing to heed the warnings to properly protect themselves and by working with the paint although they were not professional painters.\textsuperscript{99}

In another Fourth Circuit decision applying Maryland products liability law, \textit{Hood v. Ryobi America Corp.},\textsuperscript{100} the court held that the consumer had misused a miter saw by failing to heed warnings that cautioned not to use the saw without the accompanying safety guards properly attached. The court reasoned that, under Maryland law, if the consumer fails to follow clear and easy-to-understand warnings, then the consumer causes the injury, and his misconduct prevents him from asserting a defective design claim.\textsuperscript{101}

c. \textit{Developments with Product Warnings: Other Jurisdictions and the Restatement (Third) of Torts: Products Liability}.—Comment j of the \textit{Restatement (Second)} was intended to relieve consumers of the burden of proving causation in failure-to-warn claims.\textsuperscript{102} Maryland is among the few jurisdictions that construe the comment to mean that adequate warnings may be substituted for a safer design.\textsuperscript{103} Many jurisdictions have specifically rejected comment j on this point because of the concern that manufacturers could avoid liability by simply providing an adequate warning.\textsuperscript{104} The \textit{Restatement (Third) of Torts} also pointedly rejects an interpretation of comment j that would allow a manufacturer to substitute a warning for a safer design.\textsuperscript{105}

Comment j was intended to be a procedural device to help consumers in failure-to-warn suits.\textsuperscript{106} In a failure-to-warn claim, the con-

\begin{itemize}
\item \textsuperscript{97} \textit{Id.} at 1164.
\item \textsuperscript{98} \textit{Id.} at 1165.
\item \textsuperscript{99} \textit{Id.} at 1168.
\item \textsuperscript{100} 181 F.3d 608 (4th Cir. 1999).
\item \textsuperscript{101} \textit{Id.} at 612-13.
\item \textsuperscript{102} Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 358 (Tex. 1993).
\item \textsuperscript{104} \textit{E.g.}, Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978); Uniroyal Goodrich Tire Co. v. Martínez, 977 S.W.2d 328 (Tex. 1998).
\item \textsuperscript{105} \textbf{RESTATMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2 cmt. 1 (1998).
\item \textsuperscript{106} \textit{Saenz}, 873 S.W.2d at 358.
\end{itemize}
sumer alleges that the manufacturer failed to provide adequate warnings. Recognizing that it would involve speculative evidence and be difficult to prove, consumers do not have to prove causation, that they would have read and followed adequate warnings if the manufacturer had included them. Instead, comment j provides the causation element by presuming that consumers will read and heed sufficient warnings. Thus, comment j was intended to help plaintiffs, not hurt them.

In Uloth v. City Tank Corp., the Massachusetts Supreme Judicial Court specifically rejected adopting a rule that would allow manufacturers to avoid liability by simply providing an adequate warning. The Uloth court reasoned that warnings may only make the possibility of injury less likely and only in some situations. The court held that the responsibility of making the product safer by design should continue to be placed on the manufacturer.

Likewise, in Uniroyal Goodrich Tire Co. v. Martinez, the Supreme Court of Texas refused to follow the comment j approach of the Restatement (Second) and reasoned that proof of the consumer's failure to follow clear warnings should not end the suit. In Martinez, although the consumer failed to follow adequate warnings provided by the manufacturer, he still stated a cause of action in products liability. An exploding tire injured the consumer in Martinez when he attempted to mount a 16-inch tire onto a 16.5-inch rim. Labels on the tire warned that mounting a 16-inch tire on a 16.5-inch rim could cause serious injury or death. The warnings also cautioned against leaning over the assembly while inflating and against inflating the tire on the floor or a flat surface. The consumer violated each of these warnings when he installed and inflated the tire. Despite his conduct, the consumer was not precluded from his products liability claim under Texas law. The court reasoned that warnings are an

