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Recent Decisions

THE COURT OF APPEALS OF MARYLAND

RITE AID CORP. v. LEVY-GRAY: UNJUSTLY HOLDING PHARMACIES LIABLE FOR BREACH OF EXPRESS WARRANTY BY PROVIDING DRUG INFORMATION AFTER FILLING PRESCRIPTIONS

In Rite Aid Corp. v. Levy-Gray, the Court of Appeals of Maryland considered whether a pharmacy can be held liable for breaching an express warranty for providing usage instructions for a prescription drug to a consumer after purchase. The court found Rite Aid in breach of an express warranty for its written advice to a customer regarding the use of a prescription drug. The court errantly departed from precedent in considering Rite Aid's statements to be part of its bargain and to have created an express warranty because the customer received the pamphlet after the exchange. Furthermore, the court should not have found that Rite Aid induced the drug's purchase because the customer bought doxycycline—a drug which the store did not advertise—only after her physician prescribed it. Finally, the court erred in declining to insulate Rite Aid from liability under the "learned intermediary" doctrine by misconstruing the contents of the pamphlet given to the customer and by failing to acknowledge that the customer did not rely on Rite Aid when using the medication.

I. THE CASE

On October 25, 2000, Ellen Levy-Gray visited a Rite Aid pharmacy in Timonium, Maryland to fill a prescription for doxycycline to treat her Lyme disease. Along with the doxycycline, Levy-Gray received statements from both the drug manufacturer and Rite Aid advising her to take the drug with food or milk if she experienced gastric irrita-

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2. Id. at 618, 894 A.2d at 569.
3. Id.
4. See infra Part IV.A.1.
5. See infra Part IV.A.2.
6. See infra Part IV.B.
7. Rite Aid, 391 Md. at 612, 894 A.2d at 565–66. Levy-Gray had previous dealings with that same Rite Aid store. Id., 894 A.2d at 566.
tion. Rite Aid's "Rite Advice" pamphlet further stated that its advice was "INTENDED TO SUPPLEMENT, NOT SUBSTITUTE FOR, THE EXPERTISE AND JUDGMENT OF [THE CUSTOMER'S] PHYSICIAN, PHARMACIST OR OTHER HEALTHCARE PROFESSIONAL. . . CONSULT YOUR HEALTHCARE PROFESSIONAL BEFORE USING THIS DRUG."9

Two days after the purchase, Levy-Gray experienced an upset stomach.10 She then consumed a large amount of dairy products while taking the doxycycline, but did not experience any alleviation of her Lyme disease symptoms.11 At the suggestion of her brother, a urological oncologist, Levy-Gray stopped consuming dairy products while taking the drug.12 Though her symptoms improved, Levy-Gray did not fully recover from the Lyme disease.13 After a second course of doxycycline failed to improve her symptoms, Levy-Gray was diagnosed with post-Lyme syndrome.14 On November 2, 2001, Levy-Gray sued Rite-Aid in the Circuit Court for Baltimore County, pursuing claims of negligence, products liability, failure to warn, negligent misrepresentation, and breach of express warranty.15

At trial, the jury ruled in favor of Rite Aid with respect to the negligence claim and decided in favor of Levy-Gray on the breach of express warranty claim.16 The Maryland Court of Special Appeals affirmed, finding that (1) Levy-Gray established reliance on Rite Aid's pamphlet given her course of dealing with Rite Aid; (2) Rite Aid's statements about doxycycline in its pamphlet were representations of the drug's compatibility with food and milk; and (3) Levy-Gray did not have to be aware of the express warranty at the time of her purchase for the warranty to be effective.17 The Court of Appeals granted certiorari to determine whether a pharmacy can be subject to a breach of express warranty claim and, if so, whether under section 2-313 of the Maryland Commercial Law Article, a pharmacy can breach an express warranty when providing usage instructions for a prescription drug to

8. Id. at 612–13, 894 A.2d at 566.
9. Id. at 613, 894 A.2d at 566.
10. Id.
11. Id. at 613–14, 894 A.2d at 566–67.
12. Id. at 614, 894 A.2d at 567.
13. Id.
14. Id. Post-Lyme syndrome is a "chronic autoimmune response in which patients experience symptoms that mimic Lyme disease without an active bacterial infection." Id.
15. Id.
16. Id. at 615–17, 894 A.2d at 568. The trial judge dismissed the other claims at the close of evidence. Id. at 615, 894 A.2d at 568.
a customer after purchase that make no assurances regarding the drug's performance, and of which the customer is previously unaware. 18

II. LEGAL BACKGROUND

Section 2-313 of the Commercial Law Article provides that a seller creates an express warranty when the statement at issue is an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." 19 To evaluate the circumstances surrounding the basis of the bargain, Maryland law requires an initial two-pronged analysis. First, the court assesses whether the buyer received the seller's product statements and assurances after purchasing the desired item; if so, those materials do not comprise part of the basis of the bargain. 20 Second, the court asks whether the seller has specifically induced the sale with the buyer; only if the seller has taken steps to advertise or market the sale will the court hold the seller to have expressly warranted the sold product. 21

Even if the elements of an express warranty are satisfied, Maryland law accords a special status to sellers of pharmaceuticals, relieving them of liability for warranting product performance when a learned intermediary, such as a physician, more directly tends to the customer-patient. 22 Because pharmacies merely fill physicians' prescriptions and do not typically have an intimate knowledge of the unique health situation of every customer or may not know the complex composition of each drug, Maryland courts have held pharmacies to be atypical sellers and within the protection of the learned intermediary doctrine. 23

A. A Buyer Must Receive a Seller's Product Statements Before or at the Time of Sale to Form the Basis of the Bargain and Create an Express Warranty

Maryland courts examine the timing of the buyer's receipt of product information to evaluate whether the express warranty ele-

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19. *Md. Code Ann.*, *Com. Law § 2-313* (1) (a). Sections 2-313(1)(b) and (1)(c) merely reiterate (1)(a) with respect to a "description of the goods" or a "sample or model" which then become part of the "basis of the bargain," as in (1)(a).
20. See infra Part II.A.
21. See infra Part II.B.
22. See infra Part II.C.
23. See infra Part II.C.
ments are present in a commercial exchange. On its face, official comment 7 to section 2-313 of the Commercial Law Article suggests a relaxed approach to timing, stating that the exact time when the buyer receives the seller’s statements, descriptions, instructions, or affirmations is immaterial; the question is “whether the language or samples or models are fairly to be regarded as part of the contract.” The Court of Appeals has not adopted such an offhand approach to timing, however, and has only acknowledged the existence of an express warranty based on the seller’s product information pamphlets if the buyer received them at or before the exchange.

For example, in Sensabaugh v. Morgan Bros. Farm Supply, Inc., the Court of Appeals rejected an express written warranty claim based on statements in the seller’s documents delivered to a customer a few days after a sale precisely because the paper was delivered “too late to attach conditions.” In Sensabaugh, a contractor purchased a bulldozer and loader for construction purposes, but the sales agreement that accompanied the sale contained no warranty of any kind. A few days after the purchase, the buyer received the delivered equipment along with a manual that had a warranty printed on the back. The court recognized the buyer’s inability to rely on the seller’s statements in making a purchase if the buyer received those statements after the exchange. The Sensabaugh court thus found that the printed statements could not create an express warranty by the seller because the buyer received them after the sale’s consummation.

Applying Maryland law, the United States Court of Appeals for the Fourth Circuit has similarly insisted on proper timing with respect to the buyer’s receipt of the seller’s product statements to create an express warranty. In Distillers Distributing Corp. v. Sherwood Distilling Co., a seller of grain alcohol permitted an agent to sell its product and warrant to the buyer that the alcohol was first class and that any “loss through evaporation” was slight. Because of these assurances, a customer bought 165 barrels from the seller, but the product was in

24. See, e.g., Sensabaugh v. Morgan Bros. Farm Supply, 223 Md. 593, 597, 165 A.2d 914, 916 (1960) (noting that the “written warranty was never brought to the attention of the purchaser until after the machines were delivered and the sales consummated”).
25. MD. CODE ANN., COM. LAW § 2-313 cmt. 7 (LexisNexis 2002).
27. Id. at 597, 165 A.2d at 916.
28. Id. at 594, 165 A.2d at 914.
29. Id. at 594–95, 165 A.2d at 914–15.
30. Id. at 596–97, 165 A.2d at 916.
31. Id. at 597, 165 A.2d at 916.
32. 180 F.2d 800 (4th Cir. 1950).
33. Id. at 802.
fact substandard and had evaporated beyond an acceptable percentage. The court held that under Maryland law, the agent's assurances formed an express warranty and were part of the basis of bargain between seller and buyer because the buyer received them before purchasing the alcohol. The court further stated that the seller need not explicitly state that his language is a warranty, but if the seller couches his language in such a way that a reasonable buyer, receiving such statements prior to a purchase, would rely on that language, the seller's language may constitute an express warranty.

Similarly, the United States District Court for the District of Maryland has strictly adhered to the express warranty timing requirement in applying Maryland Law. In Shreve v. Sears, Roebuck & Co., the court held that an express warranty does not exist even when the seller delivered a product information manual at the time of sale if the buyer does not read the seller's statements until after the sale. In Shreve, the manufacturer of a snow thrower provided the buyer at the time of sale with instructional statements regarding the product's use in an owner's manual, which the buyer did not read until after the purchase. The court found that such statements did not create an express warranty because the buyer was unaware of such statements at the time of the purchase and could not reasonably have considered the instructions as part of the basis of the bargain. Thus under Maryland law, a seller-buyer exchange does not result in an express warranty if a buyer receives or reads the seller's statements about the product after the exchange, because such post-formation information cannot form a basis of the buyer's bargain with the seller.

Unlike Maryland's stringent approach to timing, at least one New York court has treated timing as irrelevant, and upheld an express warranty claim when a buyer obtained a seller's statements about a

34. Id.
35. Id. at 801-03, 805. In reaching its conclusion, the Fourth Circuit relied upon a statement from Osgood v. Lewis, 2 H. & G. 495, 518 (Md. 1829):
   Any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty.
   This position was also referenced with approval and adopted by the Supreme Court in Shippen v. Bowen, 122 U.S. 575, 581 (1887).
36. Distillers, 180 F.2d at 802-03.
38. Id. at 386–87, 417.
39. Id. at 420–21.
product after the sale. In *Murphy v. Mallard Coach Co.*, an intermediate appellate court in New York addressed a lawsuit for breach of warranty brought by buyers of a motor home against a manufacturer and retailer after the defendants’ attempts to correct the defects in the buyers’ home were unsuccessful and after the defendants both refused to furnish a refund. Although the mobile home sellers presented the warranty to the buyers upon the home’s delivery, which occurred after the plaintiffs paid the purchase price, the court found in favor of the buyers, reasoning that such presentation was sufficiently proximate in time to the purchase so as to fairly be considered a part of the basis of the bargain.

In a similar departure from Maryland law, the Second Circuit, in *Bigelow v. Agway*, applied Vermont law and adopted a flexible approach to timing. In *Bigelow*, a farmer bought a product from a chemical dealer after seeing advertisements that the product retarded mold growth in baled hay, allowing the hay to be baled at higher moisture levels than normal. After the purchase, the seller’s sales representatives visited the farmer to address the use of the product on some drying, unbale hay in the buyer’s barn and affirmed that the product could safely and effectively be used on the hay. When the farmer sprayed the product on the hay, however, it caused a spontaneous combustion and the resulting fire consumed the farmer’s hay and barn. Even though the buyer received the sales representative’s statement regarding the product’s effectiveness after the sale, the Second Circuit found that this post-purchase language created an express warranty because the seller’s salesman guaranteed the safety and effectiveness of his chemical in direct response to the buyer’s concerns. The *Bigelow* court did not insist that the buyer receive the seller’s product statements before the sale, but found a warranty claim existed because the seller’s visit and statements addressed particular issues and concerns upon which the buyer relied and acted.

Despite contrary applications in the Second Circuit and New York state courts, the Fourth Circuit—applying Maryland law—has af-

41. Id. at 529–30.
42. Id. at 531–32.
43. 506 F.2d 551 (2d Cir. 1974).
44. Id. at 553, 555–56.
45. Id. at 553.
46. Id.
47. Id.
48. Id. at 554–55.
49. Id. at 553–55.
firmed that Maryland courts rigidly insist upon the proper timing in creating an express warranty. In *Duvall v. Bristol-Myers Squibb Co.***, a customer sued the manufacturer of a penile prosthesis for breach of express warranty when the product malfunctioned and did not conform to the seller's alleged representations that the product would allow for normal sexual activity. The Fourth Circuit noted that to find for the buyer, Maryland law requires that the goods fail to conform to an affirmation about a seller's product that is made to the buyer prior to the purchase. The *Duvall* court ruled that the buyer could not recover on a breach of express warranty claim because the customer who had received the penile prosthesis failed to establish that the medical device manufacturer's representative had made oral representations regarding the performance of the prosthesis prior to or at the time of the vendor-customer bargain.

**B. A Seller Must Induce the Buyer's Purchase by Advertisement, Product Assurances, or Specifically Urging a Particular Product in Order to Create an Express Warranty**

For an exchange to contain the necessary elements of an express warranty, the Court of Appeals has also required that the seller solicit the buyer and induce the sale through affirmations as to a product's performance or effectiveness. In *Greer v. Whalen***, the court enunciated this principle in an exchange involving a livestock dealer's offer to a stockyard owner for the sale of cattle. In response to the offer of a price not to exceed $2.85 per hundredweight of cattle in good condition, the stockyard owner contracted to purchase forty heifers; however, upon delivery, he received a notice from the seller charging between $3.00 and $3.25 per hundredweight for the cattle. Because the buyer relied on the seller's solicitation and price offer in entering the contract, the *Greer* court held that the seller induced the sale and was therefore liable for breach of warranty as to the quality and price of the cattle.

As an alternative to a seller's direct solicitation creating an express warranty, the Court of Appeals has also found that a seller's

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50. 103 F.3d 324 (4th Cir. 1996).
51. *Id.* at 326, 331.
52. *Id.* at 331.
53. *Id.*
54. 125 Md. 273, 93 A. 521 (1915).
55. *Id.* at 274–75, 279, 93 A. at 521–23 (citing Osgood v. Lewis, 2 H. & G. 495, 518 (Md. 1829)).
56. *Id.* at 275–76, 93 A. at 521–22.
57. *Id.* at 279–80, 93 A. at 523.
product assurances, given in response to a potential customer’s questions and concerns, may induce a sale and create a warranty. In *Schley v. Zalis*, a trader in vegetables and farm produce contacted a tomato farmer and proposed to purchase 300 lugs of green tomatoes if the farmer promised that the products were fresh and not frozen. After the farmer gave such a guarantee and the trader purchased the tomatoes, the produce was discovered to be frozen, thus destroying its commercial value. The court held that the farmer was in breach of an express warranty for the products’ freshness, finding that the seller’s declarations as to the quality of the tomatoes induced the customer’s purchase.

Likewise, in *Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates Ltd. Partnership*, the Court of Special Appeals found that a condominium developer’s statements about the design and construction of a unit to a buyer formed the basis of a bargain and expressly warranted the unit’s performance and safety because the statements induced the purchase. In *Hartford*, the seller of condominium units promised the buyer in a written agreement that the mechanical, plumbing, and electrical systems, roof, walls, and other structural elements of its building were safe and conform to accepted industry standards. However, after purchasing the condominium building, the buyer discovered many faults, including leaky walls, design defects, faulty telephone wires, violations in the “stairway pressurization” system, and other structural errors. The *Hartford* court held that the buyer could pursue its claim that the developer breached its warranty because the buyer allegedly relied on the seller’s statements at purchase to build structurally sound, complete condominiums.

The Court of Appeals has applied this same inducement requirement to pharmacies, holding that because treating physicians’ prescriptions induce the buyer’s purchase of a drug, the pharmacy does not bear the same liability as prescribing physicians for negligence or breach of an express warranty. For example, in *People’s Service Drug Stores, Inc. v. Somerville*, a pharmacy accurately filled a customer’s pre-

59. Id. at 337–38, 191 A. at 563.
60. Id. at 338, 191 A. at 563–64.
61. Id. at 339–40, 191 A. at 564.
63. Id. at 279–80 n.16, 674 A.2d at 136–37 n.16.
64. Id. at 231–32, 674 A.2d at 113.
65. Id. at 232–34, 674 A.2d at 113–14.
66. Id. at 249, 674 A.2d at 121–22.
67. 161 Md. 662, 158 A. 12 (1932).
scription for strychnine, but the customer overdosed by following the physician’s dosage instructions on the drug container and experienced a weakened nervous condition and rigid bodily stiffness.\textsuperscript{68} Despite admonishing the pharmacist for filling the prescription because the prescribed dosage was too large, the court held that the pharmacy bore no liability for a breach of express warranty because the pharmacy accurately filled the prescription, the customer’s physician’s prescription induced the drug purchase, and the patient overdosed on the drug by following the prescription’s instructions.\textsuperscript{69} Maryland courts have thus emphasized that a seller does not induce a sale or warrant a product’s performance in the bargain with the buyer unless the seller overtly markets a product or makes statements to solicit the product’s purchase.

Other jurisdictions echo Maryland courts’ insistence on a seller’s inducement-to-buy as a requirement of an express warranty. In \textit{Schmaltz v. Nissen},\textsuperscript{70} for example, the Supreme Court of South Dakota noted that an express warranty does not exist if a seller’s statements did not induce a buyer’s purchase.\textsuperscript{71} In \textit{Schmaltz}, a seller’s seed package displayed a statement indicating that the seed was of a higher quality due to its prior insecticide treatment.\textsuperscript{72} Despite the inferior quality of the seeds and the fact that the buyer received the statement at the time of purchase, the court held that the seller’s statement was not part of the basis of the bargain and did not create an express warranty because it was not seen by the buyer until after purchase and thus could not have induced the sale.\textsuperscript{73}

Similar to Maryland’s characterization of pharmacies as atypical sellers in \textit{People’s Service}, the Southern District of New York, applying Mississippi law, recently addressed in \textit{In re Rezulin Products Liability Litigation}\textsuperscript{74} whether pharmacies that dispense prescription medication to customers may be held liable for breaching an express warranty as to the failed or injurious performance of the medication.\textsuperscript{75} The court held that such liability does not exist and that any representation

\textsuperscript{68} \textit{Id.} at 664, 158 A. at 12–13.  
\textsuperscript{69} \textit{Id.} at 666–67, 158 A. at 13–14.  
\textsuperscript{70} 431 N.W.2d 657 (S.D. 1988).  
\textsuperscript{71} \textit{Id.} at 660–61; see also Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136, 146–47 (Ark. 1992) (finding that a seller’s statement regarding an herbicide’s safety was not part of the basis of the bargain where the buyer was not influenced by the statement to buy the product).  
\textsuperscript{72} \textit{Schmaltz,} 431 N.W.2d at 659.  
\textsuperscript{73} \textit{Id.} at 660–61; see also Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 680 (D.N.H. 1972) (finding that no express warranty existed after the plaintiff failed to demonstrate that he acted based on the seller’s representations in making his purchase).  
\textsuperscript{74} 133 F. Supp. 2d 272 (S.D.N.Y. 2001).  
\textsuperscript{75} \textit{Id.} at 291–92.
made by a pharmacy would not form part of the basis of the bargain because patients do not purchase prescription medications based on representations from the pharmacy, but rather on advice from prescribing physicians.76

In sum, for a Maryland court to find an express warranty, a seller must have specifically induced the exchange with the buyer. Moreover, Maryland law requires inducement in addition to the proper timing; even if a seller's statements could have instigated the purchase, such statements cannot be said to have induced the sale if they were not read before the sale occurred.

C. A Customer May Not Justifiably Rely on the Pharmacy for the Use of a Drug under the Learned Intermediary Doctrine

Even if the elements of an express warranty are established, Maryland law protects pharmacies from liability for a drug's performance by designating pharmacies as atypical sellers; instead, liability falls on a learned intermediary—a healthcare professional with particular knowledge of the interaction of a specific drug with a unique individual.77 This protection was evident in People's Service, where the Court of Appeals sought to insulate pharmacies from liability for the same warranties to which the court held typical sellers because of the uncertain nature of pharmaceuticals, the lack of knowledge of each customer's unique medical conditions, and the chemical complexities of drugs.78 In an effort to shield pharmacies from liability for filling prescriptions, the People's Service court found that a pharmacy is not liable for breach of express warranty as to the drug's performance when it accurately follows a physician's instructions and provides a customer with a pharmaceutical order.79

76. Id.
77. See People's Serv. Drug Stores, Inc. v. Somerville, 161 Md. 662, 663–64, 666, 158 A. 12, 13 (1932) (indicating hesitation to treat a pharmacy with the same level of liability as a prescribing physician).
78. Id. at 666–67, 158 A. at 13–14.
The Court of Appeals reiterated its intention to insulate pharmacies from liability for express warranties and to distinguish the legal accountability of pharmacies from that of drug manufacturers and physicians in a case under the Maryland Malpractice Claims Statute. In *Mancuso v. Giant Food, Inc.*, a customer complained that Giant Food's pharmacy improperly filled her prescription, and the court addressed whether the pharmacy must submit to arbitration for the damages claimed as a condition precedent to the civil action. The court stated that the pharmacy did not have to submit to the arbitration and was not liable for breach of warranty, even though it improperly filled the prescription, because pharmacies are not considered health care providers under the statute and do not possess the same level of knowledge about a patient's condition as prescribing physicians.

In addition to generally subjecting pharmacies to a lesser degree of liability than physicians and drug manufacturers, the Court of Appeals has specifically used the learned intermediary doctrine to protect pharmaceutical companies from express warranty liability. In *Nolan v. Dillon*, an obstetrician gave a patient an injection of promazine hydrochloride to prepare the patient for childbirth. Immediately following the injection, the patient's left hand became discolored and gangrene set in, forcing the doctors to amputate three of the patient's fingers. The court held that the drug manufacturer's warnings on the drug package and on the package insert that the drug was restricted to intramuscular use were sufficient to protect the manufacturer from liability by discharging its duty to warn onto the physician who supervised the patient’s care. The *Nolan* court considered the physician to be a learned intermediary between the patient and manufacturer, and as such, the physician’s direct supervised treatment and knowledge of the drug shielded the manufacturer from liability.

Likewise, in applying Maryland law, the Maryland federal district courts have extended the learned intermediary doctrine to protect manufacturers from express warranty claims even when the manufacturer's warnings on a prescription drug package were inadequate. In *Ames v. Apothecon, Inc.*, a manufacturer of a generic version of amox-

81. Id. at 345–46, 609 A.2d at 333.
82. Id. at 348, 352, 609 A.2d at 334, 336.
83. 261 Md. 516, 276 A.2d 36 (1971).
84. Id. at 519, 276 A.2d at 38.
85. Id.
86. Id. at 522–23, 276 A.2d at 40.
87. Id. at 523, 534–35, 276 A.2d at 40, 46.
icillin did not specifically warn doctors of early signs of a life-threatening adverse reaction to the drug that causes the breakdown of mucous membranes. The court found that the manufacturer's warnings on the drug's package conformed to state law and adequately apprised the physician of the risks associated with prescribing the drug. Because the physician's medical training and familiarity with amoxicillin adequately alerted him to the drug's potential effects, the Ames court concluded that the manufacturer transferred its liability to the physician, who was in the best position to treat the patient's unique needs and weigh the benefits and risks of a particular treatment. Thus, when an intermediary treating party—such as a physician or health care provider—is more involved with the patient and drug than a distant party—such as a pharmacy or manufacturer—the distant parties receive a protected status, insulating them from liability for express warranty claims.

III. THE COURT'S REASONING

In Rite Aid Corp. v. Levy-Gray, the Court of Appeals affirmed the judgment of the Court of Special Appeals and concluded that a pharmacy could be held liable under a breach of express warranty claim and that Rite Aid's instructions constituted an express warranty. Writing for the majority, Judge Battaglia first explained that pharmacies may be held liable for a breach of express warranty because of the nature of the contract between the customer and the pharmacy at the time of a drug's purchase. The court determined that a jury reason-

89. Id. at 568–69.
90. Id. at 568, 573.
91. Id. at 572; see also Miller v. Bristol-Myers Squibb Co., 121 F. Supp. 2d 831, 838 (D. Md. 2000) (noting that manufacturers of medical devices, such as breast implants, have "no duty to warn patients of risks associated with products used under the supervision of a doctor"); Sard v. Hardy, 281 Md. 432, 451–53, 379 A.2d 1014, 1026–27 (1977) (illustrating the lengths to which physicians are protected in Maryland, as even those physicians with knowledge of a patient's idiosyncrasies are protected from express warranty claims because it is unreasonable, absent an express and absolute agreement, to insure or expect a particular result—medical results are inherently unpredictable and individual patients are different).
92. Rite Aid, 391 Md. at 618, 894 A.2d at 569.
93. Id. at 621, 894 A.2d at 571. The court distinguished a pharmacy's liability based on an express warranty claim, which is a contractual claim that rests on the individual bargain's dickered aspects and depends on the characterization of a pharmaceutical as a "good" under Maryland statutory law, from an implied warranty, which is a hybrid tort-contract claim that rests on common factual scenarios or sets of conditions. Id. at 619–21, 894 A.2d at 571. The court rejected the notion that prescription drugs could be unique based on their unpredictable efficacy and found the drugs, treated as any ordinary good for sale, to be subject to express warranties. Id.
ably could conclude that Rite Aid's statement to ingest doxycycline with food or milk in the event of an upset stomach constituted an express warranty as to the drug's effectiveness when taken under such conditions. Although Rite Aid did not negotiate or discuss its statements with Levy-Gray at the time of her purchase and although she was unaware of the existence of the statements prior to the purchase, the majority reasoned that Rite Aid's affirmation as to the drug's characteristics became part of the basis of the bargain between the customer and the pharmacy. The court found the precise timing of the pharmacy's affirmations to Levy-Gray immaterial and instead addressed whether the post-purchase statements may fairly be regarded as part of the contract. The court held that the jury reasonably could find that the instructional pamphlet was part of Levy-Gray's contract with Rite Aid because she reasonably anticipated receiving such statements from the pharmacy.

Next, the Court of Appeals addressed the learned intermediary doctrine, which limits the degree to which a customer may justifiably rely on a pharmacy's affirmations when using a drug. The court acknowledged the use of this doctrine in other jurisdictions to insulate pharmacies from liability for drugs sold and its own adoption of the doctrine to protect pharmacies that merely fill a prescription as ordered by the customer's physician. The court declined, however, to extend the learned intermediary doctrine to cases like Rite Aid, where the pharmacy actively disseminates information about "the properties and efficacy of a prescription drug." The court held Rite Aid in

94. Id. at 635, 894 A.2d at 579.
95. Id. at 623, 626, 894 A.2d at 572, 574.
96. Id. at 623, 894 A.2d at 572 (citing Md. Code Ann., Com. Law § 2-313, cmt. 7 (Lexis-Nexis 2002)).
97. Id. at 624, 894 A.2d at 573. The majority emphasized that sellers commonly render warranties to customers after purchases as part of typical marketplace behavior; therefore, because Levy-Gray reasonably anticipated receiving the pamphlet, Rite Aid's statements became part of the existing contract. Id. at 625–26, 894 A.2d at 573–74. The court also cautioned that a rule requiring that warranties be given during negotiation to be "part of the basis of the bargain" ignores the reality that most warranties are only available after purchase, and "would, in effect, render almost all consumer warranties an absolute nullity." Id. at 626, 894 A.2d at 574 (quoting Murphy v. Mallard Coach Co., 582 N.Y.S.2d 528, 531 (App. Div. 1992)).
98. Id. at 631, 894 A.2d at 577.
99. Id. at 631, 634, 894 A.2d at 577–79.
100. Id. at 634, 894 A.2d at 579. The court distinguished People's Service Drug Stores, Inc. v. Somerville, 161 Md. 662, 158 A. 12 (1932) and In re Rezulin Products Liability Litigation, 133 F. Supp. 2d 272 (S.D.N.Y. 2001) on the grounds that the pharmacies in those cases merely filled prescriptions as instructed by physicians, whereas in the case at hand, Rite Aid took the added step of providing affirmations about doxycycline, albeit in language approved by the Food and Drug Administration. Rite Aid, 391 Md. at 632–34, 894 A.2d at 577–79.
breach of an express warranty while finding the timing discrepancy irrelevant and the learned intermediary doctrine inapplicable.101

Judge Harrell dissented, noting three flaws in the majority's reasoning.102 First, Judge Harrell disagreed with the majority's treatment of the timing of Levy-Gray's receipt of the pamphlet.103 Rather, he argued, Rite Aid's statements about the drug cannot reasonably be thought of as part of the basis of the bargain because Levy-Gray received the pamphlet after her purchase.104 Second, Judge Harrell insisted that the identification of who induced Levy-Gray to purchase doxycycline must be treated as a separate issue, which the majority failed to address.105 As to inducement, Judge Harrell argued that statements in the “Rite Advice” pamphlet were not a bargained aspect of the agreement between Rite Aid and Levy-Gray because she bought the drug based on her physician's advice and prescription.106 Therefore, the dissent reasoned, the language may not be considered as part of the contract if the pharmacy does not induce the sale by actively marketing the product to the buyer; consequently, no express warranty existed.107 Third, Judge Harrell addressed the context in which Rite Aid may be held liable as an atypical seller by a customer for a breach of express warranty.108 Unlike the majority, Judge Harrell preferred the approach of other state courts that have considered the issue and chosen to insulate pharmacies from liability for breach of express warranty with respect to statements about drugs that the pharmacy dispenses to customers.109 Judge Harrell maintained that the pamphlet was insufficient to exclude Rite Aid from the protection of the

101. Rite Aid, 391 Md. at 635, 894 A.2d at 579.
102. Id. at 636, 894 A.2d at 580 (Harrell, J., dissenting). Judge Raker joined Judge Harrell in dissent. Id.
103. Id. at 637–38, 894 A.2d at 581.
104. Id. Judge Harrell contended that by holding plaintiff's receipt of Rite Aid's pamphlet to be part of the parties' bargain—despite the fact that the pamphlet arguably would not have factored into Levy-Gray's decision to buy the drug even if she had read it before her purchase—the majority's interpretation entirely disposes of the requirement in section 2-313(1) of the Commercial Law Article that the pamphlet be part of the basis of the seller-buyer exchange. Id. at 638, 894 A.2d at 581.
105. Id. at 638, 894 A.2d at 581.
106. Id.
107. Id.
108. Id.
learned intermediary doctrine. Finally, he concluded that it would be unfair to regard Rite Aid’s pamphlet as part of its contract with Levy-Gray because she could not reasonably have relied on the information when purchasing or using the drug, given that she could consult with her more knowledgeable and informed physician about any concerns.

IV. ANALYSIS

In Rite Aid Corp. v. Levy-Gray, the Court of Appeals held a Rite Aid pharmacy liable for breach of express warranty regarding the “Rite Advice” pamphlet that the pharmacy gave to a customer after she purchased a drug. The court erred by misconstruing precedent to find that the sale of doxycycline and the exchange of the product pamphlet satisfied the elements of an express warranty, both for timing and inducement-to-buy. Even if the elements of an express warranty had been present, the court failed to properly apply the learned intermediary doctrine to insulate Rite Aid from liability given its status as an atypical seller.

A. The Rite Aid Court Erroneously Concluded that the Pharmacy-Customer Exchange Satisfied the Elements of Express Warranty

1. Timing

The Rite Aid majority improperly determined that Levy-Gray’s receipt of the “Rite Advice” pamphlet satisfied the express warranty timing requirement. The majority ignored binding precedent and federal application of Maryland law in deeming the timing of the buyer’s receipt of the seller’s product statements as irrelevant. The

110. Id. at 642, 894 A.2d at 583.
111. Id. Even under a negligence theory—which Judge Harrell thought more appropriate with respect to pharmacies because of their duty to warn and instruct customers about its products—the dissent would not have held Rite Aid liable. Id. at 640–41, 894 A.2d at 582–83. Specifically, Judge Harrell explained that the Rite Aid pamphlet was not a substitute for consultation with a physician; a reasonable consumer should anticipate the inherent unpredictability of medicine and patients using drugs should rely on “the special expertise of manufacturers, prescribing and treating health-care providers, and governmental regulatory agencies.” Id. at 640–41 n.5, 894 A.2d at 582–83 n.5 (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6 cmt. h (1997)).
112. Rite Aid, 391 Md. at 635, 894 A.2d at 579 (majority opinion).
113. See infra Part IV.A.1.
114. See infra Part IV.A.2.
115. See infra Part IV.B.
116. See supra notes 26–39 and accompanying text (illustrating that Maryland law does not consider a seller’s statement, received by the buyer after the purchase, to create an express warranty regarding the purchased item).
Court of Appeals has consistently held that the proper timing of a buyer's receipt of a seller's statements is crucial, having rejected an express warranty claim in Sensabaugh precisely because the documents which the buyer claimed created the warranty were not delivered to the buyer until after the sale had been consummated by purchase.\(^{117}\) Because Levy-Gray, like the contractor in Sensabaugh, received product statements from the seller only after the purchase, the court should have similarly found that the pamphlet did not create a warranty and that the customer could not possibly have relied on such statements in making the purchase.\(^{118}\)

In addition, federal courts applying Maryland law have found that an express warranty is not created without evidence showing that the pharmacy-seller made representations about a drug at the time of or prior to the sale.\(^{119}\) Unlike the situation in Distillers, where a buyer received the seller's product statements before purchasing the product and it became a basis of the bargain,\(^{120}\) Levy-Gray never demonstrated that she received the "Rite Advice" pamphlet prior to purchasing the doxycycline from Rite Aid.\(^{121}\) But even if Levy-Gray had received the pamphlet at the time of the doxycycline purchase, her failure to read it at or before the sale signifies that Rite Aid created no warranty as to that medication;\(^{122}\) the buyer must read the product information before the sale.\(^{123}\) Without a demonstration by Levy-Gray that she had read or been aware of the contents of Rite Aid's statements when she bought the product, the Rite Aid court should have found that an express warranty did not exist.\(^{124}\)

The Rite Aid majority instead relied on other state and federal cases that are not binding Maryland law, placing particular emphasis on Bigelow v. Agway to find that statements made by the seller and received by the buyer after purchase may be considered to create an

\(^{117}\) See Sensabaugh v. Morgan Bros. Farm Supply, 223 Md. 593, 597, 165 A.2d 914, 916 (1960) (stating that because the buyer noticed the warranty after purchase, it was "too late to attach conditions").

\(^{118}\) See id. at 594-95, 165 A.2d at 914-15 (describing how the buyer was handed an instruction manual with a warranty several days after his purchase).


\(^{120}\) Distillers, 166 F. Supp. 2d at 803.

\(^{121}\) Rite Aid, 391 Md. at 612-13, 894 A.2d at 566.

\(^{122}\) Id.

\(^{123}\) See Shreve, 166 F. Supp. 2d at 421 (pointing out that the manual containing the warranty was not viewed prior to the buyer's purchase of the snow blower).

\(^{124}\) See id.
express warranty.¹²⁵ Unlike Levy-Gray’s post-purchase receipt of the statements in Rite Aid, in Bigelow, the salesman guaranteed the safety and effectiveness of his product in direct response to particular concerns raised by the buyer at the original exchange.¹²⁶ Thus Bigelow does not stand for the proposition that timing is absolutely irrelevant, but rather that post-purchase seller statements may create an express warranty when the buyer raises specific concerns that the seller then addresses.¹²⁷

As Judge Harrell aptly noted in dissent, by holding Rite Aid liable for statements which Levy-Gray read after her purchase, the majority disposes of the statutory requirement that the statements form the basis of the bargain between the seller and buyer.¹²⁸ Holding post-purchase language to create an express warranty is not an accurate or appropriate reflection of Maryland precedent, which emphasizes that the seller must give its product statement to the buyer before or at the time of purchase for the language to be part of the bargain.¹²⁹ Considering this body of precedent that emphasizes proper timing, the majority should have realized that Maryland law does not recognize Bigelow’s narrow exception. Even if it did, Levy-Gray did not bring up issues and concerns to Rite Aid that were initially raised at the time of the doxycycline purchase, as is required by Bigelow’s narrow exception to the timing requirement.¹³⁰ Thus, the Rite Aid majority erred in finding that Rite Aid created an express warranty because Levy-Gray neither received nor read Rite Aid’s pamphlet until after her purchase.¹³¹ Moreover, the court should have rejected Bigelow’s non-binding, narrow exception to the strict timing requirement because Rite Aid did not make new, direct statements or overt efforts to respond to specific concerns raised by Levy-Gray after the original purchase.

¹²⁵. Rite Aid, 391 Md. at 627–29, 894 A.2d 575–76 (citing Bigelow v. Agway, Inc., 506 F.2d 551, 553, 555–56 (2d Cir. 1974)). For examples of the majority’s use of nonbinding decisions to support its position that post-purchase language may create an express warranty, see Murphy v. Mallard Coach Co., 582 N.Y.S.2d 528, 530–31 (App. Div. 1992) and Distillers, 180 F.2d at 802.
¹²⁶. Bigelow, 506 F.2d at 553, 555–56.
¹²⁷. Id.
¹²⁸. Rite Aid, 391 Md. at 638, 894 A.2d at 581 (Harrell, J., dissenting); Md. CODE ANN., COM. LAW § 2-313 (LexisNexis 2002).
¹³⁰. Rite Aid, 391 Md. at 612–13, 894 A.2d at 566 (majority opinion); Bigelow, 506 F.2d at 553–55.
¹³¹. See Sensabaugh, 223 Md. at 596–97, 165 A.2d at 915–16 (1960) (indicating that statements received by buyer after a purchase do not make the seller liable for a breach of express warranty as to those statements).
2. Inducement-to-Buy

In addition to its errant application of timing principles, the Court of Appeals in *Rite Aid* overlooked the inducement-to-buy element of an express warranty and instead skipped to an analysis of the learned intermediary theory directly after assessing timing. Maryland precedent indicates that the seller’s acts which induce the buyer to purchase a good or service are a crucial prerequisite to the creation of an express warranty. In past decisions such as *Greer v. Whalen* and *Schley v. Zalis*, the Court of Appeals found an express warranty present only when a seller made overt attempts to market his product, such as soliciting a buyer or giving a buyer price comparisons upon request and assurances as to his product.

Levy-Gray presented no evidence of any advertisement or marketing efforts by Rite Aid, and in particular no actions by Rite Aid specifically promoting doxycycline or responding to complaints that Levy-Gray had while using the drug. Unlike in *Hartford*, where a condominium developer made statements to a prospective buyer regarding the design and construction of a unit, inducing purchase and forming the basis of the bargain, Rite Aid neither marketed doxycycline to Levy-Gray, nor solicited the purchase of this particular drug in any way. Furthermore, the majority never acknowledged the principle from *Schley* that a seller may not create an express warranty for a purchased item without evidence that the buyer relied on the seller’s marketing efforts in making the purchase. Because a seller’s affirmations of warranty are not part of the basis of the bargain, Levy-Gray cannot be said to have relied on Rite Aid’s advertising efforts.

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132. See *Rite Aid*, 391 Md. at 631, 894 A.2d at 576–77 (discussing the learned intermediary doctrine without addressing inducement).


135. See supra Part I (describing the circumstances of Levy-Gray’s purchase at the pharmacy).


137. *Schley*, 172 Md. at 338–39, 191 A. at 564. In Maryland, the inducement element of warranty formation works in tandem with the timing requirement; only if the buyer receives the seller’s solicitation efforts prior to or at the time of the purchase will the efforts be held to induce the sale and to create an express warranty. *Id.*; see also *Schmaltz v. Nissen*, 431 N.W.2d 657, 660–61 (S.D. 1988) (indicating that an express warranty does not exist if a buyer does not see a seller’s warranty until after the purchase).
when purchasing doxycycline without evidence that Rite Aid ever marketed that particular drug to Levy-Gray.\textsuperscript{138}

The \textit{Rite Aid} majority's decision was especially problematic given that in the area of prescription drugs, any representation made by a pharmacy does not form an express warranty because patients purchase prescription medications based on advice from prescribing physicians, not advertisements from the pharmacy.\textsuperscript{139} Therefore, if a customer purchases a particular drug on the advice and prescription of his treating physician, and not on the basis of a pharmacy's advertisement to the buyer or a pamphlet given to the buyer after the purchase, the pharmacy did not induce the purchase and cannot be said to have warranted the performance of the drug to the customer.\textsuperscript{140} Consequently, because Levy-Gray's physician prescribed the doxycycline, which Rite Aid did not specifically market or advertise, and because the "Rite Advice" pamphlet was received after the drug's purchase, the court erred in finding that Rite Aid expressly warranted the drug's performance.

\textbf{B. The Rite Aid Court Failed to Properly Apply the Learned Intermediary Doctrine to Shield Rite Aid from Liability}

Even if the \textit{Rite Aid} majority was correct in finding the express warranty elements satisfied, the court errantly declined to shield Rite Aid from liability under the learned intermediary doctrine.\textsuperscript{141} When the Court of Appeals adopted the learned intermediary doctrine, it sought to insulate pharmacies from liability for dispensing prescription drugs even when the express warranty elements were satisfied, because patients rely on the advice of physicians—not pharmacies—regarding drug use.\textsuperscript{142} Therefore, even if the court found that the

\textsuperscript{138} See Ciba-Geigy Corp. v. Alter, 834 S.W.2d 136, 146–47 (Ark. 1992) (noting that an express warranty exists only if a buyer shows that a seller's affirmation of the quality or condition of the product sold is made at the time of sale and induces the buyer's purchase); \textit{see also} Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 680 (D.N.H. 1972) (explaining that the buyer has the burden of showing that the seller's representations induced his purchase).

\textsuperscript{139} \textit{See In re Rezulin Prods. Liab. Litig.}, 133 F. Supp. 2d 272, 291–92 (S.D.N.Y. 2001) (emphasizing that "the only representations regarding the intrinsic properties of the drug that form the basis of the buyer's purchase are those of the physician"); \textit{see also} \textit{People's Serv.}, 161 Md. at 666–67, 158 A. at 13–14 (noting that a treating physician, not a pharmacy, induces a drug's purchase when the purchase results from a physician's prescription).

\textsuperscript{140} \textit{In re Rezulin}, 133 F. Supp. 2d at 291–92.

\textsuperscript{141} \textit{See Rite Aid}, 391 Md. at 631–34, 894 A.2d at 577–79 (choosing not to extend the learned intermediary doctrine to protect Rite Aid because the alternative is "without legal justification").

\textsuperscript{142} \textit{People's Serv.}, 161 Md. at 664–66, 158 A. at 13.
Rite Aid/Levy-Gray exchange adhered to the timing and inducement-to-buy elements of an express warranty, it nevertheless should have protected Rite Aid under the learned intermediary doctrine; Levy-Gray could not reasonably and justifiably have relied on Rite Aid’s statements as to doxycycline’s use because the pharmacy lacked the intimate knowledge of the patient which her physician possessed.\(^\text{143}\) The *Rite Aid* majority also failed to acknowledge the breadth of this protective doctrine. Other state appellate courts have protected pharmacies with respect to dispensing prescription drugs under the doctrine, emphasizing that patients place confidence in their doctor’s skill, rather than a pharmacy’s advice with respect to drug use.\(^\text{144}\)

Despite national acceptance and the court’s own prior decisions to the contrary, the *Rite Aid* majority erroneously distinguished the case at hand from two significant cases. First, the *Rite Aid* majority claimed that *In re Rezulin*, which protected pharmacies from liability as atypical sellers and transferred liability to the customer’s physicians, was irrelevant because *Rezulin* did not involve a “patient package insert” that was prepared and distributed by the pharmacy.\(^\text{145}\) The *Rite Aid* majority ignored the fact that the *In re Rezulin* court applied its rationale to statements in information pamphlets distributed by pharmacies as well as manufacturers, and found neither pamphlet distribu- tor liable for an express warranty breach for statements about a prescription drugs’ safety, performance, or reliability.\(^\text{146}\) The *In re Rezulin* court specifically addressed the possibility of patient pamphlets, concluding that patients consult their physicians and not pharmacists in how to use their drugs, and do not negotiate with a pharmacy as they would with a typical seller.\(^\text{147}\) Therefore, the *Rite Aid* majority should have applied *In re Rezulin* rather than distinguished it, and found that it would be unreasonable for Levy-Gray to have relied upon Rite Aid’s statements about the drug.\(^\text{148}\)

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\(^{143}\) *Id.*


\(^{145}\) *Rite Aid*, 391 Md. at 692–94, 894 A.2d at 577–79; *In re Rezulin*, 133 F. Supp. 2d at 291–92.

\(^{146}\) *In re Rezulin*, 133 F. Supp. 2d at 288–89.

\(^{147}\) *Id.* at 291–92.

\(^{148}\) *Id.; see also Rite Aid*, 391 Md. at 638, 640–41, 894 A.2d 563, 581–83 (Harrell, J., dissenting) (indicating that given the unpredictability inherent to medicine and customers’ reliance on physicians’ prescriptions, it would be unfair and unreasonable for a patient to rely on a pharmacy’s statement about a drug).
Second, the *Rite Aid* majority erred in its attempt to distinguish its seminal learned intermediary case, *People’s Service Drug Stores, Inc. v. Somerville*, to find Rite Aid in breach of an express warranty.\(^{149}\) The majority claimed that *People’s Service* sought only to protect pharmacists who simply fill prescriptions according to physicians’ orders, not pharmacies that disseminate information about a prescription drug’s properties and efficacy.\(^{150}\) However, this position misses the message of *People’s Service*, wherein the court sought to impose lesser liability on pharmacists than other medical caregivers who are more closely involved with the patient; even if a physician in a given case is found liable, it does not also follow to hold the customer’s pharmacist liable to the same degree.\(^{151}\)

Furthermore, the *Rite Aid* majority should have considered the Court of Appeals’s precedential protection of pharmacies as compared to drug manufacturers.\(^{152}\) Because the court has insulated pharmaceutical companies from express warranty liability when the drug producers have provided customers with product information and has held drug manufacturers to a stricter level of liability than pharmacies, the *Rite Aid* court should have similarly protected pharmacies that disseminate product pamphlets.\(^{153}\) For example, the *Rite Aid* majority should have considered the protection of pharmacies as reflected in *Mancuso v. Giant Food, Inc.*\(^{154}\) Not only did the *Rite Aid* majority fail to distinguish pharmacies from physicians and drug manufacturers, which have stronger connections with both the patients and medication, but it also failed to consider *Mancuso*, which decided that the Maryland General Assembly did not intend that pharmacies be considered health care providers.\(^{155}\) *Mancuso* extended *People’s Service* by insulating pharmacies that correctly or errantly fill a prescription, shielding them from warranty liability because pharmacists have much less knowledge of and interaction with the patient than does a physician.\(^{156}\) By failing to then apply this protection when a pharmacy provides the customer with information about a drug’s use, the *Rite  

\(^{149}\) See *Rite Aid*, 391 Md. at 633–34, 894 A.2d at 578–79 (majority opinion) (citing *People’s Serv. Drug Stores, Inc. v. Somerville*, 161 Md. 662, 663–64, 666, 158 A. 12, 12–13 (1932)).

\(^{150}\) *Rite Aid*, 391 Md. at 634, 894 A.2d at 579.

\(^{151}\) *People’s Serv.*, 161 Md. at 666, 158 A. at 13.

\(^{152}\) See supra Part II.C.

\(^{153}\) See supra Part II.C.


\(^{155}\) Id. at 352, 609 A.2d at 336.

\(^{156}\) Id. at 348, 352, 609 A.2d at 334, 336.
Aid court overlooked its special treatment of pharmacies as dictated by Mancuso and People’s Service.

Considering that courts have even protected drug manufacturers and physicians under the learned intermediary doctrine, the Rite Aid majority further erred in not extending this favored, protected status to pharmacies that disseminate information to patients. Maryland’s learned intermediary theory has protected both manufacturers of labor-inducing chemicals for childbirth and makers of generic amoxicillin—even when the drug producer had inadequate warnings of risks on its products—finding that the patient-customer could not reasonably rely on manufacturer statements when the patient is under the care and supervision of a physician. If a drug manufacturer is protected under Maryland’s learned intermediary doctrine when it disseminates product information like in Nolan and Ames, it follows that a pharmacy deserves the same protection, especially when a physician is directly involved with the customer and when the pharmacy’s language is identical to statements provided by the manufacturer. The Court of Appeals erred by ignoring precedent regarding the learned intermediary doctrine, made a flawed distinction based on Rite Aid’s “Rite Advice” pamphlet, and erroneously attempted to distinguish In re Rezulin, even though that court stated that its decision covered instances where the pharmacy distributed product information to its customers.

V. Conclusion

In Rite Aid Corp. v. Levy-Gray, the Court of Appeals found a pharmacy in breach of an express warranty for providing a customer with a pamphlet detailing how to take a particular drug if she experienced gastric irritation. In finding that the sale and the pamphlet exchange constituted an express warranty, the court neglected to apply precedent insisting on particular and appropriate timing. Specifically, because Levy-Gray received the “Rite Advice” pamphlet after her


158. Nolan v. Dillon, 261 Md. 516, 523, 276 A.2d 1014, 1026 (1977) (protecting physicians with knowledge of a patient’s idiosyncrasies because it is unreasonable to warrant a particular result given the unpredictable nature of the medical field).

159. Rite Aid, 391 Md. at 635, 894 A.2d at 579.

160. See supra Part IV.A.1.
purchase, the court should have found that Rite Aid's statements were not part of its bargain with Levy-Gray and did not create an express warranty.\textsuperscript{161} Furthermore, the court gave short shrift to the requirement that a seller induce the sale for an express warranty to exist.\textsuperscript{162} Given that Levy-Gray's physician prescribed the doxycycline and Rite Aid did not market the drug, the court should have found that Rite Aid did not induce its purchase and did not create an express warranty.\textsuperscript{163} In ruling that the learned intermediary doctrine shielded Rite Aid from liability, the court errantly departed from prior cases that protected both manufacturers when providing pharmaceutical information and once-removed sellers when the buyer is under the care or supervision of a physician.\textsuperscript{164} A better analysis would have adhered to the timing and inducement-to-buy requirements for express warranties, protecting pharmacies from breach when filling prescriptions without the particular knowledge of each customer's medical idiosyncrasies, would correctly apply the court's precedential protection of atypical sellers when the buyer is under the care of a better-informed intermediary, and would encourage pharmacies to provide ample resources to uninformed customers.\textsuperscript{165}

\textbf{Thomas M. Grace}

\textsuperscript{161} See \textit{supra} Part IV.A.1.  
\textsuperscript{162} See \textit{supra} Part IV.A.2.  
\textsuperscript{163} See \textit{supra} Part IV.A.2.  
\textsuperscript{164} See \textit{supra} Part IV.B.  
\textsuperscript{165} See \textit{supra} Part IV.
KILMON v. STATE: A MISSED OPPORTUNITY TO ADVANCE WOMEN’S RIGHTS

In Kilmon v. State, the Court of Appeals of Maryland considered whether ingesting cocaine while pregnant is criminally punishable pursuant to section 3-204(a)(1) of the Criminal Law Article. In doing so, the Kilmon court reversed the lower court’s conviction of two women for endangering the lives of their respective children by ingesting cocaine while pregnant. The court’s decision was properly supported by a finding that the legislative intent behind section 3-204 of the Criminal Law Article—the reckless endangerment statute under which the women were charged—did not include harm to a fetus caused in utero by its mother. However, the Kilmon court missed two important opportunities to address issues central to the advancement of women’s rights. First, the court should have analyzed the Kilmon case in light of the State’s attempt to expand fetal rights. Second, the court should have addressed the potential violation of Maryland’s Equal Rights Amendment by prosecuting women, and not men, for drug use. By failing to take these extra steps to promote and protect women’s rights, the Kilmon court allowed for further prosecutions of drug-addicted women, creating more harm to the women themselves, their fetuses, and their children, and ultimately, advancing the stereotypes of domesticity that women have long fought to overcome.

I. THE CASE

On June 3, 2004, Regina Kilmon gave birth to a baby boy named Andrew W. Kilmon. A drug screen performed on the baby showed the presence of cocaine “at the level of 675 nanograms per milliliter...
"-well above the minimum sensitivity level of 300 nanograms per milliliter. Based on the level of cocaine in the baby's blood, in August 2004, the Maryland State's Attorney filed several charges against Ms. Kilmon, including: (1) second degree child abuse; (2) contributing to conditions to render a child delinquent; (3) reckless endangerment; and (4) possession of a controlled dangerous substance. The State eventually agreed to nolle prosequi charges (1), (2), and (4) in exchange for Ms. Kilmon's guilty plea on the reckless endangerment charge.

In an agreed upon statement of facts, the State proffered that it would have provided expert testimony showing the detrimental effects of a pregnant woman's use of cocaine on her fetus. According to the State, such effects include the increased possibility of spontaneous abortion, premature delivery, and the formation of blood clots in the fetus's brain. Additionally, the State maintained that cocaine in the baby's system may lead to a low birth weight, which in turn usually leads to more health problems than those found in normal-size babies. Based on these facts and an assurance that Ms. Kilmon's guilty plea was offered voluntarily, the Circuit Court for Talbot County accepted the plea and found Ms. Kilmon guilty of reckless endangerment. She was sentenced to four years in prison.

On January 13, 2005, Kelly Lynn Cruz delivered a son, Denadre Michael Thomas Cross, weighing three pounds and two ounces. Ms. Cruz's baby, like Ms. Kilmon's, tested positive for cocaine. Ms. Cruz also tested positive for cocaine, although she denied using the drug.

10. Id. at 170–71, 905 A.2d at 307.
11. Id.
12. This term is shorthand for the Latin phrase nolle prosequi which means "not to wish to prosecute." BLACK'S LAW DICTIONARY 1074 (8th ed. 2004). This term provides "legal notice that a lawsuit or prosecution has been abandoned." Id.
13. Kilmon, 394 Md. at 170, 905 A.2d at 307. The reckless endangerment count was based on Ms. Kilmon's use of cocaine while pregnant with Andrew Kilmon. Id. The State claimed that Ms. Kilmon's cocaine use "created a substantial risk of death and serious physical harm to Andrew Kilmon." Id. (internal quotation marks omitted).
14. Id.
15. Id. at 171, 905 A.2d at 307.
16. Id.
17. Id.
18. Id.
19. Id. at 171–72, 905 A.2d at 308. Ms. Cruz was initially admitted to Easton Memorial Hospital complaining of stomach pains. Id. She was approximately seven months pregnant at delivery. Id. at 172, 905 A.2d at 308.
20. Id.
21. Id. Ms. Cruz maintained that people around her used cocaine, which she believed could explain why she tested positive for the drug. Id.
Based on the presence of cocaine in Ms. Cruz's son's blood, the State's Attorney filed similar charges against Ms. Cruz as those filed against Ms. Kilmon. The State again entered a nol pros for all the charges except for reckless endangerment. Unlike Ms. Kilmon, Ms. Cruz pled not guilty to the reckless endangerment charge. The Circuit Court for Talbot County found Ms. Cruz guilty and sentenced her to five years in prison, with two-and-a-half years suspended, on condition of supervised probation and drug treatment upon release from prison.

Ms. Kilmon and Ms. Cruz both appealed to the Maryland Court of Special Appeals. However, the Court of Appeals granted certiorari before any proceedings took place. Because both the appeals addressed similar issues, the Court of Appeals granted certiorari in both cases to determine whether ingesting cocaine while pregnant is criminally punishable pursuant to section 3-204(a)(1) of the Criminal Law Article.

II. LEGAL BACKGROUND

Like many state legislatures, the Maryland General Assembly chose to tackle the problem of drug-exposed babies through the civil legal system. Other states, often using this problem to expand fetal rights, also attempted to remedy the situation through the enactment of civil statutes. At the same time, state prosecutors across the country also tried using the criminal justice system to solve the problem of drug-exposed babies. Although the development of laws pertaining to drug-exposed babies is a relatively new phenomenon, the issue is inextricably intertwined with a much older concern—that of women's rights. Federal women's rights jurisprudence has been evolving since the nineteenth century.

22. Id., 905 A.2d at 307–08. The reckless endangerment count mirrored Ms. Kilmon’s, stating that Ms. Cruz’s use of cocaine while pregnant “created a substantial risk of death and serious physical injury” to her son. Id. 905 A.2d at 308.
23. Id., 905 A.2d at 308.
24. Id.
25. Id.
26. Id., 905 A.2d at 307–08.
27. Id., 905 A.2d at 308.
28. Id.
29. See infra Part II.A.
30. See infra Part II.B.1–2.
31. See infra Part II.B.2.
32. See infra Part II.C.
33. See infra Part II.C.1.
Maryland’s Equal Rights Amendment in 1972, Maryland has had to develop its own local women’s rights jurisprudence.\textsuperscript{34}

\textbf{A. History of Maryland’s Legislative and Judicial Treatment of Harm to Fetuses}

The Maryland General Assembly and Maryland courts had many opportunities to address the issues inherent in the problem of harm to a fetus. First, in the late 1980s and early 1990s, the Maryland General Assembly debated statutes that would have enforced criminal or civil sanctions in the context of children born drug-addicted due to drug exposure \textit{in utero}.\textsuperscript{35} Second, the Maryland Court of Appeals grappled with the question of whether the common law crime of manslaughter included the situation wherein harm caused to a fetus by a third party resulted in the death of a “born alive” child.\textsuperscript{36}

The “crack epidemic” of the mid-1980s challenged legislatures across the country to develop laws to stem the problem of drug-addicted babies. Maryland primarily addressed this problem through the civil legal system.\textsuperscript{37} In the 1989 legislative session, House Bill 809 was introduced.\textsuperscript{38} This bill would have expanded the definition of “child abuse” to include the physical dependency of a newborn infant on any controlled dangerous substance as defined under Maryland law.\textsuperscript{39} House Bill 809 died, however, in the House Judiciary Committee. The 1990 legislative session similarly produced a number of bills attempting to solve the drug-exposed baby problem. House Bill 1233 would have included in the definition of criminal child abuse any physical injury to an unborn child that resulted from the child’s mother’s use of illegal drugs during pregnancy.\textsuperscript{40} House Bill 689 resembled HB 1233 except that it referred to the physical injury to “the child,” rather than to an “unborn child.”\textsuperscript{41} It also would have made physical injury to an unborn child due to maternal drug use a felony.\textsuperscript{42} Finally, House Bill 689 would have exempted those women

\textsuperscript{34} See infra Part II.C.2.
\textsuperscript{35} See infra notes 38–53 and accompanying text.
\textsuperscript{36} See infra notes 54–58 and accompanying text.
\textsuperscript{37} See infra notes 45–51 and accompanying text. Note, however, this does not mean that Maryland has not also considered issues of fetal rights in the criminal justice system. See infra notes 52–56 and accompanying text.
\textsuperscript{38} Md. H.B. 809, 1989 Sess.
\textsuperscript{39} Id.
\textsuperscript{40} Md. H.B. 1233, 1990 Sess.
\textsuperscript{41} Md. H.B. 689, 1990 Sess.
\textsuperscript{42} Id.
from punishment who, upon learning of their pregnancy, participated in a drug abuse treatment program and subsequently abstained from using any controlled substance.\textsuperscript{43} Both House Bill 1233 and House Bill 689 died on the floor of the House Judiciary Committee.\textsuperscript{44}

In 1997, the General Assembly decided to address the problem of drug-exposed babies in the civil context with the passage of the Drug Addiction at Birth Act (DABA).\textsuperscript{45} DABA affected three different sections of the Maryland Code: (1) the section on juvenile court hearings in child in need of assistance (CINA) hearings;\textsuperscript{46} (2) adoption proceedings under the Family Law Article;\textsuperscript{47} and (3) services provided by the Departments of Human Resources and Health and Mental Hygiene to certain families in which abuse or neglect of a child is alleged.\textsuperscript{48} DABA created a presumption in CINA cases that a child born with substantial exposure or presence of cocaine or heroin in his or her system was not receiving adequate care and attention.\textsuperscript{49}

DABA authorizes a local social services department to begin a judicial proceeding to terminate a mother’s parental rights within ninety days after a child is born with illegal substances in his or her system.\textsuperscript{50} CINA proceedings may begin if the mother is offered admission into a drug treatment program and does not accept or fully participate within a specified time period.\textsuperscript{51}

In addition to civil sanctions under DABA, Maryland courts also addressed the criminality of harm caused to fetuses by a third party in

\begin{itemize}
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} That same year, the General Assembly also considered two statutes attempting to add civil punishments for drug use during pregnancy—House Bill 1101 and Senate Bill 662. Md. H.B. 1101, 1990 Sess.; Md. S.B. 662, 1990 Sess. These bills would have expanded the definition of both "child in need of assistance" and "neglect" under sections of the Maryland Code to include a child’s in utero exposure to a controlled substance. Md. H.B. 1101, 1990 Sess.; Md. S.B. 662, 1990 Sess. However, these programs proved too costly, and HB 1101 and SB 662 died on the floor of the House Judiciary Committee as well. One or both of these bills was before the Maryland General Assembly in 1991, 1992, 1995, 1996, and 1997, but the General Assembly failed to pass any of them.
  \item \textsuperscript{45} Act of May 8, 1997, ch. 367, 1997 Md. Laws 2522.
  \item \textsuperscript{46} Md. Code Ann., Cts. & Jud. Proc. §§ 3-801(f)(2), 3-818 (LexisNexis 2006). A child will be deemed a CINA requiring state intervention if "[t]he child’s parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child’s needs." Id. § 3-801(f)(2).
  \item \textsuperscript{47} Md. Code Ann., Fam. Law §§ 5-313, 5-710 (LexisNexis 2006).
  \item \textsuperscript{48} Id. § 5-706.3.
  \item \textsuperscript{49} Md. Code Ann., Cts. & Jud. Proc. § 3-818.
  \item \textsuperscript{50} Md. Code Ann., Fam. Law § 5-710(b)(2).
  \item \textsuperscript{51} Id. Specifically, the mother must, within forty-five days, accept both admission to the suggested program and level of drug treatment, and fully participate in such program to avoid any sanction. Id.
\end{itemize}
In *Williams*, the Court of Special Appeals considered whether common law manslaughter is committed when an infant, born alive, dies shortly thereafter as a result of wounds criminally inflicted upon the infant's pregnant mother. The court considered two opposing viewpoints hearkening back to English common law: (1) Lord Hale's belief that neither the common law crimes of murder nor manslaughter include a situation where injuries inflicted upon a pregnant woman subsequently cause her infant, born alive, to die; and (2) Lord Coke's belief that a criminal homicide occurs when a child is born alive and dies of wounds administered to him while he was in his mother's womb. The court decided that Lord Coke's "born alive" rule best reflected the common law interpretation of manslaughter and adopted it as the law in Maryland so that harm caused to a fetus that subsequently causes the death of the "born alive" child, is punishable as manslaughter.

B. The Evolution of Fetal Rights in the United States

Until the early 1970s, the law did not recognize the mother and the fetus as two separate entities. The rights and interests of the fetus were so entangled with those of the mother that the fetus was granted no separate legal rights. Eventually, courts began granting rights to the fetus, contingent upon live birth, in actions against third parties. Courts also increasingly recognized the fetus in contexts not contingent upon live birth and often in stark contrast to the rights of the women carrying them. Fetal rights again expanded with the onslaught of the drug war in the early 1990s. During this time, states began to assert fetal rights as a basis for prosecuting pregnant women who use drugs during pregnancy.

53. Id. at 414–15, 550 A.2d at 723–24.
54. Id. at 417, 550 A.2d at 724–25.
55. Id. at 418, 550 A.2d at 725.
56. Id. at 420, 550 A.2d at 726.
57. See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (noting that "the unborn have never been recognized in the law as persons in the whole sense").
58. Id. at 161. The law, the *Roe* Court recognized, had been reluctant to grant legal rights to fetuses "except in narrowly defined situations and except when the rights [were] contingent upon live birth." Id.
59. See infra Part II.B.1.
60. See infra Part II.B.2.
61. Id.
1. Fetal Rights in Causes of Action Involving Third Parties

In the late 1800s, the Supreme Judicial Court of Massachusetts first considered the possibility of fetal rights in Deitrich v. Inhabitants of Northampton. In Deitrich, a pregnant woman slipped on a defect in a road and fell, inducing an early birth. Although there was testimony that the fetus lived for ten or fifteen minutes, the fetus was not developed enough to survive. The woman brought suit, not only for the damages she incurred, but also for the damages to her fetus. Then-Massachusetts Justice Holmes, after analyzing the common law, determined that the infant did not qualify as a “person” under the invoked statute, for whose loss of life his mother could sue the town.

Soon after Deitrich, courts began to extend rights to fetuses in the narrow context of property law and eventually in the arena of wrongful death actions. These courts stayed within the holding of Deitrich, however, by making such rights contingent on the subsequent live birth of the fetus. For example, in Cowles v. Cowles, the Supreme Court of Connecticut found that the term “my grandchildren” in a will referred to and gave rights to a child upon conception. In so holding, the court stated that the “unborn grandchild was [at the death of the testator], in contemplation of law, living and capable of becoming a member of the class [of beneficiaries] . . . .”

63. Id. at 14–15.
64. Id. at 15.
65. Id.
66. Id. First, Justice Holmes considered and rejected Lord Coke’s “born alive” rule because it grew out of criminal law and did not apply to civil cases. Id. The question, Justice Holmes noted, involved whether an infant who dies before it could even survive on its own should be considered a person recognized by the law. Id. at 16. In answering no to this question, Justice Holmes cited a statute under which the punishment for attempting to procure an unlawful miscarriage was substantially increased when the woman died as a result of this attempt, but with no corresponding increase when the child died, whether in utero or after leaving the womb. Id. at 17.
67. Id. at 17.
68. See Medlock v. Brown, 136 S.E. 551, 553 (Ga. 1927) (holding that a conveyance of land by a deed to a married woman “and her children” includes a child in utero so long as it is subsequently born alive); McLain v. Howald, 79 N.W. 182, 183 (Mich. 1899) (finding that a bequest of money may be made to a fetus). Despite the few state court holdings that gave property rights to fetuses, the recognition of a fetus as a “person” throughout history has been the exception, even in property law. See, e.g., In re Peabody, 158 N.E.2d 841, 845 (N.Y. 1959) (determining that a fetus is not a person for purposes of amending a trust).
69. See infra notes 77–86 and accompanying text.
70. See infra notes 73–85 and accompanying text.
71. 13 A. 414 (Conn. 1887).
72. Id. at 417.
73. Id.
In the mid-1900s, federal and state courts further expanded fetal
rights by recognizing wrongful death actions against a fetus, again em-
phasizing the need for the fetus to first be born alive. In Bonbrest v.
Kotz, the United States District Court for the District of Columbia
upheld a medical malpractice action brought by a child for injuries
that occurred in utero. The court acknowledged, under Dietrich, that
a fetus has no judicial existence and is not to be regarded as a “sepa-
rate, distinct, and individual entity” from its mother. However, the
court noted that the case at hand, unlike Dietrich, involved a direct
injury to a viable child by the defendant doctors. The Bonbrest court
observed that a fetus, once capable of “extra-uterine” life, is no longer
a “part” of its mother. Accordingly, the Bonbrest court held that a
viable fetus has a right to an action in the courts for injuries commit-
ted against it while in the womb.

The Bonbrest case established the right of a living child to bring
action against a third party for injuries sustained in utero. Subse-
quent courts re-emphasized the need for the child to be alive to sus-
tain such a cause of action brought by the child itself. Courts also
permitted parents to bring wrongful death suits as a result of losing a
fetus. For example, in Volk v. Baldazo, the Idaho Supreme Court
allowed a wrongful death action by a parent of a viable, unborn fetus
who died due to injuries sustained in a car accident, stating that had
the child been born alive, it would have had a cause of action on its
own behalf.

75. Id. at 142.
76. Id. at 139.
77. Id. at 140.
78. Id. The Bonbrest court added that there are many examples of modern medicine
saving “living children” from the uterus of a dying mother. Id. Additionally, the court
questioned why a fetus was treated differently under property law and negligence; in the
former a fetus was treated as a human being from the moment of conception, while in the
latter the fetus was considered only a “part” of a mother. Id.
79. Id. at 141–42.
80. Id.
81. See, e.g., Dunn v. Rose Way, Inc., 333 N.W.2d 830, 831–33 (Iowa 1983) (holding that
an unborn child has no wrongful death claim but that a parent, as a remedy for the loss of
his unborn child, may bring such an action).
82. 651 P.2d 11 (Idaho 1982).
83. Id. at 14.
2. Fetal Rights and Causes of Actions Affecting Pregnant Women's Rights

Fetal rights continued to expand when courts began to recognize causes of action against the very women carrying the fetuses. For example, in *Grodin v. Grodin*,84 Randy Grodin asserted that his mother, Roberta Grodin, was negligent in continuing to take tetracycline during her pregnancy.85 As a result of Roberta's continued tetracycline use, Randy developed brown and discolored teeth.86 On appeal from a motion for summary judgment, the Michigan Court of Appeals recognized a child's right to bring an action against its own mother for injuries which occurred *in utero*.87

As fetal rights expanded, courts strayed from the strict requirement that such rights should depend on a subsequent live birth. In so doing, courts placed fetal rights in direct conflict with the rights of the women carrying them. As employers attempted to use expanded fetal rights to exclude pregnant women from high-paying industrial jobs,88 courts used fetal rights to force pregnant women to have blood transfusions89 and caesarean sections to save the life of a fetus.90 Most recently, pregnant women have increasingly been forced to give up their liberty and freedom when they are arrested and criminally charged for prenatal drug use.91

85. *Id.* at 869–70. Ms. Grodin's doctor assured her that she was unable to become pregnant, so she continued taking tetracycline. *Id.* at 869. After consulting another doctor, she became aware that she was seven or eight months pregnant and promptly stopped taking the medication. *Id.*
86. *Id.* at 869.
87. *Id.* at 870–71. The court remanded the case for a determination of the reasonableness of the mother's alleged negligent conduct. *Id.* at 871.
89. See *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964) (per curiam) (ordering that blood transfusions be administered to a pregnant woman, despite her protests, if a presiding physician finds that such transfusions are necessary to save her life or the life of her fetus). *But see In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (refusing to force a pregnant woman to submit to a blood transfusion against her will, even though it could potentially save the life of her viable fetus).
90. See *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 459–60 (Ga. 1981) (per curiam) (denying parents' motion for stay of an order requiring mother to submit to a caesarean section, which she opposed for religious reasons, to sustain the life of her unborn fetus). *But see In re A.C.*, 573 A.2d 1235, 1252–53 (D.C. 1990) (en banc) (vacating a court-ordered caesarean section on the grounds that courts should rarely authorize major surgery over a patient's objection); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that a competent woman's refusal to obtain a caesarean section during pregnancy must be upheld, even where such refusal would cause harm to her fetus).
91. See infra notes 98–119 and accompanying text.
As courts across the country continued to expand civil fetal rights, state prosecutors simultaneously attempted to expand criminal law to encompass such rights, often minimizing pregnant women's liberty. *Reyes v. Superior Court*[^92] was the first appellate case to consider the prosecution of a woman under child abuse or endangerment statutes for her drug addiction while pregnant.[^93] In *Reyes*, a woman was arrested and charged with two counts of felony child endangering.[^94] Ms. Reyes was addicted to heroin and her twins were born addicted and suffered withdrawal.[^95] The *Reyes* court held that the word "child" as used in California's felonious child endangerment statute did not apply to a fetus and that Ms. Reyes could not be prosecuted for her drug use during pregnancy under this statute.[^96]

In the years to follow, many state prosecutors would bring similar charges to those in *Reyes*. Prosecutors attempted to charge pregnant drug-addicted women with either child abuse or endangerment,[^97] or with distribution of a controlled substance.[^98] Though most of these cases addressed the issue of fetal rights openly by naming the fetus as

[^93]: Id. at 913.
[^94]: Id. at 912.
[^95]: Id. at 912–13.
[^96]: Id. at 913–14. The *Reyes* court relied on previous holdings stating that the definitions of "human being," "minor child," and "person" in various California statutes, and "dependent child" in a federal statute, did not extend to an unborn child. *Id.* at 913.
[^98]: E.g., *Johnson v. State*, 602 So. 2d 1288, 1296–97 (Fla. 1992) (overturning the conviction of a mother for delivery of a controlled substance to her fetus through her umbilical cord); *State v. Luster*, 419 S.E.2d 32, 33 (Ga. Ct. App. 1992) (determining that a statute criminalizing distribution of a controlled substance did not include transmission of such substance to a fetus).
the victim, at least two sets of prosecutors, in *State v. Luster* and *Collins v. State*, attempted to name the child as the victim and thereby avoid the issue of fetal rights. Nonetheless, both the *Luster* court and the *Collins* court explicitly rejected the prosecutors’ attempts to implicate the child and not the fetus, and held that the statutes at issue did not give any rights to fetuses. Like these two cases, the majority of courts hearing criminal fetal rights cases determined that the statutes invoked against drug-addicted pregnant women did not encompass actions taken by a mother against her unborn child.

South Carolina is one of the few exceptions to this rule. In two cases, the Supreme Court of South Carolina upheld convictions of pregnant women based on harms they caused their fetuses. In 1997, the South Carolina Supreme Court in *Whitner v. State* upheld a mother’s conviction for criminal child neglect due to her ingestion of crack cocaine while pregnant. The court considered whether a viable fetus is a “person” for purposes of the Children’s Code under which Whitner was charged. In upholding Whitner’s conviction, the court stated that South Carolina law has a long history of recogniz-

99. 419 S.E.2d 32 (Ga. Ct. App. 1992). In *Luster*, the State charged the defendant mother with possession and distribution of cocaine to her child asserting that the fetus eventually became a “living, breathing person” when she was born. *Id.* at 34 (internal quotation marks omitted).

100. 890 S.W.2d 893 (Tex. App. 1994). The *Collins* prosecutors argued that the defendant mother could be prosecuted for reckless injury regardless of whether a fetus was protected by statute because the alleged injury took place after the child was born alive. *Id.* at 898. Such injury, the *Collins* prosecutors claimed, was pain from cocaine withdrawal. *Id.*

101. *Luster*, 419 S.E.2d at 34; *Collins*, 890 S.W.2d at 898. In explicitly implicating the fetus, the *Luster* court noted that it would have been physically impossible for the defendant mother to transfer cocaine to the live child. *Luster*, 419 S.E.2d at 34. Similarly, the *Collins* court determined that the mother’s conduct did not reach the reckless injury statute, as she harmed the fetus and not “a human being who has been born and is alive.” 890 S.W.2d at 897–98.

102. See *supra* notes 97–98 and accompanying text.


105. 492 S.E.2d 777 (S.C. 1997).

106. *Id.* at 778–79, 786.

107. S.C. CODE ANN. § 20-7-50 (1985). The relevant portion of this statute makes it a misdemeanor to endanger the life, health, or comfort of a child or helpless person through neglect. *Id.*

ing viable fetuses as "persons holding certain legal rights and privileges."109

Six years after Whitner, the Supreme Court of South Carolina upheld another conviction involving a mother's harm caused to her fetus in State v. McKnight.110 In McKnight, the mother gave birth to a stillborn child born with cocaine metabolites in her system.111 The mother was convicted for homicide under a child abuse statute.112 In upholding the conviction, the court found that the plain language of the statute did not preclude its application to the case of a stillborn.113 The McKnight court observed that when the legislature amended the child abuse statute in 2000, it was well aware of Whitner yet still failed to omit viable fetus from the statute's applicability.114 This, the court noted, was persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation.115

C. The History of Discrimination Against Women and Maryland's Legislative Response

While the law has expanded to protect fetal rights through both the criminal and civil systems, it has also expanded to protect and promote an equal place for women in society. Throughout history, women have been discriminated against for many reasons. In particular, women have endured harsh and unequal treatment due to their physical ability to conceive children.116 The federal attempt of slowing the tide of discrimination was the Equal Rights Amendment.117 Though this Act failed to become law, many states, including Maryland, had already passed their own version of an equality-based protection and have used these laws to enhance the status of women.118

109. Id. The court pointed to its past decisions upholding wrongful death suits brought on behalf of a fetus—regardless of whether a live birth occurred—and a case upholding a feticide conviction. Id. at 779–80. The Whitner court read the state's policy of "prevention of children's problems" as support for its reading of the word "person" to include viable fetuses. Id. at 780.
111. Id. at 171.
112. Id.
113. Id. at 174.
114. Id. at 175.
115. Id.
116. See infra Part II.C.1.
118. See infra Part II.C.2.
1. A History of Discrimination Based on Women's Ability to Conceive Children

The Supreme Court of the late nineteenth and early twentieth centuries played a large role in promoting the stereotypical view that a woman's place was in the home, taking care of children. As early as 1873, the Court in Bradwell v. Illinois recognized states' authority to bar women from becoming lawyers. Thirty-five years later, in Muller v. Oregon, the Court upheld a statute limiting the amount of hours that women, not men, could work in a single day because it did not violate the Fourteenth Amendment. The Muller Court reasoned that a state had adequate justification for infringing women's rights because "healthy mothers are essential to vigorous offspring." Therefore, the statute, which the Court deemed to protect women from the physical harm of long workdays, would aid in "preserv[ing] the strength and vigor of the race."

The military, educational institutions, and employers continued to discriminate against women based on their capacity to bear children. For example, women were once automatically discharged from the military if they became pregnant due to the belief that a woman's priorities would lie with her maternal duties. Before the enactment of Title IX in 1972, women were also denied participation in athletic activity because rigorous competition was thought to cause physical and psychological harm, especially to a woman's reproductive capabilities. Additionally, women were denied higher education because lawmakers believed it would interfere with their reproductive organs. The Supreme Court also held, in Geduldig v. Aiello that California's decision to exclude from its benefits program disabilities

119. 83 U.S. (16 Wall.) 130 (1873).
120. Id. at 139.
121. 208 U.S. 412 (1908).
122. Id. at 416–17, 422–23.
123. Id. at 421. In further rationalizing its holding, the Court stated "[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious." Id.
124. Id.; see also Breedlove v. Suttles, 302 U.S. 277, 282 (1937) (upholding a Georgia law exempting women from a poll tax because of the "burdens necessarily borne by [women] for the preservation of the race").
125. E.g., Struck v. Sec'y of Defense, 460 F.2d 1372 (9th Cir. 1971). Eventually, these policies changed. See, e.g., Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (striking down the Marines' automatic pregnancy discharge under rational basis test).
resulting from normal pregnancies was not gender discrimination and therefore, was not prohibited by the Equal Protection Clause of the Fourteenth Amendment.\footnote{129}

Four years later, the tide turned when Congress amended the Civil Rights Act with the Pregnancy Discrimination Act\footnote{130} to prohibit employment discrimination based on pregnancy, childbirth, or related conditions. The Court followed this trend in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\footnote{131} when it recognized a woman's ability to become pregnant as protection against, and not a reason for, a state-mandated role for women.\footnote{132}

After two decades of movement toward equality, however, the Court's recent ruling in \textit{Gonzales v. Carhart}\footnote{133} is evidence that there is much progress to be made before the ultimate goal of gender equality is achieved. In \textit{Carhart}, the Court upheld the Partial-Birth Abortion Ban Act of 2003, which punishes doctors who "knowingly perform[ ] a "partial-birth [or late-term] abortion,"\footnote{134} with no exception safeguarding a woman's health. In coming to its conclusion, the \textit{Carhart} Court took a step back and reverted to the familiar paternalistic tone from \textit{Muller} and \textit{Bradwell}, as the majority sought to protect women from the "unexceptionable . . . depression and loss of self-esteem" that will result from late-term abortions.\footnote{135}

\begin{itemize}
  \item \footnote{129} Id. at 496–97 & n.20; see also Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136–40 (1976) (applying \textit{Geduldig} in determining that the exclusion of pregnancy disability benefits from GE's plan was not discrimination against women). Justice Brennan penned a prescient dissent, stating: "by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation . . . Such dissimilar treatment of men and women . . . inevitably constitutes sex discrimination." \textit{Geduldig}, 417 U.S. at 501 (Brennan, J., dissenting). Justice Brennan found support for this argument in the Equal Employment Opportunity Commission's (EEOC) interpretation of Title VII of the Civil Rights Act of 1964. See 29 C.F.R. § 604.10 (b) (2006).
  \item \footnote{131} 505 U.S. 833 (1992).
  \item \footnote{132} The \textit{Casey} Court noted that the government could not proscribe its own vision of a woman's role upon her because of the intimacy of her child-carrying experience. \textit{Id.} at 852.
  \item \footnote{133} 127 S. Ct. 1610 (2007).
  \item \footnote{134} \textit{Id.} at 1624. In dissent, Justice Ginsburg disputed the majority's use of the term "partial birth abortion," citing medical authorities referring to the practice as "either dilation and extraction (D & X) or intact dilation and evacuation (intact D & E)." \textit{Id.} at 1640 n.1 (Ginsburg, J., dissenting).
  \item \footnote{135} \textit{Id.} at 1637–38 (majority opinion).
  \item \footnote{136} \textit{Id.} at 1634.
\end{itemize}
Even before Carhart, Congress was still unable to gather enough support to pass the Equal Rights Amendment in 1982. Many states, however, including Maryland, recognized the need for legislation to help overcome this historical discrimination and passed their own forms of protection for women in state Equal Rights Amendments.

2. Interpreting Maryland’s Equal Rights Amendment

Article 46 of the Maryland Declaration of Rights provides that “[e]quality of rights under the law shall not be abridged or denied because of sex.” Soon after the enactment of this amendment in 1972, the Court of Appeals of Maryland began interpreting its language. In Rand v. Rand, the Court of Appeals first analyzed the meaning of the words found in the Maryland Equal Rights Amendment (ERA). The Rand court examined Maryland’s common law practice of finding a father primarily liable for the support of his minor children. After examining the way other states interpreted their respective ERAs, the Rand majority took a literal approach to Article 46, stating that the “broad, sweeping, mandatory language” of the Maryland ERA stood for Maryland’s commitment to equal rights for men and women. Therefore, the court held that the sex of a parent cannot be a factor in allocating the responsibility for child support.

A few months later, in Coleman v. State, the Court of Special Appeals applied the Maryland ERA in determining the constitutionality of a criminal statute that made it illegal for a husband to fail to support his wife, but not if the roles were reversed. The court held that this statute violated the Maryland ERA because the law discriminated based upon sex.

In the 1980s, the Court of Appeals had many more chances to apply the Rand court’s interpretation of the ERA to particular statutes. First, in Kline v. Ansell, the court, following Rand, held that a com-

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137. See supra note 117.
140. Id. at 511–12, 374 A.2d at 902–03.
141. Id. at 510–11, 374 A.2d at 902.
142. Id. at 512–16, 374 A.2d at 902–05 (internal quotation marks omitted).
143. Id. at 516, 374 A.2d at 905.
145. Id. at 324, 377 A.2d at 554.
146. Id. at 329, 377 A.2d at 557.
147. 287 Md. 585, 414 A.2d 929 (1980). The Kline court based its ruling on a finding that the common law action “provide[d] different benefits for and impose[d] different burdens upon its citizens based solely upon their sex.” Id. at 593, 414 A.2d at 933.
mon law action giving husbands, but not wives, the right to sue for adulterous acts, was unconstitutional. Next, in Condore v. Prince George's County,\(^{148}\) the court invalidated a common law doctrine making a husband liable for any "necessaries" purchased by his wife, including medical bills, but in the face of a husband's debt, left the wife unscathed.\(^{149}\) Under Rand, the court found again that this statute was based on a sex-based classification and therefore, unconstitutional under the ERA.\(^{150}\)

Most recently, in Giffin v. Crane,\(^{151}\) the Court of Appeals found that a parent's sex could not serve as the sole basis for awarding child custody.\(^{152}\) The Griffin court stated that the Maryland ERA absolutely forbids the determination of a citizen's legal rights solely on the basis of one's sex.\(^{153}\) The Griffin court observed that the Maryland ERA "flatly prohibits gender based classifications, absent substantial justification, whether contained in legislative enactments, governmental policies, or by application of common law rules."\(^{154}\) These cases illustrate the Court of Appeals's strong commitment to the advancement of gender equality.

III. THE COURT'S REASONING

In Kilmon, the Court of Appeals of Maryland reversed the convictions of two Talbot County women for the reckless endangerment of their respective children.\(^{155}\) Writing for a unanimous court, Judge Wilner began by observing that reckless endangerment in Maryland is solely defined by section 3-204 of the Criminal Law Article.\(^{156}\)

The court therefore turned to statutory interpretation, analyzing the legislative intent behind section 3-204 by examining past court decisions, public policy, and the legislative activity surrounding the en-

\(^{149}\) Id. at 520, 532–33, 425 A.2d at 1013, 1019.
\(^{150}\) Id. at 530, 425 A.2d at 1018. Under the same principles, particularly that a statute "provides different benefits to and imposes different burdens upon men and women," the court in Turner v. State also held unconstitutional a statute making it unlawful to employ female sitters in a bar, but not male sitters. 299 Md. 565, 575–76, 474 A.2d 1297, 1302 (1984). Additionally, the court in State v. Burning Tree Club, Inc. held that a statute affording preferential tax assessments to private country clubs and allowing these clubs to discriminate based on sex violated the Maryland ERA. 315 Md. 254, 293–96, 554 A.2d 366, 386–87 (1989).
\(^{151}\) 351 Md. 133, 716 A.2d 1029 (1998).
\(^{152}\) Id. at 155, 716 A.2d at 1040.
\(^{153}\) Id. at 149, 716 A.2d at 1037.
\(^{154}\) Id.
\(^{155}\) 394 Md. at 183, 905 A.2d at 315.
\(^{156}\) Id. at 172, 905 A.2d at 308.
First, the court acknowledged its acceptance of the "born alive" rule, prior to enactment of section 3-204. The court, however, rejected the State's view that because this common law rule existed at the time of enactment, it was the General Assembly's intent to include the born-alive rule in the reckless endangerment statute. Instead, the Kilmon court agreed with the arguments of Ms. Cruz and Ms. Kilmon, and found that the born-alive rule, did not inform whether the General Assembly intended section 3-204 to apply to actions of pregnant women.

The court recognized the presumption that the legislature acts in accordance with sensible public policy needs in enacting new laws. With this in mind, the court observed that if it followed the State's view that section 3-204 applied to the effect of a pregnant woman's conduct on her unborn child "virtually any injury-prone activity" that could reasonably endanger the child would also be covered.

The court went on to emphasize that in the sixteen years since enactment of section 3-204, numerous attempts to criminalize the conduct of pregnant mothers who ingest controlled dangerous substances had failed. The court explained that the Maryland General Assembly, attempted to address the problem of drug-addicted newborns through changes in the civil system.

157. Id. The court noted that section 3-204 was modeled after a provision of the Model Penal Code, which was intended to create a comprehensive law applying to conduct placing another at risk of death or serious bodily harm, regardless of intent. Id., 905 A.2d at 309. The Kilmon court stated that it construed section 3-204 similarly, giving no weight to intent, and basing guilt on whether the conduct was a gross departure from the standard of conduct of an ordinary law-abiding citizen. Id. at 173, 905 A.2d at 309.

158. Id. at 175-76, 905 A.2d at 310.

159. Id. at 176, 905 A.2d at 311.

160. Id.

161. Id. at 177, 905 A.2d at 311.

162. Id. at 177-78, 905 A.2d at 311-12. Specifically, the court observed that such a view of the statute could produce absurd results, such as criminalizing activities as not maintaining a proper diet, failing to wear a seat belt while driving, or the continued use of legal drugs that may be harmful during pregnancy. Id., 905 A.2d at 311.

163. Id. at 178-82, 905 A.2d at 312-14. The Kilmon court focused on the opposition of the Department of Human Services (DHS) to these bills, and the DHS view that the approach taken in the proposed laws was not good public policy. Id. at 179, 905 A.2d at 312. DHS provided several reasons for this view: (1) the difficulty of showing a correlation between a mother's drug use and injuries to her fetus; (2) drug use during pregnancy is usually a result of a pregnant mother's inability to control her addiction, inadequate treatment programs, or obliviousness to the adverse effects of such use; and (3) the absence of a deterrent effect on drug-using pregnant women in states adhering to this type of criminal statute. Id.

164. Id. at 179-80, 905 A.2d at 312-13.
The *Kilmon* court explained that in 2005, the General Assembly authorized persecutions for the murder and manslaughter of a viable fetus when it enacted section 2-103 of the Criminal Law Article.\(^{165}\) Specifically, the court emphasized that the statute clearly excluded any actions taken by a pregnant woman with regard to her fetus.\(^{166}\) Given this exemption, the court observed that it would be anomalous if the law criminalized a pregnant woman’s drug use that caused harm to a child born alive, while allowing a pregnant woman’s drug use that caused the death of her fetus.\(^{167}\) Thus, the court reversed the convictions of Ms. Kilmon and Ms. Cruz, holding that section 3-204 did not apply to drug ingestion by pregnant women.\(^{168}\)

IV. **Analysis**

In *Kilmon v. State*, the Court of Appeals properly held that section 3-204 of the Criminal Law Article does not include harm to fetuses caused *in utero* by their mothers.\(^{169}\) The *Kilmon* court’s narrow holding, however, failed to affirmatively deny the State’s attempted expansion of fetal rights\(^{170}\) or to address potential ERA issues in applying section 3-204 only to pregnant women, and not to the men who also bear responsibility for the pregnancy.\(^{171}\) The *Kilmon* court’s failure to delineate the boundaries of prosecuting drug-addicted pregnant women risks future harm to these women through imprisonment and further stereotyping.\(^{172}\)

A. **The Court Correctly Interpreted Section 3-204 by Holding that the Statute Did Not Encompass Acts by Mothers Against Fetuses**

In properly reversing the mothers’ convictions, the *Kilmon* court looked to both the legislative history behind section 3-204\(^{173}\) and judicial application of criminal punishment involving harm to fetuses.\(^{174}\) In so doing, the court appropriately found that neither the legislature, nor its own jurisprudence supported a finding that section 3-204 should apply to a mother’s drug use while pregnant.\(^{175}\)

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165. *Id.* at 180–81, 905 A.2d at 313.
166. *Id.* at 181, 905 A.2d at 313.
167. *Id.* at 182, 905 A.2d at 314.
168. *Id.*, 905 A.2d at 315.
169. See infra Part IV.A.
170. See infra Part IV.B.1.
171. See infra Part IV.B.2.
172. See infra Part IV.C.
173. See infra notes 180–186 and accompanying text.
174. See infra notes 183–197 and accompanying text.
175. See supra Part II.A.
As the parties disputed whether the language of section 3-204 covered alleged harm caused to a fetus by its mother's drug use, the Kilmon court appropriately considered the legislative history.\(^{176}\) The Kilmon court observed that the Maryland General Assembly had many opportunities to address the issue of a mother's use of illegal drugs while pregnant.\(^{177}\) Despite these opportunities, the General Assembly failed to pass either House Bill 1233 or House Bill 689, each of which attempted to criminalize injury caused to a fetus as a result of maternal drug use during pregnancy.\(^{178}\)

The Kilmon court explained that state agencies and private organizations dealing with drug-addicted mothers opposed the bills because they believed that these types of statutes were bad public policy.\(^{179}\) These organizations that opposed House Bills 809 and 1233 did not contend that criminal liability for prenatal exposure to illegal drugs already existed under section 3-204.\(^{180}\)

The Kilmon court's interpretation of section 3-204 is also supported by the enactment of DABA by the General Assembly. Faced with many proposed bills criminalizing prenatal exposure to illegal drugs, the General Assembly instead passed a bill providing for civil sanctions.\(^{181}\) The enactment of DABA, thus, is direct evidence of the General Assembly's intent to provide civil sanctions, and not criminal sanctions, for fetal exposure to illegal drugs. The Kilmon court properly looked to DABA's enactment in finding that section 3-204 did not apply to fetal harm caused by maternal drug use during pregnancy.\(^{182}\)

The Kilmon court also properly distinguished the only criminal statute in Maryland addressing harm to a fetus, section 2-103 of the Criminal Law Article\(^{183}\)—making the murder or manslaughter of a viable fetus a crime—from the situation in Kilmon.\(^{184}\) The court found two valid reasons to distinguish section 2-103.\(^{185}\) First, section

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177. Kilmon, 394 Md. at 178–79, 905 A.2d at 312; see also supra notes 38–51 and accompanying text.


179. Kilmon, 394 Md. at 179, 905 A.2d at 312; see also supra note 163 and accompanying text.

180. Id.

181. Act of May 8, 1997, ch. 367; see also supra notes 45–51 and accompanying text.

182. Kilmon, 394 Md. at 180, 183, 905 A.2d at 313, 315.


184. Kilmon, 394 Md. at 180–81, 905 A.2d at 313.

185. Id.
2-103 does not encompass reckless endangerment; it only refers to the crimes of murder and manslaughter. Second, section 2-103 specifically exempts pregnant women’s actions toward their fetuses from punishment. As the Kilmon court correctly noted, the language of the statute specifically excludes the type of action the State attempted to prosecute in Kilmon—"[n]othing in this section applies to an act or failure to act of a pregnant woman with regard to her own fetus." The Kilmon court also properly distinguished Williams v. State. The Williams court held that the crime of manslaughter under Maryland law may be committed when an infant, born alive, dies shortly thereafter as a result of wounds criminally inflicted upon the infant’s pregnant mother. The State in Kilmon argued that the Williams holding evidenced an intent by the General Assembly to include the “born alive” rule in the reckless endangerment statute, and therefore an intent to include prenatal exposure to illegal drugs in this statute as well. As the Kilmon court aptly recognized, however, Williams does not speak to conduct committed by a pregnant woman with regards to the fetus she is carrying. Instead, Williams only reflected the court’s acceptance of the “born alive” rule with respect to common law homicides committed against pregnant women by others. The Kilmon court, therefore, properly determined that in the absence of any direct evidence of legislative intent, Williams did not implicate a pregnant woman’s conduct affecting her fetus.

B. The Court Failed to Address the Issue of Fetal Rights and a Possible Violation of Maryland’s Equal Rights Amendment in the Prosecution of Pregnant Drug-Users

Although the Kilmon court’s holding was proper, it should have recognized and rejected the State’s attempt to expand fetal rights and analyzed the possible violations of Maryland’s ERA in the State’s specific application of section 3-204 to women and not men.

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186. Id. (citing Crim. Law § 2-103).
187. Id. (citing Crim. Law § 2-103(f)).
188. Id. (quoting Crim. Law § 2-103(f) (internal quotation marks omitted)).
189. Id. at 775–78, 905 A.2d at 310-12.
192. Kilmon, 394 Md. at 176–77, 905 A.2d at 311.
194. See infra Part IV.B.1.
195. See infra Part IV.B.2.
1. The Court Failed to Address the State’s Attempt to Expand Fetal Rights

The court in Kilmon did not acknowledge the State’s attempt to pursue an expansion of fetal rights. Specifically, the State argued that its charges of reckless endangerment were not based on conduct relating to the fetuses of Ms. Cruz or Ms. Kilmon, but instead were aimed at injury occurring “after [each] child’s birth.” The Kilmon court rejected in dicta the reasoning of the State’s position, recognizing that if the victims were the children and not the fetuses of Ms. Kilmon and Ms. Cruz, the causation element of reckless endangerment is negated. This is so because once a drug-abusing pregnant woman has a child, the mere ingestion of drugs into her own body will no longer “endanger” the newborn child. Beyond this brief analysis, however, the Kilmon court failed to further acknowledge the danger of the State’s position with regard to the expansion of fetal rights.

In contrast to the Kilmon court’s brief treatment, many courts across the country have addressed and rejected prosecutorial attempts to read the word “fetus” into criminal statutes involving child abuse and neglect or distribution of illegal drugs to minors. Two cases, Reyes v. Superior Court and State v. Gethers, provide pertinent examples. Prosecutors in Reyes prosecuted a drug-abusing woman under a child endangerment statute, while prosecutors in Gethers charged a pregnant woman with aggravated child abuse. Unlike the prosecutors in Kilmon, the Reyes and Gethers prosecutors actually claimed the fetus as the injured “person” in each respective case. The courts in both cases rejected this prosecutorial overreaching, and are a small sampling of the cases heard by courts across the country that deal with substantially similar facts as those found in Kilmon, but that address and reject the issue of expansive fetal rights. The Kilmon court should have considered these cases and provided a stronger barrier against the expansion of fetal rights.

Two cases, State v. Luster and Collins v. State, are particularly analogous to Kilmon and provide strong support for the Kilmon court’s

196. Brief of Appellee, supra note 191, at 11–12 (internal quotation marks omitted).
197. Kilmon, 394 Md. at 173 n.2, 905 A.2d at 309 n.2.
198. Id.
199. See supra Part II.B.2.
202. Reyes, 141 Cal. Rptr. at 912; Gethers, 585 So. 2d at 1140–41.
203. Reyes, 141 Cal. Rptr. at 913; Gethers, 585 So. 2d at 1141.
204. Reyes, 141 Cal. Rptr. at 913–14; Gethers 585 So. 2d at 1143.
205. See supra notes 97–98 and accompanying text.
missed opportunity. In both *Luster* and *Collins*, prosecutors brought criminal charges against two women for maternal drug use during pregnancy and attempted to name their children, rather than their fetuses, as the victims. Both courts named the fetus as the victim and held that the women could not be criminally charged as fetuses had no rights under either of the implicated statutes. Although the *Kilmon* court cited these cases, it effectively ignored them by refusing to bring to light the State’s subtle attempt to expand fetal rights.

Like the courts in *Luster* and *Collins*, the *Kilmon* court should have explicitly addressed the issue of fetal rights and pointed out the fallacy of the State’s claim that the victims were the subsequently born children of Ms. Kilmon and Ms. Cruz.

2. The Court Failed to Address Potential Equal Rights Amendment Violations Inherent in the Prosecution of Mothers Under Section 3-204 of the Criminal Law Article

The *Kilmon* court failed to recognize that the State’s use of section 3-204 of the Criminal Law Article to prosecute drug-addicted women, and only women, for the effect of their drug use on their fetuses, potentially violated Maryland’s ERA. Ingesting narcotics is not a criminally punishable offense in Maryland. A person in Maryland can be charged with either possession or distribution, but not simply with “doing drugs.” Therefore, by applying section 3-204 to pregnant drug-addicted women, the State attempted to make using drugs a criminal offense for women and not for men. In light of this discrepancy, the *Kilmon* court should have paid particular attention to *Coleman v. State*, where the Court of Special Appeals invalidated a statute that made it illegal for a husband to desert his wife, but not for a

206. The *Luster* charges were slightly different from those in *Kilmon*, as the defendant mother was charged with possession and distribution of cocaine rather than for child abuse or endangerment. *State v. Luster*, 419 S.E.2d 32, 33 (Ga. Ct. App. 1992).


208. *Luster*, 419 S.E.2d at 34; *Collins*, 890 S.W.2d at 898.

209. *Kilmon*, 394 Md. at 184–85 n.3, 905 A.2d. at 314–15 n.3.


211. *Id.*

212. In *Kilmon*, not only did the State attempt to create a gender-based classification, but it refused to acknowledge the effect that actions of men can have on a fetus’s health. *See Cynthia K. Daniels*, *At Women’s Expense: State Power and the Politics of Fetal Rights* 77, 111 (1998) (noting men’s exposure to toxic levels before contraception can be linked to birth defects and miscarriage, their exposure to radiation has been linked to childhood cancer, and their abuse of drugs and alcohol may damage sperm and cause health problems in the babies they father).
The Kilmon court should have noted the similarities between the facts in Coleman and those in Kilmon, and examined the potential violations of Maryland’s ERA. Despite the Coleman case and the Court of Appeals’ numerous holdings finding any type of gender-based discrimination to violate the Maryland ERA, the Kilmon court ignored the gender-based discrimination inherent in the application of section 3-204 to pregnant women.

It is possible that the Kilmon court ignored the issue of gender classifications because the Supreme Court in Geduldig v. Aiello held that classifications based on pregnancy would not count as gender classifications. But Congress and the Court itself have abrogated this narrow view of sex discrimination. The Court of Appeals should have applied this reasoning to examine the Kilmon case in light of the legislative and judicial view of gender discrimination.

Additionally, the Kilmon court, knowing that applicable Supreme Court rulings on the United States Constitution merely provide a floor for protection of individual rights of U.S. citizens, should have provided for a greater level of constitutional protection for their own citizens. The Court of Appeals has done just this in its history of

214. Both cases presented a fact pattern involving a criminal statute that, at least under the interpretation of state prosecutors, punished the sexes differently for the same action. See Coleman, 37 Md. App. at 323, 377 A.2d at 554 (examining the constitutionality of a law punishing a man, but not a woman, for failing to “provide for the support and maintenance of his wife” (emphasis added)).
215. See supra Part II.C.2. For example, the Court of Appeals held that the sex of a parent cannot be considered when allocating child support payments. Rand v. Rand, 280 Md. 508, 515, 374 A.2d 900, 905 (1977); see also State v. Burning Tree Club, Inc., 315 Md. 254, 263, 554 A.2d 366, 371 (1989) (determining a statute violative of Maryland’s ERA because it afforded preferential tax assessments to private country clubs that served or benefitted members of a particular sex); Turner v. State, 299 Md. 565, 576, 474 A.2d 1297, 1302 (1984) (holding a statute unconstitutional that made it unlawful to employ female sitters in a bar, but not male sitters); Condore v. Prince George’s County, 289 Md. 516, 532–33, 425 A.2d 1011, 1019 (1981) (invalidating a common law doctrine making a husband liable for any “necessaries”—including medical bills—purchased by his wife); Kline v. Ansell, 287 Md. 585, 592–93, 414 A.2d 929, 933 (1980) (finding unconstitutional a common law action giving men, but not women, the right to sue their spouses or other men for adulterous acts).
218. The court in Newport News Shipbuilding and Dry Dock Co. v. EEOC determined that “discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.” 462 U.S. 669, 684 (1983).
interpreting the Maryland ERA.\textsuperscript{220} Whereas the Supreme Court requires that gender-based classifications be supported by "important governmental objectives,"\textsuperscript{221} the Court of Appeals requires a version of strict scrutiny for gender-based classifications.\textsuperscript{222} In Maryland, therefore, the government must provide \textit{substantial justification} for such classifications.\textsuperscript{223}

The \textit{Kilmon} court should have applied the strict standard of its ERA line of cases in \textit{Kilmon}. The \textit{Rand} court's expansive view of the ERA indicated the court's desire to fully commit to providing equal rights for men and women.\textsuperscript{224} The \textit{Kilmon} court's failure to apply an ERA analysis missed an opportunity to further promote Maryland's stated commitment to providing equal rights for men and women.

\textbf{C. The Failure of the Kilmon Court to Affirmatively Rule Against the Prosecution of Drug-Addicted Pregnant Women Leaves Room for Future Harm to Women}

Although the \textit{Kilmon} court properly held that section 3-204 did not encompass a pregnant woman's harm to her fetus due to maternal drug use, the court erred in confining its holding to this narrow statutory context.\textsuperscript{225} The \textit{Kilmon} court holding left open the possibility of future prosecutions against pregnant drug addicts under any number of other statutes,\textsuperscript{226} resulting in the possibility of harm to pregnant women, their fetuses, and their children.\textsuperscript{227} Drastic regulations of pregnant women's behavior might still be possible and the \textit{Kilmon} court provided little room for discussion of a better solution.\textsuperscript{228} Finally, the \textit{Kilmon} court's failure to address Maryland ERA implications may result in further stereotyping of women based on their ability to bear children.\textsuperscript{229} Future courts should follow the \textit{Kilmon} court's lead in rejecting the prosecution of pregnant women for maternal drug

\begin{itemize}
\item \textsuperscript{220} See supra Part II.C.2.
\item \textsuperscript{221} United States v. Virginia, 518 U.S. 515, 533 (1996).
\item \textsuperscript{222} See, e.g., Giffin v. Crane, 351 Md. 133, 148–49, 716 A.2d 1029, 1037 (1998) (finding that Maryland's ERA prohibits all gender-based classifications unless "substantially" justified).
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Rand v. Rand, 280 Md., 508, 515–16, 374 A.2d 900, 904–05 (1977).
\item \textsuperscript{225} Kilmon, 394 Md. at 183, 905 A.2d at 315.
\item \textsuperscript{226} See generally James G. Hodge, Jr., Annotation, Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child, 70 A.L.R. 5TH 461 (1999) (discussing the prosecution of drug-abusing pregnant women under a myriad of child abuse and neglect statutes as well as drug delivery or possession statutes).
\item \textsuperscript{227} See infra Part IV.C.1.
\item \textsuperscript{228} See infra Part IV.C.2.
\item \textsuperscript{229} See infra Part IV.C.3.
\end{itemize}
use, but should also seek to establish the limits of this type of harmful prosecution on women and their place in society.\textsuperscript{230}

1. The Continued Possibility of Prosecution and Jail Time Will Further Harm Pregnant Women, Their Fetuses, and Their Children

By failing to affirmatively deny the expansion of fetal rights,\textsuperscript{231} the Kilmon court left open the possibility of further arrests and imprisonment for pregnant women, especially drug-addicted women. Though once recognized as having no rights independent of the woman carrying it,\textsuperscript{232} over time courts have slowly increased fetal rights under the law.\textsuperscript{233} Expanded fetal rights have been used in attempts to prevent women from participating in high-paying jobs\textsuperscript{234} as well as attempts (and successes) to hinder a woman’s right to make decisions regarding her own health and medical treatment.\textsuperscript{235} In at least one case, fetal rights even contributed to the loss of a woman’s life.\textsuperscript{236} Additionally, one study conducted in 1992 found that since the late 1980s, over 167 women were arrested and criminally charged on the basis of their drug addiction during pregnancy.\textsuperscript{237} These examples demonstrate the willingness of both states and courts to “curtail some

\textsuperscript{230} See infra Part IV.C.3.
\textsuperscript{231} See supra Part IV.B.1.
\textsuperscript{232} See Deitrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884) (determining that an undeveloped fetus did not qualify as a “person” and therefore, his mother could not sue for his loss of life when she was induced into early birth by a fall on a negligently built highway).
\textsuperscript{233} See supra notes 62–83 and accompanying text.
\textsuperscript{234} See UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that the employer’s fetal-protection policy, which excluded women with childbearing capacity from all jobs in which they might be exposure to lead, was sex discrimination forbidden under Title VII).
\textsuperscript{235} See Grodin v. Grodin, 301 N.W.2d 869, 870 (Mich. Ct. App. 1980) (recognizing a child’s right to bring an action against his own mother for alleged injuries occurring \textit{in utero}); Raleigh Fitkin-Paul Morgan Mem’l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964) (per curiam) (ordering blood transfusions for a pregnant woman against her wishes, if a presiding physician finds that such transfusions are necessary to save her life or the life of her fetus); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981) (per curiam) (denying a pregnant mother a stay of an order to submit to a caesarean section, to sustain the life of her unborn fetus). \textit{But see In re Brown}, 689 N.E.2d 397, 405 (Ill. App. 1997) (refusing to override the decision of a pregnant woman to refuse a blood transfusion, even though it might save the life of her viable fetus).
\textsuperscript{236} See \textit{In re A.C.}, 575 A.2d 1235, 1253 (D.C. 1990) (en banc) (vacating a court-ordered caesarean section that was listed as a contributing factor to the mother’s death on her death certificate).
persons' constitutional rights by adding new persons to the constitutional population.\footnote{238} In the face of this history, the Kilmon court's narrow holding will continue to allow the imprisonment of pregnant women due to their drug use. Such jail time has adverse affects on women, their fetuses, and their children.\footnote{239} Furthermore, the threat of prosecution and jail may deter pregnant drug-using women from seeking help.\footnote{240} Finally, the continued prosecution and imprisonment of pregnant drug-users disproportionately harms poor, black women.\footnote{241}

The Kilmon court's failure to limit the State's expansive view of fetal rights may result in disproportionate prosecutions of women seeking abortions. There are at least 36 states with homicide laws that define a fetus as a person,\footnote{242} including Maryland.\footnote{243} Recently, a jury in Texas condemned a man to death for killing a woman and her fetus—the first death sentence related to a fetal homicide.\footnote{244} Though this case involved the death of a fetus caused by a third party, the case of Regina McKnight, a pregnant drug-addicted woman now serving a twelve-year sentence for homicide after suffering an unintentional stillbirth,\footnote{245} illustrates the potential criminal charges against women should Roe v. Wade get overturned—feticide. The Tennessee General Assembly proposed a bill that would require clinics to create death certificates for aborted fetuses, creating a public record of women who have had abortions.\footnote{246} Such existing and proposed legislation demonstrates that the Court of Appeals and other state appellate
courts must stay vigilant in upholding women’s rights to control their own bodies.

Because the Kilmon court’s holding only addressed the narrow statutory issue, jail time for drug-addicted pregnant women remains a possibility in Maryland.\textsuperscript{247} Though such regulations purport to protect both “kids and families,”\textsuperscript{248} imprisoning new mothers on the grounds that their fetus’s rights trump their own right to liberty will only compound the problems of drug-exposed children.\textsuperscript{249} Separating children from their mother can cause emotional and mental harm as well as hinder their growth and development.\textsuperscript{250} This separation prevents the development of parent-child bonding that is integral to a child’s psychological growth.\textsuperscript{251} Further obstacles created by the imprisonment of drug-addicted mothers include the location of prisons, which are often far away from the urban neighborhoods where children of incarcerated women live, obscure visiting hours, and prison policies limiting the amount of contact a mother can have with her children.\textsuperscript{252} Finally, those women most likely to be imprisoned for drug use during pregnancy are the same women most vulnerable to “child welfare” policies and practices.\textsuperscript{253}

Additionally, jailing pregnant women can directly harm their fetuses. Putting women in jail provides an environment ripe with drugs and often lacking in prenatal care,\textsuperscript{254} an environment that can have devastating effects. For example, in Maryland, Kari Parsons failed a drug test as part of probation for shoplifting, and was imprisoned to

\textsuperscript{247} Although the Kilmon court’s holding specifically stated that section 3-204 does not apply to a mother’s actions that might harm her fetus, Kilmon, 394 Md. at 183, 905 A.2d at 315, the court left open the possibility for criminal prosecution under other abuse statutes that use the word “another” or “person” or “child” because the court did not determine that a fetus is not a “person” with rights protected by the state. See id. at 173 n.2, 905 A.2d at 309 n.2 (declining to rule on the State’s anomalous position that the victims were the newborn children of Ms. Cruz and Ms. Kilmon, not their fetuses).

\textsuperscript{248} See Julie B. Ehrlich & Lynn Paltrow, Jailing Pregnant Women Raises Health Risks, Women’s E-NEWS, Sept. 20, 2006, http://www.womensenews.org/article.cfm/dyn/aid/2894 (quoting Cathy Mols, the social services director for Talbot County—where Regina Kilmon and Kelly Lynn Cruz were arrested and charged—as saying that such prosecutions were “helpful in protecting children and families”).

\textsuperscript{249} Paltrow, supra note 238, at 1028–29.

\textsuperscript{250} Id. at 1028.

\textsuperscript{251} Id. at 1028–29.


\textsuperscript{253} Id. at 140–41.

Three weeks later, Parsons gave birth to her son in a dirty jail cell furnished only with a toilet and a mattress. Despite her repeated cries and other inmates' pleas that she be taken to the hospital, the guards simply took her out of the holding area and put her in a cell by herself. Parsons gave birth alone, without any support or medical care, and her son quickly developed an infection due to the unsanitary conditions. In addition to the absent prenatal care, imprisoned pregnant women also often must wear shackles, despite contrary international norms prohibiting this practice. Courts like Kilmon must recognize and consider these dangerous conditions and recognize that jailing pregnant women is simply not in the best interest of the woman or the fetus she is carrying.

Prosecutors, like those in Kilmon, cite deterrence as a justification for imposing jail time on pregnant drug-users. The Kilmon court's narrow holding ignores the fact that threats of prosecution, jail time, and the loss of child custody, do not deter drug-addicted pregnant women from stopping drug use. Instead, "[t]he threat of criminal punishment fosters a climate of fear and mistrust between doctors and patients, imperiling the health of both women and their future children." In the face of punishment for drug use during pregnancy,

255. Ehrlich & Paltrow, supra note 247.
256. Id.
257. Id.
258. Id. In September 2006, a similar situation to Ms. Parsons occurred unfolded in a Texas jail cell, when a pregnant woman who cried for medical attention, was forced to give birth in a jail cell with no medical support. Id.
259. AMNESTY INT’L, UNITED STATES OF AMERICA, RIGHTS FOR ALL: "NOT PART OF MY SENTENCE": Violations of the Human Rights of Women in Custody (1999) http://web.amnesty.org/library/index/ENGAMR510011999. Contrary to international standards, it is a common practice in the U.S. for pregnant women, whether or not they pose a threat, to be held in some form of mechanical restraint while being transported and sometimes while in the hospital. Id.; see also AMNESTY INTERNATIONAL, USA Women in Prison: A Fact Sheet, (2005), http://www.amnestyusa.org/women/pdf/womeninprison.pdf (stating that shackling pregnant prisoners is a federal policy). Because pregnant women often must quickly maneuver their legs during labor, shackling can increase the risk of injury to women and their fetuses. AMNESTY INT’L, “NOT PART OF MY Sentence,” supra.
261. Ehrlich & Paltrow, supra note 248; see also Sovinski, supra note 254, at 128 (noting that many women imprisoned for drug use are addicts who become pregnant and cannot simply end their substance abuse based on the threat of incarceration).
some women have even resorted to giving birth in their own homes.\textsuperscript{263} Prenatal and continuing medical care can mitigate health risks to women, fetuses, and children.\textsuperscript{264} The absence of adequate prenatal health care, may be even more detrimental to the fetus’s health than drug use during pregnancy.\textsuperscript{265} In the face of such data, courts such as the \textit{Kilmon} court must take every opportunity to discourage punitive approaches to substance abuse during pregnancy.

Because prosecutions against drug-addicted women disproportionately affect poor women of color,\textsuperscript{266} the \textit{Kilmon} court’s failure to affirmatively negate the future possibility of these prosecutions places an added burden on an already disadvantaged population. The “war on drugs” has had a substantially harsher effect on people of color than on white people.\textsuperscript{267} The prosecutorial fervor for criminally charging drug-addicted mothers has turned the war on drugs into a war on poor, black women. This perpetuates a past governmental policy of refusing support for unwed black mothers because illegitimacy was seen as an inherent race-based trait due to black mothers’ sexual irresponsibility.\textsuperscript{268} It is the responsibility of the Court of Appeals and other appellate courts to protect poor minorities from the stereotyping caused by prosecutions of the type in the \textit{Kilmon} case.\textsuperscript{269}

2. The Future Holds More Drastic Regulations with No Room for a Better Solution

By failing to take a strong stand against the prosecution of pregnant drug-addicted women, the \textit{Kilmon} court left room for the State to impose other measures regulating women’s behavior during pregnancy and made no attempt to advocate any solution for the problem of drug-exposed babies other than criminalization. The \textit{Kilmon} court acknowledged that the State’s reading of reckless endangerment could lead to the criminalization of a “whole host” of conceivably reckless activities such as horseback riding or skiing during pregnancy.\textsuperscript{270} Yet, by failing to bar these types of prosecutions, the court allowed for

\begin{itemize}
\item 263. Sovinski, \textit{supra} note 254, at 131.
\item 264. Ehrlich \& Paltrow, \textit{supra} note 248.
\item 265. Sovinski, \textit{supra} note 254, at 130. Results from a 1985 study in Florida established that a baby born to a normal women without prenatal care is in greater danger than one born to a drug abusing mother who has regular visits with a physician. \textit{Id.} at 130–31.
\item 266. Paltrow, \textit{supra} note 238, at 1002, 1023.
\item 268. \textit{Id.} at 521.
\item 269. \textit{See} Brennan, \textit{supra} note 219, at 491 ("[S]tate courts [and] federal [courts] are and ought to be the guardians of our libert[y].").
\item 270. 394 Md. at 177, 905 A.2d at 311.
\end{itemize}
the possibility of other types of drastic measures. For example, government agencies could withhold public benefits from pregnant women who refuse physical examinations or to abstain from drug use or alcohol consumption. States could require parents deemed "high risk" to undergo genetic testing. Some have even proposed that punitive damages be available against women who intentionally cause harm to their fetuses. The Kilmon court missed an opportunity to restrict these types of harmful policies before they begin.

By confining its holding so narrowly, the Kilmon court also left lower courts and policymakers with little guidance for seeking alternative ways of helping drug-addicted pregnant women. Targeting low-income drug-addicted pregnant women for prosecution reinforces stereotypical notions that such women are disinterested and selfish, and refuses to recognize the hardships faced by such women. For example, few drug-treatment programs accept pregnant women or women with young children. In fact, in 2000, there were only twenty-seven drug treatment beds for women in the entire state of Maryland, and only eleven which allowed a woman to have a child with her. The Kilmon court’s narrow holding left little room to explore alternatives to prosecution, and in so doing, missed an opportunity to suggest better options for drug-addicted women, such as better access to affordable medical care and access to drug treatment facilities that meet their needs.

271. See Dawn E. Johnsen, Note, The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599, 605–07 (1986) (explaining that expansive fetal rights could lead to civil and criminal liability for pregnant mothers for activities like smoking and drinking, but also for engaging in excessive sexual intercourse for exposing herself to an infectious disease).

272. Id. at 608.

273. Id.

274. Id.

275. Paltrow, supra note 238, at 1026.

276. Id. A 1989 study of the drug treatment facilities in New York City showed that 87% refused to treat pregnant women on Medicaid who were addicted to crack cocaine, 67% would not accept pregnant women on Medicaid at all, and 54% refused to treat any pregnant woman. Sovinski, supra note 254, at 133. Another survey established that two-thirds of hospitals nationwide have no place to refer pregnant women for drug and alcohol treatment. Id.


278. April Cherry, Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice, 8 TEX. J. WOMEN & L. 245, 258 (1999). To provide sufficient drug addiction treatment for pregnant women, facilities should have family-oriented services, job skills training, emotional support groups, and help with basic needs such as food, clothing, and shelter. Reese & Burry, supra note 277, at 367 n.157.
3. The Kilmon Holding Does Little to Advance the Status of Women

Throughout the history of the United States, courts and the legislative system have promoted the advancement of women in society. These gains, however, have come at a very slow pace and have been hampered by both the fight for fetal rights and society’s stereotypes about women based on their ability to have children. Because women were historically unequal to men, and are still not equal to men, courts such as the Kilmon court must take every opportunity to continue the advancement of such equality.

The Kilmon court should have emphasized that the key concept behind equal rights jurisprudence is to prohibit discrimination based on stereotypes. Although cases involving equal rights jurisprudence have improved women’s status under the law and in society, women are still not equal to men. For example, a study conducted in 2000 indicated that women earned only about 76% of what men earned that year. In 2006, only twenty of the CEOs at Fortune 1000 companies were women. These numbers are particularly alarming when compared to the large number of women in the workforce, at colleges or in professional schools, and when viewed in light of the fact that it has now been more than seventy years since the first woman was appointed to a major corporate board.

The sports world is another example of gender inequality. Secondary educational institutions still provide more opportunities for males than females in athletic programs at every level. The Kilmon court should have recognized that until women and men are on an equal playing field, courts must use every opportunity to support and

279. See supra Part II.C.1.
280. See supra Part II.C.1.
281. See infra notes 282–286.
285. Lisa M. Fairfax, Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to their Advancement, 65 MD. L. REV. 579, 584–85 (2006). Professor Fairfax also noted that studies show that there has been only a half a percentage point increase per year in the number of board seats held by women directors. Id. at 586. “At that rate, it will be almost seventy years before women’s percentage on boards will reach 50%.” Id.
further advance women's rights and thus, should have affirmatively found the prosecutions of Ms. Kilmon and Ms. Cruz violative of the Maryland ERA in addition to its narrow holding.

The Court of Appeals should also have used the Kilmon case to stop the State from perpetuating the stereotypical view that a woman's place in society is in the home. By applying section 3-204 to pregnant drug-using women, and not drug-using men who might harm their own family environments, the State emphasized the view that women should be primarily charged with caring for children, whether living or in the womb. Maryland's ERA cases and the Supreme Court's sex and pregnancy-related discrimination cases demonstrate that women have historically been denied opportunities due to the espoused "[c]oncern for a woman's existing or potential offspring." Being pregnant and drug-addicted has resulted in loss of women's liberty, as can be seen by the convictions of Cornelia Whitner and Regina McKnight in South Carolina for criminal child abuse and manslaughter, due to their ingestion of drugs during pregnancy. South Carolina's harmful and discriminatory treatment of women, especially in terms of abortion rights, is quite distinct from the treatment of women in Maryland. Thus, the Kilmon court should have followed the lead of its legislature and its own precedents and applied an ERA analysis to further distinguish Maryland from states like South Carolina.

Moreover, the Kilmon court, in line with the history of Maryland and the federal government of advancing gender equality, should

287. See supra Part II.C.2.
288. See supra Part II.C.1.
290. See supra notes 105–115 and accompanying text (relating the history and disposition of these cases).
291. While the Maryland General Assembly is predominantly pro-choice and has passed a number of laws protecting a woman's right to choose, South Carolina's legislature is almost entirely anti-choice and has passed some of the most restrictive laws against women and their right to choose. Compare NARAL Pro-Choice America, Who Decides?: The Status of Women's Reproductive Rights in the United States, Maryland, http://www.naral.org/choice-action-center/in_your_state/who-decides/state-profiles/maryland.html (last visited Sept. 2, 2007) (outlining pro-choice Maryland abortion laws and regulations, including Maryland's prohibition on insurers from discriminating against women using prescription contraception), with NARAL Pro-Choice America, Who Decides?: The Status of Women's Reproductive Rights in the United States, South Carolina, http://www.naral.org/choice-action-center/in_your_state/who-decides/state-profiles/south-carolina.html (last visited Sept. 2, 2007) (listing over ten areas concerning abortion rights, including disclosure of private medical records, where South Carolina is anti-choice).
292. See supra Part II.C.1–2.
have noted the inherent paternalism in taking a punitive approach to “harmful” maternal behavior. As a majority of Justices stated in Casey, the experience of a mother who carries her child to term “is too intimate and personal for the State to insist . . . upon its own vision of the woman’s role.”293 Instead, women must be allowed to shape their own destiny based on their conceptions of their place in society.294 Despite these convincing words from our highest court, prosecutors and legislators across the country are attempting to control women’s behavior through pregnancy-based regulations.295 The belief that third parties are more equipped to make decisions regarding a fetus than the woman carrying that fetus has, throughout history, infringed on women’s, and not men’s, right to work in certain environments,296 right to refuse certain medical procedures,297 and now, their right to liberty. It is ironic that although pregnant women have been forced to undergo medical procedures against their will, the Supreme Court and lower federal courts have prohibited attempts to compel criminal defendants and mental patients—those over whom the state exerts a great deal of control—to undergo certain medical procedures.298 Such discrepancies in the treatment of pregnant women reflect the false notion that women are not capable of making intelligent, informed decisions about their own bodies.299 This devaluation of a wo-

294. Id.
295. See, e.g., Bhargava, supra note 267, at 516–17 (discussing the punishment of Regina McKnight, a 22-year old, borderline mentally retarded woman, for drug use while pregnant that resulted in the stillbirth of her child).
296. Howard Minkoff & Lynn M. Paltrow, The Rights of "Unborn Children" and the Value of Pregnant Women, HASTINGS CENTER REPORT, 2 Mar.-Apr. 2006, at 26 (explaining that before the Supreme Court ruled against policies excluding women from environmental toxins in 1991, “companies used ‘fetal protection’ policies as a basis for prohibiting fertile women from taking high-paying blue collar jobs that might expose them to lead.”)
297. See cases cited supra notes 235–236 and accompanying text; see also Gonzales v. Carhart, 127 S. Ct. 1610, 1626 (2007) (finding constitutional an act banning a particular method of ending pregnancies despite the lack of an exception for the health of the mother).
298. Johnsen, supra note 271, at 615–16; see also Daniels, supra note 212, at 33 (“At least thirty-six cases of forced medical treatment have been reported in the courts by twenty-six states. Pregnant women have been forced to have blood transfusions against their will; they have been sedated, stripped down, and forced to undergo major surgery; they have been physically detained in hospitals when physicians suspected they weren’t following medical orders.”).
299. See Bhargava, supra note 267, at 525 (noting that the prosecution of drug-using pregnant women demonstrates a “nasty kind of paternalism”). Even the Supreme Court continues to question the ability of women to make their own, well-informed choices. For example, in Carhart, Justice Kennedy justifies the majority decision to uphold the Partial-Birth Abortion Ban Act by insisting that “some women come to regret the choice to abort” and suffer “[s]evere depression and loss of esteem” as a result. 127 S. Ct. at 1634. Where
man's ability to make decisions and to know what is best for her fetus and herself is another roadblock in the advancement of women's rights that the Kilmon court should have recognized and rejected.

The Kilmon case offered a prime opportunity for the highest court in Maryland to take a stand against the erosion of women's rights through the expansion of fetal rights. Even further, the Kilmon case provided an opportunity for the court to express its unfaltering commitment to advance women's rights in Maryland. By ignoring the State's attempt to expand fetal rights and solidity stereotypical views of women's place in society, the Kilmon court allowed the questioning of women's place in society to go unanswered.

V. CONCLUSION

In Kilmon v. State, the Court of Appeals reversed the reckless endangerment convictions of two Talbot County women that were based on their drug-use during pregnancy. Although the court's holding was properly supported by its finding that the Maryland General Assembly did not intend section 3-204 of the Criminal Law Article to include harm to fetuses caused in utero by their mothers, the Kilmon court missed two important opportunities. The Kilmon court failed to expressly reject the State's attempts to expand fetal rights and to address the potential Equal Rights Amendment issues inherent in the State's use of section 3-204 to prosecute women, and not men, for drug use. The Kilmon court's narrow holding resulted in the possibility of further prosecutions and imprisonment of pregnant drug-abusers as well as to further traditional stereotypes of women as best suited for domestic roles. The Court of Appeals should learn from the Kilmon court's decision and in the future, affirmatively deny any attempt to prosecute and jail pregnant drug-users.

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once the Court insisted that the State could not impose "its own vision of the women's role," Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992), the court now claims that the Partial-Birth Abortion Ban Act "recognizes [the] reality" of "[r]espect for human life . . . in the bond of love the mother has for her child." Carhart, 127 S. Ct. at 1634.

300. Kilmon, 394 Md. at 183, 905 A.2d at 315.
301. See supra Part IV.A.
302. See supra Part IV.B.
303. See supra Part IV.B.1.
304. See supra Part IV.B.2.
305. See supra Part IV.C.
In Schlamp v. State, the Court of Appeals of Maryland considered whether a fight between two groups of individuals, which led to the stabbing death of a twenty-year-old college student, had the requisite elements of unlawful assembly and public terror sufficient to justify a conviction for common law riot. In a unanimous decision, the Court of Appeals reversed the lower court’s riot conviction, finding neither unlawful assembly nor public terror present. The court held that no riot took place because the defendant’s group was not unlawfully assembled to “carry out a common purpose” that would terrorize others. Further, the court found that the group’s activities did not terrorize the public because the aggression prior to the incident was completely verbal and mostly diffused.

In reaching its decision, the Court of Appeals properly construed the English common law rule for riot. However, the court’s assertion that the offense must be “planned and deliberate” to constitute unlawful assembly, and its inability to find that public terror arose from a loud fight on a public street, imply an overly restrictive interpretation of the common law elements. Moreover, the court’s forced adherence to narrow common law vestiges should urge the Maryland legislature to follow other jurisdictions and the federal government and codify the crime. By enacting legislation, Maryland can abrogate antiquated and confusing words of art, such as “unlawful assembly” and “public terror,” and focus the court’s attention on tangible elements, such as the defendant’s conduct. Shifting away from the common law, in turn, will promote greater consistency and understanding in

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2. Id. at 725, 891 A.2d at 328.
3. Id. at 725–26, 891 A.2d at 328.
4. Id. at 737, 891 A.2d at 335.
5. Id.
6. See infra Part IV.A.
7. Schlamp, 390 Md. at 732, 891 A.2d at 332.
8. Id. at 737, 891 A.2d at 328.
9. See infra Part IV.B–C.
10. See infra Part IV.D.
11. See infra part IV.D.
I. THE CASE

On November 9, 2002, the University of Maryland football team defeated Atlantic Coast Conference rival North Carolina State in a 24–21 homecoming victory. To celebrate, University of Maryland student Brandon Malstrom, accompanied by his brother Bill and their friends Brandon Conheim, Matt Swope, Matt Mitchell, and Paul Speakman (Malstrom’s group), set out around 11:30 p.m. that night to attend parties around campus. The group eventually settled into adjacent Dickinson Avenue backyard parties.

Around the same time, a second group of individuals who were not students at the University of Maryland—John Ryan Schlamp, Robert Fournier, Quan Davis, Kenny Brock, and Jacob Adams (Schlamp’s group)—were also making arrangements to attend College Park parties that night. Schlamp and Adams had spent the day at Fournier’s house watching the football game and drinking alcohol. On their way to College Park, they stopped at a liquor store where they ran into Quan Davis and three of his friends. Schlamp’s group invited Davis and his friends to meet them at another friend’s house near the University of Maryland campus. Once there, Schlamp and the other members of his group resumed drinking. By midnight, the highly inebriated group left the house and went to Dickinson Avenue.

As members of Schlamp’s group traveled down Dickinson Avenue, they started verbal confrontations with individuals attending backyard parties. The group eventually reached Scott Ehrlich’s
party, where they continued to verbally harass invited guests. At one point during the party, Davis brandished a concealed “Rambo knife” to his friend Adams. Later, Davis was forced to leave Ehrlich’s party after a girl complained that Davis inappropriately rubbed against her.

In response to the group’s general demeanor and partygoers’ complaints, Ehrlich repeatedly asked the remainder of Schlamp’s group to leave. Shortly thereafter, Ehrlich asked all guests to leave his backyard, and everyone present, including Schlamp’s group, obliged.

Malstrom’s group reconvened on Dickinson Avenue in front of Ehrlich’s house, as did Schlamp’s group. Another verbal confrontation broke out; this time, Schlamp accused someone in Malstrom’s group of taking his or Davis’s cell phone, and demanded that the group empty their pockets. Brandon Malstrom told Schlamp that no one had the cell phone and refused to comply with Schlamp’s demand. Immediately, Schlamp shoved Brandon, and Fournier held Brandon from behind, immobilizing him. Allegedly, it was during this brief scuffle that Brandon was stabbed to death.

Around this time, a police car arrived on the scene and the crowd scattered. Conheim and Mitchell remained and told the officer that Schlamp had started the fight. The police took Schlamp into custody. Members of Malstrom’s group came back, but Brandon was missing. After an extensive search, Brandon was discovered lying mortally wounded on the ground behind Ehrlich’s house.

The State’s Attorney charged Schlamp with “first and second degree murder, first and second degree assault, and common law riot”

24. Id. at 727, 891 A.2d at 329.
25. Id. Davis described the knife as “big and sharp, with a serrated edge.” Id.
26. Id.
28. Schlamp, 390 Md. at 727, 891 A.2d at 329.
29. Id.
30. Id.
31. Id. No one, in fact, had anyone else’s cell phone. Id.
32. Id. at 728, 891 A.2d at 330.
33. Id. Conheim testified that Davis was present and seemed to be “favoring his hip [like he was] reaching for something.” Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
in connection with Brandon’s death. Following a trial in the Circuit Court for Prince George’s County, a jury acquitted Schlamp of murder and first degree assault, but found him guilty of second degree assault and riot. Schlamp was sentenced to ten years in prison for riot and three years for second degree assault, to be served consecutively.

On appeal to the Court of Special Appeals, Schlamp argued that the evidence was insufficient to support a conviction for common law riot. The court disagreed, finding evidence of unlawful assembly and public terror sufficient to sustain the jury verdict. First, the court found unlawful assembly because the group functioned as a unit during the night through its repeated confrontations with partygoers. The court also found that the group acted with a common violent purpose, as Fournier held Brandon from behind, Schlamp swung at Brandon, and everyone in Schlamp’s group converged around Brandon during the altercation. Second, the court found that the common purpose was carried out in a way that terrified others because a knife was brought to the party, and Fournier’s chokehold, which constituted a battery, was sufficient to breach the peace.

Subsequently, Schlamp petitioned for certiorari to the Court of Appeals to determine whether the evidence was sufficient to sustain his conviction for common law riot. The Court of Appeals granted certiorari on June 9, 2005, to review the issue of common law riot for the first time since 1937 and for the third time in the court’s history.

39. Id. at 725, 891 A.2d at 328. The State also charged Davis with “first and second degree murder, first and second degree assault, riot, and carrying a dangerous weapon openly with intent to injure.” Id. at 725 n.1, 891 A.2d at 328 n.1.
40. Id. at 725, 891 A.2d at 328.
41. Id. In mandating a ten-year sentence for riot, the trial court recognized that it exceeded the sentencing guidelines; however, it justified its decision by finding that the harm was excessive and that without Schlamp’s threats and aggressive behavior, the circumstances leading to Malstrom’s death would not have been set in motion. Schlamp v. State, 161 Md. App. 280, 298–99, 868 A.2d 914, 924–25 (2005).
42. Schlamp, 161 Md. App. at 285, 868 A.2d at 917. Schlamp also challenged the ten-year sentence as cruel and unusual punishment in violation of the Eighth Amendment. Id.
43. Id.
44. Id. at 295, 868 A.2d at 922.
45. Id.
46. Id. at 296–97, 868 A.2d at 923.
47. Schlamp, 390 Md. at 725–26, 891 A.2d at 328.
48. Id. at 725, 729, 891 A.2d at 328, 330. The Court of Appeals has only reviewed two common law riot cases in the past: Kaefer v. State, 143 Md. 151, 122 A. 30 (1923), and Cohen v. State, 173 Md. 216, 195 A. 532 (1937). Schlamp, 390 Md. at 729, 891 A.2d at 330.
II. LEGAL BACKGROUND

Criminal riot, in Maryland and under accepted common law, consists of three distinct elements:49 (1) "three or more persons";50 (2) "unlawfully assembled to carry out a common purpose";51 (3) "in such a violent or turbulent manner as to terrify others."52 Maryland is one of the few states that has not codified criminal riot by statute. Instead, Maryland maintains the crime of riot through Article V of the Maryland Declaration of Rights, which entitles Maryland inhabitants to the common law of England as it existed on July 4, 1776.53 Moreover, Maryland courts must consider two factors when interpreting each element of criminal riot: first, the English common law interpretation of each element in 1776; and second, previous interpretations of each element by the Court of Appeals. Further, statutes from other jurisdictions are also particularly useful. In this vein, the Federal Anti-Riot Act, 18 U.S.C. sections 2101-02, and D.C. Code section 22-1322 provide strong bases for comparison.54

A. Element One: The Three-Person Requirement

At common law, a gathering of three or more persons was necessary to constitute criminal riot.55 Accordingly, Maryland courts have applied the three-person rule in previous cases.56 Similarly, most United States jurisdictions require a fixed minimum number of persons to constitute a criminal riot.57 Some states distinguish felony riot

49. See Cohen, 173 Md. at 221, 195 A. at 534 (articulating the three-part common law definition of riot as the Maryland standard).
50. See infra Part II.A.
51. See infra Part II.B.
52. See infra Part II.C.
53. Md. Const. Decl. of Rts. art. 5, ("That the Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on [July 4, 1776].")
54. See infra Part IV.D.
55. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 146 (1769) (noting also that riots and unlawful assemblies must have three or more persons); see also 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 293 (6th ed. 1788) (requiring three persons for riot); 5 WILLIAM HOLDsworth, A HISTORY OF ENGLISH LAW 198 (1924) (noting that the "rule of three" originated with the Court of Star Chamber).
57. Some jurisdictions keep the common law rule of three or more persons. See, e.g., 18 U.S.C. § 2102 (2000); Minn. Stat. Ann. § 609.71 (West 2006). Massachusetts, a common law jurisdiction like Maryland, also requires that three persons be assembled for riot. Commonwealth v. Berry, 71 Mass. (5 Gray) 94 (1862). Other jurisdictions have differing number requirements. For example, California requires two or more persons, Cal. Penal Code § 404 (West 2006), D.C. requires five or more persons, D.C. Code § 22-1322 (2006), Connecticut requires six or more persons, Conn. Gen. Stat. § 53a-175 (2006), and Texas requires seven or more persons. Tex. Penal Code Ann. § 42.02 (Vernon 2006). Less com-
from misdemeanor riot based on the number of people assembled.58 This approach also has roots in the English common law.59

In Maryland, and other jurisdictions,60 the minimum number requirement applies only to the number of people unlawfully assembled; there is no requirement that the state charge a minimum number of defendants with riot.61 Thus, in Cohen v. State,62 Cohen was the only defendant charged with riot for his role in leading and inciting a tumultuous taxi cab strike in Baltimore City.63 Cohen argued that the State failed to satisfy the minimum three-person requirement because he was the only named defendant.64 The Court of Appeals rejected Cohen's argument and adopted the common law rule as articulated in Commonwealth v. Berry,65 holding that so long as the defendant is engaged with at least two other persons, those persons need not be named if unknown to the grand jury.66

B. Element Two: Unlawful Assembly for a Common Purpose

Neither common law, Maryland law, nor other jurisdictions offer a clear standard for the requirement of unlawful assembly for a common purpose. Some treatises on common law maintain that riot is impossible without first having criminal unlawful assembly—meaning, the crime requires a preconceived unlawful purpose or design before the group assembles.67 Other scholars, most notably Blackstone, do not require a common purpose but only the execution of an unlawful act by three or more persons.68 This confusion over whether a preconceived common purpose, or the crime of unlawful assembly, is a prerequisite to the crime of riot, has led to inconsistent application of the common law riot doctrine in Maryland69 and in other jurisdictions.70

58. See, e.g., N.Y. Penal Law § 240.05 (McKinney 2006) (specifying four or more persons for second degree riot, and ten or more persons for first degree riot).
59. BLACKSTONE, supra note 55, at 143 (citing 1 Geo. I c. 5 (1714)).
63. Id. at 220–21, 195 A.2d at 533.
64. Id.
65. 71 Mass. (5 Gray) 93 (1862).
67. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 483 (3d ed. 1982).
68. See BLACKSTONE, supra note 55, at 146.
69. See infra Part II.B.2.
70. See infra Part II.B.3.
1. Unlawful Assembly for a Common Purpose at Common Law

The relationship between unlawful assembly and riot is easily confused because unlawful assembly is both an element of riot and stands alone as a separate offense against the public. Perkins and Boyce describe the two offenses as pyramiding offenses. Thus, unlawful assembly occurs when three or more persons assemble with the purpose of doing an unlawful act but without making any motion towards it; whereas riot occurs when this same group gathers together to carry out an act, whether lawful or unlawful, and then executes this act with such force and tumult as to terrorize the public. In short, the crimes are pyramiding because without the first, the second is impossible.

Though leading English common law scholars agreed that a preconceived common purpose or design was a necessary element of unlawful assembly, they split over whether the same common cause was necessary for criminal riot. According to Blackstone, whereas unlawful assembly required a gathering upon contemplation of a preconceived unlawful or violent purpose, riot could occur without a common cause or quarrel so long as the executed act was sufficiently violent and tumultuous to terrorize the public.

Hawkins, on the other hand, arguably required a higher evidentiary standard for unlawful assembly to constitute an element of riot: group confederation with promises of mutual assistance. For Hawkins, the promise of mutual assistance is essential because it indicates when those otherwise innocently gathered became rioters—confederated for the common purpose of breaking the peace. Although Hawkins suggested a stricter showing of unlawful assembly than did Blackstone, he failed to address whether a showing of mutual assistance is necessary when a group is already confederated before the dispute arises.

2. Unlawful Assembly for a Common Purpose in Maryland

Maryland courts follow the common law by mandating unlawful assembly in riot cases, but courts have applied differing levels of scrup-

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71. PERKINS & BOYCE, supra note 67, at 483.
72. BLACKSTONE, supra note 55, at 146; HAWKINS, supra note 55, at 297. This appears to be a generally accepted standard today as well.
73. PERKINS & BOYCE, supra note 67, at 483.
74. E.g., BLACKSTONE, supra note 55, at 146; HAWKINS, supra note 55, at 297.
75. BLACKSTONE, supra note 55, at 146.
76. Id.
77. HAWKINS, supra note 55, at 293.
78. Id. at 294–95.
tiny when determining whether a group is unlawfully assembled with a
common intent. In Kaefer v. State, the Court of Appeals considered
whether to overturn a jury conviction of riot, unlawful assembly, and
assault when Kaefer and thirteen other defendants prevented a group
of fellow miners from entering the work site by throwing stones, using
clubs, and threatening bodily injury. Although the court did not
expressly create a Maryland rule for riot in this case, it accepted as
sufficient the state's indictment, which alleged that thirteen men un-
lawfully and riotously assembled to disturb the public peace. Im-
pliedly, by upholding the indictment, the Kaefer court both required
and found unlawful assembly.

Fourteen years later, in Cohen, the Court of Appeals explicitly re-
quired unlawful assembly for a common purpose when it set forth the
Maryland rule for riot. Cohen, the leader of a cabdriver strike in
Baltimore City, was convicted on charges of riot and inciting a riot,
stemming from a violent exchange between taxi cab picketers and
workers. In the days leading up to the strike at union meetings, Co-
hen allegedly made numerous remarks inciting workers to physically
prevent cabs from driving off the lot. On the day of the strike, 150
Yellow Cab drivers assaulted working cabs with missiles, rocks, stones
and beer bottles. Although Cohen himself was not present at the
riot, the Court of Appeals found that his role in assembling, inciting,
and aiding and abetting the unlawful acts was sufficient to uphold his
conviction under the Maryland rule.

The Court of Special Appeals has reviewed three cases involving
prison riots and has found unlawful assembly and upheld riot convic-
tions in each. In McClelland v. State, McClelland was sentenced to
ten years in prison for rioting in a Baltimore City prison. McClel-
land contended that the evidence was insufficient to maintain the
conviction, arguing, in part, that the inmates “pull[ed] a protest” only

79. 143 Md. 151, 122 A. 30 (1923).
80. Id. at 153, 157, 122 A. at 31, 33.
81. See id. at 156–57, 122 A. at 32–34. Kaefer challenged his riot and unlawful assembly
convictions by arguing that the State failed to allege the requisite elements in the indict-
ment. Id. at 155, 122 A. at 32.
82. Id.
83. 173 Md. 216, 221, 195 A. 532, 534 (1937) (“The assembly must be unlawful, else
there is no riot, and the unlawful assembly must be charged in the indictment.”).
84. Id. at 220, 227, 195 A. at 533, 537.
85. Id. at 227–28, 195 A. at 537.
86. Id. at 225, 195 A. at 536.
87. Id. at 228, 195 A. at 537.
88. 4 Md. App. 18, 240 A.2d 769 (1968).
89. Id. at 19, 240 A.2d at 770.
after officers had stifled their efforts to protest jailhouse corruption by non-violent means. McClelland attempted to justify the inmates' planned riot as lawful by arguing that it was the last possible action that inmates could take to ameliorate the inhumane treatment inflicted upon them by corrupt prison officials. The Court of Special Appeals rejected this argument. The court reasoned that McClelland—by setting fires to signal the beginning of the protest and by outfitting inmates with baseball bats and other weapons—not only participated in the riot, but acted as a leader. Although the court never explicitly reached a finding of unlawful assembly, it cited numerous facts that spoke to the inmates' predetermined plan to assemble for a common and unlawful purpose.

Though a specific intent to join or a predetermined plan is conclusive evidence of unlawful assembly, the Court of Special Appeals has found this high standard unnecessary, ruling that the intent to join two others in an unlawful act is not required to maintain a riot conviction. In Briscoe v. State, Briscoe was convicted of riot by a jury based on evidence that he waved a wooden board over his head while yelling at police and participating in the looting of the prison's commissary. Briscoe challenged his conviction, in part, by arguing that the state failed to allege a specific intent to riot in its indictment. The court, in rejecting this argument, found that a previous agreement or a specific intent is not essential to the offense of riot. The Briscoe court further explained that the intent, which is an element of the offense, is simply the intent to join or encourage the riotous act. By holding that no specific intent or previous agreement was

90. Id. at 30, 240 A.2d at 776.
91. See id. for a full explanation of McClelland's justification defense. McClelland also argued that his acts did not terrorize the public. Id. at 30–31, A.2d at 777.
92. Id.
93. Id. The court carefully noted that McClelland's degree of leadership was only relevant in so far as it helped to show his involvement and planning of the riot generally. Id. at 30, 240 A.2d at 777.
94. See id., 240 A.2d at 777.
95. See, e.g., Cohen v. State, 173 Md. 216, 228, 195 A. 532, 537 (1937) (finding the unlawful assembly element satisfied when the defendant planned a taxi driver riot but did not participate in the riot).
97. Id. at 465, 240 A.2d at 111.
98. Id. at 467, 240 A.2d at 112.
99. Id.
100. Id. at 467–68, 240 A.2d at 112. The Briscoe court found that an indictment need not allege intent since it is a matter of proof. Id. at 468, 240 A.2d at 112.
required, the Briscoe court did not interpret the element of unlawful assembly as requiring pre-articulated promises of mutual assistance.\(^{101}\)

Similarly, in \textit{Gibson v. State},\(^{102}\) the Court of Special Appeals upheld a jury conviction for riot under the weaker \textit{Briscoe} standard. In \textit{Gibson}, two of the prisoner-defendants led officers into a recreation room with forty to fifty other inmates.\(^{103}\) Once there, another defendant approached the officers with a club, ordered them up against the wall, and threatened to beat them.\(^{104}\) Without inquiring into whether the defendants had a preconceived common purpose, the court applied the \textit{Briscoe} standard and found riot based solely on evidence that three defendants assembled and acted violently.\(^{105}\)

3. Unlawful Assembly in Other Jurisdictions

Although unlawful assembly for a common purpose has been applied in Maryland over the years, many states have either abrogated or modified this element by statute, or follow the \textit{Briscoe} interpretation\(^{106}\) and require no preconceived common purpose or concert of action. In states where unlawful assembly has been abolished as an element, it is often replaced with language emphasizing the conduct of the actors over their intentions for assembling. D.C. Code section 22-1322, for example, defines riot simply as “an assemblage of [five] or more persons” who disturb the public peace “by tumultuous or violent conduct or the threat thereof.”\(^{107}\)

Some states prefer to statutorily modify the common law elements without eradicating them entirely. For example, in New Hampshire and Utah, riot lies when a person recklessly engages in conduct that causes public alarm, or when a person assembles with two others with the purpose of engaging in illegal activity or causing injury to another.\(^{108}\) By making the common law elements disjunctive, these

\(^{101}\) \textit{Id.} at 467, 240 A.2d at 112. The \textit{Briscoe} rule stands in stark contrast to the Court of Appeals’s narrow interpretation of Hawkins, and appears to accord more with Blackstone’s articulation of riot. \textit{See infra} Part IV.B.2.


\(^{103}\) \textit{Id.} at 262, 300 A.2d at 700.

\(^{104}\) \textit{Id.}

\(^{105}\) \textit{Id.} at 261–62, 300 A.2d at 700–01. In fact, there was additional evidence that one inmate intervened on an officer’s behalf and another inmate took an officer to receive first-aid treatment. \textit{Id.} at 262, 300 A.2d at 700. This evidence may have further suggested to the court that the inmates did not have a common intent to riot.


\(^{107}\) D.C. \textit{CODE} § 22-1322(a) (2001); \textit{see also infra} notes 156–160 and accompanying text.

states deemphasize unlawful assembly and force the conduct of the actor to play a greater role in proving the crime. Other states have similarly modified and deemphasized the importance of unlawful assembly by making lawful assembly an affirmative defense to riot. \textsuperscript{109}

Even when states retain the language of unlawful assembly in their statutes, courts do not require evidence of a planned or deliberate common unlawful purpose. Indiana, for instance, defines riot as when “[a] person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct.” \textsuperscript{110} In \textit{Kiphart v. State},\textsuperscript{111} however, a defendant challenged his conviction by alleging that the state failed to charge him with unlawful assembly—a necessary prerequisite under the statute.\textsuperscript{112} The Supreme Court of Indiana disagreed.\textsuperscript{113} Despite the statutory language, the court found that riot was simply an act committed by three or more in a violent or tumultuous manner.\textsuperscript{114} Similarly, in \textit{Bolin v. State},\textsuperscript{115} the court held that the common purpose with which persons do the violent or tumultuous act is not part of the statutory definition of riot.\textsuperscript{116} Thus, even though statutes may specify unlawful assembly as an element, some courts nevertheless do not require a showing of a preconceived common purpose.

\textbf{C. Element Three: Violent and Tumultuous Activity Causing Public Terror}

The public terror or \textit{in terrorum populi} requirement is a vestige of riot’s evolutionary past.\textsuperscript{117} Originally, riot was associated with the crime of treason, a crime committed against the state or the king.\textsuperscript{118} Over time, riot became a distinct crime from treason, but remained true to its lineage as an offense against the public by retaining public

\begin{thebibliography}{9}
\bibitem{109} See, e.g., \textit{Tex. Penal Code Ann.} § 42.02 (Vernon 2003). \textit{But see} Henry v. State, 149 S.W.2d 115, 118 (Tex. Crim. App. 1941) (holding, without explanation, that riot can have no meaning under the statute without the element of unlawful assembly).
\bibitem{111} 2 Ind. 273 (1873).
\bibitem{112} \textit{Id.} at 274–75.
\bibitem{113} \textit{Id.}
\bibitem{114} \textit{Id.}
\bibitem{115} 139 N.E. 659, 663 (Ind. 1923).
\bibitem{116} Bolin v. State, 139 N.E. 659, 663 (Ind. 1923) (“The authorities cited by counsel from other jurisdictions where the definition of riot embraces an unlawful assembling together as an essential element of the offense are not in point.”).
\bibitem{117} 1 \textbf{Edward East}, \textit{A Treatise of the Pleas of the Crown} 73 (1806).
\bibitem{118} \textit{Id.}
\end{thebibliography}
terror as a necessary component. Despite this history, jurisdictions, including Maryland, have taken significant steps to limit the public terror element, either by abrogating it by statute, or by broadly interpreting it as a breach of the public peace.

1. Application of the Public Terror Element in Maryland

Maryland courts consistently require proof of public terror, but inconsistently apply the element. The Court of Appeals has addressed the issue of public terror twice. In Kaefer, the court, without further explanation, accepted as sufficient an indictment alleging that Kaefer breached the peace by making noises, tumults, and disturbances. The court narrowed this broad definition of public terror in Cohen. In Cohen, the Court of Appeals articulated Maryland's rule for riot, requiring tumultuous or violent activity to the terror of the public. The Cohen court then applied the rule and found that although Cohen had the right to organize a strike and unionize employees, he had no right to use violent means to disturb the public peace "or to create a reign of terror." Thus, the court affirmed Cohen's conviction.

The Court of Special Appeals, in its jailhouse riot cases, expanded the meaning of public terror to include situations where the public is not actually terrorized. In Briscoe, Briscoe unsuccessfully challenged his riot conviction by arguing that the state could not meet the public terror requirement because the acts were confined to the jailhouse, and there was no evidence that anyone in the jailhouse was afraid. The court rejected both the legal and factual bases of these arguments. First, as a factual matter, the court found that the prisoners behaved in a violent and tumultuous manner by smashing windows, burning buildings, and looting the commissary, and that this

119. See Hawkins, supra note 55, at 293–94. Hawkins describes riot, in part, as when three or more people who engage in a violent and turbulent act to the terror of the people, regardless of whether the intended act is lawful or unlawful. Id. But see Blackstone, supra note 55, at 146 (omitting any language of public terror and describing riot as three or more persons who engage in "an unlawful act of violence," or do a lawful act in a "violent and tumultuous manner").
120. See infra Part II.C.1.
121. See infra Part II.C.2.
124. Id. at 228, 195 A. at 537.
125. Id.
126. See, e.g., Briscoe v. State, 3 Md. App. 462, 468–69, 240 A.2d 109, 113 (1968) ("[T]here may be a riot, even though no person or persons are actually terrified . . . .").
127. Id.
128. Id.
activity terrorized every officer in Baltimore City who was called to the jailhouse by radio.\textsuperscript{129} Second, as a legal matter, the \textit{Briscoe} court held that there may be a riot even when no one is actually terrified, so long as the act "tends to alarm and terrify law-abiding citizens in the peaceful exercise of their constitutional rights and privileges."\textsuperscript{130} The court reiterated this notion two weeks later in \textit{McClelland v. State},\textsuperscript{131} holding that a defendant's identical argument in the same jailhouse riot lacked merit.

2. \textit{The Public Terror Requirement in Other Jurisdictions}

Although many jurisdictions require a public disturbance component,\textsuperscript{132} few jurisdictions strictly require that the public actually be terrified by the violent or unlawful activity.\textsuperscript{133} Moreover, in states where riot is codified by statute, the common law language of public terror is either nonexistent or weakened and modified to "public disturbance" or to "causing a substantial risk of public alarm."\textsuperscript{134} Finally, in at least four jurisdictions without statutes, state courts require a showing of "public terror" only when there is no evidence that a group of three or more committed a violent or unlawful act.\textsuperscript{135}

Few jurisdictions require actual public terror. However, in \textit{International Wire Works v. Hanover Fire Insurance Co.},\textsuperscript{136} the Wisconsin Supreme Court found no riot when vandals committed unlawful acts at night away from public view. In \textit{Wire Works}, a plaintiff sought recovery against his property insurance company for riot protection when at least three vandals broke into a factory during the night and intentionally destroyed valuable machinery.\textsuperscript{137} Deciding the case for the insurer, the court found that the common law definition of riot applied to insurance claims, and held that a necessary element of riot is the actual disturbance of persons other than those engaged in the

\begin{verbatim}
129. Id. at 468, 240 A.2d at 113.
130. Id. at 469, 240 A.2d at 113.
131. 4 Md. App. 18, 240 A.2d 769 (1968).
132. See, e.g., State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975) (finding that even if the legislature defined riot by statute, a breach of the peace would be required by common law).
134. See infra notes 141–151 and accompanying text.
135. See infra notes 149–150 and accompanying text.
136. 283 N.W. 292, 294 (Wis. 1939).
137. Id. at 293.
\end{verbatim}
violent or tumultuous act. Thus, impliedly, the court denied coverage because the public was not actually terrified.

Wire Works is not representative of the modern statutory trend to either entirely abrogate the "public terror" requirement or to substantially modify it. States abrogating "public terror" often define riot simply as a certain number of people engaging in violent or tumultuous conduct. States that statutorily modify the element generally do so by weakening the language from "public terror" to "disturbing the public peace," "grave risk of causing public alarm," or "risk of causing public terror."

Even in states where public terror remains part of the statute, courts, like the Briscoe court, often interpret the element as requiring no more than a breach of the peace. For example, in United States v. Bridgeman, the D.C. Circuit, in rejecting a prisoner's argument that his activity was out of the public's view, interpreted "public disturbance" as "breach of the peace," and placed any activity threatening the security and tranquility that the law affords individuals within the ambit of a public disturbance. Similarly, in Minnesota, another state with a statutory public disturbance requirement, the Minnesota Supreme Court found that the repercussions of riot can disturb

138. Id. at 293-94.
139. Id. at 294 ("No riot exists in the absence of publicity at the time of the violent or tumultuous acts.").
140. See supra note 57 (describing the different number of persons required for riot in various states).
141. See, e.g., D.C. Code § 22-1322(a) (2001) ("A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.").
143. See, e.g., Mich. Comp. Laws Ann. § 752.541 (West 2004) (defining riot as "5 or more persons, acting in concert to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm").
144. Compare United States v. Bridgeman, 523 F.2d 1099, 1114-15 (D.C. Cir. 1975) (defining breach of the peace as "tranquility enjoyed by a community when good order reigns amongst its members"), with Briscoe v. State, 3 Md. App. 462, 469, 240 A.2d 109, 113 (1968) (defining public terror as that which "tends to alarm and terrify law-abiding citizens in the peaceful exercise of their constitutional rights and privileges").
145. 523 F.2d 1099 (D.C. Cir. 1975).
146. Bridgeman, 523 F.2d at 1114. The D.C. Circuit also noted that Congress created the D.C. law as a model for modernized riot legislation with the purpose of removing antiquated common law obstructions. Id. at 1113-14; see infra Parts IV.C-D.
the public peace even when the disturbance is neither seen nor heard.\textsuperscript{148}

At least four jurisdictions without riot statutes interpret the common law as requiring public terror only when citizens tumultuously assemble, but do not commit a violent or unlawful act. For example, in \textit{Commonwealth v. Runnels},\textsuperscript{149} the Massachusetts Supreme Judicial Court found that the \textit{in terrorem populi} element only applies when citizens assemble armed with weapons, but do not commit any act. Tennessee and Indiana also follow this interpretation.\textsuperscript{150} In all, the majority of states either follow a broad "breach of the peace" interpretation of public terror, or find the element nonessential when the prosecution can produce evidence of violent or unlawful activity.\textsuperscript{151}

\textbf{D. Model Statutes: D.C. Code Section 22-1322 and 28 U.S.C. Section 2102}

The tumult of the late 1960s and early 1970s challenged Congress to modernize riot legislation to give the federal government an effective tool to prosecute violent protestors.\textsuperscript{152} What followed—D.C. Code section 22-1322, and the Federal Anti-Riot Act, 18 U.S.C. sections 2101–02—were attempts by Congress to codify riot law to permit United States Attorneys to prosecute riot by focusing on the conduct of the actors.\textsuperscript{153} This moved riot away from the common law notion that prosecution must proceed through ancillary, prerequisite crimes such as unlawful assembly.\textsuperscript{154} These statutes have successfully withstood attacks on a variety of constitutional fronts by remaining true to underlying common law concepts, while respecting free speech and

\begin{itemize}
\item \textsuperscript{148} State v. Winkels, 283 N.W. 769, 764 (Minn. 1939).
\item \textsuperscript{149} 10 Mass. (9 Tyng) 518, 519 (1813) (citing Lord Holt’s treatise on English Common Law).
\item \textsuperscript{150} See, e.g., State v. Whitesides, 31 Tenn. (1 Swan) 88, 89 (1851); Thayer v. State, 11 Ind. 287, 288 (1858) (“We think it was not necessary to allege that the act was to the terror . . .”).
\item \textsuperscript{151} See United States v. Bridgeman, 523 F.2d 1099, 1115 (D.C. Cir. 1975). Modern courts’ interpretation of the public terror requirement recalls the classic philosophical question, “if a tree falls in the forest, does it make a sound?” On one hand, some courts require that the public actually be afraid of, or hear, the riotous activity. \textit{E.g.,} Int’l Wire Works v. Hanover Fire Ins. Co., 283 N.W. 292, 294 (Wis. 1939) (denying riot insurance when no one was present to witness the unlawful activity). On the other hand, many courts hold that if the public is naturally apt to be afraid, even if they are not present and capable of being afraid, riot still lies. \textit{E.g.,} Bridgeman, 523 F.2d at 1115; Briscoe v. State, 5 Md. App. 462, 469, 240 A.2d 109, 114 (1968).
\item \textsuperscript{153} Id.
\item \textsuperscript{154} See infra notes 156–160 and accompanying text.
\end{itemize}
providing clarity for riot prosecution, and have been endorsed by state courts.\textsuperscript{155}

D.C. Code section 22-1322 describes a riot as a public disturbance involving an assembly of five or more persons, who "by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons."\textsuperscript{156} In \textit{Bridgeman}, the D.C. Circuit discussed Congress's intent in passing the statute.\textsuperscript{157} The \textit{Bridgeman} defendant challenged his conviction for incitement to riot, in part, by arguing that because Congress only intended the statute to apply to street riots, the common law element of public terror as applied by the lower court to the jailhouse was insufficiently alleged and proven.\textsuperscript{158} In rejecting this argument, the court found that the statute's primary purpose was to clarify riot and incitement to riot, offenses whose meaning under the common law were uncertain.\textsuperscript{159} The court further noted that the Justice Department viewed D.C. Code section 22-1322 as a model local law that "incorporates the basic thrust of the common law statutes found in many jurisdictions and at the same time modernizes the law and takes cognizance of the First Amendment."\textsuperscript{160}

The Federal Anti-Riot Act, like the D.C. statute, defines riot in a modern way.\textsuperscript{161} Section 2102 of the Act defines riot as

\begin{quote}
 a public disturbance involving (1) an act . . . of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) the threat thereof with the power of execution.
\end{quote}

At least one state court has called upon its own legislature to adopt legislation similar to the Federal Anti-Riot Act. In \textit{State v.}
Beasley, the Florida Supreme Court in dicta recommended that if the state were to define riot by statute, it should adopt language similar to the Federal Anti-Riot Act.

III. THE COURT'S REASONING

In Schlamp v. State, the Court of Appeals unanimously overturned the Court of Special Appeals and the Circuit Court for Prince George’s County, and acquitted Schlamp of criminal riot. The Court of Appeals defined riot as “three or more persons ‘unlawfully assembled to carry out a common purpose in such violent or turbulent manner as to terrify others.’” The court held that Schlamp’s group, although “boorish and obnoxious,” was not unlawfully assembled, was not organized for a common purpose, and did not engage in behavior that struck terror or was likely to strike terror in the heart of the public.

Judge Wilner began by noting that although many states have codified criminal riot, Maryland remains one of the few jurisdictions that maintains riot as a common law offense. The court traced the roots of common law riot from England. Riot originated in the law of treason and later became unique as an offense against the public peace rather than as an offense against any single individual. The court then explained that, as an offense against the peace, riot became associated with unlawful assembly and rout. Articulating the three offenses as “pyramiding crimes,” the court explained the common law distinctions between unlawful assembly, rout, and riot. The court also addressed Hawkins’s common law rule for criminal riot, which included promises of mutual assistance and sufficient violence and tumult to terrorize the public.

The court found that despite a broad interpretation of riot by Hawkins and other Eighteenth Century treatise writers, “the true gravamen of the offense was planned and deliberate violent or tumultu-

163. 317 So. 2d 750 (Fla. 1975).
164. Id. at 753. Florida has a riot statute, but the statute fails to offer a definition. See Fla. Stat. Ann. § 870.01(2) (West 2000) (“All persons guilty of a riot, or of inciting or encouraging a riot, shall be guilty of a felony of the third degree . . . .”).
165. Schlamp, 390 Md. at 737, 891 A.2d at 335.
166. Id. (quoting Cohen v. State, 173 Md. 216, 221, 195 A. 532, 534 (1937)).
167. Id.
168. Id. at 729, 891 A.2d at 330.
169. Id. at 729–30, 891 A.2d at 330–31.
170. Id. at 730, 891 A.2d at 331.
171. Id.
172. Id. at 731, 891 A.2d at 332 (citing Perkins & Boyce, supra note 67).
173. Id. at 731–32, 891 A.2d at 332–33.
ous behavior." The court cited Hawkins for this view, emphasizing his example that riot involved either pre-arranged meetings to carry out a common unlawful or violent act, or innocently gathered persons who confederate themselves into groups with promises of mutual assistance to disturb the peace.

The court also used the Hawkins treatise to interpret the public terror requirement. The court observed that riot at common law was not a crime against injured persons or property, but that it was a crime against the public peace. Thus, the court observed that in every riot there must be some act that will evoke public terror.

Next, the court provided an overview of statutes codifying riot in other states. The court found that although varied in wording and approach, there are three common themes of state statutes: (1) a confederation of a certain number, (2) tumultuous or violent conduct and (3) the instigation of public disturbance, terror or alarm.

Turning its attention to Maryland riot cases, the court discussed the convictions in Kaefer v. State and Cohen v. State. Looking at Kaefer from the lens of its common law rule, the court emphasized the Kaefer court's finding that the state's indictment sufficiently alleged the necessary three elements for riot. The court then explained that the Cohen's indictment was substantively equivalent to Kaefer's indictment because it properly alleged that the taxi cab strikers unlawfully assembled with "great noise," and remained together for fifteen minutes "to the great terror and disturbance" of those nearby. The court ended its discussion of precedent by addressing the Court of Special Appeals's jailhouse riot cases. Notably, the court acknowledged Briscoe's holding that riot may lie when the activity is of a nature that tends to terrify citizens, even if no one is actually terrified.

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174. Id. at 732, 891 A.2d at 332.
175. Id. (citing Hawkins, supra note 55, at 514).
176. Id. at 732-33, 891 A.2d at 332-33.
177. Id.
178. Id. ([F]or every offence must be laid to be done in terrorem populi." (quoting Hawkins, supra note 55, at 515)).
179. Id. at 733, 891 A.2d at 333. The elements of the offense nonetheless vary by jurisdiction, as some require or omit a showing of actual terror, an unlawful act, or injury to a person or property. Id.
181. Id. at 734, 891 A.2d at 334. The court emphasized that riot only requires the participation of three or more people in the tumultuous or violent act, not that all persons involved are individually named in the indictment. Id. at 734, 891 A.2d at 334; Cohen v. State, 173 Md. 216, 221, 195 A. 532, 534 (1937).
182. Schlamp, 390 Md. at 735–37, 891 A.2d at 334–35.
183. Id. at 736, 891 A.2d at 335.
Based on its consideration of common law and relevant precedent, the court concluded that Schlamp and his comrades were not unlawfully assembled for a common purpose because the aggression displayed was individualized and the members of each group had not organized into groups before carrying out violent acts. The court also stressed that the group's activity failed to sufficiently create public terror because prior to the stabbing there were neither fights nor tumultuous behavior that was likely to strike terror into anyone. In concluding, the court observed that there was "at least a manslaughter and possibly a murder, committed by someone, but there was not a riot."

IV. ANALYSIS

In Schlamp v. State, the Court of Appeals reversed the jury verdict and the Court of Special Appeals, overturning Schlamp's ten-year riot sentence because there was insufficient evidence of unlawful assembly or public terror. In reaching this conclusion, the court used the appropriate common law rule, but interpreted the elements of unlawful assembly and public terror far too rigidly. First, the court's requirement that the actions of Schlamp's group be "planned and deliberate" to constitute unlawful assembly was a narrow and potentially inaccurate characterization of Hawkins's description of the element and ignored Blackstone's definition entirely. Second, the court's strict interpretation of unlawful assembly deviated substantially from Briscoe and the modern trend in other jurisdictions. Third, though the court acknowledged that Briscoe required a mere public disturbance to satisfy the public terror element, the court's inability to find "public terror" in this case implies an exceedingly strict reading of the public terror element that is inconsistent with Briscoe and the majority of other jurisdictions.

184. Id. at 737, 891 A.2d at 335.
185. Id. The court noted that the group's aggression before the incident was verbal, involved no destruction of property, and did not result in any reports of excessive noise. Id.
186. Id.
187. Id. at 737, 891 A.2d at 335.
188. See infra Part IV.A.
189. See infra Parts IV.B–C.
190. Schlamp, 390 Md. at 732, 891 A.2d at 332.
191. See infra Part IV.B.1.
192. See infra Part IV.B.2.
193. See infra Part IV.C.
In so strictly interpreting these elements, the Court of Appeals of Maryland has unnecessarily burdened Maryland riot law with unclear common law concepts that are difficult to prosecute and to apply. It also ignores the trend set by the federal government and other jurisdictions to modernize riot law by focusing prosecutions on the conduct of the actors. Moreover, the court’s nuanced decision in *Schlamp* should urge the Maryland legislature to clarify the state’s riot law by passing a statute similar to section 2102 of the Federal Anti-Riot Act or D.C. Code section 22-1322. Such an action should withstand constitutional scrutiny, create consistent application by trial courts, and give prosecutors a usable and predictable tool to combat group-organized crime.

**A. The Court of Appeals Correctly Determined the Three-Part Common Law Rule for Riot**

In the absence of a statute, the *Schlamp* court was bound by English common law under Article V of the Maryland Constitution and its own precedent in *Kaefer* and *Cohen*. *Cohen* clearly establishes that the Maryland common law interpretation of riot consists of “three or more persons . . . unlawfully assembled to carry out a common purpose in such violent or turbulent manner as to terrify the others.” Furthermore, though Blackstone, Hawkins, and other common law treatises differ in their approach to each element, modern courts generally recognize these three elements as common law riot. Thus, it was not within the power of the court to usurp legislative power and remove the elements of unlawful assembly or public terror from the definition of riot. The court, therefore, correctly interpreted and applied Article V of the Maryland Constitution when applying the rule for riot articulated in *Cohen*.

**B. The Schlamp Court’s Strict Interpretation of Common Law Unlawful Assembly Was Unreasonably Narrow**

The *Schlamp* court’s strict interpretation of common law unlawful assembly was unreasonably narrow in light of English treatises and trends in other jurisdictions. First, the court relied almost exclusively

194. See infra Part IV.D.
195. See infra Part IV.D.
196. See infra Part IV.D.
199. See State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975) (noting that it is within the state legislature’s power to consider defining riot differently from the common law).
on *Hawkins* when strictly interpreting unlawful assembly as requiring "promises of mutual assistance," but failed to distinguish the present case from Hawkins's hypothetical, which dealt with individuals not previously associated with one another. Second, the court disregarded Blackstone's interpretation, which requires no showing of association or purposeful assembly when a group executes a violent or unlawful act. Finally, the court's interpretation of unlawful assembly deviates substantially from Maryland cases and trends in other jurisdictions, which have abrogated or judicially weakened the unlawful assembly element because it is an impractical method for proving riot.

1. The Schlamp Court's Interpretation of Unlawful Assembly as Requiring Planned and Deliberate Behavior is too Strict in Light of the Common Law Treatises

Though the Schlamp court properly required unlawful assembly in accordance with Article V of the Maryland Constitution, the court's decision to require planned and deliberate activity is a narrow interpretation of Hawkins and ignores Blackstone's definition. The court's interpretation of unlawful assembly for the purposes of riot focuses on Hawkins's analysis of "How far the intention with which such persons assemble together must be unlawful." In this section, Hawkins describes a fight that unexpectedly erupts from an originally innocent gathering, and finds that those engaging in the fight are not guilty of riot unless they group themselves together and promise to assist each other before engaging in an unlawful, violent, or tumultuous act. From this example the Schlamp court infers that "planned and deliberate" unlawful or violent activity, or organized group confrontation, is essential for riot.

The Schlamp court's reading of the Hawkins hypothetical as requiring "planned and deliberate" activity is a narrow and potentially inaccurate characterization of the Hawkins standard. Hawkins sets

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201. See infra notes 204–217 and accompanying text.
202. See infra notes 218–237 and accompanying text.
203. See infra notes 224–235 and accompanying text.
204. See Schlamp, 390 Md. at 731–32, 891 A.2d at 331–32. Despite the fact that the court quotes directly from Blackstone, it gives little weight to this quotation in its analysis.
205. See id. at 732, 891 A.2d at 332 (citing Hawkins, supra note 55, at 294). The court's treatment of unlawful assembly is brief. The court merely states the rule that the crux of the offense is planned and deliberate behavior and then cites Hawkins's example. See id.
207. Schlamp, 390 Md. at 732, 737, 891 A.2d at 332, 335.
the scene of his hypothetical brawl in a public forum, such as a fair or marketplace, where those who are gathered are not yet an organized group, but happen upon a sudden quarrel.\textsuperscript{208} Hawkins then explains that in such a situation, if one participates in the fight without confederating himself with a group, he is only guilty of affray; if he confederates with promises of mutual assistance, then he is guilty of riot.\textsuperscript{209} Thus, essential to Hawkins's hypothetical, which teases out the distinction between riot and affray, is that individuals are not yet associated with any particular group.\textsuperscript{210}

Because Schlamp's group was confederated before the violent and tumultuous act in question, \textit{Schlamp} is distinct from the Hawkins hypothetical. After meeting at a friend's house, Schlamp's group set out to Dickinson Avenue to attend parties.\textsuperscript{211} Once there, the group verbally confronted partygoers, which caused Scott Ehrlich to ask them to leave his party.\textsuperscript{212} By the time the fight broke out, Schlamp's group had functioned as a unit for at least several hours.\textsuperscript{213} Furthermore, when Schlamp confronted Brandon Malstrom about the allegedly stolen cell phone, at least three members of the pre-confederated group exhibited an intent to join the violent and unlawful disturbance: Davis verbally confronted Brandon and demanded to search him for a cell phone and closed in around Brandon while Fournier held him;\textsuperscript{214} Fournier placed Brandon in a chokehold;\textsuperscript{215} Schlamp also took a swing at Brandon and berated him.\textsuperscript{216} Nevertheless, the \textit{Schlamp} court found no unlawful assembly because the group's confrontation was not organized, pre-planned, or deliberate.\textsuperscript{217} By requiring evidence of organized and planned confrontation when the group had already functioned as a unit for several hours, the \textit{Schlamp} court took an exceptionally narrow view of Hawkins's hypothetical and overlooked its purpose, which was to distinguish a riot from an affray when members of a fight had no predetermined connection with one another.

\begin{itemize}
\item \textsuperscript{208} Hawkins, \textit{supra} note 55, at 294.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Schlamp, 390 Md. at 726–27, 891 A.2d at 329.
\item \textsuperscript{212} Id. at 727, 891 A.2d at 329.
\item \textsuperscript{213} See Schlamp v. State, 161 Md. App. 280, 295, 868 A.2d 914, 922 (2005) (describing the group as "functioning as a continuing unit throughout the evening").
\item \textsuperscript{214} Id. at 286, 868 A.2d at 917.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Schlamp, 390 Md. at 737, 891 A.2d at 335.
\end{itemize}
Likewise, the court's narrow view of unlawful assembly is inconsistent with Blackstone's interpretation of riot, which does not require a planned or deliberate common purpose.\textsuperscript{218} Blackstone does not construe unlawful assembly as a prerequisite to riot, but defines each crime separately.\textsuperscript{219} For Blackstone, the crime of unlawful assembly requires planned and deliberate behavior because without an executed act, plans and deliberations are the only evidence that an assembly is unlawful.\textsuperscript{220} An unlawful act is not necessary for riot, however, because riot only occurs when a group takes the next step and executes such an act.\textsuperscript{221} Presumably, it is based on this evidentiary distinction that Blackstone explicitly finds that a riot can occur, "either with or without a common cause or quarrel."\textsuperscript{222} Put another way, Blackstone requires only that the actor has the intent to join the group in the riotous activity; the actor need not share with the group a specific intent to carry out a preconceived common plan. Applying the Blackstone standard to \textit{Schlamp}, \textit{Schlamp} began the fight with the victim, Fournier put the victim in a chokehold, and Davis encouraged them and closed in on the victim in a threatening way.\textsuperscript{223} Because each manifested an intent to join the violent and unlawful activity through his actions, each unlawfully assembled for a common purpose. The \textit{Schlamp} court, by requiring a "planned and deliberate" group purpose, ignored Blackstone's interpretation and instead chose to rely solely on a narrow reading of Hawkins.

2. \textit{The Schlamp Court's Narrow Interpretation of Unlawful Assembly is also Inconsistent with the Persuasive Authority of the Court of Special Appeals and other Jurisdictions}

The \textit{Schlamp} court's decision to narrowly construe Hawkins's common law standard and to require planned and deliberate activity is inconsistent with \textit{Briscoe} and \textit{Gibson}.\textsuperscript{224} In \textit{Briscoe}, the defendant

\begin{footnotesize}
\begin{enumerate}
\item[218.] See \textit{Blackstone}, supra note 55, at 146.
\item[219.] \textit{Id.}
\item[221.] \textit{Blackstone}, supra note 55, at 146.
\item[222.] \textit{Id.}
\item[223.] \textit{Schlamp}, 161 Md. App. at 295–96, 868 A.2d at 923.
\item[224.] \textit{Briscoe} v. State, 3 Md. App. 462, 240 A.2d 109 (1968); \textit{Gibson} v. State, 17 Md. App. 246, 300 A.2d 692 (1973). The decisions in \textit{Kaefer}, \textit{Cohen}, and \textit{McClelland} did not reach the issue of whether a preconceived common plan is necessary to constitute a riot. In \textit{Kaefer}, the court accepted the indictment as alleging the proper elements of riot without explanation. \textit{Kaefer} v. State, 143 Md. 151, 157, 122 A. 30, 32–34 (1923). In \textit{Cohen}, the conviction was predicated completely on a preconceived plan, as Cohen was indicted for inciting a riot but did not actually participate in the riot. \textit{Cohen} v. State, 173 Md. 216, 228, 195 A.
\end{enumerate}
\end{footnotesize}
challenged his conviction in a jailhouse riot, arguing that the state did not allege a specific intent to riot in his indictment.225 The court, in rejecting the defendant's challenge, found that specific intent is not necessary to establish riot, as it is not essential, and a previous agreement need not exist.226 The court held that the only intent needed is the intent to join or encourage the riot.227

Four years later in Gibson, the Court of Special Appeals applied the standard from Briscoe and upheld a conviction in a jailhouse riot without explicitly finding any proof that inmates had planned, deliberated, or confederated for the unlawful purpose of rioting.228 In short, the most recent cases decided in Maryland—Briscoe and Gibson—interpreted unlawful assembly in accordance with Blackstone and focused only on whether the defendant intended to engage in a riotous act;229 they did not require evidence that the defendant's acts be preconceived, planned, or deliberate.230 The Schlamp court's decision to require evidence of "planned and deliberate" confederation not only narrowly interprets the common law,231 but deviates substantially from the latest interpretations from the Maryland judiciary.

The Schlamp court's narrow reconfiguration of unlawful assembly also contrasts sharply with trends in other jurisdictions—which either entirely omit unlawful assembly or apply the Briscoe standard.232 Eighteen states, the District of Columbia, and the federal government have completely removed the language of unlawful assembly for a common purpose from riot law.233 Even Indiana, a state that has retained the

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532, 537 (1937). Likewise, in McClelland, there was ample evidence of a preconceived common plan, as McClelland set fires to signal the start of the riot. McClelland v. State, 4 Md. App. 18, 30, 240 A.2d 769, 776 (1968). Thus, before Schlamp, Briscoe and Gibson stood as the only Maryland cases in which the court was called upon to decide riot without evidence of a common, deliberate or pre-formed group intent.

226. Id. at 467, 240 A.2d at 112.
227. Id. at 467-68, 240 A.2d at 112.
229. Compare Briscoe, 3 Md. App. at 467, 240 A.2d at 112 (finding mutual assistance unnecessary and holding that the only intent necessary is the intent to join the riot), and Gibson, 17 Md. App. at 261, 300 A.2d at 700 (same), with Blackstone, supra note 55, at 146 (finding that no pre-established common cause or quarrel is necessary for a riot).
230. See Schlamp, 390 Md. at 732, 891 A.2d 332.
231. See supra Part IV.B.1.
232. See, e.g., United States v. Bridgeman, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the D.C. riot statute was created by the legislature as an all-encompassing law to eliminate reliance on common law offenses, such as unlawful assembly); infra Part IV.D.
233. ALA. CODE § 13A-11-3 (LexisNexis 2005); ALASKA STAT. § 11.61.100 (LexisNexis 2006); ARIZ. REV. STAT. ANN. § 13-2903 (2001); ARK. CODE ANN. § 5-71-201 (LexisNexis 2005); CAL. PENAL CODE § 404 (West 1999); COLO. REV. STAT. ANN. § 18-9-101 (West 2004); CONN. GEN. STAT. ANN. § 53a-175 (West 2001); D.C. CODE § 22-1322 (West 2001); GA.
language of unlawful assembly in its statutory text, interprets unlawful assembly analogously to *Briscoe*, requiring only the intent to participate in the riot.\(^{234}\) Likewise, New Hampshire and Utah retain unlawful assembly in their statutes, but mitigate the difficulty of proving the element by making it optional.\(^{235}\) In all, at least twenty-four United States jurisdictions have abrogated the unlawful assembly element from riot, making the Court of Appeals’s interpretation in *Schlamp* a significant step back towards the malleable and difficult-to-prosecute common law definition.

C. The Schlamp Court’s Unwillingness to Find Public Terror Suggests a Diversion from the Widely Accepted Public Disturbance Interpretation

Despite the Schlamp court’s affirmation of the *Briscoe* standard of public terror, the court’s inability to find evidence of a public disturbance suggests a return to an antiquated notion of public terror—where prosecutors must prove that the public was actually terrified.\(^{236}\) This view requires a level of proof previously unnecessary in Maryland under *Briscoe* and *Gibson*. It also breaks with the national trend of moving riot law away from elusive common law elements, distinguishing Maryland from the majority of other jurisdictions.

In Maryland, under *Briscoe*, an act sufficiently terrorizes the public when it “tends to alarm and terrify law-abiding citizens in the peaceful exercise of their constitutional rights and privileges.”\(^{237}\)

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**Footnotes**

234. Compare **Ind. Code Ann.** § 35-45-1-2 (LexisNexis 2004) (“A person who, being part of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct commits rioting . . .”), with Kiphart v. State, 2 Ind. 273, 275 (1873) (holding that state does not need to charge defendant with lesser included act of unlawful assembly), and Bolin v. State, 139 N.E. 659, 663 (Ind. 1923) (finding that unlawful assembly is not a necessary element of riot).


236. See, e.g., **Int’l Wire Works v. Hanover Fire Ins. Co.**, 283 N.W. 292, 294 (Wis. 1939) (finding that a vandalism by three or more under cover of darkness and out of the public’s view was not a riot because the public was not actually terrorized).

237. See *Briscoe v. State*, 3 Md. App. 462, 468-69, 240 A.2d 109, 113 (1968) (rejecting a defendant’s argument that there was no riot because the unlawful activity was confined to
Likewise, a victim’s terror in being threatened with violence can constitute fear sufficient to meet the public terror requirement.\textsuperscript{238}

In \textit{Schlamp}, Fournier held Brandon Malstrom from behind and Schlamp berated him and swung at him.\textsuperscript{239} Davis, likewise, engaged in verbal taunts and approached Malstrom in a threatening way as he closed in on him.\textsuperscript{240} Furthermore, the group had functioned as a unit throughout the night causing a number of disturbances at Dickinson Avenue parties, and each disturbance, including the fight with Brandon Malstrom, occurred in a public forum.\textsuperscript{241} Thus, if the court considered the victim’s apprehension under the public terror calculus, the jury’s verdict was on sound footing. But even if the victim’s fear is not considered under the public terror requirement, and the court solely applies \textit{Brisco}, it was reasonable for a jury to find that a battery on a public street, which led to the stabbing death of a college student, would disturb the peace and tranquility that law-abiding citizens feel in the University of Maryland community.\textsuperscript{242} In short, although the court acknowledged the \textit{Brisco} standard for public terror, its inability to find sufficient evidence to support a jury finding of public terror in this case implies a far narrower interpretation of the element than previously required.

The court’s narrow interpretation of public terror is likewise unreasonable in light of trends in other jurisdictions that generally broaden or abrogate the public terror requirement. At least twenty-four states broadly interpret the public terror requirement as breach of the public peace or public disturbance similar to \textit{Brisco}.\textsuperscript{243} Of the

\textsuperscript{238} See \textit{Gibson v. State}, 17 Md. App. 246, 261–62, 300 A.2d 692, 700–01 (1973) (using officers’ testimony that they were placed in fear as the defendant approached them with a club as relevant to establishing public terror).


\textsuperscript{240} Id. at 295, 868 A.2d at 924. There was testimony that Davis was favoring his hip and that he had a knife. \textit{See id.} at 297, 868 A.2d at 923 (using testimony about the knife as evidence of the public terror requirement).

\textsuperscript{241} Id. at 292, 868 A.2d at 925.

\textsuperscript{242} Cf. \textit{Brisco}, 3 Md. App. at 468–69, 240 A.2d at 113 (finding the public terror requirement met, in part, because people in the Baltimore community could be terrorized by knowledge of a jailhouse riot); \textit{see also Bridgeman}, 523 F.2d at 1114-15 (explaining that breach of the peace is any activity that threatens a citizen’s interest in tranquility, law, and order).

\textsuperscript{243} \textit{Bridgeman}, 523 F.2d at 1115 n.13. The \textit{Cohen} court also used the language of public disturbance: “[Cohen] had no right to resort to violence, disturbance of the public peace, or to create a reign of terror.” \textit{Cohen v. State}, 175 Md. 216, 228, 195 A. 532, 537 (1937).
remaining states, some have deleted the language of public disturbance entirely,\textsuperscript{244} while others have broadened the language to include the creation of a substantial or grave risk of public terror.\textsuperscript{245} Even other common law jurisdictions have modernized their riot law by reinterpreting the public terror requirement, holding that it only applies when assembled citizens are armed, but do not commit any violent acts.\textsuperscript{246} Given this clear trend in U.S. jurisdictions to move away from a strict application of the public terror requirement, the \textit{Schlamp} court should not have narrowed Briscoe’s scope by overturning the jury’s finding of public terror.

\textbf{D. The Schlamp Court’s Nuanced Interpretation of the Common Law Should Urge the Maryland Legislature to Adopt a Conduct-Based Riot Statute Similar to the Federal Anti-Riot Act or D.C. Code Section 22-1322}

The \textit{Schlamp} court’s narrow interpretation of the unlawful assembly and public terror requirements elevates antiquated common law concepts over a common sense understanding of riot, and should urge the Maryland legislature to modernize and codify riot law.\textsuperscript{247} Legislatures have adopted a balancing approach when adopting modern riot law statutes.\textsuperscript{248} On the one hand, a clear desire to abrogate confusing, prerequisite common law crimes, such as unlawful assembly, is key for effective prosecution and consistent judicial application.\textsuperscript{249} On the other hand, avoiding the complete preemption of common law standards is desirable, as such an act may be found unconstitutional by state supreme courts.\textsuperscript{250} Taking these factors into consideration, an all-encompassing, modernized riot statute similar to

\begin{itemize}
\item \textsuperscript{244} \textit{E.g.}, C.A.L. PENAL CODE § 404 (West 1999); GA. CODE ANN. § 16-11-30 (LexisNexis 2003); TEX. PENAL CODE ANN. § 42.02 (Vernon 2003); VA. CODE ANN. § 18.2-405 (2004).
\item \textsuperscript{246} Commonwealth v. Runnels, 10 Mass. (9 Tyng) 518, 519, (1813); State v. Sims, 16 S.C. 486 (1882) (finding application of the terror requirement necessary only when a lawful act is committed); State v. Whiteside, 31 Tenn. (1 Swan) 88 (1851) (same).
\item \textsuperscript{247} \textit{See, e.g.}, State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975) (recommending that the Florida legislature define riot and use a broad definition similar to the Federal Anti-Riot Act).
\item \textsuperscript{248} \textit{See United States v. Bridgeman}, 523 F.2d 1099, 1113–14 (D.C. Cir. 1975) (describing the enactment of the D.C. riot statute).
\item \textsuperscript{249} \textit{Id. at} 1114.
\item \textsuperscript{250} \textit{See Beasley}, 317 So. 2d at 753 (requiring any definition to include breach of the public peace under the state constitution); \textit{see also Bridgeman}, 523 F.2d at 1114 (explaining...
section 2102 of the Federal Anti-Riot Act or D.C. Code section 22-1322 would provide Maryland with a suitable modern riot statute that retains basic common law concepts without relying on confusing common law terms of art. Such a statute would focus Maryland courts on the conduct of the actors rather than on those actors' hard-to-determine preconceived plans or the intangible terror of the public. This, in turn, will create a more understandable riot law that will be an effective tool for prosecutors while promoting consistent application by trial courts.