107. Id. at 357-58.
108. Id. at 358.
109. Id.
110. Id.
112. Id.
113. Id.
114. 977 S.W.2d 328, 336-37 (Tex. 1998).
115. Id. at 337.
116. Id. at 331-32.
117. Id. at 332.
118. Id.
119. Id.
120. Id. at 337.
insufficient fix for a design defect because consumers do not always see, follow, or understand warnings, but they will always encounter the design.\footnote{Id. at 336. Similarly, the District of Columbia explicitly rejected a rule that would permit a manufacturer to avoid liability by "merely slap[ping]" an adequate warning on the product. Rogers v. Ingersoll-Rand Co., 144 F.3d 841, 844 (D.C. Cir. 1998); accord Delaney v. Deere & Co., 999 P.2d 930, 942-43 (Kan. 2000).}

For similar reasons and specifically referring to \textit{Uloth}, the \textit{Restatement (Third) of Torts: Products Liability} rejects the interpretation that comment \textit{j} of the \textit{Restatement (Second)} allows manufacturers to substitute warnings for safer designs:

Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. Warnings are not, however, a substitute for the provision of a reasonably safe design.\footnote{\textsc{Restatement (Third) of Torts: Products Liability} § 2 cmt. 1 (1998) (citation omitted). As an illustration of some of the problems with comment \textit{j}, the drafters of the new \textit{Restatement} provided an illustration based on the facts of \textit{Uloth}. § 2 cmt. 1, illus. 14.}

In sum, as many courts are confronting the problem of consumers failing to follow product warnings, these courts, along with the drafters of the \textit{Restatement (Third)}, consider it reasonably foreseeable for consumers to fail to follow product warnings. These courts and the \textit{Restatement (Third)} agree that products liability law should place the burden on the manufacturer to design a safer product whenever possible, and that consumer's failure to follow those warnings should not preclude judicial evaluation of an allegedly defective design.

3. The Court's Reasoning.—In \textit{Lightolier v. Hoon}, the Court of Appeals of Maryland reversed the Court of Special Appeals and held that the installation of insulation within three inches of the recessed lighting fixture was the sole proximate cause of the fire and the consumers' misuse of the product prevented them from bringing a defective
Writing for the majority, Judge Cathell\textsuperscript{124} found that by failing to follow the manufacturer's adequate warnings, the Hoons misused the fixture and therefore were barred from asserting a defective design claim.\textsuperscript{125}

The court first discussed the doctrine of strict products liability and misuse.\textsuperscript{126} The court noted that in \textit{Ellsworth v. Sherne Lingerie, Inc.}, it had discussed at length § 402A of the \textit{Restatement (Second) of Torts}, which defined the doctrine of strict liability in tort.\textsuperscript{127} The \textit{Ellsworth} court also adopted the defense of misuse as applied to products liability.\textsuperscript{128}

The court then clearly stated that Maryland's standard for misuse is the reasonable foreseeability test.\textsuperscript{129} The court noted that the standard should be cautiously applied because any accident could appear foreseeable after it has occurred.\textsuperscript{130}

The court then compared the case before it to another recent products liability case, \textit{Halliday v. Sturm, Ruger & Co., Inc.}\textsuperscript{131} The court pointed out that in \textit{Halliday}, the Court of Special Appeals properly applied \textit{Ellsworth} when it held that the failure to heed the warnings of the gun manufacturer was a misuse of the product, which barred a defective design claim.\textsuperscript{132} The court analogized the Hoons' case to \textit{Halliday}, in both cases, adequate warnings provided by the manufacturer were unheeded and injury resulted.\textsuperscript{133} The court noted that in both \textit{Halliday} and the case before it, the manufacturer had foreseen the potential injury and had sought to prevent this by providing warnings.\textsuperscript{134} According to the court, warnings are meant to "counteract" reasonably foreseeable injuries, and thus a person misuses a product by failing to follow such a warning.\textsuperscript{135}

\textsuperscript{123} 387 Md. at 561-62, 876 A.2d at 113-14.
\textsuperscript{124} Judge Cathell was joined by Judges Raker, Harrell, and Greene. \textit{Id.} at 543, 562, 876 A.2d at 103, 114.
\textsuperscript{125} \textit{Id.} at 545, 876 A.2d at 104.
\textsuperscript{126} \textit{Id.} at 552-55, 876 A.2d at 108-10.
\textsuperscript{127} \textit{Id.} at 552-53, 876 A.2d at 108-09.
\textsuperscript{128} \textit{Id.} at 553-54, 876 A.2d at 109.
\textsuperscript{129} \textit{Id.} at 554, 876 A.2d at 109.
\textsuperscript{130} \textit{Id.} The court reiterated with approval the Court of Special Appeals's concern that a manufacturer would become the insurer for any injury resulting from its product if the reasonably foreseeable test was liberally applied. \textit{Id.}
\textsuperscript{131} \textit{Id.} at 554-55, 876 A.2d at 109-10.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 555, 876 A.2d at 110.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
Although the court found that summary judgment was proper based solely on the doctrine of misuse, it also addressed a second distinct, yet closely connected basis for summary judgment—the failure of the Hoons to heed the manufacturer's warning. Specifically, the court stated that the failure to heed product warnings may constitute negligence. The court noted that misuse and failure to heed warnings may both be applicable to the same case. The court then compared the case before it to Simpson v. Standard Oil Co., where the Court of Special Appeals held that the consumers had failed to state a cause of action both because they misused the product and failed to heed the manufacturer's warning.

Finally, the court addressed the Hoons' argument that the failure of the SHTP safety device to work as designed was a proximate cause of the fire. The court rejected this argument. First, the court noted that the NEC required Lightolier to include some sort of thermal protection device, like the SHTP, on the recessed lighting fixture. Next, the court stressed that Lightolier's product was not defectively designed because it was designed as the NEC recommended with the SHTP detector some distance away from the hottest point of the fixture so that the SHTP is triggered only by abnormal increases in temperature. As a result, the court rejected the Hoons' argument that there was more than one proximate cause to the fire.

136. Id. at 555-58, 876 A.2d at 110-11.
137. Id. at 556, 876 A.2d at 110. The court explained that where the warnings are adequate, the plaintiff may not recover because a defective product did not cause the injury, but instead the plaintiff's failure to heed the warnings. Id.
138. Id. at 556-57, 876 A.2d at 110-11.
139. Id. at 556-58, 876 A.2d at 111-12. The court also noted that product warnings must be sufficiently clear and specific in order to be adequate. Id. at 558-59, 876 A.2d at 111-12. Furthermore, in considering the adequacy of a warning, courts should consider the standards and practices of the industry. Id., 876 A.2d at 112. Applying this rule to the case before it, the court found that because Lightolier's warnings conformed with the requirements of both the NEC and the UL marking guide, Lightolier's warnings were adequate. Id.
140. Id. at 559-62, 876 A.2d at 112-14.
141. Id. at 561, 876 A.2d at 113.
142. Id. at 560, 876 A.2d at 113.
143. Id. at 560-61, 876 A.2d at 113. The court explained that variations in temperature were not out of the ordinary with recessed lighting fixtures, especially because a recessed lighting fixture may be suitable for multiple sized lamps. Id. at 560, 876 A.2d at 112. Thus, the NEC noted that placement of the SHTP away from the heat source is common so that the SHTP is triggered only by abnormal temperature increases such as those resulting from the improper installation of insulation. Id., 876 A.2d at 112-13.
144. Id. at 561-62, 876 A.2d at 113-14.
In his dissent, Judge Wilner found that summary judgment was improper because there were two jury issues. First, Judge Wilner stated there was a genuine dispute as to whether the recessed lighting fixture at issue was intended for use in thermally insulated areas. In particular, Judge Wilner thought the intended use of the product was unclear because the warnings stated that the fixture should not be placed within three inches of insulation and because the manufacturer equipped the fixture with the SHTP safety device. Judge Wilner argued that such precautions suggested that the fixture was actually designed for use in insulated ceilings. Next, the dissent argued that there was a genuine dispute over whether the SHTP device was defectively designed and whether the failure of the SHTP device to function was a proximate cause of the fire. The dissent therefore did not agree that the consumers' failure to follow the warnings was a misuse that barred a design defect claim.