V. CONCLUSION

Although the Court of Appeals was bound to follow precedent and had little choice but to apply the elements of unlawful assembly and public terror, its mandate that "planned and deliberate" violent behavior must precede a riot, and its strict application of the "public terror" requirement deviated substantially from Briscoe v. State and trends in other jurisdictions. Furthermore, the court's narrow interpretation placed undue emphasis on malleable common law elements while ignoring the common sense approach of focusing on the conduct of the actors. The Maryland legislature should view the court's decision in Schlamp as an opportunity to modernize the State's riot law by adopting a statutory definition similar to 18 U.S.C. section 2102 (a), or D.C. Code section 22-1322. By defining riot in this conduct-based manner, Maryland can retain basic common law concepts, such as public disturbance, while providing a clear, effective tool for prosecutors and enabling trial courts to consistently apply the law.

THOMAS K. PREVAS

that the Justice Department intended to preserve underlying common law concepts in the D.C. riot statute).
CHOW v. STATE: HOW THE COURT OF APPEALS’S NARROW INTERPRETATION OF “TRANSFER” COULD IMPAIR GUN CONTROL POLICY AND INCREASE HANDGUN VIOLENCE

In Chow v. State, the Court of Appeals of Maryland considered whether the word “transfer,” as used in a Maryland handgun statute, encompasses only permanent exchanges of handguns between individuals or whether it refers more broadly to all exchanges of handguns, permanent or temporary. The court held that the word “transfer” in Article 27, section 442(d) refers only to permanent exchanges and thus a temporary handgun exchange was not a violation of the statute. In so holding, the court misconstrued the meaning of the word “transfer.” The court’s interpretation of “transfer” also contradicted the legislative intent of the statute, as well as federal and state gun control policies. The court’s holding will likely hinder crime investigation, make gun control more difficult, and increase instances of violent crimes. Instead of excluding temporary handgun exchanges, the Court of Appeals should have concluded that “transfer” encompasses all exchanges that last for “more than a momentary period.”

I. THE CASE

On April 2, 2003, Man Nguyen contacted his friend Todd Lin Chow and told Chow that he needed to buy a gun. The two met the

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2. Id. at 433–34, 903 A.2d at 389.
3. Id. at 462, 903 A.2d at 406–07. In 2003, the Maryland General Assembly repealed Article 27 in its entirety and reenacted it; section 442(d) is now located at section 5-124 of the Public Safety Article. Act of October 1, 2003, ch. 5, 2003 Md. Laws 14, 22–23, 234. Article 27, section 442(d) is part of the Regulated Firearms Subheading, which is composed of Article 27, sections 441, and subsequent related sections. Chow, 393 Md. at 434 n.2, 903 A.2d at 389 n.2.
4. See infra Part IV.A.
5. See infra Part IV.B.
6. See infra Part IV.C.
7. Chow, 393 Md. at 475, 903 A.2d at 414 (Wilner, J., dissenting); see infra Part IV.D.
8. Chow v. State, 163 Md. App. 492, 497, 881 A.2d 1148, 1151 (2005). Although Nguyen claimed that he simply asked if he could “hold on” to Chow’s gun for a week or two, Nguyen admittedly contacted Chow on April 2, 2003, and expressed he was anxious to purchase a gun because his previous pistol had been confiscated by the police the day before, during a traffic stop. Id. at 497–99, 881 A.2d at 1151–52.
same day and Chow gave Nguyen his handgun. They subsequently parted ways, with Chow’s handgun remaining in Nguyen’s vehicle and no money changing hands. Two days later, on April 4, 2003, Nguyen was driving when he was stopped by police officers from the Prince George’s County Police Department. The police searched Nguyen’s car and found Chow’s handgun. On July 31, 2003, Chow was charged with illegally transferring a firearm under section 442 of Article 27. A bench trial ensued on November 25, 2003 in the Circuit Court for Prince George’s County. The circuit court held that there was a temporary transfer and found Chow guilty, sentencing him to sixty days in prison and a $200 fine.

Chow appealed the circuit court’s decision, disputing in part the court’s interpretation of section 442(d). The Court of Special Appeals of Maryland affirmed the judgment of the circuit court, holding that “transfer” in section 442(d) included a temporary exchange of a handgun between an owner and another individual. In so holding, the court considered several dictionary definitions of the verb “transfer,” and ultimately refused to define “transfer” as a “permanent exchange of title or possession.” Rather, the court examined the ordinary meaning of the word and looked at the word in the context

9. Id. at 497, 881 A.2d at 1151. According to testimony at trial, this handgun had been formally transferred to Chow on November 27, 1996. Id. at 499, 881 A.2d at 1152.
10. Id. at 498, 881 A.2d at 1151. Initially, the two men drove in Nguyen’s car toward a firing range because Nguyen wanted to test fire Chow’s handgun, but they ended the trip when Nguyen received a business call. Id. at 497–98, 881 A.2d at 1151.
11. Id. at 498, 881 A.2d at 1151. The police stopped Nguyen pursuant to an arrest warrant issued for illegally carrying the gun that had been confiscated earlier that week. Id.
12. Id.
13. Chow, 393 Md. at 435, 903 A.2d at 390. According to testimony at Chow’s trial, there were no records of subsequent transfers of Chow’s handgun or applications for transfer from Chow to Nguyen. Chow, 163 Md. App. at 499, 881 A.2d at 1152.
15. Chow, 163 Md. App. at 500, 881 A.2d at 1152–53. Chow’s sentence was suspended. Id., 881 A.2d at 1153.
16. Id. Chow also challenged the circuit court’s decision that he “knowingly” violated section 442(d). Id.
17. Id. at 496, 881 A.2d at 1150.
18. Id. at 502–03, 881 A.2d at 1154. The court reasoned that defining transfer as a permanent exchange “would run afoul of the rule that [o]rdinary and popular understanding of the English language dictates interpretation of terminology within legislation.” Id. at 503, 881 A.2d at 1154 (quoting Deville v. State, 383 Md. 217, 223, 858 A.2d 484, 487 (2004) (internal quotation marks omitted)). The court also reasoned that “transfer” does not logically include only permanent exchanges and cannot merely mean “gift.” Id. at 503–504, 881 A.2d at 1154–55.
of the statute to determine that section 442(d) prohibits the loan of a firearm.\textsuperscript{19}

In reaching its conclusion, the Court of Special Appeals also examined the legislative history of section 442(d) and found that because it was part of two bills proposed specifically to reduce gun violence in Maryland,\textsuperscript{20} “[t]o read § 442(d) as exempting the loan of a regulated firearm would undermine the laudable purpose of the legislative scheme.”\textsuperscript{21} Moreover, the court found that the legislature intended remedial application of section 442(d), and that to achieve its remedial intention of decreasing firearms in the illegal market, the words in section 442(d) should be expansively construed.\textsuperscript{22} The court therefore concluded that a gun owner violates section 442(d) when he loans a firearm to another individual before that person completes the firearm application process and waiting period.\textsuperscript{23}

After this decision, Chow filed a motion for reconsideration, which the Court of Special Appeals denied on October 4, 2005.\textsuperscript{24} Chow then filed a petition for writ of certiorari to the Court of Appeals.\textsuperscript{25} On December 19, 2005, the Court of Appeals granted certiorari\textsuperscript{26} to determine the meaning of “transfer” as used in section 442(d) and to “decide whether a temporary gratuitous exchange or loan of a regulated firearm constitutes a ‘transfer’ under § 442(d).”\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{19}Id. at 502–06, 881 A.2d at 1154–56.
  \item \textsuperscript{20}Id. at 507, 881 A.2d at 1156–57 (quoting Maryland Gun Violence Act of 1996: Briefing Statement on S.B. 215 and H.B. 297 Before the S. Judicial Proceeding Comm. and the H. Judiciary Comm. 412th Session 2 (1996) (statement of Bonnie A. Kirkland, Chief Legislative Officer, Governor’s Legislative Office, and Colonel David B. Mitchell, Superintendent of State Police)) [hereinafter Briefing Statement]. The court also found that the purpose of section 442(d) was to disrupt “established gun trafficking patterns by reducing the supply of regulated firearms to the illegal market.” Id. at 508, 881 A.2d at 1158 (quoting Briefing Statement, supra, at 5) (internal quotation marks omitted).
  \item \textsuperscript{21}Id. at 508–09, 881 A.2d at 1158.
  \item \textsuperscript{22}Id. at 509, 881 A.2d at 1158.
  \item \textsuperscript{23}Id. at 509–10, 881 A.2d at 1158. The Court of Special Appeals also considered the mens rea required to violate section 442(d), finding that the gun owner must “knowingly participate[ ] in the illegal sale, rental, transfer, purchase, possession, or receipt of a regulated firearm.” Id. at 511, 881 A.2d at 1159. The court determined that “knowingly” means that the defendant knew of the facts that would make up the offense. Id.
  \item \textsuperscript{24}Chow, 393 Md. at 435, 903 A.2d at 390.
  \item \textsuperscript{25}Id.
  \item \textsuperscript{26}Chow v. State, 390 Md. 284, 888 A.2d 341 (2005).
  \item \textsuperscript{27}Chow, 393 Md. at 434, 903 A.2d at 389.
\end{itemize}
II. Legal Background

Maryland courts have developed rules for statutory interpretation to guide attempts to define specific words in statutes.28 These rules mandate that courts consider the intent of the legislature, construe the words of a statute according to their common understanding, and, if the plain meaning of a word is ambiguous, consider the legislative history of the statute.29 Although “transfer” is not explicitly defined in Article 27, section 442,30 the legislative history of section 442(d) indicates that the statute was enacted to reduce a violent crime epidemic in Maryland and to better regulate handgun exchanges.31 These purposes mimic the common goal of both federal and state gun control regulations to reduce violent crime by limiting the availability of handguns, and specifically restricting access to handguns by convicted felons and other potentially violent individuals.32

A. Statutory Interpretation

The Court of Appeals has established rules for statutory interpretation that aim to give effect to the intent of the legislature.33 A court begins by examining the statute’s plain language.34 In looking at the plain language of a statute, a court should not alter the language in a way that would either misconstrue the obvious intent of the statute or change its scope.35 A court should also read the statute in such a way that no word, sentence, or phrase would become “surplusage, superfluous, meaningless or nugatory.”36 When a word included in a statute has not been defined by the legislature, then a court should assign the word its common, ordinary, popular, and natural meaning.37 Be-

28. See, e.g., State Dep’t of Assessments & Taxation v. Maryland-National Capital Park & Planning Comm’n, 348 Md. 2, 13, 702 A.2d 690, 696 (1997) (explaining that because a disputed term had not been defined in a statute, the court would have to engage in statutory construction).
29. See infra Part II.A.
31. See infra Part II.B.
32. See infra Part II.C.
34. Deville, 383 Md. at 223, 858 A.2d at 487.
cause the goal of statutory construction is to give effect to the legislature's intent, a court must harmonize all of the provisions of the statute that address the same topic and interpret them together.\footnote{38 Navarro-Monzo v. Wash. Adventist Hosp., 380 Md. 195, 204, 844 A.2d 406, 411 (2004).}

If the words of the statute are clear and indicate the intent of the legislature, then a court's inquiry into the meaning of the statute ends.\footnote{39 Price v. State, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003).} If there is a concern that a literal interpretation of a statute would be inconsistent with the legislative intent, however, a court may examine more than just the literal meaning of the statute.\footnote{40 Brown v. State, 359 Md. 180, 189, 753 A.2d 84, 88 (2000).} Also, when there are several possible meanings of a statute, the statute is deemed ambiguous.\footnote{41 Deville, 383 Md. at 223, 858 A.2d at 487.} A court must then consider the statutory purpose thoroughly, examining the connection between the common understanding of the statute's words and the statute's purpose and setting.\footnote{42 Collins v. State, 383 Md. 684, 691-92, 861 A.2d 727, 732 (2004).} A court analyzes the language in light of the overall statutory scheme.\footnote{43 Deville, 383 Md. at 223, 858 A.2d at 487.} Furthermore, in determining the intent behind legislation, a court may consider the results that would stem from adopting one interpretation over another and accept the "construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense."\footnote{44 Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75, 517 A.2d 730, 732 (1986).}

**B. The Legislative History of Article 27, Section 442(d)**

In 1941, the Maryland General Assembly enacted legislation for the regulation of handguns.\footnote{45 Act of June 1, 1941, § 531B, ch. 622, 1941 Md. Laws 1064.} This statute required firearms dealers to keep records of pistols or revolvers that were sold or transferred.\footnote{46 Id.} In 1957, the General Assembly re-codified this provision, without making any substantial changes, into Article 27, section 442.\footnote{47 Md. Ann. Code art. 27, § 442 (1957).} The section was then repealed and subsequently re-enacted in 1966.\footnote{48 Act of June 1, 1966, § 442, ch. 502, 1966 Md. Laws 819.} Substantial changes were made to the regulations at that time.\footnote{49 Compare Md. Ann. Code art. 27, § 442, with § 442, 1966 Md. Laws at 828–31.}
change was that the new version of the statute provided rules for the
sale and transfer of handguns by dealers.\textsuperscript{50}

It was not until 1996 that subsection (d) was added to Article 27,
section 442.\textsuperscript{51} Subsection (d) states:

A person who is not a regulated firearms dealer may not sell, rent, transfer, or purchase any regulated firearm until after 7
days shall have elapsed from the time an application to purchase or transfer shall have been executed by the prospective purchaser or transferee, in triplicate, and the original copy is forwarded by a regulated firearms dealer to the Secretary.\textsuperscript{52}

Subsection (d) was added to Article 27, section 442 pursuant to
the Maryland Gun Violence Act (the Act).\textsuperscript{53} The Act was introduced in 1996.\textsuperscript{54} The Act aimed to reduce the gun violence epidemic in Maryland that stemmed from the "ready availability of firearms."\textsuperscript{55} Moreover, in order to stop the countless gun-related deaths and injuries in Maryland, the Act intended to reduce the availability of guns to "prohibited persons."\textsuperscript{56}

To prevent prohibited persons from obtaining regulated firearms, the Act proposed several changes to the existing regulated handgun statute, one of which was the addition of section 442(d).\textsuperscript{57} Section 442(d) required sales, rentals, and transfers of weapons be-

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\item \textsuperscript{50} § 442, 1966 Md. Laws at 828–31. The statute stated:

No dealer shall sell or transfer any pistol or revolver until after seven days shall have elapsed from the time an application to purchase or transfer shall have been executed by the prospective purchaser or transferee, in triplicate, and forwarded by the prospective seller or transferor to the superintendent of the Maryland State Police.

\textit{Id.} at 828 (emphasis added).


\item \textsuperscript{52} Md. ANN. CODE art. 27, § 442(d) (1996) (emphasis added).

\item \textsuperscript{53} § 442, 1996 Md. Laws 3139, 3152–53; § 442, 1996 Md. Laws 3175, 3189. The Act supplemented existing handgun laws by requiring additional information on firearm transfer applications, subjecting rentals of firearms by firearm dealers to the seven-day waiting period requirement, and limiting legal purchases of regulated handguns to one purchase in a thirty-day period. S. JUD. PROC. COMM., BILL ANALYSIS: S.B. 215, 1996 Leg., 412th Sess. (Md. 1996) [hereinafter BILL ANALYSIS].


\item \textsuperscript{55} \textit{Briefing Statement}, supra note 20, at 2; see also JUDICIARY COMM., supra note 54 ("This bill is aimed at reducing gun-related violent crime in Maryland . . . ").

\item \textsuperscript{56} \textit{Briefing Statement}, supra note 20, at 2.

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between individuals to undergo the same process required for initial purchases from a licensed gun dealer, including a background check and a seven-day waiting period. In accordance with the overall purpose of the Act, this section endeavored to reduce the availability of guns and keep guns out of the hands of prohibited individuals. The legislative history of the Act similarly indicates that the purpose of adding section 442(d) was to reduce gun-related violent crime in Maryland.

C. Federal and State Gun Control Policies

The general purpose of federal and state gun control regulation is to lower the number of violent crimes. Federal and state legislatures have two primary methods of achieving this purpose: first, by preventing certain individuals from obtaining handguns, while simultaneously ensuring that individuals who are legally allowed to own and possess handguns can obtain them; and second, by reducing and restricting the supply and exchange of handguns.

1. Legislative Balancing—Keeping Certain People From Obtaining Handguns While Allowing Other Non-Prohibited Individuals to Obtain and Possess Them

Both federal and state legislatures have enacted regulations designed to reduce violent crime by preventing convicted felons and other potentially dangerous individuals from obtaining handguns, while at the same time endeavoring to protect the rights of individuals who are legally permitted to own and possess guns. First, with respect to the restriction of handguns, several federal and state handgun laws have demonstrated that legislatures have a strong desire to keep handguns away from certain types of individuals. Beginning with the Omd-
nibus Crime Control and Safe Streets Act of 1968, the United States Congress expressed concern over the availability of firearms to criminals, juveniles, drug addicts, individuals with mental deficiencies, and "others whose possession of such weapons is similarly contrary to the public interest."\(^{64}\) Congress addressed this concern by enacting a law prohibiting licensed dealers, manufacturers, and distributors from selling guns to certain categories of individuals, namely convicted felons and fugitives.\(^{65}\) With this Act, Congress also put federal firearms licensees in charge of the sale and shipment of handguns.\(^{66}\)

Within the same year, Congress amended the federal laws by passing the Gun Control Act of 1968.\(^{67}\) According to the Supreme Court of the United States, the Gun Control Act of 1968 had the same intention of preventing potentially dangerous individuals from obtaining handguns.\(^{68}\) This Act extended the categories of persons to whom licensed dealers, manufacturers, or distributors were prohibited from selling guns, including drug users and individuals deemed mentally defective.\(^{69}\)

In enacting the Brady Handgun Violence Prevention Act in 1993,\(^{70}\) Congress expressed similar motives. The Brady Act required that a background check be performed on all individuals attempting to purchase handguns, as well as a five-day waiting period, before a handgun could be transferred to anyone.\(^{71}\) According to congres-

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68. See Barrett v. United States, 423 U.S. 212, 218 (1976) (reasoning that the construction and organization of the 1968 Gun Control Act indicates that Congress aspired to keep firearms away from individuals whom Congress had labeled "potentially irresponsible and dangerous").


71. H.R. Rep. No. 103-344, at 7, 10 (1993), as reprinted in 1993 U.S.C.C.A.N. 1984, 1984, 1987. The Brady Act also mandated that a national instant criminal background check system be created, and that the waiting period be terminated once the system comes into effect. Id. at 10, as reprinted in 1993 U.S.C.C.A.N. 1987. In Printz v. United States, the Supreme Court held that the provision of the Brady Act requiring state and local law enforcement officers to perform background checks was unconstitutional. 521 U.S. 898, 933
sional documents, the purposes behind the Brady Act were to prevent convicted felons and other dangerous persons from purchasing guns, and to decrease handgun-related crime. These goals would be accomplished with the waiting period and the background check, which would ensure that a prospective buyer was permitted to own a handgun.

Like Congress, the Maryland General Assembly enacted handgun regulations with the intention of keeping certain types of individuals from obtaining handguns. In 1941, the Maryland General Assembly passed a law prohibiting dealers or individuals from selling or transferring a handgun to a fugitive or a person convicted of a violent crime. In this same statute, Maryland made it illegal for any individuals who have been convicted of violent crimes or who are fugitives to possess a handgun. As interpreted by the Court of Special Appeals, the 1941 statute was intended to keep individuals "who have already demonstrated a propensity for violence, as evidenced by a conviction of a crime of violence" from obtaining and retaining handguns. In 1966, the General Assembly bolstered these sections by banning additional categories of individuals from being sold or transferred guns, and making it illegal for such individuals to possess guns.

In 1996, the General Assembly again acted to restrict certain individuals from obtaining handguns. With the Maryland Gun Violence Act of 1996, the General Assembly attempted to reduce gun-related violence and death in Maryland by preventing "prohibited persons" from obtaining handguns. The desire to keep certain individuals

(1997). Despite this holding, the congressional intent of the Brady Act remains undisturbed, as the Printz holding does not necessarily negate congressional intent.

75. Act of June 1, 1941, § 531D, ch. 622, 1941 Md. Laws 1064, 1065.
76. Id.
78. Act of June 1, 1966, ch. 502, 1966 Md. Laws 819, 834–35. Specifically, the General Assembly added habitual drunkards, addicts or habitual users of narcotics, those of unsound mind, those under the influence of drugs or alcohol, and individuals under age twenty-one to the list of people to whom dealers cannot sell handguns, and added habitual drunkards and addicts or habitual users of narcotics to the list of individuals who cannot legally possess handguns. Id.
from possessing handguns also motivated the General Assembly to pass the Responsible Gun Safety Act of 2000. The Responsible Gun Safety Act imposed punishments on individuals wrongfully possessing a gun because of prior convictions.

Although federal and state gun control policies aim to prevent certain individuals from obtaining handguns, at the same time, Congress and the Maryland General Assembly have endeavored to protect the rights of individuals who are legally permitted to own and possess handguns. At the federal level, Congress clarified when it enacted the Omnibus Crime Control and Safe Streets Act of 1968 that while it was prohibiting certain individuals from obtaining firearms, it did not intend to deter or encumber citizens who are allowed to possess guns from obtaining or using them legally. Then, in 1986, with the Firearms Owners’ Protection Act, Congress modified the Gun Control Act of 1968 because it had been found to hinder law-abiding citizens in lawfully obtaining and using their handguns. Among other things, the modifications allowed for the purchase of shotguns and rifles from another state, provided that the sale was legal in both the state of purchase and the buyer’s home state; compelled mandatory penalties for individuals who employed a firearm while committing a federal crime; and permitted the transportation between states of unloaded weapons.

80. See ch. 2, 2000 Md. Laws 6-7 (stating that its purpose was to ban individuals who have been found delinquent of certain crimes involving firearms from obtaining a handgun permit, “purchasing, renting, or transferring a handgun, and possessing a handgun” until they have reached a certain age, and also to ban dealers from transferring or selling handguns to individuals who have been found guilty of firearms crimes until such individuals have reached a certain age); see also Melton v. State, 379 Md. 471, 484, 842 A.2d 743, 750–51 (2004) (explaining that the intent behind the passage of the Responsible Gun Safety Act of 2000 was to keep guns away from felons and other possibly violent individuals).


82. See Pub. L. No. 90-351, § 901(b), 82 Stat. 197, 226 (“[I]t is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity . . . .”).

83. See H.R. Rep. No. 99-495, at 1 (1986), as reprinted in 1993 U.S.C.C.A.N. 1327, 1327 (stating that the bill is intended to “relieve the nation’s sportsmen and firearms owners and dealers from unnecessary burdens under the Gun Control Act of 1968”); Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449, 449 (1986) (asserting that Congress found it necessary to enact further legislation to rectify existing firearms regulations and policies because of the citizens’ right to keep and bear arms; to security against unreasonable searches and seizures; against uncompensated taking of property; and against unconstitutional exercise of authority).

The Maryland General Assembly has likewise acted to ensure that, while prohibited persons do not obtain handguns, other citizens can lawfully and easily obtain handguns. The General Assembly seemingly had this goal in mind when it enacted the Maryland Gun Violence Act, as the Act did not include any restrictions on legal uses of firearms, such as hunting and sport shooting.85

2. Federal and State Legislation to Reduce the Availability of and Facilitated Access to Handguns

Federal and state handgun regulations consistently exhibit a desire to reduce the occurrence of violent crimes by reducing the availability of handguns. For example, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 because it found that the ease and availability of handguns to the masses, including criminals, was a major contributing factor in the pervasiveness of violent crime in the United States.86 Congress intended the Omnibus Act to reduce crime and gun abuse by reducing public firearms access and exercising more effective control over firearms.87 Congress thus mandated that firearms be shipped only to and from licensed federal firearms dealers, manufacturers, and distributors.88

The Maryland General Assembly has also worked to reduce violent crime by limiting the facilitated access to handguns. Much like Congress’s Omnibus Act, in 1972 the Maryland legislature enacted a statute to address the prevalent use of firearms in the fulfillment of crimes.89 The General Assembly opined that the increase in violent crimes necessitated a vast restriction of the instances when individuals are legally allowed to transport weapons.90 The General Assembly also expressed the goal of reducing gun-related violence by limiting hand-

87. See S. REP. No. 90-1097, at 76 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2164 (stating that evidence shows that gun control is an effective method of reducing gun abuse).
89. See Act of March 27, 1972, § 36B, ch. 13, 1972 Md. Laws 38, 40 (averring that instances of violent crimes have increased, a large number of those crimes have involved handguns, and the current laws have been ineffective in reducing the use of handguns in the commission of crimes).
90. Id.
To accomplish this objective, the Maryland Gun Violence Act proposed a variety of measures, such as prohibiting straw purchases, requiring a license to purchase a firearm, treating secondary sales of handguns like dealer sales, and limiting firearm purchases to one purchase in a thirty-day period.

III. THE COURT'S REASONING

In *Chow v. State*, the Court of Appeals reversed the judgment of the Court of Special Appeals and held that the temporary loan of a handgun between two adults who are allowed to possess regulated handguns is not an illegal “transfer.” Writing for the court, Judge Cathell first considered the plain language of the statute to determine the meaning of “transfer” as used in section 442(d). Looking at the ordinary and common understanding of “transfer” by consulting various dictionaries, the court was persuaded that dictionaries available prior to the enactment of the predecessor statute defined “transfer” as “a permanent exchange of title or possession.”

Next, the *Chow* majority acknowledged that words can have several ordinary meanings and that it must therefore look to the whole statute and its context to determine the intended meaning of “transfer.” The court examined the use of the word “transfer” in various other sections of the statute and concluded that “transfer,” when read in conjunction with the other provisions of the Regulated Fire-

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91. See Briefing Statement, *supra* note 20, at 2 (explaining that in order to stop the violence epidemic in Maryland, the Maryland Gun Violence Act focuses on decreasing handgun availability).

92. *Id.*

93. *Chow*, 393 Md. at 472–73, 903 A.2d at 413.

94. *Id.* at 444–48, 903 A.2d at 396–98.

95. *Id.* at 445–47, 903 A.2d at 396–97. The predecessor statute to the Regulated Firearms Subheading was enacted in 1941. *Id.* at 446, 903 A.2d at 397. The court reasoned that the statute has always contained the word “transfer,” and that “the meaning and context of the term have not been altered over the course of the years, even though other definitions may have changed.” *Id.* at 447, 903 A.2d at 397.

96. *Id.* at 448, 903 A.2d at 398.

97. *Id.* at 448–55, 903 A.2d at 398–402. For instance, after considering section 441, which supplies the definitions for the Regulated Firearms subheading, the *Chow* court determined that each time “transfer” was used, it was employed to mean a “permanent exchange of title or possession of the regulated firearm for consideration.” *Id.* at 448–49, 903 A.2d at 398. Moreover, the court noted, in section 443, which addresses licenses for regulated firearm dealers, “transfer” is also used to mean a permanent exchange of title for consideration. *Id.* at 451–52, 903 A.2d at 400.
arms subheading, unambiguously means a permanent "exchange of title or possession."\(^9\)

The Court of Appeals then turned to the legislative intent behind section 442(d).\(^99\) First, the court described how the Uniform Machine Gun Act was passed before the predecessor of the Regulated Firearms subheading was enacted.\(^100\) The court reasoned that because the legislature included "loan" in the Uniform Machine Gun Act, it could have done so with the Regulated Firearms statute had it intended the statute to cover temporary exchanges.\(^101\) Next, the court explained that subsection (d) was added to Article 27, section 442 in 1996, as part of the Maryland Gun Violence Act,\(^102\) the goal of which was to reduce the gun violence epidemic in Maryland.\(^103\) The Chow court observed that the purpose of that Act was to regulate sales and ban multiple permanent sales transactions of firearms, and that a narrow construction of "transfer" encompassing only permanent exchanges best served this purpose.\(^104\) The majority then stated that it would respect the finding of the circuit court that the exchange in the present case was temporary, reiterated that "transfer" as used in section 442(d) excludes temporary gratuitous exchanges, and concluded that Chow did not violate section 442(d).\(^105\)

Judge Wilner dissented, arguing that the transfer between Chow and Nguyen violated section 442(d).\(^106\) Judge Wilner contended that the majority's interpretation of "transfer" rendered the word meaningless.\(^107\) Judge Wilner also argued that, while dictionary definitions like those relied upon by the majority are helpful in determining the

\(^9\) Id. at 454–55, 903 A.2d at 401–02. The Chow majority maintained that "[t]he context in which the term 'transfer' is used in the Regulated Firearms subheading's statutory scheme as a whole must be harmonized with its use in § 442(d)." Id. at 452, 903 A.2d at 400.

\(^99\) Id. at 455–63, 903 A.2d at 402–07. Although the court found the meaning of "transfer" unambiguous, it nevertheless examined the purpose of the Regulated Firearms subheading to confirm its interpretation that "transfer" means a permanent exchange. Id. at 455, 903 A.2d at 402.

\(^100\) Id. at 455–56, 903 A.2d at 402.

\(^101\) Id. at 456–58, 903 A.2d at 402–04.

\(^102\) Id. at 459, 903 A.2d at 405.

\(^103\) Id. (quoting Briefing Statement, supra note 20, at 2).

\(^104\) Id. at 460–61, 903 A.2d at 405–06.

\(^105\) Id. at 462–63, 903 A.2d at 406–07. As a final matter, the court examined the mens rea requirement in section 449(f). Id. at 463–72, 903 A.2d at 407–12. The court determined that specific intent is needed, whereby "a defendant 'knows' that the sale, rental, transfer, purchase, possession, or receipt of a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale." Id. at 471, 903 A.2d at 412.

\(^106\) Id. at 473, 903 A.2d at 413 (Wilner, J., dissenting). Judges Raker and Battaglia joined in dissent. Id.

\(^107\) Id.
meaning of a word, the crucial concern is the legislative intent behind the statute.\(^{108}\)

According to Judge Wilner, the purpose of section 442(d) was to fix a loophole in the former law that allowed secondary firearms transactions to go unregulated.\(^{109}\) He expressed doubt that the legislature intended to open a larger loophole than the one it closed "by allowing both dealers and non-dealers to lend regulated firearms to persons without complying with the seven-day waiting period."\(^{110}\) Thus, Judge Wilner would have held that the word "transfer" encompasses a loan in which a firearm is surrendered for "anything more than a momentary period."\(^{111}\)

IV. ANALYSIS

In \textit{Chow v. State}, the Court of Appeals held that the word "transfer," as used in Article 27, section 442(d), refers only to permanent exchanges of handguns between individuals, and thus the temporary transfer between Chow and Nguyen was not an illegal transfer under the statute.\(^{112}\) In so holding, the court erroneously concluded that "transfer" clearly and unambiguously refers only to permanent exchanges.\(^{113}\) The \textit{Chow} court's holding is improper because it contravenes the legislature's intent in enacting the statute, as well as federal and state gun control policies.\(^{114}\) Furthermore, the majority's holding will likely hinder crime investigation, make gun control more difficult, and increase violent crime.\(^{115}\) Hence, a more appropriate interpretation of "transfer" would be that the term encompasses all exchanges between individuals that last for "more than a momentary period."\(^{116}\)

A. The Court of Appeals Improperly Determined that "Transfer" Unambiguously Refers only to Permanent Exchanges

In \textit{Chow}, the Court of Appeals claimed that the unambiguous meaning of the word "transfer" includes only permanent ex-

\(^{108}\) \textit{Id.} at 473–74, 903 A.2d at 413.

\(^{109}\) \textit{Id.} at 474–75, 903 A.2d at 414.

\(^{110}\) \textit{Id.} at 475, 903 A.2d at 414.

\(^{111}\) \textit{Id.} Hence, Judge Wilner argued, if Chow and Nguyen had completed their intention of only test firing the gun, then the statute would not have been violated; however, when Chow permitted Nguyen to possess the gun for a period of time, an illegal transfer took place. \textit{Id.} at 476, 903 A.2d at 415.

\(^{112}\) \textit{Id.} at 462–63, 903 A.2d at 406–07 (majority opinion).

\(^{113}\) See infra Part IV.A.

\(^{114}\) See infra Part IV.B.

\(^{115}\) See infra Part IV.C.

\(^{116}\) See \textit{Chow}, 393 Md. at 475, 903 A.2d at 414 (Wilner, J., dissenting); infra Part IV.D.
Both the common meaning of the word and strict application of the rules of statutory construction show, however, that the meaning of "transfer" in the statute is ambiguous and could cover temporary exchanges as well.

The rules of statutory interpretation dictate that a court first look at the plain language of a statute. If the plain language is not clear—as in section 442, because "transfer" is not defined—the court must apply the commonly understood meaning. Although "[o]rdinary and popular understanding of the English language dictates interpretation of terminology within legislation," the Court of Appeals did not fully consider the ordinary and popular meaning of "transfer" because it relied on definitions from 1941 and earlier, when the predecessor statute to the Regulated Firearms Subheading was first enacted. Contrary to the Chow court's assertions, a definition from 1941 should not be exclusively relied upon to obtain the ordinary and popular understanding of a word. Instead, to obtain the commonly understood meaning of the word, the court should have also relied upon contemporary dictionaries.

Two commonly used contemporary dictionaries define "transfer" broadly and impart meanings that significantly differ from the Chow court's definition. The Oxford English Dictionary provides two definitions: 1. trans. To convey or take from one place, person, etc. to another; to transmit, transport; to give or hand over from one to

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117. Chow, 393 Md. at 455, 903 A.2d at 402 (majority opinion).
120. See supra note 37 and accompanying text (explaining that when a word in a statute is not defined within the statute, the court should define the word according to its common and popular meaning).
121. Deville, 383 Md. at 223, 858 A.2d at 487.
122. See Chow, 393 Md. at 446-48, 903 A.2d at 396-98. The Chow court acknowledged that the lower court had consulted several different dictionaries, but the Chow court ultimately defined "transfer" solely based on the definitions found in dictionaries from 1941. Id. at 445-48, 903 A.2d at 396-98.
123. It is debatable whether a 1941 definition, examined in a vacuum, can be considered the "ordinary and popular understanding" of a word, and whether such an old definition should be relied upon exclusively in determining the meaning of a disputed word. See Rossville Vending Mach. Corp. v. Comptroller of Treasury, 97 Md. App. 305, 316-17, 629 A.2d 1283, 1289 (1993) (consulting dictionaries that were present at the time of a statute's enactment, then checking contemporary versions of the dictionaries, to see if the understanding of the words changed over the years).
124. See Harvey v. Marshall, 389 Md. 243, 260-61 n.11, 884 A.2d 1171, 1181 n.11 (2005) (noting that when attempting to ascertain the legislative intent behind specific words in a statute, courts should consult both current editions of dictionaries and editions in existence when the statute was enacted).
another," and "2. Law. To convey or make over (title, right, or property) by deed or legal process." Likewise, in Black's Law Dictionary, "transfer" is defined as "1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of," and "2. To sell or give." These contemporary definitions, considered alone and in comparison to the 1941 definitions, show that the meaning of "transfer" is ambiguous and could refer to either temporary or permanent exchanges. Because the meaning of transfer is ambiguous, the Chow court should have engaged in a full analysis of the legislative intent behind section 442(d).

B. The Court of Appeals' Holding is Inconsistent with the Legislative Intent Behind Section 442(d) and Federal and State Gun Control Policies

Because the meaning of the word "transfer" is ambiguous, the Chow court had an obligation under the rules of statutory interpretation to fully consider the legislative history of section 442(d) and to give effect to the legislative intent. Not only did the Court of Appeals engage in a cursory examination of the legislative history of section 442(d), but it also misinterpreted the legislative intent. The Chow court's holding also contravenes section 442(d)'s legislative intent and federal and state gun control policy.

1. The Court of Appeals Misinterpreted the Legislative History of Section 442(d)

Had the Chow court fully considered the legislative history of section 442(d), the court would have recognized that the legislature intended for the Maryland Gun Violence Act and section 442(d) to strictly regulate both temporary exchanges and sales of handguns in the secondary market. The Maryland General Assembly enacted

125. 18 THE OXFORD ENGLISH DICTIONARY 396 (2d ed. 1989).
126. BLACK'S LAW DICTIONARY 1536 (8th ed. 2004).
127. See supra notes 41–43 and accompanying text (explaining that when a statute is deemed ambiguous, a court must consider the statutory purpose and statutory scheme).
128. Even if the Chow court found the meaning of "transfer" unambiguous, it had latitude to look beyond the language of the statute; courts are free to do so when there is some concern as to whether a literal interpretation of a statute would be inconsistent with the legislative intent. Brown v. State, 359 Md. 180, 188–89, 753 A.2d 84, 88 (2000).
129. See infra Part IV.B.1.
130. See infra Part IV.B.2.
131. See supra Part II.B; see also Chow, 393 Md. at 474, 903 A.2d at 413 (Wilner, J., dissenting) ("The provision in question was added to the law as part of what the Legislature called
the Maryland Gun Violence Act, and more specifically section 442(d), with the goal of reducing the gun violence epidemic in Maryland by restricting handgun availability to prohibited persons. According to the legislature, this objective would be accomplished in part by subjecting secondary sales and exchanges to the same requirements as those applicable to dealers. These goals are consistent with other state and federal handgun control measures which have endeavored to lower violent crime by keeping certain individuals from obtaining handguns and reducing the facilitated access to handguns.

Despite contrary indications in the legislative history of 442(d), the Chow court found that the purpose of the Act was to regulate only permanent sales transactions, and not temporary exchanges. The court thus determined that a narrow construction of “transfer,” in which only permanent exchanges are included, met the intent of the legislature. Such an interpretation is erroneous. The General Assembly indicated a desire to regulate more than just permanent exchanges, and to reduce the gun violence epidemic in Maryland, by regulating all trafficking in the secondary market. Furthermore, while admittedly there is some indication in the legislative history of the Maryland Gun Violence Act that section 442(d) only pertains to secondary or private sales, there is also evidence that 442(d) was intended to regulate more exchanges than just sales between individuals. The Chow court failed to consider this evidence in reaching its erroneous conclusion about the meaning of “transfer.”

the Maryland Gun Violence Act of 1996, which was a comprehensive law designed to place additional limits on the trafficking in regulated firearms.

132. See supra Part II.B.
133. See supra Part II.B.
134. See supra Part II.C.
135. Chow, 393 Md. at 460–61, 903 A.2d at 405–06.
136. Id. at 461, 903 A.2d at 406.
137. See supra Part II.B.
138. See, e.g., Judiciary Comm., supra note 54 (noting under the heading “Secondary or Private Sales of Guns” that the bill “requires sales between individuals to be transacted in the same way as are initial purchases from licensed gun dealers”); S. Jud. Proc. Comm.: Floor Rep., supra note 60, at 2 (same). But see Bill Analysis, supra note 53 (noting under the heading “7-Day Waiting Period—Secondary Sales” that the bill dictates that the waiting period of seven days applies to any non-dealer “who sells, rents, transfers or purchases any regulated firearm”) (emphasis added).
139. See, e.g., Maryland Gen. Assembly Dep’t of Fiscal Services, Fiscal Note on S.B. 215, at 1 (1996) (stating that the bill “[e]xtends to transactions between individuals the requirement that a person receiving a firearm must complete a transfer application and is subject to a seven-day waiting period”) (emphasis added).
2. The Court of Appeals's Holding Contradicts the Legislative Intent of Section 442(d) and Federal and State Gun Control Policies

Not only did the *Chow* court misinterpret the legislative intent of section 442(d), its conclusion is inconsistent with federal and state gun control policies of reducing violent crime by preventing certain types of individuals from obtaining guns and limiting handgun availability. Specifically, as the Court of Special Appeals recognized, to limit "transfer" to permanent exchanges potentially allows prohibited individuals to possess firearms. With the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, Congress expressly prohibited certain categories of individuals from being sold guns. Maryland likewise banned certain categories of individuals from obtaining and possessing handguns in 1941, 1966, and 2000. With the Brady Handgun Violence Prevention Act, Congress reiterated its desire to prevent certain individuals from obtaining handguns, this time establishing a waiting period and background check to ensure that handguns are kept out of the hands of convicted felons and other dangerous persons. Having "transfer" only encompass permanent exchanges means that temporary exchanges between individuals would not be subject to the waiting period and background check requirement. This plainly undermines the policy behind the

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To read § 442(d) as exempting the loan of a regulated firearm would undermine the laudable purpose of the legislative scheme. One cannot imagine that the General Assembly intended the unrestricted shifting of possession of a regulated firearm from one who lawfully possesses it to one who might not satisfy the requirements for gun possession laid out in § 442(h).


144. This follows logically from the fact that section 442(d) mandates that purchases, sales, rentals, and transfers not be consummated until an application has been completed and seven days have passed. Md. ANN. CODE art. 27, § 442(d) (1996). If "transfer" does not include temporary exchanges, then temporary exchanges would not be subject to section 442(d)'s requirements, including the waiting period, purchase application, and background check.
Brady Act. Furthermore, by exempting prohibited individuals from the waiting period and background check requirements, such individuals might be able to obtain handguns more easily, because a legal gun owner could transfer his handgun to another person without knowing whether that person is legally allowed to possess a handgun.\textsuperscript{145} By allowing temporary exchanges to take place without any regulations, the \textit{Chow} court has circumvented and impeded federal and state attempts to decrease the rates of violent crime by keeping handguns away from prohibited persons.

Moreover, the \textit{Chow} court's narrow definition of "transfer" also conflicts with the legislative intent behind section 442(d) and federal and state gun control policies because its holding renders handguns more easily accessible. Congress passed the Omnibus Crime Control and Safe Streets Act based on the belief that the ready availability of handguns to criminals contributed to the high rates of violent crime in the United States.\textsuperscript{146} Maryland also attempted to restrict the availability of handguns in 1972 by limiting the instances when individuals are legally allowed to transport weapons.\textsuperscript{147} The \textit{Chow} court explicitly undermined these goals and policies by making handguns more accessible, in particular, by allowing individuals to temporarily possess handguns without complying with any statutory requirements.\textsuperscript{148} Without having to undergo a background check or waiting period, prohibited individuals will have an easier time obtaining handguns. The \textit{Chow} court's holding, therefore, defies both the federal and Maryland gun control policies of reducing the facilitated access to firearms.

\textbf{C. The Court of Appeals's Holding is Likely to Have Negative Social Implications}

Beyond erroneously defining "transfer"\textsuperscript{149} and contradicting legislative intent and federal and state gun control policies,\textsuperscript{150} the \textit{Chow} court's holding is likely to have harmful social consequences. The

\textsuperscript{145} Cf. \textit{Chow}, 393 Md. at 474, 903 A.2d at 413 (Wilner, J., dissenting) ("The purpose of the waiting period [imposed on firearms dealers selling to individuals] was, and remains, to give the Secretary an opportunity to make an investigation and determine whether the prospective transferee is eligible to own and possess the weapon.").

\textsuperscript{146} Pub. L. No. 90-351, §§ 901(a)(2), 922(a), 82 Stat. at 225.

\textsuperscript{147} Act of March 27, 1972, § 36B, ch. 13, 1972 Md. Laws 38, 40.

\textsuperscript{148} See supra note 144 and accompanying text (explaining how having "transfer" encompass only permanent exchanges means temporary transfers are not subjected to section 442(d)'s requirements, including the waiting period and background check).

\textsuperscript{149} See supra Part IV.A.

\textsuperscript{150} See supra Part IV.B.
court's holding will undoubtedly hinder crime investigation\textsuperscript{151} and impede gun control efforts.\textsuperscript{152} Most troubling, however, is that the Chow court's holding will likely increase instances of violent crime.\textsuperscript{153}

1. The Chow Court's Holding Will Hinder Crime Investigation

In holding that "transfer" does not encompass all exchanges, the Chow court will make crime investigations substantially more difficult by impairing gun tracing. A gun tracing system was first made possible with the 1968 Gun Control Act, as that Act required that firearms be stamped with a serial number; that Federal Firearms Licensees, manufacturers, and others record all transactions; and that records of firearms transactions be transferred to the Bureau of Alcohol, Tobacco, and Firearms.\textsuperscript{154} The Gun Control Act essentially established a paper trail of gun transactions for gun tracers to follow.\textsuperscript{155} Gun tracing is a significant aspect of crime investigation; such tracing may ascertain the suspect of a crime or aid in building evidence against a crime suspect.\textsuperscript{156} Gun tracing has also contributed to research and the general understanding of the channels by which criminals obtain handguns.\textsuperscript{157}

The Chow court's holding that "transfer" only encompasses permanent exchanges will debilitate gun tracing, because temporary exchanges of handguns can take place without abiding by any of the statutory requirements, including the filing of transactions paperwork.\textsuperscript{158} By allowing temporary handgun transactions to take place without any records of the transactions, it will be nearly impossible to keep track of who owns or is merely borrowing a gun, thus hindering effective crime investigation and research by making it im-

\textsuperscript{151} See infra Part IV.C.1.

\textsuperscript{152} See infra Part IV.C.2.

\textsuperscript{153} See infra Part IV.C.3.


\textsuperscript{155} Id.

\textsuperscript{156} See id. at 277–78 ("Best practice in a police investigation of a gun homicide or assault often includes submitting the gun (if available) for tracing, in the hope of identifying a suspect or developing the case against a suspect.").

\textsuperscript{157} Id. at 277.

\textsuperscript{158} See supra note 144 and accompanying text (explaining how construing "transfer" to only encompass permanent exchanges means temporary changes are not subject to section 442(d)'s requirements); see also Anthony A. Braga et al., \textit{The Illegal Supply of Firearms}, 29 Crime & Just. 319, 323 (2002) (explaining that private citizens can sell firearms under federal law without keeping any records of the transactions).
possible to determine who was in possession of a handgun used to commit a crime.159

2. The Chow Court's Holding Will Hamper Gun Control Efforts

Gun control as a whole will also be affected by the Chow court's decision. The court's definition of "transfer" means that temporary exchanges between individuals can legally take place without any restrictions, including the background check and waiting period.160 This result frustrates the legitimate efforts of legislatures and other authorities in controlling access to handguns.161 Anyone could temporarily give a gun to someone else without knowing whether the recipient is prohibited by law from possessing a handgun.162

The court's holding will also affect interstate gun control efforts. The Chow court's interpretation of "transfer" weakens Maryland's handgun regulations,163 thereby potentially increasing the interstate trafficking of handguns and undercutting the handgun regulations of other states.164

Finally, the Chow court's definition of "transfer" could obstruct the prosecution of individuals who transfer guns to prohibited persons. Because an individual can only be prosecuted for selling a firearm to a prohibited person if he knew that the purchaser was not allowed to possess a handgun, and because Chow enables private citizens to transfer firearms to others without doing background checks, the Court of Appeals's decision could make it difficult to prosecute countless temporary transferors.165

159. See Braga et al., supra note 158, at 323 (explaining that one consequence of not requiring private citizens to keep records of gun sales is that it makes it especially difficult to trace the various transactions of a particular firearm recovered during a crime investigation).

160. See supra note 144 and accompanying text (explaining how section 442(d)'s requirements for transfer would not apply to temporary exchanges, because of the Chow court's refusal to include temporary exchanges in its definition of "transfer").


162. See supra notes 144–145 and accompanying text.

163. By only construing "transfer" to encompass permanent exchanges, the Chow court has left temporary handgun exchanges unregulated.

164. Cf. Braga et al., supra note 158, at 321 (explaining that a significant goal of federal law is to keep one state's weaker handgun regulation laws from undermining another state's more restrictive laws).

165. See id. at 323 (explaining that private citizens can sell firearms to others without doing background checks, and consequently, prosecuting sellers for selling to prohibited persons is very hard because such transactions are only illegal if the seller knew that the firearm buyer was not allowed to possess the gun).
The Chow Court’s Holding Will Increase Incidents of Violent Crime in Maryland

Long term, the Chow court’s holding will likely increase the acts of violence in a state which already has a very high murder and crime rate, and thus detrimentally impact Maryland citizens. First, there will undoubtedly be increased acts of violence because those not subject to the waiting period required in permanent gun exchanges—meaning, individuals engaging in temporary exchanges—would not have the corresponding benefit of having time to regain their composure and think logically before shooting someone on impulse.

Second, by overlooking the secondary market, the decision in Chow makes it easier for criminals to obtain and use handguns in the commission of violent crimes. Most criminals acquire handguns in the secondary market. The Maryland General Assembly recognized this very fact in the course of debating the Maryland Gun Violence Act. Logically, then, many handguns that are used in the commission of violent crimes are obtained through secondary transactions.

By excluding temporary exchanges from the definition of “transfer,” the Court of Appeals has left a substantial amount of exchanges unregulated. This in turn makes handguns more accessible, especially to

166. In 2005, 552 individuals in Maryland were murdered, and there were 39,369 violent crimes. U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2005), http://www.fbi.gov/ucr/cius/data/table_05.html. This is a very high murder rate when compared to other states’ murder rates per 100,000 inhabitants—the only other state with a comparable rate is Louisiana, which has the exact same murder rate as Maryland. Id. Likewise, Maryland has a high violent crime rate when compared to other states’ violent crime rate per 100,000 inhabitants—only Florida and South Carolina have higher violent crime rates. Id.

167. A waiting period could very well prevent upset or angry individuals from obtaining a handgun and killing someone immediately. James B. Jacobs, Off Target: Gun Control Advocates Miss the Point: Laws Won’t Keep Guns Out of the Wrong Hands, LEGAL AFFAIRS, Jan.-Feb. 2003, at 18, 20; cf. 139 Cong. Rec. H9088, H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick) (explaining that the waiting period required by the Brady Act “will save lives by providing a cooling off period that will prevent handgun purchases in the heat of passion”). But see 139 Cong. Rec. at H9092 (statement of Rep. Volkmer) (“There is no evidence that a waiting period of any length . . . prevents violent crime. As a matter of fact waiting periods of any length have not been effective.”).


169. According to testimony before the Senate and House Committees, “[a] majority of criminals obtain regulated firearms through the secondary sales market and ‘straw purchases.’” Briefing Statement, supra note 20, at 3.

170. See Thomas, supra note 168, at 59 (explaining that the majority of juveniles and criminals acquire their handguns in the secondary market, and that most crimes are committed with those guns).
criminals and juveniles, thereby increasing the number and intensity of violent crimes that are committed in Maryland.\footnote{171}

\textbf{D. The Court of Appeals Should Have Held That “Transfer” Includes All More-Than-Momentary Handgun Exchanges}

The court in \textit{Chow} misinterpreted the common understanding of the word “transfer,”\footnote{172} contravened the legislative intent behind the enactment of section 442(d), as well as federal and state gun control polices,\footnote{173} and overlooked the negative social implications of its decision.\footnote{174} Thus, as Judge Wilner argued in dissent, it would have been more accurate and reasonable for the Court of Appeals to have defined “transfer” as any more-than-momentary exchange that takes place between a gun owner and another individual.\footnote{175} Such a definition is more consistent with both the intent of section 442(d) and federal and state gun control policies,\footnote{176} supported by other provisions of the Maryland Gun Violence Act,\footnote{177} and in harmony with a federal definition of “transfer.”\footnote{178}

\begin{itemize}
\item \footnote{171}{See Philip J. Cook et al., \textit{Regulating Gun Markets}, 86 J. CRIM. L. & CRIMINOLOGY 59, 62 (1995) (“While the widespread availability of guns in urban areas is not a ‘root cause’ of violent crime, it significantly adds to the deadliness of that violence.”); Hugh LaFollette, \textit{Gun Control}, 110 ETHICS 263, 275 (2000) (“Perhaps the most well-established statistic is this: the more widely available guns (especially handguns) are, the more people are murdered.”); Thomas, \textit{supra} note 168, at 41 (explaining that easy access to guns intensifies violence, and that reducing such access could reduce gun crime). \textit{But see} Cook & Ludwig, \textit{supra} note 168, at 606 (claiming that the Brady Act, which imposed a background check, has not had any effect on either homicides by use of guns or homicides generally); Cook et al., \textit{supra}, at 62 (“Effective control over the distribution of guns would have little effect on the volume of assaults and robberies, but it would reduce the homicide rate.”).
\item \footnote{172}{See \textit{supra} Part IV.A.}
\item \footnote{173}{See \textit{supra} Part IV.B.}
\item \footnote{174}{See \textit{supra} Part IV.C.}
\item \footnote{175}{\textit{Chow}, 393 Md. at 475, 903 A.2d at 414 (Wilner, J., dissenting) (“I would hold that ‘transfer’ includes a loan—at least one in which possession and control of the firearm is relinquished for anything more than a momentary period.”). A mere momentary exchange would not be illegal, because dominion or control over the weapon would have to be surrendered for there to be a transfer. \textit{United States v. Hurd}, 642 F.2d 1179, 1182 (9th Cir. 1981).
\item \footnote{176}{See \textit{infra} Part IV.D.1.}
\item \footnote{177}{See \textit{infra} Part IV.D.2.}
\item \footnote{178}{See \textit{infra} Part IV.D.3.}}
1. A Broad Definition of "Transfer" Is More Consistent with the Legislative Intent Behind Section 442(d) and with Federal and State Gun Control Policies

The goal of statutory interpretation is to give effect to the intent of the legislature. Holding that "transfer" refers to all more-than-momentary exchanges that take place between individuals would effectuate the intent of the Maryland General Assembly in enacting section 442(d). By the same reasoning, such a holding would be more consistent with federal and state gun control policies.

As the Court of Special Appeals properly recognized, the legislative history of section 442(d) clearly signals that a broad definition of "transfer" would be correct. The unmistakable purpose of section 442(d) was to reduce the gun violence epidemic in Maryland by restricting the availability of handguns and preventing prohibited individuals from obtaining handguns. Moreover, the Maryland Gun Violence Act and section 442(d) were meant to regulate both sales and temporary exchanges in the secondary market. To properly fulfill these goals, as well as to abide by federal and state gun control policies, it is necessary to interpret "transfer" broadly and include temporary exchanges within the definition. Such a reading would not alleviate gun-related violent crimes in Maryland, and in fact, will probably increase it.

On the other hand, had the Chow court appropriately interpreted "transfer" broadly to include temporary exchanges—subjecting such exchanges to the waiting period and background check requirements—the court could have reduced the gun violence epidemic, be-

180. See Chow v. State, 163 Md. App. 492, 506, 881 A.2d 1148, 1156 (2005) ("We conclude that attributing to the verb ‘transfer’ its ordinary meaning and reading the word in context makes plain the intent of § 442(d). The statute prohibits, among other forms of transfer, a loan of a regulated firearm without there first being compliance with the statute’s requirement of an application and seven-day waiting period.").
181. See supra Part IV.B.
182. See supra Part IV.B.
183. Chow, 163 Md. App. at 509, 881 A.2d at 1158.
184. See supra Part IV.B; see also Chow, 163 Md. App. at 506, 881 A.2d at 1156 ("Indeed, a construction of § 442(d) that does not include the loan of a regulated firearm could result in a complete end-run around the statute. The General Assembly could not have intended such an absurd result.").
185. See supra Part IV.C.3.
cause prohibited individuals will surely be screened through background checks. Additionally, by interpreting “transfer” broadly to include temporary exchanges, and by regulating all exchanges within the secondary market, gun control could be more effective, and facilitated access to handguns could be reduced. Such regulation would not only be consistent with the intent of the Maryland General Assembly in enacting section 442(d), but would also bolster federal and state gun control policies.

2. Maryland Gun Violence Act Provisions Support a Broad Interpretation of “Transfer”

Although “transfer” is not defined within Article 27, section 442, it is possible to discern the intended meaning of this word by examining other provisions of the Maryland Gun Violence Act. In that Act, the Maryland General Assembly broadened the situations in which firearm dealers were required to accept applications and apply the seven-day waiting period; the statute was extended to firearm rentals, in addition to sales and transfers by dealers. As Judge Wilner noted, the legislative history indicates that the purpose of this extension was to close a loophole in the previous statute, whereby individuals could buy firearms and then rent them to others without completing a background check.

Likewise, the General Assembly included the word “rent” in its proposed section 442(d). The legislature’s intentions to curb rentals by dealers and individuals logically extends to temporary exchanges between individuals, as a rental is essentially a temporary

186. Cf. 139 Cong. Rec. H9088, H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick) (arguing that the Brady Bill will prevent persons who are not permitted under the law to have handguns from obtaining them). The implementation of the Brady Act and its background check requirement has already resulted in the rejection of a substantial number of applications, and has prevented countless prohibited individuals from obtaining firearms. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Background Checks for Firearms Transfers, 2002 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/bcfit02.pdf. (“Since the inception of the Brady Act (the interim provisions went into effect on March 1, 1994), nearly 46 million applications for firearm transfers have been checked, of which 976,000 were rejected, a rejection rate of 2.1%.”).

187. See Thomas, supra note 168, at 48 (arguing that regulating the secondary market for handguns would effectively control handgun movement).

188. See supra Part II.B.

189. See supra Part II.C.


191. Bill Analysis, supra note 53.

192. Chow, 393 Md. at 474–75, 903 A.2d at 414 (Wilner, J., dissenting).

exchange, with consideration. Because the only difference between a rental and a temporary loan of a firearm is that a rental includes consideration, the policy implications for regulating rentals and temporary exchanges are essentially the same. It would therefore have been more reasonable to have “transfer” cover temporary exchanges.

3. Congress’s Construction of “Transfer” Dictates that “Transfer” Refers to All More-Than-Momentary Exchanges

Federal law similarly favors a construction of “transfer” that encompasses temporary exchanges. Because federal law can be considered when applying Article 27, section 442, it is possible to consult federal law to define “transfer” in the context of section 442(d). Such a comparison supports the argument that “transfer” should be broadly construed to encompass all exchanges, including temporary ones.

Part of the federal Gun Control Act of 1968 provided for the imposition of taxes on the making and transferring of firearms. Among other things, the Act dictated that a firearm is not to be transferred until several conditions are met, including the filing of a transfer application; the identification within the application of the transferor and the transferee of the firearm; and the payment of any applicable taxes. The definition section states that “[t]he term ‘transfer’ and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.” Based on this definition, Congress has broadly construed “transfer” to cover a variety of exchanges. Since a federal law, which addresses the making, use, and exchanging of handguns, and which frequently uses the word “transfer” throughout its text, has defined transfer to refer to all exchanges, and because federal law can be considered in applying the provisions of Article 27, section 442, the word “transfer” in section 442(d) should likewise be construed broadly to encompass temporary exchanges.

196. Id. at 1228.
197. Id. at 1232 (emphasis added).
198. See id. at 1227-36.
199. See Berg, 342 Md. at 139, 674 A.2d at 519.
200. While the federal Gun Control Act did not explicitly include gratuitous temporary exchanges within the meaning of “transfer,” it did include the “loaning” of firearms, which has essentially the same meaning as a temporary gratuitous exchange. See supra Part IV.D.3.
V. Conclusion

In Chow v. State, the Court of Appeals held that the word “transfer,” as used in Article 27, section 442(d), refers only to permanent exchanges of handguns between individuals, and thus the temporary exchange that took place between Chow and his friend was not a violation of section 442(d).201 With this holding, the court erroneously concluded that “transfer” clearly and unambiguously refers only to permanent exchanges.202 More significantly, however, the court’s holding is contrary to the legislative intent behind section 442(d) and federal and Maryland gun control policies.203 In addition, the court’s holding will likely hinder crime investigation, impede gun control efforts, and increase the prevalence of violent crimes.204 Hence, the Court of Appeals should have instead held that “transfer” encompasses all more-than-momentary exchanges.205

JENNIFER H. STINNETTE
BYNDLOSS v. STATE: EXPANDING AN OFFICER'S INVESTIGATIVE OPPORTUNITIES DURING A TRAFFIC STOP AT THE EXPENSE OF AN INDIVIDUAL'S FREEDOM

In Byndloss v. State, the Court of Appeals of Maryland considered whether a thirty-minute detention resulting from an initially valid traffic stop was reasonable under the Fourth Amendment. The court held that the detention was reasonable in scope because the detaining officer diligently pursued the license, registration, warrant, and criminal history checks that were delayed by a computer malfunction. As a result, the court refused to suppress evidence obtained in the interim because it found that the initial purpose of the stop had not yet been fulfilled. Therefore, the court determined that the conduct of the officer and the duration of the detention did not taint the discovery of narcotics during the delay.

In so holding, the Court of Appeals failed to fully consider Fourth Amendment precedent and thus misinterpreted the scope limitations of a reasonable traffic stop. In particular, the court improperly analyzed the scope limitations as applied to the officer's actions and the duration of the stop. As a result, the court's decision threatens the constitutionally protected rights of individuals to be free from unreasonable searches and seizures, sets a confusing standard for lower courts, and sanctions the use of delay tactics to support other investigative desires.

I. THE CASE

On November 19, 2003, at 10:58 a.m., Sergeant Clifford Hughes pulled over a vehicle because its plastic license plate cover partially obstructed the registration tags. When Sergeant Hughes called in the stop, an officer at the College Park police barrack advised him that the system to check the driver's license, vehicle registration, out-
standing warrants, and criminal history was temporarily down. While waiting for the system to begin working, Sergeant Hughes proceeded to the front passenger side window of the car and obtained the license and registration of the driver, Joan Henry Malone, and the license of the passenger, Orlando Byndloss.

Sergeant Hughes had a brief conversation with Malone in which she stated that she was traveling from Florida to New York. Malone offered to remove the plastic cover from the license plate, but Sergeant Hughes replied that it was too dangerous for her to do that on I-95. Sergeant Hughes later noted that Malone seemed nervous and shaky during this interaction. Sergeant Hughes then returned to his vehicle, called for a canine unit, and wrote a warning for the license plate cover. Although Sergeant Hughes finished writing the warning, he decided not to give it to Malone.

At 11:08 a.m., Sergeant Hughes called the College Park barrack again and was informed that the system was still down. He was told to call the Rockville or Forestville barrack where the systems were working. Instead, Sergeant Hughes called the Waterloo barrack and was informed that he would receive a call back with the results of the license and warrant checks.

While waiting for the checks, Sergeant Hughes went back to Malone’s car, ordered her to step out, and explained that she could not leave until he learned the results of the checks. Sergeant Hughes then questioned Malone again about where she was going, how long she would be there, and the amount of luggage in her vehicle. Once again, Sergeant Hughes noted that Malone appeared nervous, shaking, and was even crying at certain moments.

At 11:19 a.m., the College Park dispatcher called Sergeant Hughes to inform him that the canine handler was having trouble.

11. Id. at 469, 893 A.2d at 1123.
12. Id. at 469–70, 893 A.2d at 1123–24.
13. Id. at 470, 893 A.2d at 1124.
14. Id. at 469, 893 A.2d at 1124.
15. Id. at 470, 893 A.2d at 1124.
16. Id.
17. Id. Hughes pointed out Malone’s nervousness to the other police officer on the scene and indicated that he wanted to talk to her further. Id.
18. Id.
19. Id.
20. Id. at 470–71, 893 A.2d at 1124.
21. Id. at 471, 893 A.2d at 1124–25.
22. Id., 893 A.2d at 1125.
23. Id. Sergeant Hughes also noted that Malone’s answers about her trip were inconsistent with previous answers. Id.
finding him on the highway, but was on the way.\(^24\) Immediately after hanging up, and again at 11:23 a.m., Sergeant Hughes called the Waterloo barrack to inquire about the status of the checks.\(^25\) Both times the barrack told him to continue to wait.\(^26\) Sergeant Hughes asked Malone if she would like to wait in his vehicle, and she agreed.\(^27\) After explaining to Malone that he was still awaiting the results of the checks, Sergeant Hughes asked her whether there were “any weapons, narcotics, untaxed cigarettes, contraband, [or] currency” in the vehicle, to which Malone responded that there were none.\(^28\)

At 11:26 a.m., the canine team arrived and the dogs immediately began to sniff the vehicle.\(^29\) One minute later, the Waterloo barrack called and told Sergeant Hughes that Byndloss, the passenger, had an extensive criminal background.\(^30\) At 11:30 a.m., over thirty minutes after Sergeant Hughes made the initial stop, the dog gave a positive “sit alert” indicating the presence of narcotics in the vehicle.\(^31\) The officers conducted a search of the vehicle and discovered approximately two kilograms of cocaine in a suitcase in the trunk.\(^32\) Byndloss and Malone were subsequently arrested for possession of drugs with the intent to distribute.\(^33\)

Following his arrest, Byndloss moved to suppress the evidence recovered during the search of the vehicle on the ground that his detention exceeded the length necessary to effectuate the traffic stop, thereby violating his Fourth Amendment rights.\(^34\) Byndloss argued that the traffic stop surpassed the reasonable time it should take an officer to complete the various checks, and a second detention began that required independent justification to be valid.\(^35\) Without such justification, Byndloss claimed, the canine sniff and subsequent discovery of narcotics were invalid.\(^36\)

\(^{24}\) Id. at 472, 893 A.2d at 1125.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) Id. From approximately 11:10 to 11:20 a.m., while Sergeant Hughes was making phone calls, Malone stood outside of her vehicle alongside I-95. Id. at 471, 893 A.2d at 1124–25.
\(^{28}\) Id. at 472, 893 A.2d at 1125.
\(^{29}\) Id.
\(^{30}\) Id. The Waterloo barrack did not report on Malone’s criminal history or the license, registration, and warrant checks of Malone or Byndloss. Id.
\(^{31}\) Id.
\(^{32}\) Id. at 472–73, 893 A.2d at 1125–26.
\(^{33}\) Id. at 473, 893 A.2d at 1126.
\(^{35}\) Byndloss, 391 Md. at 478 & n.14, 893 A.2d at 1129 & n.14.
\(^{36}\) Id. at 479, 893 A.2d at 1129.
The Circuit Court for Prince George's County denied the motion, reasoning that there was no second detention because Sergeant Hughes diligently pursued the initial justification for the stop. The Court of Special Appeals of Maryland affirmed the trial court's ruling, finding that the duration of the detention was reasonable to complete the necessary procedures of the traffic stop. Byndloss appealed the decision, and the Court of Appeals granted certiorari to determine whether a prolonged detention caused by a computer malfunction is unreasonable in scope, and if so, whether the officer had the requisite justification to validate a second detention.

II. LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The purpose of the Fourth Amendment is to safeguard individuals against unreasonable governmental invasions of their privacy. Thus, the Supreme Court of the United States has held that stopping an automobile for a traffic violation is within the meaning and protection of the Fourth Amendment. Traffic stops, like other warrantless seizures, are subject to a two-prong standard: (1) the purpose of the stop must be justified; and (2) the scope of the stop must be reasonable. However, when the scope of the stop is exceeded, a second detention ensues that must be independently warranted.

A. The Contours of a Permissible Traffic Stop Under the Fourth Amendment

The Supreme Court first considered the legitimacy of a warrantless seizure in Terry v. Ohio. In Terry, a police officer observed Terry
and another man engaging in suspicious behavior on the sidewalk outside of a department store, leading the officer to believe that they were planning to commit a robbery. The officer approached Terry and asked him several questions. Based on his prior observations and Terry's answers, the officer frisked the outside of Terry's clothing, fearing that he may be armed. During the frisk, the officer found a pistol and arrested Terry for carrying a concealed weapon.

The *Terry* Court identified the officer's encounter with Terry as a "seizure"—restraining a person's freedom of movement under circumstances where a reasonable person would not feel free to leave. To constrain law enforcement officials from conducting unreasonable seizures, the Court articulated a two-prong test for a constitutional seizure: first, the officer's action must be "justified at its inception," and second, the action must be "reasonably related in scope to the circumstances which justified the interference in the first place." The Court in *Terry* explained that if either of these requirements are violated, the court must enforce the exclusionary rule and suppress the evidence seized in violation of the Fourth Amendment.

Seven years later, in *United States v. Brignoni-Ponce*, the Supreme Court considered for the first time whether a traffic stop is a seizure that implicates the Fourth Amendment. In *Brignoni-Ponce*, a police officer stopped the defendant while conducting roving patrols of the Mexican border. The government asserted that the police had authority to randomly stop any car near the border to determine whether it contained illegal aliens or was involved in smuggling operations. However, the Court disagreed, and applied *Terry* to conclude that a traffic stop is a seizure protected by the Fourth Amendment because the occupant of the vehicle has been restrained by a police officer and does not feel free to walk away. The Court held that

48. *Id.* at 6.
49. *Id.* at 6–7.
50. *Id.*
51. *Id.* at 7.
52. *Id.* at 19 n.16.
53. *Id.* at 19–20.
54. *Id.* at 28–29. The exclusionary rule is a judicial device used to enforce a defendant's Fourth Amendment right to be free from unreasonable searches and seizures; it mandates that any evidence obtained in violation of the Fourth Amendment must be excluded. See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (explaining that the exclusionary rule began as a "deterrent remedy").
55. 422 U.S. 873 (1975).
56. *Id.* at 874.
57. *Id.* at 874–75.
58. *Id.* at 877.
59. *Id.* at 877–78.
stopping cars on a random basis, absent justification, was unreasonable.\textsuperscript{60} Thus, \textit{Brignoni-Ponce} established that a traffic stop must be reasonable under the Fourth Amendment, and an officer's actions during the stop are subject to the constraints of \textit{Terry}.\textsuperscript{61}

In subsequent cases, the Supreme Court continued to follow \textit{Brignoni-Ponce}\textsuperscript{62} and further added that a person has an expectation of privacy in their vehicle, and that such expectation is one that society recognizes as reasonable.\textsuperscript{63} The Court therefore clarified that because a traffic stop is more analogous to a detention than an arrest, it is analyzed under the seizure limitations in \textit{Terry}.\textsuperscript{64} Thus, a traffic stop must be: (1) "justified at its inception," and (2) "reasonably related in scope to the circumstances which justified the interference in the first place."\textsuperscript{65}

\textbf{B. Terry's First Prong: The Justification Required to Initiate a Traffic Stop}

Less than four years after \textit{Brignoni-Ponce}, the Supreme Court clarified the nature of a constitutional traffic stop in \textit{Delaware v. Prouse}.\textsuperscript{66} In \textit{Prouse}, a police officer stopped the defendant's vehicle to check his driver's license and registration.\textsuperscript{67} As he approached the vehicle, the officer smelled marijuana; when he reached the car window, the officer seized marijuana that was in plain view.\textsuperscript{68} The police officer admitted that he had not witnessed any suspicious activity or a traffic infraction to warrant the stop, but that in his mind, the stop was "routine."\textsuperscript{69}

In determining whether the automobile stop was justified, the \textit{Prouse} Court noted that under the first prong of \textit{Terry}, courts must analyze whether there was pre-existing, sufficient evidence to justify the stop.\textsuperscript{70} The \textit{Prouse} Court explained that probable cause will justify the initiation of a traffic stop,\textsuperscript{71} adding that most traffic stops are sub-

\begin{flushleft}
\textsuperscript{60.} \textit{Id.} at 883.
\textsuperscript{61.} \textit{Id.} at 881-82.
\textsuperscript{63.} \textit{Delaware v. Prouse, 440 U.S. 648, 662-63 (1979).}
\textsuperscript{64.} \textit{Id.} at 653.
\textsuperscript{65.} \textit{Terry v. Ohio, 392 U.S. 1, 19-20 (1968).}
\textsuperscript{66.} \textit{Prouse, 440 U.S. at 653-54.}
\textsuperscript{67.} \textit{Id.} at 650.
\textsuperscript{68.} \textit{Id.}
\textsuperscript{69.} \textit{Id.} at 650-51.
\textsuperscript{70.} \textit{Id.} at 661 (citing \textit{Terry}, 392 U.S. at 22).
\textsuperscript{71.} The \textit{Prouse} Court added that "articulable and reasonable suspicion" may also justify the initiation of a traffic stop. \textit{Id.} at 663. The standard of "reasonable articulable suspi-
stated by probable cause because, typically, the officer witnesses a traffic infraction. Thus, in Prouse, the Court held that because the police officer randomly stopped the defendant to check his license and registration without sufficient justification, the seizure was unreasonably intrusive.

After the Prouse decision, scholars argued that given the high occurrence of traffic infractions, and the fact that virtually anyone could be stopped, there should be guidelines to limit law enforcement authority to conduct traffic stops. However, more than fifteen years later in Whren v. United States, when given an opportunity to restrict an officer's broad ability to conduct a traffic stop, the Supreme Court refused to do so. In Whren, plain-clothes officers patrolling an area known for high drug activity stopped the defendant for failing to use his signal when changing lanes. When the officer approached the vehicle, he immediately observed drugs in plain view. The defendant argued that this was a "pretextual stop." Unconcerned with pretext, however, the Court opined that an officer's subjective motivation for the stop is irrelevant so long as the temporary detention was justified at its inception by the belief that the driver committed a traffic infraction.

The Supreme Court has since interpreted Whren to suggest that an officer may stop a car to investigate possibilities of criminal activity if the officer has reason to initially detain the vehicle and the seizure is not prolonged. Maryland courts interpret Whren similarly. How-
ever, while allowing broad flexibility in initiating a traffic stop, Maryland courts also caution officers to use careful discretion. For example, in Charity v. State, the Court of Special Appeals stated that police officers must exercise the discretion permitted by Whren with self-control and temperance, warning that if it is ever abused, courts may restrict such conduct. Thus, because Whren does not implicate a pretextual or arbitrary traffic stop under the first prong of Terry, courts have focused on the second prong of Terry—the stop must be reasonably related to the initiating purpose—when balancing law enforcement needs and an individual’s right to privacy.

C. Terry’s Second Prong: Reasonableness of the Scope of the Stop

In Florida v. Royer, the Supreme Court clarified the second requirement in Terry, that the stop be reasonably related in scope to the circumstances that justified the initial interference. The Royer Court held that to satisfy the scope prong, a seizure must be no longer than necessary to complete the purpose of the stop, and the investigation should be the least intrusive means to confirm or dismiss the officer’s suspicion. In Royer, two narcotics detectives seized the defendant at the Miami International Airport based on suspicions that he was a drug courier. The detectives questioned the defendant, requested his airline ticket and license, and subsequently moved him to an interrogation room that was about forty feet away. During the seizure, detectives received consent from the defendant to search his luggage, where they found marijuana.

The Royer Court affirmed the lower court’s decision to suppress the evidence, holding that the defendant’s consent was tainted because it was given during the course of a seizure that was unreasonable in scope. It explained that the detectives’ conduct—in particular, their questions and their decision to move the defendant to another room—was more intrusive than necessary to effectuate the purpose of

84. Id. at 601-02, 753 A.2d at 558.
85. Cf State v. Ofori, 170 Md. App. 211, 235, 906 A.2d 1089, 1102 (2006) (noting that while the law indulges such investigative opportunism, it is necessary to minimize the degree of exploitation).
87. Id. at 500; see also Terry v. Ohio, 392 U.S. 1, 20 (1968) (setting forth scope limits).
88. Royer, 460 U.S. at 500.
89. Id. at 493.
90. Id. at 494.
91. Id. at 494-95.
92. Id. at 507-08.
the stop. In doing so, the Court in Royer established two inquiries to analyze the scope prong: (1) the nature of the officer's conduct; and (2) the duration of the stop.

A traffic stop that exceeds the scope of a permissible seizure, whether due to an officer's excessive actions during the stop or due to an unreasonably long duration, becomes a "second detention" that is only permissible with independent justification. In Maryland, the Court of Special Appeals first examined the notion of a "second detention" in Snow v. State. In Snow, an officer stopped a driver for speeding, yet continued to detain the driver after issuing a warning so that he could conduct a canine scan. The Snow court explained that because the purpose of the initial traffic stop was complete when the officer scanned the vehicle, the driver was actually stopped twice: once for speeding, and once to scan the vehicle. Therefore, the court held that under Terry's second prong, if either the officer's actions or the stop's length is excessive, a second seizure ensues as an additional intrusion upon the driver's Fourth Amendment rights.

1. The Nature of the Officer's Actions During a Traffic Stop

When a police officer stops an automobile because the driver violated a traffic law, the nature of the officer's actions during the resulting detention must be limited to the enforcement of that law. Accordingly, there are certain actions that a police officer is justified in undertaking during the course of a traffic stop, as they are reasonably related to the initial purpose of the stop. When the scope limit

93. Id. at 504-05.
94. Id. at 500.
96. The independent justification necessary for a second detention must be different from the justification that satisfied the initial detention, typically stemming from either reasonable articulable suspicion or consent. See, e.g., Ferris v. State, 355 Md. 356, 372-73, 735 A.2d 491, 499-500 (1999) (finding that a prolonged traffic stop was invalid absent additional and independent justification). For an explanation of reasonable articulable suspicion, see supra note 71.
98. Id. at 246-48, 578 A.2d at 817-18.
99. Id. at 267, 578 A.2d at 827.
100. Id., 578 A.2d at 827-28.
101. See, e.g., Ferris v. State, 355 Md. 356, 372, 735 A.2d 491, 499 (1999) (restricting the scope of a seizure to only the necessary elements required by the investigation of a traffic infraction).
102. See infra Part II.C.1.a.
was first invoked, any expansion of the traffic stop to include investigation of other illegal activity was prohibited unless independently justified. However, as Fourth Amendment jurisprudence evolved in the 1990s, the scope limitation similarly expanded, and courts have been more inclined to hold certain actions, seemingly outside the scope of the stop, permissible. Thus, while there still exists a limit on the nature of an officer’s actions, over the past two decades a police officer has been given much more discretion in broadening the scope of the stop.

a. The Limited Scope of Terry: Conduct Deemed Reasonably Related to the Circumstances Justifying a Traffic Stop

During a typical traffic stop, a police officer has the authority to complete license and registration checks on the driver of the vehicle, ask a few customary questions, and issue a warning or traffic citation. In *Prouse*, the Supreme Court found that checking the driver’s license and registration is a reasonable action during a traffic stop. The Court explained that the state has an interest in ensuring that drivers are qualified and permitted to operate the car and that the vehicle itself is safe for operation. Thus, the *Prouse* Court held that so long as the driver is legally detained for a traffic stop, the officer is permitted to request a license and registration.

Similarly, an officer may pose limited questions related to the traffic infraction and the driver’s travel plans. Furthermore, an officer may choose to either issue a warning or a traffic citation based on

103. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (stating that the scope of the stop must be related to the purpose of the initial intrusion).

104. See infra Part II.C.1.b–c.


108. Id. at 663.

109. See, e.g., *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (en banc) (per curiam) (stating that the permissibility of an officer’s questions relating to the reason for the traffic stop are “beyond dispute” and that these questions may also include inquiry into the driver’s travel plans).
the initial reason for the stop. The above actions fall within the scope limits of Terry because they are reasonably related to the circumstances that justified the traffic stop in the first place.

b. Expanding the Scope of Terry: Conduct That is Permissible Even Though Not Reasonably Related to the Circumstances Justifying the Traffic Stop

Courts have acknowledged that while specific conduct—such as ordering a passenger out of the vehicle or requesting warrant and criminal history checks—is unrelated to the purpose of the stop, it still falls within the scope limits of the Fourth Amendment for the purpose of officer safety. For example, in Maryland v. Wilson, the Supreme Court held that law enforcement officers may order the driver and passengers out of the vehicle. Likewise, many courts hold that warrant checks and criminal history checks are permissible. Courts have justified this conduct as a general safety precaution for all traffic stops.

Similarly, while a canine sniff is not directly related to a traffic infraction, the Supreme Court recently held it constitutionally permissible. In Illinois v. Caballes, the Court ruled that canine sniffs of...
vehicles detained during lawful traffic stops are permissible because they do not implicate the Fourth Amendment. The Court relied upon United States v. Place, which held that a canine sniff of luggage was not a search that implicated the Fourth Amendment because it did not infringe on the individual's constitutionally protected interest in privacy. Applying Place, the Court in Caballes found that a canine sniff is not a search that violates the driver's reasonable expectation of privacy because it is conducted in public and the nature of the intrusion and the type of information revealed is limited.

c. The Future Expansion of Terry: Conduct that is Potentially Permissible Depending Upon the Jurisdiction, Even Though Not Reasonably Related to the Circumstances Justifying the Traffic Stop

While Supreme Court precedent allows an officer to pose questions to the driver that directly relate to the purpose of the stop, federal circuit courts are split with regard to the permissibility of questions unrelated to the purpose of the stop. Additionally, the Supreme Court has yet to directly rule on the issue of unrelated police questioning. Some courts have analyzed the acceptability of these questions by solely focusing on the temporal element of the stop and not interpreting the inquiries required by Royer—the nature of the officer's actions and the duration of the stop—to include an analysis of whether the questions related to the stop.

120. Id. at 408–09.
122. Id. at 707. Place involved, in relevant part, whether a seizure of the defendant and his luggage, followed by a canine sniff of the luggage, was reasonable where the officer had reasonable articulable suspicion to justify the initial seizure. Id. at 697–98.
123. Caballes, 543 U.S. at 408–09; see also Wilkes v. State, 364 Md. 554, 569, 774 A.2d 420, 429 (2001) (holding that a canine sniff that occurred during the scope of a traffic stop was reasonable).
125. See United States v. Childs, 277 F.3d 947, 951–52, 954 (7th Cir. 2002) (recognizing the split in federal circuit courts); 6 CRIM. PRAC. GUIDE 15–16 (2005) (same).
127. Specifically, the Fifth and Seventh Circuits focus on the duration of the stop rather than the nature of the officer's questions. See, e.g., Childs, 277 F.3d at 953–54 (focusing only on whether the duration of the stop was valid and rejecting other circuits' scope tests).
For example, in *United States v. Shabazz*, the United States Court of Appeals for the Fifth Circuit held that questions unrelated to the purpose of the traffic stop do not violate *Terry*’s scope prong. In *Shabazz*, an officer who pulled a car over for speeding questioned the driver about his recent whereabouts while running a license and registration check. Simultaneously, another officer posed similar questions to the passenger. The court reasoned that because the questions were asked while awaiting the results of the checks, the questions did not prolong the duration of the stop and therefore were permissible. *Shabazz* and its progeny take the position that the key element to *Terry*’s second prong is duration, and the nature of the officer’s actions are only considered if they delay the length of the stop. Thus, under *Shabazz*, the Fifth Circuit views the duration of the stop as the crux of the scope limitation.

In contrast, other courts interpret *Terry* as requiring an analysis of the questions themselves and whether they reasonably relate to the purpose of the stop. These courts rule that certain questions outside the scope of the stop may be impermissible even if conducted before the original purpose of the stop is complete. For example,

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128. 993 F.2d 431 (5th Cir. 1993).
129. *Id.* at 433.
130. *Id.*
131. *Id.* at 437.
132. *Shabazz*, 993 F.2d at 436–37. In rejecting the argument that the type of questions asked by the officer were outside the scope, and concentrating on the duration of the stop, the *Shabazz* court stated that the detention was reasonable because the purpose of the stop—issuing a speeding ticket—was ongoing when the questions were asked. *Id.* at 437.
133. *Id.* at 436–37.
134. See, e.g., People v. Gonzalez, 789 N.E.2d 260, 269 (Ill. 2003) (citing Florida v. Royer, 460 U.S. 491, 500 (1983)) (citing *Royer* for the notion that if police were allowed to question the driver on issues totally unrelated to the traffic stop, a balancing of the competing interests would be moot, and thus the scope of questioning must be considered); Mitchell v. United States, 746 A.2d 877, 888–89 & n.18 (D.C. 2000) (rejecting *Shabazz* and analyzing both the duration and the nature of the officer’s questions). For example, the Eighth, Ninth, Tenth, and Eleventh Circuits have rejected *Shabazz*, holding instead that asking unrelated questions is off-limits because it exceeds the scope requirement. See *infra* note 139 and accompanying text.
135. See, e.g., United States v. Alcaraz-Arellano, 302 F. Supp. 2d 1217, 1223 (D. Kan. 2004) (ruling that where the officer questioned the driver on unrelated issues, the scope became impermissible, regardless of the fact that the duration of questioning did not extend the normal length of a traffic stop); State v. Syhavong, 661 N.W.2d 278, 281 (Minn. Ct. App. 2003) (stating that a question regarding contraband was not related in scope to the purpose of the traffic stop—a broken tail light—and thus the stop was unreasonable); Maxwell v. State, 785 So. 2d 1277, 1279 (Fla. Dist. Ct. App. 2001) (holding that an officer’s questions during a stop, which included whether he had drugs and weapons, and where he worked, had nothing to do with the purpose of the stop and were most likely intended as a fishing expedition).
in _United States v. Holt_, the Tenth Circuit held that asking a motorist if he had a weapon, when the officer stopped the motorist for failing to wear his seatbelt, could only be justified if the officer had a legitimate safety concern. According to the court in _Holt_, any other type of question unrelated to the traffic stop would likely be outside the scope of the seizure.

Similarly, the Eighth, Ninth, and Eleventh Circuits have held that questions unrelated to the purpose of the stop are impermissible without independent justification. In _United States v. Murillo_, the Ninth Circuit opined that the requirements of _Terry_ demand that an officer’s questions be related in scope to the purposes of the traffic stop. In _Murillo_, in addition to asking the defendant questions about where he was going, the officer asked questions relating to whether the defendant had alcohol, drugs, or weapons in the car. The Ninth Circuit stated that such questions exceeded the scope of the stop absent independent justification to expand the permissible bounds of questioning.

In Maryland, the Court of Appeals has not acknowledged the federal circuit split on the issue of permissible police questioning; however, the Court of Special Appeals has held that an officer’s unrelated questions exceeded the scope limits. Specifically, in _Charity_, the court held that a traffic stop was unreasonable in scope where the officer engaged in a narcotics-related investigation that included asking questions unrelated to the purpose of the stop. The court explained that an officer’s actions during the course of an ongoing stop must be closely tied to the purpose of the stop; the stop should not be

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136. 264 F.3d 1215 (10th Cir. 2001) (en banc) (per curiam).
137. The _Holt_ plurality rejected _Shabazz_ and its reasoning. _Id._ at 1229.
138. _Id._ at 1230.
139. See, e.g., _United States v. Murillo_, 255 F.3d 1169, 1174 (9th Cir. 2001) (stating that an officer is only permitted to ask questions reasonably related in scope to the purpose for the traffic stop); _United States v. Pruitt_, 174 F.3d 1215, 1221 (11th Cir. 1999) (same); _United States v. Ramos_, 42 F.3d 1160, 1162–63 (8th Cir. 1994) (holding an officer’s questions regarding the presence of drugs or guns to be outside the scope of a traffic stop). But see _United States v. Boyce_, 351 F.3d 1102, 1111 (11th Cir. 2003) (refusing to determine whether the Fifth or Tenth Circuit test is controlling in the Eleventh Circuit).
140. 255 F.3d 1169 (9th Cir. 2001).
141. _Id._ at 1174.
142. _Id._ at 1173.
143. _Id._ at 1174.
145. _Id._ at 618, 622, 629, 753 A.2d at 566–67, 569, 573. The _Charity_ court also analyzed the officer’s state of mind and his intentions when considering whether his actions exceeded the scope of the stop. _Id._ at 622–23, 753 A.2d at 569.
unreasonably attenuated.\footnote{146} It reasoned that if the only limit placed on the officer was time, he could justify any conduct imaginable so long as he did so within the timeframe of a typical traffic stop, and thus the Fourth Amendment would have no limits.\footnote{147} Therefore, the Charity court looked closely at the officer’s actions, including the questions he asked to the motorist,\footnote{148} to determine whether they were outside the scope of the stop.\footnote{149}

2. \textit{The Permissible Duration of a Traffic Stop}

As established in \textit{Florida v. Royer}, in addition to limits on the nature of the officer’s conduct, the duration of a traffic stop must also be constrained to satisfy the scope restrictions.\footnote{150} After \textit{Royer}, however, in \textit{United States v. Sharpe},\footnote{151} the Supreme Court rejected an absolute time limit for traffic stops. In \textit{Sharpe}, an officer for the Drug Enforcement Agency (DEA) on patrol in an area suspected of drug activity became suspicious of a Pontiac and a pick-up truck, driving in tandem on the highway.\footnote{152} While the DEA agent pulled over the Pontiac, he radioed to another police officer to pull over the pick-up truck.\footnote{153} The officer detained the driver of the pick-up truck for twenty minutes while awaiting the arrival of the DEA agent.\footnote{154}

The \textit{Sharpe} Court considered whether the twenty-minute seizure of the driver of the pick-up truck exceeded the permissible duration.\footnote{155} The Court explained that although time itself is a factor when evaluating the reasonableness of the duration of the detention, the focus should be on whether the purpose of the stop is complete and if the officer acted diligently in completing that purpose.\footnote{156} The Court in \textit{Sharpe} observed, however, that when evaluating diligence, a court should not engage in second-guessing, but should instead consider

\footnote{146} \textit{Id.} at 614–15, 753 A.2d at 565.
\footnote{147} \textit{Id.} at 615–16, 753 A.2d at 565–66.
\footnote{148} The Charity court maintained that the officer’s questions had nothing to do with enforcing the speed limit, but rather were asked to justify a narcotics investigation. \textit{Id.} at 622, 753 A.2d at 569.
\footnote{149} \textit{See id.} at 622–23, 753 A.2d at 569 (stating that the officer’s questions had nothing to do with the purpose of the stop).
\footnote{150} 460 U.S. 491, 500 (1983).
\footnote{151} 470 U.S. 675 (1985).
\footnote{152} \textit{Id.} at 677.
\footnote{153} \textit{Id.} at 677–78.
\footnote{154} \textit{Id.} at 678–79.
\footnote{155} \textit{Id.} at 683.
\footnote{156} \textit{Id.} at 686. Justice Brennan wrote a strong dissent decrying the outward expansion of the brevity requirement for law enforcement needs, and insisting that the threshold consideration must be the intrusiveness of the length of the stop. \textit{See id.} at 703–04 (Brennan, J., dissenting).
whether an officer acted unreasonably in failing to pursue alternative, less intrusive means. The Court found that the DEA agent was diligent, as he did not unreasonably fail to pursue less intrusive means; he called other officers for assistance and proceeded to the pick-up truck as expeditiously as possible—any extra delay was due almost entirely to the evasive actions of the defendant. Additionally, the Court explained that it was reasonable for the officer to hold the defendant, rather than release him before the arrival and consent of the DEA agent. Therefore, the Sharpe Court held that the duration of the stop was reasonable with regards to the scope limitation.

Maryland courts have followed Sharpe by evaluating the diligence of an officer with respect to the durational limits of the stop. Specifically, Maryland courts determine whether the officer acted diligently through the point at which the initial purpose of the stop concluded. In Wilkes v. State, the Court of Appeals emphasized the importance of analyzing the reasonable duration of each stop on a case-by-case basis. In Wilkes, an officer stopped a car for speeding and while awaiting the results of a license, registration, and warrant check, asked the driver background questions and conducted a canine sniff of the vehicle. The sniff of the vehicle occurred within five minutes of when the officer initially stopped the vehicle and resulted in the discovery of drugs. The court affirmed the introduction of evidence that resulted in the defendant's conviction, reasoning that the officer did not delay the traffic stop to pursue the investigatory canine search, but rather the search was complete before the officer received the results of the license and registration checks.

157. Id. at 687 (majority opinion).
158. Id. at 687–88. The fact that the defendant was the primary cause for the delay may have been determinative in the Court's holding. See, e.g., United States v. Shareef, 100 F.3d 1491, 1503 (10th Cir. 1996) (applying the exclusionary rule when a dispatcher's error resulted in a Fourth Amendment violation).
159. Sharpe, 470 U.S. at 687 n.5.
160. Id. at 688.
163. Id. at 576, 774 A.2d at 433; see also Charity, 132 Md. App. at 617, 753 A.2d at 566 (requiring a case-by-case analysis of a traffic stop for Fourth Amendment purposes).
164. Wilkes, 364 Md. at 570, 572, 774 A.2d at 429, 431.
165. Id. at 573, 576, 774 A.2d at 431, 433.
166. Id. at 569, 582, 774 A.2d at 429, 437; cf. Charity, 132 Md. App. at 620–21, 753 A.2d at 568 (holding that an officer who continued to investigate a vehicle for two hours before issuing a traffic citation impermissibly delayed the termination of the stop to investigate matters unrelated to the traffic infraction).
The Wilkes court focused on the fact that the officer acted diligently to complete the stop, and his investigatory measures did not prolong the stop more than necessary to issue a traffic citation.\textsuperscript{167} Thus, the court held that the stop was in accordance with the scope limitations of the Fourth Amendment.\textsuperscript{168}

Although Sharpe stated that the focus of the duration inquiry should be the officer's diligence in completing the purpose of the stop, it also acknowledged that time itself is an important factor.\textsuperscript{169} As such, to effectively evaluate an officer's diligence in completing the purpose of the stop, Maryland courts also focus on the time an average traffic stop should take.\textsuperscript{170} For example, in Pryor v. State,\textsuperscript{171} the Court of Special Appeals held a traffic stop to be unreasonable in duration because it took longer than necessary for the officer to check the status of the driver's license and registration and to issue a citation. Because the officer continued to detain the driver for twenty-five minutes while awaiting the arrival of a canine unit, the court held that the stop violated the Fourth Amendment.\textsuperscript{172}

III. THE COURT'S REASONING

In Byndloss v. State, the Court of Appeals affirmed the judgment of the Court of Special Appeals and held that the thirty-minute detention of Byndloss, a car passenger, during a traffic stop was reasonable under the Fourth Amendment.\textsuperscript{173} The Byndloss court found that the length of the detention was reasonable because the officer exercised diligence in obtaining license, registration, and warrant information from the malfunctioning computer system, and the purpose of the initial stop was still ongoing when the canine sniff identified the presence of narcotics.\textsuperscript{174} Writing for the majority, Judge Cathell first acknowledged that the stop and detention of Byndloss was a seizure that implicated the protections of the Fourth Amendment.\textsuperscript{175} However, the court explained that because the initial stop was undisputedly

\begin{itemize}
\item\textsuperscript{167} Wilkes, 364 Md. at 577, 582, 774 A.2d at 434, 437.
\item\textsuperscript{168} Id. at 576–77, 774 A.2d at 433–34.
\item\textsuperscript{169} United States v. Sharpe, 470 U.S. 675, 685–86 (1985).
\item\textsuperscript{170} See, e.g., Carter v. State, 143 Md. App. 670, 692, 795 A.2d 790, 803 (2002) (analyzing the reasonable time a traffic stop should take); Wilkes, 364 Md. at 575, 774 A.2d at 432–33 (noting that a factor to consider is how long a traffic stop lasts).
\item\textsuperscript{171} 122 Md. App. 671, 716 A.2d at 338 (1998).
\item\textsuperscript{172} Id. at 678, 716 A.2d at 342.
\item\textsuperscript{173} Byndloss, 391 Md. at 478–79, 893 A.2d at 1129–30.
\item\textsuperscript{174} Id. at 479, 893 A.2d 1129–30.
\item\textsuperscript{175} Id. at 479–80, 893 A.2d at 1130.
\end{itemize}
valid, the crux of the case rested upon whether the prolonged detention of Byndloss was unreasonable, thereby tainting the subsequent recovery of narcotics.