4. Analysis.—In Lightolier v. Hoon, the Court of Appeals of Maryland missed an opportunity to reevaluate the effect of a consumer's failure to follow product warnings in a products liability case. In each of the cases upon which the majority relies, misuse was based on a failure to follow warnings. Under Maryland products liability law, the failure to follow warnings is a type of misuse that operates like contributory negligence in that the misconduct of the consumer precludes any claim. This rule is based on Maryland's construction of comment j of the Restatement (Second) of Torts: Products Liability § 402A. However, Maryland's application of comment j is an inappropriate standard for two reasons: first, comment j reflects an unrealistic understanding of a consumer's ability to comprehend and follow warnings; and second, Maryland's construction of comment j allows manufacturers to use warnings as a shield against liability, rather than mandate that manufacturers design a safer product whenever possible. Maryland is misapplying comment j, invoking it in both the wrong context and in the wrong manner. In Lightolier v. Hoon, the

145. Id. at 563, 876 A.2d at 114 (Wilner, J., dissenting). Judge Wilner was joined by Chief Judge Bell and Judge Battaglia. Id. at 562, 876 A.2d at 114.
146. Id. at 563, 876 A.2d at 114.
147. Id.
148. Id.
149. Id. at 563-64, 876 A.2d at 115.
150. Id.
151. See supra notes 73-101 and accompanying text.
152. See supra Part 2.b.
153. See infra Part 4.a.
154. See infra Part 4.b.
Court of Appeals also missed an opportunity to conform Maryland law with the *Restatement (Third)*, which explicitly rejects Maryland’s interpretation of comment j of the *Restatement (Second).*

a. *Failure to Follow Warnings Should Not Be a Complete Bar to a Products Liability Claim Because It Unrealistically Assumes Consumers Always Understand and Heed Warnings.*—In *Lightolier v. Hoon*, the Court of Appeals of Maryland continued to apply the unrealistic assumption that adequate warnings will always be understood and properly followed by consumers. The court held that failure to follow warnings is a type of misuse; the court also continued to define misuse as one that is “not reasonably foreseeable.” Considering these two statements together, it seems that the court held that a consumer’s failure to follow product warnings is not reasonably foreseeable. This conclusion is contrary to practical experience. As a number of courts and commentators have recognized, there are myriad reasons why an adequate warning may nonetheless not be followed.

Because there is substantial evidence that consumers often do not follow warnings for a variety of reasons, the Maryland rule followed in *Lightolier v. Hoon*, which assumes as a matter of law that warnings should always be understood and followed, is simply unrealistic. As Howard Latin argues, there are many reasons why consumers may not follow product warnings, and comment j is an inappropriate judicial presumption. For instance, a consumer may not follow instructions because the instructions are difficult to understand or the conse-

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155. See infra Part 4.c.
156. 387 Md. at 557-58, 876 A.2d at 111.
157. Id. at 554-55, 876 A.2d 109-110.
158. See, e.g., Delaney v. Deere & Co., 999 P.2d 930, 942 (Kan. 2000) (noting that a warning does not necessarily render a product safe); Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) (holding that a consumer’s failure to follow warnings should not preclude judicial evaluation of an alleged design defect because warnings cannot prevent all injuries and because the manufacturer is in a better position to prevent the injury); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 336-37 (Tex. 1998) (reasoning that “warnings are an imperfect means to remedy a product defect” and rejecting the manufacturer’s argument that a manufacturer is not liable for an alleged defective design when the consumer fails to follow product warnings); Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 358 (Tex. 1993) (“[I]t is not at all unusual for a person to fail to follow basic warnings and instructions.”).
quences of not following the instructions are not clear.\textsuperscript{161} In some cases, the consumer may reason that she is less likely to be injured by a product when she has already used the product contrary to the warnings without any injury.\textsuperscript{162} Also, as manufacturers place more and more warnings on products, consumers may be less responsive to these warnings based on an assumption that manufacturers include warnings more for the purpose of avoiding liability, rather than to warn against serious dangers.\textsuperscript{163}

In \textit{Lightolier}, the Court of Appeals of Maryland should have considered the rationales of other jurisdictions that have rejected comment j because of its unrealistic behavioral assumption. For example, the Supreme Court of Texas in \textit{Uniroyal Goodrich Tire Co. v. Martinez} explicitly rejected any rule that would assume that warnings are always understood and heeded as a matter of law.\textsuperscript{164} The court noted that there are many reasons why warnings may not be followed by consumers and the court specifically quoted the rationale of comment l of the \textit{Restatement (Third)}.\textsuperscript{165} Likewise, the Massachusetts Supreme Judicial Court in \textit{Uloth v. City Tank Corp.} rejected a rule that would prevent a defective design claim if the consumer failed to follow product warnings because the court reasoned that a warning will not always prevent injury.\textsuperscript{166} The \textit{Uloth} court noted that a warning will not prevent an injury caused by "instinctual reactions, momentary inadvertence, or forgetfulness."\textsuperscript{167}

In \textit{Lightolier}, the court erred in finding that it was unforeseeable for the Hoons to contract with Gede to install insulation around the light fixtures without ensuring that the warnings were heeded. On the contrary, because consumers routinely fail to follow warnings, the failure of the Hoons to follow the product warnings seems reasonably foreseeable.\textsuperscript{168} Furthermore, the Hoons' mistake was arguably more

\textsuperscript{161} Latin, \textit{supra} note 159, at 1222-26. Latin refers to comment j’s assumption that people will always understand and follow adequate warnings as an “unrealistic behavioral presumption.” \textit{Id.} at 1196.

\textsuperscript{162} \textit{Id.} at 1232.

\textsuperscript{163} \textit{Id.} at 1247-48.

\textsuperscript{164} 977 S.W.2d at 345.

\textsuperscript{165} \textit{Id.} at 336-37.

\textsuperscript{166} 384 N.E.2d 1188, 1192 (Mass. 1978).

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} Latin, \textit{supra} note 159, at 1276. In \textit{Lightolier}, it is not even clear that the consumers acted unreasonably in failing to follow the warnings. The consumers were not unreasonable in failing to check the other light fixtures after they discovered a problem with two of the fixtures. Hoon v. Lightolier, 158 Md. App. 648, 657, 857 A.2d 1184, 1189 (2004). From the consumers' perspective, they could have reasonably assumed any other fixture would also blink if it had an insulation problem. \textit{Id.} The Court of Special Appeals found this argument persuasive. \textit{Id.}
foreseeable because of the wording of the warning and the existence of the SHTP. 169 As Judge Wilner notes in his dissent, although Lightolier insisted the fixture at issue was not intended for use in an insulated ceiling, the fact that the fixture included the SHTP safety device and the presence of the warning could reasonably lead to the opposite inference. 170 The warning on the fixture did not prohibit installing the fixture in an insulated ceiling; instead, the warning only stated not to install the fixture within three inches of insulation. 171 Thus, in Lightolier, the warnings themselves were not clear and therefore it is all the more problematic to assume that they will be followed. 172

The Court of Appeals did not sufficiently respond to the lower court's finding that the existence of the SHTP did in fact imply that Lightolier foresaw that a consumer might not follow the warnings. 173 The Court of Appeals noted that NEC guidelines required the Lightolier fixture to include a safety device like the SHTP. 174 Thus, the court reasoned, it was not necessarily because Lightolier foresaw a failure to follow directions that Lightolier included the SHTP, but because Lightolier was simply following NEC guidelines. 175 This, however, does not negate the Court of Special Appeals's point, but simply moves the foresight from Lightolier to NEC. Consequently, a consumer's failure to follow the warnings is still reasonably foreseeable and is even more foreseeable because the agency responsible for overseeing the safety of this product line specifically foresaw such a problem. 176