The court acknowledged the bright-line rule established in State v. Green that once the purpose of the initial stop is accomplished, a continued detention amounts to a second detention that is impermissible unless the person consents or the officer has reasonable articulable suspicion for the second seizure. However, the court explained that here, the purpose of the initial stop was not completed when the canine unit arrived and discovered narcotics, and thus a second stop never ensued. Therefore, the court found it unnecessary to consider whether independent justification—such as consent or reasonable articulable suspicion—existed to validate a second detention.

In reaching its conclusion that there was not a second detention, the court acknowledged the Supreme Court's refusal to impose rigid time limits on traffic stops. The court observed that while time is one factor to consider, courts should focus on whether the police diligently pursued their investigation. Relying on Wilkes v. State, the court deemed it reasonable for an officer to conduct license, registration, and warrant checks while issuing a traffic citation. The court further explained that although there was a delay in processing the checks, the computer malfunction was the cause of the delay, not Sergeant Hughes. Rather, the majority found, Sergeant Hughes was diligent in communicating with the police barracks and he did not purposely prolong the stop to accommodate the arrival of the canine unit. Therefore, the court held that the canine search was permissi-

176. Id. at 481, 893 A.2d at 1130. The court explained that Sergeant Hughes had probable cause to stop the vehicle due to the plastic license plate cover. Id.
177. Id. at 482, 893 A.2d at 1131.
178. Id. at 483, 893 A.2d at 1132 (quoting State v. Green, 375 Md. 595, 610, 826 A.2d 486, 495 (2003)).
179. Id. at 484, 893 A.2d at 1132.
180. Id. at 478 & n.14, 893 A.2d at 1129 & n.14.
181. Id. at 484, 893 A.2d at 1132.
182. Id. at 485, 893 A.2d at 1133. The Byndloss court emphasized that courts should explore whether the officer unreasonably failed to recognize or pursue less intrusive means, rather than simply point out the existence of alternative or less intrusive means to conducting a detention. Id. at 484, 893 A.2d at 1133.
184. Id. at 489, 893 A.2d at 1136.
185. Id. at 491–92, 893 A.2d at 1136–37.
ble because it occurred while Sergeant Hughes diligently pursued the initial traffic stop.\textsuperscript{186}

Chief Judge Bell, in a dissent joined by Judge Greene, argued that the prolonged seizure was unreasonable and violated Byndloss's Fourth Amendment rights because Sergeant Hughes lacked both diligence and a reasonable suspicion in conducting the stop.\textsuperscript{187} Chief Judge Bell maintained that according to case law, Byndloss was detained longer than it should reasonably take an officer to check the license, registration, and warrant information.\textsuperscript{188} Further, the dissent emphasized that such checks are not even required when the computer system is down.\textsuperscript{189} Criticizing the majority for misinterpreting precedent, Chief Judge Bell contended that the court's decision jeopardizes the balance of an individual's right to privacy with the state's legitimate interests by validating delay as a technique to turn traffic stops into drug investigations absent justification.\textsuperscript{190} He concluded that Sergeant Hughes expanded the scope of the stop in time and manner, and did not have sufficient reasonable articulable suspicion to justify a second stop.\textsuperscript{191} Thus, the dissent would have held that the prolonged detention was unreasonable, and thus the narcotics that were discovered should have been suppressed.\textsuperscript{192}

IV. Analysis

In Byndloss v. State, the Court of Appeals held that the prolonged detention of a passenger in a vehicle stopped for a traffic violation was reasonable because the officer acted diligently in completing the purpose of the stop despite a computer malfunction.\textsuperscript{193} In its analysis of the permissible scope of a traffic stop, the court departed from precedent in two ways. First, the court neglected to consider whether the officer's actions during the course of the stop were reasonably related

\textsuperscript{186} Id. at 492, 893 A.2d at 1137.
\textsuperscript{187} Id. at 493, 893 A.2d at 1138 (Bell, C.J., dissenting).
\textsuperscript{188} Id. at 495, 497, 893 A.2d at 1139–40.
\textsuperscript{189} Id. at 497, 893 A.2d at 1140.
\textsuperscript{190} Id. at 502–03, 893 A.2d at 1143–44.
\textsuperscript{191} Id. at 493, 501, 893 A.2d at 1138, 1143.
\textsuperscript{192} Id. at 504, 893 A.2d at 1144.
\textsuperscript{193} Id. at 469, 479, 893 A.2d at 1123, 1129–30 (majority opinion). There was no dispute that the initial traffic stop was valid, as Sergeant Hughes had probable cause to believe that Malone, the driver, committed a traffic infraction. Id. at 481, 893 A.2d at 1130; see also Delaware v. Prouse, 440 U.S. 648, 655 (1979) (noting that an officer may validly detain a driver if he has probable cause); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (acknowledging that an officer, short of probable cause, may still be justified in detaining a driver).
to the circumstances initially justifying the detention. Second, the majority mischaracterized the duration of the stop by failing to consider whether the officer deliberately caused a delay by his actions. In misevaluating the permissible scope of a traffic stop, the court failed to identify the completion of the first stop and the initiation of a second detention requiring independent justification. As a result, the court set a confusing precedent and reduced an individual's right to privacy and freedom from unreasonable searches and seizures while unconstitutionally broadening the state's interests in law enforcement.

A. The Court Failed to Analyze Whether the Officer's Actions Were Within the Scope of the Traffic Stop

The Byndloss court disregarded an essential element in its purported effort to apply Terry v. Ohio. The court solely analyzed scope by looking at whether the officer's actions delayed the completion of the stop. Rather, the court should have considered whether the officer's actions altered or departed from the nature of the stop at any point during the detention. If the court had properly analyzed this element of the scope prong, it would have found that Sergeant Hughes's questions were unrelated to the scope of the stop and therefore prohibited by the Fourth Amendment.

The Byndloss court should have analyzed the actions of Sergeant Hughes as mandated by the Supreme Court in Florida v. Royer. In

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194. See infra Part IV.A.
195. See infra Part IV.B.
196. See infra Part IV.C.
197. See infra Part IV.C.
198. See People v. Gonzalez, 789 N.E.2d 260, 268–69 (Ill. 2003) (refusing to disregard the scope requirement as other courts have inappropriately done).
199. Compare United States v. Sharpe, 470 U.S. 675, 682, 685 (1985) (eliminating the bright-line test for duration, but continuing to require that an officer's actions be narrowly tied to the purposes of the stop), with Byndloss, 391 Md. at 489, 893 A.2d at 1135 (concluding that the scope of the stop was sufficiently related to the initial intrusion because the purpose of the stop was not yet fulfilled).
200. See, e.g., United States v. Pruitt, 174 F.3d 1215, 1221 (11th Cir. 1999) (finding that an officer's questions departed from the purpose of the stop, which was based on a traffic infraction); Gonzalez, 789 N.E.2d at 270 (evaluating an officer's actions and the questions he asked in determining whether he exceeded the scope of a traffic stop).
201. Cf. John F. Decker et al., Curbing Aggressive Police Tactics During Routine Traffic Stops in Illinois, 36 Loy. U. Chi. L.J. 819, 863–64 (2005) (explaining that in recent decisions, Illinois appellate courts have narrowly construed questions asked during traffic stops and found many of them to alter, and thus prolong the nature of the stop).
202. Compare Byndloss, 391 Md. at 489, 893 A.2d at 1135 (focusing on the duration of the stop), with Florida v. Royer, 460 U.S. 491, 504–06 (1983) (examining each action of the officer to determine if the officer exceeded the scope of the stop at any point).
Royer, the Court required that all aspects of the stop be reasonably related to its underlying justification, analyzing each of the officer's actions to determine whether he exceeded the justifiable scope. In Byndloss, on the other hand, the court only required that the officer's conduct not delay the completion of the stop. Thus, it ignored the officer's conduct throughout the thirty-minute detention, relying on the fact that the computer malfunction caused the delayed issuance of the citation.

The Byndloss court failed to recognize that scope, as explained in Royer, pertains to not only the length of the detention, but also the questioning that occurs throughout the stop. The Supreme Court in Royer specifically identified the officer's actions and the duration of the stop as two separate elements of the scope prong. Instead of applying Royer, the Byndloss court inappropriately relied on the Fifth Circuit's decision in Shabazz for the proposition that the scope of the stop is reasonable so long as the police investigative tactic occurs before the purpose of the stop is complete.

In Byndloss, the Court of Appeals adopted the flawed reasoning of United States v. Shabazz. Shabazz relied upon a statement in Florida v. Bostick that "mere police questioning does not constitute a seizure." However, Shabazz misinterpreted this statement to mean that police questioning someone detained during a traffic stop is reasonable because it is even less intrusive than questioning a random

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203. 460 U.S. at 494-95, 500.
204. Byndloss, 391 Md. at 489, 893 A.2d at 1135.
205. For example, the court relied upon United States v. Shabazz for the notion that because the investigation occurred while the officer awaited the results of the computer check, it was permissible police procedure. Byndloss, 391 Md. at 486-87 n.20, 893 A.2d at 1133-34 n.20.
206. See Royer, 460 U.S. at 500 (considering an officer's actions in addition to the duration of the stop). In discussing these requirements, the Royer Court separated scope and detention, stating that the detention must be temporary and that the investigative methods must be the "least intrusive means . . . to verify or dispel the officer's suspicion." Id. The Court continued to say that the prosecution bears the burden to establish that the stop was "limited in scope and duration." Id.
207. Amy L. Vazquez, Comment, "Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" What Questions Can a Police Officer Ask During a Traffic Stop?, 76 Tul. L. Rev. 211, 226 (2001).
208. See Byndloss, 391 Md. at 486-87 n.20, 893 A.2d at 1133-34 n.20 (discussing the Shabazz holding).
209. Id. But see, e.g., United States v. Holt, 264 F.3d 1215, 1229 (10th Cir. 2001) (finding the reasoning employed by the Shabazz court "unpersuasive"); People v. Gonzalez, 789 N.E.2d 260, 268-69 (Ill. 2003) (disagreeing with the holding in Shabazz).
211. Id. at 434.
pedestrian who is not considered “seized.”\textsuperscript{212} However, the Supreme Court in \textit{Bostick}—which analyzed whether the police could board a bus and randomly ask questions to the passengers—did not attempt to answer the question posed by \textit{Shabazz}: whether police questioning that is unrelated to the purpose of a traffic stop constitutes a violation of the scope limitations of the Fourth Amendment.\textsuperscript{213} \textit{Bostick} does not control the issue of permissible police questioning of a seizure that is already taking place, but rather applies to the questioning of a person not already detained.\textsuperscript{214} Thus, because traffic stops are custodial encounters, the scope of the stop must adhere to the limitations imposed by \textit{Terry} and \textit{Royer}.\textsuperscript{215} 

Although the Court of Appeals of Maryland has never directly ruled on the permissibility of unrelated questions during the traffic stop, applying the \textit{Shabazz} standard disposes of an essential element of \textit{Terry}'s scope prong.\textsuperscript{216} The court in \textit{Byndloss} should have considered persuasive authority interpreting \textit{Royer} as requiring analysis of both the duration of the stop and the permissibility of the officer's actions.\textsuperscript{217} Specifically, the \textit{Byndloss} court should have followed the Court of Special Appeals's approach in \textit{Charity v. State}.\textsuperscript{218} The \textit{Charity} court aptly cautioned that without any restraints, a creative officer could always find a reason to delay a stop and incorporate unrelated investigative conduct before the stop is complete.\textsuperscript{219} Thus, the court

\begin{footnotes}
\item[212] See United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993). But see Holt, 264 F.3d at 1229 (discrediting the reasoning in \textit{Shabazz}).
\item[213] See \textit{Bostick}, 501 U.S. at 435–36 (determining whether an officer’s questions to passengers aboard a bus constitute a seizure); see also Holt, 264 F.3d at 1229 (stating that the Supreme Court in \textit{Bostick} did not rule on the permissibility of police questions during an already valid seizure); Mitchell v. United States, 746 A.2d 877, 889 (D.C. 2000) (noting that \textit{Bostick} did not address the constitutionality of questions asked by an officer during a non-consensual traffic stop). But see United States v. Childs, 277 F.3d 947, 951 (7th Cir. 2002) (agreeing with the reasoning of \textit{Shabazz}, and interpreting \textit{Bostick} to permit questions during the course of a traffic stop).
\item[214] \textit{Bostick}, 501 U.S. at 435–36; Holt, 264 F.3d at 1229; Mitchell, 746 A.2d at 889.
\item[215] See, e.g., Holt, 264 F.3d at 1229–30 (recognizing that the Supreme Court’s framework in \textit{Terry} and \textit{Royer} applies to traffic stops).
\item[216] See \textit{Byndloss}, 391 Md. at 486–87 n.20, 893 A.2d at 1133–34 n.20 (applying the \textit{Shabazz} standard); see also Holt, 264 F.3d at 1228 (explaining that to follow \textit{Shabazz} would mean to abandon the “scope” limitations of \textit{Terry}).
\item[217] See supra note 134 and accompanying text; see also Florida v. Royer, 460 U.S. 491, 500 (1983) (emphasizing that the prosecution bears the burden of proving a short duration and limited intrusiveness).
\item[219] Id.
\end{footnotes}
in Charity properly limited police actions that deviate from the purpose of the traffic stop.\footnote{220} If the Byndloss court had appropriately followed Royer's interpretation of the scope prong of Terry, it would have limited Sergeant Hughes’s questions to only those related to the original purpose of the stop: an obstructed license plate.\footnote{221} In United States v. Murillo, the Ninth Circuit held the exact same questions that Sergeant Hughes asked regarding alcohol, weapons, and drugs to be outside the scope of the traffic stop.\footnote{222} Likewise, the Byndloss court should have held that Sergeant Hughes’s questions regarding Malone’s possession of luggage, contraband, guns, and money were unrelated in scope to the traffic infraction and thus required independent justification to be permissible.\footnote{223} However, in failing to find that Sergeant Hughes’s actions exceeded the scope limits of the traffic stop, the Byndloss court never considered whether Sergeant Hughes had justification to permissibly broaden the scope of the stop.\footnote{224}

B. The Court’s Analysis of the Duration of the Stop Mischaracterized the Sergeant’s Actions as Diligent

Just as the nature of the officer’s actions can violate the Fourth Amendment, so too can an excessively long seizure. In addition to ignoring the nature of Sergeant Hughes’s actions and instead focusing solely on the length of the stop, the court’s evaluation of the duration was flawed.\footnote{225} The Byndloss court mischaracterized Sergeant Hughes’s actions as diligent rather than deliberately delayed.\footnote{226} While noting that it should analyze the diligence of the officer, the court failed to fully explore Sergeant Hughes’s available alternatives,

\footnote{220. Id. at 629, 753 A.2d at 573; see also State v. Rankin, 92 P.3d 202, 207 (Wash. 2004) (en banc) (explaining that under the state constitution, an officer has exceeded the permissible scope and the seizure is unlawful if he asks a passenger for identification in order to conduct a criminal investigation); People v. McGraughran, 601 P.2d 207, 213 (Cal. 1979) (en banc) (holding that a warrant check was not reasonably related to the purpose of stop and therefore was unreasonable).

221. See supra notes 135–139 and accompanying text.

222. See 255 F.3d 1169, 1173–74 (9th Cir. 2001) (holding that questions regarding drugs and alcohol were impermissible unless the officer had reasonable suspicion that would enable him to broaden the scope of the traffic stop).

223. See id.; see also supra notes 141–143 and accompanying text.

224. See supra notes 179–180 and accompanying text.

225. See infra Parts IV.B.1–3.

226. See Byndloss, 391 Md. at 479, 893 A.2d at 1129 (finding that Sergeant Hughes "exercised reasonable diligence under the circumstances"); see also Whitehead v. State, 116 Md. App. 497, 506–07, 698 A.2d 1115, 1119–20 (1997) (refusing to affirm the lower court’s decision that a stop was valid because, in part, the officer did not pursue the traffic stop diligently).}
disregarded an analysis of the surrounding circumstances, and neglected to consider the typical time that a traffic stop takes.

1. An Incomplete Evaluation of the Alternatives

The Byndloss court neglected to analyze whether Sergeant Hughes acted unreasonably in failing to take other actions to prevent the prolonged detention. The court conceded that although it should not indulge in unrealistic second-guessing of the Sergeant’s actions, it should consider whether the officer acted unreasonably in failing to recognize or pursue alternative methods to expedite the stop. Despite recognizing this standard, however, the court failed to actually implement it. In doing so, the court ignored the Supreme Court’s decision in United States v. Sharpe, which considered the diligence of the detaining officer who held a driver for fifteen minutes while awaiting the arrival of an investigating DEA agent. In evaluating alternatives, the Sharpe Court examined whether it was unreasonable that the officer did not release the driver before the delayed arrival and consent of the DEA agent.

In contrast to Sharpe, however, the Byndloss court failed to address a similar available alternative: whether Sergeant Hughes should have ended the stop after writing the warning, and allowed Malone and Byndloss to leave. While license, registration, warrant, and criminal history checks are permissible, there is no statutory or agency requirement that a police officer conduct such checks during the course of a traffic stop, let alone that the officer wait for the results of such checks when the computer systems are not working properly. If the

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227. Byndloss, 391 Md. at 484, 893 A.2d at 1132-33.
228. See id. 491–92, 893 A.2d at 1157 (dismissing quickly Byndloss’s argument that Sergeant Hughes should have called other barracks to inquire about the records check).
229. See United States v. Sharpe, 470 U.S. 675, 687–88 & n.5 (1985) (analyzing the reasonableness of available alternatives). Similarly, in United States v. Alpert, the Fourth Circuit analyzed alternatives. See 816 F.2d 958, 963 (4th Cir. 1987) (exploring whether it was unreasonable that an officer failed to pursue two potentially faster alternatives when he conducted a canine scan).
230. Sharpe, 470 U.S. at 687 n.5. The Sharpe Court concluded, however, that it was not unreasonable for the officer to detain the driver while waiting for the DEA agent to arrive, and additionally, that the delayed arrival was mostly attributable to the actions of the driver. Id. at 687–88 & n.5.
231. See Byndloss, 391 Md. at 487, 893 A.2d at 1135 (noting that Sergeant Hughes was informed that the Waterloo barrack was experiencing delays).
court had considered this point, it could have found that Sergeant Hughes's decision to wait for the results, rather than conclude the stop, was unreasonable because he did not know how long the delay would be given that the system was down. Alternatively, the court could have found that although the decision to wait for the results was unreasonable, Sergeant Hughes had sufficient independent justification, such as reasonable articulable suspicion or consent, to permissibly prolong the stop into a second detention. However, the Byndloss court neglected to analyze either of these possibilities.

The Byndloss court also failed to evaluate whether it was unreasonable that Sergeant Hughes did not contact any other barracks for assistance with the computer search. During the stop, Sergeant Hughes learned that the Waterloo barrack was experiencing delays and was not told when he would receive results. The court should have assessed Sergeant Hughes's reasons for not calling another barrack that may have had immediate access to its computers, and whether failing to act on that alternative was unreasonable.

Additionally, the Byndloss court neglected to consider whether it was unreasonable that Sergeant Hughes did not cancel the criminal history check when he realized that the system was significantly

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234. See, e.g., United States v. Shareef, 100 F.3d 1491, 1503 (10th Cir. 1996) (applying the exclusionary rule when the dispatcher's error resulted in a Fourth Amendment violation); United States v. Gonzalez, 753 F.2d 1127, 1130 (10th Cir. 1985) (pointing out that officers have instant access to computer checks when discussing their reasonable use during traffic stops); People v. Cobb, 690 P.2d 848, 852-53 (Colo. 1984) (en banc) (remanding for determination as to whether the prolonged detention was due to awaiting the results of the warrant check, or if the detention was prolonged only to obtain identification). Of additional importance in Byndloss is that the dispatcher never sent Sergeant Hughes the results of Malone's license, registration, warrant, or criminal history check. 391 Md. at 487-88, 893 A.2d at 1135.

235. See, e.g., State v. Ofori, 170 Md. App. 211, 244-45, 906 A.2d 1089, 1108 (2006) (holding that even though the prolonged traffic stop on its own violated the duration limits of the scope prong, it was permissible because the officer developed reasonable articulable suspicion to await the arrival of the canine unit).

236. See supra notes 179-180 and accompanying text.

237. See Byndloss, 391 Md. at 491-92, 893 A.2d at 1137 (addressing whether Sergeant Hughes should have called another barrack when he first stopped the vehicle but not analyzing whether it was unreasonable that he did not call another barrack at any point during the thirty-minute seizure).

238. Id. at 487, 893 A.2d at 1135.

239. See id. at 491-92, 893 A.2d at 1137 (maintaining that Sergeant Hughes was diligent because he called the Waterloo barrack twice to check on the status of the requested information, but failing to address whether Sergeant Hughes should have pursued alternative measures).
delayed, as it was possible that the criminal history check was a further cause of that delay.\textsuperscript{240} Although most courts have found that a criminal history check is an acceptable element of a traffic stop, they acknowledge that it has the potential to cause additional and inexcusable delay.\textsuperscript{241} For example, in United States v. Purcell,\textsuperscript{242} the Eleventh Circuit discussed the permissibility of conducting a criminal history check on the detained driver of a traffic violation.\textsuperscript{243} Refusing to create a bright-line rule, the court held the stop permissible under the circumstances, finding that the check did not add an additional amount of time to the simultaneously requested license and registration checks.\textsuperscript{244} The Eleventh Circuit’s decision in Purcell is not directly applicable to the facts in Byndloss;\textsuperscript{245} nevertheless, in failing to address the question, the court ignored a possible alternative available to Sergeant Hughes: the option of canceling the criminal history request in order to accelerate the stop.\textsuperscript{246} Thus, the court did not fully analyze whether it was unreasonable for Sergeant Hughes to disregard these alternatives.

2. A Failure to Account for the Surrounding Circumstances

The Byndloss court disregarded the surrounding circumstances when analyzing Sergeant Hughes’s diligence. Although Whren v. United States clarified that a police officer's subjective intent in stopping a vehicle is not relevant as to the permissibility of the initial stop,\textsuperscript{247} intent should nevertheless be considered when determining

\textsuperscript{240} See, e.g., United States v. Finke, 85 F.3d 1275, 1280 (7th Cir. 1996) (noting that the results of criminal history checks normally take longer than the results of license and warrant checks); see also supra note 235 and accompanying text.


\textsuperscript{242} 236 F.3d 1274 (11th Cir. 2001).

\textsuperscript{243} Id. at 1277.

\textsuperscript{244} Id. at 1279; see also Finke, 85 F.3d 1275, 1280 (7th Cir. 1996) (explaining that there may be circumstances where a criminal history request impermissibly delays the traffic stop).

\textsuperscript{245} The holding in Purcell is not directly applicable to Byndloss because in Byndloss, the results of the criminal history check were never reported, rendering the court unable to discern whether the criminal history check was the cause of an additional delay. See Byndloss, 391 Md. at 473, 893 A.2d at 1126 (noting that the dispatcher never returned the results of the requested checks).

\textsuperscript{246} Cf. id. at 489–90, 893 A.2d at 1136 (noting that license, registration, and warrant checks are an integral part of the police stop).

\textsuperscript{247} Whren v. United States, 517 U.S. 806, 813 (1996); see also Ohio v. Robinette, 519 U.S. 33, 38 (1996) (affirming Whren and stating that an officer's intentions are unimportant).
an officer's diligence throughout the stop.\textsuperscript{248} First, the court failed to account for Sergeant Hughes's repeated assertions of Malone's nervousness and his decision to call for the canine unit after initially talking to her and suspecting her anxiety.\textsuperscript{249} Rather, the court should have weighed more heavily the fact that the officer's suspicions may have wrongly influenced his actions, as the Court of Special Appeals recognized in \textit{Charity}.\textsuperscript{250} Second, the court discounted Sergeant Hughes's incentive to delay the stop to permit the lost canine unit to arrive.\textsuperscript{251} Third, the court ignored Sergeant Hughes's testimony that an officer's main objective is not only to conduct traffic enforcement, but also to intercept other criminal activity.\textsuperscript{252} Sergeant Hughes explained that to complete these objectives, he employs "aggressive, proactive traffic enforcement."\textsuperscript{253} The \textit{Byndloss} court, like \textit{Charity}, should have placed more emphasis on Sergeant Hughes's admittedly pretextual purpose.\textsuperscript{254} Fourth, the court overlooked the fact that the very first piece of information that the Waterloo barrack gave to Sergeant Hughes was \textit{Byndloss}'s criminal record—not a license or registration check.\textsuperscript{255}

While these factors could potentially show that Sergeant Hughes had reasonable articulable suspicion, the court chose not to focus on this possibility.\textsuperscript{256} Thus, because the court relied solely on the traffic infraction to substantiate the entire detention, the cumulative effect

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\textsuperscript{248} See, e.g., \textit{Whitehead} v. State, 116 Md. App. 497, 506-07, 698 A.2d 1115, 1120 (1997) (noting that \textit{Whren} did not intend for police officers to detain a driver on the pretext of conducting a traffic stop, while actually exploring unrelated activities to justify a further and independent investigation of criminal wrongdoing).

\textsuperscript{249} Cf. \textit{Byndloss}, 391 Md. at 470-71, 491-92, 893 A.2d at 1124-25, 1137 (describing how Malone's panicked response sparked Sergeant Hughes's suspicions).

\textsuperscript{250} See \textit{Charity} v. State, 132 Md. App. 598, 618, 753 A.2d 556, 567 (2000) (holding that an officer was not diligent because his total focus shifted from the traffic infraction when he smelled and saw air fresheners and became concerned with investigating potential drug activity).

\textsuperscript{251} \textit{See Byndloss}, 391 Md. at 473, 893 A.2d at 1126 (noting that due to the delay in receiving the license, registration, and warrant information, the canine team was able to arrive and conduct a scan of the vehicle). While a canine search is valid if conducted during a permissible seizure, it may be impermissible if the officer intentionally delays the completion of the seizure to allow the canine unit to arrive. \textit{See supra} notes 120-123 and accompanying text; cf. \textit{State v. Ofori}, 170 Md. App. 211, 243-45, 906 A.2d 1089, 1107-08 (2006) (noting that an officer's clear incentive to delay a stop while awaiting the arrival of a canine unit affects the analysis of his diligence).

\textsuperscript{252} \textit{Byndloss}, 391 Md. at 468 n.6, 893 A.2d at 1123 n.6.

\textsuperscript{253} \textit{Id}.

\textsuperscript{254} \textit{See Charity}, 132 Md. App. at 609-10, 753 A.2d at 562 (noting that the detaining officer was assigned the special task of drug interdiction and was not a "highway patrolman with any apparent interest in enforcing the traffic regulations \textit{per se}).

\textsuperscript{255} \textit{Id} at 472-73, 893 A.2d at 1125-26.

\textsuperscript{256} \textit{See supra} notes 179-180 and accompanying text.
of these factors should be evaluated. If the court had considered the totality of the surrounding circumstances when determining Sergeant Hughes’s diligence, it would have likely reached a different result.

3. A Disregard of the Time a Traffic Stop Should Take

While case law indicates that a traffic stop ends when its purpose is complete, courts also analyze whether the officer’s actions in completing that purpose were reasonable in duration. The Byndloss court, however, failed to consider that the total duration of the stop was longer than it should reasonably have taken. By ignoring this consideration, the Byndloss court allowed Sergeant Hughes to pursue an unrelated investigative activity—in particular, a canine search—because it occurred before he formally completed the purpose of the stop.

Byndloss should have followed the analysis in cases such as Carter v. State, Pryor, and Wilkes. For example in Carter, the Court of Special Appeals analyzed the reasonableness of a canine sniff that occurred during a traffic stop and stated that once the reasonable time for processing a traffic charge expires, the stop must end. The court reasoned that while a canine sniff is valuable, it should not be permitted solely because the officer found a way to delay the issuance of the traffic citation, thereby conducting the scan before the formal termination of the traffic stop. Similarly, in Pryor, the Court of Special Appeals held that a traffic stop exceeded the reasonable time it should take an officer to issue a citation, and thus the stop terminated before the actual issuance of the citation. The Byndloss court’s opinion was also inconsistent with its own previous comments in Wilkes, where it stated that a canine scan may be unreasonable if it occurs while waiting for warrant information that is taking an excessively long time.

257. See supra note 170 and accompanying text; see also Berkner v. McCarty, 468 U.S. 420, 437 (1984) (noting that a motorist expects a traffic stop to last only a few minutes).
258. Compare Byndloss, 391 Md. at 489, 893 A.2d at 1135–36 (refusing to give weight to the amount of time a typical traffic stop should take because the thirty-minute delay was caused by technical difficulties), with supra note 170 (presenting cases that held detentions invalid because they exceeded the reasonable time a traffic stop should take).
259. See Byndloss, 391 Md. at 491, 893 A.2d at 1136–37 (noting that the initial reason for the search was ongoing when the canine scan took place).
261. Id. at 692–93, 795 A.2d at 802–03.
262. Id. at 692, 795 A.2d at 803.
In dismissing the reasoning of *Carter*, *Pryor*, and *Wilkes*, the *Byndloss* court did not apportion weight to the fact that the stop took longer than a reasonable traffic stop. If it had, the court would have recognized that an officer is usually able to complete license and registration checks within a few minutes of the initial detention.\(^{265}\) Thus, it would have found that the initial stop ended and a second detention began when a typical traffic stop ends—approximately when Sergeant Hughes completed the writing of the citation.\(^{266}\) Specifically, the *Byndloss* court would have found the scan impermissible, even though it occurred while waiting for the results, because the checks took an unreasonable period of time.\(^{267}\)

4. The Court Failed to Identify the Initiation of a Second Detention

By improperly holding that the officer’s actions and the duration of the stop did not violate the scope limits of the Fourth Amendment,\(^{268}\) the court in *Byndloss* failed to identify that there were two separate stops.\(^{269}\) If the court had correctly analyzed the scope limits imposed on traffic stops, it would have found that the excessive nature of both the officer’s actions and the duration initiated a second detention.\(^{270}\) In overlooking the second detention, as it previously explained in *Snow v. State*, the *Byndloss* court neglected to evaluate whether the officer had independent justification to permissibly expand the scope of the initial detention into a second detention.\(^{271}\)

Although the *Byndloss* court may have found that Sergeant Hughes had sufficient independent justification to expand the scope of the stop,\(^{272}\) by setting a precedent that allows courts to avoid this

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265. See, e.g., United States v. Sharpe, 470 U.S. 675, 697 (1985) (Marshall, J., concurring) (agreeing that *Terry*'s brevity requirement cannot be judged by a “stopwatch,” but acknowledging that the amount of time it takes to stop a person, ask questions, or check identification is typically a few minutes); United States v. Gonzalez, 763 F.2d 1127, 1130 (10th Cir. 1985) (noting that an officer can issue a ticket and obtain all necessary information within minutes when using modern technology); *Wilkes*, 364 Md. at 579, 774 A.2d at 435 (explaining that modern technology enables officers to quickly access information).

266. *Byndloss*, 391 Md. at 497, 893 A.2d at 1140 (Bell, C.J., dissenting).

267. *See supra* note 264 and accompanying text.

268. *See supra* Parts IV.A-B.

269. *See* *Byndloss*, 391 Md. at 483–84, 893 A.2d at 1132 (holding that there was only one stop).

270. *See supra* note 100 and accompanying text (explaining that either the officer’s actions or the duration can initiate a second detention).

271. *See* *Snow v. State*, 84 Md. App. 243, 267, 578 A.2d 816, 827–28 (1990) (evaluating the permissibility of the second detention by determining whether an officer had independent justification, such as reasonable articulable suspicion).

272. Compare *Byndloss*, 391 Md. at 478 n.14, 893 A.2d at 1129 n.14 (declining to analyze reasonable articulable suspicion), *with* United States v. Murillo, 255 F.3d 1169, 1174 (9th
evaluation entirely, the court unreasonably expanded police power. In essence, Byndloss validated a traffic stop in which an officer can investigate other criminal activity and delay the completion of the stop while waiting for a canine unit. In condoning this behavior, and admitting the seized drugs, the Court of Appeals lost sight of the constitutional purpose of the exclusionary rule—to limit extreme police intrusiveness and protect a citizen’s interest in privacy.

V. Conclusion

The Court of Appeals in Byndloss v. State found that an unreasonably long traffic stop was nevertheless permissible because the officer was diligently awaiting the license, registration, warrant, and criminal history checks. However, the court misinterpreted the scope limitations of a traffic stop by failing to evaluate the nature of the officer’s actions and improperly characterizing the duration of the stop as reasonable. In doing so, the court mistakenly held that the initial stop was ongoing when the canine unit arrived, thereby overlooking the initiation of a second detention requiring independent justification. As a result, the court’s decision sets a confusing precedent for lower courts, encourages police officers to use delay tactics to support other investigative desires, and erodes the constitutionally protected rights of individuals to be free from unreasonable searches and seizures.

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Cir. 2001) (holding that because an officer had reasonable articulable suspicion, the excessive scope of the traffic stop was permissible).

273. See, e.g., United States v. Childs, 277 F.3d 947, 954 (7th Cir. 2002) (Cudahy, J., concurring) (noting that in refusing to determine whether the officer had reasonable articulable suspicion, the majority permitted a range of questions that are not a per se violation of the scope limit).

274. See supra Parts IV.A–B.

275. See supra note 54 and accompanying text.


277. See supra Part IV.A.

278. See supra Part IV.B.

279. See supra Part IV.C.

280. See supra Part IV.C.
In Butler v. State, the Court of Appeals of Maryland held that a trial judge's statement to a deadlocked jury that one of the jurors might be violating his oath by not disclosing his general distrust of police was potentially coercive, and thus the defendants were potentially deprived of their constitutional right to a fair trial. The court's decision was justified because courts should avoid depriving individuals of their constitutional rights; the Butler court appropriately erred on the side of caution since it was possible that a deprivation took place. However, with its cursory review of the record in determining whether prejudice actually occurred, the court failed to recognize that its decision will impede judicial efficiency. A better approach, as demonstrated by precedent, would have been to (1) view the case by the totality of the circumstances to determine if prejudice occurred; and (2) accord the trial judge greater discretion when deciding what to do with a potentially untruthful juror. This approach would properly protect constitutional rights without causing judicial inefficiency.

I. The Case

In 2002, the Baltimore City Police Department conducted an undercover operation called "Red-E-Rock" to arrest low-level drug dealers. As part of the operation, police officers purchased drugs from dealers but delayed arresting them until a later date to allow the officers to make multiple purchases in the same locations. While undercover for Red-E-Rock, Detective Will Farrar met Donald Lowery, who claimed to possess a particular drug. Detective Farrar and Lowery...
tery then approached another individual, Anthony Butler, who sold Farrar a small amount of heroin.9

After leaving the scene, Detective Farrar provided to Detective David Clasing and Sergeant Mark Janicki a description of Lowery and Butler.10 Detective Clasing and Sergeant Janicki then went to the scene, found the two men, and asked them to produce photo identification.11 During this exchange, Detective Farrar drove by and positively the men.12 No arrests were made at that time.13 Subsequently, a grand jury issued indictments against Butler and Lowery (the defendants), the court issued warrants for their arrest, and the two men were arrested.14

The defendants’ trial commenced on July 1, 2003, in the Circuit Court for Baltimore City.15 Before jury selection, the trial judge asked the prospective jurors whether any of them would automatically believe or disbelieve a police officer strictly because of the officer’s occupation.16 No individual who became a juror responded that he or she had such a predisposition.17

Approximately four-and-a-half hours after the judge sent out the jury for deliberations, the jurors sent the judge a note saying that they “can’t agree or don’t agree” on a verdict.18 The judge asked the prosecution and defense counsel how they wished to proceed.19 Defense

9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 172–73, 896 A.2d at 361. Detective Farrar explained that no arrests were made at the time because after the police make the purchase and positively identify the dealers, the police need to prepare a case folder and reports. Id. at 173, 896 A.2d at 361. Then, after the project has ended, the police pass the case folders to the State’s Attorney’s office, where the cases are prepared for indictment. Id. Finally, the case is read before a grand jury, and if the grand jury finds sufficient evidence, it issues an indictment warrant. Id.
14. The grand jury issued the indictments on March 7, 2002, and the Circuit Court for Baltimore City issued the warrants on March 22, 2002. Id., 896 A.2d at 362. Lowery was arrested on June 6, 2002, and Butler was arrested on August 9, 2002. Id.
15. Id. at 174, 896 A.2d at 362.
16. Id. This process, known as voir dire, provides counsel and the court the opportunity to question prospective jurors to determine whether there is cause for disqualifying them. Dingle v. State, 361 Md. 1, 9, 759 A.2d 819, 823 (2000). It is one of the mechanisms that helps ensure a fair and impartial jury. Id.
17. Butler, 392 Md. at 174, 896 A.2d at 362. The State’s evidence included the substance allegedly purchased from the defendants, a copy of the money used to buy the drugs, and testimony from five witnesses, including four police officers and the police department’s chemical analyst. Id. At the close of the State’s case, the trial court denied the defendants’ motions for acquittal and the defense rested without calling any witnesses. Id.
18. Id.
19. Id. at 175, 896 A.2d at 362–63.
counsel requested a mistrial, while the State asked for an Allen charge.\textsuperscript{20} The judge agreed with defense counsel that an Allen charge was improper at that time.\textsuperscript{21} Given that it was 8:30 p.m., the judge thought that the jury was tired and an Allen charge would be coercive.\textsuperscript{22} The judge released the jury for the evening with instructions to resume deliberations the next day.\textsuperscript{23}

The next morning, the jury sent the judge a note requesting to see videotape of closing arguments.\textsuperscript{24} Defense counsel objected to this request.\textsuperscript{25} While the judge researched whether he should allow the jury to view the videotape, the jury sent him another note stating that one juror distrusted the police.\textsuperscript{26} After discussing the second note with the attorneys on both sides, the judge decided that a second viewing of the closing argument might "bring more harmony to the jury in a non-coercive manner."\textsuperscript{27} Thus, rather than giving the jury an Allen charge, the judge allowed the jurors to review the closing arguments.\textsuperscript{28}

Before sending the jury to watch video of closing arguments and continue deliberations, the judge addressed the jury, calling attention to the jury's note regarding one juror's distrust of police.\textsuperscript{29} The judge

\textsuperscript{20} Id., 896 A.2d at 363. An Allen charge is a controversial jury instruction given by a judge when the jury cannot reach a decision. Goodmuth v. State, 302 Md. 613, 616, 490 A.2d 682, 683 (1985). The charge, which originated in Allen v. United States, provides that a juror who does not agree with the rest of the jurors should: (1) give proper deference to the other jurors' opinions; (2) listen to the other jurors with a disposition to be convinced; and (3) consider whether his opinions, which are not shared by the other equally intelligent jurors, are reasonable. 164 U.S. 492, 501 (1896).

\textsuperscript{21} Butler, 392 Md. at 175, 896 A.2d at 363. An Allen charge has also been referred to as the "dynamite" or "nitroglycerin" charge. Burnette v. State, 280 Md. 88, 92 n.2, 371 A.2d 663, 665 n.2 (1977) (quoting Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting)).

\textsuperscript{22} Butler, 392 Md. at 175, 896 A.2d at 363.

\textsuperscript{23} Id. at 175–76, 896 A.2d at 363.

\textsuperscript{24} Id. at 176, 896 A.2d at 363.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 176–77, 896 A.2d at 363–64. The judge opined that if one juror did indeed distrust the police no matter the circumstance, it meant that the juror had lied during voir dire. Id. at 177, 896 A.2d at 364. The judge said he did not "wish to think ill" of his fellow citizens, instead reasoning that any police mistrust was more likely a result of the jury being "exhausted and frustrated." Id. at 177, 896 A.2d at 364.

\textsuperscript{28} Id. Defense counsel objected on the record to the judge's decision to allow review of closing arguments. Id. at 177–78, 896 A.2d at 364. Lowery's counsel argued that a rehearing of the closing argument would lead the jury to make an improper decision based on someone's statement, and not the evidence. Butler v. State, No. 1399, slip op. at 8 (Md. Ct. Spec. App. July 25, 2005). The judge noted that this request for review of closing arguments was a case of first impression in Maryland. Butler, 392 Md. at 178, 896 A.2d at 364.

\textsuperscript{29} Butler, 392 Md. at 178, 896 A.2d at 364.
stated that anybody who felt that way should have spoken up during voir dire so a party could have challenged that juror's presence.\textsuperscript{30} The judge added that "if anybody deliberates with that spirit now, I suggest they might be violating their oath."\textsuperscript{31} Defense counsel objected to this statement and moved for a mistrial, but the motion was denied.\textsuperscript{32} Lowery's lawyer told the judge that he thought that the judge's comments "did nothing but put a chilling effect on that juror to be cornered out," and that the juror's view on police might be a result of what he saw during the trial rather than a preconceived belief.\textsuperscript{33}

Ultimately, the judge allowed the jury to watch the videotape of the closing arguments and resume deliberations.\textsuperscript{34} On July 3, 2003, the jury found Butler guilty on conspiracy, distribution, and possession counts, and Lowery guilty on conspiracy counts.\textsuperscript{35} After their convictions, the defendants filed a joint motion for a new trial, arguing that (1) the trial judge's statement about the jury's note singled out and coerced one member of the jury into switching his position; and (2) the judge erred in permitting the jury to review the closing arguments.\textsuperscript{36} The trial court denied their joint motion.\textsuperscript{37}

The defendants appealed to the Court of Special Appeals of Maryland, arguing that the trial judge's comments were clearly coercive and warranted a mistrial.\textsuperscript{38} In an unreported opinion, the Court of Special Appeals affirmed.\textsuperscript{39} The court reasoned that the decision to grant a mistrial falls within the discretion of the trial court, and an appellate court should not reverse unless the trial judge's denial was an abuse of discretion.\textsuperscript{40} The court also found that the judge could

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Butler, No. 1399, slip op. at 10. Butler's counsel later objected to the statement as well. Butler, 392 Md. at 179, 896 A.2d at 365.
\item \textsuperscript{33} Butler, 392 Md. at 178–79, 896 A.2d at 365.
\item \textsuperscript{34} Id. at 179, 896 A.2d at 365.
\item \textsuperscript{35} Id. The defendants were both convicted on the following charges: (1) conspiracy to distribute a controlled dangerous substance; (2) conspiracy to possess with intent to distribute a controlled dangerous substance; and (3) conspiracy to possess a controlled dangerous substance. Id. at 169, 896 A.2d at 359. Butler was additionally convicted of: (1) distribution; (2) possession with intent to distribute; and (3) possession of a controlled dangerous substance. Id.
\item \textsuperscript{36} Butler, No. 1399, slip op. at 10–11.
\item \textsuperscript{37} Id. at 11.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Butler, 392 Md. at 171, 896 A.2d at 361.
\item \textsuperscript{40} Butler, No. 1399, slip op. at 11 (quoting Stewart v. State, 334 Md. 213, 221, 638 A.2d 754, 757 (1994)). The Court of Special Appeals further noted that an appellate court will not find an abuse of discretion unless it is obvious that there has been "egregious prejudice" to the defendants. Id. at 11 (quoting Nero v. State, 144 Md. App. 333, 362, 798 A.2d 5, 22 (2002)).
\end{itemize}
not have reasonably interpreted the note to mean that a juror had formed an opinion of police distrust during the trial.\textsuperscript{41} Finally, the court held, any contention that the comments were coercive was purely speculative.\textsuperscript{42}

The defendants subsequently filed a joint petition for a writ of certiorari.\textsuperscript{43} On November 10, 2005, the Court of Appeals granted certiorari to determine whether the trial judge improperly coerced a guilty verdict by instructing the jury that any juror who distrusted police should have disclosed such a belief during voir dire, and indicating that anyone holding such a belief during deliberations might be violating their oath.\textsuperscript{44}

II. LEGAL BACKGROUND

Maryland appellate courts have adjudicated claims that a trial judge has potentially coerced the jury and thus deprived an individual of his Sixth Amendment right to a fair trial in a variety of contexts.\textsuperscript{45} Courts have found the deprivation of the right to a fair trial in jury instructions and errors in verdict sheets;\textsuperscript{46} judges’ communications with, and acts toward, defense counsel;\textsuperscript{47} and judges’ interactions with witnesses.\textsuperscript{48} In analyzing these claims, courts have reviewed the specific facts and circumstances of the cases to determine whether under

\begin{itemize}
  \item \textsuperscript{41} Id. at 12.
  \item \textsuperscript{42} Id. The defendants also argued on appeal that the court’s miscalculation as to the length of the trial contributed to the unfair verdict and that the court erred in allowing the jury to review videotape of the closing arguments. \textit{Id.} at 12–14. The court quickly dismissed these arguments. \textit{Id.} at 13–14. First, the court explained that estimating the length of the trial is within the trial judge’s discretion, and to say that the jury found a guilty verdict as a result of its desire to end deliberations would be to “engage in the rawest of raw speculation.” \textit{Id.} Second, the court found that the trial judge instructed the jury to not consider closing arguments as evidence, and jurors are presumed to have followed the court’s instruction. \textit{Id.} at 14–15.
  \item \textsuperscript{43} \textit{Butler}, 392 Md. at 171, 896 A.2d at 361.
  \item \textsuperscript{44} Id. at 171–72, 896 A.2d at 361.
  \item \textsuperscript{45} \textit{See infra Part II.A.} The Sixth Amendment to the United States Constitution guarantees the right to a fair trial. \textit{U.S. Const. amend. VI.} It provides:
    In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
  \item \textsuperscript{46} \textit{Id.} The right to a fair trial is also found in Article 21 of Maryland’s Declaration of Rights; it states that “in all criminal prosecutions, every man hath a right... to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.” \textit{Md. Const. Decl. of Rts. art. 21.}
  \item \textsuperscript{47} \textit{See infra Part II.A.1.}
  \item \textsuperscript{48} \textit{See infra Part II.A.2.}
  \item \textsuperscript{48} \textit{See infra Part II.A.3.}
\end{itemize}
the totality of the circumstances any prejudice occurred. In addition, Maryland appellate courts generally grant discretion to trial judges in deciding how to conduct matters in their courtrooms.

A. Maryland Trial Judges Have Potentially Coerced Juries and Thus Possibly Deprived Defendants of Their Right to a Fair Trial in a Variety of Contexts

Judges possess great power and influence over those in their courtrooms—including juries—and thus they must maintain high standards of conduct. Maryland trial judges have prejudiced defendants' rights to a fair trial by potentially coercing juries in a variety of ways, including jury instructions and errors in verdict sheets; judges' communications with, and actions toward, defense counsel; and judges' interactions and communications with witnesses.

1. Jury Instructions and Communications

Appellate courts closely scrutinize jury instructions because these instructions dictate the questions the jury shall decide. Likewise, judges' communications with the jury or individual jurors are highly scrutinized since a judge must remain impartial at all times.

Maryland appellate courts generally uphold trial judges' use of Allen charges when the charge complies with previously approved standards. For example, the Court of Appeals upheld an Allen-type charge in Leupen v. Lackey. In Leupen, the trial judge instructed a deadlocked jury that absolute certainty is not expected, and that each juror should come to his own conclusion while examining the question with proper deference to the opinions of the others. The judge further told the jurors that they should "listen with a disposition to be convinced to each others arguments," and that if their views are contrary to those of the majority they should consider whether those views

49. See infra Part II.B.
50. See infra Part II.C.
52. See infra Part II.A.1.
53. See infra Part II.A.2.
54. See infra Part II.A.3.
55. See infra notes 58-74 and accompanying text.
56. See State v. Hutchinson, 287 Md. 198, 206, 411 A.2d 1035, 1040 (1980) ("[T]he trial judge must remain ever vigilant in order to avoid conveying any idea as to what he thinks the jury's verdict should be or suggesting the slightest partiality.").
57. See supra note 20 (describing the content of an Allen charge).
59. Id. at 22, 234 A.2d at 574.
“which make no impression on the minds of so many equally intelligent jurors” are correct.60

The Leupen court acknowledged that while Allen charges are improperly coercive in some instances, they are proper if formulated correctly.61 The court held that the charge was close enough to the approved versions of the Allen charge.62 Further, the court held, the trial judge chose his words with great care as to not improperly influence the jury, and thus the instruction was in accord with the approved language in Allen v. United States.63

More recently, though, Maryland appellate courts have struck down as potentially coercive similarly worded Allen charges. In Burnette v. State,64 the trial judge gave an Allen charge to a deadlocked jury after the jury gave the judge a note stating that it could not decide on one count.65 The most controversial aspect of the instruction stated that “[i]f your views are contrary to those of the vast majority you should consider whether your views, which make no impression on the minds of so many equally intelligent jurors, are correct.”66 The Court of Appeals reversed the conviction and ordered a new trial because the charge deviated too greatly from the American Bar Association (ABA) standards and was prejudicial to the defendant.67 Particularly, the Burnette court noted, the instruction included the “majority-minority” language, which it concluded was improper be-

60. Id.
61. Id. at 25, 234 A.2d at 576.
62. Id. at 26, 234 A.2d at 576. The court cited Lively v. Sexton, 35 Ill. App. 417 (App. Ct. 1889), as an example of an improper judge-jury communication. Leupen, 248 Md. at 26, 234 A.2d at 576. In Lively, the trial judge, after receiving a note from the jury that it was deadlocked, told the jurors that if he found out that any juror tried to bring about disagreement so as to interfere with the judicial process, he would send him to jail for contempt of court. Lively, 35 Ill. App. at 419. The Illinois Court of Appeals believed that the jury’s verdict was influenced by this statement, which the court referred to as a threat, and therefore held that the case should be remanded, stating that a judge may not coerce a single juror. Id. at 420. The Lively court also cautioned that if courts tolerate trial judges threatening jurors, the uniformity of trial by jury disappears. Id.
63. Leupen, 248 Md. at 26, 234 A.2d at 576 (citing Allen v. United States, 164 U.S. 492 (1896)). In Allen, the judge’s now famous jury instruction said, in part, that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. Allen, 164 U.S. at 501.
64. 280 Md. 88, 371 A.2d 663 (1977).
65. Id. at 90–91, 371 A.2d at 664.
66. Id. at 91, 371 A.2d at 664.
67. Id. at 99–100, 371 A.2d at 668–69.
cause it singles out the minority as being the cause of the deadlock and assumes the majority is correct. Thus, the Burnette court held that the Allen charge used by the trial judge was potentially coercive and deprived the defendant of his right to a fair trial.

In 2002, the Court of Appeals in Thompson v. State again held an Allen charge to be coercive and prejudicial. In Thompson, the trial judge instructed the jury that their verdict would be the “final test of the quality” of their service, not the opinions held as they retire. The Thompson court ordered a new trial, finding that this portion of the instructions deviated too much from the ABA standards. Also, the court reasoned, the concept of a final test implies that a good juror should acquiesce in a verdict rather than trust his judgment. The Thompson court determined that the final test language improperly suggested a preference for collective judgment over autonomous decisionmaking.

In addition, appellate courts in Maryland have adjudicated claims of trial court prejudice in the context of erroneous verdict sheet instructions. In State v. Hutchinson, the trial judge instructed the jury that it could return a verdict of guilty for rape in the first degree or rape in the second degree, but failed to instruct the jury that it could return a verdict of not guilty. Even though the verdict sheet itself included a choice of “not guilty,” the Court of Appeals held that the judge’s omission deprived the defendant of his right to a fair trial. The Hutchinson court stated that the “trial judge may influence the jury by the inflection of his voice, his words, his conduct and his assessment of the evidence, if revealed,” and thus the judge must refrain from conveying any opinion on the proper verdict. The court further noted that even though the judge did not intend to impair the defendant’s right to a fair trial, the omission in his instructions was

68. Id. at 100, 371 A.2d at 669. The court in Burnette also noted that while many courts have approved the use of the Allen charge, it has faced increasing criticism that it is coercive and intrudes upon the jury’s role. Id. at 92–93, 371 A.2d at 665.
69. Id. at 100, 371 A.2d at 669.
71. Id. at 485, 810 A.2d at 443.
72. Id. at 486, 810 A.2d at 443.
73. Id.
74. Id. at 487, 810 A.2d at 443–44.
75. 287 Md. 198, 411 A.2d 1035 (1980).
76. Id. at 201, 411 A.2d at 1037.
77. Id. at 206, 411 A.2d at 1040.
78. Id.
material to the defendant's rights.\textsuperscript{79} Thus, the court found that this constituted plain error and the defendant was entitled to a new trial.\textsuperscript{80}

2. 	extit{Judges’ Communications With, and Acts Toward, Defense Counsel}

A trial judge's actions towards and communications with defense counsel can also prejudice the defendant in a criminal trial. In 	extit{Suggs v. State},\textsuperscript{81} the trial judge stated in front of the jury that the defense lawyer was being inappropriate, and commanded the sheriff to physically restrain him.\textsuperscript{82} The Court of Special Appeals ordered a new trial, reasoning that the judge's comments portrayed defense counsel in such a prejudicial way as to deny the defendant of his right to a fair trial.\textsuperscript{83}

Likewise, the Court of Appeals granted a new trial based on similar circumstances in 	extit{Johnson v. State}.\textsuperscript{84} In 	extit{Johnson}, numerous inappropriate incidents occurred between the judge and defense counsel throughout the trial, including interruptions and insults.\textsuperscript{85} On appeal, the Court of Appeals noted that a judge's conduct during a trial has a large impact on a defendant's chances of receiving a fair trial because the judge's opinions often significantly impact the jury's verdict.\textsuperscript{86} The court reasoned that a new trial was necessary because the exchanges between the judge and counsel were not limited to a few instances, but rather were extensive and prejudiced the defendant's right to a fair trial.\textsuperscript{87} As evidenced by 	extit{Suggs} and 	extit{Johnson}, Maryland appellate courts do not hesitate to order a new trial for a criminal defendant if it appears that a trial judge's actions toward, and interactions with, the defense counsel were possibly prejudicial to the defendant.

\textsuperscript{79} Id. at 208, 411 A.2d at 1040–41.
\textsuperscript{80} Id., 411 A.2d at 1041. The court in \textit{Hutchinson} also pointed out that it had no way of knowing what effect the judge's omission had upon the jury, but it did know that the judge has a profound influence on the jury. \textit{Id.}
\textsuperscript{82} Id. at 253–54, 589 A.2d at 553. The judge also asked the jury to "disregard the sideshow" and stated that the attorney was "ten miles out of limit." \textit{Id.} at 256, 589 A.2d at 554.
\textsuperscript{83} Id. at 256–57, 589 A.2d at 555.
\textsuperscript{84} 352 Md. 374, 722 A.2d 873 (1999).
\textsuperscript{85} Id. at 378, 722 A.2d at 875. Examples of the inappropriate actions included: threatening counsel with contempt of court, arresting counsel in front of the jury, and accusing counsel of stealing a marker from the courtroom. \textit{Id.} at 377–82, 722 A.2d at 874–77.
\textsuperscript{86} Id. at 385, 722 A.2d at 878.
\textsuperscript{87} Id. at 387, 722 A.2d at 879.
3. Judges’ Interactions with Witnesses

Finally, jury coercion and the deprivation of an individual’s right to a fair trial can result from a trial judge’s interactions with witnesses.\textsuperscript{88} In Vandegrift v. State,\textsuperscript{89} the trial judge questioned a witness in such a way as to indicate his disbelief in the witness’s testimony.\textsuperscript{90} The Court of Appeals reversed the defendant’s conviction and ordered a new trial on the grounds that such questioning suggested the judge’s suspicion that the witness was lying and thus prejudiced the defendant’s case.\textsuperscript{91} Furthermore, the Vandegrift court reasoned, such questioning is presumed to have influenced the jury and “was beyond the line of impartiality over which a judge must not step.”\textsuperscript{92}

Similarly, in Elmer v. State,\textsuperscript{93} the trial judge declared in front of the jury that a witness was hostile.\textsuperscript{94} The Court of Appeals stated that since the outcome of the case depended almost entirely on the credibility of the witnesses, this declaration of hostility clearly prejudiced the defendant.\textsuperscript{95} The Elmer court also emphasized that the judge was not wrong in concluding that the witness was hostile, but rather he was wrong in declaring the witness’s hostility in the presence of the jury.\textsuperscript{96} As a result, the court reversed the conviction and granted a new trial.\textsuperscript{97}

B. The Totality of the Circumstances Approach

When adjudicating a claim that a defendant has been deprived of his right to a fair trial, Maryland appellate courts carefully examine the totality of the circumstances in the trial court to determine if any prejudice occurred. This approach entails looking at all the facts and circumstances of each case to determine if the defendant was actually prejudiced. The Court of Appeals reviewed a potential impartial jury case by the totality of the circumstances in Apple v. State.\textsuperscript{98} There, the

\textsuperscript{88} See infra notes 90–96. A witness’ interactions with a juror can also affect the impartiality of the jury, thus depriving an individual of his right to a fair trial. See Jenkins v. State, 375 Md. 284, 825 A.2d 1008 (2003) (holding that a defendant had been deprived of an impartial jury when a juror became friendly with a witness outside of the courtroom during the trial).

\textsuperscript{89} 237 Md. 305, 206 A.2d 250 (1965).

\textsuperscript{90} Id. at 310, 206 A.2d at 253.

\textsuperscript{91} Id., 206 A.2d at 253–54.

\textsuperscript{92} Id. at 311, 206 A.2d at 254.

\textsuperscript{93} 239 Md. 1, 209 A.2d 776 (1965).

\textsuperscript{94} Id. at 4, 209 A.2d at 778.

\textsuperscript{95} Id. at 10, 209 A.2d at 781.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at 11, 209 A.2d at 782.

\textsuperscript{98} 190 Md. 661, 59 A.2d 509 (1948).
defendant claimed that during his trial the judge acted in a way that indicated he had a prejudice against the defendant, and this affected the jury's decision to convict him. The court noted that a judge should be impartial at all times, but the court will not reverse a conviction unless the defendant can clearly show that the judge's conduct adversely influenced the jury. The court affirmed the conviction, explaining that it was "unable to find upon the whole record that the [defendant] was prejudiced by any conduct of the judge."

Likewise, in Johnson, several inappropriate incidents occurred between the trial judge and defense counsel. In reversing the defendant's convictions and ordering a new trial, the court reasoned that if the conduct in the case were limited to a few moderate exchanges, it might conclude that no prejudice occurred. However, the court stated, the judge's conduct was more than just a few mere incidents of harsh gestures, and under the totality of the circumstances, the multitude of incidents violated the defendant's right to a fair trial.

The Court of Special Appeals has also employed a totality of the circumstances approach to evaluate potential prejudice. In Suggs, the trial judge scolded defense counsel in front of the jury for asking on cross-examination what the judge thought were inappropriate questions. On appeal, the defendant claimed that his right to a fair trial was deprived because the judge was not impartial and it influenced the jury. The Court of Special Appeals agreed, holding that "under the totality of the circumstances, . . . the trial judge's comments painted such a prejudicial portrait of the defense counsel as to deny [the defendant] his right to a fair trial."

C. Trial Judges' Discretion in Conducting Their Trials

The Court of Appeals generally grants deference to trial court judges as to how they conduct matters in their courtrooms. With

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99. Id. at 669, 59 A.2d at 513. Specifically, the judge asked a witness a question, the defendant and his attorney answered it, and the judge replied to them: "Now you keep quiet. I don't want any help from you." Id.
100. Id. at 670, 59 A.2d at 513.
101. Id. (emphasis added).
102. 352 Md. 374, 722 A.2d 873 (1999); see also supra note 85 (describing the inappropriate conduct).
103. Johnson, 352 Md. at 387, 722 A.2d at 879.
104. Id.
106. Id. at 257, 589 A.2d at 554.
107. Id., 589 A.2d at 555.
this discretion, an appellate court should strike down only actions that are so erroneous or prejudicial as to fall outside the trial judge’s realm of discretion.\textsuperscript{109}

For example, in \textit{Bryant v. State},\textsuperscript{110} a defendant convicted of murder appealed his conviction, claiming that the trial judge prejudiced the jury against him and therefore deprived him of a fair and impartial jury.\textsuperscript{111} Specifically, the defendant claimed, the judge displayed an antagonistic attitude toward him and his attorney, stating in front of the jury that defense counsel was not cooperating with the judge and offended him.\textsuperscript{112} The Court of Appeals noted that “[t]he degree of severity of a trial judge’s rebukes of an attorney, when the occasions require them, is left to the discretion of the judge so long as they do not prevent a fair and impartial trial.”\textsuperscript{113} The court found that there was no “clear showing that the judge’s statements influenced the jury against the defendant,” and thus a reversal was not warranted.\textsuperscript{114}

The Court of Appeals acknowledged a trial judge’s discretion to use \textit{Allen} charges in \textit{Kelly v. State}.\textsuperscript{115} In \textit{Kelly}, the trial judge instructed the jury that if they do not agree with the majority, they should maintain their positions, but not do so out of stubbornness.\textsuperscript{116} Additionally, the judge told the jury that there “must be some give and take between you” and it “makes no difference whether you originally start out in the minority or the majority.”\textsuperscript{117} The \textit{Kelly} court upheld the instruction, noting that the trial judge is in the best position to determine what is appropriate in a given case, and has the discretion to decide when to use, and what words to use in, an \textit{Allen} charge.\textsuperscript{118}

The Court of Appeals has also recognized a trial judge’s discretion in claims of prejudice in jury polling. In \textit{Lattisaw v. State},\textsuperscript{119} the trial judge convicted the defendant notwithstanding a juror’s ambigu-

\textsuperscript{109} Kelly v. State, 270 Md. 139, 143, 310 A.2d 538, 541 (1973); see also Malin v. Mininberg, 153 Md. App. 358, 414–15, 837 A.2d 178, 211 (2003) (stating that when an appellate court gives proper discretion to the trial court, it will affirm its decision even if it would have reached a different result itself).
\textsuperscript{110} 207 Md. 565, 115 A.2d 502 (1955).
\textsuperscript{111} Id. at 583–84, 115 A.2d at 510.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 585, 115 A.2d at 511.
\textsuperscript{114} Id.
\textsuperscript{115} 270 Md. 139, 310 A.2d 538 (1973).
\textsuperscript{116} Id. at 145, 310 A.2d at 542.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 143, 310 A.2d at 541.
ous response during post-verdict jury polling.\textsuperscript{120} The Court of Appeals reversed the conviction and ordered a new trial, but in so doing noted that the decision as to whether the response was ambiguous is within the trial judge’s discretion since he is in a unique position to observe the juror’s behavior in responding to the poll.\textsuperscript{121}

The court again recognized a trial judge’s discretion in the jury polling context in \textit{Bishop v. State}.\textsuperscript{122} In \textit{Bishop}, as in \textit{Lattisaw}, the Court of Appeals reversed the trial court’s decision to convict notwithstanding a juror’s ambiguous response during jury polling.\textsuperscript{123} After the juror gave his ambiguous response, the judge held a bench conference and, over defense counsel’s objection that re-polling would be coercive towards the ambiguous juror, instructed the clerk to re-poll the jury.\textsuperscript{124} The Court of Appeals held that the judge’s actions made it very possible that the reluctant juror felt pressure to give an unequivocal response, and there must be a new trial because it was unclear whether the second juror response “was a product of compulsion or represented the requisite unanimity.”\textsuperscript{125} The \textit{Bishop} court acknowledged that a trial court ordinarily has discretion when determining if a juror’s response is ambiguous, but found that in the case at hand, the response was clearly ambiguous.\textsuperscript{126} Therefore, the court held that the trial court abused its discretion.\textsuperscript{127}

III. THE COURT’S REASONING

In \textit{Butler v. State}, the Court of Appeals reversed the decision of the Court of Special Appeals and remanded for a new trial, holding that the right to a fair trial guaranteed by the United States Constitution and Maryland Declaration of Rights prohibits judges from making comments that could improperly influence the jury.\textsuperscript{128} Writing for the court, Judge Cathell began by noting the general right to a jury

\textsuperscript{120} \textit{Id.} at 341–43, 619 A.2d at 549–50. The trial judge in \textit{Lattisaw} asked the jurors if all of their verdicts were the same as the verdict of the jury; one juror responded, “[y]es, with reluctance.” \textit{Id.} at 341, 619 A.2d at 549.

\textsuperscript{121} \textit{Id.} at 346, 619 A.2d at 551.

\textsuperscript{122} 341 Md. 288, 670 A.2d 452 (1996).

\textsuperscript{123} \textit{Id.} at 294, 670 A.2d at 456. The juror’s response in this case to the question of whether his verdict was the same as the jury’s was “uhh, reluctantly, yes.” \textit{Id.} at 289, 670 A.2d at 453.

\textsuperscript{124} \textit{Id.} at 289–90, 670 A.2d at 453–54.

\textsuperscript{125} \textit{Id.} at 294, 670 A.2d at 455–56.

\textsuperscript{126} \textit{Id.} at 293, 670 A.2d at 455.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Butler}, 392 Md. at 192, 896 A.2d at 373; see also supra note 45 (providing the text of the Sixth Amendment and article 21 of the Declaration of Rights).
The court then stated that one of the key elements to a jury trial is a unanimous verdict, noting that unanimity is "indispensable" to a proper verdict.130

Next, the court emphasized that a judge's role during a jury trial makes his comments subject to a high level of scrutiny, because the court must guard against situations in which juries are improperly influenced.131 The court noted that the important policy behind such scrutiny is to avoid suspicion and distrust by the public of the jury system.132 In addition, the court noted that the trial judge can easily influence the jury, even by little things such as the "inflection of his voice, his words, his conduct and his assessment of the evidence."133 Thus, the Butler court stated, judges must avoid conveying to the jury any idea as to their opinion of the case.134 Further, the court reasoned, a judge's actions need not be intentional to inappropriately influence the jury.135

The court then applied this backdrop to the case, finding that even though the judge may have thought his comment to the jury was simply a non-coercive mention of the jurors' oath, it might have had a large impact on the jurors.136 Also, the Butler court reasoned, if the juror rethought his legal obligation, as the judge wanted, it may have led the juror to put aside his distrust of police and vote with the majority.137

The court then stated that it is beyond the power of the trial judge to suggest while the jury is deliberating that an opinion of police distrust is impermissible.138 The court reasoned that even though

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129. Butler, 392 Md. at 180, 896 A.2d at 365. The court pointed to several articles of the Maryland Declaration of Rights that contain the right to a jury trial, including articles 5, 21, 23 and 24. Id., 896 A.2d at 366 (quoting Stokes v. State, 379 Md. 618, 625-26, 843 A.2d 64, 68-69 (2004)).
130. Id. at 181, 896 A.2d at 366.
131. Id.
132. Id. (quoting Jenkins v. State, 375 Md. 284, 340, 825 A.2d 1008, 1041 (2003) ("Any lesser degree of vigilance would foster suspicion and distrust and risk erosion of the public's confidence in the integrity of our jury system.").)
133. Id. at 182, 896 A.2d at 367 (quoting State v. Hutchinson, 287 Md. 198, 206, 411 A.2d 1035, 1047 (1980))
134. Id. (quoting Hutchinson, 287 Md. at 206, 411 A.2d at 1047).
135. Id. As an example of unintentional jury influence, the court cited Hutchinson, 287 Md. at 208, 411 A.2d at 1041. According to the Butler court, the trial judge in Hutchinson erred by failing to instruct the jury that it could find the defendant not guilty although such an option was available. Butler, 392 Md. at 182, 896 A.2d at 367 (citing Hutchinson, 287 Md. at 208, 411 A.2d at 1041).
136. Butler, 392 Md. at 182, 896 A.2d at 367.
137. Id.
138. Id. at 183, 896 A.2d at 367.
the judge might have been correct that the juror was violating his oath and that a mistrial would have followed, he did not have the power at that stage to warn the juror about his views.\textsuperscript{139}

Subsequently, the court pointed out that "[t]rial judges can improperly influence the jury at different times throughout the trial."\textsuperscript{140} Because, the court noted, it had never previously adjudicated a case with the same facts, the court analogized the case to precedent involving \textit{Allen} charges.\textsuperscript{141}

Although the court ultimately rejected the defendants' argument that the judge's statement was similar to an \textit{Allen} charge, it decided that the coercive nature of the judge's statement "amounted to a clear deviation from the allowed communications between judge and jury during deliberations."\textsuperscript{142} The court stated that the court's normal course of action when confronted with a possibly biased juror is to declare a mistrial.\textsuperscript{143}

Next, the court reasoned that it was possible for a juror to infer from the judge's comments that he must put aside his beliefs about the police or risk violating his oath and facing the consequences.\textsuperscript{144} Further, the court noted, it is difficult to imagine that the juror in the present case was not placed in some discomfort and possibly felt compelled to change his position.\textsuperscript{145} As a result, the Butler court stated, it is impossible to determine whether the guilty verdicts against the de-

\begin{footnotesize}
\begin{enumerate}
\item The Butler court mentioned various times throughout the trial when a judge may improperly influence the jury. First, the judge "may prejudice the jury during the presentation of either party's case through his or her interactions with counsel and witnesses." \textit{Id.} (citing Johnson v. State, 352 Md. 374, 722 A.2d 873 (1999); Vandegrift v. State, 237 Md. 305, 206 A.2d 250 (1965)). Second, the judge may influence the jury through improper jury instructions, thus giving an advantage to either party. \textit{Id.}, 896 A.2d at 368 (citing Thompson v. State, 371 Md. 473, 810 A.2d 435 (2002); State v. Hutchinson, 287 Md. 198, 411 A.2d 1035 (1980); Burnette v. State, 280 Md. 88, 371 A.2d 663 (1977)). Lastly, the judge may influence the jury during the post-verdict polling process. \textit{Id.} (citing Bishop v. State, 341 Md. 288, 670 A.2d 452 (1996); Lattisaw v. State, 329 Md. 339, 619 A.2d 548 (1993)).
\item Id. at 183–84, 896 A.2d at 368.
\item Id. at 184, 896 A.2d at 368 (emphasis in original).
\item Id. at 184–85, 896 A.2d at 368.
\item Id. at 186, 896 A.2d at 369. The court analogized the present case to Thompson, in which the Court of Appeals held that a jury instruction was coercive since it implied that a juror should acquiesce in a verdict rather than hold his or her beliefs. \textit{Id.} at 185–86, 896 A.2d at 369 (citing \textit{Thompson}, 371 Md. at 486, 810 A.2d at 443). The Butler court noted that a judge's safest course of action when using an \textit{Allen} charge is to adhere to the Maryland Pattern Jury Instruction, MPJI-Cr 2:01, otherwise known as the "duty to deliberate" instruction. \textit{Id.} at 186, 896 A.2d at 369.
\item Id. at 186–87, 896 A.2d at 370.
\end{enumerate}
\end{footnotesize}
fendants were the result of compulsion or were the product of honest, uninfluenced deliberation.\textsuperscript{146}

The court then noted that in these situations the judge has a limited number of options.\textsuperscript{147} According to the court, the judge may either send out the jury for further deliberations with the instruction that its verdict must be unanimous, or alternatively, the judge may question the juror directly.\textsuperscript{148} The court determined that in the present case, however, the judge made no attempt to verify the allegations against the juror, nor did he send the jury out with a unanimity instruction.\textsuperscript{149} Instead, the court maintained, the judge improperly opted to comment on the juror’s beliefs and inappropriately intended to influence the juror.\textsuperscript{150}

The court concluded its analysis by restating that the U.S. Constitution and Maryland’s Declaration of Rights guarantee the right to a fair trial, and that right requires that judges refrain from making potentially influential statements to the jury.\textsuperscript{151} The Butler court found that the trial judge’s comment was potentially coercive and, as a result, the defendants may have been denied their constitutional right to a fair trial.\textsuperscript{152} Therefore, the Court of Appeals reversed the Court of Special Appeals’s decision and remanded the case for a new trial.\textsuperscript{153}

IV. Analysis

In Butler v. State, the Court of Appeals held that a trial judge’s comment to a deadlocked jury—that a juror who distrusted police but failed to state so earlier possibly violated his oath—was potentially coercive and deprived the defendants of their constitutional right to a fair trial.\textsuperscript{154} The Butler court properly erred on the side of caution, as both the U.S. Constitution and Maryland Declaration of Rights guarantee an individual’s right to a fair trial, and courts cannot deprive

\begin{itemize}
  \item \textsuperscript{146} Id. at 188–89, 896 A.2d at 371.
  \item \textsuperscript{147} Id. at 189, 896 A.2d at 371.
  \item \textsuperscript{148} Id. (quoting Lattisaw v. State, 329 Md. 339, 347, 619 A.2d 548, 552 (1993)).
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id. The court analogized the present case to another case in which the trial judge warned the jury in a coercive manner: Lively v. Sexton, 35 Ill. App. 417 (App. Ct. 1889). Butler, 392 Md. at 190, 896 A.2d at 372. The Butler court opined that the comment in the present case generated a similarly coercive effect. Id. at 191, 896 A.2d at 372. The court also noted that while the judge in the present case did not per se threaten the jury, his strong message generated a similarly coercive effect. Id. at 192, 896 A.2d at 373.
  \item \textsuperscript{151} Butler, 392 Md. at 192, 896 A.2d at 373.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
\end{itemize}
such a right except in limited circumstances.\textsuperscript{155} However, the court’s decision will likely counter judicial efficiency, as its low standard for obtaining a new trial based on prejudice will encourage more appeals and, accordingly, more new trials.\textsuperscript{156} A better approach would have been to view the case by the totality of its circumstances to determine if any actual prejudice occurred.\textsuperscript{157} Moreover, the court should have granted deference to the trial judge’s decision to warn the jury.\textsuperscript{158} 

A. The Butler Court Reached the Proper Outcome by Ensuring the Defendants’ Right to a Fair Trial

The Butler court properly ordered a new trial since the trial judge likely deprived the defendants of their constitutional right to a fair trial by coercing the holdout juror. A court cannot deprive an individual of his constitutional right to a fair trial and therefore courts should err on the side of caution when faced with such claims.\textsuperscript{159} Furthermore, it is possible that a decision to grant a new trial will not have a long term effect since the end result after a new trial could simply be the same as it was in the trial court: conviction.

The Butler court’s decision to grant a new trial is justified because of the fundamental rights implicated by the case. In Butler, the jury deliberated for several hours before sending the judge a note stating that a juror does not trust the police under any circumstances.\textsuperscript{160} Following the judge’s comment that this juror might be violating his oath, the jury’s viewing the videotape of closing arguments, and continued deliberations, the juror who supposedly distrusted police apparently had a change of heart, as the jury convicted thereafter.\textsuperscript{161}

This juror’s decision to change his verdict to guilty is a strong indication of the coercive nature of the trial judge’s comment.\textsuperscript{162}

\textsuperscript{155} See infra Part IV.A.
\textsuperscript{156} See infra Part IV.B.
\textsuperscript{157} See infra Part IV.C.1.
\textsuperscript{158} See infra Part IV.C.2.
\textsuperscript{159} E.g., Jenkins v. State, 375 Md. 284, 319, 825 A.2d 1008, 1028–29 (2003) (noting that a “right as fundamental as the right to an impartial jury cannot be compromised by even the hint” of potential prejudice). This is not to say, however, that courts need to always defer to the defendant when evaluating claims involving the right to a fair trial. For example, if the circumstances show that it is likely that no prejudice occurred, courts should not feel compelled to err on the side of upholding the right just because that claim was raised.
\textsuperscript{160} Butler, 392 Md. at 174–76, 896 A.2d at 362–63.
\textsuperscript{161} Id. at 179, 896 A.2d at 365. It was unclear from the record how long it took for the jury to reach a verdict after it resumed deliberations following the judge’s comment. Id. at 179 n.1, 896 A.2d at 365 n.1.
\textsuperscript{162} Cf. State v. Hutchinson, 287 Md. 198, 206, 411 A.2d 1055, 1040 (1980) (noting that the trial judge can influence the jury in a variety of ways, including with his words).
Since the jurors had deliberated for several hours over the course of two days and the holdout juror still stood firmly in his belief of innocence, it is quite likely that the judge's comment in some way persuaded this juror to change his mind and go along with the other jurors.

Given the realistic possibility that some of the jurors may have been coerced to reach the verdict, the Butler court properly erred on the side of caution in granting a new trial. The Butler court ruled in accordance with the majority of its prior trial prejudice cases by not risking the possibility that a trial judge deprived an individual's constitutional rights. Although the court should have followed precedent that dictated the correct type of review and amount of discretion to be used in trial prejudice cases, the facts of Butler strongly indicate that the defendants were in fact prejudiced, and thus the court correctly protected the defendants' rights by ordering a new trial.

B. The Butler Court's Decision Will Cause Judicial Inefficiency, as it Promotes a Low Prejudice Threshold and Fails to Accord Discretion to the Trial Judge

Even though the Butler court's decision appropriately protected two individuals' constitutional rights to a fair trial, it may result in judicial inefficiency by prompting countless appeals and new trials. The Butler court's decision could have this effect because more criminal defendants—given the easy standard for finding prejudice and lack of discretion given to the trial judge—will appeal their convictions on the grounds of prejudice during trial. In addition, with the in-
increased frequency of appeals and the low standard through which such appeals are analyzed, appellate courts will in turn grant more new trials.

Judicial efficiency and the quick resolution of disputes are important policies to the functioning of the Maryland judiciary, and the Butler court’s decision contravenes this policy because it will result in an increase appeals and new trials in Maryland. The Butler court’s cursory review of the case and its focus on a single incident in the course of an entire trial will likely make it easier for individuals to establish a claim of trial court prejudice. This hasty review will, in turn, promote an increase in appeals by claimants claiming prejudice because the claimant in essence gets another chance for a court to declare prejudice. Furthermore, the lack of deference shown to the trial judge in Butler will likely result in an increase in new trials granted by appellate courts because they will simply make their own decisions with less concern for how the trial judges handled matters before them.

Therefore, the Butler court’s decision will undermine the important principle that courts should strive to promote efficiency. Indeed, the Butler court’s decision requires a minimal showing of prejudice and suggests that an appellate court should review a trial court’s actions with little if any deference. As a result, more unsuc-

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that if a court adopts a de novo standard of review, it could be overwhelmed with appeals because claimants would appeal so they could have another opportunity for the court to review the facts.

168. See William H. Edmonson, Note, A "New" No-Contact Rule: Proposing an Addition to the Non-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays, 80 N.Y.U. L. Rev. 1773, 1789 (2005) ("Judicial efficiency is politically popular, and is admittedly an important policy motivation.").

169. See supra note 167.

170. See Butler, 392 Md. at 182, 896 A.2d at 367 (noting simply that the trial judge’s statement to the jury "could" have influenced the juror’s opinion).

171. Lowenstein & Guggenheim, supra note 167, at 777 (noting statistics showing that there are substantially more appeals to a court that reviews matters de novo than to one that does not).

172. See Sally Baumler, Note, Appellate Review Under the Bail Reform Act, 1992 U. Ill. L. Rev. 483, 491 ("A further reason for deferring to the lower court judge is that appellate courts already have too much work to do, and engaging in independent review would unbearably backlog their dockets.").

173. See supra note 168 and accompanying text.

174. See infra Part IV.C.1.

175. See infra Part IV.C.2.
cessful defendants at trial will appeal and, more importantly, will be successful in their appeal, thus resulting in more new trials.\textsuperscript{176}

\section*{C. A Better Approach for the Butler Court Would Have Been to Review the Totality of the Circumstances for Possible Prejudice and to Grant Discretion to the Trial Judge}

The \textit{Butler} court should have reviewed the totality of the circumstances of the case to determine if any actual coercion or prejudice occurred that deprived the defendants of their right to a fair trial.\textsuperscript{177} Moreover, the \textit{Butler} court should have given the trial judge discretion since he was in the best position to determine if the defendants were prejudiced.\textsuperscript{178}

\subsection*{I. The Butler Court Should Have Assessed the Totality of the Circumstances to Determine if any Actual Prejudice Occurred}

The \textit{Butler} court would have done a more complete analysis of the record had it reviewed the totality of the circumstances when deciding if the trial judge prejudiced the defendants. Unlike in \textit{Johnson v. State}, the \textit{Butler} court did not truly review the record to determine if the jury was impermissibly coerced, nor did it require a clear showing of such coercion.\textsuperscript{179} Rather, the court in \textit{Butler} merely concluded that given the judge’s persuasive role in a trial, his comments may have coerced the holdout juror to change his mind.\textsuperscript{180}

Applying a totality of the circumstances approach could have revealed that the judge’s comment did not in fact prejudice the defendants.\textsuperscript{181} In \textit{Johnson}, the Court of Appeals reviewed the case under a totality of the circumstances approach.\textsuperscript{182} The \textit{Johnson} court pointed out that had the possibly prejudicial conduct been limited to a few

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  \item \textsuperscript{176} Cf. Lowenstein & Guggenheim, \textit{supra} note 167, at 777 (“The substantial increase in caseload that could occur as a result of a de novo standard of review . . . would create a strain on the court and possibly swamp its resources.”).
  \item \textsuperscript{177} See \textit{infra} Part IV.C.1.
  \item \textsuperscript{178} See \textit{infra} Part IV.C.2.
  \item \textsuperscript{180} See \textit{Butler}, 392 Md. at 182, 896 A.2d at 367 (“As gentle as the admonishment may have appeared to the judge, it may have carried great weight in the minds of the jurors (especially the mind of the juror who allegedly held certain views about police officers) who may be very susceptible to a judge’s words and instructions.”).
  \item \textsuperscript{181} See \textit{75B Am. Jur.}, \textit{supra} note 164, at § 1563 (“[E]ven where coercion of the jury has occurred, it is not reversible error in the absence of a prejudicial effect”).
  \item \textsuperscript{182} \textit{Johnson}, 352 Md. at 393–94, 722 A.2d at 882; see also \textit{Suggs v. State}, 87 Md. App. 250, 257, 589 A.2d 551, 555 (1991) (reviewing the trial circumstances in their totality to determine if prejudice occurred).
\end{itemize}
instances, it might have concluded that no prejudice occurred.\textsuperscript{183} However, the court reasoned, the numerous incidents that occurred in that case taken together clearly violated the criminal defendant's right to a fair trial.\textsuperscript{184} The Butler court should have followed this same approach and considered whether the judge's comment to the jury was presumptively prejudicial in light of the totality of the circumstances.\textsuperscript{185} Given the Johnson court's statement that courts may declare possibly prejudicial conduct non-prejudicial if the conduct is limited to only a few instances,\textsuperscript{186} it is possible that the Court of Appeals would declare the judge's comment in Butler\textsuperscript{187} non-prejudicial, as it was the only possibly prejudicial occurrence.\textsuperscript{188} As a result, the Butler court might have upheld the defendants' convictions due to the overall lack of prejudice when taking into consideration all the circumstances.\textsuperscript{189}

In sum, the Butler court should have followed precedent that proposed the proper approach for analyzing a claim of prejudice during trial. Under such an approach, the court would review the case under the totality of its circumstances to determine if any actual prejudice occurred.\textsuperscript{190} The benefit of a deliberate review of the totality of the circumstances is that more of the court's decisions to grant new trials will be based on the likelihood of real prejudice, rather than the emotional effect on the appellate judges that a trial judge's unusual comment may have. Although the Butler court might have reached the same result had it reviewed the record as a whole, it improperly skipped an analysis of the totality of the circumstances.

2. The Butler Court Should Have Granted the Trial Judge Deference in Deciding how to Conduct his Trial

Even though an appellate court should grant deference to a trial judge's actions, the court in Butler exhibited no such discretion. Indeed, the court cited Kelly v. State as authority in its decision but failed

\textsuperscript{183} Johnson, 352 Md. at 387, 722 A.2d at 879.
\textsuperscript{184} Id. at 393–94, 722 A.2d at 882.
\textsuperscript{185} See id. at 387, 722 A.2d at 879 (noting that an appellate court should look at all of the circumstances during trial to determine if the defendant was prejudiced).
\textsuperscript{186} Id.
\textsuperscript{187} The trial judge in Butler stated that "if anybody deliberates with that spirit now, I suggest they might be violating their oath." Butler, 392 Md. at 178, 896 A.2d at 364.
\textsuperscript{188} See Apple v. State, 190 Md. 661, 670, 59 A.2d 509, 513 (1948) (affirming a conviction even though a few of the trial judge's statements in front of the jury might have exhibited his annoyance with defense counsel because the record as a whole did not show that appellant was prejudiced); see also supra notes 98–101.
\textsuperscript{189} I do not suggest that a different result was likely; only that it was possible.
\textsuperscript{190} See supra Part II.B.
to apply the deference that \textit{Kelly} espoused.\textsuperscript{191} In \textit{Kelly}, the court emphasized that the words a judge chooses when giving an \textit{Allen} charge are left to the discretion of the trial judge.\textsuperscript{192} However, the court in \textit{Butler}, even while acknowledging \textit{Kelly} as a similar case involving alleged prejudice, failed to extend to the trial judge the discretion it dictated an appellate court shall give.\textsuperscript{193}

The \textit{Butler} court also overlooked precedent from other prejudice contexts that stressed that a trial judge has discretion in deciding how to handle situations that may arise during the course of trial.\textsuperscript{194} In \textit{Bryant v. State}, the court stated that trial judges have discretion to comment on attorneys' conduct as long as they do not deny an individual his right to a fair and impartial jury.\textsuperscript{195} Likewise, in \textit{Lattisaw v. State}, the court maintained that the trial court has discretion to decide whether to move forward with a verdict after a juror gives an ambiguous response during jury polling, since it is in a "unique position to observe the juror's demeanor and tone of voice in responding to the poll."\textsuperscript{196} However, the \textit{Butler} court made no mention of any discretion accorded to the trial judge, and instead applied its own independent judgment as if the trial judge's determination was irrelevant.

The court in \textit{Butler} should have granted some level of deference to the trial judge's decision to make the comment to the jury. While the court cited and relied upon its own prior cases, it did not grant the deference those cases required\textsuperscript{197} and instead substituted its own judgment. The \textit{Butler} court's review of the case without any deference to the trial court's decision is problematic because the proper deferential review might have produced a different result.\textsuperscript{198} Under such a limitation, it is possible that the \textit{Butler} court would have held that the judge did not abuse his discretion and upheld the convictions. The benefit to this approach, in addition to improving judicial efficiency, would be that decisions about how a trial will proceed are left to those

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  \item \textsuperscript{191} See \textit{Butler}, 392 Md. at 185, 896 A.2d at 369 (citing \textit{Kelly} in its discussion of when trial judges can use \textit{Allen} charges).
  \item \textsuperscript{192} 270 Md. 139, 143, 310 A.2d 538, 541 (1973). The \textit{Kelly} court also noted that each jury is unique and thus the trial judge is in the best position to make a judgment on giving an \textit{Allen} charge. Id.
  \item \textsuperscript{193} \textit{Butler}, 392 Md. at 185, 896 A.2d at 369.
  \item \textsuperscript{194} See \textit{Bishop v. State}, 341 Md. 288, 293, 670 A.2d 452, 455 (1996) (noting a trial court's discretion in deciding whether a juror's response during polling is ambiguous).
  \item \textsuperscript{195} 207 Md. 565, 585, 115 A.2d 502, 511 (1955).
  \item \textsuperscript{196} 329 Md. 339, 346, 619 A.2d 548, 551 (1993).
  \item \textsuperscript{197} See supra notes 108--127 and accompanying text.
  \item \textsuperscript{198} See, e.g., \textit{Malin v. Mininberg}, 153 Md. App. 358, 414--15, 837 A.2d 178, 211 (2003) (stating that with proper discretion given to the trial court, an appellate court will affirm its decision even if it would have a reached a different result originally).
\end{itemize}
individuals in the best position to make them—trial judges—and judges could be confident that their decisions will not always be second-guessed.199

V. Conclusion

In Butler v. State,200 the Court of Appeals held that a trial judge’s comment to the jury during deliberations—that one of the jurors might be violating his oath if he hid his distrust of police—was potentially coercive and thus deprived the defendants of their right to a fair trial. The Butler court’s decision to order a new trial was proper because courts must take all precautions to make sure trial judges do not deprive individuals of their constitutional right to a fair trial.201 Notwithstanding its correct conclusion, in its hasty review the court failed to consider that its decision could result in an increase in appeals and new trials, thus undermining Maryland’s policy of promoting judicial efficiency.202 A better approach for the court would have been to view the situation by the totality of its circumstances to determine if any actual prejudice occurred.203 Moreover, the court should have granted discretion to the trial judge rather than substitute its own judgment, since the trial judge was in the best position to determine the proper course of action in the case.204

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200. Butler, 392 Md. at 192, 896 A.2d at 373.
201. See supra Part IV.A.
202. See supra Part IV.B.
203. See supra Part IV.C.1.
204. See supra Part IV.C.2.
STATE v. WILKINS: FAULTY REASONING JEOPARDIZES CRIMINAL DEFENDANTS' RIGHT TO SENTENCING DISCRETION

In State v. Wilkins, the Court of Appeals of Maryland considered the effect of a sentencing judge's failure to recognize his right to exercise sentencing discretion and whether a motion to correct an illegal sentence was the appropriate vehicle to raise this issue. The court held that a sentence is not rendered illegal by a sentencing judge's failure to recognize discretion, and thus a motion to correct an illegal sentence is an improper means by which to raise a challenge. Although the court reached the proper outcome in this case by denying Wilkins's motion to correct an illegal sentence, it did so by relying on faulty reasoning that departed from precedent. Specifically, the court erred by treating the judge's failure to recognize discretion as a procedural, rather than a substantive, error. The court should have held that this failure is a substantive error, and if made manifest on the record, renders the sentence illegal as a matter of substantive law. Accordingly, the court should have recognized that in such circumstances, a motion to correct an illegal sentence is a fitting vehicle to remedy the illegal sentence.

I. THE CASE

In December 1971, Ralph Edward Wilkins was tried before a jury and convicted of first-degree murder in the Circuit Court for Prince George's County. Wilkins was sentenced to life imprisonment in January 1972. The Maryland Court of Special Appeals affirmed both the judgment and the life sentence on direct appeal in 1973. At his sentencing, Wilkins argued that Maryland law gave a sentencing judge the discretion to impose a sentence of less than life im-

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2. Id. at 272, 900 A.2d at 767.
3. Id. at 272, 284, 900 A.2d at 767, 774.
4. See infra Part IV.
5. See infra Part IV.A.1.
7. See infra Part IV.B.
8. Wilkins, 393 Md. at 271, 900 A.2d at 766.
9. Id.
prisonment for first-degree murder. Wilkins asked the judge to exercise discretion and impose a lesser sentence based on several mitigating factors. During the hearing, Wilkins’s attorney and the sentencing judge engaged in an extensive colloquy about the judge’s authority to use discretion and impose a lesser sentence. Ultimately, the sentencing judge declined to lessen the sentence and imposed a life sentence, prompting Wilkins’s eventual claim for failure to recognize discretion.

In June 2003, more than thirty years after his conviction, Wilkins sought post-conviction relief in the Circuit Court for Prince George’s County. Wilkins claimed that the sentencing judge’s failure to recognize his authority to suspend part of Wilkins’s sentence constituted an abuse of discretion. In May 2004, Wilkins filed a motion in the circuit court to correct an illegal sentence; when the court denied that motion, Wilkins appealed the decision to the Court of Special Appeals.

The Court of Special Appeals vacated Wilkins’s sentence as illegal and remanded the case to the circuit court. The court determined that a sentencing judge has the discretion to suspend any portion of a life sentence and that a refusal to exercise this discretion is error. The court distinguished State v. Chaney, in which the Court of Appeals found no error in a sentence because the record did not sufficiently show that the sentencing judge failed to exercise his discretion. Unlike in Chaney, the Court of Special Appeals found that the Wilkins record clearly showed that the trial court was unaware of its discretion.
and misstated the law. The court concluded that the sentencing judge's failure to recognize his right to consider suspending part of Wilkins's sentence rendered the sentence illegal. The Court of Special Appeals then remanded the case to the trial court for resentencing.

The Court of Appeals granted certiorari to determine whether a sentencing judge's failure to recognize the right to exercise discretion in the imposition of a sentence renders the sentence illegal under Maryland law, and whether a motion to correct an illegal sentence is an appropriate procedural vehicle to resolve this question.

II. LEGAL BACKGROUND

In Maryland, the right of a sentencing judge to use discretion in imposing a lesser sentence has not always been absolute, and has evolved and expanded over time. The use of judicial discretion, specifically sentencing discretion, has broadened over the past three decades, as have the consequences of a sentencing judge's failure to recognize or exercise discretion. Recently, Maryland courts have begun to use Maryland Rule 4-345 as a procedural vehicle to challenge a failure to recognize sentencing discretion.

A. Sentencing Discretion for First-Degree Murder Convictions in Maryland

Prior to 1970, sentencing courts in Maryland were bound under Article 27, section 413 to issue one of two sentences for first-degree murder: death or life imprisonment. In 1963, the Court of Appeals confirmed that sentencing discretion in first-degree murder cases was limited to a choice between "two alternative penalties" of death or life imprisonment and the court would not consider any other option.

21. Id.
22. Id. at 525, 875 A.2d at 239.
23. Id.
24. Wilkins, 393 Md. at 272, 900 A.2d at 767.
25. See infra Part II.A.
26. See infra Part II.B.
27. See infra Part II.C.
29. White, 227 Md. at 620, 177 A.2d at 879.
Seven years later, the Court of Special Appeals also described first-degree murder as “punishable in the discretion of the judge, by death or life imprisonment,” with no indication that a judge could discretionarily impose a sentence of less than life. These descriptions signify that, prior to 1970, sentencing judges considered themselves limited to imposing only life imprisonment or death for first-degree murder, with no discretion under section 413 to impose anything less.\(^\text{31}\)

Technically, this lack of sentencing discretion changed on July 1, 1970, when the Maryland General Assembly enacted Article 27, section 641A, which gave a sentencing court the power to use discretion to suspend or impose a lesser sentence in cases of its jurisdiction. However, even after the passage of section 641A, sentencing courts failed to realize that the statute gave them discretion to lessen sentences for life imprisonment. For example, two years after the passage of section 641A, the Court of Special Appeals stated that first-degree murder carried only the alternative penalties of life imprisonment or death, indicating judicial uncertainty about the scope and applicability of reducing sentences under section 641A.\(^\text{34}\)

In 1976, the Court of Appeals addressed this uncertainty and clarified the scope of section 641A in *State v. Wooten*. In that case, defendant Wooten was sentenced to life imprisonment for first-degree murder, but the sentencing court suspended all but the first eight years of the sentence. The Court of Appeals upheld the suspension of the sentence, stating that section 641A gives sentencing courts the


\(^{31}\) See also Veney v. State, 251 Md. 182, 188, 246 A.2d 568, 571 (1968) (commenting that “there have been many convictions in Maryland of murder in the first degree where . . . the sentence has been to life imprisonment rather than death”).

\(^{32}\) MD. ANN. CODE art. 27, § 641A (1970), repealed and reenacted without substantive change as MD. CODE ANN., CRIM. PROC. § 6-221 to -222(a) (LexisNexis 2001). The statute provided, in relevant part: “Upon entering a judgment of conviction, the court having jurisdiction, may suspend the imposition or execution of sentence and place the defendant on probation upon such terms and conditions as the courts deem proper.” *Id.*


\(^{34}\) Dodson v. State, 14 Md. App. 483, 486, 287 A.2d 324, 325 (1972) (describing the life imprisonment statute after the passage of section 641A as allowing “two alternative penalties, each fixed by the Legislature itself, without committing to the trial judge any discretion except a choice between the two”); see also Chandler v. Maryland, 360 F. Supp. 305, 310 (D. Md. 1972) (stating that, under Maryland law, a verdict of first-degree murder “carries a mandatory sentence of life imprisonment”) (emphasis added).

\(^{35}\) 277 Md. 114, 352 A.2d 829 (1976).

\(^{36}\) *Id.* at 115, 352 A.2d at 830.
clear and unqualified right to suspend any sentence.\textsuperscript{37} Accordingly, the \textit{Wooten} court clarified that section \textit{641A} provides sentencing judges the discretion to reduce a sentence of life imprisonment following a conviction for first degree murder.\textsuperscript{38}

\textbf{B. The Presumption of Judicial Knowledge of Sentencing Discretion}

After clarifying the scope of section \textit{641A} in \textit{Wooten}, the Court of Appeals considered the effects of a sentencing judge’s failure to comply with section \textit{641A}. Three years after \textit{Wooten}, in \textit{Williamson v. State},\textsuperscript{39} the sentencing judge explicitly refused to recognize his discretion to suspend a sentence.\textsuperscript{40} The Court of Appeals found that the judge’s refusal to consider whether to suspend any portion of the life sentence denied the defendant her right to a proper exercise of judicial discretion.\textsuperscript{41} The court ordered a new sentencing hearing and instructed the judge to use discretion to consider suspending the sentence.\textsuperscript{42} \textit{Williamson} thus marked the first time that a court found substantive error due to a judge’s failure to recognize sentencing discretion.

Next, the Court of Appeals went a step further by establishing that when a trial court has the discretion to act, it must exercise that discretion.\textsuperscript{43} In \textit{Maus v. State},\textsuperscript{44} the court applied this general principle to sentencing cases.\textsuperscript{45} In \textit{Maus}, the sentencing court failed to recognize discretion because it did not believe it had the ability to take into account time already served by the defendant when determining the appropriate sentence.\textsuperscript{46} The court held that a failure to exercise

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\item \textsuperscript{37} Id. at 117, 352 A.2d at 831. The \textit{Wooten} court stated that "in clear, unambiguous and unqualified language, [section \textit{641A}] bestows upon courts the power to suspend completely or partially any and all sentences over which they have jurisdiction." \textit{Id.}
\item \textsuperscript{38} See id. at 117-18, 352 A.2d at 832 (noting that there is nothing in the statute that exempted life sentences from the reach of section \textit{641A}).
\item \textsuperscript{39} 284 Md. 212, 395 A.2d 496 (1979).
\item \textsuperscript{40} Id. at 214, 395 A.2d at 497. The sentencing judge stated: "I completely disagree with Judge Raine and the Court of Appeals. I think the Legislature said when a person kills somebody else or causes them to be killed, it's life. So as far as I am concerned, the sentence on the murder charge is life. . . ." \textit{Id.}
\item \textsuperscript{41} Id. at 215, 395 A.2d at 497.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See \textit{Colter v. State}, 297 Md. 423, 426, 466 A.2d 1286, 1288 (1983) (noting the general principle that a court must exercise discretion when given it).
\item \textsuperscript{44} 311 Md. 85, 532 A.2d 1066 (1987).
\item \textsuperscript{45} See id. at 108, 532 A.2d 1077-78 (citing \textit{Colter v. State} with approval and applying it to a case involving sentencing discretion).
\item \textsuperscript{46} Id.
\end{itemize}
\end{footnotesize}
discretion in sentencing amounts to error and ordinarily requires reversal.\textsuperscript{47}

Although a court is required to exercise sentencing discretion, the Court of Appeals has held that a judge need not state with particularity each time he is exercising discretion because there is a presumption that the trial judge knows the law.\textsuperscript{48} For example, in \textit{State v. Chaney},\textsuperscript{49} the sentencing judge stated that he was using discretion in refusing to lessen a life sentence, but failed to expressly acknowledge that section 641A allowed him to do so.\textsuperscript{50} The \textit{Chaney} court found that the failure to expressly acknowledge section 641A does not mean the judge was unaware of the law.\textsuperscript{51} The Court of Appeals has since bolstered \textit{Chaney}'s holding by presuming that, in the absence of any "misstatement of law or conduct inconsistent with the law," a trial court knows and properly applies the law.\textsuperscript{52} Thus, although a judge is required to recognize and exercise discretion, the Court of Appeals has ensured that the fact that it is not done expressly in the record does not reflect a lack of recognition and does not constitute error.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} See \textit{State v. Chaney}, 375 Md. 168, 181, 825 A.2d 452, 459 (2003) ("The presumption that trial judges know the law and apply it properly is of long standing. . . ."). But see \textit{Gunning v. State}, 347 Md. 332, 351, 701 A.2d 374, 383 (1997) ("It is well settled that a trial judge who encounters a matter that falls within the realm of judicial discretion must exercise his or her discretion in ruling on the matter. . . . That exercise of discretion must be clear from the record."); \textit{Nelson v. State}, 315 Md. 62, 70, 553 A.2d 667, 671 (1989) ("If the judge has discretion, he must use it and the record must show that he used it.").

\textsuperscript{49} 375 Md. 168, 825 A.2d 452 (2003).

\textsuperscript{50} \textit{Id.} at 178–79, 825 A.2d at 458.

\textsuperscript{51} \textit{Id.} at 179, 825 A.2d at 458. The court stated:

The issue before us, therefore, is whether the sentencing judge’s failure expressly and consecutively to acknowledge the existence of a second statute permitting a suspension of that sentence, [section 641A], is sufficient to infer that he was unaware of its potential application to the sentence he imposed in the case \textit{sub judice}. We conclude that it is not.

C. Maryland Rule 4-345 and Sentencing Errors

Maryland Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." In a series of cases, the Court of Appeals has emphasized that a trial court has both the authority and the responsibility to correct an illegal sentence using Rule 4-345 and that a failure to do so can be raised by a defendant at any time, not just on direct review. As the court explained in Walczak v. State, because the illegal sentence can be corrected at any time, a failure to immediately raise the issue does not waive the defendant's right to challenge the sentence. One year later, in Corcoran v. State, the Court of Special Appeals addressed the Walczak decision, emphasizing that the exception to the waiver doctrine applies only to substantive, not procedural, law. The court explained that a flaw in the sentencing procedure is not enough to render a sentence illegal; an illegal sentence is only caused by a substantive error, such as the imposition of a sentence that exceeds the statutorily granted authority of the judge.

The Corcoran decision indicated that Maryland Rule 4-345 is applicable only when there is a substantive error in the sentence, as opposed to a procedural flaw in the sentencing proceedings. The Court of Appeals confirmed in Evans v. State that there must be "some illegality in the sentence itself" for the error to be substantive and a motion to correct an illegal sentence to be appropriate. For example, in Ridgeway v. State, the Court of Appeals held that mistak-
only sentencing a defendant for crimes of which he had actually been acquitted is a substantive error that results in an illegal sentence.\textsuperscript{64}

Similarly, in \textit{Moosavi v. State},\textsuperscript{65} the court found substantive error when a lower court mistakenly charged and convicted a defendant under the wrong statute, resulting in the imposition of an illegal sentence.\textsuperscript{66} In \textit{Jones v. State},\textsuperscript{67} the court held that a sentence is illegal if it is based upon a guilty verdict in a jury trial that was not orally announced in court. Because these errors are substantive and make the sentences themselves illegal, such errors are appropriate for review under Rule 4-345.

On the other hand, procedural errors during the sentencing proceeding do not render the sentence illegal under Maryland Rule 4-345 when the resulting sentence is itself lawful.\textsuperscript{68} For example, in \textit{Randall Book Corp. v. State},\textsuperscript{69} the existence of improper motivation by the sentencing judge was held to be a procedural error that did not result in an illegal sentence. Similarly, in \textit{Teasley v. State},\textsuperscript{70} the court found no substantive error when a sentencing judge mistakenly applied improper sentencing guidelines during the sentencing proceedings.\textsuperscript{71} The Supreme Court of the United States has also weighed in on this issue, holding that the procedural error that resulted when a defendant was prevented from introducing mitigating evidence during sentencing proceedings did not make the sentence illegal by definition.\textsuperscript{72} Thus, when the sentence itself is lawful and the only errors are proce-

\textsuperscript{64} This is substantive error because the court's action in reviewing the sentence "was not to correct a mistake, but rather, it was to correct this illegal sentence." \textit{Id.} at 171, 797 A.2d at 1290.
\textsuperscript{65} 355 Md. 651, 736 A.2d 285 (1999).
\textsuperscript{66} \textit{Id.} at 662-63, 736 A.2d at 291.
\textsuperscript{67} 384 Md. 669, 866 A.2d 151 (2005).
\textsuperscript{68} \textit{See} \textit{Evans v. State}, 382 Md. 248, 278, 855 A.2d 291, 309 (2004) ("[A]s a general rule, a Rule 4-345(a) motion to correct an illegal sentence is not appropriate where the alleged illegality did not inhere in the defendant's sentence." (quoting \textit{State v. Kanaras}, 357 Md. 170, 185, 742 A.2d 508, 517 (1999)) (brackets and internal quotation marks omitted)).
\textsuperscript{69} 316 Md. 315, 323, 558 A.2d 715, 719 (1989).
\textsuperscript{70} 298 Md. 364, 470 A.2d 337 (1984).
\textsuperscript{71} \textit{Id.} at 371, 470 A.2d at 340. The sentencing judge mistakenly applied a consecutive sentence rather than a concurrent sentence. \textit{Id.} at 369-70, 470 A.2d at 339-40. The court found the sentence legal because it "constituted the end result of a good faith exercise of the trial judge's discretion." \textit{Id.} at 371, 470 A.2d at 340.
\textsuperscript{72} \textit{See} \textit{Hill v. United States}, 368 U.S. 424, 430 (1962) ("The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.").
dural, a Rule 4-345 motion to correct an illegal sentence is not the proper vehicle to correct a sentence.\textsuperscript{73}

III. THE COURT’S REASONING

In \textit{State v. Wilkins}, the Court of Appeals held that a sentencing judge’s failure to recognize his right to exercise discretion is a procedural error that does not render a sentence illegal, and thus a motion to correct an illegal sentence is an improper tool to raise this question.\textsuperscript{74} Writing for the majority, Judge Greene first examined the legality of a sentence when a judge fails to recognize his right to exercise discretion in sentencing.\textsuperscript{75} The court acknowledged the statutory right of a court to correct an illegal sentence at any time, but noted that a motion to correct an illegal sentence is appropriate only where there is a substantive error in the sentence itself.\textsuperscript{76} The court observed that procedural errors do not render a sentence illegal when the resulting sentence is itself lawful.\textsuperscript{77} The majority emphasized that the concept of an illegal sentence exclusively involves substantive law, not procedural law.\textsuperscript{78}

Turning to Wilkins’s sentence, the court concluded that, because life imprisonment for first-degree murder is a sentence technically permitted by law—because the sentencing statute provided for life imprisonment as a penalty for first-degree murder—any alleged error was procedural and did not inhere in the sentence itself.\textsuperscript{79} The court concluded that even if the trial court refused to exercise discretion, the sentence actually imposed was within the sentencing requirements and was therefore lawful.\textsuperscript{80}

The court next distinguished \textit{Williamson v. State}, a case that was factually analogous but resulted in a different outcome.\textsuperscript{81} In \textit{Williamson}, the court explained, the judge’s express refusal to exercise discretion was raised on direct appeal, whereas in Wilkins’s case, the judge’s alleged refusal was raised in a collateral attack on the sentence.\textsuperscript{82}

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\item \textsuperscript{73} See \textit{Baker v. State}, 389 Md. 127, 134, 883 A.2d 916, 920 (2005) (finding a Rule 4-345(a) motion inappropriate where the sentence was itself lawful).
\item \textsuperscript{74} \textit{Wilkins}, 393 Md. at 272, 284, 900 A.2d at 767, 774.
\item \textsuperscript{75} \textit{Id.} at 273, 900 A.2d at 767–68. The majority noted that the court has defined an illegal sentence as one not permitted by statute. \textit{Id.}, 900 A.2d at 767.
\item \textsuperscript{76} \textit{Id.}, 900 A.2d at 767–68.
\item \textsuperscript{77} \textit{Id.} at 275, 900 A.2d at 769.
\item \textsuperscript{78} \textit{Id.} at 273, 900 A.2d at 768 (citing \textit{Corcoran v. State}, 67 Md. App. 252, 255, 507 A.2d 200, 202 (1986)).
\item \textsuperscript{79} \textit{Id.} at 278, 900 A.2d at 770.
\item \textsuperscript{80} \textit{Id.}, 900 A.2d at 771.
\item \textsuperscript{81} \textit{Id.} at 281–82, 900 A.2d at 773.
\item \textsuperscript{82} \textit{Id.} at 282, 900 A.2d at 773.
\end{itemize}
court noted that direct appeal would have been a proper time to raise the issue, but Wilkins failed to do so.\textsuperscript{83}

The Wilkins court then relied upon \textit{State v. Chaney} to support its conclusion that a sentencing judge is presumed to know the law and that his failure to specifically acknowledge his discretion does not mean that he is unaware of the right to use this discretion.\textsuperscript{84} Recognizing that \textit{Chaney} and \textit{Williamson} were not entirely on point, the court ended its analysis by invoking the underlying principles of those cases to find that a motion to correct an illegal sentence is an improper vehicle to raise this particular issue.\textsuperscript{85}

Judge Harrell filed a partial dissent in which he stated that, though he reached a similar result as the majority, he disagreed with the majority's reasoning.\textsuperscript{86} He argued that a sentencing judge's failure to recognize his discretion in sentencing is a substantive error that inheres in the sentence itself, thus making the sentence illegal if the failure to recognize discretion was clearly on the record.\textsuperscript{87} In this case, however, Judge Harrell maintained that the record did not establish a failure to recognize discretion.\textsuperscript{88}

Judge Harrell then criticized the majority's conclusion that a sentence was legal so long as it was within the statutorily permitted sentencing limits as both novel and unsupported by precedent.\textsuperscript{89} He claimed that the cases relied upon by the majority were distinguishable from this case because such cases concerned procedural errors, not the violation of substantive statutory authority that Wilkins alleged.\textsuperscript{90}

Judge Harrell also recognized the principles expressed in \textit{Williamson} and \textit{Wooten} that courts have the statutory authority to suspend any or all sentences and that a sentencing judge is in error if he refuses to

\textsuperscript{83} Id. at 280, 900 A.2d at 772.
\textsuperscript{84} Id. at 282–84, 900 A.2d at 773–74.
\textsuperscript{85} Id. at 284, 900 A.2d at 774.
\textsuperscript{86} Id. at 285, 900 A.2d at 775 (Harrell, J., concurring and dissenting). Chief Judge Bell also joined in Judge Harrell's opinion. \textit{Id.}
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 286, 900 A.2d at 775.
\textsuperscript{90} Id. Specifically, Judge Harrell distinguished \textit{Randall Book Corp. v. State}, 316 Md. 315, 558 A.2d 715 (1989), which involved a judge's improper consideration of extraneous circumstances during the sentencing hearing. \textit{Wilkins}, 593 Md. at 286–87, 900 A.2d at 775–76 (Harrell, J., concurring and dissenting). As Judge Harrell explained, the \textit{Randall Book} court ultimately determined that even though the trial court committed an error during the sentencing proceeding, the sentence itself was still legal. \textit{Id.} Judge Harrell categorized this as a procedural defect and thus distinguishable from the substantive statutory defect of Wilkins's case. \textit{Id.}
acknowledge his discretion to suspend a sentence. He reasoned that if a judge refuses to recognize his power of discretion, any resulting sentence is illegal since the judge imposed a sentence in violation of a statute requiring him to exercise discretion. According to Judge Harrell, imposing a sentence in a manner that violates a statute is an error that inheres in the sentence itself, resulting in an illegal sentence.

Finally, Judge Harrell emphasized that any alleged error in a judge's refusal to recognize discretion must be made manifest on the record. In Wilkins's case, he found that the record did not show that the sentencing judge refused to recognize his power to suspend the sentence. He distinguished the facts from Williamson, where there was an explicit refusal to recognize discretion by the sentencing judge. In the present case, Judge Harrell maintained, there was no indication on the record that would lead the court to reasonably conclude that the judge refused to recognize his discretionary power to reduce a sentence. Accordingly, Judge Harrell found no merit in Wilkins's appeal and would have reversed and remanded the case to the Court of Special Appeals with instructions to affirm the circuit court decision.

IV. Analysis

In State v. Wilkins, the Court of Appeals held that a sentencing judge's failure to recognize discretion does not render a sentence substantively illegal and that a motion to correct an illegal sentence is an improper mechanism to address this issue. The court reached the proper result in denying Wilkins's motion to correct an illegal sentence, but in doing so, relied upon faulty reasoning that departed from precedent. The court erroneously found that a sentencing

91. Id. at 288, 900 A.2d at 776.
92. Id. Judge Harrell contended that, because section 641A gives a judge a clear statutory mandate to use discretion, and because Williamson and Wooten stated that a refusal to acknowledge this discretion is error, a judge violates a statutory mandate if he fails to acknowledge his discretion. Id. Essentially, this results in the imposition of a sentence in violation of a statute. Id.
93. Id.
94. Id. at 285, 900 A.2d at 775.
95. Id. at 288, 900 A.2d at 777.
96. Id. at 289, 900 A.2d at 777.
97. Id. Judge Harrell found that the judge was aware of his power and exercised it accordingly, even if he chose not to suspend any part of the sentence. Id.
98. Id. at 290, 900 A.2d at 777.
99. Id. at 272, 900 A.2d at 767 (majority opinion).
100. See infra Part IV.A.
judge's failure to recognize discretion is a procedural error and not a substantive error that results in an illegal sentence. Instead, the court should have recognized that in cases where a sentencing judge expressly refuses to recognize his discretion, the sentence itself is rendered illegal by this substantive error. Accordingly, the court should have also held that a motion to correct an illegal sentence is a proper vehicle to remedy this error.

A. The Court of Appeals Departed from Precedent in Finding that a Refusal to Recognize Discretion Is a Procedural Error

The Wilkins court misinterpreted precedent by holding that a sentencing judge's failure to recognize discretion is a procedural flaw, not a substantive error. The court should have held that a failure to recognize discretion results in a substantive error that renders a sentence illegal. For the sentence to be illegal, however, the judge's failure must be clear in the record.

1. A Failure to Recognize the Right to Exercise Discretion Renders a Sentence Substantively Illegal

The Wilkins court should have held that a sentencing judge's failure to recognize discretion constitutes a substantive error that makes a sentence illegal. The Court of Appeals has long interpreted section 641A as giving sentencing courts the discretionary power to suspend sentences and has held that a trial court must exercise discretion when given it. Accordingly, the Wilkins court should have held that

101. See infra Part IV.A.1.
102. See infra Part IV.A.2.
103. See infra Part IV.B.
104. See Wilkins, 393 Md. at 286, 900 A.2d at 775 (Harrell, J., concurring and dissenting) (stating that the Court of Appeals has “never held so until now” that a sentence is not illegal so long as it “falls within the statutorily permitted sentencing limits for the crime”).
105. See id. (stating that a failure to recognize discretion that is clear in the trial record results in a substantive error that makes the sentence itself unlawful).
106. Id.
107. See id. (arguing that “a sentencing judge’s failure to recognize his or her discretion in sentencing a defendant, if made manifest on the record, is a deficiency that inheres in the sentence itself”).
108. E.g., State v. Chaney, 375 Md. 168, 176 n.4, 825 A.2d 452, 456 n.4 (2003); Williamson v. State, 284 Md. 212, 214, 395 A.2d 496, 497 (1979); State v. Wooten, 277 Md. 114, 117, 352 A.2d 829, 831 (1976); see also Colter v. State, 297 Md. 423, 426, 466 A.2d 1286, 1288 (1983) (“[W]e observe that when a court has discretion to act, it must exercise that discretion as that is one of its functions.”).
a failure to comply with section 641A's discretionary mandate amounts to substantive error requiring reversal.\textsuperscript{109}

The \textit{Wilkins} court erred by finding that a judge's failure to recognize discretion is a procedural, not a substantive, error because such a failure amounts to a violation of section 641A's statutorily imposed sentencing discretion.\textsuperscript{110} Criminal defendants have a statutory right to a proper exercise of discretion by the sentencing judge when deciding whether to sentence them to death, life imprisonment, or less than life imprisonment.\textsuperscript{111} A judge commits a statutory violation if he does not recognize and exercise the discretion given to him in section 641A.\textsuperscript{112} Because an illegal sentence is defined as one not permitted by statute, a judge's failure to exercise his statutory mandate to recognize and exercise discretion logically results in the imposition of an illegal sentence.\textsuperscript{113}

In \textit{Wilkins}, if the sentencing judge did not recognize his statutorily mandated authority to suspend Wilkins's sentence, he would have effectively converted the sentence into an "illegal 'mandatory' life sentence."\textsuperscript{114} Both logic and precedent suggest that a judge's refusal to recognize his right to exercise discretion, in clear violation of a statutory mandate, is a substantive error that inheres in the sentence, rendering the sentence illegal.\textsuperscript{115}

The \textit{Wilkins} court declined to adopt this definition of an illegal sentence, however, and instead held that a sentence is legal so long as

\textsuperscript{109} See Maus v. State, 311 Md. 85, 108, 532 A.2d 1066, 1077–78 (1987) ("When a court must exercise discretion, failure to do so is error, and ordinarily requires reversal.").

\textsuperscript{110} See \textit{Wilkins}, 393 Md. at 287, 900 A.2d at 776 (Harrell, J., concurring and dissenting) (stating that the error at issue in this case is a violation of statutory authority, not a violation of procedure). Section 641A gives a judge the "clear, unambiguous and unqualified" statutory right to exercise sentencing discretion. \textit{Wooten}, 277 Md. at 117, 352 A.2d at 831.

\textsuperscript{111} See \textit{Williamson}, 284 Md. at 215, 395 A.2d at 497 (stating that a judge denies a defendant his right to an exercise of discretion if the judge does not consider whether to suspend any part of the life sentence).

\textsuperscript{112} See \textit{Wilkins}, 393 Md. at 287, 900 A.2d at 776 (Harrell, J., concurring and dissenting) (noting that a judge's failure to recognize discretion is a violation of his statutory authority).

\textsuperscript{113} See Holmes v. State, 362 Md. 190, 195–96, 763 A.2d 737, 740 (2000) ("A sentence that is not permitted by statute is an illegal sentence.").

\textsuperscript{114} \textit{Wilkins}, 393 Md. at 275, 900 A.2d at 769 (majority opinion) (contrasting Wilkins's argument that the judge's refusal to recognize discretion resulted in an illegal sentence with the State's argument that the sentence imposed was legal because it was within statutory requirements).

\textsuperscript{115} See \textit{id.} at 288, 900 A.2d at 776 (Harrell, J., concurring and dissenting) (finding that a refusal to recognize discretion is an error that inheres in the sentence itself); see also \textit{Williamson}, 284 Md. at 215, 395 A.2d at 497 (holding that a judge's failure to recognize discretion denied the defendant's "right to a proper exercise of the discretion vested in him").
it falls within the statutorily based sentencing limits for the particular crime.\textsuperscript{116} The cases relied upon by the court to conclude that a failure to exercise discretion results in procedural error do not sufficiently support its narrow conclusion.\textsuperscript{117} Those cases involve clear procedural errors, such as a trial judge considering extraneous circumstances or preventing a defendant from introducing mitigating evidence during sentencing proceedings,\textsuperscript{118} none of the cases involve the imposition of a sentence in violation of a statute. The \textit{Wilkins} court thus erred by relying on cases that fail to address the central issue in this case: the violation of a statutory mandate requiring an exercise of sentencing discretion.\textsuperscript{119}

\section*{2. \textit{For a Sentence to be Rendered Illegal Because of a Sentencing Judge’s Refusal to Recognize Discretion, the Refusal Must be Clear in the Record}}

Although the \textit{Wilkins} court should have held that a sentencing judge's failure to recognize discretion is substantive error resulting in an illegal sentence, it should have also clarified that such a finding requires that the failure be clearly stated in the trial record. Judges are presumed to know the law and are not required to state with particularity every time they exercise discretion.\textsuperscript{120} In fact, “absent a mis-

\begin{itemize}
\item \textsuperscript{116} \textit{Wilkins}, 393 Md. at 286, 900 A.2d at 775. According to the majority, since, at the time of Wilkins's sentencing in 1972, the law permitted a life sentence for first-degree murder, the sentence itself was statutorily permitted. \textit{Id.} at 276, 900 A.2d at 769. The court misleadingly analogized Wilkins's sentence to being sentenced thirty years for second-degree murder or twenty years for armed robbery, stating that “[a]ll of the above sentences are within the statutory limits for the crimes committed. None of the sentences could properly be characterized as an illegal sentence if the sentencing judge failed to suspend all or any portion of the sentences imposed.” \textit{Id.} at 278, 900 A.2d at 770–71.
\item \textsuperscript{117} See \textit{id.} at 286, 900 A.2d at 775 (Harrell, J., concurring and dissenting) (“The principal authorities relied upon by the Majority to support its conclusion do not provide the necessary analyses or bases to reach the Majority's conclusion here.”).
\item \textsuperscript{118} See, \textit{e.g.}, Randall Book Corp. v. State, 316 Md. 315, 322–23, 558 A.2d 715, 719 (1989) (holding that improper motivation by the trial judge is an error in the process of imposing a sentence that does not render a sentence substantively illegal); Hill v. United States, 368 U.S. 424, 430 (1962) (holding that preventing a defendant from presenting mitigating evidence at sentencing was an error occurring during proceedings that did not transform the sentence imposed into an illegal one).
\item \textsuperscript{119} See \textit{Wilkins}, 393 Md. at 287, 900 A.2d at 776 (Harrell, J., concurring and dissenting) (“In contrast to the rules of criminal procedure at issue in \textit{Hill} and \textit{Randall Book Corporation}, the error at issue here is an asserted violation of statutory authority (sentencing discretion) vested in the sentencing court.”).
\item \textsuperscript{120} See \textit{Wilkins} v. State, 162 Md. App. 512, 520, 875 A.2d 231, 236–37 (2005) (describing the presumption given to trial judges); see also \textit{John O. v. Jane O.}, 90 Md. App. 406, 429, 601 A.2d 149, 160 (1992) (noting that there is a presumption that the judge knows and applies the law correctly unless the record clearly shows that the judge neither knew or followed the law).
\end{itemize}
statement of law or conduct inconsistent with the law," a judge is presumed to understand and correctly apply the law.\textsuperscript{121} The fact that a judge does not expressly acknowledge the existence of a statute allowing the exercise of discretion is not a sufficient basis to assume that the judge was unaware of the requirement to utilize discretion.\textsuperscript{122}

Because of this presumption, Maryland courts have required that any failure to recognize discretion must be absolutely clear in the record.\textsuperscript{123} In \textit{Williamson v. State}, one of the very few cases where a sentencing judge’s refusal to recognize discretion rendered a sentence illegal, the sentencing judge explicitly refused to follow Wooten’s mandate that he exercise sentencing discretion.\textsuperscript{124} This refusal to recognize discretion was so clear that the Court of Appeals unanimously reversed the sentence.\textsuperscript{125} However, in \textit{State v. Chaney}, the court found no substantive error because the refusal to recognize discretion was not made express in the record, at least not to the degree in \textit{Williamson}.\textsuperscript{126} Together, \textit{Williamson} and \textit{Chaney} establish the importance of the sentencing judge’s specific language in determining whether a refusal to recognize discretion renders a sentence substantively illegal.\textsuperscript{127}

In \textit{Wilkins}, there was no substantive error resulting in an illegal sentence because the sentencing judge did not expressly refuse to rec-

\begin{itemize}
\item \textsuperscript{121} Medley v. State, 386 Md. 3, 7, 870 A.2d 1218, 1220 (2005).
\item \textsuperscript{122} See \textit{State v. Chaney}, 375 Md. 168, 179, 825 A.2d 452, 458 (2003) (recognizing that a sentencing judge’s failure to acknowledge his power to suspend a sentence does not imply that the judge was unaware of the existence of the statute allowing for the suspension of sentences). Two months after the decision in \textit{Wilkins}, the Court of Appeals handed down \textit{Pollard v. State}, 394 Md. 40, 42, 904 A.2d 500, 501 (2006), a case nearly identical to \textit{Wilkins} both factually and in its outcome. In \textit{Pollard}, the court denied the defendant’s motion to correct an illegal sentence, finding that the trial judge’s failure to recognize discretion did not result in an illegal sentence and, therefore, a motion to correct an illegal sentence was improper. \textit{Id.} at 42, 904 A.2d at 501. Relying on the rationale of \textit{Wilkins}, the \textit{Pollard} court ultimately concluded that a motion to correct an illegal sentence was an improper method of obtaining appellate review of procedural errors in sentencing. \textit{Id.} at 47, 904 A.2d at 504.
\item \textsuperscript{123} See \textit{John O.}, 90 Md. App. at 429, 601 A.2d at 160 (noting the presumption that the judge knows and applies the law correctly unless it is made clear in the record that the judge does not know the law).
\item \textsuperscript{124} Williamson v. State, 284 Md. 212, 215, 395 A.2d 496, 497 (1979). The sentencing judge in \textit{Williamson} stated that he completely disagreed with the Court of Appeals and that, as far as he was concerned, the sentence must be for life imprisonment. \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} State v. Chaney, 375 Md. 168, 178, 825 A.2d 452, 457 (2003). The sentencing judge in \textit{Chaney} noted that the “law provides a single penalty and no other penalty and so the sentence in the discretion of the Court in this case is limited to the imposition of that penalty.” \textit{Id.}
\item \textsuperscript{127} See \textit{Wilkins}, 393 Md. at 288–90, 900 A.2d at 777 (Harrell, J., concurring and dissenting) (contrasting the \textit{Williamson} judge’s language with that of the \textit{Wilkins} judge to conclude that the record in \textit{Wilkins} was insufficient to find a lack of discretion).
\end{itemize}
Recognize his power to exercise sentencing discretion. The present facts are clearly distinguishable from the extreme refusal by the Williamson judge and are comparable to the facts in Chaney, because there was no indication in the trial record that the sentencing judge refused to recognize discretion. In fact, the sentencing judge recognized his discretion by stating on the record that he would “assume that we do have a right to give something less than the death penalty.” Accordingly, Wilkins’s sentence was not rendered illegal by the actions of the sentencing judge.

B. Because a Judge’s Failure to Recognize Discretion Should be Substantive Error when Clear on the Record, a Motion to Correct an Illegal Sentence Is the Proper Mechanism to Remedy the Error

Had the Wilkins court properly held that a sentence is illegal if a judge expressly refuses to recognize his statutorily mandated discretion, a motion to correct an illegal sentence would have been the proper tool to fix the error. By failing to so hold, the Wilkins court severely limited the rights of criminal defendants by restricting their ability to correct substantively illegal sentences.

Appellate review of sentences is very narrow in Maryland. By holding that a failure to recognize sentencing discretion is an error that does not result in an illegal sentence, the Wilkins court limits an already restrictive field of options for defendants seeking to remedy sentencing error. Rule 4-345(a) plays a crucial role in remediying such error because it allows for the correction of an illegal sentence at any time. By classifying a failure to recognize discretion as a procedural error that does not result in an illegal sentence, however, the

128. Id. at 289–90, 900 A.2d at 777.
129. Id.
130. Id.
131. See Evans v. State, 382 Md. 248, 278–79, 855 A.2d 291, 309 (2004) (stating that a motion to correct an illegal sentence can be granted when the sentence itself is illegal).
132. See Teasley v. State, 298 Md. 364, 370, 470 A.2d 337, 340 (1984) (noting that appellate review of sentences is limited to three circumstances: (1) whether the sentence violates a constitutional requirement; (2) whether the sentencing judge was motivated by impermissible considerations; and (3) whether the sentence itself was within statutory limits).
133. See Wilkins, 393 Md. at 276, 900 A.2d at 769 (“We note at the outset that the allegation of error, in the present case, does not inhere in the sentence itself. The imposition of a life sentence for first-degree murder is a sentence permitted by law.”). By finding Wilkins’s sentence substantively legal, the Wilkins court removed it from the purview of a Rule 4-345 motion, leaving Wilkins with only three options for appellate review of his sentence. See supra note 132 and accompanying text.
134. See Md. R. 4-345(a) (“The court may correct an illegal sentence at any time.”).
Wilkins court has prevented petitioners from using Rule 4-345 and consequently has removed an important opportunity for petitioners to remedy substantively illegal sentences.

Though Rule 4-345 is not the only post-conviction vehicle to remedy sentencing error, it is arguably the most significant and effective because it allows for the correction of an illegal sentence at any time.\textsuperscript{135} Sentencing error also can be alleged in a post-conviction petition under the Post-Conviction Procedure Act, but petitioners requesting such relief have only a ten-year period before their right to file expires and are limited to only one petition.\textsuperscript{136} If a petitioner’s counsel for his first post-conviction petition fails to allege the sentencing judge’s failure to exercise discretion, he has potentially lost his only chance to have his sentencing error remedied.\textsuperscript{137} Thus, Rule 4-345 is the most important remedy to a criminal defendant seeking review of sentencing error. By removing sentencing discretion cases from the Rule’s scope, the Wilkins court nullified an extremely important safeguard protecting criminal defendants from serving illegal sentences. The court could have prevented this harm to defendants had it properly held that a refusal to recognize discretion is a substantive error that can result in an illegal sentence and can be remedied by a Rule 4-345 motion to correct an illegal sentence.

V. CONCLUSION

In \textit{State v. Wilkins}, the Court of Appeals denied a criminal defendant's motion to correct an illegal sentence, holding that a sentencing judge’s failure to recognize sentencing discretion does not render the sentence illegal.\textsuperscript{138} In so doing, the court reached the proper outcome in the case, but relied upon faulty reasoning that is inconsistent

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Md. Code Ann., Crim. Proc.} § 7-103 (LexisNexis 2006). This section reads, in pertinent part:
(a) For each trial or sentence, a person may file only one petition for relief under this title.
(b) (1) Unless extraordinary cause is shown, in a case in which a sentence of death has not been imposed, a petition under this subtitle may not be filed more than 10 years after the sentence was imposed.
\textit{Id.} Although petitioners are only permitted to file one petition, under section 7-104, a court may reopen a concluded post-conviction proceeding if determined to be “in the interests of justice.” \textit{Id.} § 7-104.
\textsuperscript{137} Petitions are rarely reopened under section 7-104. \textit{See} Gray v. State, 388 Md. 366, 388, 879 A.2d 1064, 1073 (2005) (noting that the decision to reopen is discretionary and only granted if the sentencing court has abused its discretion and issued a decision “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable”).
\textsuperscript{138} \textit{Wilkins}, 393 Md. at 272, 900 A.2d at 767.
with precedent. The court ignored the fact that a sentence can be rendered illegal when a sentencing judge fails to recognize his statutory mandate to exercise discretion. If this failure to recognize discretion is made manifest on the record, it results in the imposition of a substantively illegal sentence. Accordingly, a motion to correct an illegal sentence is an appropriate vehicle to remedy a sentence rendered illegal in this manner. 

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139. See supra Part IV.
140. See supra Part IV.A.1.
141. See supra Part IV.A.2.
142. See supra Part IV.B.
DEPARTMENT OF NATURAL RESOURCES v. HELLER:
WHITTLING AWAY AT MARYLAND'S
WHISTLEBLOWER PROTECTIONS

In Department of Natural Resources v. Heller, the Court of Appeals of Maryland narrowed the protections of the Maryland Whistleblower Law in the Executive Branch of State Government (Maryland Whistleblower Law) when it ruled that an employee is not protected from employer retaliation unless the employee reported the alleged wrongdoing to someone with actual authority to fix the problem. The court erred because its decision undercut the legislative intent of the Maryland Whistleblower Law by discouraging potential whistleblowers from reporting wrongdoing. The court could have decided the case without narrowing whistleblower protections. Furthermore, the court had no justification for its decision because it misinterpreted the cases on which it purported to rely. Instead of restricting whistleblower protections, the Heller court should have adopted an intent-based rule that protects all whistleblowers from employer retaliation if they possess a reasonable belief that their report is true and the intent to disclose the problem to someone who remedy it. An intent-based rule furthers the purpose of the Maryland Whistleblower Law by encouraging potential whistleblowers to disclose government impropriety.

I. THE CASE

James Heller worked for the Department of Natural Resources (DNR) as the manager of the Somers Cover Marina (the Marina) from October 1998 until April 2001. As part of his job requirements,

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2. See infra Part IV.A.
3. See infra Part IV.B.
4. See infra Part IV.C.
5. See infra Part IV.D.
6. See infra Part IV.D. Consider a government lab worker who blows the whistle because he reasonably believes that a drug slated to be approved for distribution to the general public causes a dangerously high risk of stroke in women over forty. Assume this technician found several studies to support his allegation, but unbeknownst to the employee, the studies are flawed. Under an intent-based whistleblower rule, the lab worker would be protected as long as he possesses a reasonable belief that his allegations are true. Nevertheless, under Heller, the court would not protect this lab worker from employer retaliation because his belief is technically incorrect. See infra Part IV.D.2
Heller was instructed to investigate why the Marina was running a $197,000 deficit. During his investigation, Heller discovered certain fiscal practices that he believed caused the Marina's deficit and violated state law. Heller reported his concerns to his supervisor, Joseph Ward, and Ward's direct report, Daryl DeCesare, but both supervisors dismissed Heller's claim.

After Heller's allegations were dismissed, Superintendent Colonel Rick Barton demoted Heller and transferred him to Pocomoke River State Park. Barton asserted that he demoted Heller due to the finding of an Equal Opportunity Employment Officer (EOEO) that Heller may have engaged in gender discrimination. Heller contended, however, that his supervisors manufactured the discrimination complaint to silence his allegations of fiscal impropriety.

Heller subsequently appealed to the DNR Secretary to reconsider Barton's decision to demote him, but the DNR Secretary upheld Barton's action. Heller then filed a second appeal, during which he negotiated a settlement with the DNR. Simultaneously, Heller filed

9. Id. Specifically, Heller discovered that $80,000 in revenue had not been timely credited to the Marina's budget and marina-appropriated funds were diverted to non-marina uses and encumbered for non-marina purchases. Id. at 306-07, 868 A.2d at 929.
Heller believed that reallocating funds designated for the Marina violated Natural Resources Article, section 5-908.1, which stated, "[a]ny money obtained by the [Natural Resources] Department from Somers Cove Marina shall be credited to the Somers Cove Marina Improvement Fund." Id. at 304, 868 A.2d at 928 (quoting Md. Code Ann., Nat. Res. § 5-908.1 (LexisNexis 1973 & Supp. 2004)). Soon after Heller initiated legal proceedings, this statute was amended to read: "Any money obtained by the [Natural Resources] Department from Somers Cove Marina shall be credited to the [Somers Cove] Fund... Any investment earnings of the Fund may not be transferred or revert to the General Fund of the State, but shall remain in the [Somers Cove] Fund." Id. at 304 n.1, 868 A.2d at 928 n.1 (quoting Md. Code Ann., Nat. Res. § 5-908.1 (LexisNexis 1981 & Supp. 2005)).

10. Id. at 307, 868 A.2d at 929-30.
11. Id. at 310-11, 868 A.2d at 931.
12. Id. at 311-12, 868 A.2d at 932.
13. Id. at 310, 868 A.2d at 931. Immediately after Heller's transfer and demotion, the woman who brought the gender discrimination claim, Mary Taylor, received an "unusual five grade promotion and raise, retroactive for one year." Id. Taylor had worked as Heller's office manager before Barton demoted Heller. Id. at 309, 868 A.2d at 930.

Previously, Heller alleged that Taylor made inappropriate attempts to "romanticize" their professional relationship, and he sent a memorandum to Ward and DeCesare forewarning that Taylor was taking steps to set up a hostile work environment lawsuit. Id., 868 A.2d at 930. Neither Ward nor DeCesare responded to Heller's alert. Id. at 330, 868 A.2d at 943. However, when Taylor later alleged that Heller's actions toward her bordered on sexual harassment, DeCesare promptly demoted Heller and referred Taylor's sexual harassment claim to the DNR's EOEO. Id. at 310, 868 A.2d at 931.
14. Id. at 311, 868 A.2d at 931-32.
15. Id., 868 A.2d at 932. As part of the settlement, the DNR removed the written reprimand from Heller's record and reinstated Heller to his prior rank. Id.
a separate whistleblower claim with the Secretary of the Department of Management and Budget (DMB). In Heller’s settlement with the DNR regarding the gender discrimination allegation, Heller reserved his right to pursue the whistleblower claim.

The DMB rejected Heller’s whistleblower claim, and Heller appealed, requesting an administrative hearing. The Administrative Law Judge (ALJ) denied Heller relief on the grounds that Heller failed to establish that he made a protected disclosure under the Maryland Whistleblower statute. In particular, the ALJ found that Heller did not factually establish the disclosure, and did not disclose information to an agent with actual authority to handle the problem. Heller petitioned for judicial review and the Circuit Court for Somerset County affirmed the ALJ’s ruling.

Following the circuit court decision, Heller appealed to the Court of Special Appeals, which reversed and remanded the case for further administrative proceedings. The Court of Special Appeals found that a memorandum written by Heller and sent to Barton qualified as a protected disclosure under the Maryland Whistleblower Act because Heller disclosed information to someone with actual authority to remedy the problem. The court further determined that Heller merely needed to establish that he possessed an objectively reasonable belief

16. Id.
17. Id.
18. Id.
19. Id. at 320, 868 A.2d at 937. The ALJ rejected Heller’s whistleblower claim for two additional reasons. First, according to the ALJ, Heller failed to prove that Barton transferred him in reprisal for his disclosures about the allegedly improper fund diversions. Heller, 391 Md. at 162, 892 A.2d at 505. Second, the ALJ determined that Heller’s “allegations of fiscal impropriety were meritless.” Id.

During the administrative hearing, Heller attempted to challenge Barton’s testimony that Barton demoted Heller solely based on the EOEO’s findings by presenting evidence that Taylor’s gender discrimination claim was a pretext and that Barton’s real motive was to silence Heller’s whistleblowing efforts. Heller, 161 Md. App. at 311–12, 868 A.2d at 932. The ALJ, however, refused to allow any evidence or testimony about the merits of that complaint, stating that Heller waived his right to challenge the gender harassment case by settling with the DNR. Id. at 312, 868 A.2d at 932.
20. Heller, 391 Md. at 162, 892 A.2d at 505.
22. Id. Heller raised several issues for review, including whether he made a protected disclosure under the Whistleblower statute and whether the ALJ erred by not allowing Heller to offer evidence that might show that the EOEO finding was used as a pretext to remove and demote Heller. Id.

23. Id. at 320, 868 A.2d at 937. The court also stated that Heller’s memorandum qualified as a protected disclosure because Heller did not need to specify the location to which the funds were diverted because any diversion of Marina funds is illegal under Natural Resources Article, section 5-908.1. Id. (referencing Md. Code Ann., Nat. Res. § 5-908.1 (LexisNexis 1981 & Supp. 2005)).
that his allegations were true, and that Heller satisfied that requirement.\textsuperscript{24}

At the DNR’s request, the Court of Appeals granted certiorari to consider: (1) whether the Court of Special Appeals exceeded its scope of review when it found that Heller reasonably believed that he was alleging actual illegal acts; and (2) whether the Court of Special Appeals intruded upon the ALJ’s role when it decided that the ALJ should have permitted Heller to introduce evidence challenging the merits of Taylor’s sexual harassment allegations.\textsuperscript{25}

II. LEGAL BACKGROUND

In 1996, the Maryland legislature enacted the Maryland Whistleblower Law to encourage government employees to report government improprieties and protect such employees from employer retaliation.\textsuperscript{26} The Maryland legislature modeled the law after the Federal Whistleblower Protection Act and created a statute with a similar purpose and almost identical language.\textsuperscript{27} Under the Maryland Whistleblower Law, an employee must satisfy three elements to state a claim for employer retaliation, the most difficult of which is to demonstrate that the employee made a “protected disclosure.”\textsuperscript{28} To qualify as protected, the employee’s disclosure must include particular information;\textsuperscript{29} the employee must reasonably believe that she is disclosing true information;\textsuperscript{30} and the employee must possess an intent to alert a higher authority who is in a position to correct the alleged wrongdoing.\textsuperscript{31}

\textsuperscript{24} Id. at 325–27, 868 A.2d at 940–41. The court also found that the ALJ erred by not permitting Heller to offer evidence regarding the merits of the gender discrimination claim. \textit{Id.} at 327–29, 868 A.2d at 941–42. The Court of Special Appeals held that Heller could cross-examine Barton to challenge his testimony about his motive for demoting and transferring Heller, and that Heller could use the merits of the gender harassment case to do so. \textit{Id.} at 329–30, 868 A.2d at 942–43. For example, Heller could ask Barton why Barton ignored Heller’s complaints but immediately acted on Taylor’s allegations. \textit{Id.} at 330, 868 A.2d at 943.

\textsuperscript{25} Heller, 391 Md. at 164 n.4, 892 A.2d at 506–07 n.4.

\textsuperscript{26} See infra Part II.A.

\textsuperscript{27} See infra Part II.B.

\textsuperscript{28} See infra Part II.C.

\textsuperscript{29} See infra Part II.C.1.

\textsuperscript{30} See infra Part II.C.2.

\textsuperscript{31} See infra Part II.C.3.
A. Maryland’s Whistleblower Law for Public Employees

The Maryland legislature enacted the Maryland Whistleblower Law\footnote{32. Md. Code Ann., State Pers. & Pens. § 5-305 (LexisNexis 1993). The pertinent section of the Maryland Whistleblower Law is titled “Reprisals prohibited” and provides: [A] supervisor, appointing authority, or the head of a principal unit may not take or refuse to take any personnel action as a reprisal against an employee who: (1) discloses information that the employee reasonably believes evidences: (i) an abuse of authority, gross mismanagement, or gross waste of money; [or] (ii) a substantial and specific danger to public health or safety; or (iii) a violation of law; or (2) following a disclosure under item (1) of this section seeks a remedy provided under this subtitle or any other law or policy governing the employee’s unit. Id.} to prohibit Maryland authorities from retaliating against employees who report illegal government activities.\footnote{33. The Maryland legislature clarified its intent in the preamble to the Maryland Whistleblower Law: “The purpose of this subtitle is to prohibit any State appointing authority from using a personnel action as a retaliatory measure against an employee or applicant for State employment who has made a disclosure of illegality or impropriety.” Act of May 27, 1980, ch. 850, 1980 Md. Laws 2998–99.} Specifically, the legislature intended to protect employees who report government cost overruns and legitimate health risks, as well as employees who call attention to government delays in setting industry standards that benefit private business while hurting the public.\footnote{34. When the Senate Constitutional and Public Law Committee considered the precursor to section 5-305, Delegate Joan Pitkin, one of the bill’s sponsors, identified the three scenarios listed above as examples where employers retaliated against their employees who acted in the public interest. Hearing on HB 616 before the Senate Constitutional and Public Law Committee, 1980 Leg., 396th Sess. (Md. 1980) (statement of Delegate Joan B. Pitkin); see also Montgomery v. E. Corr. Inst., 377 Md. 615, 626–27 n.7, 835 A.2d 169, 176 n.7 (2003) (discussing the three situations Delegate Pitkin sought to prevent by supporting a prior version of section 5-305).}

B. Maryland Courts Rely on Federal Whistleblower Protection Law to Interpret the Maryland Whistleblower Law

Generally, Maryland courts find federal court interpretations of analogous statutes highly persuasive.\footnote{35. Fioretti v. Maryland State Bd. of Dental Exam’rs, 351 Md. 66, 76, 716 A.2d 258, 263 (1998) (applying Federal Freedom of Information Act precedent to questions regarding the Maryland Public Information Act because the two statutes have virtually identical language and similar historical developments).} In fact, Maryland courts frequently recite that “when the purpose and language of a federal statute are substantially the same” as a Maryland statute, federal interpretations are persuasive.\footnote{36. Id.} Maryland courts have applied this
concept to rules of civil procedure, tax statutes, and contract laws. Because the language and purpose of the federal and Maryland whistleblower statutes are nearly identical, Maryland courts tend to apply federal court interpretations of the Federal Whistleblower Protection Act to aspects of the Maryland Whistleblower Law.

C. Elements of a Retaliation Claim for Whistleblowing

To state a prima facie case for unlawful employer retaliation under federal and state law, the Maryland Court of Appeals requires

37. East v. Gilchrist, 293 Md. 453, 459, 445 A.2d 343, 345 (1982) (stating that Maryland courts find federal decisions that construe certain Federal Rules of Civil Procedure especially persuasive because the Maryland rules are modeled after the federal rules); Biro v. Schombert, 285 Md. 290, 295, 402 A.2d 71, 74 (1979) (stating that federal court interpretations of Federal Rule 54(b) are highly persuasive to Maryland courts because the Maryland rule was modeled after the federal rule and uses "substantially the same language"); Diener Enter. v. Miller, 266 Md. 551, 554, 295 A.2d 470, 472 (1972) (same); Edmonds v. Lupton, 253 Md. 93, 99, 252 A.2d 71, 74 (1969) (applying the aforementioned concept to Maryland Rule 314 al).

38. See Villa Nova Night Club, Inc. v. Comptroller of the Treasury, 256 Md. 381, 386-87, 260 A.2d 307, 309-10 (1970) (stating that decisions under the federal tax code are instructive to Maryland courts because the state statute and the federal statute are similarly structured).


40. The Maryland Whistleblower Law is modeled after the Federal Whistleblower Protection Act, which states that a supervisor shall not:

- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of
- (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
  - (i) a violation of any law, rule, or regulation, or
  - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]


Neither the federal nor the Maryland whistleblower statute protects whistleblowers in the private sector. Wholey v. Sears Roebuck, 370 Md. 38, 57 & n.11, 803 A.2d 482, 492-93 & 493 n.11 (2002) (noting that the Maryland legislature provided statutory protection for government employees who report government improprieties, but did not grant the same protections to private-sector employees who report illegal actions in private businesses).

41. See infra Part II.C.1.
an employee to plead and prove three elements.\textsuperscript{42} The employee must: (1) make a protected disclosure; (2) show that the employer took an adverse employment action against the employee; and (3) demonstrate the existence of a causal connection between the protected activity and the adverse action.\textsuperscript{43} Once the employee establishes a prima facie case, the employer may rebut the allegations by providing non-retaliatory justifications for its allegedly discriminatory actions.\textsuperscript{44} Next, the burden of proof shifts back to the plaintiff to show that the employer’s articulated reasons were a mere pretext and that the employer was actually motivated by discrimination.\textsuperscript{45}

The most frequently litigated element of the test is whether the employee made a “protected disclosure.”\textsuperscript{46} Under Maryland law, a protected disclosure must address a government impropriety and the employee must reasonably believe that the disclosure is true as well as have the intent to report to a superior or colleague with the authority to fix the problem.\textsuperscript{47}

1. First Requirement for a Protected Disclosure: Content

For a disclosure to be protected in Maryland, an employee must disclose evidence of an abuse of authority, gross mismanagement, or illegal activities.\textsuperscript{48} In Montgomery v. Eastern Correctional Institution,\textsuperscript{49} the Court of Appeals adopted federal definitions of abuse of authority and gross mismanagement.\textsuperscript{50} The Montgomery court defined “abuse of authority” as “the arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.”\textsuperscript{51} Moreover, the same court defined “gross misman-

\begin{thebibliography}{9}
\bibitem{Manikhi} Manikhi v. Mass Transit Admin., 360 Md. 333, 349, 758 A.2d 95, 103-04 (2000); Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994).
\bibitem{Manikhi2} Manikhi, 360 Md. at 349, 758 A.2d at 103-04; Carter, 33 F.3d at 460.
\bibitem{Carter} Carter, 33 F.3d at 460.
\bibitem{Id} Id.
\bibitem{46} The other two elements are litigated less often; employees almost always satisfy the second element because typically the employer fires the employee, and the threshold to establish a causal connection is quite low. 135 CONG. REC. S2779-81 (daily ed. Mar. 16, 1989) (statement of Sen. Levin) (explaining that any weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the “contributing factor” test to establish a causal connection).
\bibitem{47} MD. CODE ANN., STATE PERS. & PENS. § 5-305 (LexisNexis 2004); Hooven-Lewis v. Caldera, 249 F.3d 259, 276 (4th Cir. 2001); see also infra Parts II.C.1-3.
\bibitem{49} 377 Md. 615, 835 A.2d 169 (2003).
\bibitem{50} Id. at 639, 835 A.2d at 184.
\bibitem{51} Id. at 640, 835 A.2d at 184 (quoting McCollum v. Dep’t of Veterans Affairs, 75 M.S.P.R. 449, 455-56 (1997)). For example, misuse of government equipment is consid-
agement” as a manager’s “action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.”

2. **Second Requirement for a Protected Disclosure: Reasonable Belief**

An employee must also have a reasonable belief that the disclosed information actually demonstrates an abuse of authority, gross mismanagement, or violation of law for the disclosure to qualify as protected. The reasonable belief standard is objective, inquiring whether a reasonable person in the employee’s position would believe that the disclosure evidenced a violation. Additionally, at least one Fourth Circuit case interpreting Maryland law explicitly stated that as long as a person reasonably believes that she is reporting a government impropriety, that person should be protected from employer retaliation—even if disclosure does not contain an actual violation.

3. **Third Requirement for a Protected Disclosure: Intent to Alert Authority in Position to Change Alleged Wrongdoing**

The Maryland Whistleblower Protection Law does not identify to whom an employee must disclose information. The Federal Whistleblower Protection Act contains the same omission; however, at least three federal cases used an intent-based test to interpret the Federal Whistleblower Protection Act, meaning that the courts required the discloser to possess an intent to alert someone with authority to fix the problem.

First, in *Willis v. Department of Agriculture,* the court evaluated an employee’s words and actions and determined that criticizing the

52. *Id.* at 639, 835 A.2d at 184 (quoting Embree v. Dep’t of Treasury, 70 M.S.P.R. 79, 85 (1996)). For an action to rise to the level of gross mismanagement, a manager must do something manifestly wrong, not merely make a questionable decision. *Id.*

53. 5 U.S.C. § 2302(b)(8)(A) (2003); MD. CODE ANN., STATE PERS. & PENS. § 5-505 (LexisNexis 2004); *Montgomery*, 377 Md. at 641, 835 A.2d at 185 (citing Ramos v. Dep’t of Treasury, 72 M.S.P.R. 235, 240 (1996)).

54. *Montgomery*, 377 Md. at 641, 835 A.2d at 185 (citing Ramos, 72 M.S.P.R. at 240).

55. *See Horton v. Dep’t of Navy*, 66 F.3d 279, 283 (4th Cir. 1995) (“The statute requires only that the whistleblower had a reasonable belief that, for example, a rule or regulation had been violated, in order for the disclosure of such violations to be protected.”). The Court of Appeals has not made a similarly explicit statement.

56. *See supra* notes 32, 40 and accompanying text.

57. The term *intent-based test* will be used to identify the federal court requirement that a discloser possess the intent to alert someone with authority to fix the problem.

58. 141 F.3d 1139 (Fed. Cir. 1998).
wrongdoer does not evidence the proper intent for a whistleblower claim. In Willis, a federal employee reviewed whether farms in Iowa violated federal conservation standards. The employee reported to his supervisor, Erwin Aust, that sixteen of seventy-seven farms were not in compliance. Seven farms appealed the decision to Aust, who subsequently granted six of the seven appeals. The employee complained to Aust that the reversals were unfounded, and then brought a claim under the Federal Whistleblower Protection Act, arguing that he was forced to retire after he complained to his supervisor. The Willis court held that the employee did not possess the proper intent and thus failed to make a protected disclosure. After evaluating the employee’s actions, the court stated that merely criticizing a wrongdoer does not demonstrate an intent to tell someone who can fix the problem.

Second, in Carr v. Social Security Administration, the court suggested that an employee should be protected under the Federal Whistleblower Protection Act even if she reports a government impropriety to someone without authority to fix the problem, as long as she possessed the intent to tell someone who could remedy it. In Carr, an ALJ who worked for the Social Security Administration alleged that she was fired in response to her whistleblowing activities. The employee had reported conduct that she believed violated various statutes to the appropriate authorities, but she also undisputedly engaged in disruptive behavior and inappropriate conduct. The Carr court confirmed that the Federal Whistleblower Protection Act did shield the judge from retaliation for her disclosures, but it did not inoculate

59. Id. at 1140–41.
60. Id. at 1141.
61. Id.
62. Id. at 1143.
63. Id. at 1141–42.
64. Id. at 1143.
65. Id. ("Willis’s disclosures . . . did not evidence an intent to raise the issue with higher authorities who were in a position to correct the alleged wrongdoing."). Willis did alert other authorities about his supervisor’s alleged wrongdoing, however, the Willis court held that those disclosures could not qualify under the Federal Whistleblower Protection Act because Willis made them after he quit his job. Id. Presumably, the federal employee could have received protection from retaliation if he had alerted someone other than his supervisor, because his supervisor was the alleged wrongdoer.
66. 185 F.2d 1318 (Fed. Cir. 1999).
67. Id. at 1326.
68. Id. at 1322.
69. Id. at 1320.
her from the repercussions of her own wrongdoings; thus, the court upheld her termination as lawful.

Third and finally, in Hooven-Lewis v. Caldera,71 the court explicitly stated that a discloser must have the intent to raise the problem with someone who can remedy it.72 In Hooven-Lewis, a former government employee alleged that the Army terminated her in violation of the Federal Whistleblower Protection Act because she reported her superior for hiding important lab errors.73 The employee made her report to the lab supervisor, who was also the wrongdoer.74 The court did not grant the lab technician protection because the court found that she lacked an intent to report the alleged wrongdoing to someone who could fix the problem—she merely reported the violation to the actual wrongdoer.75

III. THE COURT’S REASONING

In Department of Natural Resources v. Heller, the Court of Appeals held that an ALJ correctly determined that a state employee failed to make a protected disclosure.76 The court created a rule that required employees to disclose wrongdoing to someone with actual authority to ameliorate it in order to qualify for protection from employer retaliation under the Maryland Whistleblower Law.77 Further, the court

70. Id. at 1322, 1326. The Carr court upheld the employee’s termination because it determined that she was fired for inappropriate behavior, not for reporting government wrongdoing, ruling that a misbehaving employee does not enjoy permanent job security merely because she reported government impropriety. Id. at 1326.
71. 249 F.3d 259 (4th Cir. 2001).
72. Id. at 276.
73. Id. at 262, 264, 274.
74. Id. at 262–63.
75. Id. at 276. The court explained that “[c]riticism directed at the wrongdoer . . . is not whistleblowing.” Id. Similar to the employee in Willis, the federal employee in Hooven-Lewis could have likely received protection from retaliation if she had alerted someone other than her supervisor, because he was the source of the alleged problem.
76. 391 Md. at 164–65, 892 A.2d at 507. Interestingly, the Court of Appeals altered the question presented by the DNR’s petition for certiorari. Id. at 177–78, 892 A.2d at 514–15 (Raker, J., dissenting). The Heller court phrased the DNR’s question as: “Did the ALJ erroneously determine that [Heller] did not make protected disclosures as defined by Maryland’s Whistleblower Statute?” Id. at 178, 892 A.2d at 514. In its petition, however, the DNR asked:
Where the ALJ specifically found that Mr. Heller lied under oath and that he was not a credible witness, did the Court of Special Appeals exceed its scope of review when it found, as a matter of fact, that, at the times Mr. Heller purportedly raised allegations that Somers Cove revenues were being unlawfully diverted by DNR, Mr. Heller reasonably believed that he was alleging actual violations of law?
Id. at 177, 892 A.2d at 514.
77. Id. at 172, 892 A.2d at 511 (majority opinion).
held that the ALJ correctly excluded evidence that Heller proffered to challenge the merits of his underlying harassment allegations.\textsuperscript{78}

Writing for the court, Judge Battaglia began by noting that Maryland courts use interpretations of the Federal Whistleblower Protection Act to help interpret the Maryland Whistleblower Law because the two statutes have substantially similar purposes and language.\textsuperscript{79} The court also identified the elements for an employer retaliation claim under the Maryland Whistleblower Law.\textsuperscript{80} Next, the court stated that the appropriate standard of review for this case is limited to the substantial evidence test.\textsuperscript{81} Applying the substantial evidence test, the \textit{Heller} court found reasonable evidence to uphold the ALJ's conclusion that Heller's disclosure was not protected under the Maryland Whistleblower Law because Heller did not disclose to a person with

\textsuperscript{78} \textit{Id.} at 165, 892 A.2d at 507.

\textsuperscript{79} \textit{Id.} at 169–70, 892 A.2d at 510.

\textsuperscript{80} \textit{Id.} at 170, 892 A.2d at 510. According to the \textit{Heller} majority, the elements required for an employee to qualify for protections under the Maryland Whistleblower Law are: (1) the disclosure must contain information that the employee reasonably believes reveals an abuse of authority; (2) the employee must "prove a causal connection between the disclosure and the personnel action"; and (3) the employee must show "by a preponderance of the evidence that the protected disclosure was a contributing factor in the decision to take the personnel action" against the employee. \textit{Id.} at 170–71, 892 A.2d at 510 (internal quotation marks omitted).

The second element contains an aspect of controversy because the \textit{Heller} court stated the law in two different ways. See \textit{id.} at 170, 172, 892 A.2d at 510, 511. Both times, the \textit{Heller} court cited to federal cases for support. First, the majority characterized the law as requiring that an employee disclosing information must have the intent to alert someone with authority to solve the situation. \textit{Id.} at 170, 892 A.2d at 510 (internal quotation marks omitted).

Second, the majority revisited the second element of a protected disclosure and said that an employee must have disclosed the information to someone with actual authority to correct the reported wrongdoing. \textit{Id.} at 172, 892 A.2d at 511 (stating that for "allegations to be considered protected disclosures under the law, [Heller] must make his disclosures to individuals in a position to remedy the wrongful actions"). Oddly, the court prefaced its second description of the rule with the phrase "[a]s previously stated," although the specific language was never previously stated. The court's second articulation of the second element for a protected disclosure is a more rigorous test because the employee must know who has authority to remedy his alleged problem, and be correct in his belief that a problem exists, in order to obtain protection from employer retaliation. See infra Part IV.D.

\textsuperscript{81} \textit{Heller}, 391 Md. at 165–66, 892 A.2d at 507–08. Under the substantial evidence test, the court is required to uphold an agency's decision if the record contains substantial evidence that supports the agency's factual findings and the agency's decision is not based on an incorrect conclusion of law. \textit{Id.}, 892 A.2d at 507. In \textit{Heller}, the court upheld the ALJ's decision because her first ruling was factually supported by substantial evidence and not premised on an error of law. \textit{Id.} at 172–73, 892 A.2d at 511.
actual authority to fix the alleged problem. The majority opinion did not consider Heller's intent.

In a dissenting opinion, Judge Raker, joined by Judge Harrell and Chief Judge Bell, argued that the majority made a mistake of law when it concluded that the Maryland Whistleblower Law requires an employee to disclose information to a person with authority to remedy the alleged wrongdoing. Rather, Judge Raker argued, the statute only requires that the employee possess an intent to disclose to a person with authority to fix the problem. Judge Raker also maintained that the majority's new requirement is unsupported by Maryland or federal precedent. Additionally, Judge Raker contended that the majority's new rule incorrectly narrows Maryland whistleblower protections to exclude all employees who reasonably—but erroneously—allege wrongdoing.

IV. Analysis

In Department of Natural Resources v. Heller, the Court of Appeals ruled that an employee is not protected from employer retaliation unless the employee reports an alleged wrongdoing to someone with authority to fix the problem. The Heller court erred because its rule discourages potential whistleblowers from reporting wrongdoing, thus narrowing the protections and undercutting the purpose of the Maryland Whistleblower Law. In addition, the court lacked justification for its decision because the court could have decided the case without

82. Id. at 173, 892 A.2d at 512. The Heller court stated that "a reasoning mind reasonably could have reached the factual conclusion that Mr. Ward and Mr. DeCesare were not individuals who could correct the alleged wrongdoing." Id.
83. Id. at 176–77, 892 A.2d at 514 (Raker, J., dissenting).
84. Id. Judge Raker also argued that the majority made a procedural mistake by changing the first issues submitted for certiorari under the veil of reformulating the question. Id. at 176–80, 892 A.2d at 514–16. See supra note 76 for the precise wording of the issues in the DNR's petition for certiorari and the court's reformulation of the DNR's questions.

Furthermore, Judge Raker alleged that the majority's decision violated Maryland Rule § 8-131 by addressing an issue that the petitioner did not raise in the certiorari petition in a non-extraordinary situation. Heller, 391 Md. at 178–81, 892 A.2d at 515–16; see also Md. R. 8-131 (1957), amended by Md. R. 8-131 (2005) (stating that "the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari").
85. Heller, 391 Md. at 181, 892 A.2d at 516–17 (Raker, J., dissenting).
86. Id. at 183, 892 A.2d at 517–18. Judge Raker argued that the majority's new law excludes such individuals, as they could never make a qualified disclosure because nobody has the authority to remedy a situation with no actual wrongdoing. Id.
87. Id. at 172, 892 A.2d at 511 (majority opinion).
88. See infra Part IV.A. The court narrowed whistleblower protections because its decision denied protection to employees who report government improprieties if the employee reports to someone who lacks authority to fix the problem, even if the person appears to have authority, or if the employee's belief of wrongdoing is reasonable but
restricting whistleblower protections. Moreover, the court had scant legal basis for its ruling and misconstrued the cases on which it purported to rely. Instead of whittling away at whistleblower protection, the court should have adopted the implicit rule from the federal cases—an intent-based rule. In other words, as Judge Raker argued in dissent, whistleblowers should be protected as long as they report a government wrongdoing and have a reasonable belief that their report is true. An intent-based rule also furthers the purpose of the Maryland Whistleblower Law: to encourage more whistleblowers to disclose government impropriety so that the government will function more efficiently.

A. The Heller Court’s Decision Undercuts the Legislative Intent of the Maryland Whistleblower Law

The Heller court’s decision to limit whistleblower protections weakens the statutory intent of the Maryland Whistleblower Law because it denies protection to the very individuals the legislature specifically intended to protect. When passing the Maryland Whistleblower Law, the Maryland legislature stated that the statute’s purpose was to encourage employees to disclose government impropriety, and to prohibit retaliatory measures against employees who have made protected disclosures. The statutory language supports an inclusive interpretation because it only requires that an employee reasonably believes that her disclosure evidences an abuse of authority, a danger to public health, or an illegal act; the statute does not require that an employee know for certain that the impropriety occurred or that the employee must report the impropriety to a particular person. Thus,

wrong. See infra note 140 for examples of employees who might be denied protection under the Heller decision. See also infra Part IV.D for related information.

89. See infra Part IV.B.
90. See infra Part IV.C.
91. See supra note 57 and accompanying text for a definition of intent-based rule.
93. See infra Part IV.D.
94. Act of May 27, 1980, ch. 850, 1980 Md. Laws 2998 (stating that in order to accomplish the goals of the Maryland Whistleblower Law, “it is essential that classified State employees be free to disclose impropriety”).
95. Id. (stating that the purpose of the Maryland Whistleblower Law is “to prohibit any State appointing authority from using a personnel action as a retaliatory measure against an employee or applicant for State employment who has made a disclosure of illegality or impropriety”).
a plain reading of the statutory language yields no indication that the statute mandates the additional requirement imposed by the *Heller* court: that an employee must report to someone with actual authority to resolve the problem to gain whistleblower protections.\(^\text{97}\) Instead, the statute’s language suggests that employees should be protected even if they have incorrect information or they report to someone with apparent but not actual authority, as long as the employee intends to disclose an objectively reasonable and subjectively true allegation of government impropriety.\(^\text{98}\)

The *Heller* court’s new requirement also cuts against the statutory intent of the Federal Whistleblower Protection Act.\(^\text{99}\) Although the statutory purpose of the federal law is not controlling, Maryland courts should find it highly persuasive because the Maryland statute is modeled after the federal one,\(^\text{100}\) and Maryland courts have confirmed that the two statutes have the same purpose.\(^\text{101}\) The United States Congress intended the Federal Whistleblower Protection Act to “send a strong, clear signal to whistleblowers” that Congress intends “to protect them from any retaliation related to their whistleblowing.”\(^\text{102}\) In other words, Congress meant to encourage whistleblowers—all types of whistleblowers—to disclose the wrongdoing that they observed, regardless of whether the whistleblowers were correct in their allegations and regardless of to whom the whistleblowers reported.\(^\text{103}\) The purpose of the Federal Whistleblower Protection Act is best served by an inclusive intent-based rule.

\(^{97}\) *Id.* § 5-305; *Heller*, 391 Md. at 172, 892 A.2d at 511.

\(^{98}\) *Heller*, 391 Md. at 182–83, 892 A.2d at 517 (Raker, J., dissenting) (“[T]he Maryland Whistleblower Law was intended to protect employees from reprisals for allegations of wrongdoing that, although reasonably believed to be correct by the employee, are nonetheless mistaken.”); *see also* Horton v. Dep’t of Navy, 66 F.3d 279, 283 (Fed. Cir. 1995) (interpreting the Federal Whistleblower Protection Act to require only that the whistleblower had a reasonable belief of wrongdoing).

\(^{99}\) *See supra* Part II.B.

\(^{100}\) *See supra* note 41 and accompanying text.

\(^{101}\) *See supra* Part II.B.


\(^{103}\) *Id.; see also* Marano v. Dep’t of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993), which states that the Federal Whistleblower Protection Act should be broadly construed because:

As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the [Federal Whistleblower Protection Act] is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government. How a protected disclosure is made, or by whom, matters not to the achievement of the [Federal Whistleblower Protection Act’s] goal.

*Marano*, 2 F.3d at 1142 (footnote omitted).
Most importantly, the *Heller* decision de-prioritizes the central policy consideration of whistleblower protections: that shielding whistleblowers is in society's best interest not just because whistleblowers promote the public good, but also because they often risk their jobs and livelihoods for the greater good. In recognition of the sacrifice that whistleblowers make, there is a national trend towards interpreting statutes to protect whistleblowers to encourage all potential whistleblowers to disclose government wrongdoing. After all, legislatures embrace whistleblower protections and anti-retaliatory measures to discover and deter government impropriety. Legislatures would have difficulty accomplishing either goal if whistleblower statutes did not adequately assure employees that they could report government wrongdoing and be protected from employer retaliation. Thus, the purpose of the Maryland

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105. Many whistleblowers lose their jobs even though retaliation is illegal because employers successfully obscure the connection between termination and their whistleblowing. C. Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* 18–19 (2001). Furthermore, after blowing the whistle, many whistleblowers lose their families and homes and are alienated from their colleagues and professional organizations. *Id.* at 19–20. Employer retaliation for raising ethical issues usually terminates the whistleblower's current job and often ends the whistleblower's career in the field. Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 *Md. L. Rev.* 504, 535 (2006). Furthermore, the psychological harm to the whistleblower and her family is often greater than the loss of income. Billie Pirner Garde, *You Can't Do That To Me, I'm a Whistleblower!*, 52 *Prac. L. Rev.* 39, 39 (2006).

106. According to some scholars, the "overall trend of the courts is to interpret [whistleblower] statutes in a manner protective of whistleblowers." Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 *Am. Bus. L.J.* 99, 130 (2000). Generally, the objective of whistleblower statutes is to expose, deter, and curtail wrongdoing, and all of these objectives are furthered by interpreting whistleblower statutes inclusively. *Id.* at 130–31.

107. *Id.* at 108.

108. Potential whistleblowers often only report government fraud and abuse when they are confident that their jobs are protected against possible employer retaliation. 147 *Cong. Rec.* S5970 (daily ed. June 7, 2001) (statement of Sen. Akaka); see also Marci Alboher Nusbaum, *Blowing the Whistle: Not for the Fainthearted*, *N.Y. Times*, Feb. 10, 2002, at 3–10 (offering a statement by Tom Devine, legal director of the Government Accountability Project, who explained that current safeguards for whistleblowers are insufficient because "[a]lmost any whistle-blower who relies on these rights and fights to the bitter end will spend many years and dollars on legal fees and be virtually guaranteed to get a formal legal ruling that he or she deserved whatever retaliation was received").
Whistleblower Protection Law would be furthered by an inclusive interpretation of the statute, and the *Heller* court should have adopted such an interpretation.

B. The *Heller* Court’s Requirement that an Employee Must Report to a Person with Actual Authority to Fix the Problem was Unnecessary

The court’s decision to grant employees whistleblower protections only if they disclosed to a person with actual authority to fix the problem was unnecessary. The text of the statute is silent regarding the person to whom an employee must disclose an alleged wrongdoing. Moreover, the court could have reached the same outcome on alternate grounds under the substantial evidence test without limiting whistleblower protections.109 Lastly, as Judge Raker recognized in her dissent, the court could have avoided the question entirely because the DNR did not raise a question in its certiorari petition regarding to whom an employee must report.110 By creating a new requirement for whistleblower protection, the *Heller* court answered a question that it had not been asked and did not need to address.

First, the *Heller* court’s decision is not supported by the statutory language of the Maryland Whistleblower Law.111 Notably, the statute does not specify the individual to whom an employee must report a violation. Rather, the statute merely prohibits reprisals against an employee who “discloses information that the employee reasonably believes evidences . . . an abuse of authority, gross mismanagement[,] . . . [or] a violation of law.”112 Thus, the *Heller* court did not need to create a rule limiting the scope of the statute to employees who report to someone with actual authority.

Second, not only is the rule not required by the statute and arguably inconsistent with it, the court’s new prerequisite is not central to its result. The *Heller* court could have arrived at the same outcome without creating a new requirement for whistleblower protections.113 Under the substantial evidence test, the Court of Appeals could have upheld the ALJ’s decision that Heller did not make a protected disclo-
sure based on the fact that the ALJ did not believe Heller was a credible witness. Instead, the court based its holding on the fact that Heller did not report the wrongdoings to someone with authority to remedy the issue. But the Court of Appeals could have decided the appeal based on the ALJ’s determination of Heller’s credibility because appellate courts generally defer to the fact-finding of government agencies, as government agencies have more expertise in fact-finding. Additionally, the judicial system is more efficient overall when appellate courts rely on administrative agencies for factual determinations.

Lastly, the Court of Appeals erred by adding a requirement to the Maryland Whistleblower Law because the DNR’s petition for certiorari did not request review of the type of person to whom a whistleblower must report. As Judge Raker contended in her dissent, the DNR’s petition did not ask whether the Court of Special Appeals erred when it set aside the ALJ’s finding that Heller failed to make a protected disclosure because he did not report his allegations to someone in a position to fix the problem—the DNR merely asked if “the Court of Special Appeals erred by making factual findings at the appellate level.” The Heller majority, however, substantially altered the DNR’s question and then proceeded to answer its reformulation instead of the question posed by the DNR’s petition for certiorari. The court’s reformulation weakens its holding because the court addressed an issue not included in the certiorari petition.

114. Heller, 391 Md. at 173, 892 A.2d at 511-12.
115. See id. at 172, 892 A.2d at 511 (“Therefore, we find that ALJ Fraiser’s determination that [Heller] did not make his disclosures to individuals in a position to correct the wrongdoing is not premised on an error of law.”).
118. See Bulluck v. Pelham Wood Apts., 283 Md. 505, 513, 390 A.2d 1119, 1124 (1978) (stating that an appellate court should not “substitute its judgment for the expertise of those persons who constitute the administrative agency”).
119. Heller, 391 Md. at 178, 892 A.2d at 515 (Raker, J., dissenting). The Court of Appeals does not normally consider issues that were not raised in a petition for certiorari. Md. R. 8-131(b) (1957), amended by Md. R. 8-131(b) (2005); see, e.g., Renbaum v. Custom Holding, Inc., 386 Md. 28, 33 n.2, 871 A.2d 554, 557 n.2 (2005).
120. Heller, 391 Md. at 178, 892 A.2d at 515 (Raker, J., dissenting).
121. Id.; see supra note 76 for the Court of Appeals’s reformulation of the DNR’s petition for certiorari.
122. In fact, as Judge Raker aptly noted, the court may have violated Rule 8-131 because the court addressed an issue not raised in the certiorari petition in a non-extraordinary circumstance. Md. R. 8-131 (stating that “the Court of Appeals ordinarily will consider
court could have prevented this problem entirely by avoiding the question of who an employee must report to in order to obtain "protected disclosure" status.

C. The Heller Court Lacked Support for its New Requirement

In addition to adding an unnecessary requirement, the Heller court lacked legal support for its new rule because it misinterpreted the three federal cases on which it purported to rely. The majority relied upon three federal cases to support its premise that under the Federal Whistleblower Protection Act, an employee must disclose to a person who has authority to remedy the alleged wrongdoing. The Heller court then applied the legal theory drawn from these cases to the Maryland Whistleblower Law. The federal cases, however, did not support the majority's conclusion. Rather, each case used an intent-based test and explicitly stated that the Federal Whistleblower Protection Act requires that a discloser possess an intent to raise an issue with a higher authority but does not require that a discloser report to someone with actual authority. Thus, the Heller court's decision to limit whistleblower protections lacks substantive support because the cases cited by the Heller court do not support the court's conclusion.

In Willis, the Federal Circuit clarified that the purpose of the Federal Whistleblower Protection Act was to encourage whistleblowers to report wrongdoing to people who may be in a position to fix the problem. Although the court noted that Willis did not report his alleged abuse to a person with actual authority to correct it, the court used that fact as evidence to show that Willis lacked the proper intent. The Heller court departed from Willis because it did not ana-
lyze Heller’s intent. Instead, the Heller court ruled against Heller based entirely on his actions, not his intentions. If the Heller court had properly applied the Willis framework, the court would have used Heller’s actions as an aid to evaluate his intent. An intent-based test would have been a better measure of whether Heller deserved protection under the Maryland Whistleblower Law.

The Willis court was not the only federal court that applied an intent-based test to determine whether an employee should receive whistleblower protections. In Carr v. Social Security Administration, the Federal Circuit emphasized that the Federal Whistleblower Protection Act required only that an employee disclose information to someone who may be in a position to fix the problem. The court did not say that employees must report to someone who has actual authority to remedy the wrongdoing. Unlike the court in Carr, the Heller court faulted Heller for not reporting to someone with actual authority instead of considering whether the reportee may have been in a position to fix the alleged financial improprieties. Moreover, Heller’s actions may have satisfied the Carr test because at least according to the dissenting judges, Heller’s report to Barton qualified as a protected disclosure because Barton may have had the power to remedy the situation.

In the three federal cases cited by the Heller court, the courts evaluated the intent of the whistleblower—not merely the whistleblower’s actions—to determine if the whistleblower deserved protections from employer retaliation under the Federal Whistleblower Protection Act. Thus, the court in Heller erred when it misinterpreted the fed-

130. Heller, 391 Md. at 172, 892 A.2d at 511.
131. Id. Specifically, the court upheld the ALJ’s ruling, which provided that Heller’s disclosures were not protected under law because he did not disclose “to individuals in a position to remedy the wrongful actions.” Id.
132. Id. at 182–83, 892 A.2d at 517–18 (Raker, J., dissenting). The Heller majority did not need to ignore Heller’s conduct, rather, the court could have considered Heller’s action as evidence of his intent instead of as a proxy for his intent. Id.
133. See infra notes 136, 144 and accompanying text. The Heller court also relied upon Hooven-Lewis v. Caldera, 249 F.3d 259, 276 (4th Cir. 2001), in which the Fourth Circuit found that a lab technician’s actions did not evidence an intent to disclose the improprieties to someone with the ability to remedy them because she merely complained to the wrongdoer. Heller, 391 Md. at 172, 892 A.2d at 511 (majority opinion).
134. 185 F.3d 1318, 1326 (Fed. Cir. 1999).
135. See supra note 77 and accompanying text.
136. Heller, 391 Md. at 186, 892 A.2d at 519 (Raker, J., dissenting); see also infra note 142 and accompanying text for a discussion of the Heller court’s debate regarding whether Heller reported to an individual with authority to fix his alleged problem.
137. Heller, 391 Md. at 180–81, 892 A.2d at 517.
eral court cases and consequently failed to apply an intent-based rule.\textsuperscript{138}

\textbf{D. The Court of Appeals Should Have Adopted an Intent-Based Rule}

The \textit{Heller} court improperly denied protection to employees who report government improprieties in two situations: where the employee reports to someone who has apparent but not actual authority to fix the problem, or, where the employee’s belief of wrongdoing is reasonable but correct.\textsuperscript{139} The intent-based test espoused in the federal case law would protect employees in both scenarios.\textsuperscript{140}

\textbf{1. An Intent-Based Rule Would Protect Well-Meaning Employees who Report Improprieties to the “Wrong” Person}

Requiring Maryland government employees to report to someone with authority to ameliorate a specific government impropriety is unrealistic because at least some employees are unlikely to know who possesses the proper authority.\textsuperscript{141} For example, in \textit{Heller}, the Court of Special Appeals and the Court of Appeals disagreed over whether Daryl DeCesare, Heller’s supervisor’s boss, had authority to fix Heller’s alleged improprieties.\textsuperscript{142} If Maryland judges—who are charged with analyzing these types of statutes all day, every day—could not agree as to whether Heller reported to someone with the proper authority, it seems reasonable that the employees themselves might not

\textsuperscript{138} Id. at 182, 892 A.2d at 517–18.

\textsuperscript{139} In both situations, employees must possess a reasonable belief that the government wrongdoings they reported are true. See supra notes 32, 40 for the specific statutory language.

\textsuperscript{140} For an illustrative example, see supra note 7. See also supra note 57 and accompanying text for the definition of an intent-based rule.

\textsuperscript{141} In Maryland, there are twenty different agencies: nineteen executive branch agencies and over twenty independent agencies. Each agency has several managers; for example, in the Education Department, there are twelve different managers. Maryland State Archives, \textit{Maryland Manual On-line}, http://www.mdarchives.state.md.us/msa/mdmanual/13sdoe/pdf/13sdoe.pdf.

\textsuperscript{142} The Court of Appeals affirmed the ALJ’s decision that Heller did not report to an official with authority to fix his problem, \textit{Heller}, 391 Md. at 172, 892 A.2d at 511, while the Court of Special Appeals and the dissenting opinion in the Court of Appeals reached the opposite conclusion. \textit{Id.} at 186, 892 A.2d at 519 (Raker, J., dissenting). Other courts also disagree on which parties have authority to fix a problem. See Callahan et al., \textit{Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest}, 44 \textit{Va. J. Int’l L.} 879, 889–90 (2004) (stating that the question of the proper reportee implicates inter-organizational channels, government agencies, government officials, judicial representatives, union representatives, non-governmental organizations, and journalists, and therefore has generated considerable statutory variation).
always ferret out the proper person. Nevertheless, under the Court of Appeals's new requirement, if an employee misjudges and discloses an impropriety to someone with only *apparent* authority, that employee is not shielded from employer retaliation. Therefore, it is likely that employees will refrain from disclosing at all because telling the wrong person could leave the employee without a job and without legal recourse. Thus, the *Heller* court decision discourages employees from reporting government wrongdoing.

Alternatively, an intent-based rule encourages whistleblowers to report wrongdoing because they will be protected from employer retaliation regardless of whether they can pinpoint the exact bureaucrat who can fix the problem, as long as they have the intent to alert someone with authority to fix their problem. The *Heller* court should have adopted an intent-based rule because it would further the purpose of the Maryland Whistleblower Law by encouraging employees to freely disclose impropriety.

2. An Intent-Based Rule Protects Well-Intentioned but Factually Incorrect Whistleblowers

The *Heller* court's new requirement precludes protection for an employee who makes a reasonable but incorrect allegation of government impropriety, because if no wrongdoing exists, there is nobody with the proper authority to remedy it. Thus, these well-inten-

143. *See Heller*, 391 Md. at 186, 892 A.2d at 519 (Raker, J., dissenting); *see also id.* at 178, 892 A.2d at 520.
144. *Id.* at 182–83, 892 A.2d at 517–18.
145. The *Heller* majority's rule may also prevent employees from reporting alleged wrongdoing when the employee is not 100% sure that the wrongdoing took place. *See id.* at 183 n.1, 892 A.2d at 518 n.1 (stating that the majority's rule heavily burdens employees who plan to disclose wrongdoing because it forces these employees to determine if their allegations are correct when the employee may have difficulty assessing the necessary information); Callahan et al., *supra* note 142, at 882 (stating that the "premise behind most whistleblowing legislation is that people of conscience... would disclose observed wrongdoing and important errors, but for fear of losing their jobs or other forms of retaliation"). Thus, protection from retaliation encourages whistleblowing by ridding employees of these fears.
146. The employee must also possess a reasonable belief that the alleged wrongdoing is true. *See supra* note 139.
147. Act of May 27, 1980, ch. 850, 1980 Md. Laws 2998 ("The General Assembly finds that... it is essential that classified State employees be free to disclose impropriety[.]").
148. *See Heller*, 391 Md. at 183, 892 A.2d at 517–18 (Raker, J., dissenting) (stating that employees who make reasonable but incorrect allegations of wrongdoing will not be protected under the majority's ruling "because there is no actual wrong to remedy"). It is also possible that the Court of Appeals would interpret the whistleblower statute to grant protection to an employee with a reasonable but incorrect belief of wrongdoing if she told someone who would have authority to remedy the problem if the problem actually
tioned employees may never receive protection from retaliation because nobody has actual authority to fix a non-existent problem.\textsuperscript{149}

Because the Maryland Whistleblower Law is intended to encourage employees to report government impropriety if they have a reasonable belief that their allegations are true, the additional requirement in \textit{Heller} contradicts the statutory purpose by refusing to grant protection to some employees who possess the requisite reasonable belief.\textsuperscript{150} In addition, the \textit{Heller} court’s new requirement is likely to chill government whistleblowing because many people are not willing to risk their jobs to report government wrongdoing.\textsuperscript{151} Instead, the Court of Appeals should have adopted an intent-based rule and avoid forcing employees to choose between their jobs and their civic responsibility—the employees’ job would be protected as long as they have a reasonable belief that the reported improprieties are true.

V. \textsc{Conclusion}

In \textit{Department of Natural Resources v. Heller}, the Court of Appeals narrowed the Maryland Whistleblower Law to exclude employees who hold a reasonable but inaccurate belief of wrongdoing and employees who possess a correct belief of government impropriety but report that belief to someone who lacks the authority to fix the problem.\textsuperscript{152} The court erred because its decision undercut the legislative intent of the Maryland Whistleblower Law by discouraging potential whistleblowers from reporting wrongdoing.\textsuperscript{153} Furthermore, the court could have decided the case without narrowing whistleblower protections,\textsuperscript{154} and the court had little justification for its conclusion because it relied on misinterpreted federal case law to reach its decision.\textsuperscript{155} The \textit{Heller} court should have adopted the rule used by the

\textsuperscript{149} Id.
\textsuperscript{150} Act of May 27, 1980, ch. 850, 1980 Md. Laws 2998 (stating that in order to accomplish the goals of the Maryland Whistleblower Law, state employees must be able to report government impropriety); \textsc{Md. Code Ann., State Pers. & Pens.} § 5-305 (LexisNexis 1993) (stating that a supervisor may not take retaliatory actions against an employee who discloses information that the employee reasonably believes evidences an abuse of authority, gross mismanagement, or gross waste of money by the government).
\textsuperscript{151} See Callahan et al., \textit{supra} note 142, at 882 (stating that the concept of whistleblower laws is to have moral people reporting government impropriety without worrying about retaliation).
\textsuperscript{152} See \textit{supra} Part IV.A.
\textsuperscript{153} See \textit{supra} Part IV.A.
\textsuperscript{154} See \textit{supra} Part IV.B.
\textsuperscript{155} See \textit{supra} Part IV.C.
federal courts—an intent-based rule—that grants protection to all whistleblowers with the intent to report wrongdoing to an authority who can fix the problem even if the whistleblower’s belief is reasonable but incorrect or the whistleblower reports to someone with apparent but not actual authority to remedy the problem. An intent-based rule furthers the purpose of the Maryland Whistleblower Law by broadly encouraging whistleblowers with reasonable beliefs that they witnessed government impropriety to improve society by blowing the whistle.

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156. See supra Part IV.D.
In *Kelly v. State*, the Court of Appeals of Maryland considered whether a trial judge violated a criminal defendant's right to present a defense by excluding the defendant's present witnesses based on defense counsel's proffers. While the Court of Appeals held that the exclusion violated the defendant's Sixth Amendment right to present a defense, the court failed to assess whether the excluded testimony was admissible. Thus, the court departed from prior cases concluding that a defendant must show that the excluded testimony is both admissible and favorable to demonstrate a violation of her Sixth Amendment rights. The court's decision grants criminal defendants a broad right to present witnesses who are present in the courtroom, regardless of whether they have admissible testimony to offer. Moreover, the court's decision limits the trial court's broad discretion to control trials, which may impact the trial court's ability to preserve other interests in the trial court setting.

I. THE CASE

On October 31, 2002, three individuals were riding on a public transit bus in Montgomery County, Maryland, when they got into a verbal altercation with Francesco Kelly. The three people then got off the bus before Kelly, entered a local convenience store, returned to the same bus stop, and awaited another bus. After approximately ten minutes, a gunman shot at the three individuals, wounding two of them; two of the three victims identified Kelly as the shooter. Kelly v. State, 162 Md. App. 122, 127-28, 873 A.2d 434, 436-37 (2005).

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2. Id. at 517, 898 A.2d at 422.
3. Id. at 543, 898 A.2d at 438.
4. See infra Part IV.A.
5. See infra Part IV.A.
6. See infra Part IV.B.
7. See infra Part IV.C.
8. See infra Part IV.D.
10. Id., 873 A.2d at 437.
11. Id. at 128-29, 873 A.2d at 437.
was arrested and charged with various criminal offenses associated with the shooting.\textsuperscript{12}

During Kelly's jury trial, the State presented twelve witnesses without the court requiring a prior proffer of each witness's testimony.\textsuperscript{13} Defense counsel attempted to call two witnesses, both of whom were present in the courtroom and available to testify.\textsuperscript{14} The trial court required defense counsel to proffer both witnesses' testimony in the State's presence, overruling defense counsel's objections.\textsuperscript{15}

The defense proffered that it planned to call the first witness, a police officer who investigated the crime, to testify that there was no corroboration of the bus incident.\textsuperscript{16} The defense also proffered that it planned to call the second witness to testify about her personal knowledge of one of the victim's habit of loitering and reputation in the community where the crime occurred.\textsuperscript{17} The trial court excluded both witnesses based on defense counsel's proffers.\textsuperscript{18}

On May 22, 2003, a jury convicted Kelly of two counts of attempted first-degree murder, two counts of attempted second-degree murder, two counts of first-degree assault, and two counts of use of a handgun in the commission of a felony or a crime of violence.\textsuperscript{19} Kelly was sentenced to forty years imprisonment.\textsuperscript{20}

Kelly appealed his convictions in part on the grounds that the trial court violated his fundamental Sixth Amendment right to present a defense by not permitting the two witnesses to testify.\textsuperscript{21} The Maryland Court of Special Appeals affirmed the convictions, concluding that the trial court neither abused its discretion by requiring the

\begin{itemize}
  \item \textsuperscript{12} Id. at 126–29, 873 A.2d at 436–37.
  \item \textsuperscript{13} Kelly, 392 Md. at 519, 898 A.2d at 423. Proffered evidence is "offered to the court to obtain a ruling on its admissibility." BLACK'S LAW DICTIONARY 598 (8th ed. 2004).
  \item \textsuperscript{14} Id. at 521–22, 527, 898 A.2d at 425, 428.
  \item \textsuperscript{15} Id. at 527, 898 A.2d at 428.
  \item \textsuperscript{16} Id. at 522, 898 A.2d at 425. Defense counsel also sought to question the police officer about the bus schedule that he used to investigate the crime to highlight inconsistencies in the victims' testimony about the timing of the incidents on the night of the shootings. Id. at 523, 898 A.2d at 426.
  \item \textsuperscript{17} Id. at 528, 898 A.2d at 428. Defense counsel noted that the testimony could lead to the inference that people other than Kelly would have known that the victim was standing at the particular bus stop on the night of the shootings. Id. at 529, 898 A.2d at 429.
  \item \textsuperscript{18} Id. at 526, 528–29, 898 A.2d at 428–29. The court excluded the police officer from testifying after determining that nothing defense counsel proffered to the court would be admissible through the officer. Id. at 526, 898 A.2d at 428. The court excluded the other defense witness after concluding that the jury could not reasonably infer from the witness's testimony that someone else would have set out to shoot the victim at that location on the night in question. Id. at 528–29, 898 A.2d at 429.
  \item \textsuperscript{19} Id. at 515, 898 A.2d at 421.
  \item \textsuperscript{20} Id. at 515–16, 898 A.2d at 421.
\end{itemize}
proffers, nor erred in precluding the defense from calling the two witnesses based on the proffers. The court noted that excluding the witnesses was within the trial court's broad discretion and control over trial proceedings, and emphasized that trial court rulings on the relevance and admissibility of evidence are entitled to deference and will not be disturbed on appeal absent an abuse of discretion.