The Lightolier court failed to address the logical incongruity of the application of the doctrine of misuse to a case where the consumer fails to follow product warnings. The example the court used in its first and still fundamental explanation of misuse, in Ellsworth v. Sherne Lingerie, Inc., is inapposite to a case like Lightolier where the consumer

169. See supra notes 19-24 and accompanying text.
171. Id., 876 A.2d at 114.
172. The Court of Appeals found the directions were adequate because they were plainly visible on the fixture itself and in the instruction manual, conformed with industry standards, and were precise enough to state that insulation should not come within three inches of the fixture. Id. at 558-59, 876 A.2d at 112 (majority opinion). However, the dissent argued that the warnings were not clear about the proper usage of the fixture. Id. at 563, 876 A.2d at 114-15 (Wilner, J., dissenting). Furthermore, the court should also have considered that the warnings and the purpose of the safety device are likely clearer to the court when evaluating them after the fire than they would be to a consumer about to use the product. Latin, supra note 159, at 1223.
174. Lightolier, 387 Md. at 560, 876 A.2d at 113.
175. Id. at 559-60, 876 A.2d at 112-13.
176. Id.
has failed to follow product warnings. In Ellsworth, the court explained that misuse may be the sole proximate cause of an injury where the misuse is the intervening or superseding cause. As an example, the court offered an electric drill with a design defect that causes the drill to short circuit and results in an electric shock during normal usage. If a consumer took that same drill and attached a toothbrush to the drill and injured himself trying to brush his teeth with the drill (and the drill did not short circuit), misuse of the drill would be the sole proximate cause of his injury. As the court correctly states, although anything is reasonably foreseeable after a consumer has done it, attaching a toothbrush to an electric drill to brush one’s teeth is not. In this example, the design defect and the consumer’s use of the drill are separate, such that the design defect was not a part of the chain of events leading to the injury.

The Lightolier court did not, however, reconcile the Ellsworth explanation of misuse with its finding of misuse in Lightolier. In Lightolier, the design defect and the consumer’s misuse were part of the same chain leading to the injury. More specifically, the Hoons alleged that Lightolier had defectively designed the fixture by placing the SHTP so far from the heat source that it could not properly detect a fire. The misuse by the Hoons in failing to follow the directions led to entrapment around the fixture of heat that the fixture was intended to detect. Thus, if the SHTP had functioned properly, it should have detected the excessive heat prior to the fire caused by insulation placed around the fixture. In Lightolier, the defect in the light fixture may have led to the harm. Although the Hoons misused the product because they used the fixture contrary to the directions, the Hoons’ misuse was reasonably foreseeable as Lightolier specifically warned against such use. The court failed, however, to address this logical inconsistency in Maryland’s misuse doctrine.

Thus, in Lightolier v. Hoon, the Court of Appeals failed to eliminate Maryland’s adherence to the unrealistic assumption that consumers consistently comprehend and follow product warnings.

178. Id., 495 A.2d at 355-56.
179. Id., 495 A.2d at 356.
180. Id.
181. Id.
182. 387 Md. at 559, 876 A.2d at 112.
183. Id. at 561, 876 A.2d at 113.
184. Id. at 563, 876 A.2d at 115 (Wilner, J., dissenting).
185. Id.
Particularly in this case, where the consumers' actions were foreseeable and the product did not function as designed, the heeding assumption is an awkward judicial fiction.