The Court of Appeals granted certiorari to determine whether the trial court violated Kelly's right to present a defense by requiring defense counsel, in the State's presence, to proffer its available witnesses' testimony as a predicate to allowing the witnesses to take the stand.

II. LEGAL BACKGROUND

Criminal defendants have a constitutional right under the Sixth Amendment to present a defense, which incorporates the fundamental right to present witnesses. However, the ability to call witnesses is not absolute. Trial judges have broad discretion under the Federal and Maryland Rules of Evidence to exclude inadmissible evidence, including witness testimony. An abuse of discretion occurs when a trial judge acts in an arbitrary or capricious manner, and consequently denies a defendant the right to a fair trial.

A. Defendant's Sixth Amendment Right to Present a Defense

The United States Constitution guarantees a criminal defendant the fundamental right to present a complete defense. The Sixth Amendment to the Constitution enumerates particular rights of an accused, including compulsory process for obtaining favorable wit-
nesses.\textsuperscript{31} The Maryland Declaration of Rights also protects a criminal defendant's right to examine witnesses for and against him.\textsuperscript{32}

The Supreme Court of the United States has emphasized that the right to offer the testimony of witnesses is the essence of the right to present a defense, as it allows the defendant to present his version of the facts to the jury.\textsuperscript{33} In \textit{Washington v. Texas},\textsuperscript{34} the Court considered whether state statutes disallowing principals, accomplices, or accessories in the same crime to testify for each other denied a defendant his Sixth Amendment right to compulsory process.\textsuperscript{35} The defendant in \textit{Washington} was on trial for murder, and the witness—an accomplice in the crime—planned to testify that the defendant ran from the scene before the murder took place.\textsuperscript{36} The Court held that the state statute in question was unconstitutional, as it denied the defendant from calling a competent witness in his defense whose testimony would have been relevant and material.\textsuperscript{37}

Several years later in \textit{Chambers v. Mississippi},\textsuperscript{38} the Supreme Court reiterated the fundamental nature of an accused's right to present witnesses in his own defense, and concluded that an evidentiary rule could not be applied mechanistically if it infringed on this right.\textsuperscript{39} In \textit{Chambers}, the trial court excluded testimony of three defense witnesses because the testimony—evidence of a third-party's oral confession—violated Mississippi's hearsay rule.\textsuperscript{40} The Court noted that in exercising the right to present witnesses, the accused must abide by well-settled rules of procedure and evidence designed to guarantee fairness and reliability in the trial process.\textsuperscript{41} Despite this obligation, the Court declared that the hearsay rule cannot be applied so rigidly as to deprive the defendant of his constitutional right to a fair trial.\textsuperscript{42} The \textit{Chambers} Court concluded that the trial court erred because the excluded testimony was both critical to the accused's defense and suffi-
ciently reliable to be admitted, and thus the exclusion of the testimony deprived the defendant of a fair trial.\textsuperscript{43}

A decade later, the Court of Appeals applied the Supreme Court's ruling in \textit{Chambers} to excluded testimony in \textit{Foster v. State}.\textsuperscript{44} In \textit{Foster}, a defendant on trial for murder sought to call a friend of the victim who would testify that the victim told her that the defendant's husband had threatened to kill the victim.\textsuperscript{45} The trial court excluded the testimony as hearsay.\textsuperscript{46} The Court of Appeals reversed and held that the excluded testimony was both critical to the accused's defense and sufficiently trustworthy to be admitted.\textsuperscript{47} Thus, the court found that the trial court's application of the hearsay rule to exclude this critical testimony deprived the defendant of a fair trial.\textsuperscript{48}

\textbf{B. The Right to Present Witnesses Is Fundamental but not Absolute}

The defendant's fundamental right to present witnesses' testimony is not without limits.\textsuperscript{49} The Supreme Court has restricted this right by approving limits on a criminal defendant's ability to offer unreliable, privileged, or otherwise inadmissible testimony.\textsuperscript{50} Such limitations enable trial courts to preclude the defense from presenting particular witnesses, and such exclusions do not automatically violate compulsory process rights.\textsuperscript{51}

In \textit{United States v. Valenzuela-Bernal},\textsuperscript{52} the Supreme Court established that a defendant must make a plausible showing that excluded testimony would have been both "material and favorable" to the defense to prove a violation of the Compulsory Process Clause.\textsuperscript{53} In \textit{Valenzuela-Bernal}, the defendant claimed he was denied his constitutional right to compulsory process because the federal government deported passengers of the automobile he was driving at the time of his arrest, thus depriving him of his right to present the passengers' testimony.\textsuperscript{54} The Court noted that the mere absence of testimony...
does not establish a violation of compulsory process, because the Sixth Amendment does not grant an accused the right to secure the testimony of any and all witnesses.\(^\text{55}\) Thus, the Court held that absent a demonstration by the defendant that the testimony would have been both favorable and material to his defense, the Government’s deportation of the witnesses did not deprive the accused of a fair trial.\(^\text{56}\)

Six years later, in *Taylor v. Illinois*,\(^\text{57}\) the Supreme Court established that the Compulsory Process Clause does not automatically bar a trial court from excluding a defense witness as a sanction for violating a pretrial discovery request.\(^\text{58}\) In *Taylor*, defense counsel in an attempted murder trial failed to identify a potential witness in his answer to the prosecution’s discovery motion requesting a list of witnesses.\(^\text{59}\) As a sanction for violating the discovery request, the trial judge refused to allow the witness to testify.\(^\text{60}\) The Court affirmed the trial court’s ruling, reasoning that there is a meaningful distinction between a defendant’s right to compulsory process and other Sixth Amendment rights, such as a trial by jury and assistance of counsel, in that the availability of compulsory process depends fully on the defendant’s initiative.\(^\text{61}\) The *Taylor* Court asserted that effective use of the compulsory process right requires “deliberate planning and affirmative conduct” on the part of defense counsel.\(^\text{62}\) Thus, the Compulsory Process Clause did not bar the exclusion of a defense witness as a sanction for defense counsel’s failure to comply with discovery rules.\(^\text{63}\)

### C. The Trial Court’s Broad Discretion Pursuant to the Rules of Evidence

Trial court judges have considerable discretion to manage trials under the Federal and Maryland Rules of Evidence, including making evidentiary determinations.\(^\text{64}\) But this discretion is not unlimited, and an abuse of discretion occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when the judge acts beyond the

\(^{55}\) *Id.* at 867.

\(^{56}\) *Id.* at 874.

\(^{57}\) 484 U.S. 400 (1988).

\(^{58}\) *Id.* at 401–02.

\(^{59}\) *Id.* at 403–05.

\(^{60}\) *Id.* at 405.

\(^{61}\) *Id.* at 410 & n.14.

\(^{62}\) *Id.* The *Taylor* Court noted that other Sixth Amendment rights, such as the right to confront adverse witnesses, are triggered automatically at the start of the adversary process and apply without any affirmative action by the defendant. *Id.*

\(^{63}\) *Id.* at 418.

\(^{64}\) See infra Part II.C.1.
letter or reason of the law. The Court of Appeals has considered the trial court’s discretion in allowing or requiring a witness to testify in cases where witnesses were either missing from the courtroom or present and available to testify.

1. The Trial Court’s Discretion to Manage Trials Through Evidentiary Decisions

The state’s interest in the orderly administration of criminal proceedings justifies the implementation of rules that limit a party’s ability to control the time and content of witness testimony. As such, both the Federal and Maryland Rules of Evidence provide trial judges with considerable discretion to manage trials. Such discretion extends to decisions regarding the admissibility of evidence, and permits trial courts to determine if legitimate interests in the administration of criminal proceedings outweigh a defendant’s interest in presenting relevant evidence.

For example, the Federal and Maryland Rules of Evidence establish that trial judges may exclude relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Further, the Supreme Court has observed that the Constitution permits judges to exclude evidence that is cumulative, only slightly relevant, or poses an inappropriate risk of harassment. The rules also permit judges to conduct these evidentiary proceedings out of earshot of the jury.

These evidentiary rules do not infringe upon an accused’s right to present a defense as long as the rules are not out of balance with

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65. See infra Part II.C.2.
66. See infra Part II.C.3.a.
67. See infra Part II.C.3.b.
68. See infra Part II.C.3.b.
69. Taylor, 484 U.S. at 411.
70. Federal Rule of Evidence 611 and Maryland Rule 5-611 both provide: “The court shall exercise reasonable control over the mode and order of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” Fed. R. Evid. 611(a); Md. R. 5-611(a).
71. Fed. R. Evid. 104(a); Md. R. 5-104(a).
73. Fed. R. Evid. 403; Md. R. 5-403.
75. Md. R. 5-104(c). Maryland Rule 5-103 provides that “[p]roceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to a jury by any means, such as making statements or offers of proof or asking questions within the hearing of the jury.” Md. R. 5-103(c).
the purposes they serve.\textsuperscript{75} For example, both the Federal and Maryland Rules of Evidence exclude the admission of hearsay evidence, unless the evidence falls within a recognized exception.\textsuperscript{76} The rule seeks to eliminate the risk that juries will have difficulty assessing the credibility of hearsay because jurors cannot observe the declarant under oath and subject to cross-examination.\textsuperscript{77} These concerns underlie the policy against admitting hearsay, as excluding this type of testimony reduces the danger that evidence will lack reliability.\textsuperscript{78}

Pursuant to the Federal and Maryland Rules of Evidence, trial judges make most evidentiary determinations based on party motions.\textsuperscript{79} Under the Federal Rules, trial courts also have authority to take notice of plain error without any action on behalf of a party.\textsuperscript{80} Further, federal and Maryland trial courts have discretion to call their own witnesses and to question the parties' witnesses.\textsuperscript{81} Moreover, trial judges may have a responsibility to make sua sponte determinations to ensure a fair trial outcome.\textsuperscript{82}

For example, in \textit{Bernadyn v. State},\textsuperscript{83} the Court of Appeals held that a trial court erred by admitting hearsay evidence that did not fall


\textsuperscript{76} \textit{Fed. R. Evid.} 801–804; \textit{Md. R.} 5-801 to -804. Exceptions under both the Federal and Maryland Rules of Evidence include statements of present sense impression, excited utterances, records of regularly conducted activity, and public records and reports. \textit{Fed. R. Evid.} 803(1), (2), (6) & (8); \textit{Md. R.} 5-803(1), (2), (6) & (8).

\textsuperscript{77} \textit{1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence} \textsection{802.02[3]} (Joseph M. McLaughlin ed., 2d ed. 2006).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Fed. R. Evid.} 103(a)(1); \textit{Md. R.} 5-103(a)(1).

\textsuperscript{80} \textit{Fed. R. Evid.} 103(d); \textit{Weinstein & Berger, supra note} 77, \textsection{103.02[1].

\textsuperscript{81} \textit{Fed. R. Evid.} 614(a)–(b); \textit{Md. R.} 5-614(a)–(b).

\textsuperscript{82} \textit{See} Bernadyn v. State, 990 Md. 1, 15 n.5, 887 A.2d 602, 610 n.5 (2005) (noting that the trial court probably should have given the jury a limiting instruction sua sponte regarding admitted evidence); \textit{see also} Weaver v. United States, 374 F.2d 878, 882 (5th Cir. 1967) ("It is not only the trial judge's right but his duty to see that only proper and relevant evidence [is] admitted."); United States v. Clarke, 390 F. Supp. 2d 131, 135 (D. Conn. 2005) (explaining that a party's objection is not a necessary precondition to the exclusion of evidence); People v. Sturm, 129 P.3d 10, 23 (Cal. 2006) (recognizing that the trial judge may exclude irrelevant evidence sua sponte); Barber v. State Highway Comm'n, 342 P.2d 723, 727 (Wyo. 1959) (observing that the trial judge has a duty to control the conduct of the trial, and can rule sua sponte on the admissibility of evidence to enable the discovery of the true facts of a case).

\textsuperscript{83} 390 Md. 1, 887 A.2d 602 (2005).
within any exception to the hearsay rule. The court rejected the State's alternative contention that the evidence was admissible for a limited purpose, and noted that the trial court should make clear when evidence is admitted for a limited purpose to put the defense counsel on notice to request a limiting jury instruction. In the alternative, the Bernadyn court maintained that the trial court sua sponte should have provided the jury with instructions regarding the limited use of the evidence.

2. Abuse of Discretion Standard of Review for Evidentiary Determinations

Although the trial judge "runs the court," the right of an accused to a fair trial is of paramount concern under both the Federal and Maryland Constitutions. The Court of Appeals has observed that an impartial and disinterested judge is fundamental to a defendant's right to a fair trial. An abuse of discretion "occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when [the judge] acts beyond the letter or reason of the law."

In Hopkins v. State, the Court of Appeals upheld a trial court's decision to admit evidence in the form of a voice exemplar given by the defendant. The court noted that appellate courts extend a significant amount of deference to trial court determinations of the admissibility of evidence, and reverse only where the court abused its discretion. The court reasoned that the specific type of evidence was relevant and that its probative value was not outweighed by any prejudice to the defendant. Thus, the court in Hopkins held that the trial judge did not abuse its discretion by admitting the evidence.

84. Id. at 15, 887 A.2d at 610.
85. Id. at 15 n.5, 887 A.2d at 610 n.5.
90. Id. at 167, 721 A.2d at 241. A voice exemplar is "[a] sample of a person's voice used for the purpose of comparing it with a recorded voice to determine whether the speaker is the same person." Black's Law Dictionary, supra note 13, at 1604.
91. Hopkins, 352 Md. at 158, 721 A.2d at 237.
92. Id. at 163–67, 721 A.2d at 239–41.
93. Id. at 167, 721 A.2d at 241.
Seven years later in *Cooley v. State*, the Court of Appeals considered whether a trial judge abused his discretion by abrogating the authority to make decisions regarding courtroom security. In discussing the abuse of discretion standard of review, the court noted that trial judges must exercise sound discretion that is reflected in the record, and that the conduct of the trial must rest largely in the control of the trial judge. The court concluded that determinations about courtroom security rest entirely in the discretion of the trial judge and generally may not be delegated to law enforcement.

One notable exception to the deferential standard applied in appellate review of evidentiary decisions is the admissibility of hearsay evidence. Hearsay evidence that does not fall within an exception to the hearsay rule is almost always excluded. Thus, a trial court has no discretion to admit hearsay evidence where there is no provision providing for its admissibility. Consequently, appellate review of decisions regarding the admissibility of hearsay evidence is de novo, rather than the deferential standard of review used in other evidentiary decisions.

3. Trial Court’s Abuse of Discretion When Excluding or Failing to Secure Witnesses

The Court of Appeals has considered the trial court’s discretion in allowing or requiring a witness to testify in two distinct types of cases: (1) when the witness is not in the courtroom at the appropriate time, and (2) when the witness is present in the courtroom but precluded from testifying.

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95. *Id.* at 183, 867 A.2d at 1075.
96. *Id.* at 175, 867 A.2d at 1071 (citing *Jenkins v. State*, 375 Md. 274, 295–96, 825 A.2d 1008, 1015 (2003)).
97. *Id.* at 176, 867 A.2d at 1071 (citing *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714–15 (1974)).
98. *Id.* at 169, 184, 867 A.2d at 1067, 1076. The court vacated the Court of Special Appeals’s affirmation of the trial court, but did not determine whether there was an abuse of discretion as the lower appellate court had not fully addressed the abrogation issue. *Id.* at 184, 867 A.2d at 1076.
100. *Id.*
101. *Id.*
102. *Id.* at 7–8, 887 A.2d at 606.
103. See *infra* Part III.C.3.a.
104. See *infra* Part III.C.3.b.
a. Securing Unavailable Witnesses

Trial courts have a significant amount of discretion to grant a continuance to locate, subpoena, or apprehend a missing witness. A court’s refusal to grant a subpoena or a continuance to locate a missing witness does not violate the right of compulsory process, unless the accused can show that the testimony would be admissible and favorable to the defense. In Wilson v. State, the Court of Appeals reviewed a trial court’s decision denying a defendant a continuance or assistance in securing a missing defense witness. The Wilson court concluded that the witness’s testimony—personal knowledge of the events that occurred during the defendant’s arrest—would have been both admissible and favorable to the defense. Thus, the court held that the trial court abused its discretion and violated the defendant’s state and federal constitutional right to compulsory process when it failed to help secure the defense witness.

Trial courts also have discretion to quash subpoenas for defense witnesses, but must have a sufficient basis from which to exercise that discretion. In Void v. State, the Court of Appeals found reversible error where a trial court quashed subpoenas served on witnesses called to testify as character witnesses against the State’s key witness. The Void court emphasized that the trial judge had a limited basis for this decision given that he refused to hear from the subpoenaed witnesses, and that their affidavits were of no help to assess the admissibility of their testimony. Rather than barring the witnesses’ testimony before learning of its reliability and relevance, the court concluded that the appropriate time for the judge to determine the admissibility of the witnesses’ testimony was during their examination.

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<td>106</td>
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<td>112</td>
<td>Id. at 392–93, 601 A.2d at 126–27. The State’s key witness was a former police officer who was the alleged victim of the crime, and the Void court noted that the potential conviction of the defendant hinged on the credibility of this witness. Id. at 387, 601 A.2d at 124. The defense witnesses were three police officers who had previously investigated the former officer for perjury and testified against him at his trial for perjury. Id. at 387–89, 601 A.2d at 124–25. The trial court granted the State’s motion to quash the subpoenas of the witnesses, based largely on the fact that the police officer had been acquitted of the perjury charge. Id. at 389, 601 A.2d at 125.</td>
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<td>113</td>
<td>Id. at 393, 601 A.2d at 127.</td>
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under oath. Thus, the court held that the trial court’s decision to quash the subpoenas violated the defendant’s common law and statutory rights to attack the credibility of a witness against him.

b. Excluding Present and Available Witnesses

A trial court does not have the discretion to exclude a defense witness for violating nonexistent courtroom rules. In McCray v. State, the Court of Appeals found reversible error where a trial court excluded a defense witness because she was present in the courtroom during the trial, despite not having issued a sequestration order for the witness. The court reasoned that because the sequestration rule applies mechanically to sequester any and all witnesses, it followed that there must be an order of sequestration before a judge can exclude a witness. Thus, in the absence of such an order, the trial court’s exclusion of the witness was erroneous.

Ten years later in Redditt v. State, the Court of Appeals found reversible error where a trial court excluded a defense witness for committing a minor violation of a sequestration order. The court noted that although the trial judge has the discretion to impose a sanction when a sequestration violation occurs, a per se rule of exclusion is inappropriate. The Redditt court reasoned that when an arguable decision to exclude a witness confronts a defendant’s compulsory process rights, trial courts should err on the side of the defendant’s constitutional rights. Moreover, the court observed, the excluded testimony constituted either impeachment of the State’s key witness by prior inconsistent statement or by proof of improper motive or bias. Thus, the Court of Appeals concluded that the trial judge abused its discretion by imposing a sanction to exclude the defense witness’s testimony.

114. Id. at 392–94, 601 A.2d at 126–27.
115. Id. at 391–92, 394, 601 A.2d at 126, 128.
117. Id. at 137, 501 A.2d at 861.
118. Id. at 134, 501 A.2d at 860.
119. Id. The court refused to consider whether the proffered testimony was inadmissible, and thus properly excluded, because the issue was not raised by the State at trial, nor in a cross-petition for certiorari. Id. at 135–37, 501 A.2d at 860–61.
121. Id. at 637, 640, 655 A.2d at 398, 399.
122. Id. at 629, 655 A.2d at 394.
123. Id. at 635, 655 A.2d at 397.
124. Id. at 636, 655 A.2d at 397.
125. Id. at 637, 655 A.2d at 398.
III. THE COURT'S REASONING

In Kelly v. State, the Court of Appeals overturned the conviction of Francesco Kelly, holding that the trial court abused its discretion and denied the defendant his constitutional right to present a defense by requiring the defense to proffer the content of present witnesses' testimony and refusing to allow the defendant to present those witnesses. Writing for the majority, Judge Cathell focused on the defendant's rights to compulsory process guaranteed by both the Federal and Maryland Constitutions. The court reasoned that the right to present witnesses is a fundamental right essential to due process, and that proffers—while helpful—are not an adequate substitute for available witness testimony. Thus, the majority determined that the trial court's rulings effectively denied the defendant "the only defense available to him—the witnesses he hoped would provide favorable testimony." Next, the court noted that the trial court's reversible error was not in ruling that the evidence was hearsay, but in the trial court's method of determining that the testimony would be hearsay. The court reasoned that while the trial judge may deny defense witness testimony upon proper objection by the prosecution, the defendant still has the right to present favorable witnesses in the first place. The majority found the trial court's exclusion of the testimony premature, and emphasized that a judge should wait for an in-court examination before ruling on the admissibility of testimony. The Kelly court further explained that even if the testimony was hearsay, only an objection by the State would bar it, and the trial court's sua sponte decision to exclude the evidence improperly interfered with the adversarial process.

The majority acknowledged a limitation of the defendant's fundamental right to present witnesses in that the accused does not have a right to offer testimony that is inadmissible under standard rules of evidence. The court focused on its analysis in Wilson v. State, which interpreted Supreme Court precedent as requiring the defendant to
make some plausible showing of how the testimony would be admissi-
ble, favorable, and material to his defense in order to use it at trial.\textsuperscript{136}
The court reasoned that Kelly made the required showing, because
after hearing the proffers, the witnesses’ testimony seemed prema-
布置ably favorable.\textsuperscript{137}

Finally, the court asserted that the trial judge went beyond his
role as an impartial officer in dismissing the witnesses’ testimony,\textsuperscript{138}
particularly because only the defense counsel had to provide detailed
proffers of witness testimony.\textsuperscript{139} The majority reasoned that the de-
fendant’s right to a fair trial is at risk when the court assumes the role
of a party by ruling on the admissibility of evidence in the absence of
appropriate objections.\textsuperscript{140} As a result of the trial court’s abuse of dis-
cretion, the Kelly court reversed the convictions and remanded the
case for a new trial.\textsuperscript{141}

In her dissent, Judge Raker criticized the majority for focusing
solely on the trial court’s procedure in excluding the testimony,
rather than discussing the actual relevance of the proposed testi-
mony.\textsuperscript{142} The dissent emphasized the majority’s failure to analyze the
admissibility of the proffered testimony, and its effective concession
that the testimony was inadmissible hearsay.\textsuperscript{143}

Pointing to the Maryland Rules of Evidence, the dissent con-
tended that the trial judge’s discretion over trial proceedings includes
the authority to exclude inadmissible evidence sua sponte, and that
such evidence need not be presented to the jury.\textsuperscript{144} The dissent fur-
ther opined that Maryland evidentiary rules allow, and at times re-
quire, a trial court judge to rule on the admissibility of evidence
outside the presence of the jury.\textsuperscript{145} Thus, the dissent argued that the
trial judge could legitimately exclude the witnesses’ testimony on the

\begin{itemize}
\item \textsuperscript{136} Id. at 537, 898 A.2d at 434 (citing Wilson v. State, 345 Md. 437, 448, 693 A.2d 344,
349–50 (1997)).
\item \textsuperscript{137} Id. at 538, 898 A.2d at 434.
\item \textsuperscript{138} Id. at 541, 898 A.2d at 436.
\item \textsuperscript{139} Id. at 542, 898 A.2d at 437.
\item \textsuperscript{140} Id. at 541, 898 A.2d at 436.
\item \textsuperscript{141} Id. at 543, 898 A.2d at 438.
\item \textsuperscript{142} Id. at 545, 898 A.2d at 438–39 (Raker, J., dissenting). Judge Raker’s dissent was
joined by Judge Harrell. Id. at 544, 898 A.2d at 438.
\item \textsuperscript{143} Id. at 545, 898 A.2d at 439.
\item \textsuperscript{144} Id. at 546–47, 898 A.2d at 439–40. Judge Raker cited Maryland Rules 5-103, 5-104,
and 5-602, which together suggest an inference that admissibility hearings can be con-
ducted outside the presence of the jury. Id. at 547, 898 A.2d at 440.
\item \textsuperscript{145} Id. at 547, 898 A.2d at 440.
\end{itemize}
basis of a proffer, and such action was not an abuse of discretion, but rather a cost-saving, efficient procedure. 146

Consequently, the dissent contended that the real question before the court was whether the trial court improperly excluded the witnesses’ testimony based on its substance. 147 Judge Raker maintained that because the evidence was hearsay, and no exception was put forward, the testimony was inadmissible and Kelly was not deprived of his right to present a defense. 148 The dissent, therefore, would have affirmed Kelly’s conviction in all respects. 149

IV. ANALYSIS

In Kelly v. State, the Court of Appeals held that a trial court abused its discretion by excluding a defendant’s present witnesses based on proffers, and that the abuse of discretion violated the defendant’s Sixth Amendment right to present a defense. 150 The court’s analysis departed from precedent by failing to address whether the excluded testimony was actually admissible. 151 The majority’s failure to assess the admissibility of the testimony suggests that trial judges should allow defendants to call witnesses who are present in the courtroom regardless of whether the witnesses have any admissible testimony to offer. 152 The court also created new law by limiting a trial court’s discretion to exclude sua sponte certain witnesses and inadmissible evidence, which cuts against the traditional flexibility of trial judges to manage trials and balance the various interests within the trial setting. 153 As a result, problems may arise when the presentment of a defendant’s witnesses intersects with other interests at stake in the trial setting. 154

146. Id. at 560, 898 A.2d at 448.
147. Id. at 549, 898 A.2d at 441.
148. Id. at 550, 898 A.2d at 442. The dissent further asserted that even if the trial judge had committed error in excluding the testimony, Maryland precedent requires reversible error to be both wrong and injurious. Id. The dissent argued that the majority overturned the conviction based on the risk of denying Kelly a fair trial. Id. at 551, 898 A.2d at 442. Thus, the dissent concluded that the majority abandoned Maryland precedent by employing a standard focused on risk of harm rather than actual harm. Id.
149. Id. at 560, 898 A.2d at 447.
150. Id. at 517, 543, 898 A.2d at 422, 438 (majority opinion).
151. See infra Part IV.A.
152. See infra Part IV.B.
153. See infra Part IV.C.
154. See infra Part IV.D.
A. The Court Departed from Precedent by Failing to Demonstrate the Admissibility of the Excluded Testimony

The *Kelly* court failed to adhere to the rule it established in *Wilson*, that the trial court violates a criminal defendant's Sixth Amendment compulsory process rights by excluding testimony only where the defendant can demonstrate that the testimony is both favorable and admissible.\(^5\) Although the majority in *Kelly* thoroughly discussed the legal precedent establishing a criminal defendant's fundamental right to present witness testimony,\(^6\) the court only briefly analyzed the substantive quality of the excluded testimony.\(^7\) The court's cursory analysis of this point rested on the fact that the witness testimony might have been favorable to *Kelly*, without addressing the admissibility of the testimony at all.\(^8\) The *Kelly* court's method of analysis deviated from the court's analysis in prior cases where only missing admissible testimony denied the defendants their constitutional rights.\(^9\)

Both the Supreme Court in *Taylor v. Illinois* and the Court of Appeals in *Wilson v. State* clarified that a defendant's right to compulsory process does not confer a right to present inadmissible evidence.\(^10\) This limitation formed the basis for the *Wilson* court's decision that a trial judge does not violate the Sixth Amendment by failing to help secure a witness unless the witness's testimony would be both admissible and helpful to the defense.\(^11\) The *Kelly* court's failure to assess the admissibility of the excluded testimony departs from the *Wilson* standard, as the court considered only the potential favorability of the evidence.\(^12\)

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156. *See Kelly*, 392 Md. at 532–38, 898 A.2d at 431–34 (laying out Supreme Court and Court of Appeals precedent regarding a criminal defendant's Sixth Amendment right to compulsory process).

157. *See id.* at 538, 898 A.2d at 434 (discussing the witnesses' testimony in one paragraph).

158. *Id.*; *see also id.* at 545, 898 A.2d at 439 (Raker, J., dissenting) (arguing that the majority never analyzed the admissibility of the testimony).

159. *See Wilson*, 345 Md. at 451, 693 A.2d at 351 (emphasizing that the missing witness's testimony was admissible in reversing the defendant's conviction); *Foster v. State*, 297 Md. 191, 212, 464 A.2d 986, 997 (1983) (reversing the defendant's conviction because the trial court excluded hearsay testimony that was trustworthy and likely admissible); *see also Void v. State*, 325 Md. 386, 392, 601 A.2d 124, 126 (1992) (concluding that the trial court erred in quashing witness subpoenas where the testimony was admissible character evidence).


161. *Wilson*, 345 Md. at 448, 693 A.2d at 349.

162. *Kelly*, 392 Md. at 538, 898 A.2d at 434 (assessing only the potential favorability and not the admissibility of the excluded evidence).
Not only did the Kelly court fail to indicate how the excluded testimony would have been admissible, but the majority also did not reject the trial court ruling that the excluded evidence was hearsay. The Maryland Rules of Evidence clearly establish that hearsay testimony is not admissible unless it falls within an enumerated exception. Without this critical finding, the majority’s determination of reversible error rested on grounds that do not satisfy these well-established rules. Thus, as Judge Raker contended in her dissent, Kelly was not deprived of any constitutional right when the trial court excluded the hearsay testimony.

Further, unlike its decision in Foster v. State, the Court of Appeals in Kelly did not find that the trial court rigidly applied the hearsay rule to exclude testimony that was both critical to the defense and bore reliable indicia of trustworthiness. In Foster, the trial court’s application of the hearsay rule implicated the defendant’s constitutional rights because of the nature of the testimony that was excluded—reliable testimony that someone other than the defendant threatened to kill the victim. In contrast, the Kelly court made no such finding that the excluded testimony was trustworthy or critical to the defense, which, based on Foster, indicates that the trial court’s application of the hearsay rule to the proffered testimony was proper.

The decision in Kelly also deviates from the Supreme Court’s rule in Valenzuela-Bernal that excluded testimony violates a defendant’s compulsory process rights only where the evidence is both favorable and material. Consequently, the majority deviated from its prior

163. See id. at 531–32, 898 A.2d at 431 (leaving the trial court’s ruling that the evidence was hearsay undisturbed, but finding error in the trial court’s method of determining that the testimony was hearsay).

164. Md. R. 5-801 to -804.

165. See Bernadyn v. State, 390 Md. 1, 7–8, 887 A.2d 602, 606 (2005) (noting that trial court judges have no discretion to admit hearsay evidence that does not fall within an exception to the hearsay rule); see also Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (explaining that the hearsay rule stems from the notion that untrustworthy evidence should not be presented to triers of fact).

166. Kelly, 392 Md. at 550, 898 A.2d at 442 (Raker, J., dissenting). But see Chambers, 410 U.S. at 302 (finding an erroneous application of the hearsay rule where the trial court mechanically applied the rule to exclude critical, trustworthy evidence that directly affected the ascertainment of guilt, thus implicating the defendant’s constitutional rights).

167. See Foster v. State, 297 Md. 191, 212, 464 A.2d 986, 997 (1983) (granting the defendant a new trial because the trial court’s strict application of the hearsay rule excluded admissible testimony that implicated the ascertainment of guilt).

168. Id. at 211–12, 464 A.2d at 997.

169. See Kelly, 392 Md. at 545, 898 A.2d at 439 (Raker, J., dissenting) (emphasizing that the majority failed to address the admissibility of the hearsay evidence).

cases and from Supreme Court precedent by finding that the trial
court deprived Kelly of his constitutional rights by excluding the wit-
cesses' testimony—the excluded testimony was inadmissible hearsay,
and the Court of Appeals did not deem the testimony to be material
to the outcome, critical to the defense, or bearing reliable indicia of
trustworthiness.

B. The Court Unnecessarily Expands Sixth Amendment Rights of
Criminal Defendants Whose Witnesses Are Present in the
Courtroom

The Kelly court focused almost entirely on the trial court's proce-
dure, indicating that the procedure itself violated the defendant's
constitutional rights and required a new trial.\(^{171}\) Unlike prior cases
where the court appeared to accept the use of proffers to assess the
admissibility of evidence,\(^{172}\) the Kelly court established that the use of
proffers to discern how witnesses will testify is ill-advised where the
witnesses are present in the courtroom and able to testify.\(^{173}\) Thus, as
Judge Raker noted in her dissent, the majority appeared to create a
per se rule requiring trial court judges to allow defendants to call pre-
sent witnesses regardless of whether these witnesses have any admissi-
bly testimony.\(^{174}\) This rule strays from Wilson's two-prong analysis of
favorability and admissibility for missing witnesses.\(^{175}\) Consequently,
the Kelly court's rule creates an arbitrary distinction between the Sixth
Amendment rights of criminal defendants whose witnesses fail to ap-
pear and those whose witnesses come to court.\(^{176}\) The protection of a
right so significant to be deemed fundamental should not turn solely

\(^{171}\) Compare Kelly, 392 Md. at 531–32, 898 A.2d at 431 (emphasizing that its decision
turned on the limits of the trial court’s discretion to exclude defense witnesses, rather than
the substantive admissibility of hearsay evidence), with Void v. State, 325 Md. 386, 392–93,
601 A.2d 124, 126–27 (1992) (focusing review on both the trial judge's procedural discre-
tion and the admissibility of the excluded testimony).

\(^{172}\) See, e.g., Wilson v. State, 345 Md. 437, 448, 693 A.2d at 344, 349–50 (1997) (main-
taining that a defendant must be able to establish that missing testimony is admissible,
material, and favorable to the defense to establish a compulsory process right to receive
court assistance in locating a missing witness).

\(^{173}\) See Kelly, 392 Md. at 532, 898 A.2d at 431.

\(^{174}\) Id. at 546 n.1, 898 A.2d at 439 n.1 (Raker, J., dissenting).

\(^{175}\) See Wilson, 345 Md. at 448, 693 A.2d at 349.

\(^{176}\) Compare id. (requiring criminal defendants to demonstrate the admissibility and
favorability of proposed testimony to establish a compulsory process right to the court’s
assistance in locating a missing witness), with Kelly, 392 Md. at 538, 898 A.2d at 434 (major-
ity opinion) (concluding that the defendant established his right to question a present
witness where he demonstrated merely that the testimony was presumably favorable).
on whether a defendant's witnesses are available when called to testify. By granting a broader compulsory process right, the Court of Appeals strayed from the Supreme Court's decision in *Taylor* that the effectiveness of a defendant's compulsory process rights depends on the "deliberate planning and affirmative conduct" of defense counsel. During Kelly's trial, the trial judge gave defense counsel adequate opportunity to proffer grounds for admissibility, yet the attorney was unable to do so. By emphasizing that trial judges can exclude evidence only upon objection, the *Kelly* court held the trial judge accountable for excluding inadmissible testimony sua sponte rather than placing the burden on the defense to present admissible testimony. Thus, ironically, the court sidestepped defense counsel's failure to present admissible evidence by focusing on the prosecution's potential failure to object to inadmissible evidence.

C. The Removal of Discretion from Trial Courts Cuts Against Judges' Inherent Flexibility to Manage Trials

Despite quoting large excerpts of the defense counsel's proffers and the trial judge's rulings, the *Kelly* court did not assess the legitimacy of the trial judge's rulings on the admissibility of the evidence. Rather, the majority obviated the need to discuss whether the testimony was admissible by focusing on how the judge determined that the testimony was inadmissible. To support this rationale, the court relied heavily on its conclusion in *Void* that the appropriate time for the judge to determine the admissibility of the excluded witnesses' testimony was during their in-court examination. In *Void*, however,

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177. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").
179. See *Kelly*, 392 Md. at 520–30, 898 A.2d at 424–30 (quoting numerous instances in the trial court transcript where defense counsel was given the opportunity to find a hearsay exception for the testimony).
180. Compare *Kelly*, 392 Md. at 541, 898 A.2d at 436 (finding that the trial judge's sua sponte exclusion of inadmissible witness testimony jeopardized the defendant's right to a fair trial because the judge had effectively become a party to the proceeding), with *Taylor*, 484 U.S. at 401–02, 410 (upholding the trial judge's exclusion of a defense witness as a sanction for violating a discovery order because compulsory process rights depend fully on the defendant's initiative).
182. See id. at 532, 898 A.2d at 431 ("[T]he court's error was not in the nature of the evidence as hearsay, but instead in how it determined that the testimony would be hearsay.").
the court determined that the judge’s exclusion of the witnesses without hearing their testimony was erroneous because the judge had an insufficient basis for exercising his discretion. 184 But finding an insufficient basis does not mean that a judge lacks the discretion altogether to exclude witnesses without hearing their testimony. 185

In contrast to the Kelly opinion, the Void court emphasized the materiality of the excluded testimony—character evidence directed at the State’s key witness—and maintained that it was highly unlikely that the jury would convict unless it believed that the witness was credible. 186 Moreover, the Void court premised its decision on the notion that the trial judge could not have made an accurate decision of whether the evidence was admissible without hearing the witnesses’ testimony. 187 In Kelly, however, the Court of Appeals’s decision was not based on a sufficiency determination, but rather on the trial judge’s discretion to even make the evidentiary decision. 188 The Kelly court went substantially beyond Void by effectively removing a trial court’s discretion to exclude present witnesses based on proffers, instead of questioning whether the judge had a sufficient basis for excluding the witnesses in light of the information elicited by the proffers. 189

The Court of Appeals also created new law by establishing that trial courts cannot exclude evidence sua sponte, splitting from a number of courts that have considered the question. 190 In Kelly, the trial court sought to exclude testimony under the hearsay rule, 191 a rule intended to exclude unreliable evidence. 192 Thus, following the Kelly court’s logic, a trial court must refrain from excluding inadmissible, unreliable, and even prejudicial hearsay evidence if the opposing

185. See id. (noting that additional indicia such as barebones affidavits and confidential investigations led to the need for a courtroom examination).
186. Id. at 987, 392, 601 A.2d at 124, 126.
187. Id. at 393–94, 601 A.2d at 127.
188. See Kelly, 392 Md. at 532, 898 A.2d at 431.
189. Id. at 535, 543, 898 A.2d at 433, 438.
190. See cases cited supra note 82 (discussing the role of the trial court to act as the evidence gatekeeper, which includes making sua sponte determinations about the admissibility of evidence).
191. See Kelly, 392 Md. at 526, 898 A.2d at 428.
192. See Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (explaining that the hearsay rule stems from the view that out-of-court statements should not be presented to the jury because they often lack certain indicia of trustworthiness: the declarant is not under oath, the declarant is not subject to cross-examination, and the jury cannot assess the declarant’s demeanor and credibility); WEINSTEIN & BERGER, supra note 77, § 802.02[3] (“The hearsay rule seeks to eliminate the danger that evidence will lack reliability because faults in the perception, memory, or narration of the declarant will not be exposed.”).
party does not object.\textsuperscript{193} Such a result is at odds with the requirement that trial courts must exclude hearsay as evidence at trial, unless it falls within an exception to the general rule.\textsuperscript{194} Moreover, the rule contrasts with the Court of Appeals’s admonition in \textit{Bernadyn} that the trial judge should have instructed the jury sua sponte as to the limited scope of admitted evidence to preserve the fairness of the trial,\textsuperscript{195} notwithstanding Maryland Rule 5-105 providing that the court shall instruct the jury about the limited scope of admitted evidence upon request.\textsuperscript{196} In contrast to the \textit{Bernadyn} court’s suggestion that trial judges have discretion to make evidentiary decisions sua sponte to maintain fairness, the \textit{Kelly} court’s decision finds that because the trial court has no discretion to make evidentiary decisions on its own, fairness does not even enter the equation.\textsuperscript{197}

The Court of Appeals’s limitation on the trial judge’s ability to exclude a present witness and evidence sua sponte runs counter to the generally broad discretion given to trial judges to manage their courtrooms.\textsuperscript{198} The trial judge’s broad discretion derives from the inherent flexibility of the evidentiary rules, which are designed to enable judges to balance the various interests at stake in the trial setting.\textsuperscript{199} In \textit{Taylor v. Illinois}, the Supreme Court emphasized that the mere invocation of the defendant’s right to call witnesses does not automatically outweigh countervailing interests, including the integrity of the

\begin{itemize}
\item \textsuperscript{193} See \textit{Kelly}, 392 Md. at 540, 898 A.2d at 435–36 (concluding that the trial judge left his role as impartial arbiter to which the prosecution had not properly objected).
\item \textsuperscript{194} Md. R. 5-802; \textit{see also} \textit{Bernadyn v. State}, 390 Md. 1, 8, 887 A.2d 602, 606 (2005) (noting that appellate review of hearsay testimony is de novo because trial courts do not have discretionary authority to admit hearsay evidence absent an exception).
\item \textsuperscript{195} \textit{Bernadyn}, 390 Md. at 15 n.5, 887 A.2d at 610 n.5.
\item \textsuperscript{196} Md. R. 5-105.
\item \textsuperscript{197} See \textit{Kelly}, 392 Md. at 541, 898 A.2d at 436 (maintaining that a trial court abandons its role of impartial arbiter and becomes a party to the proceeding where it makes a decision regarding the admissibility of evidence sua sponte).
\item \textsuperscript{198} See, \textit{e.g.}, \textit{Cooley v. State}, 385 Md. 165, 175–76, 867 A.2d 1065, 1071 (2005) (emphasizing the broad discretion afforded trial judges to control trial proceedings); \textit{Hopkins v. State}, 352 Md. 146, 158, 721 A.2d 231, 237 (1998) (maintaining that appellate courts extend significant deference to trial court decisions regarding evidence determinations, reversing only upon an abuse of discretion); \textit{see also} \textit{Fed. R. Evid.} 104(a), 611(a) (outlining the role of the trial court in making evidentiary decisions and controlling the order of the trial); \textit{Md. R. 5-104(a), 5-611(a) (same)}.
\item \textsuperscript{199} See \textit{Weinstein & Berger, supra} note 77, §§ 102.02[1], 102.03 (suggesting that the multiple goals of the rules of evidence—such as fairness in administration, elimination of unjustifiable expense and delay, the ascertainment of truth, and justly determined proceedings—mandate trial court flexibility, and that the balancing of the goals forces courts to proceed on a case-by-case basis).
\end{itemize}
adversarial process, which relies on the presentation of reliable evidence and the exclusion of unreliable evidence.\textsuperscript{200}

D. The Court’s Limitations on Trial Court Flexibility Poses Risks Where the Presentment of Defense Evidence Intersects with Other Critical Trial Interests

In determining that the trial court denied Kelly his constitutional right to present a defense, the majority failed to indicate whether its rule extends only to situations like Kelly’s, where a defendant is completely prevented from calling witnesses who are present in the courtroom, or whether excluding any present defense witnesses at all results in a constitutional violation.\textsuperscript{201} The court’s language implies the latter because the court did not qualify the defendant’s right to put present witnesses on the stand.\textsuperscript{202} Given this interpretation, the rule has broad implications for impacting the trial court’s discretion to consider time and convenience of the jury in making evidentiary decisions,\textsuperscript{203} particularly considering continued increases in the criminal dockets of Maryland circuit courts\textsuperscript{204} and the lack of a corresponding growth in the number of trial court judges.\textsuperscript{205}

Moreover, the \textit{Kelly} rule may raise problems where presentment of defense witnesses intersects with the rights of other parties. For example, it is questionable whose interests should prevail when the defense’s only witness violates a sequestration order, and the violation poses serious risks of prejudicing the prosecution.\textsuperscript{206} Further, if the

\begin{itemize}
\item \textsuperscript{200} 484 U.S. 400, 414–15 (1988).
\item \textsuperscript{201} See \textit{Kelly}, 392 Md. at 535, 898 A.2d at 433 (discussing the right of defendants to call witnesses who are present in the courtroom).
\item \textsuperscript{202} \textit{Id}.
\item \textsuperscript{203} See \textit{Wilson v. State}, 345 Md. 437, 452, 693 A.2d 344, 351 (1997) (noting that trial courts have the discretion to consider the convenience of the jury and risk of delay in searching for a subpoenaed witness).
\item \textsuperscript{205} Despite having a certified need for thirty-three new judgeships for fiscal year 2006, the Maryland judiciary received only thirteen new judgeships, the first increase in judgeships since 1998. \textit{Court Info. Office, Maryland Judiciary: 2004–2005 Highlights 4} (2006), http://www.courts.state.md.us/publications/annualreport/reports/2005/areport04-05.pdf.
\item \textsuperscript{206} The Court of Appeals has addressed situations where defense witnesses were excluded for minor violations of the rule on witnesses. In \textit{Redditt v. State}, the Court of Appeals found reversible error where the trial court excluded a defense witness for violating a sequestration order when the violation was minor. 337 Md. 621, 637, 655 A.2d 390, 398 (1995). In \textit{McCray v. State}, the Court of Appeals found reversible error where the trial
Kelly rule applies to all present witnesses, trial judges may have less discretion under the Maryland Rules of Evidence to limit the number of witnesses that the defendant can present to prevent unnecessary accumulation of evidence, jury inconvenience, or unnecessary expense and delay.\textsuperscript{207}

In addition, the Kelly court’s pronouncement that judges may not exclude evidence sua sponte\textsuperscript{208} also raises problems where an opposing party fails to object to testimony that prejudices the trial. For example, under the Kelly rule, it is questionable whether a trial judge may exclude sua sponte inadmissible evidence of a rape victim’s prior history\textsuperscript{209} during a proffer session, despite a trial judge’s broad discretion to make preliminary rulings on the admissibility of evidence.\textsuperscript{210} Such a rule sends a mixed message to trial judges who, pursuant to the evidentiary rules, bear the responsibility of ensuring that trials are fair and promote the interests of justice.\textsuperscript{211} Moreover, the Kelly court’s limitations on trial court discretion contrast with trial judges’ considerable flexibility to make decisions on a case-by-case basis rather than following a rigid adherence to the evidentiary rules.\textsuperscript{212} Such flexibility typically enables judges to tailor their rulings to the fair administration of individual trials.\textsuperscript{213}

V. CONCLUSION

In Kelly, the Court of Appeals reversed a trial court’s exclusion of a criminal defendant’s present witnesses, finding that the exclusion violated the defendant’s constitutional rights.\textsuperscript{214} By failing to assess

court excluded a defense witness for violating a nonexistent sequestration order. 305 Md. 126, 137, 501 A.2d 856, 861 (1985).

\textsuperscript{207} See, e.g., Md. R. 5-102 (providing trial judges the discretion to construe evidentiary rules so as to promote fairness and reduce unnecessary expense and delay); Md. R. 5-403 (permitting trial courts to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”); Md. R. 5-611 (granting the trial court control over witness interrogation to make the issues clear for juror determination and to avoid unnecessary waste of judicial resources).

\textsuperscript{208} Kelly, 392 Md. at 540, 898 A.2d at 435–36.

\textsuperscript{209} See Md. Code Ann., Crim. Law § 3-319(b) (LexisNexis 2002) (listing the requirements for introducing evidence of specific instances of a rape victim’s sexual history).

\textsuperscript{210} See Md. R. 104(a) (“Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court.”).

\textsuperscript{211} See supra note 207.

\textsuperscript{212} Weinstein & Berger, supra note 77, § 102.03.

\textsuperscript{213} Id.

\textsuperscript{214} Kelly, 392 Md. at 543, 898 A.2d at 438.
whether the excluded testimony was admissible, the court appeared to create a broad right for criminal defendants to call present witnesses, regardless of whether the witnesses have any admissible testimony to offer. Moreover, the court’s decision restricted the trial court’s broad discretion to manage trials. As a consequence, trial judges have less flexibility to resolve issues that arise when the presentation of a defendant’s witnesses intersects with other interests of justice.

JENNIFER L. KATZ

215. See supra Part IV.A.
216. See supra Part IV.B.
217. See supra Part IV.C.
218. See supra Part IV.D.
IN RE BLESSEN H.: LOWER WAIVER STANDARD IN CINA PROCEEDINGS SATISFIES DUE PROCESS AND LEAVES POLICY ISSUE TO LEGISLATURE

In In re Blessen H., the Court of Appeals of Maryland considered whether the waiver of a mother’s right to a contested Child in Need of Assistance (CINA) adjudicatory hearing requires the court to conduct a personal colloquy with a parent to establish her voluntary, knowing, and intelligent waiver. The court held that this stricter waiver standard—requiring a personal waiver and first articulated in Johnson v. Zerbst—is not required in CINA proceedings. In so holding, the court rightfully recognized that personal waivers are only necessary when the right to be waived is fundamental and the proceedings could result in incarceration, whereas CINA proceedings are civil in nature and cannot result in physical confinement. In addition, the court’s decision properly reinforced the boundary between CINA proceedings and those with a greater potential for the deprivation of liberty, such as cases with the potential for incarceration. The lower waiver requirement is also consistent with judicial standards in other jurisdictions. Finally, in declining to require a personal waiver, the court properly deferred to the legislature to address the waiver issue in the future.

I. THE CASE

In July 2002, the Montgomery County Department of Health and Human Services (MDHHS) filed a CINA petition on behalf of Blessen...
H., the daughter of Sheldon A. and Tynetta H. MDHHS dismissed the petition after learning that Blessen H. and her siblings were living with Tynetta H. in Pennsylvania and receiving assistance from the Philadelphia Child Protective Services (PCPS). The PCPS eventually removed the children from their mother’s care and sent Blessen H. to live with her father in Montgomery County. Blessen H. then moved again, this time to live with her paternal grandmother in New Jersey. Soon after, Tynetta H. and her mother, Rose G., arrived in New Jersey and took the child using an expired document granting temporary custody to Rose G.

MDHHS filed another petition asserting that Blessen H. was a CINA on July 29, 2003. After a shelter care hearing, the court issued a juvenile warrant for Blessen H.; two days later she was found in Georgia with her mother. On September 2, 2003, the Circuit Court for Montgomery County held a combined adjudicatory and disposition hearing. Counsel for MDHHS informed the judge that, although Tynetta H. “was not of a mind . . . to reach an agreement,” she was willing to participate in mediation.

Through mediation that afternoon, the parties were able to amend the CINA petition and reach an agreement. The court reviewed the amended petition with the parties, clarified certain facts, suggested changes, and confirmed that the amended petition would serve as the basis for the court’s determination that Blessen H. was a CINA. The agreement provided that Blessen H. would remain in foster care until the completion of a home study of her paternal grandmother’s home. Blessen H. would then live with her paternal

11. In re Blessen H., 163 Md. App. 1, 6–7, 877 A.2d 161, 164 (2005). MDHHS also filed the CINA petitions on behalf of Blessen’s two siblings. Id. at 7, 877 A.2d at 164.
12. Id. at 7–8, 877 A.2d at 164–65.
13. Id. at 8, 877 A.2d at 165.
14. Id.
15. Id.
17. A shelter care hearing is held to establish whether the child needs to be temporarily placed outside of the home. Md. Code Ann., Cts. & Jud. Proc. § 3-801(x) (LexisNexis 2006).
19. In re Blessen H., 392 Md. at 686–87, 898 A.2d at 981–82. A disposition hearing is held to establish whether a child needs help and, if so, the type of court action that will “protect the child’s health, safety, and well-being.” Md. Code Ann., Cts. & Jud. Proc. § 3-801(m).
20. In re Blessen H., 163 Md. App. at 8, 877 A.2d at 165 (alteration in original).
21. Id. at 9, 877 A.2d at 165.
22. Id.
23. In re Blessen H., 392 Md. at 689, 898 A.2d at 983.
grandmother, have weekly supervised visits with Sheldon A. and have monthly supervised visits with Tynetta H.\textsuperscript{24}

The proceedings continued as the parties discussed the circumstances surrounding Tynetta H. and Rose G.'s removal of Blessen H. from her paternal grandmother's home in New Jersey.\textsuperscript{25} Tynetta H. objected to the "no contact" order that the court had previously imposed on Rose G. after the New Jersey incident.\textsuperscript{26} The court decided to continue the order against Rose G., at least temporarily.\textsuperscript{27} When both Tynetta H. and her lawyer declined to raise any further issues, the court rendered its disposition reflecting the parties' agreement.\textsuperscript{28}

At the conclusion of the proceedings, Tynetta H. requested an opportunity to explain the circumstances from her perspective; specifically, she wanted the court to know more about her character and the reason why Blessen H. lacked a stable home.\textsuperscript{29} However, the court responded that it had been listening to her attorney and that the proceedings were finished.\textsuperscript{30} On September 5, 2003, the court filed a combined adjudication and disposition order declaring Blessen H. a CINA.\textsuperscript{31}

Tynetta H. subsequently appealed to the Court of Special Appeals, arguing that the trial court should have required a personal colloquy on the record to waive her right to an adjudicatory hearing.\textsuperscript{32} The court rejected this contention, focusing instead on the differences between CINA proceedings, which aim to safeguard the best interest of the child, and criminal trials or proceedings that are punitive and carry the possibility of incarceration.\textsuperscript{33} The court also distinguished CINA adjudications from termination of parental rights (TPR) proceedings, noting that the former do not seek to sever the parent-child relationship while the latter may result in a parent losing custody of her child permanently.\textsuperscript{34} The court noted that in a TPR case, a parent may consent to the termination of parental rights with-
out offending due process by failing to file a timely objection. Given that a personal waiver is not even required in TPR proceedings, the court concluded, it certainly should not be required at CINA hearings. The court deemed due process satisfied where a judicial determination that a parent wishes to waive her right to a contested hearing was based on the totality of the circumstances. It further concluded that a personal waiver is not necessary unless the waived right is fundamental and the proceeding could result in incarceration.

The Court of Appeals granted certiorari to decide whether a parent may only waive the right to a contested adjudicatory hearing in a CINA proceeding by a "personal, knowing, intelligent and voluntary waiver."

II. LEGAL BACKGROUND

During both criminal and civil proceedings, a party may waive a number of fundamental rights as long as the waiver comports with due process requirements. The Supreme Court of the United States and the Court of Appeals of Maryland have determined that a parent’s right to raise a child is a fundamental right that deserves a high level of due process protection. Under Maryland law, a party must only make a personal waiver when a fundamental right is at stake and the proceedings could result in confinement. In analogous cases in other jurisdictions, courts have similarly declined to require a personal waiver.

35. Id. at 17, 877 A.2d at 170; see also In re Adoption/Guardianship No. 93921055, 344 Md. 458, 494, 687 A.2d 681, 698 (1997) (holding that a failure to file a timely objection in a TPR case can constitute a parent’s consent without violating that parent’s due process right).

36. In re Blessen H., 163 Md. App. at 17, 877 A.2d at 170. The Court of Special Appeals also applied Mathews v. Eldridge, 424 U.S. 319 (1976), to determine that due process did not require a personal waiver under the circumstances. In re Blessen H., 163 Md. App. at 19–21, 877 A.2d at 171–72. Mathews requires a court to examine three factors to determine what process is due: (1) the private interest at stake; (2) the risk of a wrongful deprivation of that interest based on the procedures and the potential value of other safeguards; and, (3) the government interest involved, including the burdens that the additional procedural requirement would impose. Mathews, 424 U.S. at 335.


38. Id. at 13–14, 877 A.2d at 168.


40. See infra Part II.A.

41. See infra Part II.A.

42. See infra Part II.B.
sonal waiver except by mandate of the legislature. Provided the minimum requirements for due process are satisfied, legislatures have traditionally been the proper forum to decide public policy matters such as whether to require a more stringent waiver standard.

### A. Waiver Standards for Fundamental Rights

As the Supreme Court has noted, “waiver” is an ambiguous term that is used for myriad purposes in the law. Accordingly, the Court has defined waivers based on the various rights that a party can waive and the procedures for each. Both the Supreme Court and the Court of Appeals have permitted a party to waive fundamental rights provided the waiver is consistent with due process requirements. Both courts have also steadfastly recognized that the right to parent is fundamental and cannot be denied without clear justification.

#### 1. Differing Waiver Standards

In its broadest sense, the term “waiver” could describe most of an attorney’s tactical decisions, or even inaction by an attorney. However, the Supreme Court has not accepted this broad definition, expressly distinguishing a waiver from a forfeiture by noting that a forfeiture is a failure to assert a right in a timely manner. In 1937, the Court stated in two separate decisions that courts must “indulge every reasonable presumption” against the waiver of a fundamental right, and not presume that a party has acquiesced in losing fundamental rights. In neither decision, however, did the Court articulate what constituted a waiver.

In 1938, the Supreme Court established a heightened waiver standard in *Johnson v. Zerbst*. The *Zerbst* definition of a waiver as the “intentional relinquishment or abandonment of a known right” is now

43. See infra Part II.C.
44. See infra Part II.D.
46. See infra Part II.A.1.
47. See infra Part II.A.1.
48. See infra Part II.A.2.
49. Curtis v. State, 284 Md. 132, 147–48, 395 A.2d 464, 473 (1978) (observing that whenever an attorney makes a strategic decision during a trial, one could say that he has waived the alternate choice).
the generally accepted definition.\textsuperscript{54} In \textit{Zerbst}, a defendant who was tried, convicted, and sentenced for possessing and passing counterfeit money without the aid of a lawyer complained that he had been denied his constitutional right to counsel.\textsuperscript{55} The Court determined that the trial judge is responsible for establishing whether the defendant has made an "intelligent and competent waiver," and that this determination should appear on the record.\textsuperscript{56} However, if the defendant is unrepresented and does not intelligently and competently waive a fundamental right, the Court emphasized, the Sixth Amendment will bar the defendant's conviction.\textsuperscript{57} The \textit{Zerbst} Court also clarified that a court's decision as to whether the defendant has made an intelligent waiver must depend on the circumstances of the case, including the defendant's background, experience, and behavior.\textsuperscript{58}

Courts do not always require this heightened waiver standard, recognizing that some situations where individuals neglect to raise constitutional protections do not call for a knowing and intelligent waiver.\textsuperscript{59} For example, in \textit{Jones v. State},\textsuperscript{60} the Court of Appeals rejected the use of the \textit{Zerbst} waiver standard in a civil contempt hearing.\textsuperscript{61} The \textit{Jones} court decided that the trial judge need not describe the proceedings, the potential defenses, or the possible results of a finding of contempt when the party is represented by a lawyer and is aware that incarceration is a potential consequence.\textsuperscript{62} Moreover, courts have also accepted that a party's counsel may waive certain fundamental rights without violating the party's due process rights.\textsuperscript{63} Finally, courts have allowed the waiver of a fundamental right by inaction in certain situations.


\textsuperscript{55} \textit{Zerbst}, 304 U.S. at 459–60.

\textsuperscript{56} \textit{Id.} at 465.

\textsuperscript{57} \textit{Id.} at 468.

\textsuperscript{58} \textit{Id.} at 464.

\textsuperscript{59} See, e.g., \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 235 (1973) ("Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection.").

\textsuperscript{60} 351 Md. 264, 718 A.2d 222 (1998).

\textsuperscript{61} \textit{Id.} at 275–77, 718 A.2d at 228–29.

\textsuperscript{62} \textit{Id.} at 277, 718 A.2d at 229. The \textit{Jones} court pointed out that a finding of contempt does not present imminent danger of incarceration; rather, Maryland law specifies a set of procedural and substantive measures before imprisonment. \textit{Id.} at 275–76, 718 A.2d at 228.

circumstances, such as when a parent waives her right to a TPR hearing by failing to file a timely notice of objection.\textsuperscript{64}

2. Recognition of the Fundamental Right to Parent

A parent's interest in raising her own children is so strong that courts have recognized it as a constitutionally protected right under the Fourteenth Amendment. As early as 1923, in \textit{Meyer v. Nebraska},\textsuperscript{65} the Supreme Court implicitly recognized that a parent's right to raise children is fundamental by deeming the right essential to the pursuit of happiness.\textsuperscript{66} Nearly six decades later, in \textit{Santosky v. Kramer},\textsuperscript{67} the Court explicitly recognized the right to parent as a fundamental liberty interest.\textsuperscript{68} The \textit{Santosky} Court held that due process requires that a state support its allegations in TPR proceedings by clear and convincing evidence.\textsuperscript{69} In reaching its conclusion, the Court specifically observed that a parent has a fundamental interest in the "care, custody, and management of their child" that does not simply dissolve when the parent has lost custody.\textsuperscript{70}

The Court of Appeals has also expressly declared that a parent's interest in raising her child is a fundamental right that courts cannot strip without clear justification.\textsuperscript{71} In \textit{In re Adoption/Guardianship No. 93321055},\textsuperscript{72} the Court of Appeals considered five cases challenging Maryland's statutory scheme, under which the failure to file a timely objection in a TPR case is deemed irrevocable consent to the State's petition.\textsuperscript{73} The court recognized three basic principles in the Supreme Court decisions acknowledging a fundamental right to parent.\textsuperscript{74} First, a parent's interest in the "care, custody, and

\begin{footnotes}
64. E.g., \textit{In re Adoption/Guardianship No. 93321055}, 344 Md. 458, 494, 687 A.2d 681, 698 (1997).
65. 262 U.S. 390 (1923).
66. Id. at 399.
68. Id. at 753.
69. Id. at 769.
70. Id. at 753. Similarly, in \textit{Troxel v. Granville}, the Court again emphasized that the Fourteenth Amendment protects a parent's fundamental right "to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000) (plurality opinion). Writing for the plurality, Justice O'Connor asserted that there is a "presumption that fit parents act in the best interests of their children." \textit{Id.} at 68.
72. 344 Md. 458, 687 A.2d 681 (1997).
73. Id. at 464-65, 687 A.2d at 684.
74. Id. at 491, 687 A.2d at 697. In \textit{Wolinski v. Browneller}, the Court of Special Appeals similarly recognized the Supreme Court's history of providing protection to parents in the
\end{footnotes}
management” of her child is fundamental. Second, the State must provide parents with “fundamentally fair procedures” when it acts to terminate that interest. Third, the process owed to parents depends on the balancing of the three Mathews v. Eldridge factors.

Although the Court of Appeals has recognized a fundamental liberty interest in the right to parent, it has also cautioned that the right is not absolute. Under the doctrine of parens patriae, the State is the guardian for citizens who are unable to take care of themselves, including minors. Therefore, in a custody, visitation, or adoption dispute, the best interests of the child may trump the parent’s right. In cases with evidence of abuse or neglect, including CINA proceedings, the court’s role is more proactive than usual; the court must be particularly vigilant in protecting the child’s safety and well-being. Specifically, the court must provide for the child’s mental and physical development and hold the parents accountable for resolving any issues that required judicial intervention.

B. The Correlation of Waiver Standards to the Potential Deprivation of Liberty

Both the Supreme Court and the Court of Appeals have consistently upheld the right to waive fundamental rights in criminal and civil proceedings, as long as the waiver is consistent with due process requirements. In criminal proceedings, for example, the potential for incarceration has led courts to require a stricter waiver standard when both a fundamental right and the immediate threat of incarceration are at stake.


75. In re Adoption/Guardianship No. 93321055, 344 Md. at 491, 687 A.2d at 697.

76. Id.; see also supra note 36 (describing the Mathews factors for evaluating whether procedural due process is satisfied).


78. In disputes over children, the State’s aim is “to protect the child’s best interests as parens patriae—a derivation of the State’s interest in protecting the health, safety, and welfare of its citizenry.” Wolinski, 115 Md. App. at 300, 693 A.2d at 37. Equity courts are given full parens patriae power to grant minors any necessary relief to protect their best interests. Wagner v. Wagner, 109 Md. App. 1, 41, 674 A.2d 1, 20 (1996).

79. In re Adoption/Guardianship No. 10941, 335 Md. 99, 113, 642 A.2d 201, 208 (1994) (stressing that the most important consideration in adoption and custody disputes is the best interest of the child, not the parent’s interest in raising the child).


81. Id. at 449, 745 A.2d at 418; see also Md. Code Ann., Cts. & Jud. Proc. § 3-802(a)(1)–(4) (LexisNexis 2006).

82. See infra Part II.B.1–3.
ation are at stake. However, courts have accepted a lower waiver standard when these two elements are absent, such as in TPR cases carrying no criminal punishment.

I. Waiver Requirements in Criminal Proceedings

In the criminal context, courts have consistently noted that a waiver indicates an intelligent, knowing relinquishment of a fundamental right. Accordingly, the strict waiver standard of Johnson v. Zerbst has been applied to a broad range of criminal cases, particularly those involving fundamental rights that are essential to ensure a fair trial. For example, courts have required this higher standard when defendants offer to waive the Sixth Amendment right to counsel and the right to trial by jury. Courts also require a higher waiver standard when defendants waive their right to trial by entering a guilty plea, which in itself constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, and to remain silent.

Not all criminal or quasi-criminal proceedings, however, require application of the higher waiver standard. Rather, courts have limited the requirement of the stricter waiver standard to cases involving fundamental rights that may result in confinement. As the Court of Appeals has recognized, the realities of modern litigation necessitate a rule in certain circumstances that the actions of counsel will bind a party if such actions are taken with the party's knowledge and acquiescence. For example, in New York v. Hill, the Supreme Court held that a defendant waived his right to trial within 180 days under the

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85. See infra Part II.B.1.
86. See infra Part II.B.2–3.
87. See, e.g., Curtis v. State, 284 Md. 132, 147–48, 395 A.2d 464, 473 (1978) (distinguishing waivers from tactical decisions by defining a waiver in a criminal case as "the knowing and intelligent relinquishment of certain basic constitutional rights").
90. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 158 (1968) ("[W]e hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial . . . .").
91. See, e.g., Boykin v. Alabama, 395 U.S. 238, 242–44 (1969) (holding that the record must show that the defendant entered his guilty plea voluntarily and with full understanding).
94. Williams, 292 Md. at 218, 438 A.2d at 1309.
95. 528 U.S. 110 (2000).
Interstate Agreement on Detainers when his attorney agreed to a trial date outside that time period. Likewise, in *Williams v. State*, the Court of Appeals noted that the justice system must operate under the understanding that it is chiefly the lawyer's job to assert or waive the majority of the defendant's rights.

Finally, in *Schneckloth v. Bustamonte*, the Supreme Court declined to apply the *Johnson v. Zerbst* standard to the Fourth Amendment right to be free from unreasonable search or seizure. In so doing, the Court noted that the knowing and intelligent waiver standard has almost always been applied exclusively to constitutional rights preserving a fair trial. The *Schneckloth* Court distinguished between the rights that protect a fair criminal trial, such as the right to counsel—without which the defendant may be convicted simply because he lacks legal knowledge—and Fourth Amendment protections, which guard individual privacy against arbitrary police invasion.

2. Waiver Standards in Civil Proceedings

Waivers are often applied in civil proceedings as well, although the standards required to comport with due process differ from criminal cases. For example, a party to a civil proceeding that could result in incarceration must meet the strict *Johnson v. Zerbst* standard to waive fundamental rights, including the right to a contested probation revocation hearing and the right to counsel at a contested constructive civil contempt hearing. When a lower waiver standard is sufficient, however, a party in a civil proceeding may waive certain rights by inaction.

Courts have required a *Zerbst*-type waiver in civil cases only when the proceedings involve the waiver of a fundamental right and pose an immediate threat of incarceration. In *Hersch v. State*, the Court of Appeals noted that the simple fact that probation violation proceedings are civil is not determinative when deciding which waiver stan-

97. *Id.* at 218, 438 A.2d at 1309.
99. *Id.* at 235, 241–42.
100. *Id.* at 237.
101. *Id.* at 241–45.
Rather, the court held that probation revocation proceedings often result directly in the deprivation of liberty, and thus a Johnson v. Zerbst standard must apply to the probationer's waiver of her right "to put the State to its proof." 108

Similarly, in Zetty v. Piatt, 109 the Court of Appeals required a personal waiver of the right to counsel for constructive civil contempt proceedings with a penalty of incarceration. 110 The Zetty court concluded that the defendant's incarceration, which followed a proceeding at which he did not knowingly and intelligently waive the right to counsel, was unjust, and the court emphasized that the possibility of confinement was crucial. 111 Along the same vein, the Court of Appeals held in Jones v. State 112 that a stricter waiver standard was not required to waive a defendant's right to a contested constructive civil contempt hearing with no immediate threat of incarceration. Rather, the Jones court concluded that a lower waiver standard was sufficient and the trial judge did not need to obtain a personal waiver on the record. 113

3. Waiver Requirements for TPR Proceedings and the Characterization of CINA Proceedings in Maryland

As in other civil cases, a parent can also waive her rights in TPR cases. Maryland courts have accepted a less stringent waiver standard in TPR proceedings. With respect to CINA proceedings, courts have noted that their purpose differs from TPR cases.

Although TPR proceedings seek to permanently sever the parent's right to care for her child, 114 Maryland courts do not require a personal waiver in TPR cases. As discussed earlier, in In re Adoption/Guardianship No. 93321055, 115 the Court of Appeals determined that lower courts may infer that a parent has waived her right to contest termination of her parental rights if she fails to file a timely notice of objection. The court concluded that this practice did not violate due process. 116 The Court of Appeals has also clarified that in TPR proceedings, a court may decide that a parent has waived the right to

107. Id. at 206–07, 562 A.2d at 1257.
108. Id. at 207–09, 562 A.2d at 1257–58.
110. Id. at 158–60, 776 A.2d at 641–42.
111. Id. at 158, 776 A.2d at 641.
113. Id. at 277, 718 A.2d at 229.
116. Id. at 494, 687 A.2d at 698.
notice in a guardianship case if reasonable good faith efforts to serve a show cause order on the parent have been unsuccessful.\textsuperscript{117}

CINA proceedings arise when a local Department of Social Services files a petition alleging that a child is in need of assistance because of abuse or neglect.\textsuperscript{118} After a CINA petition is filed, the courts hold an adjudicatory hearing to determine whether the allegations in the petition are accurate and if the court must intervene.\textsuperscript{119} The goal of CINA proceedings is to protect the child and act in the child's best interest, not to penalize the parent.\textsuperscript{120} Thus, Maryland courts seek to avoid removing a child from her home or attempt to return her to her home whenever possible.\textsuperscript{121}

In \textit{In re John P.},\textsuperscript{122} the Court of Appeals considered whether holding a second CINA hearing would violate double jeopardy, and specifically labeled them as civil proceedings.\textsuperscript{123} After the trial court concluded that the children were not in need of assistance, counsel for the children filed a motion for reconsideration.\textsuperscript{124} At a subsequent hearing, the trial court determined that it lacked authority to reconsider the merits of its earlier dismissal.\textsuperscript{125} The Court of Appeals held that the double jeopardy prohibition did not apply because the proceedings were not a criminal action against the parent, and the state had not sought criminal sanctions.\textsuperscript{126}

\section*{C. Waiver Standards in Other States}

Maryland is not alone in addressing the required waiver standards for criminal and civil proceedings. Analogous decisions from other jurisdictions demonstrate that courts have generally declined to require personal waivers in abuse or neglect cases involving interference with parental rights without the possibility of physical confinement. In \textit{In re Kerry O.},\textsuperscript{127} for example, a California intermediate

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\textsuperscript{117} \textit{In re Adoption/Guardianship No. 6Z000045}, 372 Md. 104, 118, 812 A.2d 271, 279 (2002).


\textsuperscript{119} Id. § 3-817(a).

\textsuperscript{120} Id. § 3-817(a).

\textsuperscript{121} Md. Code Ann., Fam. Law § 5-525(d)(1) (LexisNexis 2006).

\textsuperscript{122} 311 Md. 700, 537 A.2d 263 (1988).

\textsuperscript{123} Id. at 706-07, 537 A.2d at 266-67.

\textsuperscript{124} Id. at 704, 537 A.2d at 265. The children's attorney relied on Maryland Rule 916 (current version at Maryland Rule 11-116(a) (2007)), which provides that a court may modify or vacate an order "if the court finds that action to be in the best interest of the child or the public." Id. at 703-04, 537 A.2d at 264-65.

\textsuperscript{125} Id. at 704, 537 A.2d at 265.

\textsuperscript{126} Id. at 708, 710, 537 A.2d at 267-68.

\textsuperscript{127} 258 Cal. Rptr. 448 (Dist. Ct. App. 1989).
appellate court held that the parents' attorneys could stipulate to the use of the child's prior testimony in a dependency proceeding without the parents' personal waiver. The court declined to extend the rule that waivers of constitutional rights must be made expressly to dependency proceedings, and noted that the attorney had the right to dictate trial strategy, including calling witnesses and introducing evidence.

Along with California, the Appeals Court of Massachusetts has recognized that parents can effectively waive their parental rights in juvenile care and protection proceedings by failing to exercise those rights. In Care & Protection of Leo, the court held that the father waived his right to complain of the admission of hearsay when his attorney turned down the chance to call those sources to testify. Likewise, the Court of Appeals of Wisconsin has held that a parent may waive the right to counsel in TPR cases if the court determines that the waiver was made knowingly and voluntarily. Finally, in In re Welfare of G.L.H., the Supreme Court of Minnesota held that although a parent's waiver of her right to counsel in TPR proceedings must be voluntary and intelligent, a court need not follow the strictures of waivers required for criminal cases and may examine the circumstances of the case.

D. The Legislature as Arbiter of Public Policy

When addressing matters of public policy, courts traditionally give great deference to the legislature. In Harrison v. Montgomery County Board of Education, the Court of Appeals expressed reluctance to modify a long-established common law rule, instead explaining that the General Assembly is normally responsible for declaring Maryland's public policy. In upholding the doctrine of contributory negligence, the Harrison court noted that Article 5 of the Maryland Declaration of Rights expressly grants the General Assembly the

128. Id. at 452-53.
129. Id.
132. 614 N.W.2d 718 (Minn. 2000).
133. The court found that the mother (though unrepresented) understood the nature of the TPR proceedings because of her questions posed to witnesses at the hearing, and thus deemed her waiver valid. Id. at 724.
135. Id. at 460, 456 A.2d at 903; see also Felder v. Butler, 292 Md. 174, 183, 438 A.2d 494, 499 (1981) (observing that, although courts are "empowered to change common law rules in light of changed conditions, [the Court of Appeals] has always recognized that declaration of public policy is normally the function of the legislative branch of government").
authority to amend the common law of Maryland through legislation.\textsuperscript{136}

The Court of Appeals has frequently deferred to the legislature to decide public policy issues. For example, in \textit{Baynor v. State},\textsuperscript{137} the court found that without legislative action, it would be inappropriate to require the tape-recording of all statements taken while a person is in custody. While admitting that such a rule would be practical, the court in \textit{Baynor} declared that legislation is the proper way to establish rules to enhance citizens' due process rights.\textsuperscript{138} Similarly, in \textit{Frye v. Frye},\textsuperscript{139} the Court of Appeals designated the legislature as the most suitable body to address the scope of the parent-child immunity rule because of the important public policy considerations involved.\textsuperscript{140} Accordingly, the \textit{Frye} court declined to exclude motor torts from the parent-child immunity doctrine.\textsuperscript{141} Significantly, in 2001, the legislature created precisely such an exception by statute.\textsuperscript{142} Cases like Baynor and Frye demonstrate that Maryland courts historically favor the resolution of public policy concerns by legislative action rather than judicial mandate, and further show how the legislature will often respond accordingly.\textsuperscript{143}

III. The Court's Reasoning

In \textit{In re Blessen H.}, the Court of Appeals affirmed the Court of Special Appeals and held that a lawyer's acceptance of the facts in a CINA petition for a mother, Tynetta H., was sufficient to waive the mother's right to a contested adjudicatory hearing.\textsuperscript{144} Writing for the majority, Judge Battaglia began by acknowledging Maryland's historical recognition of a parental interest in raising children with limited state involvement as a fundamental right protected by the Constitu-

\begin{itemize}
\item \textsuperscript{136} \textit{Harrison}, 295 Md. at 460, 463, 456 A.2d at 903, 905. The Supreme Court has similarly expressed deference to the legislature on public policy matters, noting that the Court's responsibility is to interpret and uphold the Constitution and existing laws, not to create social policy. \textit{Evans v. Abney}, 396 U.S. 435, 447 (1970).
\item \textsuperscript{137} 355 Md. 726, 736 A.2d 325 (1999).
\item \textsuperscript{138} \textit{Id.} at 740, 736 A.2d at 332.
\item \textsuperscript{139} 305 Md. 542, 505 A.2d 826 (1986).
\item \textsuperscript{140} \textit{Id.} at 567, 505 A.2d at 839.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{143} \textit{But see Boblitz v. Boblitz}, 296 Md. 242, 273, 275, 462 A.2d 506, 521-22 (1983) (abrogating the interspousal immunity rule in negligence cases as "a vestige of the past").
\item \textsuperscript{144} \textit{In re Blessen H.}, 392 Md. at 686, 898 A.2d at 981.
\end{itemize}
Nevertheless, the court rejected Tynetta H.'s argument that CINA proceedings require heightened due process protection because the proceedings represent the first step toward the termination of a parent's fundamental right to raise her children. Rather, the majority determined, the right to parent is not absolute and the best interests of the child may prevail over the parent's interest in custody disputes.

Next, Judge Battaglia addressed whether the agreement by counsel for Tynetta H. containing the stipulated facts represented a valid waiver of Tynetta H.'s right to an adjudicatory hearing. The majority noted that the term "waiver" is extremely vague and can be applied in a variety of circumstances. Based on the many opportunities that arise to waive important rights, the In re Blessen H. court explained, the Court of Appeals and the Supreme Court have only required "personal" waivers—in which the judge addresses a party on the record—in certain limited situations. Judge Battaglia then clarified that the personal waiver from Johnson v. Zerbst is necessary only when a fundamental right is at stake, and incarceration is a potential consequence of the proceedings. The majority reasoned that the similarities between CINA proceedings and criminal or quasi-criminal proceedings are irrelevant "because neither the Supreme Court nor [the Court of Appeals] has ever required a personal waiver of fundamental rights in proceedings that could not result in confinement."

Finally, the In re Blessen H. court found that a personal waiver is required only when the possibility of incarceration exists; the requirement does not depend upon any other characterization of the proceedings. The majority further emphasized that a CINA proceeding is civil in nature and that the State had not sought criminal sanctions against Tynetta H. Therefore, the court concluded, there was a valid waiver of a contested adjudicatory hearing when Tynetta H.'s attorney agreed to the stipulated facts.

145. Id. at 693, 898 A.2d at 985.
146. Id. at 690-91, 898 A.2d at 984.
147. Id. at 694, 898 A.2d at 986 (citing In re Mark M., 365 Md. 687, 705-06, 782 A.2d 332, 343 (2001)).
148. Id. at 698, 898 A.2d at 988.
149. Id.
150. Id. at 699, 898 A.2d at 989.
151. Id.
152. Id. at 702, 898 A.2d at 991.
153. Id. at 705, 898 A.2d at 993.
154. Id. at 706-07, 898 A.2d at 994.
155. Id. at 708, 898 A.2d at 995.
Chief Judge Bell dissented, arguing that the true issue in the case, which the majority ignored, was whether Tynetta H. withdrew her consent to the mediation agreement after it was entered on the record.\textsuperscript{156} He noted that where a judge indicates either verbally or in writing that a written order will follow, a final judgment occurs only when that written order is signed and filed.\textsuperscript{157} Because the trial judge had indicated at the September 2, 2003 hearing that a later written order would encapsulate the oral agreement, Chief Judge Bell asserted that the order did not become final until it was filed with the clerk on September 5, 2003.\textsuperscript{158} Chief Judge Bell further observed that if Tynetta H.'s statements adequately demonstrated her intent to withdraw consent, her withdrawal would have happened before the final judgment was issued.\textsuperscript{159}

The dissent concluded that Tynetta H.'s statements in court suggested that she did not fully comprehend the proceedings or the mediation agreement, and may have been expressing her wish to withdraw her consent to the stipulated facts.\textsuperscript{160} Under these circumstances, in Chief Judge Bell's view, the trial judge had an affirmative obligation to draw out the meaning of Tynetta H.'s statement.\textsuperscript{161} Therefore, Chief Judge Bell would have reversed the decision of the Court of Special Appeals and remanded for further proceedings to clarify whether Tynetta H. continued to agree with the facts in the CINA petition.\textsuperscript{162}

\section*{IV. Analysis}

In \textit{In re Blessen H.}, the Court of Appeals held that an attorney's agreement to the stipulated facts in a CINA petition served as an adequate waiver of the client's right to a contested adjudicatory hearing.\textsuperscript{163} The court appropriately rejected the argument that the waiver of such a right is proper only where the record reflects the parent's "personal" waiver of the right\textsuperscript{164} for three reasons. First, the holding...
followed precedent dictating that due process requires personal waivers only when a fundamental right is at stake and the possibility of incarceration exists.\textsuperscript{165} Second, the court’s acceptance of a more lenient waiver standard is consistent with analogous cases from other jurisdictions.\textsuperscript{166} Finally, the court’s decision that the lower standard satisfies due process properly affords the legislature an opportunity to require a higher standard as a matter of public policy.\textsuperscript{167}

A. The Court’s Decision to Allow a Lower Waiver Standard Adheres to Precedent Involving Fundamental Rights Without the Possibility of Incarceration

The \textit{In re Blessen H.} court properly followed precedent by distinguishing the due process requirements at CINA hearings from those in cases carrying the possibility of imprisonment.\textsuperscript{168} The court’s holding was also consistent with case law that permitted a lower waiver standard in proceedings that could not result in confinement.\textsuperscript{169} Finally, the \textit{In re Blessen H.} court’s decision appropriately recognized that the due process requirements in CINA proceedings should certainly not be stricter than the requirements in TPR cases.\textsuperscript{170}

1. The Court’s Rejection of the Johnson v. Zerbst Standard Is Consistent with the Due Process Distinctions Between Proceedings with Potential for Confinement and Cases Not Involving Incarceration

The Court of Appeals’s decision to accept a lower waiver standard is consistent with precedent holding that a party’s interests in a proceeding that could result in incarceration demand a higher level of protection to satisfy due process. In declining to extend the requirement for a \textit{Johnson v. Zerbst}-type personal waiver to cases waiving fundamental rights with no immediate possibility of physical confinement, the Court of Appeals carefully examined previous Supreme Court and Court of Appeals decisions and appropriately concluded that precedent would not support such an extension.\textsuperscript{171} Courts require a stricter waiver standard in criminal cases because of the fundamental

\begin{itemize}
  \item \textsuperscript{165} See infra Part IV.A.
  \item \textsuperscript{166} See infra Part IV.B.
  \item \textsuperscript{167} See infra Part IV.C.
  \item \textsuperscript{168} See infra Part IV.A.1.
  \item \textsuperscript{169} See infra Part IV.A.1.
  \item \textsuperscript{170} See infra Part IV.A.2.
  \item \textsuperscript{171} See \textit{In re Blessen H.}, 392 Md. at 698–708, 898 A.2d at 988–95 (engaging in a comprehensive review of Supreme Court and Maryland cases involving waiver and deeming the potential for incarceration as the determinative criteria for personal waivers).
\end{itemize}
concern of protecting the defendant's right to a fair trial. In re Blessen H., however, involved only the fundamental right of a parent to raise her own child and carried no possibility of incarceration because the State had not attempted to bring criminal sanctions against Tynetta H.

The In re Blessen H. court appropriately recognized that the potential loss of physical liberty deserved a greater level of due process protection than the temporary loss of custody of one's child. Courts must make a critical determination about the due process requirements in a particular case based on the liberty interests involved. The Supreme Court has recognized that the consequences for a defendant facing death or imprisonment demand courts' highest concern and attention to make sure that the defendant fully understands the meaning and effects of a waiver. While a parent's interest is constitutionally protected, it is also limited by the doctrine of parens patriae, under which the best interests of the child may take precedence over the parent's interest in raising the child. Accordingly, in In re Adoption/Guardianship No. 10941, the Court of Appeals emphasized that the biological parent's right to raise the child is not the controlling factor in adoption and custody cases; rather, the determinative inquiry is what is in the best interest of the child. Given the critical difference in the liberty interests at issue in these two types of proceedings, the Court of Appeals was justified in requiring a lower waiver standard concerning a CINA hearing where the state did not seek criminal sanctions.

The Court of Appeals's decision that due process does not require a personal waiver because there was no immediate possibility of incarceration is also consistent with analogous cases accepting a lower

172. See Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) (noting that previous cases have not demanded a Zerbst-type personal waiver in every circumstance where an individual has declined to assert constitutional rights).


174. See In re Blessen H., 392 Md. at 702, 898 A.2d at 991 (distinguishing CINA proceedings from those with the potential for physical confinement).

175. See supra Part II.B.


177. Boswell v. Boswell, 352 Md. 204, 219, 721 A.2d 662, 669 (1998); see also In re Mark M., 365 Md. 687, 705–06, 782 A.2d 332, 342–43 (2001) (emphasizing that the right to parent is not absolute); In re Justin D., 357 Md. 431, 448–49, 745 A.2d 408, 417–18 (2000) (stating that courts have greater responsibility to assure a child's safety and well-being in cases showing evidence of neglect or abuse).

waiver standard. When dealing with two cases involving a defendant's waiver of the right to counsel at a contested constructive civil contempt hearing, the Court of Appeals expressly stated that the determinative factor in deciding whether to require a heightened waiver standard is "the fact of incarceration." In Zetty v. Piatt, therefore, the court required a personal waiver because the defendant was found to be in contempt and sentenced to 179 days of incarceration. Furthermore, in declining to require a stricter waiver standard in Schenckloth v. Bustamonte, the Supreme Court recognized that courts do not require the Zerbst standard in every circumstance where an individual has not invoked a constitutional protection. Rather, the higher standard has been limited almost exclusively to constitutional rights guaranteed to criminal defendants to ensure a fair trial. Because the constitutional concerns with a fair criminal trial are not implicated in civil cases, the In re Blessen H. court was correct in holding that due process does not require a parent to personally waive her right to a contested adjudicatory hearing.

The In re Blessen H. holding also appropriately reflects the conclusion that action by counsel is sufficient to waive a client's rights in certain cases because the attorney must have full authority to manage the proceedings. To hold otherwise would not only detract from the attorney's role in the courtroom, but would also impose a burden on the courts to ensure that parties agree with counsel's tactical decisions. In In re Blessen H., Tynetta H. was present and protested only at the very end of the proceedings about the no contact order against Ms. G. and the court's failure to ask about her character and situa-


182. Zetty, 365 Md. at 155, 158, 776 A.2d at 639, 641.

183. Schenckloth, 412 U.S. at 235.

184. Id. at 237.


Tynetta H. did not raise any concerns about the facts supporting the determination that Blessen was a CINA, so it was entirely proper for the court to infer that she agreed with her attorney's representation that the facts were not contested.

2. The Court Appropriately Recognized that Due Process Requirements in CINA Proceedings Should Not Be Stricter Than Those in TPR Cases

In In re Blessen H., the Court of Appeals explored the relationship between TPR and CINA proceedings and properly concluded that a personal waiver on the record is not required at a CINA hearing because such a requirement does not exist for TPR cases. Specifically, the court reasoned that imposing a personal waiver requirement for CINA cases would be inconsistent with In re Adoption/Guardianship No. 93321055, in which the court concluded that a parental waiver of the right to contested TPR hearings by failing to file a timely notice of objection was not violative of due process. The In re Blessen H. court suitably concluded that if allowing a waiver through inaction did not violate due process in that case, a parent's rights are certainly not violated by accepting a waiver by counsel in a less threatening CINA adjudicatory hearing.

The court's decision that due process requirements in CINA proceedings should not be more stringent than those in TPR proceedings appropriately reflects the critical distinction that must be made between the two types of cases. On the surface, CINA and TPR cases are similar in that both could infringe upon a parent's right to raise her child by removing the child from the parent's custody. Although Tynetta H. argued that a CINA hearing represents "the first step towards termination of a parent's right to raise his or her children," the goals of the two proceedings differ, as do the ultimate consequences. Accordingly, the evidentiary standards of each diverge—whereas TPR proceedings require a clear and convincing stan-

188. Id.; see also Williams v. State, 292 Md. 201, 218, 438 A.2d 1301, 1309 (1981) (stating that it is the lawyer's responsibility to assert or waive most of the defendant's rights unless the defendant speaks out in court).
189. In re Blessen H., 392 Md. at 708, 898 A.2d at 994.
190. Id. at 707–08, 898 A.2d at 994; In re Adoption/Guardianship No. 93321055, 344 Md. 458, 494, 687 A.2d 681, 698 (1997).
192. See In re Blessen H., 163 Md. App. at 16–18, 877 A.2d at 169–71 (contrasting the goals and due process requirements in CINA and TPR proceedings).
193. Id. at 15, 877 A.2d at 169.
194. In re Blessen H., 392 Md. at 690, 898 A.2d at 984.
standard of proof before the parent-child relationship can be permanently terminated, CINA adjudications are only conducted under the more lenient preponderance of the evidence standard.195 This distinction bolsters the In re Blessen H. court’s conclusion that due process requirements for a valid waiver in CINA cases must accordingly be lower than the waiver requirements in TPR cases;196 any other result would simply be illogical.

The Court of Appeals’s decision to accept a lower waiver standard also reflects the importance of considering the safeguards that the legislature imposes in CINA cases before permanently removing a child from parental custody.197 Specifically, the trial court temporarily placed Blessen H. in foster care before she would be sent to live with her paternal grandmother, and included monthly visitation rights for her mother.198 Furthermore, under Maryland law, the court must hold a hearing to establish a permanency plan for a child no later than eleven months after the child is removed from her home, or “[w]ithin 30 days after the court finds that reasonable efforts to re-unify a child with the child’s parent or guardian are not required.”199 A court must then hold a review hearing every six months until the commitment or voluntary placement is terminated, or every twelve months after the child is placed with a permanent caregiver.200 Given the existence of these review processes before parental rights are terminated altogether, the process owed to Tynetta H. must be less than the process owed to a parent facing permanent termination of parental rights. Thus, the majority was justified in comparing CINA hearings to TPR proceedings and concluding that, if due process rights are not violated when a parent does not personally waive her rights in TPR proceedings, such rights are not violated in CINA cases where fewer parental rights are at stake.201

B. The Court’s Decision to Adopt a Lower Waiver Standard in Proceedings that Lack a Possibility of Incarceration Corresponds with the Views of Other Jurisdictions

The In re Blessen H. court’s decision was also in accordance with a number of other states that have reached similar conclusions about

196. In re Blessen H., 392 Md. at 708, 898 A.2d at 994.
198. In re Blessen H., 392 Md. at 689, 898 A.2d at 983.
200. Id. § 3-823(h)(1).
201. See In re Blessen H., 392 Md. at 708, 898 A.2d at 994.
waiver standards. States like California, Massachusetts, and Minnesota have declined to require a personal, *Johnson v. Zerbst*-type waiver in cases involving the right to parent, even when a parent was faced with the permanent termination of her parental rights.\(^{202}\) For example, the California Second District Court of Appeal’s decision in *In re Kerry O.* is analogous to *In re Blessen H.* in that both courts relied on the attorneys to speak for their clients—the parents—and both pointed to the differences between civil and criminal proceedings in declining to require a personal waiver on the record.\(^{203}\) The *In re Kerry O.* decision demonstrates that other jurisdictions recognize that due process requirements must be stricter in cases involving incarceration.\(^{204}\) In addition, California’s emphasis on the role of counsel also supports the *In re Blessen H.* court’s determination that Tynetta H.’s attorney’s agreement with the stipulated facts constituted a valid waiver of Tynetta H.’s right to a contested adjudicatory hearing.\(^{205}\)

Moreover, the circumstances strongly suggest that Tynetta H.’s waiver comported with due process. The *In re Blessen H.* court observed that Tynetta H.’s waiver was sufficient to waive her right to a contested adjudicatory hearing.\(^{206}\) In *In re Welfare of G.L.H.*, the Supreme Court of Minnesota held that the validity of a parent’s waiver of the right to counsel in TPR proceedings can be assessed by examining the circumstances of the case.\(^{207}\) The *In re G.L.H.* court determined that due process was satisfied when the mother’s statements indicated that she understood the nature and consequences of the TPR proceeding.\(^{208}\) Like the court in *In re G.L.H.*, the *In re Blessen H.* court reasonably concluded that the totality of the circumstances demonstrated that Tynetta H.’s waiver was sufficient to satisfy due process.\(^{209}\) The record also indicated that Tynetta H.’s attorney assented when the judge asked if all of the parties agreed “that these facts should be

\(^{202}\) See supra Part II.C.

\(^{203}\) *In re Kerry O.*, 258 Cal. Rptr. 448, 453 (Ct. App. 1989); *In re Blessen H.*, 392 Md. at 689–90, 702–05, 898 A.2d at 983, 991–92.

\(^{204}\) See *In re Kerry O.*, 258 Cal. Rptr. at 451–52 (discussing the differences between dependency and criminal proceedings).