b. Comment J, as Construed by the Maryland Court of Appeals, Is an Improper Standard Because It Allows Manufacturers to Substitute Warnings for Safer Designs.—In Lightolier v. Hoon, even though the manufacturer had a safer alternative design, the manufacturer could produce the more dangerous model with a warning, rather than the safer alternative, because the consumers' misuse precluded their products liability suit.187 Given Maryland's interpretation of comment j of the Restatement (Second), if the manufacturer provides an adequate warning that the consumer fails to follow, the consumer is precluded from bringing a defective design suit, even if the manufacturer knows of a safer, alternative design.188

By continuing to follow this interpretation of comment j, the Court of Appeals in Lightolier v. Hoon inappropriately reduces the burden on manufacturers to design a safer product.189 Applying the comment j presumption as Maryland does means that once the manufacturer shows that the consumer failed to follow adequate warnings, the court's ability to analyze any potential design defect is summarily eliminated.190 Maryland is one of a few "misguided" jurisdictions that continue to apply the comment j presumption in this way.191 Furthermore, Maryland's application of the comment j presumption treats all consumers the same, regardless of why they failed to follow warnings.192

In Lightolier, the Court of Appeals should have taken the chance to follow those jurisdictions that reject a construction of comment j that allows warnings to substitute for safer designs. For example, the Supreme Court of Kansas in Delaney v. Deere & Co., refused to follow

188. Lightolier, 387 Md. at 553-54, 876 A.2d at 109.
189. See Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) (arguing that the manufacturer is in a better position to recognize defects and minimize risks and consequently the burden should be on the manufacturer to cure defects).
192. See Latin, supra note 159, at 1207-08 (explaining that there are many different reasons why consumers may not read or heed warnings, one of which is illiteracy).
comment j specifically because it has been construed to allow adequate warnings to substitute for a safer design. \(^{193}\) Likewise in \textit{Uloth v. City Tank Corp.} (upon which the \textit{Delaney} court relied in part), the Massachusetts Supreme Judicial Court refused to hold that an adequate warning allows a manufacturer to avoid liability. \(^{194}\) The \textit{Uloth} court reasoned that even a careful user may on occasion fail to follow warnings, and this should not preclude analysis of whether a product is defective. \(^{195}\) Along the same lines, the Supreme Court of Texas reasoned that it is appropriate for courts to evaluate an alleged design defect precisely because warnings will not always solve design problems or prevent injuries. \(^{196}\) Consequently, while consumers may not understand or heed warnings, they will always "encounter" the design. \(^{197}\)

The \textit{Lightolier} court did not properly address the failure of the IC-rated fixture to function as designed. \(^{198}\) In his dissent, Judge Wilner rightly criticized the court for minimizing the issue. \(^{199}\) None of the decisions upon which \textit{Lightolier} relied involved a product that failed to function as designed. \(^{200}\) Consequently, the \textit{Lightolier} court's finding that \textit{Halliday} was controlling was misplaced because \textit{Halliday} and \textit{Lightolier} are factually distinguishable. \(^{201}\) Although in both \textit{Halliday} and \textit{Lightolier}, the consumers failed to heed product warnings, \textit{Halliday} is inapposite because the product there functioned exactly as designed, while in \textit{Lightolier}, the light failed to blink to warn of an insulation problem. \(^{202}\) This makes the application in \textit{Lightolier} of the doctrine of misuse awkward at best. \(^{203}\)

\(^{193}\) 999 P.2d 930, 942-43 (Kan. 2000).

\(^{194}\) 384 N.E.2d at 1192.

\(^{195}\) Id.

\(^{196}\) Uniroyal v. Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 336-37 (Tex. 1998).

\(^{197}\) Id. at 336. Even courts that adhere to the comment j presumption admit the presumption does not reflect reality. \textit{E.g.}, Coffman v. Keene Corp., 628 A.2d 710, 717 (N.J. 1993).

\(^{198}\) \textit{See} Hoon v. Lightolier, 158 Md. App. 648, 666, 857 A.2d 1184, 1194 (2004) (stating that the light fixture did not operate correctly, according to expert testimony). The Court of Special Appeals looked outside Maryland to an Ohio court for guidance and held that the failure of the light fixture to properly function meant that the comment j presumption is inapplicable. \textit{Id.}

\(^{199}\) \textit{Lightolier}, 387 Md. at 563-64, 876 A.2d at 115 (Wilner, J., dissenting).

\(^{200}\) \textit{Hoon}, 158 Md. at 666, 857 A.2d at 1194. More specifically, although each of the cases cited by Lightolier did involve a consumer's failure to follow warnings, in each case the product either functioned as intended or did not malfunction. \textit{Id.} at 659-72, 857 A.2d at 1190-97.

\(^{201}\) \textit{See} Lightolier, 387 Md. at 554-555, 876 A.2d at 109-10.


\(^{203}\) At least one court has held that the comment j presumption does not apply when the product fails to operate as designed. Moorhead v. Carborundum Co., No. 461, 1983
c. The Lightolier Court Missed an Opportunity to Bring Maryland Law into Conformity with the Third Restatement.—In Lightolier v. Hoon, the Court of Appeals should have reconsidered its interpretation of the comment j presumption. Maryland is improperly interpreting the comment j presumption by applying it to the detriment of consumers, rather than for their benefit, as intended.\textsuperscript{204} Although most courts employ the comment j presumption in failure-to-warn suits to relieve consumers of the burden of proving causation, Maryland is misapplying the comment by using the presumption against consumers in design defect claims.\textsuperscript{205}

In Lightolier, the Court of Appeals missed an opportunity to advance Maryland products liability law by bringing it into agreement with the \textit{Restatement (Third) of Torts: Products Liability}. In the new \textit{Restatement}, comment j is rejected as “unfortunate language” that has led to extensive criticism and misapplications.\textsuperscript{206}

In Lightolier, the Court of Appeals failed to reconsider the effects of its interpretation of comment j. The drafters of the \textit{Restatement (Third)} agree with the criticisms of comment j that to assume as a matter of law that consumers will always understand warnings is unrealistic.\textsuperscript{207} The \textit{Restatement (Third)} rejects Maryland’s interpretation of comment j as “primitive.”\textsuperscript{208} According to the \textit{Restatement (Third)}, the read-and-heed presumption should have no more force than its original purpose: to relieve consumers of the burden of showing they would have followed adequate warnings if they had been provided.\textsuperscript{209} The presumption is not intended to allow manufacturers to substitute warnings for a safer design because an adequate warning cannot always prevent injury.\textsuperscript{210} Instead a safer design, when possible, is preferred over a warning.\textsuperscript{211}

\textsuperscript{204} See generally Owen, \textit{supra} note 187.
\textsuperscript{205} Id. at 1 n.6.
\textsuperscript{206} \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} \S 2, cmt. 1 (1998).
\textsuperscript{207} Id.
\textsuperscript{208} Henderson & Twerski, \textit{supra} note 190, at 689.
\textsuperscript{209} Owen, \textit{supra} note 187, at 1.
\textsuperscript{210} Id.
\textsuperscript{211} \S 2, cmt. 1.
5. Conclusion.—In *Lightolier v. Hoon*, the Court of Appeals held that a manufacturer may not be held strictly liable when a consumer fails to follow warnings. This decision was based on Maryland’s continued adherence to its interpretation of comment j of the *Restatement (Second)*. Comment j’s assumption that warnings will always be followed by consumers is unrealistic based on everyday experience. By maintaining such a standard, the court allows manufacturers to avoid liability and to avoid designing safer alternatives by simply warning consumers of potential dangers. Rather than upholding such an unrealistic assumption, the court should have taken the opportunity presented in *Lightolier* to reevaluate its assumption that consumers always read and heed instructions and should have brought Maryland law into conformity with the *Restatement (Third)*.

ERIN O'DEA

212. 387 Md. at 545, 876 A.2d at 104.
213. See supra Part 2.b.
214. See supra Part 4.a.
215. See supra Part 4.b.
216. See supra Part 4.c.