\(^{205}\) See id. at 453 (stressing the lawyer’s ability to control litigation strategy); see also *Care & Protection of Leo*, 646 N.E.2d 1086, 1090 (Mass. App. Ct. 1995) (binding the father to the actions of his attorney when the attorney refused to call witnesses to testify).

\(^{206}\) *In re Blessen H.*, 392 Md. at 708, 898 A.2d at 995.

\(^{207}\) 614 N.W.2d 718, 723 (Minn. 2000).

\(^{208}\) Id. at 724.

\(^{209}\) See *In re Blessen H.*, 163 Md. App. 1, 21, 877 A.2d 161, 172–73 (2005) (observing that the trial court properly presumed that Tynetta H.’s silence meant that she agreed with her counsel’s statement that the stipulated facts were agreeable).
sustained and form the basis for a finding of CINA[].”210 Tynetta H. made no objection when the judge stated that Blessen would be declared a CINA based on the parties’ agreement.211 When asked if she wished to object to anything besides the no contact order against Rose G., neither Tynetta H. nor her attorney raised any concerns.212 Therefore, a comparison to cases involving similar circumstances in other jurisdictions supports the Court of Appeals’s decision in In re Blessen H. that the mother’s waiver was sufficient absent a personal colloquy on the record.

C. The Court’s Decision Is Sound Because Requiring a Stricter Waiver Standard Is a Public Policy Determination Best Made by the Legislature

The Court of Appeals properly accepted a lower waiver standard in CINA proceedings because the decision to require a personal waiver likely qualifies as a public policy issue that should be decided by the legislature. After determining that due process did not demand a Johnson v. Zerbst personal waiver, the court prudently declined to impose a stricter standard absent an indication from the legislature that it should do so. In previous decisions, including Harrison v. Montgomery County Board of Education,213 Baynor v. State,214 and Frye v. Frye,215 the Court of Appeals has demonstrated its strong preference to defer to the legislature on matters of public policy. The proper role of the court when a longstanding rule has been left unchanged by the legislature is to interpret and enforce existing law, not to dictate social policy.216

Although the court’s decision to limit application of the Johnson v. Zerbst standard may seem problematic to those concerned that parental rights are not adequately protected, such a decision was necessary absent legislative action.217 Even when courts recognize the potential benefit of a particular policy decision, to implement those

210. In re Blessen H., 392 Md. at 688, 898 A.2d at 983.
211. Id. at 689, 898 A.2d at 983.
212. In re Blessen H., 163 Md. App. at 9, 877 A.2d at 166.
215. 305 Md. 542, 567, 505 A.2d 826, 839 (1986) (emphasizing that the legislature is the proper body to address whether the parent-child immunity rule should be abrogated).
217. See Baynor, 355 Md. at 740, 736 A.2d at 332 (acknowledging the value of a rule requiring tape-recording of all statements taken of a person in custody but noting that
policy changes would be to usurp the role of the legislature.\textsuperscript{218} Therefore, in rejecting persuasive precedent upon which Tynetta H. relied, the court noted that such cases were based on statutory schemes mandating a personal waiver that are nonexistent in Maryland.\textsuperscript{219} Furthermore, the Maryland legislature has acted to define the procedures by which a CINA receives court intervention,\textsuperscript{220} and to require a contested adjudicatory hearing to determine the veracity of the allegations in the CINA petition,\textsuperscript{221} indicating that future decisions about CINA requirements should be made by the General Assembly. Unlike the judiciary, which is limited to the record in the case at bar, the legislature has much greater access to relevant information about these important public policy determinations.\textsuperscript{222} Therefore, the \textit{In re Blessen H.} court’s decision appropriately leaves room for the legislature to define the standard required to waive the right to an adjudicatory hearing if it so decides.

V. Conclusion

In \textit{In re Blessen H.}, the Court of Appeals held that the waiver of a parent’s right to a contested CINA adjudicatory hearing does not require the court to conduct a personal colloquy to establish the parent’s voluntary, knowing, and intelligent waiver.\textsuperscript{223} Rather, the court clarified that a personal waiver is only necessary when the right at stake is fundamental and the proceedings could result in incarceration.\textsuperscript{224} The court’s holding was appropriate because it was consistent with precedent recognizing that a personal waiver is unnecessary when the proceedings could not result in physical confinement.\textsuperscript{225} Furthermore, the majority’s decision to accept a lower waiver standard was consistent with other states’ waiver requirements in analogous cases.\textsuperscript{226} Finally, the \textit{In re Blessen H.} court’s holding properly declined legislation is the most appropriate means to establish rules that enhance due process rights).

\textsuperscript{218} See \textit{Fye}, 305 Md. at 567, 505 A.2d at 839 (stating that it would be improper to create an exclusion from a common law rule by judicial action because such action would be legislative without electoral accountability).
\textsuperscript{219} \textit{In re Blessen H.}, 392 Md. at 706 n.16, 898 A.2d at 993 n.16.
\textsuperscript{220} Md. CODE ANN., CTS. & JUD. PROC. § 3-801(f) (LexisNexis 2006).
\textsuperscript{221} Id. §§ 3-801(c), 3-817(a).
\textsuperscript{223} \textit{In re Blessen H.}, 392 Md. at 686, 898 A.2d at 981.
\textsuperscript{224} Id. at 699, 898 A.2d at 989.
\textsuperscript{225} See supra Part IV.A.
\textsuperscript{226} See supra Part IV.B.
to extend the stricter requirement absent legislative intervention to decide this public policy matter.\textsuperscript{227}

\textbf{ELIZABETH S. CROOK}

\textsuperscript{227} See supra Part IV.C.
**TREMBOW v. SCHONFELD: DENYING EQUAL PROTECTION TO DISABLED ADULTS BORN OUT OF WEDLOCK**

In *Trembow v. Schonfeld*, the Court of Appeals of Maryland considered whether the mother of a destitute adult child could collect child support from the alleged father. The court held that the mother’s action was barred because she had not established the alleged father’s paternity prior to the child’s eighteenth birthday. In so doing, the court interpreted section 5-1006 of the Family Law Article as creating an eighteen-year statute of limitations on all paternity actions—even those involving destitute adult children. The *Trembow* court improperly based its holding on the state’s interest in providing the defendant with repose and punishing the plaintiff for sleeping on her rights. The court failed to recognize that although this state interest supports limitation periods on certain actions, it does not support a limitation period on paternity actions. The state’s interest in providing repose conflicts with the state’s objectives in promulgating paternity laws. As advocated by Judge Raker in her dissent, the *Trembow* court should have applied the two-pronged test that the Supreme Court of the United States established in *Mills v. Habluetzel* to determine that placing an eighteen-year statute of limitations on the paternity actions of destitute adult children violates the Equal Protection Clause of the Fourteenth Amendment.

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2. Section 13-101 of the Family Law Article defines “destitute adult child” as “an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity.” Md. Code Ann., Fam. Law § 13-101(b) (LexisNexis 2006).
3. *Trembow*, 393 Md. at 329, 901 A.2d at 826.
4. Id.
5. Id. at 336–37, 901 A.2d at 830–31. In February 2007, the Maryland House of Delegates introduced House Bill 536 which, if enacted, would permit a parent to establish the paternity of a destitute adult child anytime before or after the child’s eighteenth birthday. H.B. 536, 2007 Leg., 42nd Sess. (Md. 2007).
6. See infra Part IV.A.
7. See infra Part IV.A.
8. See infra Part IV.A.
10. See infra Part IV.B–C.
I. THE CASE

In March of 1983, Victoria Trembow gave birth to a son, Ivan. Through correspondence, Alan Schonfeld purportedly acknowledged himself to be Ivan’s father, but he refused to pay child support. In 1996, when Ivan was thirteen, he was diagnosed with a genetic degenerative bone disorder. Ivan was permanently disabled by the time he reached eighteen. The disability left Ivan unable to provide financially for himself. Prior to Ivan’s eighteenth birthday, Trembow had never sought to establish Schonfeld’s paternity or to collect child support from him. In August 2003, when Ivan was twenty years old, Trembow filed a complaint in the Circuit Court for Frederick County seeking child support from Schonfeld. She argued that Schonfeld was obligated to pay child support because Maryland law required parents to financially support their destitute adult children.

Trembow brought the complaint individually and did not offer a reason why Ivan could not pursue his own action. Schonfeld moved to dismiss Trembow’s complaint, and in June 2004 the court did so.

In July 2004, Trembow filed an amended two-count complaint to both establish paternity and collect child support. Schonfeld filed another motion to dismiss, which the court granted.

11. Trembow, 393 Md. at 330, 901 A.2d at 827.
12. Id. Six months after Ivan’s birth, Trembow married a man named John O’Brien, and Ivan was raised as Ivan O’Brien. Id. After Ivan turned eighteen and the couple divorced, Ivan changed his name to Ivan Trembow. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
20. Trembow, 393 Md. at 330, 901 A.2d at 827.
21. Id. at 330–31, 901 A.2d at 827.
22. Id. at 331, 901 A.2d at 827. Schonfeld moved to dismiss on several grounds, including: Trembow lacked standing, the complaint was not filed on time and did not state a claim upon which relief was available, and Trembow was estopped from bringing the claim. Id.
23. Id. The court did not indicate upon what grounds it dismissed the complaint. Id. The court did, however, grant Trembow leave to file an amended complaint. Id.
25. Id., 901 A.2d at 828. In this motion to dismiss, Schonfeld repeated his earlier contentions concerning Trembow’s complaint. Id.
filed a motion to alter or amend the order of dismissal, which the court also denied. Trembow appealed, but before the Court of Special Appeals could begin proceedings, the Court of Appeals granted certiorari to determine whether the mother of a destitute adult child born out of wedlock is entitled to pursue a paternity action against and collect child support from the man she claims is the father after the child’s eighteenth birthday.

II. LEGAL BACKGROUND

The Supreme Court of the United States reviews classifications based on nonmarital child status with a heightened level of scrutiny. In 1984, Maryland rewrote its paternity statute so as to allow an individual to bring a paternity action for child support any time before the child’s eighteenth birthday. The provision had little effect on the child support rights of nonmarital minor children, but minors are not the only class entitled to child support under Maryland law. Maryland law requires that parents with sufficient means provide financial support for their destitute adult children. Thus, in Maryland, a destitute adult child born out of wedlock can only collect financial support from his or her father if someone initiated a paternity proceeding before the child turned eighteen. The Supreme Court, however, has developed a two-pronged test to determine whether a statute of limitations on paternity actions, such as the one imposed in Maryland, violates the Equal Protection Clause of the Fourteenth Amendment.

26. *Id.* The trial court indicated that the complaint was dismissed because the paternity action was barred by a corresponding statute of limitations. *Id.*
27. *Id.* at 331–32, 901 A.2d at 828.
28. *Id.* at 332, 901 A.2d at 828. In her motion, Trembow attached correspondence in which Schonfeld allegedly acknowledged himself to be Ivan’s father. *Id.* In denying her motion, however, the trial court struck the correspondence from the record. *Id.*
30. *Trembow*, 393 Md. at 332, 901 A.2d at 828. The court declined to adopt Trembow’s framing of the issue as “whether an adult disabled child may initiate proceedings for paternity and child support after his eighteenth birthday,” because it was Trembow, not Ivan, who initiated the paternity and child support proceedings. *Id.* According to the court, the true issue presented by the case was whether a mother may individually pursue a paternity action after her disabled child’s eighteenth birthday. *Id.*
31. See infra Part II.A.
32. See infra Part II.B.
33. See infra Part II.C.
34. See infra Part II.C.
35. See infra Parts II.B–C.
36. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); see also infra Part II.D.
A. The Supreme Court’s Intermediate Scrutiny of Classifications Based on Nonmarital Child Status

Today the Supreme Court requires that a statutory classification based on nonmarital child status be substantially related to an important government interest, but historically the Court has not always been consistent when scrutinizing such classifications. In 1968, in \textit{Levy v. Louisiana}, the Court held for the first time that children born to unwed parents were “persons” under the Fourteenth Amendment’s Equal Protection Clause. The Supreme Court held that Louisiana was prohibited under the Equal Protection Clause from denying recovery to nonmarital children for the wrongful death of their mother. The Court stated that it was “invidious to discriminate against them” because the fact that the children were born out of wedlock was completely unrelated to the mother’s wrongful death. In \textit{Levy’s} internally conflicted opinion, Justice Douglas appeared to simultaneously endorse rational basis review and heightened scrutiny. He stated, “the test . . . is whether the line drawn is a rational one,” but then cited \textit{Brown v. Board of Education} to support the proposition that the Court has been willing to disregard tradition and history when addressing invidious classifications.

In 1973, in \textit{Gomez v. Perez}, the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, a state could never deny a child the right to financial support from his natural father solely because his father was not married to his mother. Again, the Court labeled the disparate treatment of nonmarital children as “invidious discrimination.”

Just three years later, the Supreme Court wavered from the heightened scrutiny standard it had impliedly adopted in \textit{Levy} and

\begin{itemize}
\item 38. 391 U.S. 68 (1968).
\item 39. At common law, a nonmarital child was neither entitled to financial support, nor entitled to inherit, from his or her biological parents because a nonmarital child was the child of no one. \textit{See} Cooley v. Dewey, 21 Mass. (4 Pick.) 93, 94 (1827) (stating that at common law a “bastard” was \textit{filius nullius}). The courts punished innocent children for the “odious illicit commerce” between their parents, because they thought it “wise to prohibit [the children] from tracing their birth to a source which [was] deemed criminal by law and by religion.” \textit{Id.}
\item 40. \textit{Levy}, 391 U.S. at 72.
\item 41. \textit{Id.}
\item 42. 347 U.S. 483 (1954).
\item 43. \textit{Levy}, 391 U.S. at 71.
\item 44. 409 U.S. 555 (1973) (per curiam).
\item 45. \textit{Id.} at 538.
\end{itemize}
Gomez. In *Mathews v. Lucas*, the Court explicitly stated that nonmarital children were not a suspect class. The Court refused to review classifications based on legitimacy with heightened scrutiny, but it insisted that its level of scrutiny was "not a toothless one."

When the Court decided *Trimble v. Gordon* in 1977, it delivered on its promise that its scrutiny of legitimacy classifications would not be toothless. In a 5-4 decision, the Court applied heightened scrutiny and struck down an Illinois statute permitting marital children to inherit from both parents while allowing nonmarital children to inherit by intestate succession only from their mothers. The Court rejected the State's assertion that the probate statute served a legitimate state interest by promoting legitimate family relationships. The Court found that the state's desire to discourage extramarital sexual relations was not sufficiently related to the sanctions placed on nonmarital children. Although it acknowledged that the state had a legitimate interest in maintaining an accurate and efficient method of property distribution that avoided the difficulties of proving paternity, the Court nonetheless struck down the statute because its blanket prohibition was over-inclusive and thus not sufficiently related to that interest.

47. *Id.* at 506. The *Mathews* Court held that before disbursing Social Security insurance benefits, the government could require nonmarital children to provide proof of dependency on a wage earner without requiring marital children to do so. *Id.* at 516. The Court explained that the country had an interest in only providing Social Security insurance benefits to those children who were dependent on the wage earner at the time of his death. *Id.* at 507. Thus, the Court concluded that Congress was justified in placing additional requirements on nonmarital children, who unlike their marital counterparts could not be presumed, in the interest of administrative convenience, to be dependent on the wage earner at the time of his death. *Id.* at 509.
48. *Id.* at 510.
50. *Id.* at 776.
51. *Id.* at 768–69. Writing for the majority, Justice Powell noted that the Court had consistently rejected the contention that "a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." *Id.* at 769.
52. *Id.* at 769–70 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173, 175 (1972)).
53. See *id.* at 770.
54. See *id.* at 771. Although the Court has historically waivered when scrutinizing classifications based on nonmarital child status, the Court has been consistent in applying intermediate scrutiny to statutes of limitations placed on paternity actions for child support. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that the Court generally applies intermediate scrutiny to discriminatory classifications based on "sex or illegitimacy"); *Pickett v. Brown*, 462 U.S. 1, 8 (1983) (observing that the Court employs a heightened scrutiny standard to review statutory classifications based on illegitimacy); *cf. Mills v. Habluetzel*, 456
In sum, historically the Court was not consistent in its analysis of equal protection cases involving nonmarital children. In the last two decades, however, the Court has consistently applied a heightened scrutiny standard when reviewing discrimination based on nonmarital child status.

B. Maryland's Implementation of an Eighteen-Year Statute of Limitations on Paternity Actions

The eighteen-year statute of limitations on paternity actions is a recent development in Maryland family law. Originally, under Maryland's old "Bastardy and Fornication" laws, the act of fathering a child out of wedlock was a misdemeanor, the prosecution of which had a one-year statute of limitations.\(^5\) In 1912, the legislature extended the statute of limitations to two years from birth or "from the last payment by the accused for the maintenance and support of the said bastard child."\(^6\) In 1963, the legislature repealed the old "Bastardy and Fornication" laws and made paternity actions civil in nature.\(^7\) Unlike the punitive purpose of the old laws, the purpose of the new paternity law was to promote the general welfare and the best interests of nonmarital children, and to impose parental responsibilities on biological fathers.\(^8\) Although the legislature's repeal in 1963 altered the nature of the paternity law, it left the two-year statute of limitations on paternity actions intact.\(^9\)

In 1979, the Court of Appeals upheld the constitutionality of the two-year statute of limitations in Thompson v. Thompson.\(^6,5\) The Thompson court concluded that the state had a legitimate interest in preventing fraudulent or stale claims, and the legislature was reasonable in

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U.S. 91, 99–100 (1982) (stating that any limitation period placed on the paternity actions of nonmarital children to assert their right to child support must be "substantially related to the State's interest in avoiding litigation of stale or fraudulent claims"). Nowhere in Mills or in any Supreme Court case following it, does the Court recognize repose—the state's interest in relieving its citizens from the threat of untimely litigation—as an important state interest to which a statute of limitations on paternity actions can be substantially related. On the contrary, the only important state interest the Court has recognized in this line of cases is the prevention of fraudulent and stale claims. See Clark, 486 U.S. at 462, 464; Pickett, 462 U.S. at 15; Mills, 456 U.S. at 99–100.

58. Id., 1963 Md. Laws at 1499. A third purpose of the 1963 paternity law was to simplify procedures. Id.
60. 285 Md. 488, 404 A.2d at 269 (1979).
concluding that this interest outweighed "the potential harm to illegitimate children who may have their right to paternal support forfeited by their mother's inaction." The court stressed that memories fade with the passage of time and witnesses become increasingly difficult to contact. Moreover, the court in Thompson refused to take judicial notice that blood testing was an alternative means of preventing fraudulent or stale claims.

Four years later, in Frick v. Maldonado, the Court of Appeals overturned its Thompson ruling in response to the Supreme Court's decision in Pickett v. Brown. In Frick, the Court of Appeals held that Maryland's two-year statute of limitations was unconstitutional, as it was nearly identical to the unconstitutional statute of limitations in Pickett.

In 1984, Congress passed the Child Support Enforcement Amendments (CSEA). The CSEA provided financial incentives to states that, among other things, permitted a paternity action at any time before the child's eighteenth birthday. In response to both the Frick decision and the CSEA, the General Assembly redrafted the Family Law Article to repeal the statute of limitations applicable to patern-

61. Id. at 496, 404 A.2d at 273 (quoting Thompson v. Thompson, 40 Md. App. 256, 266, 390 A.2d 1139, 1145 (1978)).
62. Id. at 493, 404 A.2d at 272.
63. Id. at 496-97, 404 A.2d at 274. Five years later, in 1984, Congress passed the Child Support Enforcement Amendments after concluding that blood testing did serve to prevent the litigation of fraudulent or stale claims. See infra note 67.
64. 296 Md. 304, 462 A.2d 1206 (1983).
65. Id. at 309, 462 A.2d at 1208. In Pickett v. Brown, the Supreme Court found that a Tennessee statute placing a two-year limitations period on paternity actions restricted nonmarital children's right to child support but left marital children's identical rights unrestricted. 462 U.S. 1, 12 (1983). After finding that the state's interest in preventing the litigation of fraudulent or stale claims did not justify the disparate treatment, the Court held that the statute of limitations was unconstitutional. Id. at 18; see also infra Part II.D.
66. 296 Md. at 309, 462 A.2d at 1208. The Frick court relied on the equal protection interests of nonmarital children in rejecting the statutory restriction. Id.
67. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. §§ 666-667 (2000)). Congress passed the CSEA after recognizing that advances in genetic testing had eliminated states' reasons for placing "arbitrary" limitation periods on paternity actions. H.R. REP. No. 98-527, at 38 (1983). Technology, even in 1983, had rendered paternity testing more than 99% accurate. Id. Thus, because paternity proceedings no longer depended on the fading memory of the parties, the House Ways and Means Committee opined that the states' interest in preventing fraudulent or stale claims no longer provided a justification for short statutes of limitations on paternity proceedings. Id.
68. § 3, 98 Stat. at 1306-07.
nity actions altogether.\textsuperscript{69} For the next ten years, section 5-1006 merely stated that a paternity proceeding may be initiated during pregnancy.\textsuperscript{70} Then, in 1995, the General Assembly rewrote section 5-1006 to require that a proceeding to establish paternity be started at any point before the child turns eighteen.\textsuperscript{71} Thus, today, Maryland law may bar paternity actions for child support when the child has attained the age of eighteen.\textsuperscript{72}

C. Parents' Affirmative Duty to Support their Destitute Adult Children under Maryland Law

Section 13-102 of the Family Law Article requires parents of sufficient means to support their destitute adult children.\textsuperscript{73} Maryland did not always impose this duty on parents.\textsuperscript{74} Traditionally, parents had a duty to support only those children still in their minority.\textsuperscript{75}

In the early twentieth century, however, courts began to expand the common law and impose a legal duty upon parents to support their destitute adult children. This started a national trend.\textsuperscript{76} In \textit{Borchert v. Borchert},\textsuperscript{77} the Court of Appeals declined to follow this trend, refusing to impose upon a divorced father any duty to financially support his destitute adult son.\textsuperscript{78} The court concluded that without legislation criminalizing a parent's failure to support his destitute adult child, the court had no way of enforcing such a duty under the divorce and general equity statutes, which only imposed on parents a duty to support minor children.\textsuperscript{79}

In the 1947 term—its first term after the court issued the \textit{Borchert} decision—the Maryland General Assembly enacted a statute criminalizing a parent's failure to support his or her destitute adult child.\textsuperscript{80}


\textsuperscript{71} Act of May 9, 1995, ch. 248, 1995 Md. Laws 2071-72.

\textsuperscript{72} Md. Code Ann., Fam. Law § 5-1006.

\textsuperscript{73} Id. § 13-102(b).

\textsuperscript{74} See \textit{Borchert v. Borchert}, 185 Md. 586, 590, 45 A.2d 463, 465 (1946) (noting that the common law placed no obligation on parents to support incompetent adult children).

\textsuperscript{75} Id. at 591, 45 A.2d at 465 (stating that since 1896, a Maryland statute has criminalized "the nonsupport of minor children," but "no such similar statute" has criminalized the nonsupport of destitute adult children).

\textsuperscript{76} Id. at 592, 45 A.2d at 465.

\textsuperscript{77} 185 Md. 586, 45 A.2d 463 (1946).

\textsuperscript{78} Id. at 595, 45 A.2d at 466-67.

\textsuperscript{79} Id.

Then, in *Smith v. Smith*, the court again considered whether a non-custodial father must financially support his destitute adult son. The *Smith* court interpreted the General Assembly's quick action after *Borchert* as "a clear indication of legislative intent to place failure to support an incapacitated adult child on equal footing with failure to support a minor child." Thus the court in *Smith* held that under Article 27, section 97, the father was properly ordered to pay child support for his destitute adult son.

In *Sininger v. Sininger*, the court reaffirmed its holding in *Smith* that Article 27, section 97 placed destitute adult children "on equal footing" with minors. The *Sininger* court held that a divorced father had a legal duty to support his twenty-three-year-old mentally challenged daughter, even though his daughter did not become mentally challenged until after reaching the age of majority. The court stated that the term "child" had been statutorily enlarged to include destitute adults in addition to minors.

In 1984, the General Assembly repealed Article 27, section 97, and reenacted its provisions in two different sections of the Family Law Article: section 13-101(b), which defines a "destitute adult child," and sections 13-102(b) and (c), which set forth the parents' duty to support such a child. Today, parents' obligation to support destitute adult children is still codified in sections 13-101 and 13-102 of the Family Law Article. In sum, Maryland currently imposes a statutory duty upon parents to financially support destitute adult children.

82. Id. at 359-60, 176 A.2d at 864-65.
83. Id. at 360, 176 A.2d at 865.
84. Id.
86. Id. at 610, 479 A.2d at 1357.
87. Id. at 617-18, 479 A.2d at 1361.
88. Id. at 612-13, 479 A.2d at 1358-59. *Sininger* further established that a parent's duty to support his or her destitute adult child was enforceable, not only in a criminal proceeding, but also under the general equity jurisdiction of the circuit court through section 3-602(a) of the Courts and Judicial Proceedings Article. *Id.* at 618, 479 A.2d at 1361. Section 3-602(a) of the Courts and Judicial Proceedings Article is now codified at section 1-201(b) of the Family Law Article. *Presley v. Presley*, 65 Md. App. 265, 276 n.3, 500 A.2d 322, 327 n.3 (1985).
89. Act of May 15, 1984, ch. 256, 1984 Md. Laws 1849, 2180-81; see *Presley*, 65 Md. App. at 277 n.4, 500 A.2d at 327 n.4. In reenacting the provisions of Article 27 in sections 13-101 and 13-102 of the Family Law Article, the legislature made subtle language changes. *Id.* The General Assembly replaced "destitute of means" with "has no means of subsistence." *Id.* The Revisor's Note to 13-102 clarified that the section "is new language derived without substantive change from former Art. 27, §§ 97 and 104." *Id.*
D. The Supreme Court's Articulation and Application of the Mills Test

In Mills v. Habluetzel,91 the Supreme Court set forth a two-pronged test to determine whether a statute of limitations on paternity actions was sufficiently long so as not to violate the equal protection rights of nonmarital children.92 First, the period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf.93 Second, any limitation period must be substantially related to the state’s interest in avoiding the litigation of stale or fraudulent claims.94

The following year, the Court applied the Mills test in Pickett v. Brown95 to strike down a Tennessee statute placing a two-year limitations period on paternity suits.96 The Pickett Court first found that the two-year limitations period did not provide illegitimate children with an adequate opportunity to obtain support because the mother may face obstacles during the two years following the child’s birth.97 According to the Court, such obstacles may include fear of disapproval from the community, confusion, emotional strain, harbored affection for the child’s father, loss of income, and debt from increased expenses.98 Second, the Court found that the two-year limitations period was not substantially related to the state’s interest in preventing fraudulent or stale claims.99 The Court noted that the two-year limitations period was no more substantially related to this interest than the one-year limitation period at issue in Mills.100 Furthermore, the Court

92. Id. at 99–100. In Mills, the Court struck down a Texas statute setting a one-year limitation period on paternity suits. Id. at 101. Justice Rehnquist, writing for the Court, observed that a state must provide a nonmarital child with more than an illusory opportunity to identify his natural father and assert his right to support. Id. at 97.
93. Id. at 99. In creating this requirement, the Court acknowledged that difficult personal, family, and financial circumstances often surround the birth of a child outside of wedlock and encumber a mother’s filing of a paternity suit. Id. at 100.
94. Id. at 99–100; see supra note 54 (observing that under Mills, preventing the litigation of fraudulent or stale claims is the only important state interest to which a statute of limitations on paternity actions can be substantially related). In her Mills concurrence, Justice O’Connor noted that even this important state interest can be undermined by the state’s countervailing interest in ensuring that valid claims for child support are honored and by advances in DNA testing that limit the possibility of false accusations. Mills, 456 U.S. at 103–04 & n.2 (O’Connor, J., concurring).
96. Id. at 18.
97. Id. at 12–13.
98. Id. (citing Mills, 456 U.S. at 100).
99. Id. at 13.
100. Id. at 13–14.
reasoned, the Tennessee statute created exceptions for nonmarital children who were, or were likely to become, wards of the state.\textsuperscript{101} The \textit{Pickett} Court found that this exception undermined any relationship that the two-year limitation period purportedly bore to the discouragement of fraudulent or stale claims.\textsuperscript{102}

In 1988, Justice O’Connor, writing for a unanimous court in \textit{Clark v. Jeter},\textsuperscript{103} applied the \textit{Mills} test to determine that Pennsylvania’s six-year statute of limitations on paternity actions violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{104} Justice O’Connor suggested that the six-year limitations period did not satisfy the first prong of the \textit{Mills} test, because even six years does not necessarily provide those with an interest in the nonmarital child an adequate opportunity to assert a claim on the child’s behalf.\textsuperscript{105} The Court, however, rested its decision on its conclusion that the six-year statute of limitations did not satisfy the second prong of \textit{Mills}.\textsuperscript{106} Just as in \textit{Pickett}, the Court found that statutory exceptions to the limitations period cast doubt on the statute’s relationship to the state’s interest in avoiding the litigation of stale or fraudulent claims.\textsuperscript{107} Because the \textit{Clark} Court found that the limitations period did not satisfy the second prong of the \textit{Mills} test, the statute of limitations did not survive the Court’s intermediate scrutiny.\textsuperscript{108}

In sum, the Court developed its two-pronged approach in \textit{Mills} to address the constitutionality of statutes of limitations on paternity actions, specifically as they relate to nonmarital children.\textsuperscript{109}

\begin{flushright}
\textit{Mills}, 456 U.S. at 99–100.
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the Mills test, the limitations period must be (1) long enough to pro-
vide anyone with an interest in the nonmarital child to bring an action
on his or her behalf; and (2) substantially related to the state's interest
in avoiding the litigation of stale or fraudulent claims. Under Mills
and its progeny, the Court has struck down as unconstitutional any
statute of limitations impacting nonmarital children.

III. THE COURT'S REASONING

In Trembow, the Court of Appeals affirmed the judgment of the
Circuit Court for Frederick County and held that a mother is not enti-
tled to pursue a paternity action against the man purported to be the
father of her destitute adult child if she has not established the pater-
nity of that man prior to the child's eighteenth birthday. Writing
for the majority, Judge Wilner interpreted section 5-1006 of the Fam-
ily Law Article as creating an affirmative eighteen-year statute of limi-
tations on all paternity actions. The court found no ambiguity in the
statute, which states that "[a] proceeding to establish paternity of
a child under this subtitle may be begun at any time before the child's
eighteenth birthday." Despite finding no ambiguity in the statutory
language, the court nevertheless offered several justifications for its
view that section 5-1006 of the Family Law Article affirmatively set a
limitations period of eighteen years rather than merely eliminating
any previous or default statutory limitation period.

First, the court asserted that the history of the statute, coupled
with the General Assembly's comment in the title to the bill that the
new language was to "clarify" the limitations period on paternity ac-
tions, evidenced the General Assembly's intent that the statute affirm-
atively create a limitations period. Second, the court found that an
affirmative eighteen-year statute of limitations was consistent with fed-
eral requirements, as well as statutes of limitations on paternity ac-
tions in other states. Third, the court found that the language in

110. Id.
111. 393 Md. at 329, 901 A.2d at 826.
112. Id. at 336, 901 A.2d at 830 (alteration in original) (citing Md. Code Ann., Fam. Law
§ 5-1006(a) (LexisNexis 2006)).
113. Id.
114. Id. at 337, 901 A.2d at 831.
115. Id. at 337-43, 901 A.2d at 831-34.
116. Id. at 341, 343, 901 A.2d at 833, 835; see also supra notes 67-68 and accompanying
text.
117. Trembow, 393 Md. at 343-44, 901 A.2d at 835. The court observed that fourteen
states require that parents wishing to file paternity actions do so before the child's eight-
eenth birthday: Arizona, Colorado, Connecticut, Idaho, Kentucky, Maine, Michigan, Ne-
braska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Dakota, and
section 5-1032(b)(2) of the Family Law Article established that the legislature was aware in passing section 5-1006 that destitute adult children also had rights under the paternity provisions of the Article.\textsuperscript{118} Thus, the \textit{Trembow} court concluded that the General Assembly knew the "eighteenth birthday" language in section 5-1006 established an affirmative statute of limitations on the paternity actions of destitute adult children and did not merely eliminate any statute of limitations on the paternity actions of minors.\textsuperscript{119} The majority concluded that the affirmative eighteen-year statute of limitations was enforceable because it discouraged plaintiffs from sleeping on their rights.\textsuperscript{120}

In her dissent, Judge Raker argued that section 5-1006 should not bar a mother from receiving financial support for her destitute adult child because the limitations period on paternity actions violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{121} Judge Raker relied on the Supreme Court's inclination—as evidenced by \textit{Mills}, \textit{Pickett}, and \textit{Clark}—to invalidate statutory limitations periods on paternity actions as violative of the Fourteenth Amendment.\textsuperscript{122} According to Judge Raker, the Court generally has allowed statutory limitation periods where the state has a legitimate interest in preventing stale or fraudulent paternity and support claims.\textsuperscript{123} Judge Raker observed, however, that the \textit{Clark} Court found that the accuracy of scientific methods for proving paternity significantly reduced a state's valid interest in preventing stale or fraudulent paternity and support claims.\textsuperscript{124} Although Judge Raker based her reasoning primarily on equal protection principles, she also suggested that the majority may

\textsuperscript{118} \textit{Id.} at 344, 901 A.2d at 835. Section 5-1032(b)(2) provides: "If the child is an adult but is destitute and cannot be self-supporting because of a physical or mental infirmity, the court may require the father to continue to pay support during the period of the infirmity." Md. CODE ANN., FAM. LAW § 5-1032(b)(2). According to the \textit{Trembow} court, this provision evidenced the legislature's awareness that destitute adult children, and not merely minors, had rights under the paternity law. \textit{Trembow}, 393 Md. at 344, 901 A.2d at 835.

\textsuperscript{119} \textit{Trembow}, 393 Md. at 342-44, 901 A.2d at 834-35.

\textsuperscript{120} See \textit{id.} at 344-45, 901 A.2d at 835-36 (remarking that \textit{Trembow} should not be rewarded "for sleeping on her rights for more than eighteen years").

\textsuperscript{121} \textit{Id.} at 347, 901 A.2d at 837 (Raker, J., dissenting).

\textsuperscript{122} \textit{Id.} at 351-56, 901 A.2d at 840-43.

\textsuperscript{123} \textit{Id.} at 352, 901 A.2d at 840.

\textsuperscript{124} \textit{Id.} at 356, 901 A.2d at 843.
have misinterpreted the legislative intent behind and the application of section 5-1006 of the Family Law Article.125

IV. Analysis

In Trembow, the Court of Appeals held that the mother of a destitute adult child could not collect child support from the alleged father if she had not established his paternity prior to the child’s eighteenth birthday.126 In so holding, the court interpreted section 5-1006 of the Family Law Article as creating an eighteen-year statute of limitations on all paternity actions—even those involving destitute adult children.127 The Court of Appeals improperly premised its holding on the state’s interest in providing defendants with repose and punishing plaintiffs for sleeping on their rights.128 In so doing, the Trembow court ignored Supreme Court precedent,129 as well as the underlying purpose of paternity statutes.130 The court should have applied the Mills test, as advocated by Judge Raker’s dissent.131 Because Maryland’s eighteen-year statute of limitations on paternity actions fails to satisfy either prong of the Mills test, the Trembow court should have held that the statute unconstitutionally violated the equal protection rights of nonmarital destitute adult children.132

125. Id. at 347–48 n.4, 901 A.2d at 837–38 n.4. Judge Raker contended that, contrary to the majority’s view, the statutory language change in 5-1006 could have meant that the Maryland General Assembly did not intend to place a limitations period on paternity actions. Id. at 348 n.4, 901 A.2d at 838 n.4. Thus, in her view, the effect of the legislature’s 1985 decision to repeal the two-year limitations period on paternity actions was unclear. See id. (referencing letters sent to legislative judiciary committees arguing both that a three-year statute of limitations would apply and that no limitations period existed at all).

126. Id. at 329, 901 A.2d at 826 (majority opinion). Maryland law offers four ways of establishing paternity. The purported father must either: (1) be judicially determined to be the father; (2) acknowledge in writing that he is the father; (3) openly and notoriously recognize the child as his offspring; or (4) subsequently marry the mother and acknowledge, either orally or in writing, that he is the father. Md. Code Ann., Est. & Trusts § 1-208(b)(2) (LexisNexis 2001). Because one way to establish paternity is to acknowledge it in writing, Schonfeld may have legally established his paternity in his correspondence with Ivan. See supra note 27 and accompanying text. Had the exhibits remained on the record, the court might have determined that Schonfeld acknowledged himself to be Ivan’s father in the letters and that the letters constituted a writing. Moreover, if the court had determined that Schonfeld sent the correspondence before Ivan’s eighteenth birthday, it may have concluded that Trembow was entitled to support from Schonfeld.

127. Trembow, 393 Md. at 337, 901 A.2d at 831.

128. See infra Part IV.A.

129. See infra Part IV.A.1.

130. See infra Part IC.A.2.

131. See infra Part IV.B.

132. See infra Part IV.C.
A. The Trembow Court Erroneously Based its Holding on a Desire to Provide Defendants with Repose and to Penalize Plaintiffs for Sleeping on their Rights

The Trembow court should have recognized that the state’s interest in providing a defendant with repose and punishing a plaintiff for sleeping on her rights conflicted with Supreme Court precedent, countervailing state interests, and the state’s purpose in passing the paternity law.\textsuperscript{133}

1. The Trembow Court Ignored Supreme Court Precedent

Although the policy of providing repose and punishing those who sleep on their rights justifies statutes of limitations on many types of actions,\textsuperscript{134} under Supreme Court jurisprudence, it does not justify statutes of limitations on paternity actions.\textsuperscript{135} To the extent possible, statutes of limitations should be imposed so as not to infringe on a plaintiff’s constitutionally protected interests.\textsuperscript{136} Because the Court analyzes classifications based on nonmarital status with heightened scrutiny, a statute of limitations on paternity actions must be substantially related to an important government objective.\textsuperscript{137} The Supreme Court has recognized that preventing the litigation of fraudulent or stale claims is an important government objective to which a statute of limitations on paternity actions could be substantially related.\textsuperscript{138} However, the Court has never recognized the government’s interest in providing repose as substantially related to a statute of limitations on

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\textsuperscript{133} Cf. Carlotta P. Wells, Comment, Statutes of Limitations in Paternity Proceedings: Barring an “Illegitimate’s” Right to Support, 32 Am. U. L. Rev. 567, 573 (1983) (observing that limitations periods in paternity statutes result in conflicts between the state’s desire to prevent stale claims and its belief that illegitimate children should be financially supported by their parents).

\textsuperscript{134} See Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944) (“Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

\textsuperscript{135} See Trembow, 393 Md. at 358, 901 A.2d at 844 (Raker, J., dissenting) (noting that the Supreme Court has not found relevant a defendant’s right to repose when weighing the equal protection problems with limitations period on paternity actions); see also supra note 54.

\textsuperscript{136} Wells, supra note 133, at 574–75.


\textsuperscript{138} Mills v. Habluetzel, 456 U.S. 91, 99–100 (1982). The Court has also recognized that the state’s interest in the efficient distribution of property can justify inheritance laws that discriminate on the basis of nonmarital child status. See supra text accompanying note 53.
The Trembow majority’s elevation of repose over the equal protection problems with limitations periods on paternity actions inappropriately infringed on the right of illegitimate children to financial support from their real fathers.

Furthermore, the Trembow court ignored the Court’s guidance when it failed to consider the state’s interest in ensuring that valid claims for child support are honored. Justice O’Connor, writing for a unanimous court in Clark, acknowledged that the state interest supporting short statutes of limitations on paternity actions is undermined by the state interest in honoring valid claims for child support. Six years prior to authoring the Clark opinion, Justice O’Connor noted this countervailing state interest in her Mills concurrence. In Mills, Justice O’Connor explained that this state interest is grounded in notions of justice and in reducing the number of individuals receiving state assistance. Thus, the Supreme Court has recognized the state interest in honoring valid claims for child support as additional support for invalidating abbreviated statutes of limitations on paternity actions. Conversely, the Supreme Court has never recognized repose as a reason to uphold a statute of limitations on paternity actions.

By basing its holding on a desire to provide repose, the Trembow court disregarded the Supreme Court’s heightened scrutiny standard of review for statutes of limitations on paternity actions. The Trembow court similarly ignored Supreme Court precedent by failing to consider the countervailing government interests recognized by the Supreme Court. In its eagerness to punish Trembow for sleeping on her rights, the Trembow court failed to consider the state’s interest in honoring valid claims for child support.

139. See supra note 135 and accompanying text. The Court has also refused to recognize that statutory classifications based on nonmarital child status can be substantially related to the state’s interest in promoting marriage or in discouraging extramarital sexual relations. See supra text accompanying notes 51–52.


141. Clark, 486 U.S. at 462.

142. Mills, 456 U.S. at 103–04 (O’Connor, J., concurring); see also supra note 94 and accompanying text.

143. Mills, 456 U.S. at 103–04 (O’Connor, J., concurring). Justice O’Connor observed that imposing limitations periods on paternity actions places an additional burden on the state welfare system, as unwed mothers have difficulty obtaining child support. Id.

144. Clark, 486 U.S. at 462.

145. See supra note 135 and accompanying text.
2. The Trembow Court Overlooked the Legislative Intent Behind Paternity Laws

The Trembow court failed to observe the inherent conflict between the legislature’s objective in passing the paternity law and the state interest in providing a defendant with repose. Legislatures generally design paternity laws to determine the putative father’s obligation, rather than to discipline him.\textsuperscript{146} Such was the case in Maryland. In drafting the Family Law Article in 1984, the General Assembly acknowledged that the purpose of the paternity statute was to promote the general welfare and the best interests of nonmarital children by providing them with “the same rights to support, care, and education” as marital children.\textsuperscript{147} The General Assembly also acknowledged that the paternity law was supposed to impose on mothers and fathers of nonmarital children “the basic obligations and responsibilities of parenthood.”\textsuperscript{148}

By justifying the eighteen-year statute of limitations as a means of providing repose and punishing the mother of a nonmarital destitute adult for sleeping on her rights, the Trembow court overlooked the underlying purposes of the Maryland paternity law. A defendant has no vested right in repose,\textsuperscript{149} whereas a child born out of wedlock has a constitutional right to the same access to parental support as a child.

\textsuperscript{146} See Wells, supra note 133, at 572 (explaining the civil nature of modern paternity statutes). After 1965, Maryland’s paternity law was no longer criminal and no longer punitive in purpose. See supra notes 57–58 and accompanying text. The General Assembly intended for the new civil paternity law to promote the general welfare and the best interests of nonmarital children, as well as to impose parental responsibilities on fathers. See supra note 58 and accompanying text.

Two different societal changes most likely inspired the change in legislative philosophy. The growing number of nonmarital children may have been one factor. The nonmarital child population increased dramatically throughout the latter half of the century. In 1960, only one out of twenty births (5%) was to an unmarried woman. \textsc{Stephanie Coontz}, \textit{Marriage, A History} 264 (2005). By 1980, the rate had risen to just under 20%, and by 2004 it had grown to 35.7%. Brady G. Hamilton et al., \textit{Preliminary Births for 2004}, National Center for Health Statistics, http://www.cdc.gov/nchs/products/pubs/pubd/hestats/prim_births/prim_births04.htm#Figure%202 (last visited Mar. 3, 2007). The increasing scope of constitutional challenges available under the Equal Protection Clause may also have influenced the legislative reform. Before \textit{Brown v. Board of Education} in 1954, the Supreme Court rarely found any state action violative of the Equal Protection Clause. \textsc{Erwin Chemerinsky}, \textit{Constitutional Law} 617 (2d ed. 2005). After \textit{Brown}, the Court began to rely heavily on the Equal Protection Clause to safeguard fundamental rights. \textit{Id.}

\textsuperscript{147} \textsc{Md. Code Ann., Fam. Law} § 5-1002(b)(1) (LexisNexis 1984).

\textsuperscript{148} \textit{Id.} § 5-1002(b)(2).

\textsuperscript{149} Wells, supra note 133, at 574. In fact, because the purpose of Maryland’s paternity statute is to impose parental responsibility on the biological fathers of nonmarital children rather than to punish them, the state’s interest in providing repose is less than it would be if the statute’s purpose was punitive in nature.
The Trembow court should not have prioritized Schonfeld's interest in repose over Ivan Trembow's right to the same access to financial support as his marital counterparts.

The Trembow court erred in justifying its holding on a desire to provide Schonfeld with repose and to punish Trembow for sleeping on her rights. In so doing, it ignored both Supreme Court precedent and the state's objectives in passing the paternity law.

B. The Trembow Court Failed to Apply the Mills Test

The Court of Appeals erred in not applying the two-pronged Mills test in Trembow to determine whether Maryland's eighteen-year statute of limitations on paternity actions violated the equal protection rights of nonmarital destitute adult children. In failing to analyze the equal protection issues presented in Trembow, the court ignored decades of Supreme Court precedent. Since Levy v. Louisiana in 1968, the Supreme Court has regarded nonmarital children as "persons" under the Equal Protection Clause of the Fourteenth Amendment and has analyzed discrimination based on nonmarital child status as an equal protection issue. Furthermore, in the nearly twenty-five years of case law following Mills, the Supreme Court has consistently applied the two-pronged Mills test when faced with a time-barred paternity suit involving a nonmarital child. The Court of Appeals should have applied the Mills test in Trembow to determine the constitutionality of Maryland's eighteen-year statute of limitations on paternity actions. The court should have done so regardless of the fact that the nonmarital "child" at issue was actually a nonmarital destitute adult, and regardless of the fact that the suit was not initiated by the nonmarital destitute adult himself.

150. See Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam) (holding that under the Equal Protection Clause of the Fourteenth Amendment, a state may not deny illegitimate children any substantial benefit accorded children generally).

151. Trembow, 393 Md. at 346–49, 901 A.2d at 837–38 (Raker, J., dissenting).

152. See Levy v. Louisiana, 391 U.S. 68, 70 (1968); see also Trimble v. Gordon, 430 U.S. 762, 776 (1977) (striking down a state statute allowing only marital children to inherit from both natural parents on Equal Protection grounds); Mathews v. Lucas, 427 U.S. 495, 510 (1976) (imposing a level of scrutiny that is not "toothless" when evaluating the equal protection claims of nonmarital children); Gomez, 409 U.S. at 538 (stating that it is invidious discrimination to deny a nonmarital child the right to financial support from his father); supra note 39 and accompanying text.


154. See infra Part IV.B.1.

155. See infra Part IV.B.2.
1. The Mills Test Was Applicable Because the Trembow Court Should Have Treated the Nonmarital Destitute Adult as a Nonmarital Child for the Purpose of Constitutional Review

The Trembow court should have analyzed the constitutionality of Maryland’s statute of limitations under the Mills framework despite the fact that the nonmarital individual in Trembow had attained the age of majority. Maryland cases support the proposition that a nonmarital destitute adult is a nonmarital child under the law.156 As the Smith court observed, the General Assembly, in criminalizing a parent’s failure to financially support his or her destitute adult child, intended to put the parents’ duty to support destitute adults “on equal footing” with the parents’ duty to support minor children.157 The Sininger court took its analysis one step further, concluding that Maryland law not only placed the duty to support destitute adults on equal footing with the duty to support minor children, but placed the destitute adults themselves on equal footing with minor children.158 The Sininger court concluded that the legislature statutorily enlarged the definition of “child” to include destitute adults.159 Thus, in following precedent, the Trembow court should have analyzed a limitations period affecting nonmarital, destitute adult children under the same equal protection principles it would apply to any classification based on nonmarital child status.

2. That the Paternity Suit Was Not Initiated by the Nonmarital Destitute Adult Child Did Not Preclude the Court from Analyzing the Equal Protection Issue Under Mills

Although the Trembow court stressed that Ivan Trembow, the disabled adult, did not initiate the proceeding himself,160 this fact has little bearing on the constitutional analysis. In many paternity actions

156. See Sininger v. Sininger, 300 Md. 604, 608, 479 A.2d 1354, 1356 (1983) (holding that the legislature statutorily enlarged the definition of “child” to include incapacitated adults); Smith v. Smith, 227 Md. 355, 360, 176 A.2d 862, 865 (1962) (observing that the legislature placed the parental duty to support destitute adults “on equal footing” with the parental duty to support minor children); Presley v. Presley, 65 Md. App. 265, 276, 500 A.2d 322, 327 (1985) (observing that under Sininger, a divorced father may have to support his destitute, incapacitated adult child even though she is over eighteen years of age and emancipated).

157. Smith, 227 Md. at 360, 176 A.2d at 865. The Smith court emphasized the fact that the General Assembly criminalized a parent’s failure to support a destitute adult child so soon after the Borchert decision. See supra notes 81–83 and accompanying text.

158. Sininger, 300 Md. at 608, 611, 479 A.2d at 1356, 1358.

159. Id. at 612–13, 479 A.2d at 1358–59.

160. Trembow, 393 Md. at 330–31, 901 A.2d at 827.
for child support involving challenges to the constitutionality of the statute of limitations, the child has neither initiated nor is a party to the proceeding.\textsuperscript{161} Because Maryland law considers destitute adults to be children under the law,\textsuperscript{162} it follows that anyone with an interest in the destitute adult may initiate a proceeding for child support. Thus, the fact that Ivan Trembow did not himself initiate the paternity action for child support does not preclude the court from employing the \textit{Mills} test to analyze the constitutionality of the statute of limitations that barred the action.

C. Had the Trembow Court Properly Applied the Mills Test, it Would Have Concluded that Maryland’s Eighteen-Year Statute of Limitations on Paternity Actions Violated the Equal Protection Clause with Respect to Nonmarital Destitute Adult Children

Although the Trembow court briefly mentioned \textit{Mills} and its progeny in its analysis,\textsuperscript{163} the court cabined its equal protection analysis to little more than a paragraph in a footnote.\textsuperscript{164} The Trembow court should have concluded that Maryland’s eighteen-year statute of limitations does not satisfy either prong of the Mills test, and thus, is unconstitutional.

1. The Court Should Have Concluded that Eighteen Years Does Not Provide Interested Individuals with a Reasonable Opportunity to Assert a Claim on a Nonmarital Child’s Behalf

After establishing that nonmarital destitute adults are nonmarital children for purposes of constitutional review,\textsuperscript{165} the court should have concluded that Maryland’s eighteen-year limitations period on paternity actions does not satisfy the first prong of the \textit{Mills} test. Under \textit{Mills}, the court’s first inquiry should have been whether the limitations period was long enough to permit anyone with an interest in the nonmarital destitute adult child to assert his right to support.\textsuperscript{166} Tragically, external and often uncontrollable factors can leave a

\textsuperscript{161} See, e.g., Frick v. Maldonado, 296 Md. 304, 305, 462 A.2d 1206, 1206 (1983) (permitting Edna Frick, the mother of a nonmarital child, to initiate a paternity proceeding for child support).

\textsuperscript{162} See supra Part IV.B.1.

\textsuperscript{163} \textit{Trembow}, 393 Md. at 339–40, 901 A.2d at 832–33.

\textsuperscript{164} \textit{Id.} at 345–46 n.9, 901 A.2d at 836 n.9.

\textsuperscript{165} See supra Part IV.A.2.

healthy child destitute shortly before reaching the age of eighteen. 167 In these circumstances, a mother who thought herself capable of providing for her child until he reached the age of eighteen 168 may be left with a short window of time in which to assert her adult child’s right to long-term support from his natural father. A mother is likely to be in shock or grieving, and initiating a paternity proceeding might be the last thing on her mind. Therefore, eighteen years may not in fact provide those with an interest in the nonmarital destitute adult a reasonable opportunity to assert a claim on his behalf.

Additionally, the statute of limitations might cut off a mother’s opportunity to assert her child’s right to lifelong support from his natural father. According to the Sininger court, section 13-1002 of the Family Law Article requires parents to support their destitute adult children, even if the adult child does not become destitute until after reaching the age of majority. 169 Thus, Maryland law requires parents to support their destitute adult child for an indefinite period, even if they could not anticipate the need for any future support beyond the child’s eighteenth birthday. 170

In sum, one could imagine cases where the limitations period on paternity actions would force a mother—able to financially support her child until he reaches the age of eighteen—to instead provide financial support for the child for life. Therefore, an eighteen-year limitations period does not necessarily provide a mother with an adequate amount of time to assert the child’s possible future right to lifelong support from his natural father.


168. For many different reasons, unwed mothers of healthy children often decline to initiate a paternity suit and fail to assert the child’s right to financial support from his father. See supra note 93 and accompanying text.


170. See id.
2. **The Trembow Court Should Have Concluded that Maryland’s Legitimate Interest in Preventing the Litigation of Fraudulent and Stale Claims Is Not Substantially Related to the Eighteen-Year Statute of Limitations on Paternity Actions**

Under the *Mills* test, the *Trembow* court’s second inquiry should have been whether the statute of limitations on paternity actions was substantially related to the state’s interest in preventing fraudulent or stale claims.  

The court should have concluded that any interest the state may have in preventing the litigation of fraudulent and stale claims is not rationally related to the eighteen-year limitations period because DNA testing can determine paternity with near perfect accuracy. As Justice O’Connor observed in her *Mills* concurrence, the state’s interest in preventing the litigation of fraudulent and stale claims is substantially diminished by improvements in scientific testing techniques that reduce the possibility of false paternity accusations.

In *Mills*, the Supreme Court concluded that although blood tests could disprove paternity, the same tests could not affirmatively establish paternity. DNA testing has come a long way since 1982, and blood tests can now affirmatively establish paternity with 99.999999% accuracy. Thus, had the *Trembow* court properly applied the *Mills* test, it would have concluded that the eighteen-year statute of limitations is not substantially related to Maryland’s interest in preventing fraudulent or stale claims because modern DNA testing can affirmatively establish paternity even after periods much longer than eighteen years.

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172. Some subscribe to the theory that there are no stale claims in paternity actions for child support. See, e.g., *Wells*, *supra* note 133, at 606. According to this viewpoint, a child’s right to support is continuing. *Id.* Because a nonmarital child’s right to support is tied to a paternity determination, the claim can never become stale. *Id.*
173. *See Trembow*, 393 Md. at 256–57, 901 A.2d at 853 (Raker, J., dissenting) (citing E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 29 (1993) (observing that DNA testing techniques can likely determine paternity with 99.999999% accuracy)).
175. *Id.* at 98 n.4 (majority opinion). In 1979, the *Thompson* court refused to find that blood testing techniques for paternity were sufficiently reliable as to override Maryland’s two-year statute of limitations on paternity actions. *Thompson v. Thompson*, 285 Md. 488, 497, 404 A.2d 269, 274 (1979). When it passed the CSEA in 1984, Congress tried to persuade the states that arbitrary statutes of limitations on paternity actions were no longer appropriate since DNA testing effectively discouraged the litigation of fraudulent and stale claims. *See supra* note 67 and accompanying text.
V. CONCLUSION

In Trembow, the Court of Appeals considered whether the mother of a destitute adult child could initiate a paternity proceeding to collect child support from the alleged father. Because the child was over the age of eighteen, the court held that the mother’s action was barred. In so holding, the court interpreted section 5-1006 of the Family Law Article as creating an eighteen-year statute of limitations on paternity actions involving destitute adult children. The Trembow court improperly based its holding on a desire to provide the defendant with repose. The court failed to recognize that neither Supreme Court precedent nor the legislature’s purpose in passing the paternity law supported barring a paternity action in the interest of providing repose. The Court of Appeals should have applied the Supreme Court’s two-pronged Mills test to determine that Maryland’s eighteen-year statute of limitations on paternity actions, as it related to destitute adult children, violated the Equal Protection Clause of the Fourteenth Amendment.

Kelly T. Moore

177. 393 Md. at 329, 901 A.2d at 826.
178. Id.
179. Id. at 337, 901 A.2d at 831.
180. See supra Part IV.A.
181. See supra Part IV.A.1–2.
182. See supra Part IV.B–C.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. DEHAAN: NARROWING THE CAUSATION REQUIREMENT FOR UNINSURED MOTORIST BENEFITS

In State Farm Mutual Automobile Insurance Co. v. DeHaan, the Court of Appeals of Maryland considered whether injuries from a gunshot inflicted during a vehicle theft, where the assailant was in the driver's seat of the victim's automobile with the ignition off, arose out of the "use" of the automobile as contemplated by the uninsured motorist provision of the victim's insurance policy. The court held that the word "use" demanded that the injury result from the "normal use" of an uninsured motor vehicle, and that under this standard, the incident did not "arise out of the . . . use" of the vehicle as stipulated by the language of the uninsured motorist statute and the victim's insurance policy. The DeHaan court's decision was problematic in two respects. First, the court's interpretation of the statute over-emphasized the importance of the owned-but-uninsured exclusion clause in assessing the extent of coverage intended by the legislature. Second, although the court portrayed its decision as consistent with precedent, the narrower standard of causation applied by the court represented a departure from the court's consistently broad interpretation of "arising out of" clauses. Consequently, the DeHaan court's decision to deny coverage leaves lower courts without a clear standard and contravenes the purpose of the statute by limiting compensation to innocent victims of uninsured motorists. Extending coverage would have logically fit with precedent and posed little danger of undermining legislative intent by allowing recovery in all cases of criminal activity associated with a vehicle.

I. THE CASE

On January 28, 2001, at approximately 11:15 p.m., Richard DeHaan pulled his 1989 Chevrolet Blazer, insured by State Farm Mutual

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1. (DeHaan II), 393 Md. 163, 900 A.2d 208 (2006).
2. Id. at 166–67, 900 A.2d at 210.
3. Id. at 195, 900 A.2d at 226–27 (citing Md. Code Ann., Ins. § 19-509 (LexisNexis 2006)).
4. See infra Part IV.A.
5. See infra Part IV.B.
6. See infra Part IV.B.
7. See infra Part IV.C.
Insurance Company (State Farm), into a Shell gas station in Baltimore County. After shutting off the vehicle, DeHaan left the keys on the floorboard and entered the gas station’s convenience store. Upon leaving the store, DeHaan observed an individual sitting in the driver’s seat of his vehicle, prompting him to open the driver’s side door and ask, “What are you doing?” The intruder responded by shooting DeHaan in the abdomen, starting the Blazer, and driving off. DeHaan suffered serious injuries, which caused him to miss six months of work and incur approximately $70,000 in medical expenses. DeHaan’s State Farm policy included $10,000 in personal injury protection benefits (PIP) and $100,000 in uninsured motorist benefits, and he submitted claims under both portions of the policy. After State Farm denied the claims, DeHaan filed a complaint against it in the Circuit Court for Howard County.

The trial court determined that DeHaan was entitled to benefits under both portions of the policy and granted his motion for summary judgment. Regarding the uninsured motorist claim, the trial court held that the injury arose from the “use” of the uninsured vehicle as required by section 19-509 of the Insurance Article because DeHaan would not have been injured but for the attacker’s unauthorized use of the vehicle.

Following the verdict, State Farm paid DeHaan the PIP benefits owed under the policy, but contested the trial court’s ruling that DeHaan was additionally entitled to uninsured motorist benefits. The Court of Special Appeals agreed with the substance of the circuit court’s ruling, but vacated and remanded because of a procedural defect by the trial court in the entry of the judgment. In distinguishing its previous cases denying coverage where attackers had shot at their victims from outside the vehicle, the Court of Special Appeals ob-

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9. Id.
10. Id.
13. Id. at 167–68, 900 A.2d at 210–11.
14. Id. at 168, 900 A.2d at 211.
15. Id.
17. DeHaan III, 393 Md. at 168, 900 A.2d at 211.
18. Id. at 168–69 n.3, 900 A.2d 211 n.3. Specifically, the trial court failed to follow Maryland Rule 2-601 requiring that the judgment and opinion be set forth on separate documents. Id.
served that the assailant was inside the car and had taken control of the vehicle when the shooting occurred. Consequently, the court reasoned that there was a direct causal connection between the use of the vehicle and the injury, as opposed to the incidental connection seen in prior assault cases.

State Farm petitioned the Court of Appeals, which granted certiorari to decide whether the lower courts erred in concluding that DeHaan's gunshot injuries arose from the "use" of an automobile under the uninsured motorist statute, and consequently, whether these injuries alone entitled him to uninsured motorist benefits under the terms of his State Farm automobile insurance policy.

II. LEGAL BACKGROUND

Maryland courts have looked to the legislative history and purpose of the uninsured motorist statute and judicial interpretations of its statutory language in determining the extent of insurance coverage. While the statute has undergone several significant amendments, the essential mandate—that insurers provide coverage for insured victims suffering injuries "arising out of the . . . use" of an uninsured motor vehicle—has remained unchanged since its enactment. Maryland courts have consistently recognized the broad scope of the provision's language and the statute's remedial purpose.

A. The Uninsured Motorist Statute Developed as a Remedial Scheme to Protect Maryland Drivers from Economic Harm Caused by Uninsured Motorists

The uninsured motorist statute was enacted by the Maryland legislature in 1972 as part of a comprehensive revision of motor vehicle insurance law that required automobile insurance policies issued within Maryland to contain specific types of coverages. The legisla-

20. Id. at 21–23.
22. See infra Part II.A–B.
23. See infra Part II.A.
24. See infra Part II.B.
26. Jennings v. Gov't Employees Ins. Co., 302 Md. 352, 357–58 & n.3, 488 A.2d 166, 168–69 & n.3 (1985). The court observed that these laws substantially changed Maryland's public policy on motor vehicle insurance by mandating certain types of coverage, including personal injury protection, property damage liability, and uninsured motorist coverage. Id. at 357–58, 488 A.2d at 168–69. The 1972 legislation also established a state-owned
ture included uninsured motorist coverage to assure a source of compensation for Maryland drivers injured by irresponsible motorists without liability insurance. Although initially optional, uninsured motorist coverage became mandatory in 1975.

The legislature made significant amendments to the uninsured motorist statute in 1981 and 1982, adding a definition of "uninsured motor vehicle" and expanding the allowable coverage exclusions. The statute originally permitted insurers to deny coverage where the insured was injured while operating an uninsured vehicle that he owned. The primary purpose of this exclusion was to encourage owners of multiple automobiles to obtain coverage for all their vehicles, and to limit the exposure of the insurer by preventing the extension of coverage to an additional vehicle where the policy holder had paid a premium based on a single vehicle. The 1982 amendment expanded the exclusion to encompass family members residing with the insured when occupying or struck by an uninsured vehicle owned by the insured or a family member living in the same residence.

This expansion of the permissible exclusions was a concession to insurers by further limiting their exposure and allowing better risk assessment when issuing a policy. In 1997, the statute was recodified in its present form as section 19-509 of the Insurance Article.

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29. An "uninsured motor vehicle" was defined as a "motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury or death of an insured." Act of May 19, 1981, ch. 510, 1981 Md. Laws 2122.
31. Gartelman, 288 Md. at 158, 416 A.2d at 737.
33. 1982 Md. Laws 3442, 3443.
34. In Gartelman, the insurer argued that a similar provision was consistent with the original exclusion clause, claiming that such a result was necessary to allow proper risk assessment when issuing a policy. Gartelman, 288 Md. at 158–59, 416 A.2d at 738. The court rejected this argument, holding that penalizing insured persons unable to obtain insurance for vehicles they did not own would not further the statutory purpose of encouraging uninsured vehicle owners to obtain insurance. Id. at 160, 416 A.2d at 739.
B. Maryland Courts' Interpretation of "Arising out of" Requires only a Limited Causal Relationship

Maryland courts have broadly construed the phrase "arising out of the . . . use" to be a liberal standard of causation. Early cases involving motor vehicle insurance coverage established that "arising out of" causation required only a sufficiently direct causal relationship between the vehicle and the harm. Courts subsequently applied this standard when encountering the same phrase in the uninsured motorist statute, standard automobile insurance policies, and general business insurance contracts. Although Maryland courts have expansively construed "arising out of" causation, uninsured motorist benefits have been denied to victims of criminal assaults when the vehicle was only incidentally related to the harm.

1. The Court of Appeals Has Rejected Proximate Cause Analysis in Interpreting "Arising out of" Causation and Instead Required only a Direct Causal Relationship

In National Indemnity Co. v. Ewing and Frazier v. Unsatisfied Claim & Judgment Fund Board the Court of Appeals interpreted "arising out of" as a liberal causation requirement in a standard automobile liability policy and remedial statute. In Ewing, the court relied on its broad treatment of the phrase "arising out of" in the Maryland Workmen's Compensation Act and the analysis by several other state courts to conclude that the words required only a causal relationship and were not limited by the rules of direct and proximate cause. The insured had negligently skidded off the road, causing his passenger to be thrown from the vehicle. The driver then negligently walked his passenger, who was uninjured in the crash, down the center of the road, where he was struck by a passing car. The Ewing court refused to allow Ewing's insurer to disclaim liability, concluding that a sufficient nexus existed between the use of the insured's automobile and

36. See infra Part II.B.1–3.
37. See infra Part II.B.1.
38. See infra Part II.B.2.
39. See infra Part II.B.3.
41. 262 Md. 115, 277 A.2d 57 (1971).
42. See, e.g., Ewing, 235 Md. at 149, 200 A.2d. at 682 (automobile policy); see also Frazier, 262 Md. at 119, 277 A.2d at 59 (remedial statute).
44. Id. at 147–48, 200 A.2d at 681.
45. Id. at 148, 200 A.2d at 681.
the harm because Ewing’s negligent driving created the risk of injury, and an unbroken chain of causation led to the harm.\textsuperscript{46}

In \textit{Frazier}, the court broadly construed “arising out of” language in the Unsatisfied Claim and Judgment Fund Law to include injuries caused by a firecracker thrown from an unidentified vehicle.\textsuperscript{47} The victim and her child were injured when the firecracker exploded in the backseat of her convertible, causing her to lose control and strike a tree.\textsuperscript{48} Pointing to the remedial purpose of the Law, the \textit{Frazier} court reasoned that case law construing standard insurance policies was not binding.\textsuperscript{49} Nevertheless, the court found these decisions persuasive, observing that the victim could sue the Board on a theory that the use of the vehicle was directly or incidentally connected to the injury, regardless of whether the vehicle was the proximate cause of the harm.\textsuperscript{50}

Together, \textit{Ewing} and \textit{Frazier} demonstrate that the Court of Appeals only requires a sufficiently direct causal relationship between the use of vehicle and the harm to satisfy “arising out of” causation.\textsuperscript{51} Furthermore, though the \textit{Frazier} court did not offer a definite standard, it did make clear that “arising out of” causation deserved special consideration when used in a remedial statute.\textsuperscript{52}

\textsuperscript{46} Id. at 150–51, 200 A.2d at 683. The court relied primarily on \textit{Schmidt v. Utilities Insurance Co.}, 182 S.W.2d 181 (Mo. 1944), \textit{Merchants Co. v. Hartford Accident & Indemnity Co.}, 188 So. 571 (Miss. 1939), and \textit{Carter v. Bergeron}, 160 A.2d 348 (N.H. 1960), in its decision. \textit{Ewing}, 235 Md. at 149–50, 200 A.2d 682. In \textit{Schmidt}, a pedestrian was injured after tripping and falling over blocks that employees had negligently left on the sidewalk after using them to unload their truck. \textit{Schmidt}, 182 S.W.2d at 181–82. The \textit{Schmidt} court held that the injury arose out of the use of the truck, referring to the language as “broad, general and comprehensive.” \textit{Id.} at 183, 186. Similarly, in \textit{Merchants}, a driver was injured after striking poles left on the road that had been used to remove a truck caught in a ditch. \textit{Merchants}, 188 So. at 571. The court held that the injury arose from the use of the truck because the poles had a direct and substantial relation to the operation of the truck and there was no intervening act to break the chain of use. \textit{Id.} at 572. The \textit{Ewing} court also quoted with approval \textit{Carter}'s finding that coverage existed even if the insured vehicle did not exert a physical force on the instrumentality of the harm. \textit{Ewing}, 235 Md. at 150, 200 A.2d at 682 (quoting \textit{Carter}, 160 A.2d at 353).

\textsuperscript{47} \textit{Frazier}, 262 Md. at 119, 277 A.2d at 59. The Unsatisfied Claim and Judgment Fund Law allowed anyone suffering an injury “aris[ing] out of the ownership, maintenance or use of” an unidentified motor vehicle in Maryland to bring an action for compensation against the Unsatisfied Claim and Judgment Fund Board. \textit{Id.} at 117, 277 A.2d at 58 (quoting Md. Ann. Code art. 66½, § 7-620 (1970)).

\textsuperscript{48} \textit{Id.} at 116, 277 A.2d at 58.

\textsuperscript{49} \textit{Id.} at 118, 277 A.2d at 59.

\textsuperscript{50} \textit{Id.}


\textsuperscript{52} \textit{Frazier}, 262 Md. at 118, 277 A.2d at 59.
2. The Maryland Courts Have Consistently Required Only a Sufficiently Direct Causal Relationship to Satisfy "Arising out of" Causation in both Private Insurance Contracts and Where Mandated by Statute

Maryland courts applied the broad standard for "arising out of" causation established in *Ewing* and *Frazier* in subsequent cases involving the uninsured motorist statute, standard automobile liability insurance policies, and general business insurance and indemnification contracts. In *State Farm Mutual Automobile Insurance Co. v. Maryland Automobile Insurance Fund*, the Court of Appeals did not specifically refer to the phrase "arising out of," but did recognize that the uninsured motorist statute, which used that language to describe the scope of coverage, should be construed liberally in accordance with its remedial purpose. The victim in *State Farm*, who was forced off the road by an unidentified vehicle, was unable to recover under his insurance policy, which required physical contact between the insured and uninsured vehicle to receive uninsured motorist benefits. Consequently, he sued the Maryland Automobile Insurance Fund (MAIF), which in turn sought a declaratory judgment against State Farm nullifying the policy limitation for providing less coverage than mandated by statute. Focusing on the statute's purpose of compensating innocent accident victims, the court found that neither the statute, nor the case law interpreting it required physical contact between vehicles.

In *McNeill v. Maryland Insurance Guaranty Ass'n*, the Court of Special Appeals relied principally on *Ewing* and *Frazier* to expansively construe "arising out of" causation in a standard automobile liability policy. In *McNeill*, the victim was injured when his car battery ex-

55. *Id.* at 605, 356 A.2d at 562; see also *Pa. Nat'l Mut. Cas. Ins. Co. v. Gartelman*, 288 Md. 151, 157, 416 A.2d 734, 737 (1980) (stating that the primary purpose of the uninsured motorist statute is to ensure compensation for victims of financially irresponsible motorists).
56. *State Farm*, 277 Md. at 602–03, 356 A.2d at 561.
57. *Id.* at 603, 362 A.2d at 561.
58. *Id.* at 605, 356 A.2d at 562.
60. *Id.* at 415–20, 427 A.2d at 1059–61.
ploded while using the insured's vehicle to jump start his car. The driver of the insured vehicle caused the explosion when he lit a match while standing nearby. The court held that the lit match was not an intervening cause and that there was a sufficient causal relationship between the use of the insured vehicle and the carelessly thrown match for the victim to qualify for benefits under the statute.

The Court of Appeals extended its broad interpretation of "arising out of" causation outside the automobile liability context in *Northern Assurance Co. of America v. EDP Floors, Inc.* and *Mass Transit Administration v. CSX Transportation, Inc.* In *EDP Floors*, which involved a dispute over an exclusion clause in a general business liability insurance policy, the insurer argued that it had no duty to defend EDP in a tort action because the policy excluded coverage for injuries "arising out of" the unloading of a truck. An EDP employee, who arrived at work intoxicated, was operating a hydraulic lift to unload floor tiles from a truck when the tiles fell and struck the victim. The victim alleged vicarious liability against EDP for the employee’s negligence and direct liability against EDP for negligent hiring, retention, and supervision. EDP contended that the exclusion applied only to the vicarious liability claim and not the additional claims of direct negligence.

Though the "arising out of" provision in *EDP Floors* described coverage exclusions as opposed to the scope of coverage, the court found that the language required only a causal relationship. The court reasoned that the provision encompassed situations where the injury was caused by additional factors other than just the actual unloading of the truck. The court observed that a proximate cause analysis was contrary to the text of the policy and would force the insurer to pro-

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61. *Id.* at 412, 427 A.2d at 1057.
62. *Id.*
63. *Id.* at 418–20, 427 A.2d at 1060–61. As in *Ewing*, the *McNeill* court cited *Merchants Co. v. Hartford Accident & Indemnity Co.*, 188 So. 571, 572 (Miss. 1939), for the proposition that a dangerous situation causing injury arises from the use of the vehicle, unless an intervening event breaks the causal link to the vehicle. *McNeill*, 48 Md. App. at 419–20, 427 A.2d at 1060–61.
66. *EDP Floors*, 311 Md. at 225, 533 A.2d at 686.
67. *Id.* at 220, 533 A.2d at 683–84.
68. *Id.*, 533 A.2d at 684.
69. *Id.* at 225, 533 A.2d at 686.
70. *Id.* at 230, 533 A.2d at 688.
71. *Id.*
vide coverage for accidents that were inseparably related to the use or unloading of the vehicle. The court held that the existence of a causal connection between the unloading of the vehicle and the harm made the exclusion applicable.

In *CSX Transportation*, the Court of Appeals refused to require more than "but for" causation when interpreting "arising out of" as used in a contractual indemnification clause. After reviewing its cases construing "arising out of" causation in liability insurance policies, the court found that it had never applied proximate or "intermediate causation," thus reaffirming the position from *EDP Floors* that the phrase required only a causal connection.

Returning to the uninsured motorist statute, the Court of Special Appeals applied the causal relationship test in *Harris v. Nationwide Mutual Insurance Co.* to determine the extent of coverage, asking whether the injuries at issue were directly or incidentally related to the use of the vehicle. The victim in *Harris* sought compensation for injuries inflicted when an unidentified driver grabbed her purse as she was walking through a shopping center parking lot, dragging her along the ground for fifteen feet. Construing the policy's provision broadly, the court ruled for the victim, finding a direct causal connection between the use of the vehicle and the harm.

3. Maryland Courts Have Limited the Scope of "Arising out of" Coverage by Declining to Extend Uninsured Motorist Benefits to Victims Injured by Criminal Acts only Incidentally Related to the Use of an Uninsured Motor Vehicle

In two recent cases, the Court of Special Appeals limited the extent of uninsured motorist coverage by concluding that victims of criminal assaults conducted by assailants outside the uninsured vehicle were not entitled to compensation. In *Wright v. Allstate Insurance Co.*, a husband and wife were shot by an acquaintance who had

72. *Id.* at 231, 533 A.2d at 689.
73. *Id.*
75. *Id.* at 316-17, 708 A.2d at 307.
77. *Id.* at 17, 699 A.2d at 455.
78. *Id.* at 4, 699 A.2d at 448-49.
79. *Id.* at 18, 699 A.2d at 455.
emerged from a parked car while they were at a stop sign.\textsuperscript{82} Although the court found the shooting was an "accident" within the meaning of the statute, it rejected Wright's analogies to \textit{Frazier} and \textit{Harris}, distinguishing those cases based on the "prominent role" of the vehicles in the commission of those crimes.\textsuperscript{83} Because the causal connection between the injuries and use of the vehicle was only incidental to the commission of the assault, the court found that the statute did not cover the injuries suffered by the Wrights.\textsuperscript{84}

Likewise, in \textit{Webster v. Government Employees Insurance Co.},\textsuperscript{85} the court denied uninsured motorist benefits to the parents of a passenger who was shot and killed when the driver of the car she was riding in attempted to flee from a carjacker.\textsuperscript{86} Emphasizing that the carjacker was not inside or in control of any vehicle, the court found no causal connection with the use of an uninsured vehicle, and attributed the passenger's injuries solely to the criminal assault.\textsuperscript{87}

\section*{III. THE COURT'S REASONING}

In \textit{State Farm Mutual Automobile Insurance Co. v. DeHaan}, the Court of Appeals of Maryland reversed the Court of Special Appeals, holding that the uninsured motorist provision of the Maryland Code requires that the claimant's injury stem from the "normal use" of an uninsured vehicle, and granted summary judgment in favor of State Farm.\textsuperscript{88} Writing for a unanimous court, Judge Cathell began by noting that the central objective of statutory interpretation is to discern legislative intent by considering the plain meaning of the statute's terms and avoiding illogical or unreasonable constructions.\textsuperscript{89} Focusing on sections 19-509(a)(1) and (c)(1) of the Insurance Article, both of which refer to the "use" of an uninsured motor vehicle, the court observed that the word "use" was not defined by the statute and thus was subject to multiple interpretations.\textsuperscript{90} Consequently, the court found it neces-

\bibliography{references}{82. Id. at 695, 740 A.2d at 50.  
83. Id. at 698, 740 A.2d at 52.  
84. Id. at 698–99, 740 A.2d at 52.  
86. Id. at 67, 744 A.2d at 582.  
87. Id.  
88. DeHaan III, 393 Md. at 195, 900 A.2d at 226–27. Though both parties referred to the incident as a carjacking, the court noted that there had not been proper factual findings to determine whether the requirements of criminal carjacking had been met. DeHaan III, 393 Md. at 168 n.2, 900 A.2d at 210–11 n.2. Accordingly, the court referred to the incident as a shooting in the process of a theft. Id., 900 A.2d at 211 n.2.  
89. Id. at 170, 900 A.2d at 212.  
90. Id. at 171, 900 A.2d at 212.}
sary to use additional tools of statutory construction to determine legislative intent.\textsuperscript{91}

The court first discussed the legislative history of the uninsured motorist statute, noting that the statute was originally conceived to protect Maryland drivers from the financial consequences of accidents with uninsured out-of-state drivers.\textsuperscript{92} The court then examined amendments to the statute, which defined the term “uninsured motor vehicle” and expanded the allowable coverage exclusions.\textsuperscript{93} The court particularly focused on the changes in the exclusion clause provision.\textsuperscript{94} Although the court found it possible that Mr. DeHaan’s vehicle might qualify as an “uninsured motor vehicle,” the court reasoned that it was illogical to believe that the legislature intended that insurers could exclude coverage when an uninsured vehicle owned by the victim was the instrumentality of the harm, but could not exclude coverage when the injuries were only incidentally related to the actual operation of the same uninsured vehicle.\textsuperscript{95} The court believed a more reasonable interpretation of the amendment was that the legislature viewed the entire uninsured motorist statute as applying only to those scenarios where an uninsured motor vehicle itself caused the harm.\textsuperscript{96} Thus, the DeHaan court concluded that it could reasonably infer that the legislature did not consider the statute as a source of compensation for victims harmed by intentional criminal acts that were only incidentally related to the use of an uninsured motor vehicle.\textsuperscript{97}

The court then examined the language at issue in the context of the entire section of the statute, and once again looked to the exclusion clause.\textsuperscript{98} The court found that the statute “would have to be stood on its head” to exclude recovery if the vehicle actually hit the owner, but to allow recovery where the vehicle was idle and did not directly contribute to the injury.\textsuperscript{99}

Turning next to the case law interpreting the statutory language, the court acknowledged that the statute’s remedial nature dictated a

\begin{itemize}
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id. at 172, 900 A.2d at 213.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id. at 173, 900 A.2d at 213–14. See supra Part II.A for the history and language of the exclusion clause. The court also reviewed several additional amendments that did not substantively change the statute. Id. at 174, 900 A.2d at 214.
  \item \textsuperscript{95} Id. at 173 & n.4, 900 A.2d at 213–14 & n.4.
  \item \textsuperscript{96} Id., 900 A.2d at 214.
  \item \textsuperscript{97} Id. at 175, 900 A.2d at 215.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id. at 176, 900 A.2d at 215.
\end{itemize}
liberal construction, but found that the language of the statute was more limiting than DeHaan suggested.\textsuperscript{100} Reviewing its own cases, the court observed that although \textit{Ewing} had interpreted the "arising out of" language as to not make recovery dependent on the strict rules of direct and proximate cause, it nevertheless required a connection between the injury and the use of the vehicle.\textsuperscript{101} The court found that even if DeHaan's vehicle was in "use" as contemplated by the statute, the shooting was an intervening act that broke the causal chain.\textsuperscript{102} The court reasoned that a contrary view would require insurers to provide coverage for a wide array of injuries beyond the contemplation of the statute.\textsuperscript{103}

The court also distinguished \textit{Frazier}, noting that it did not describe the necessary relationship between the injury and the vehicle or produce a clear holding.\textsuperscript{104} Further, the \textit{DeHaan} court found \textit{Frazier} distinguishable on its facts, as the victims in \textit{Frazier} were inside the vehicle when injured and the firecracker causing the crash was thrown from a moving, operating vehicle; DeHaan's vehicle was immobile with the ignition off when the shooting occurred.\textsuperscript{105}

After examining additional cases interpreting "arising out of" coverage in insurance contracts, the court concluded that the language was intended to focus the inquiry on the instrumentality of the harm.\textsuperscript{106} The court found that the overly broad reading advocated by DeHaan would force insurers to cover liabilities unrelated to the purpose of the statute.\textsuperscript{107} Moreover, although previous cases indicated that only "but for" causation was required, the court suggested that such a minimal standard would result in unreasonable liability for insurers.\textsuperscript{108}

\textsuperscript{100} \textit{Id.} at 176–77, 900 A.2d at 216. The court rejected comparisons to a New Jersey case offered by DeHaan, noting that the New Jersey personal injury protection statute was broader than the Maryland uninsured motorist statute and did not contain the same language. \textit{Id.} at 177, 900 A.2d at 216.

\textsuperscript{101} \textit{Id.} at 177–79, 900 A.2d 216–17.

\textsuperscript{102} \textit{Id.} at 178–79, 900 A.2d 217.

\textsuperscript{103} \textit{Id.} at 179, 900 A.2d at 217.

\textsuperscript{104} \textit{Id.} at 180, 900 A.2d at 218.

\textsuperscript{105} \textit{Id.}


\textsuperscript{107} \textit{Id.} at 183–84, 900 A.2d at 220.

\textsuperscript{108} \textit{Id.} The court referred favorably to Judge Eldridge’s dissent in \textit{CSX Transportation}, 349 Md. at 323, 708 A.2d at 310 (Eldridge, J., dissenting), which reasoned that the phrase "arising out of," as used in an indemnification clause, should require more than "but for" causation. \textit{DeHaan III}, 393 Md. at 183, 200 A.2d at 220.
The court also found that several cases from the Court of Special Appeals supported its requirement of a direct causal connection between the normal use of the vehicle and the harm. Specifically, the court pointed to several cases in the intermediate appellate court that denied when recovery the victim had been wounded or killed by gunfire, and several permitting recovery when the vehicle actively contributed to the harm. The court found further support for its position in the decisions of other jurisdictions interpreting uninsured motorist statutes, concluding that they likewise required a direct causal connection between the injury and the use of the uninsured vehicle.

Finally, the court noted that the language in DeHaan’s insurance policy mirrored the uninsured motorist statute, indicating that their meanings were synonymous. Consequently, the court held that DeHaan was not entitled to recover under the policy because his injuries lacked the necessary nexus to a normal use of the vehicle.

IV. Analysis

In DeHaan, the Court of Appeals examined the language of the exclusion clause in the uninsured motorist statute, concluding that it reflected a legislative intent to cover only those situations where the vehicle was the instrumentality of the harm, and that the statute’s referral to “arising out of the . . . use” required a nexus between the injury and the normal use of an uninsured vehicle. The court’s attempt to reconcile this narrow standard with conflicting precedent is likely to create confusion in the lower courts and undermine the statute’s remedial purpose by limiting its scope. Instead, the court should have granted DeHaan compensation by interpreting the statute to require only a limited causal relationship between the injury

111. Id. at 189–93, 900 A.2d 223–25.
112. Id. at 194, 900 A.2d at 226.
113. Id. at 195, 900 A.2d at 226–27. The Court of Appeals was also presented with the questions of whether sitting in the driver’s seat alone made the assailant an “operator” of the vehicle, and whether DeHaan’s car qualified as an uninsured motor vehicle under the same policy that insured it. Id. at 166–67, 900 A.2d at 210. The court did not reach these latter issues because its holding questions were dispositive. Id. at 167, 900 A.2d at 210.
114. See infra Part IV.A.
115. See infra Part IV.B.
and an uninsured motor vehicle.\footnote{116} This result would have fit with the court’s previous “arising out of” cases and the remedial purpose of the statute without realizing the court’s fear of turning the statute into an uncontrollable source of benefits for all victims of crimes related to an uninsured vehicle.\footnote{117}

A. \textit{The Court Over-Emphasized the Importance of the Owned-But-Uninsured Exclusion Clause in its Interpretation of the Word “Use”}

The court’s undue reliance on the language in the exclusion clause when examining the legislative history and structure of the statute resulted in an overly narrow interpretation of the word “use” and a corresponding reduction in the scope of coverage.\footnote{118} The court’s analysis was flawed in two respects. First, it failed to account adequately for the purpose and development of the owned-but-uninsured exclusion when assessing the clause’s relation to the extent of coverage provided by the statute.\footnote{119} Second, the court’s conclusion—that the language of the exclusion clause reflected the legislature’s belief that the phrase “arising out of the . . . use” referred only to situations where the vehicle was the instrumentality of the harm—was inconsistent with the plain meaning of the words and the court’s rules of statutory interpretation.\footnote{120}

1. \textit{The DeHaan Court Did not Give Proper Consideration to the Development and Objective of the Owned-But-Uninsured Exclusion When Considering its Effect on the Entire Statute}

The court erred by viewing the terms of the owned-but-uninsured exclusion section as reflective of the scope of coverage under the entire uninsured motorist statute rather than recognizing exclusion’s limited purpose in the overall statutory scheme.\footnote{121} This method of

\begin{itemize}
  \item \footnote{116} See infra Part IV.C.
  \item \footnote{117} See infra Part IV.C.
  \item \footnote{118} See \textit{DeHaan III}, 393 Md. at 173–76, 900 A.2d at 213–15 (stressing the importance of the exclusion section when examining both the history of the statute and the context of the words “arising out of the . . . use” within the entire section of the statute).
  \item \footnote{119} See infra Part IV.A.1.
  \item \footnote{120} See infra Part IV.A.2.
\end{itemize}
analysis was at odds with the court's express refusal to engage in "forced or subtle interpretation in an attempt to extend or limit the statute's meaning."\textsuperscript{122} The original statutory exclusion, which barred recovery for individuals injured while "operating or riding in an uninsured motor vehicle" that they owned, was intended to encourage owners of uninsured motor vehicles to obtain insurance and to protect insurers from unforeseen liability.\textsuperscript{123} The subsequent amendment to the owned-but-uninsured exclusion, encompassing family members living with the named insured, was a further concession to the insurers' interest in reducing their liability.\textsuperscript{124} The purpose of the entire statute, however, was to protect innocent victims of motor vehicle accidents involving uninsured drivers by assuring them of a source of financial compensation.\textsuperscript{125} Moreover, the uninsured motorist statute was part of a comprehensive shift of Maryland public policy to provide greater protection for its drivers and transfer the risk of loss to the private sector by requiring motorists to carry insurance policies with specific types of coverage.\textsuperscript{126} Considering the broad, remedial objective of the statute as a whole against the more limited goals of the exclusion clause,\textsuperscript{127} there was no basis for the \textit{DeHaan} court's as-

\textsuperscript{122} \textit{DeHaan III}, 393 Md. at 171, 900 A.2d at 212 (internal quotation marks omitted) (quoting Nesbit v. Gov't Employees Ins. Co., 382 Md. 65, 76, 854 A.2d 879, 885 (2004)).

\textsuperscript{123} See \textit{Gartelman}, 288 Md. at 158, 416 A.2d at 737–38 (stating that the purpose of the exclusion was to encourage drivers to insure all owned vehicles); Powell v. State Farm Mut. Auto. Ins. Co., 86 Md. App. 98, 107, 585 A.2d 286, 290 (1991) (observing that the lack of such an exclusion would frustrate premium determinations); \textit{Janquitto}, supra note 121, at 240–41 (stating that the exclusion limited the insurer's exposure by preventing the insured from claiming uninsured motorist benefits for a second or third vehicle when he had only paid a premium based on one vehicle).

\textsuperscript{124} \textit{Janquitto}, supra note 121, at 241; cf. \textit{Gartelman}, 288 Md. at 160–61, 416 A.2d at 739 (rejecting an argument that the original exclusion clause should be read to exclude persons other than the named insured to allow insurers to better assess the risk when issuing a policy).

\textsuperscript{125} \textit{Gartelman}, 288 Md. at 157, 416 A.2d at 737.

\textsuperscript{126} See Jennings v. Gov't Employees Ins. Co., 302 Md. 352, 357, 488 A.2d 166, 168 (1985) (explaining that the original statutory coverage scheme enacted in 1972 was a substantial change in Maryland public policy regarding motor vehicle insurance and compensation for damages caused by automobile accidents); \textit{Janquitto}, supra note 121, at 173–76 (stating that the purpose of changing the insurance law was to protect Maryland citizens from economic harm cause by motor vehicle accidents, and to alleviate the burden on the State by shifting risk of loss to the private sector).

\textsuperscript{127} See \textit{Gartelman}, 288 Md. at 160, 416 A.2d at 739 (rejecting a more expansive reading of the exclusion clause advocated by insurance company as contrary to the statutory goal of assuring compensation for innocent accident victims, and not furthering the purpose of encouraging owners of uninsured vehicles to obtain insurance).
sumption that the legislature intended the more limited language of the clause to dictate the extent of coverage under the entire statute.\textsuperscript{128}

The evolving scope of the exclusion section, juxtaposed with the lack of any significant changes to the coverage section,\textsuperscript{129} further belies the \textit{DeHaan} court's conclusion that the legislature viewed these provisions as synonymous. Though the language of the exclusion clause was expanded from "operating and riding in" to "occupying, or struck as a pedestrian by"\textsuperscript{130} only a minor and inconsequential change was made to the coverage portion of the statute.\textsuperscript{131} The legislature's decision to refer to discrete scenarios in the exclusion clause, both before and after the amendment, while continuing to use more expansive "arising out of" language in the coverage section suggests that legislators viewed the statute as covering a wider range of vehicle-related harms than those specified in the exclusion section. This reading of the legislative intent, unlike the \textit{DeHaan} court's more narrow interpretation, is consistent with the statute's remedial purpose.\textsuperscript{132}

2. \textbf{The Court's Interpretation of the Exclusion Clause Did Not Comport with its Plain Meaning or Common Sense}

Although the language of the amended exclusion clause differed significantly from the language in the coverage section, the \textit{DeHaan} court nonetheless concluded that the terms of the exclusion section revealed a legislative intent to provide coverage only where the vehicle was the instrumentality of the harm.\textsuperscript{133} By finding the two sections synonymous despite their distinct language, the court did not follow its stated practice of giving the words of a statute their plain, common sense meaning.\textsuperscript{134} The court followed this practice in \textit{Northern Assur-}

\textsuperscript{128} See \textit{DeHaan III}, 393 Md. at 175, 900 A.2d at 215 (stating that the exclusion clause reflected the legislature's concept of coverage provided by the entire statute).

\textsuperscript{129} See id. at 172–74, 900 A.2d at 213–14 (reviewing the history of the uninsured motorist statute, which included several amendments to the exclusion section but no substantive changes to the coverage section).


\textsuperscript{131} The words "motor vehicle" were inserted before the word "accident." Compare Md. Ann. Code art. 48A, § 541(c), with Md. Code Ann., Ins. § 19-509(c)(1).


\textsuperscript{133} \textit{DeHaan III}, 393 Md. at 173, 900 A.2d at 213–14.

\textsuperscript{134} Id. at 170, 900 A.2d at 212; see also Frost v. State, 336 Md. 125, 137, 647 A.2d 106, 112 (1994) (stating that courts must "avoid constructions that are illogical, unreasonable, or inconsistent with common sense").
ance by referencing a standard dictionary to define "arising out of" as "originating from, growing out of" or "flowing from." In DeHaan, however, the court relied on the uninsured motorist statute's exclusion clause to conclude that "arising out of the... use" meant that the vehicle be the instrumentality of the harm. Based on the EDP Floors court's definition of "arising out of," the phrase "arising out of the... use" should logically refer to a much broader range of scenarios beyond those specifically delineated by the exclusion clause.

B. The Court's Effort to Reconcile its Narrow Interpretation of the Statute's Causation Requirement with Contrary Precedent Leaves Lower Courts Without a Clear Standard and may Frustrate the Statute's Remedial Purpose

The court's narrow construction of the statute resulted in a stricter standard of causation than previous "arising out of" cases, which required only a sufficient causal relationship between the vehicle and the harm. The court was unconvincing in its attempt to reconcile its conclusion that DeHaan was not entitled to compensation with prior decisions granting coverage to the victim. The court's placement of DeHaan within its precedent despite its narrower causation requirement leaves lower courts to guess at the proper standard for uninsured motorist benefits. The resulting confusion is likely to produce inconsistent coverage for deserving victims, thus frustrating the statute's remedial purpose.

The court was unpersuasive in distinguishing the causal chain leading to DeHaan's injury from Ewing and Frazier's guidelines for "arising out of" causation. The court explained that DeHaan's in-

136. See DeHaan III, 393 Md. at 173, 900 A.2d at 214 (relying on the exclusion clause in analyzing both the history of the statute and the context of the language at issue in order to ascertain the scope of coverage).
137. Compare EDP Floors, 311 Md. at 230, 533 A.2d at 688 (defining "arising out of" as "originating from, growing out of, flowing from, or the like"), with DeHaan III, 393 Md. at 173, 900 A.2d at 214 (limiting "arising out of" to an instrumentality of the harm standard).
139. See DeHaan III, 393 Md. at 193, 900 A.2d at 225 (determining that uninsured motorist coverage requires "a direct causal relationship between the injury and the actual use of the vehicle").
140. The court acknowledged that the use of the vehicle in Ewing was connected to the injury, even though the vehicle itself did not cause the harm, but failed to recognize that
jury was not part of the chain of causation initiated by the attacker's use of the vehicle by stating that "the shooting had no direct or substantial relation to the use" and thus broke the causal chain. But the facts belie this conclusion, as DeHaan was shot while the assailant was in the midst of using the vehicle, and whose purpose was to effectuate a continued use. The situation causing the injury was therefore centered on the use of the vehicle. In contrast, the injury in Ewing, which the court held to arise from the use of the vehicle, was the product of a more attenuated chain of causation, occurring well after the use of the relevant vehicle had ceased. Given these facts, the DeHaan court's argument that Ewing involved a greater connection between the use and the injury carries little force. Finally, Ewing involved a provision in a private insurance contract, whereas the policy provision in DeHaan was mandated by a remedial statute that consistently was interpreted liberally. Thus, the standard of causation applied in DeHaan should have been less stringent than the standard in Ewing.

The court's attempt to distinguish Frazier was equally problematic. The factual distinction made by the court—that the Frazier victims were actually using their own vehicle when injured by an act committed from a presumed uninsured vehicle—is entirely irrelevant to the statutory inquiry of whether the harm arose from the use of an
uninsured vehicle.\textsuperscript{151} The court also noted that the uninsured vehicle in \textit{Frazier} was operating and in motion when the firecracker was thrown,\textsuperscript{152} suggesting that, in contrast, the vehicle in \textit{DeHaan} was not in use during the shooting because the ignition was off. This distinction is undermined by the fact that the assailant in \textit{DeHaan} was in the process of using the vehicle when DeHaan’s injuries occurred: the assailant was in the driver’s seat when he fired his weapon, and he immediately started the ignition and drove off after the shooting.\textsuperscript{153}

Moreover, the \textit{Frazier} court found a sufficient causal connection to the use of the vehicle even though the firecracker, and not the uninsured vehicle, was the instrumentality of the harm.\textsuperscript{154} Conversely, the \textit{DeHaan} court refused to grant coverage based on the fact that the handgun, rather than the vehicle, actually caused the harm.\textsuperscript{155} Under the causal relationship standard of \textit{Frazier}, DeHaan arguably had a more persuasive case than the victims in \textit{Frazier} because the shooting was a direct consequence of the assailant’s intent to use the vehicle, whereas the use of the uninsured vehicle in \textit{Frazier} did not provoke the act of throwing the firecracker.\textsuperscript{156} Thus, had the court applied the same causal standard it used in \textit{Frazier}, DeHaan’s injuries would have fallen within the terms of the statute.\textsuperscript{157}

Though the court seized on the statement in \textit{EDP Floors}—that the “arising out of” inquiry focuses on the instrumentality of the harm—to support its position that the use of DeHaan’s vehicle did not cause the harm,\textsuperscript{158} several countervailing factors negated this argument. First, the \textit{EDP Floors} court’s broad definition of “arising out of” as...
"originating from, growing out of," and "flowing from" supported recovery for *DeHaan* because his injuries "flowed from" the use of the vehicle. Second, the *EDP Floors* court also noted that the "arising out of" language did not require that the excluded conduct be the sole cause of injury. Even if the use of the vehicle was not the sole cause of DeHaan's injuries, the use was causally related to the harm because the shooting would not have occurred without the use. Finally, in its discussion of *CSX Transportation*, which established that "arising out of" did not require more than "but for" causation, the court observed that the dispute in that case was over a service contract and not an automobile liability statute. If the *DeHaan* court chose to diminish the significance of *CSX Transportation* on this basis, it should have also done so with *EDP Floors*, which concerned a general business insurance contract. Instead, the court relied on *EDP Floors* to conclude that the handgun, and not the vehicle's use, caused the harm.

Finally, the court analogized *DeHaan* to the Court of Special Appeals's decisions in *Webster* and *Wright*, but failed to account for the critical factual distinction that in those cases, the shooter was outside the vehicle, while in *DeHaan*, the assailant was physically inside the car. In both opinions, the Court of Special Appeals noted that there was only an incidental relationship between the vehicle and the harm because the shooter was not inside or in control of the uninsured vehicle. In its 2005 decision, however, the Court of Special Appeals adopted the circuit court's finding that "[b]ut for [the assailant] seizing, brutally controlling, and using [DeHaan's] vehicle, there

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159. See supra notes 137, 142–143 and accompanying text.
161. See *DeHaan* I, No. 13-C-02-52183CN, slip op. at 8 (observing that there would have been no injury "but for" the use of the vehicle).
163. *EDP Floors*, 311 Md. at 224–25, 533 A.2d at 685–86.
164. *DeHaan III*, 393 Md. at 182, 900 A.2d at 219.
165. See id. at 184–86, 900 A.2d at 220–21 (discussing *Wright* and *Webster* as supporting the idea that DeHaan's gunshot injuries did not result from the use of the vehicle).
166. *DeHaan II*, No. 118, slip op. at 22–23 (Md. Ct. Spec. App. Aug. 22, 2005) (noting that *Webster* "went to great lengths to emphasize that the assailant was not in the car at the time the injury occurred").
167. See *Wright* v. Allstate Ins. Co., 128 Md. App. 694, 698, 740 A.2d 50, 52 (1999) (noting that the assailant fired at his victims from outside the vehicle, which was simply a means of transportation to the area of the planned assault); *Webster* v. Gov't Employees Ins. Co., 130 Md. App. 59, 65, 744 A.2d 578, 581–82 (1999) (finding the fact that the carjacker was never inside or in control of the vehicle as indicative of incidental use).
would have been no injury to [DeHaan]."\textsuperscript{168} Despite this distinction, the Court of Appeals favorably compared the situation leading to DeHaan's gunshot injuries to the circumstances in \textit{Webster} and \textit{Wright}, and consequently, that DeHaan's injuries did not result from the use of the vehicle.\textsuperscript{169}

At best, the \textit{DeHaan}'s court's effort to reconcile its result with conflicting precedent is likely to cause confusion in the lower courts, and at worst may undermine the remedial purpose of the statute by limiting its previously broad construction. As the circuit court suggested, had the assailant slammed the door on DeHaan's hand or arm in the process of the theft, the injuries from such a "use" would have been compensable.\textsuperscript{170} Thus, to deny DeHaan coverage because he was instead shot in furtherance of the theft would result in a "mechanistic distinction" and "would clearly not be in accord with the liberal purposes of the statute."\textsuperscript{171}

The Court of Appeals's previous cases did not limit "arising out of" causation as it did here by interpreting the statute to require that the uninsured vehicle be the instrumentality of the harm and a nexus between the injury and the normal use of the vehicle.\textsuperscript{172} Though several of the court's prior cases, such as \textit{Frazier}, \textit{Ewing}, and possibly \textit{Harris}, would likely been decided differently based on this new restrictive interpretation, the court did not overrule any of these cases.\textsuperscript{173} Therefore while \textit{Frazier}, \textit{Ewing}, and \textit{Harris} still exist to allow lower courts to extend coverage in factually similar cases,\textsuperscript{174} the lower courts could ignore these prior cases and decline coverage under \textit{DeHaan}.\textsuperscript{175}

\begin{itemize}
\item \textsuperscript{168} \textit{DeHaan II}, No. 118, slip op. at 23.
\item \textsuperscript{169} See \textit{DeHaan III}, 393 Md. 163, 184–86, 900 A.2d 208, 220–21 (2006) (finding that \textit{Webster} and \textit{Wright} supported the notion that the gunshot injuries suffered by DeHaan were not connected to the use of the vehicle).
\item \textsuperscript{170} \textit{DeHaan I}, No. 13-C-02-52183CN, slip op. at 8 (Howard County Cir. Ct. Feb. 24, 2004).
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See supra Part II.B.
\item \textsuperscript{173} In \textit{Frazier}, the thrown firecracker, not the uninsured vehicle, was the actual instrumentality of the harm and throwing a firecracker is not a normal use of a vehicle. \textit{Frazier} v. \textit{Unsatisfied Claim & Judgment Fund Bd.}, 262 Md. 115, 116, 277 A.2d 57, 58 (1971). In \textit{Ewing}, the victim was not injured by the vehicle covered under the policy, but was instead injured when struck by a second vehicle as his companion negligently walked him down the center of the road. \textit{Nat'l Indem. Co. v. Ewing}, 235 Md. 145, 148, 200 A.2d. 680, 680–81 (1964). Finally, in \textit{Harris}, the victim was not injured by the vehicle itself, but by the thief who grabbed her purse and dragged her while driving a vehicle. \textit{Harris v. Nationwide Mut. Ins. Co.}, 117 Md. App. 1, 4, 699 A.2d 447, 448–49 (1997).
\item \textsuperscript{174} See \textit{DeHaan III}, 393 Md. at 179–83, 900 A.2d at 217–20 (distinguishing prior "arising out of" cases that ruled in favor of coverage).
\item \textsuperscript{175} See \textit{id.} at 195, 900 A.2d at 226 (interpreting "\textit{use} to require a nexus between the injury and the normal use of an uninsured vehicle").
\end{itemize}
This inconsistency means that a victim’s ability to recover for injuries caused by an uninsured motorist will directly depend on which line of cases a lower court chooses to follow.

If courts adopt DeHaan’s narrower standard of causation, the result will be more denials of coverage for victims such as DeHaan, whose injuries were not the result of a normal use and were not caused by the vehicle itself, but nevertheless arose from use within the meaning of the statutory language.\textsuperscript{176} This outcome will generally undercut the statute’s remedial purpose by leaving some innocent victims of uninsured motorists without a source of compensation.\textsuperscript{177}

C. \textit{The Court Should Have Found that DeHaan’s Injuries had a Direct Causal Relationship to the Use of the Vehicle as Consistent with Precedent and the Statute’s Remedial Purpose}

The Courts of Appeals should have affirmed the decision of the lower court and extended uninsured motorist benefits to DeHaan because such a result would have avoided the possibility of arbitrary distinctions in granting compensation,\textsuperscript{178} conformed with precedent, and better recognized the remedial purpose of the statute.\textsuperscript{179} Moreover, the court’s fear that extending benefits would lead to “coverage against all criminal activity perpetrated in connection with a vehicle”\textsuperscript{180} was unfounded.\textsuperscript{181}

As Court of Appeals precedent indicates, the statute does not require fine distinctions on causation, and demands only a sufficient causal connection between the “use” and the injury.\textsuperscript{182} The direct causal relationship test for “arising out of” causation applied in previ-

\textsuperscript{176} See \textit{DeHaan II}, No. 118, slip op. at 23 (Md. Ct. Spec. App. Aug. 22, 2005) (holding that DeHaan’s injuries arose from the use of the uninsured motor vehicle); \textit{DeHaan I}, No. 15-C-02-52183CN, slip op. at 8 (Howard County Cir. Ct. Feb. 24, 2004) (same).


\textsuperscript{178} See supra notes 170–171 and accompanying text.

\textsuperscript{179} See infra notes 181–183 and accompanying text.

\textsuperscript{180} \textit{DeHaan III}, 393 Md. at 194–95, 900 A.2d at 226.

\textsuperscript{181} See infra notes 184–188 and accompanying text.

\textsuperscript{182} In \textit{Ewing}, for example, the court expounded on the phrase “arising out of,” commenting that “while the words import and require a showing of causal relationship, recovery is not limited by the strict rules [of] direct and proximate cause.” Nat’l Indem. Co. v. Ewing, 235 Md. 145, 149, 200 A.2d 680, 682 (1964). Further, in finding it unnecessary that the vehicle be the instrumentality of the harm, the \textit{Ewing} court quoted \textit{Carter v. Bergeron}, which similarly stated that the proper test was not whether vehicle itself caused the harm but instead whether “the use was connected with the accident or the creation of a condition that caused the accident.” \textit{Id.} at 150, 200 A.2d at 682 (internal quotation marks omitted) (quoting \textit{Carter v. Bergeron}, 160 A.2d 348, 353 (N.H. 1960)).
ous cases did not require that the injuries arise from the normal use of a vehicle or that the vehicle be the instrumentality of the harm, as the court suggested in *DeHaan*. The court should have left this broader standard of causation intact and granted DeHaan compensation. Such a result would have been consistent with the statute’s traditionally “liberal construction” and consonant with the “primary purpose of... assur[ing] financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists.”

There was little danger that a decision in favor of DeHaan would have turned uninsured motorist provisions into a source of compensation for all crimes associated with a vehicle. The Court of Special Appeals’s decision in *Wright* properly established that recovery will be denied when an uninsured vehicle is simply used for transportation to the scene of an assault. Thus, a decision in favor of DeHaan would have set precedent only for the limited scenario where a criminal is in control of the vehicle and commits an assault from inside the vehicle to further its use. Lastly, prior opinions by the Maryland courts granting uninsured motorist benefits to victims of criminal acts connected to an uninsured vehicle did not express the same concern about runaway coverage voiced by the Court of Appeals in *DeHaan*.

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186. The Court of Special Appeals’s decisions in *Wright* and *Webster* had already precluded the possibility of collecting uninsured motorist benefits where an uninsured vehicle was only incidentally related to a criminal act. See *Wright* v. Allstate Ins. Co., 128 Md. App. 694, 700–01, 740 A.2d 50, 54 (1999) (holding that an assailant’s use of an uninsured vehicle to drive to the crime scene was insufficient basis for coverage); *Webster* v. Gov’t Employees Ins. Co., 130 Md. App. 59, 64, 744 A.2d 578, 582 (1999) (holding that injuries caused by a carjacker from outside the vehicle lacked the necessary connection with the use of the vehicle to qualify for uninsured motorist coverage).

187. *Wright*, 128 Md. App. at 701, 740 A.2d at 54; see also *Webster*, 130 Md. App. at 64, 744 A.2d at 581 (interpreting “arising out of” as not encompassing an attempted carjacking when the assailant was never inside the vehicle).

188. See *DeHaan II*, No. 118, slip op. at 22 (Md. Ct. Spec. App. Aug. 22, 2005) (distinguishing DeHaan’s case from prior assault cases where assailant was outside the vehicle).

189. *DeHaan III*, 393 Md. at 183, 900 A.2d at 220 (stating that taking DeHaan’s view of the statute would force insurers to cover a “myriad of liabilities” unrelated to the statute’s purpose). The court in *Frazier* did recognize a need to protect the Unsatisfied Claim and Judgment Fund, but nevertheless found that the victims injured by a firecracker thrown from an uninsured motor vehicle were entitled to pursue their claims. *Frazier* v. Unsatis-
V. CONCLUSION

In State Farm Mutual Automobile Insurance Co. v. DeHaan, the Court of Appeals of Maryland found that the uninsured motorist statute was only intended to cover those situations where the uninsured motor vehicle was the instrumentality which caused the harm, and consequently held that the injury must result from the “normal use” of an uninsured motor vehicle to qualify for compensation. However, in discerning legislative intent, the court overemphasized the language of the owned-but-uninsured exclusion clause of the uninsured motorist statute as indicative of the scope of coverage provided by the entire statute. The court’s decision to deny recovery indicated that it applied a more stringent standard than in prior cases even though the court did not overrule any of its previous “arising out of” causation cases favoring compensation under facts analogous to DeHaan. Consequently, the court’s holding may create confusion over the proper standard in lower courts and potentially frustrate the statute’s remedial purpose of compensating innocent victims. Instead of denying coverage, the court should have recognized that DeHaan’s injuries were directly related to the use of an uninsured vehicle and granted compensation. Such a result would have been consistent with the remedial objectives of the statute and fit within the court’s precedent giving broad import to “arising out of” clauses in automobile liability insurance policies.

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190. DeHaan III, 393 Md. at 195, 900 A.2d at 226.
191. See supra Part IV.A.
192. See supra Part IV.B.
193. See supra Part IV.B.
194. See supra Part IV.C.
195. See supra Part IV.C.
GARFINK v. CLOISTERS AT CHARLES, INC.: GOING BEYOND THE “PLAIN LANGUAGE” AND EXTENDING INDIVIDUAL RIGHTS AT THE EXPENSE OF COMMUNAL VALUES IN CONDOMINIUM REGIMES

In Garfink v. Cloisters at Charles, Inc.,\(^1\) the Court of Appeals of Maryland considered whether to grant an easement to a condominium unit owner to repair a defect in a dryer vent without prior approval from the Cloister’s Condominium Council (Council) of unit owners.\(^2\) The court held that the unit owner had an express easement from her condominium declaration to install a new exterior dryer vent without prior approval under the limited circumstances present in the case.\(^3\) In so doing, the court failed to consider the appropriate standard for interpretation of an easement.\(^4\) Rather, the Garfink court expanded the scope of the easement to prevent the unit owner from experiencing further harm at the risk of a defective dryer vent.\(^5\) The result of the court’s limited holding is that condominium councils—the governing bodies of condominium regimes—lose their ability to ensure the well-being of all residents in a communal setting, as these councils are open to more threats of litigation and challenges to their authority from individual unit owners.\(^6\)

The Court of Appeals instead should have enforced the plain language of the condominium declaration, which required approval by the Council before any change to the exterior of a unit is made.\(^7\) Requiring the Council’s good-faith approval would have been in the best interest of both parties: it would allow the unit owner to install a safer, new dryer vent without bypassing the Council’s authority and threatening their ability to govern the condominium complex.\(^8\)

\(^1\) 392 Md. 374, 897 A.2d 206 (2006).
\(^2\) Id. at 376–78, 897 A.2d at 207–08.
\(^3\) Id. at 378, 897 A.2d at 208.
\(^4\) See infra Part IV.A.
\(^5\) See infra Part IV.A.
\(^6\) See infra Part IV.B.
\(^7\) See infra Part IV.C.
\(^8\) See infra Part IV.C.
I. THE CASE

Danetta Garfink owned a condominium unit at The Cloisters at Charles Condominiums (Cloisters) in Baltimore County, Maryland. Garfink purchased her condominium unit, which was one of the original model units, in 1991. Garfink's purchase was subject to the conditions that she abide by the Cloisters' Declaration and Bylaws and comply with the decisions of the Council.

Garfink's unit included an installed clothes dryer that vented internally into the furnace room, rather than the external ventilation system contained in the construction plans and required by local building codes and regulations. The internal venting system created a "potentially hazardous mixture of elements," but Garfink used her dryer without harm for nine years. It was not until Garfink attempted to replace the old dryer with a new one from Sears, Roebuck & Co. that she discovered that the vent system violated the building code. Sears refused to install the replacement dryer because it believed that the venting system was a fire hazard.

Garfink decided to re-route the system and installed a vent into the

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10. Garfink, 392 Md. at 378, 897 A.2d at 208.
11. Id.
12. Id.
13. Id. at 379–80 & n.2, 897 A.2d at 209 & n.2.
14. Id. at 378, 897 A.2d at 208. The Baltimore County Building Code follows the standards contained in the 2000 version of the International Building Code. Id. at 580 n.3, 897 A.2d at 209 n.3. The International Building Code's provisions on ventilation, particularly those addressing contaminant exhaust, express the concern that "[c]ontaminant sources in naturally ventilated spaces shall be removed in accordance with [other International Codes]." INT'L BLDG. CODE § 1202.4.2 (2000). The International Mechanical Code has express provisions on clothes dryer exhaust, and states that "[d]ryer exhaust systems shall be independent of all other systems and shall convey the moisture and any products of combustion to the outside of the building." INT'L MECH. CODE § 504.1 (2000).
15. Garfink, 392 Md. at 379, 897 A.2d at 208. During operation, the clothes dryer emitted a combination of heat, lint, and moisture through the vent system that discharged into the furnace room. Id. There were two furnaces and a hot water heater powered by gas burners inside the furnace room. Id.
16. Id.
17. Id.
18. Id.
exterior of the condominium's garage wall. She did so without seeking or obtaining permission from the Council.

The Council contended that Garfink's installation of an exterior vent violated a prohibition in the condominium bylaws against altering the exterior of individual condominium units. Garfink, however, maintained that she had the right to attach the vent to the exterior of her home through an express grant of easement in the condominium declaration.

The Council sought a permanent injunction against Garfink, and on July 1, 2003, filed a complaint in the Circuit Court for Baltimore County, asking the court to order Garfink to remove the exterior dryer exhaust vent. The circuit court issued an order and declaratory judgment on August 18, 2004 in the Council's favor, enjoining Garfink from using the vent and ordering its removal. Garfink appealed the decision to the Maryland Court of Special Appeals, which affirmed the judgment of the circuit court. Subsequently, Garfink filed a petition for writ of certiorari to the Court of Appeals. The Court of Appeals granted certiorari to determine whether the easement contained in the declaration and condominium bylaws allowed for the installation of a new dryer vent without prior approval by the Council.

19. Id., 897 A.2d at 209.
20. Id. Garfink's immediate neighbor complained about the newly installed venting system, as the new vent was within seventeen feet of his front door. Id. The neighbor, Garfink, and the Council were unable to resolve the matter, and took their dispute to court. Id.
21. Id. at 377, 897 A.2d at 207. Article IX of the bylaws prohibits condominium owners from making any external changes to their units without prior written approval of the Council. Id. at 398–99, 897 A.2d at 220–21.
22. Id. at 376, 897 A.2d at 207. Article 15.2 of the condominium declaration stated that "each unit shall have . . . an easement in the common elements for the purposes of providing maintenance, support, repair or service for such unit to and for the ducts, pipes, conduits, vents, plumbing, wiring and other utility services to the unit." Id. at 393, 897 A.2d at 217 (emphasis removed).
23. Id. at 377, 897 A.2d at 207.
24. Id. The circuit court found it dispositive that neither the condominium declaration nor the bylaws contained provisions permitting exterior alterations to individual condominium units. Id. at 381, 897 A.2d at 210. The circuit court maintained that Garfink should have obtained consent before installing the new dryer vent. Id. at 382, 897 A.2d at 210–11.
25. Id. at 377, 897 A.2d at 207. The Court of Special Appeals held that because easements contained in condominium contracts do not trigger the application of traditional easement law, the easement expressed in the condominium declaration did not apply. Id. at 378, 897 A.2d at 208.
26. Id. at 377, 897 A.2d at 207.
27. Id., 897 A.2d at 207–08.
II. LEGAL BACKGROUND

Condominium regimes present an interesting lens through which to view property rights, as they are a communal property system. The rights and characteristics of condominium regimes in Maryland are provided in the Real Property Article. Each condominium unit includes all of the incidents of real property, including the ability to possess an easement; however, these property interests must be viewed in light of the declaration, bylaws, and regulations of the condominium regime, which a unit owner is subject to by virtue of purchase. Furthermore, under Maryland law, condominium councils are given broad authority to govern the affairs of the condominium community so as to uphold the values of communal living in the regime. Despite the broad discretion afforded to condominium councils, they still must act reasonably in their decisionmaking, balancing the necessity of rules and regulations with the rights of those living in the regime.

A. Characteristics of Condominium Living

A condominium is “a communal form of estate in property consisting of individually owned units which are supported by collectively held facilities and areas.” A condominium unit owner possesses a cross of two property interests: one interest in fee simple for the unit itself to the exclusion of everyone else, and another interest as a tenant in common with other unit owners for the common elements of the condominium. Condominium complexes typically involve a number of different owners with property interests in the community, and for the ease of administration and maintenance, owners agree at

28. See infra Part II.A.
30. See infra Part II.B.
31. See infra Part II.C.
32. See infra Part II.D.
33. See infra Part II.D.
35. Id. at 73–74, 441 A.2d at 1068; see also Jurgen v. New Phoenix Atl. Condo. Council of Unit Owners, 380 Md. 106, 115, 843 A.2d 865, 870 (2004). Common elements are those areas that are not within individual condominium units. Sea Watch Stores L.L.C. v. Council of Unit Owners, 115 Md. App. 5, 40, 691 A.2d 750, 767 (1997). For example, the exterior portion of individual units outside of the interior drywall and between units is a general common element. Id. The lobby of a complex is also considered to be a common element. Ridgley Condo. Ass’n v. Smyrnioudis, 343 Md. 357, 370, 681 A.2d 494, 501 (1996).
purchase to abide by the rules and regulations of a board of unit owners. Condominium housing is more community-oriented than other styles of housing because of the shared use of common areas and the close proximity of neighbors. As the court in *Ridgley Condominium Ass'n v. Smyrniosidis* highlighted, because of the close confines and community atmosphere, unit owners must relinquish a "certain degree of freedom of choice" that they might possess in privately owned property. An amicable residential situation in condominium living requires consideration of the interests of all unit owners. These important communal values are protected under Maryland law, which provides guidelines and regulations for the condominium regime. The Maryland Condominium Act regulates all aspects of condominium regimes in Maryland, from development, to administration, to termination. In particular, these statutes: (1) provide for the creation of a condominium regime; (2) give unit owners the ability to make alterations or improvements to their unit; (3) confer au-

36. See Andrews, 293 Md. at 73, 441 A.2d at 1068; see also *Ridgley Condo. Ass'n*, 343 Md. at 359, 681 A.2d at 495 (noting that "[i]n exchange for the benefits of owning property in common, condominium owners agree to be bound by rules governing the administration, maintenance, and use of the property" (footnote omitted)). The court in *Ridgley Condominium Ass'n* further noted that the governing rules of the condominium regime include any regulation enacted by a council or board of condominium owners, or incorporated in any of the condominium's original documents. Id. at 359 n.2, 681 A.2d at 495 n.2.


39. Dulaney Towers Maint. Corp. v. O'Brey, 46 Md. App. 464, 466, 418 A.2d 1233, 1235 (1980). The *Dulaney Towers* court utilized the "communal living" principle to uphold a rule adopted by the condominium council limiting unit owners to one dog or one cat. Id. at 465-67, 418 A.2d at 1235. The court found the rule reasonable, considering the effect that pets may have in terms of maintenance and upkeep in common areas and possible noise and odor pollution. Id. at 466, 418 A.2d at 1235.

40. See Md. Code Ann., Real Prop. §§ 11-101 to -143 (LexisNexis 2006). These sections are also referred to as the "Maryland Condominium Act." Id.

41. *Ridgley Condo Ass'n*, 343 Md. at 360, 681 A.2d at 495.

42. Real Prop. § 11-102. A condominium regime is created by recording a declaration, bylaws, and condominium plat that satisfy the provisions of the Maryland Condominium Act. Id. A condominium plat is a recorded document containing the condominium name, a survey of the property's boundaries showing the placement of all the buildings on the property, floor plans of each of the buildings, and the elevation above sea level of the upper and lower boundaries of each unit depicted property. Id. § 11-105.

43. Id. § 11-115. Subject to condominium bylaws or declaration, a unit owner may make "alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium." Id. § 11-115(1). But a unit owner "may alter, make additions to, or change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the council of unit owners." Id. § 11-115(2).
authority upon a group of unit owners to govern the regime;\(^{44}\) (4) uphold the right to enjoy the common elements of the condominium complex;\(^{45}\) and (5) establish methods of interpreting the declaration and bylaws of the regime.\(^{46}\)

**B. Property Interests and Easements in the Condominium Regime**

Upon the creation of a condominium regime, "[e]ach unit in a condominium has all of the incidents of real property."\(^{47}\) One distinct incident of property available to all unit owners is the easement. An easement is a nonpossessory interest in real property owned by another person, often deriving from an express grant or by implication.\(^{48}\) An easement can generally be categorized as a "right-of-way."\(^{49}\) An express easement by reservation occurs when a prior owner retains the right to use part of the land as a right-of-way when conveying the entire property to another.\(^{50}\)

There are two distinct tenements created by a private easement: one dominant tenement that benefits from the easement and one ser-

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44. *Id.* § 11-109. This statute also delineates—subject to any bylaws and the declaration—a council's many powers, including the ability to establish and change any reasonable rules and regulations, to supervise and administer the functioning of common elements, to grant easements and rights-of-way, and to enforce the provisions of the Maryland Condominium Act, as well as any rules and regulations of the condominium council (including the declaration and bylaws) against a unit owner. *Id.* § 11-109(d).

45. *Id.* § 11-108. Subject to any limitations in the declaration, all unit owners have mutual rights of access and use of the common elements. *Id.* § 11-108(a).

46. *Id.* § 11-124. The declaration, bylaws, and condominium plat are construed together and stand as one document; a deficiency in one document can be cured by reference to any of the other documents. *Id.* § 11-124(c). If there is any conflict among the provisions of the Maryland Condominium Act, the declaration, condominium plat, bylaws, or rules adopted under the Condominium Act, the Condominium Act controls, followed by the declaration, then the plat, followed by the bylaws, and finally rules adopted pursuant to the Condominium Act. *Id.* § 11-124(e).

47. *Id.* § 11-106(a). "Incident," in this context, refers to all rights associated with property ownership. See, e.g., S. Mgmt. Corp. v. Kevin Willes Constr. Co., 382 Md. 524, 544, 856 A.2d 626, 638 (2004) (noting that section 11-106 establishes that each condominium unit owner has a separate, individual real property interest in that unit); Ridgley Condo. Ass'n v. Smyrnioudis, 343 Md. 357, 371, 681 A.2d 494, 501 (1996) (listing an easement as one of the incidents of ownership vested under section 11-106). Despite these individual property rights, condominium councils have a degree of authority over individual unit owners. See, e.g., Sea Watch Stores L.L.C. v. Council of Unit Owners, 115 Md. App. 5, 43, 691 A.2d 750, 768 (1997) (noting that reasonable deed restrictions on condominium units are enforceable).


50. *Id.*
vent tenement that is burdened by the easement. Because "an easement is a restriction upon the rights of the servient property owner, no alteration can be made by the owner of the dominant estate which would increase such restriction except by mutual consent of both parties." On the other hand, the owner of the servient tenement cannot do anything that would impede the use of the easement.

As with any deed, the language of an easement is construed using the basic principles of contract interpretation. Maryland courts generally seek to determine and give effect to the intent of the parties at the time the contract was created. As the Court of Appeals stated in *Owens-Illinois, Inc. v. Cook,* "Maryland follows the objective law of contract interpretation and construction." In other words, a court must determine what a reasonable person in the position of the parties would have thought the easement meant at the time it was effectuated.

A primary consideration in determining what a reasonable person in the position of the parties would have intended is the plain, customary, and accepted meaning of the language used. The "plain

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51. Consol. Gas Co. v. Mayor of Balt., 101 Md. 541, 545, 61 A. 532, 534 (1905). "The term 'dominant tenement' denotes that the possessor of the land to which it is applied has, as appurtenant thereto, an easement over other land." Restatement (First) of Property § 456 (1944). "The term 'servient tenement' signifies that the possessor of the land to which it is applied is subject to an easement." Id. § 455.


53. Miller, 377 Md. at 350, 833 A.2d at 544.


55. Id. Giving effect to this intention does not mean analyzing what the parties themselves thought the contract meant, but rather what a reasonable person in the position of the parties would have thought it to mean. See infra note 60 and accompanying text.

56. 386 Md. 468, 872 A.2d 969 (2005).


59. Fister ex rel. Estate of Fister v. Allstate Life Ins. Co., 366 Md. 201, 210, 783 A.2d 194, 199 (2001). For example, in *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.,* the court read the plain language of a Maryland Casualty insurance policy. 324 Md. 44, 56-57, 595 A.2d 469, 475 (1991). The policy required the insurer to pay on behalf of the insured any sums resulting from "bodily injury" caused by "an occurrence." Id. at 46-47, 595 A.2d at 470. The court rejected an interpretation that would require a bodily injury to become manifest before coverage duties ensued; the plain meaning of the policy was that coverage turned on an "occurrence" during the policy period that resulted in "bodily injury." Id. at 57, 595 A.2d at 475, 478. Similarly, in *Langston v. Langston,* the court analyzed the plain meaning of the terms in a separation agreement between divorced parties. 366 Md. 490, 507, 784 A.2d 1086, 1095 (2001). Because the agreement specifically stated that alimony provi-
language" doctrine requires that the terms of the contract must be interpreted in context, and given their customary meaning.\textsuperscript{60} When a court finds the language to be unambiguous, it must give effect to its plain meaning.\textsuperscript{61} Thus, because easements are interpreted using the same standards as those used for contracts, courts must give effect to the customary understandings of the language used in the conveyance.\textsuperscript{62}

C. Statutes, Regulations, and Bylaws Regarding Alteration of the Appearance of the Common Elements in a Condominium Regime

Courts reviewing disputes concerning condominium unit owners' rights must look to the provisions of the condominium enabling statute, the condominium declaration, and the governing condominium bylaws, "and attempt to reconcile the three."\textsuperscript{63} The Maryland Condominium Act provides that, subject to the bylaws or condominium declaration, a unit owner may not modify or change the construction of common elements or the exterior of a unit without permission of the governing condominium board.\textsuperscript{64} This provision is mirrored in many other states that have adopted restrictions against altering the exterior of the unit.\textsuperscript{65}
Section 11-124 of the Real Property Article requires that section 11-115 be read in conjunction with the declaration, bylaws, and condominium plat to determine whether a unit owner is required to obtain permission before altering the exterior appearance of a condominium unit. However, if there is dissonance among the provisions of section 11 of the Real Property Article, the condominium declaration, the plat, or the bylaws, section 11 controls, followed by the declaration, the plat, and finally, the bylaws.

D. The Condominium Board and Its Authority

The Maryland Condominium Act provides that the affairs of condominiums are governed by a council of unit owners, which is comprised of all unit owners. The council of unit owners may delegate its powers to a board of directors pursuant to section 11-109(b). A council or board has a broad range of powers to provide for the common affairs of the condominium regime. These “condominium unit owners comprise a little democratic subsociety of necessity,” because there are many more restrictions and regulations in the condominium regime context than would be found outside the condominium community. The power to restrict, granted to the council, is in place to uphold the values of communal living inherent in the condominium regime. A council’s adherence to and administration of the condominium declaration and bylaws ensures that the rights of all unit owners are given fair consideration, and promotes “a harmonious residential atmosphere.”

67. Id. Thus, if there is a conflict among those provisions regarding whether approval is necessary for alterations to the exterior of a unit, section 11-115 of the Real Property Article controls. But see Sea Watch Stores L.L.C. v. Council of Unit Owners, 115 Md. App. 5, 42, 691 A.2d 750, 768 (1997) (holding that when a conflict between condominium documents and provisions of section 11-115 exist, the condominium documents control).
68. See supra note 44 and accompanying text.
69. Real Prop. § 11-109(b); see also Ridgley Condo. Ass’n v. Smyrniodis, 343 Md. 357, 361, 681 A.2d 494, 496 (1996).
70. See supra note 44 and accompanying text.
73. Id.
1. Condominium Councils Must Exercise Their Authority Reasonably

Condominium councils have authority to monitor and control the use and modification of condominium common elements by statutory law and express provisions in the condominium documents.\(^74\) The council's exercise of authority over common element modification, however, must still be reasonable.\(^75\) Accordingly, if an individual unit owner wishes to challenge the authority of the condominium council on any regulation made pursuant to section 11-109 of the Real Property Article, the unit owner must demonstrate that the regulation promulgated by the council was unreasonable.\(^76\)

A reasonableness standard prevents condominium councils from enacting arbitrary or capricious rules bearing little relationship to the health and happiness of those living in the regime.\(^77\) For example, in *Dulaney Towers Maintenance Corp. v. O'Brey*,\(^78\) the court observed that so long as there is a valid rationale for a restriction, it may be upheld.\(^79\) But if the reasonableness boundaries are overstepped, as in *Ridgely Condominium Ass'n*, courts will find that condominium councils exceeded their authority when implementing restrictions on use of common areas of the condominium property without the consent of all owners.\(^80\)

2. Condominium Regulations Involving the Modification of Common Elements Are also Held to a Reasonableness Standard

The Maryland Condominium Act—and frequently provisions in a condominium's bylaws or declaration—expressly give a council of unit owners the ability "[t]o regulate the use, maintenance, repair, replacement, and modification of common elements."\(^81\) But as is the

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75. Id. at 118. A unit owner is given advance notice of the council's authority at purchase. Id. A unit owner's purchase "involves acceptance of the condominium regime, with its concomitant restriction on the unit owner's ability to alter the property as he or she might otherwise desire." Id.
76. Id. (noting that reviewing courts apply a reasonableness standard in evaluating challenges to council regulatory activity).
79. See supra note 39.
80. 343 Md. 357, 371, 681 A.2d 494, 501 (1996). The Ridgley Condominium Association passed and attempted to enforce a bylaw provision that prohibited use of the condominium lobby by clients of the condominium's first-floor commercial unit owners. Id. at 358, 681 A.2d at 495. Because the association's actions disparately affected the commercial unit owners' enjoyment of a common element over other unit owners, the court found that the association had overstepped its authority. Id. at 370-71, 681 A.2d at 501.
case with all powers reserved by the council, this authority must be exercised reasonably. Thus, in regulating the maintenance and modification of common elements, should the council require approval before any unit owner is permitted to make any changes to the common elements of her unit, the approval or disapproval of the change must be made in good faith. A good faith standard requires the council to act fairly and base its decision on legitimate principles and objectives of condominium regulation.

The Court of Appeals has used a good faith standard to review the decisions of developers and associations in approving or disapproving plans in various property regimes. For example, in Harbor View Improvement Ass'n v. Downey, the court overturned a neighborhood association’s rejection of a lot owner’s plan to build a duplex in the neighborhood because the disapproval was made without legal justification. In Kirkley v. Seipelt, the court upheld a realty corporation’s rejection of a homeowner’s plan to add an awning and window coverings using a good faith standard. The court reasoned that even though the corporation had no specific criteria for approval of a homeowner’s plan to modify the exterior of her property, its restrictions were reasonable and therefore satisfied the good faith standard.

The good faith standard articulated by such cases is applicable to a condominium complex, another property regime with a common design scheme. Thus, a condominium council’s refusal to approve any alteration to the exterior of a property would have to be based upon a reason that is adequately related to the other buildings in the complex or the general plan of the condominium development. If a

82. See supra note 75 and accompanying text.
83. Cf. Kirkley v. Seipelt, 212 Md. 127, 133, 128 A.2d 430, 434 (1957) (noting that a developer’s refusal to approve an external design plan under a restrictive covenant “would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner”).
84. See id. (citing West Bloomfield Co. v. Haddock, 326 Mich. 601, 613, 40 N.W.2d 738, 743 (Mich. 1950)). The Haddock court required the approving body to “consider the facts” and “be fair and reasonable in approving or rejecting the plan submitted.” Id.
86. Id. at 374–76, 311 A.2d at 427–28.
88. Id. at 133–35, 128 A.2d at 434–35.
89. Id. at 132–33, 128 A.2d at 433–34. The corporation’s refusal survived the good faith test because it was reasonable in light of the other buildings and the general design plan of development. Id. at 135, 128 A.2d at 435.
90. See id. at 133, 128 A.2d at 434; see also Harbor View Improvement Ass’n, 270 Md. at 374, 311 A.2d at 427 (agreeing with the trial court’s view that any refusal by a development board to approve an external design or location plan would have to be a reasonable deter-
council objects to a unit owner’s plan to make modifications that affect the common design scheme of the condominium complex, this objection must be rationally related to upholding the general plan and design of the condominium regime.  

III. THE COURT’S REASONING

In *Garfink v. Cloisters at Charles, Inc.*, the Court of Appeals reversed the Court of Special Appeals, holding that an easement granted in the condominium declaration and bylaws allowed a condominium unit owner to install an exterior dryer vent without prior approval from the Council.  

Judge Cathell, writing for the majority, began by discussing the law and its relationship to the condominium form of property ownership. The court defined a condominium as a communal form of property consisting of individual property units combined with collectively held facilities and common areas. In exchange for the benefits of common property ownership, the court observed, condominium unit owners agree to abide by rules enacted by the condominium council for the management and use of the property.

The majority then analyzed the pertinent statutes and condominium regulations to determine whether or not Garfink had an easement to install the new vent without approval of the Council. The court referenced section 11-115 of the Real Property Article, which governs permissible exterior changes to condominium units, and attempted to reconcile it with the condominium declaration, which grants an easement in the common elements for repair and maintenance in the condominium unit. The court rejected the view that traditional easement principles did not apply to condominiums, designation made in good faith and not in an arbitrary manner); Markey v. Wolf, 92 Md. App. 137, 163, 607 A.2d 82, 95 (1992) (noting the Court of Appeals’s adoption of a reasonableness standard with respect to the disapproval of building plans).

91. See Harbor View Improvement Ass’n, 270 Md. at 374–76, 311 A.2d at 427–28 (rejecting a neighborhood association’s disapproval of a building plan because the association’s reasons were arbitrary, invalid, or based upon speculative impact to the value of the property).

92. 392 Md. at 378, 897 A.2d at 208.

93. Id. at 384, 897 A.2d at 211.

94. Id. (quoting Ridgely Condo. Ass’n v. Smyrnoudis, 343 Md. 357, 358, 681 A.2d 494, 495 (1996)).

95. Id. at 385–86, 897 A.2d at 213 (citing Ridgely Condo. Ass’n, 343 Md. at 359, 681 A.2d at 495).

96. Id. at 386–87, 897 A.2d at 213.

97. See supra notes 48–53 and accompanying text for a further description of easements and the types of property interests that they create.

98. Garfink, 392 Md. at 387, 897 A.2d at 213–14.
where unit owners have both dominant and servient estates. The majority reasoned that the mutual existence of both benefit and burden on the different estates was permissible and thus, the court found that traditional easement law governed the easement granted to Garfink in her condominium declaration.

After concluding that the traditional law of easement applied, the court next interpreted the language and scope of the easement granted in the declaration. Strictly construing the language of the easement to determine the intent of the parties, the court concluded that the declaration provided condominium unit owners with the ability to perform maintenance and support on elements such as vents and wiring that pass through the exterior walls or common spaces of the unit. The court further found that the intent to provide all unit owners with the ability to maintain such vents was further evidenced by the fact that every other condominium unit had an exterior dryer vent and the respective easement to service that vent without prior approval from the Council.

Furthermore, the court determined, Garfink's only reasonable option to enjoy the easement was to install the exterior dryer vent. The court maintained that an easement allowed its owner to perform such acts that were reasonably necessary to utilize the easement and to make alterations on the servient tenement necessitated by a change of conditions for which the owner is not responsible. The court concluded that the installation of the venting system on the exterior of

99. Id. at 390-91, 897 A.2d at 216. The court recognized Garfink's express easement and dominant estate status as an individual unit owner, and her additional interest in the servient estate as to common elements as a member of the condominium community. Id. The majority expressly rejected the ruling of the Court of Special Appeals that the traditional rule of easements did not apply in this case because there was no traditional set-up of a dominant and servient estate. Id. at 391, 897 A.2d at 216.

100. Id. at 391, 897 A.2d at 216.

101. Id.

102. Id. at 392, 897 A.2d at 216. The court analogized an easement in a condominium document to an easement by deed. Id. at 391, 897 A.2d at 216. As the majority noted, the basic principles of contract interpretation apply to the language of a deed; thus, the grant of an easement by deed is strictly construed. Id. at 392, 897 A.2d at 216; see also supra notes 54-62 and accompanying text.

103. Id. at 393, 897 A.2d at 217.

104. Id. at 394, 897 A.2d at 217-18. The majority observed that the fact that Garfink's vent was installed in the interior of her unit did not change the analysis. Id., 897 A.2d at 218. Cloisters clearly intended that the unit be built to fire code specifications, as the court noted that all forty-seven other units had an exterior vent which did not require the permission of the Council-for repair. Id. at 395-96, 897 A.2d at 219.

105. Id. at 394, 897 A.2d at 218.

106. Id. at 396 n.13, 897 A.2d at 219 n.13 (citing 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 810 (3d ed. 1939)).
the condominium unit was essential for Garfink's unit to comply with the building code, and thus, was reasonable and necessary.\textsuperscript{107}

Although the court granted the easement to Garfink, it limited its holding to situations with similar circumstances—where the original construction was defective, an express easement exists in the condominium documents, and a bylaw exception\textsuperscript{108} permits repair without prior approval of the condominium council.\textsuperscript{109} Finally, the court added that the location of the new dryer exhaust vent was in the most logical location, and thus Garfink reasonably exercised her easement.\textsuperscript{110} The Court of Appeals thereby reversed the Court of Special Appeals, holding that Garfink's actions were a reasonable use of the easement granted in the condominium declaration.\textsuperscript{111}

Judge Wilner, writing for the dissent, started with the oft-quoted phrase: "[H]ard cases make bad law."\textsuperscript{112} Judge Wilner argued that the majority expanded legal principles so as to avoid an unfair result for a litigant.\textsuperscript{113} He contended that the court expanded the easement's scope beyond its plain language, and gave short shrift to the statutorily authorized powers of the condominium council.\textsuperscript{114} As a result, Judge Wilner maintained, the law itself would become "less certain, less reliable, and, in the end, less just."\textsuperscript{115}

Judge Wilner listed three problems with the majority's ruling: (1) the scope expressed by the court was ambiguous, creating uncertainty in the area of law involving condominiums; (2) even if the scope was

\textsuperscript{107} Id. at 397, 897 A.2d at 220. According to the majority, the installation of the new vent was "the functional equivalent of maintenance necessary for the reasonable and safe operation of the dryer"—an easement all unit owners hold without requiring approval of the Council. Id. at 398, 897 A.2d at 220.

\textsuperscript{108} Article IX of the condominium bylaws prohibits a unit owner from altering the exterior of any condominium unit, unless those alterations are for the purposes of maintenance or repair. Id. at 398, 897 A.2d at 220. The court found that the exception for maintenance granted the same exception found in the declaration, which allowed Garfink to make essential repairs (or in this case, installation) to the vent without permission. Id. at 399–400, 897 A.2d at 221.

\textsuperscript{109} Id. at 402, 897 A.2d at 222. The court rejected the Council's claim that allowing an easement in this instance would give a unit owner the unbridled ability to install new systems in areas where they had not previously been installed. Id. at 397, 897 A.2d at 219–20.

\textsuperscript{110} Id. at 403–04, 897 A.2d at 223. The court rejected the Council's alternate locations for the vent, which either violated the building code, required tearing down portions of the unit, or were not substantially different from the place where Garfink decided to install a vent. Id. at 402–03, 897 A.2d at 223.

\textsuperscript{111} Id. at 404, 897 A.2d at 223–24.

\textsuperscript{112} Id., 897 A.2d at 224 (Wilner, J., dissenting). Judges Harrell and Battaglia joined in dissent. Id.

\textsuperscript{113} Id. at 404–05, 897 A.2d at 224.

\textsuperscript{114} Id. at 405, 897 A.2d at 224.

\textsuperscript{115} Id.
not ambiguous, the ruling was so unique to one situation that it violated the principle that certiorari should only be granted to consider issues of public importance; and (3) the court inappropriately engaged in "legal gyrations and gymnastics" to permit Garfink to use her dryer without violating the fire code.\footnote{116} Judge Wilner further explained that these three problems arose as a result of the court's misinterpretation of the condominium declaration, which did not grant an easement to install new vents, but only to provide maintenance and support for those elements that already existed.\footnote{117} Similarly, he also observed that the bylaws only gave the unit owner the ability to maintain and repair existing elements, and required prior approval by the Council to alter the exterior of the unit with a new element.\footnote{118} Thus, Judge Wilner concluded, if the bylaws and declaration were properly read together with section 11-115 of the Real Property Article and in a manner consistent with section 11-124(c),\footnote{119} a unit owner who wants to install a new vent in the exterior of the unit must get approval from the Council.\footnote{120}

The dissent criticized the majority's justification for its exception to the requirement of council approval by making it applicable only to the particular situation forced by Garfink.\footnote{121} Judge Wilner observed that the limits the majority claimed it created for Garfink were not well-defined.\footnote{122} Moreover, Judge Wilner argued, the court could have avoided creating such an ambiguous exception by requiring the parties to negotiate a practical solution.\footnote{123} He reasoned that when a unit owner is required to seek approval from a condominium council before making some alteration to the property, the council must act reasonably and in good faith.\footnote{124} Allowing the parties to reach a reasonable resolution on their own, the dissent concluded, would permit

\begin{itemize}
\item \footnote{116} Id. at 405-06, 897 A.2d at 224-25.
\item \footnote{117} Id. at 407, 897 A.2d at 225.
\item \footnote{118} Id. at 407-08, 897 A.2d at 226.
\item \footnote{119} See supra note 46.
\item \footnote{120} Garfink, 392 Md. at 406-08, 897 A.2d at 225-26 (Wilner, J., dissenting).
\item \footnote{121} Id. at 408-09, 897 A.2d at 226. By extending the language of condominium documents to include creation of new vents, the dissent asserted that the court created a loophole that destroys the requirement of council approval. \textit{Id.}, 897 A.2d at 226.
\item \footnote{122} Id. at 409, 897 A.2d at 226. The dissent posed a number of questions that suggested the majority's holding was not so limited—criticizing the malleable term "construction defects," wondering what language would be sufficient for an express easement, and pondering the extent to which "maintenance and repair" is broadened to encompass the installation of other new elements. \textit{Id.}, 897 A.2d at 226-27.
\item \footnote{123} Id. at 410, 897 A.2d at 227.
\item \footnote{124} Id. Judge Wilner noted that a good faith standard would avoid any problems with the Council rejecting, in an arbitrary or capricious manner, Garfink's plans for placement of the new dryer vent. \textit{Id.}.
\end{itemize}
Garfink to dry her clothes in conformity with the fire code without distorting the law or abrogating the statutory authority of the condominium council.

IV. Analysis

In *Garfink v. Cloisters at Charles, Inc.*, the Court of Appeals held that an easement contained in a condominium's declaration and by-laws allowed a unit owner to install an exterior dryer vent without prior approval from a condominium council. In so holding, however, the court failed to properly interpret the language of the easement according to principles of contract interpretation. Instead of expanding easement interpretation principles, the court should have followed the plain, ordinary language of the declaration, which allows for exterior modifications of a unit solely for repair. Had the court done so, it would not have restricted the ability of the Council to promote the ideal of communal living. A just and fair result to both parties could have been achieved by requiring a unit owner to propose a location for the exterior vent to the Council, subject to the Council's reasonable, good faith approval. Following this approach would maintain both safety for unit owners and the necessity for an authoritative council in a communal living context.

A. The Court's Departure from Traditional Contract Interpretation Principles Improperly Expanded the Easement Granted in the Condominium Declaration

The *Garfink* court's attempt to interpret the language and scope of the rules and regulations that govern the condominium regime impermissibly broadened the scope of the easement in the condominium declaration. All unit owners agree, as a condition of purchase of a unit, to be bound by the rules governing the administration, maintenance, and use of the property. One such regulation in *Garfink* was the condominium declaration, which granted an easement to unit owners in the exterior of the unit for the purpose of providing maintenance, support, and repair to the ducts and vents of the unit.

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125. *Id.* at 405, 411, 897 A.2d at 224, 228.
126. *Id.* at 378, 897 A.2d at 208 (majority opinion).
127. *See infra* Part IV.A.
128. *See infra* Part IV.A.
129. *See infra* Part IV.B.
130. *See infra* Part IV.C.
131. *See infra* Part IV.C.
132. *See supra* note 36 and accompanying text.
133. *Garfink*, 392 Md. at 390, 897 A.2d at 215.
The majority's interpretation of the declaration's language gave a unit owner the right to install a new vent to replace a defective one, without seeking the approval of the Council.¹³⁴

Rather than liberally construing the terms in the declaration, the Garfink court should have adhered to the accepted principle that easements are interpreted using the plain language doctrine.¹³⁵ This doctrine allows the court to determine what a reasonable person in the position of the parties would have intended the easement to grant, using the ordinary meanings of the declaration's terms.¹³⁶ Here, the plain language of the condominium declaration stated that each unit owner shall have "an easement in the common elements for the purposes of providing maintenance, support, repair or service for such unit to and for the ducts, pipes, conduits, vents, plumbing, wiring and other utility services to the unit."¹³⁷ As Judge Wilner observed in dissent, a plain reading of the declaration allows for maintenance and repair of already existing ducts and vents, but not for installation of an entirely new vent on the exterior of the unit.¹³⁸

The majority in Garfink went beyond the terms of the declaration in granting an easement for the installation of a new dryer vent.¹³⁹ In so doing, the Garfink court gave effect to what the individual unit owner believed the declaration provided.¹⁴⁰ Maryland courts, however, do not consider what the individual unit owner thought the easement granted.¹⁴¹ Garfink's belief that the easement for repair of ducts and vents allowed for installation of an entirely new vent was essentially irrelevant. Rather than applying the established principles of objective contract interpretation, the court let Garfink's view of the declaration dictate and expand the meaning of the terms solely to grant Garfink an exception.

Instead, the court should have used the plain language doctrine to determine what a reasonable person in the position of the parties would have intended the terms of the easement to grant, and not given effect to what the parties themselves thought the easement

¹³⁴. Id. at 394, 897 A.2d at 217–18.
¹³⁵. See supra notes 54–62 and accompanying text.
¹³⁶. See supra note 58 and accompanying text. For examples of how the Court of Appeals has utilized the plain language doctrine in other contexts, see supra note 59.
¹³⁷. Garfink, 392 Md. at 397, 897 A.2d at 213–14 (emphasis omitted).
¹³⁸. Id. at 407, 897 A.2d at 225 (Wilner, J., dissenting).
¹³⁹. Id.
¹⁴⁰. That Garfink neither sought nor obtained approval from the Council before installing the vent suggests that she believed she was well within her rights to install the vent in a location of her choice. See supra notes 19–20 and accompanying text.
¹⁴¹. See supra note 60 and accompanying text.
granted.\textsuperscript{142} Had the court properly used the traditional plain and
ordinary language standard for interpretation of the easement, it would
have found that the declaration did not allow for new alterations to
the exterior without approval of the Council.\textsuperscript{143} Furthermore, with
limited exceptions, Article IX of the bylaws prohibits unit owners from
altering the exterior of the unit or the common areas in any manner
without prior approval of the Council.\textsuperscript{144} Thus, a plain reading of
both the bylaws and declaration establishes that a unit owner is pre-
vented from installing any new vent that would alter the outside
appearance of the unit without prior approval from the Council.\textsuperscript{145}

As required by section 11-124(c) of the Real Property Article,
courts must also interpret the bylaws and declaration alongside sec-
tion 11-115.\textsuperscript{146} All of these provisions state that a unit owner does not
have the authority to make alterations to the exterior of the unit with-
out condominium council approval.\textsuperscript{147} Taken together, all three pro-
visions should be deemed to read that a unit owner lacks the authority
to install a new dryer vent that will alter the outside appearance of the
unit without first gaining approval from the council of unit owners.
Thus, Garfink did not have the authority to install a new vent on the
exterior of the unit without the Council’s approval.

\subsection*{B. Requiring Council Approval for Exterior Modifications Upholds the
Core Values of Condominium Communal Living}

In Garfink, the majority’s expansion of the term “repair” allowed
it to conclude that the declaration and bylaws operated in harmony,
permitting a unit owner to alter the exterior of the unit without prior
approval of the Council.\textsuperscript{148} However, the majority incorrectly inter-
preted the word repair to encompass the installation of an entirely
new vent rather than maintenance of an existing one.\textsuperscript{149} If the court
instead followed the plain language doctrine and read the pertinent

\textsuperscript{142} See supra notes 55, 60.

\textsuperscript{143} Garfink, 392 Md. at 407, 897 A.2d at 225 (Wilner, J., dissenting). The declaration
only allowed for repair or maintenance of a pre-existing vent. \textit{Id.}

\textsuperscript{144} \textit{Id.}, 897 A.2d at 226.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} See supra note 46.

\textsuperscript{147} See supra note 43 and accompanying text. Subject to the bylaws and declaration,
section 11-115 forbids modifications to the exterior of a unit without condominium coun-

\textsuperscript{148} Garfink, 392 Md. at 401, 897 A.2d at 222. Because section 11-115 of the Real Prop-
erty Article is made subject to the provisions of the declaration or bylaws, these two provi-
sions are controlling over the statute, which does not permit modifications to the exterior
of the unit without prior approval. \textit{Id.}

\textsuperscript{149} See supra notes 137, 143 and accompanying text.
portions of the bylaws with the easement contained in the declaration and section 11-115, it is evident that a unit owner who wanted to install a new vent in the exterior of the unit must get approval from the Council. All of these documents contain similar requirements for condominium council approval—a significant fact which demonstrates that not only is the requirement common in condominium regimes, but also that council approval has a salutary purpose. Mandating council approval ensures that the rights of individuals will not be expanded at the expense of the common interests of those living in the condominium community.

Garfink’s situation is a clear example of the dangers that can arise when individuals are allowed to pursue their own objectives and do with their property as they please. Most individuals correctly ascribe to the belief that they can do what they want with their property. But in a communal living context, an individual cannot have unfettered rights to modify their property, as it may result in harm to other unit owners. In this instance, the location that Garfink chose to install her new dryer vent caused a problem for her immediate neighbor—a problem which the two could not amicably resolve. Had Garfink instead sought the approval of the Council, this dispute—and this litigation—potentially could have been avoided. Because the Council must balance the interests of all individuals in the condominium regime, it would have likely considered a plan for placement of the new vent that did not interfere with the use or enjoyment of the

150. Garfink, 392 Md. at 407-08, 897 A.2d at 226 (Wilner, J., dissenting).
151. See supra note 65 and accompanying text (noting that a number of other states have statutory provisions prohibiting unit owners from altering the exterior of the unit or modifying any of the common elements of the complex).
152. Garfink, 392 Md. at 408, 897 A.2d at 226 (Wilner, J., dissenting).
153. "The close, intimate nature of condominium living is such that 'individual[s] ought not be permitted to disrupt the integrity of the common scheme' by doing what they want with their property." David E. Grassmick, Note, Minding the Neighbor's Business: Just How Far Can Condominium Owners' Associations Go In Deciding Who Can Move into the Building?, 2002 U. ILL. L. Rev. 185, 186 (quoting Sterling Vill. Condo., Inc. v. Breitenbach, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971)). In fact, these rules are often an enticement for potential condominium unit owners. Id.
154. See Sterling Vill. Condo., 251 So. 2d at 688 (stating that "[e]very man may justly consider his home his castle and himself as the king thereof").
155. See supra notes 38-39 and accompanying text (noting that individuals in a condominium regime live in close proximity to each other and often share common areas).
156. See supra note 20 and accompanying text (detailing the dispute between Garfink and her neighbor over the location of her new vent, which discharged near the neighbor's front door).
property of any other unit owner.\textsuperscript{157} Accordingly, Council approval would have ensured that Garfink’s pursuit of her individual rights to dry her clothes safely and in accordance with building codes did not infringe upon her neighbor’s right to enjoy his or her property.

The underlying dispute in \textit{Garfink} thus gives credence to the claim that condominium council approval best serves all of the interests at stake in a condominium regime.\textsuperscript{158} A condominium complex typically involves multiple parties with property interests in the regime.\textsuperscript{159} As a result of the number of parties involved, section 11-109(d) of the Real Property Article authorizes the council of unit owners to ensure that the property is properly maintained.\textsuperscript{160} Unit owners forfeit their rights to the council’s authority to ensure fair consideration of the rights and privileges of all owners, and to sustain a harmonious residential atmosphere.\textsuperscript{161} Thus, even a limited restriction of a council’s ability to govern the condominium regime threatens to harm the welfare of all unit owners.\textsuperscript{162}

The \textit{Garfink} court’s exception to the usual pre-approval process by the condominium council compromises the council’s ability to govern the welfare of the condominium complex and the unit owners living there.\textsuperscript{163} And by expanding the scope of the easement, the court welcomes other individual challenges to the rules and regulations created by the council in promotion of common order, includ-

\textsuperscript{157} See supra note 39 and accompanying text (noting that the rights and considerations of all unit owners must be given effect in a condominium regime so as to promote a harmonious living atmosphere).

\textsuperscript{158} See, e.g., Marvin J. Nodiff, Decision-Making in the Community Association: Do the Old Rules Still Apply?, J. Mo. B., Jan.-Feb. 1996, at 141, 141. ("[T]he overall objective of the association is to protect property values through preservation of an attractive, uniform appearance. . . . [T]he enforcement of architectural control or design review . . . ensure[s] aesthetic adherence to the original development scheme and enforcement of restrictions to guard against uses that would devalue property."); Frank Bentayou, Common Ground Community Associations Work Like Small Democracies to Keep Homeowners Happy, CLEV. Plain Dealer, July 27, 2003, at E1 (noting a real estate attorney’s belief “that a well-informed and hard-working community association board—along with an effective set of rules—is key to the success of a condo or planned community”).

\textsuperscript{159} Andrews v. City of Greenbelt, 293 Md. 69, 73, 441 A.2d 1064, 1068 (1982).

\textsuperscript{160} MD. CODE ANN., REAL PROP. § 11-109 (LexisNexis 2006).

\textsuperscript{161} See supra note 36 and accompanying text.

\textsuperscript{162} See, e.g., Andree Brooks, Fining the Rule Breakers, N.Y. Times, Sept. 11, 1994, at A5 (criticizing court decisions prohibiting condominium councils from imposing fines on unit owners who break the rules because it undercuts a condominium council’s ability to make its community a valued investment and a pleasant place to live).

\textsuperscript{163} Reducing the authority of the condominium council will likely result in less consideration of the interests of all unit owners living in the regime. See supra note 73 and accompanying text.
ing the ability to modify the exterior of a unit.\textsuperscript{164} If the court was willing to grant an exception for Garfink, other unit owners who wish to challenge a condominium council’s authority may come forward in hopes that the court will grant an exception for them as well.\textsuperscript{165} Had the court instead ruled in favor of the Council, the court would have limited individual unit owners’ ability to challenge regulations by maintaining a consistent standard in condominium law without allowing for exceptions.\textsuperscript{166} Unit owners could then only challenge the condominium council in cases where they have a legitimate claim that a condominium council has overstepped its authority.\textsuperscript{167} Thus, the \textit{Garfink} court’s decision to grant an exception restricts condominium councils’ ability to regulate all of the property interests involved in a condominium regime and maintain common order, free from threats of litigation.

\textbf{C. Requiring Condominium Council Approval Would Better Achieve a Just Result for Unit Owners and Condominium Councils}

The court in \textit{Garfink} properly recognized that Garfink had an important interest in installing the new vent—to ensure that her unit met building code standards and that her dryer functioned in a safe manner.\textsuperscript{168} The majority preserved this interest, however, at the expense of the condominium council.\textsuperscript{169} Instead of granting the easement to Garfink, the court could have required that the parties negotiate a location for the new vent.\textsuperscript{170} Furthermore, imposing the

\textsuperscript{164} As the dissent mentions, the majority’s decision may mean that the court is willing to grant easements that are deviations from the precise language of the conveyance, or it also could mean that in the interest of “maintenance” and “repair,” a unit owner may freely make new modifications to the exterior wall without approval. \textit{Garfink}, 392 Md. at 409, 897 A.2d at 226–27 (Wilner, J., dissenting). The ambiguous scope of the majority’s decision may therefore result in more litigation that tests the boundaries of the decision in \textit{Garfink}. \textit{Id.} at 405, 897 A.2d at 224.

\textsuperscript{165} \textit{See id.} at 405, 897 A.2d at 224 (noting that the majority pays “less even than lip service” to the important function of condominium councils to control the maintenance and administration of the common elements and building exterior).

\textsuperscript{166} \textit{See id.} (arguing that the exception for Garfink will create extensive uncertainty in the law and “will likely generate a good bit of litigation” in the context of residential condominiums).

\textsuperscript{167} Unit owners will present such a challenge when they believe a council is acting unreasonably or beyond the scope of its authority. \textit{See supra} note 78 and accompanying text.

\textsuperscript{168} \textit{See Garfink}, 392 Md. at 397, 897 A.2d at 220.

\textsuperscript{169} \textit{Id.} at 405, 897 A.2d at 224 (Wilner, J., dissenting).

\textsuperscript{170} \textit{Id.} at 409–10, 897 A.2d at 227. The majority, however, insisted that this option had already been attempted, and failed, as none of the solutions proposed by the Council were acceptable. \textit{Id.} at 402–03, 897 A.2d at 223 (majority opinion). However, the majority also failed to consider the reasonable rejection plan that the dissent urged would require the
commonly held principle that an approving body must act reasonably and in good faith would ensure that the Council would not reject Garfink's plan arbitrarily.\textsuperscript{171}

Although the condominium council is infused with the power to regulate modifications to the common elements and exterior of the units through statute and condominium documents, it must exercise this power reasonably.\textsuperscript{172} Despite the fact that the Maryland Condominium Act and the declaration and bylaws of the condominium required council approval, the council may still not reject a unit owner's plan in an arbitrary or capricious manner.\textsuperscript{173} Giving the Council its proper authority would only have permitted it to reject Garfink's plan for a valid reason.\textsuperscript{174}

If a council was to reject a unit owner's plan for modification of a common element or exterior of the unit, and the unit owner believed this rejection was unreasonable, he or she could potentially have a valid claim in court.\textsuperscript{175} In the event that the parties are not able to reach an agreement, a reviewing court could assess the reasonableness of each party's position about the location for the new dryer vent.\textsuperscript{176} The court would have to closely scrutinize any rejection by the condominium council, because disapproval may restrain the free use and alienability of the land.\textsuperscript{177} If disapproval of a plan was unreasonable and made in bad faith, the court would have the ability to overturn the decision of the council.\textsuperscript{178}

Applying a good faith standard to a council's rejection preserves the interest of the individual unit owner, while at the same time recognizes the authority of the condominium council. If the court had applied a good faith standard for council approval in this case, Garfink

\textsuperscript{171} Council's reasonable and good faith consideration of Garfink's proposal. \textit{Id.} at 410, 897 A.2d at 227 (Wilner, J., dissenting).
\textsuperscript{172} See \textit{supra} Part II.D.1.
\textsuperscript{173} See \textit{supra} Part II.D.2.
\textsuperscript{174} A proper application of a reasonableness standard to the facts of this case would allow, for example, the Council to reject the placement of an exterior vent by Garfink if this placement would have a concrete impact on the value of the property. See \textit{supra} note 91 and accompanying text.
\textsuperscript{175} See \textit{supra} notes 78–80, 91 and accompanying text (discussing cases where the Court of Appeals has upheld or reversed the decision of a ruling board's rejection of plans to modify an element of a property regime).
\textsuperscript{176} Garfink, 392 Md. at 411, 897 A.2d at 228 (Wilner, J., dissenting).
\textsuperscript{177} \textit{Id.} at 410, 897 A.2d at 227 (Wilner, J., dissenting).
\textsuperscript{178} See Harbor View Improvement Ass'n v. Downey, 270 Md. 365, 374–76, 311 A.2d 422, 427–28 (1973) (affirming a trial court's rejection of a council's disapproval of a unit owner's building plan because the council's decision was based on speculation and animus towards the unit owner).
would have still been able to install a new vent in the interest of her own safety, and the Council would have maintained a necessary degree of authority over the exterior and common elements of the condominium regime. Application of a good faith standard would have served both parties' interests in the condominium regime.

V. CONCLUSION

In *Garfink v. Cloisters at Charles, Inc.*, the Court of Appeals improperly interpreted the language of the easement granted in the condominium declaration to give a condominium unit owner the right to install a new dryer vent without prior approval of the Council. The court should have applied the plain language doctrine of contract interpretation, and construed the declaration, bylaws, and pertinent statutes together to find that the Council's approval was necessary.

Though granting the easement achieved a safe means for Garfink to dry her clothes, the *Garfink* decision has far-reaching and deleterious effects on the ability of condominium councils to ensure that the rights of all individuals in the complex are fairly considered. Proper interpretation of the plain language would give condominium councils greater protection from challenges from individual unit owners, and maintain the core values of communal living that are an essential part of the condominium regime. The *Garfink* court's decision inappropriately elevated a unit owner's individual interests over the communal values inherent in the condominium regime.

Gina Fenice

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179. *Garfink*, 392 Md. at 405, 411, 897 A.2d at 224, 228 (Wilner, J., dissenting).

180. See supra Part IV.A.

181. See supra Part IV.A.

182. See supra Part IV.B.

183. See supra Part IV.B.

184. See supra Part IV.C.
STANSBURY v. MDR DEVELOPMENT, L.L.C.: A UTILITARIAN APPROACH TO THE DOCTRINE OF IMPLIED EASEMENTS BY NECESSITY

In Stansbury v. MDR Development, L.L.C., the Court of Appeals of Maryland considered whether an implied easement by necessity existed to benefit a portion of property that was accessible by navigable waters where the remainder of the property was occupied and accessible by a public roadway. The court held that an implied easement by necessity existed because access by navigable waters was not a reasonable gateway to the property. This determination was proper because all of the requirements for an easement by necessity were met. Furthermore, the utilitarian theory supports this decision in particular and greater flexibility in the application of the doctrine of implied easements by necessity in general. The utilitarian theory, unlike other theories of property law, allows courts to apply the doctrine with more flexibility by considering not only the property owner’s right to exclude others from the property, but also the benefit to society for property to be fully utilized.

Applying this broader approach, the court properly rejected the circuit court’s balancing approach because it would add confusion to the case law. However, the court should have discussed in greater detail the reasoning behind its disapproval of the circuit court’s balancing approach. By failing to do so, the Stansbury court left lower courts with little guidance as to whether there are any circumstances when a balancing approach would be appropriate, or whether the method is foreclosed with respect to the doctrine of implied easements.

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2. Id. at 480, 889 A.2d at 406.
3. Id.
4. See infra Part IV.A.
5. See infra Part IV.B.
6. See infra Part IV.B.
7. See infra Part IV.C.
8. See infra Part IV.C. The Stansbury court devoted only one footnote in its decision to the trial court’s balancing approach. Stansbury, 390 Md. at 479–80 n.1, 889 A.2d at 405 n.1.
9. See infra Part IV.C.
I. The Case

In 1936, James Edward Stansbury purchased adjoining Lots 178, 179, 9A, and 10A on the Chesapeake Bay in Maryland. Approximately twenty years later, Mr. Stansbury dredged a channel between the four lots in order to access the Chesapeake Bay via Pleasant Lake. He also constructed a footbridge over the channel between lots 9A and 178 in order to access Lot 179, which adjoined Lot 178.

Mr. Stansbury died in 1977 and left the property to his wife, Laura Stansbury, and his two children, Nancy R. Stansbury and James Elijah Stansbury. Approximately ten years later, Laura Stansbury transferred her share in the property to her children, so that Nancy Stansbury owned Lots 179 and 9A and James Stansbury owned Lots 178 and 10A. In 1995, however, James Stansbury defaulted on a mortgage, which resulted in the foreclosure of Lots 178 and 10A.

David and Charlotte Caldwell and James and Margaret Thrift (the Caldwells) purchased the lots at a foreclosure sale and thereafter consolidated the properties into one lot.

Since Lot 10A was surrounded on three sides by water, the Caldwells wanted to use the footbridge from the adjoining lot to access their lot. Nancy Stansbury, however, denied permission. Consequently, the Caldwells proposed building a new footbridge directly connecting Lot 10A to Lot 178. Ms. Stansbury once again rejected this proposal because the footbridge would negatively impact her property running underneath the channel.

In response to Ms. Stansbury’s opposition to the new bridge, the Caldwells filed a complaint in the Circuit Court for Anne Arundel County for an implied easement by necessity across part of Lot 9A in order to access Lot 10A. After the initiation of the action, MDR De-

10. Stansbury, 390 Md. at 481–82, 889 A.2d at 406–07. Lots 10A and 179 “shared a common lot line, as [did] lots 178 and 9a.” Id. at 481, 889 A.2d at 407.

11. Id. at 481–82, 889 A.2d at 407. The channel covered the common lot lines. Id. at 481, 889 A.2d at 407.

12. Id. at 482, 889 A.2d at 407.

13. Id.

14. Id. at 482–83, 889 A.2d at 407. The Stansbury children divided the lots amongst themselves after they became joint owners of all four of the lots. Id.

15. Id. at 483, 889 A.2d at 407.

16. Id. at 483–84, 889 A.2d at 407–08.

17. Id. at 483, 889 A.2d at 408. The adjoining lot was 9A, which Ms. Stansbury owned. Id.

18. Id.

19. Id. at 484, 889 A.2d at 408.

20. Id.

21. Id.
velopment, L.L.C. (MDR) purchased the lots from the Caldwells, and the court substituted MDR as the plaintiff. The circuit court determined that neither a quasi easement nor an easement by necessity existed over Ms. Stansbury's property. The court denied the existence of a quasi easement because the old footbridge had not provided access between Lots 178 and 10A while unity of title was present. Moreover, the court found that there was no implied easement by necessity because the proposed footbridge would provide access to Lot 10A without entering onto Ms. Stansbury's property. The circuit court, however, allowed MDR to build the new footbridge after balancing the parties' interests and determining that the construction of the footbridge benefited MDR more than it injured Ms. Stansbury.

Both Ms. Stansbury and MDR appealed the circuit court's decision. The Court of Special Appeals vacated the judgment of the circuit court, holding that, because Lot 10A was only accessible by a small boat or crossing the channel by foot at low tide, an easement by necessity existed.

In response, Ms. Stansbury petitioned for a writ of certiorari to the Court of Appeals, and MDR filed a conditional cross-petition. The Court of Appeals granted certiorari to determine (1) whether an easement by necessity existed to provide access to a part of MDR's property when the remaining property was occupied and could be reached by a road; and (2) whether an easement by necessity existed for a part of MDR's property when that portion was accessible by navigable water.

22. Id.
24. Id. at 612, 871 A.2d at 622.
25. Id. at 616, 871 A.2d at 625.
26. Id. In reviewing the parties' interests, the circuit court evaluated: (1) MDR's right to build a footbridge to connect its properties; (2) Ms. Stansbury's right to thwart interference with a portion of her property that is submerged beneath the channel; and (3) public interest in using the channel for fishing and navigation. Id. at 609, 871 A.2d at 621.
27. Id. at 598, 871 A.2d at 614.
28. Stansbury, 390 Md. at 479–80, 889 A.2d at 405.
29. Stansbury, 161 Md. App. at 617, 871 A.2d at 625. The court also maintained that the easement had not terminated simply because Ms. Stansbury's brother did not use it. Id., 871 A.2d at 626.
30. Stansbury, 390 Md. at 480, 889 A.2d at 405–06.
31. Id., 889 A.2d at 406.
II. LEGAL BACKGROUND

The doctrine of easement by necessity is rooted in English common law.32 Over time, however, the doctrine has evolved to address concerns that are unique to American society.33 Particularly, Maryland courts have relaxed the rigid standard once applied by the English courts.34 At the same time, public policy concerns regarding the full utilization of land have become much more central to the doctrine.35 This evolution to a more flexible doctrine of easement by necessity is mirrored in a number of other jurisdictions in the United States.36

A. The Transplantation of the Easement by Necessity into the American Judicial System

American common law rights are derived primarily from English common law.37 Under Article 5 of the Maryland Declaration of Rights, Maryland citizens are entitled to the benefit of the English common and statutory law as it existed on July 4, 1776.38 Accordingly, Maryland courts have recognized the precedential value of English common law cases and relied upon them, especially in areas of law where a strong body of Maryland case law is lacking.39 The doctrine of easement by necessity is no exception; early Maryland cases often looked to English precedent for guidance.40

The doctrine of easements had its origins in English common law,41 with Maryland courts recognizing the doctrine as early as 1855.42 Maryland courts define easements as "nonpossessory interest[s] in the real property of another" which arise "through express

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32. See infra Part II.A.
33. See infra Part II.A.
34. See infra Part II.B.
35. See infra Part II.B.
36. See infra Part II.C.
38. MD. CONST. DECL. OF RTS. art. 5(a).
39. See Mitchell v. Seipel, 53 Md. 251, 264–70 (1880) (discussing the development of the doctrine of easement by necessity in English case law to decide the case at bar); McTavish v. Carroll, 7 Md. 352, 360–65 (1855) (same).
40. See, e.g., Mitchell, 53 Md. at 264–70 (devoting much of the opinion to a review of the contemporary English law on implied easements by necessity); McTavish, 7 Md. at 360–65 (relying in part on English precedent to conclude that an implied easement can exist where there is a legal necessity).
41. Gillies v. Orienta Beach Club, 289 N.Y.S. 733, 735 (Sup. Ct. 1935).
42. See McTavish, 7 Md. at 364–65 (recognizing an implied easement by necessity).
One type of implied easement is an easement by necessity. In 1880, the Court of Appeals in Mitchell v. Seipel summarized the English law pertaining to easements by necessity. According to Mitchell, an easement exists if: (1) it is continuous or apparent; (2) necessary for the reasonable enjoyment of the property; and (3) the necessity arose prior to the grant of the property and continues to exist. The court noted that, at the time, other American jurisdictions adhered to the same requirements. The first and third requirements were fairly straightforward for courts to apply. However, the second requirement of necessity was more problematic because different interpretations could be assigned to the word.

During the nineteenth century, the English common law's strict view of the necessity requirement heavily influenced Maryland courts. For example, in McTavish v. Carroll one of Maryland's first cases addressing the doctrine of implied easement by necessity, the Court of Appeals relied primarily upon English precedent. While the McTavish court referred to American case law as well, the court's reasoning was structured by the English requirements for finding an easement by necessity. Accordingly, McTavish and other Maryland courts required a showing of absolute necessity, not mere inconvenience. As the Court of Appeals noted in Burns v. Gallagher, this stringent standard accomplishes the doctrine's purpose of effectuating the intent of the parties. Therefore, according to Burns, without an express grant of an easement, the only way to discern the intent of

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44. Id.
45. 53 Md. 251 (1880).
46. Id. at 264-70.
47. Id. at 269.
48. Id. at 270.
49. See, e.g., McTavish v. Carroll, 7 Md. 352, 358-67 (1855) (mentioning in passing the requirements for an easement by necessity, but discussing the necessity prong in detail).
50. For detailed discussions of the necessity requirement see Jay v. Michael, 92 Md. 198, 208-12, 48 A. 61, 63-64 (1900); Mitchell, 53 Md. at 272-76; McTavish, 7 Md. at 358-67.
51. See, e.g., Burns v. Gallagher, 62 Md. 462, 472 (1884) (following the English rule requiring that the necessity be absolute).
52. 7 Md. 352 (1855).
53. Id. at 360.
54. Id.
55. Jay, 92 Md. at 210, 48 A. at 63; Burns, 62 Md. at 472; McTavish, 7 Md. at 367.
56. 62 Md. 462 (1884).
57. Id. at 472.
the parties with any certainty is to require a showing of strict necessity.\textsuperscript{58}

B. The Relaxation of the Doctrine of Implied Easement by Necessity in Maryland

Beginning in the later nineteenth century and continuing into the twentieth and twenty-first centuries, the doctrine of implied easements by necessity evolved in Maryland to become more flexible.\textsuperscript{59} In part, this evolution grew out of the distinction between implied grants of easements by necessity and implied reservations of easements by necessity.\textsuperscript{60} An implied grant of an easement by necessity occurs when a grantor conveys inaccessible property to another.\textsuperscript{61} On the other hand, an implied reservation of an easement by necessity is when the grantor retains landlocked property.\textsuperscript{62}

Maryland courts have distinguished between these two types of implied easements in terms of the degree of necessity needed to satisfy them.\textsuperscript{63} Much stricter necessity, known as absolute necessity, is required for implied reservations,\textsuperscript{64} while reasonable necessity is required for implied grants.\textsuperscript{65} The reason for the distinction is that, in the case of an implied grant, the grantor can exert control over the terms of the grant and hence cannot derogate from it.\textsuperscript{66} Therefore, Maryland courts presume that, where the reservation of an easement is not explicit in the grant, the two parties intended not to reserve an easement.\textsuperscript{67} This presumption can be overcome by strict necessity, because it would be unreasonable to presume that the parties intended for the transaction to leave the grantor landlocked.\textsuperscript{68}

\textsuperscript{58} Id.
\textsuperscript{59} See Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964) (resting much of its decision on the modern view that necessity may exist where property is bordered by navigable water); Condry v. Laurie, 184 Md. 317, 322, 41 A.2d 66, 68 (1945) (considering the cost of establishing another access route to the property in determining whether necessity existed).
\textsuperscript{61} Dalton v. Real Estate & Improvement Co., 201 Md. 34, 47, 92 A.2d 585, 591 (1952).
\textsuperscript{62} Id.
\textsuperscript{63} Shpak, 280 Md. at 360–61, 373 A.2d at 1238.
\textsuperscript{64} Id. at 361, 373 A.2d at 1238 (describing the required necessity as "imperative and absolute").
\textsuperscript{65} Greenwalt v. McCardell, 178 Md. 132, 138, 12 A.2d 522, 525 (1940).
\textsuperscript{66} Dalton, 201 Md. at 47, 92 A.2d at 591.
\textsuperscript{67} Slear v. Jankiewicz, 189 Md. 18, 23–24, 54 A.2d 137, 139 (1947) (quoting Burns v. Gallagher, 62 Md. 462, 471–72 (1884)).
\textsuperscript{68} Id.
The *Mitchell* case, decided in the late nineteenth century, best explains this distinction.⁶⁹ In *Mitchell*, the Court of Appeals considered whether a property owner had an implied reservation in an alley that ran between two houses.⁷⁰ The court determined that there was no implied reservation because the necessity was not absolute.⁷¹ Specifically, the *Mitchell* court observed, there were other means to access the premises and the alley was merely a more convenient access route.⁷² In reaching its decision, the court rejected a reasonable necessity standard on the basis that this standard applies only to implied grants, not implied reservations.⁷³ Furthermore, the *Mitchell* court noted that, at the time of its decision, there was only one decision by an American court of last resort that granted an easement by necessity in an implied reservation case.⁷⁴

The distinction between implied reservations and implied grants has endured in Maryland into the twenty-first century. As recently as 2003, the Court of Appeals recognized the distinction and its importance in *Calvert Joint Venture #140 v. Snider*.⁷⁵ In *Calvert*, the court held that an owner of mineral rights did not have an implied reservation of an easement by necessity in the surface because the minerals could potentially be accessed from the owner’s adjoining property.⁷⁶ Thus, the *Calvert* court found no absolute necessity existed to warrant an implied reservation.⁷⁷

Another way that the doctrine of easement by necessity has evolved is in the leniency with which the Maryland courts have applied some of the doctrine’s requirements. Although courts today still require that each element be met, courts are not as strict about analyzing every element.⁷⁸ For example, cases merely will mention in passing the requirement that the easement be continuous or apparent.⁷⁹ In *Hancock v. Henderson*,⁸⁰ the court determined that an ease-

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⁷⁰. *Id.* at 262–63.
⁷¹. *Id.* at 275.
⁷². *Id.*
⁷³. *Id.* at 264.
⁷⁴. *Id.* at 271.
⁷⁵. 373 Md. 18, 816 A.2d 854 (2003).
⁷⁶. *Id.* at 61, 816 A.2d at 879.
⁷⁷. *Id.*
⁷⁸. See *id.* at 47–62, 816 A.2d at 870–79 (focusing much of its discussion on the necessity requirement and assuming that the other requirements are met); *Hancock v. Henderson*, 236 Md. 98, 102–05, 202 A.2d 599, 601–03 (1964) (primarily discussing the necessity requirement).
⁷⁹. See, e.g., *Condry v. Laurie*, 184 Md. 317, 321, 41 A.2d 66, 68 (1945) (discussing the necessity and original unity of title requirements but only briefly mentioning the continuous or apparent requirements).
ment by necessity existed where the owner's property was bordered by a creek on one side and properties owned by the opposing party and others on the remaining sides. The Hancock court focused primarily on whether the necessity requirement was met and did not state that the easement had to meet the continuous or apparent requirement as well.

Similarly, in Shpak v. Oletsky, the court devoted much of its discussion to whether or not the necessity requirement was fulfilled. The court made only passing mention of the requirement that the easement be continuous or apparent. Thus, Maryland courts have become much less mechanical in applying the doctrine of easement by necessity, focusing solely on the elements that are in dispute.

The doctrine of easement by necessity has further relaxed due to a shift in the underlying public policy justifications. When the Maryland courts first adopted the doctrine, the main purpose was to give effect to the intent of the parties. To determine the parties' intent, courts primarily looked to the deed to see whether the parties meant to create an easement. If the deed was silent, courts inferred that the intent of the parties was not to reserve an easement. Therefore, in order to overcome the presumption that the parties would have included an explicit easement in the grant if they so intended, courts in early cases required a showing of strict necessity.

Modern case law focuses less on the intent of the parties, and instead emphasizes society's interest in the full utilization of land.

81. Id. at 100, 202 A.2d at 600.
82. Id. at 102, 202 A.2d at 601.
84. See id. at 370-71, 373 A.2d at 1243 (holding that since necessity did not exist at the time of severance, there was no implied easement by necessity).
85. Id. at 360, 373 A.2d at 1238.
86. See supra notes 33-34 and accompanying text (discussing the evolution of the doctrine from the rigid English standard to a more flexible one).
87. See, e.g., Burns v. Gallagher, 62 Md. 462, 472 (1884) (explaining that strict necessity was required to effectuate the intent of the parties).
88. E.g., Oliver v. Hook, 47 Md. 301, 308 (1877).
89. E.g., Burns, 62 Md. at 471-72.
90. Shpak, 280 Md. at 365, 373 A.2d at 1240.
91. E.g., Burns, 62 Md. at 471-72.
92. See Hancock v. Henderson, 226 Md. 98, 103-04, 202 A.2d 599, 602 (1964) (discussing and embracing the modern view that an easement by necessity may exist where water access is available but not suitable to put the property to its reasonable use, and also noting the public interest in full utilization of land); Condry v. Laurie, 184 Md. 317, 321, 41 A.2d
Thus, not surprisingly, Maryland cases have trended away from a requirement of strict necessity to a requirement of reasonable necessity.\textsuperscript{93} Reasonable necessity is a more flexible standard since courts consider such variables as the cost of obtaining another way of access\textsuperscript{94} and modern notions of reasonableness.\textsuperscript{95}

Over the years, Maryland courts have adjusted the definition of "reasonable," giving weight to modern trends.\textsuperscript{96} One of the clearest examples is judicial treatment of navigable water in determining whether the necessity requirement is met. In Woelfel v. Tyng\textsuperscript{97} the Court of Appeals held that access to property by navigable water is not so burdensome as to require an easement by necessity.\textsuperscript{98} However, just four years later in Hancock, the court distinguished Woelfel and gave greater weight to the modern trend that water access is not always reasonable based on the intended use of the property.\textsuperscript{99}

Furthermore, while the intent of the parties is still an important inquiry,\textsuperscript{100} judicial presumptions about that intent have changed. During the nineteenth century, Maryland courts presumed that, if the deed was silent regarding an easement, the parties intended to reject the easement.\textsuperscript{101} Currently, however, the courts read the same silence not as the intent to leave property landlocked, but to convey property fit for occupancy.\textsuperscript{102} In Hancock, for example, the court relied on this presumption to find an implied easement by necessity even though the property was accessible by water.\textsuperscript{103} The Hancock court also ac-

\textsuperscript{66, 68} (1945) (citing the public policy of full utilization of land as the basis for the easement by necessity doctrine).

\textsuperscript{93} See Hancock, 236 Md. at 103-05, 202 A.2d at 602-03 (finding an easement by necessity even though the property at issue could be accessed by a water route); Condry, 184 Md. at 322, 41 A.2d at 68 (noting that, while constructing another access route would be possible, it would require unreasonable expense and therefore justifies a finding of necessity).

\textsuperscript{94} Condry, 184 Md. at 322, 41 A.2d at 68.

\textsuperscript{95} Hancock, 236 Md. at 103, 202 A.2d at 602.

\textsuperscript{96} See, e.g., id. (taking into consideration that under the "modern view," water routes are not always a reasonable means of access depending on the property's intended use).

\textsuperscript{97} 221 Md. 539, 158 A.2d 311 (1960).

\textsuperscript{98} Id. at 544-45, 158 A.2d at 313-14. The Woelfel court rested its decision in part on the fact that the property was marshland that was suitable for ducking or trapping, and was accessible by water from public wharves. Id. at 542, 544, 158 A.2d at 312-13.

\textsuperscript{99} Hancock, 236 Md. at 103, 202 A.2d at 602.

\textsuperscript{100} Id.

\textsuperscript{101} Burns v. Gallagher, 62 Md. 462, 471-72 (1884).

\textsuperscript{102} Hancock, 236 Md. at 103-04, 202 A.2d at 602.

\textsuperscript{103} See id. (citing the modern view that a way of necessity may exist even if a waterway is available). By presuming that the intent of the parties was not to leave property landlocked, the Hancock court had a difficult time distinguishing Woelfel. In fact, the court dodged the issue by maintaining that the facts were closer to Jay v. Michael, 92 Md. 198, 48 A. 61 (1900), where the court found an easement by necessity though the property was
knowledged that the doctrine of implied easement by necessity is based on the public policy of full utilization of land. These two policies motivate Maryland courts to apply the doctrine more flexibly.

Maryland courts' growing emphasis on utility rather than intent reflects the current theoretical trend in property rights. Two important theories in American property law have been the natural rights theory, which prevailed during the country's founding, and the utilitarian theory, which is prominent today. Depending on which theory is applied, the outcome in an easement by necessity case may differ. The natural rights theory supports an absolute view of property rights that allows a property owner to exclude all others from the property. In contrast, the utilitarian theory focuses on property rights as a way to promote the efficient use of resources.

C. The Doctrine of Easement by Necessity in Other Jurisdictions

Maryland's trend toward a more flexible concept of necessity is mirrored in other jurisdictions. In particular, jurisdictions that require reasonable necessity have held that available access to one portion of property does not thwart a finding of necessity if the part in question is not reasonably accessible. For example, in Miller v. Schmitz, the Appellate Court of Illinois held that, where property was bisected by a creek and only one part was inaccessible, the owner had an easement by necessity over the neighbor's property in order to reach the inaccessible land. The Court of Appeals of Washington reached a similar conclusion in Beeson v. Phillips. bordered by water. One potentially important factual distinction between Hancock and Woelfel is that in Woelfel, the property was marshland used for duck hunting, while in Hancock, the property was used for cutting trees for timber and firewood. However, the Hancock court did not note this difference.

104. Id. at 104, 202 A.2d at 602.
105. See State ex rel. Penrose Inv. Co. v. McKelvey, 256 S.W. 474, 477 (Mo. 1923) (en banc) (noting that courts and legislatures predominantly use the utilitarian theory in determining property rights).
107. Penrose Inv., 256 S.W. at 477.
108. Cannon, 807 A.2d at 567.
112. 702 P.2d 1244, 1247 (Wash. Ct. App. 1985) (holding that an easement by necessity existed to access the upper portion of the property even though the lower portion was accessible by another route).
In both Miller and Beeson, the courts determined that access to one portion of property did not negate the reasonable necessity for an easement based on the public policy of full utilization of land.\(^{113}\) Moreover, in both cases, use of the inaccessible part of the property was hampered because the reachable portion did not provide reasonable means of access.\(^{114}\) Thus, to enable utilization of the inaccessible portion of property, the courts granted easements by necessity.\(^{115}\)

III. THE COURT’S REASONING

In Stansbury v. MDR Development, L.L.C., the Court of Appeals affirmed the decision of the Court of Special Appeals and held that an easement by necessity existed over adjoining properties where a portion of one property was inaccessible, except through navigable water.\(^{116}\) Writing for a unanimous court, Judge Cathell first articulated three prerequisites for the creation of an easement by necessity: (1) original unity of title between the properties in question; (2) “severance of the unity of title” when one parcel of property is conveyed; and (3) the easement is necessary for the owner to be able to access the property, and this necessity must exist both when the title is severed and when the easement is exercised.\(^{117}\)

Next, the Stansbury court specifically addressed the questions it certified for review. First, the court determined that an easement by necessity may exist to reach an otherwise inaccessible portion of property, even though the rest of the property can be reached by a public road.\(^{118}\) The court deemed it irrelevant to the existence of an easement by necessity that Lots 10A and 178 may have been consolidated after the Caldwells’ purchase.\(^{119}\) Instead, according to the court, the relevant inquiry was whether there was unity of title between Lots 10A and 178, and whether, upon severance, an easement by necessity existed and continued to exist.\(^{120}\)

The Stansbury court answered these questions regarding unity of title in the affirmative.\(^{121}\) As to the first question regarding the unity of title of the properties, the court concluded that unity of title in the property existed until Ms. Stansbury and her brother divided the

\(^{113}\) Miller, 400 N.E.2d at 491; Beeson, 702 P.2d at 1246.
\(^{114}\) Miller, 400 N.E.2d at 491; Beeson, 702 P.2d at 1247.
\(^{115}\) Miller, 400 N.E.2d at 491; Beeson, 702 P.2d at 1247.
\(^{116}\) Stansbury, 390 Md. at 497–98, 889 A.2d at 416.
\(^{117}\) Id. at 489, 889 A.2d at 411.
\(^{118}\) Id. at 496, 889 A.2d at 415.
\(^{119}\) Id. at 492, 889 A.2d at 413.
\(^{120}\) Id. at 490–92, 889 A.2d at 412–13.
\(^{121}\) Id. at 496, 889 A.2d at 415.
Furthermore, the court found that an easement by necessity arose at the time of the severance since Lot 10A became inaccessible except by water or over Ms. Stansbury's property. Also, the court determined that the necessity continued to exist, noting that non-use of the easement by Ms. Stansbury's brother did not by itself extinguish the easement.

Regarding the second question that the court certified for review, the court found that access to Lot 10A via navigable water did not alleviate the necessity. Although Lot 10A could be reached by boat, the court determined that it would be too burdensome for MDR to obtain a boat, go to a public launching ramp, and navigate the Chesapeake Bay in order to access its property. Finally, the court found that construction of a footbridge would have a minimum impact on Ms. Stansbury's property, part of which was submerged under the channel.

IV. ANALYSIS

In Stansbury v. MDR Development, L.L.C., the Court of Appeals held that an implied easement by necessity exists when access to the property by navigable water is not reasonable. The Stansbury court applied the doctrine of implied easement by necessity to determine that an easement existed over Stansbury's property. While the court did not explicitly refer to the utilitarian theory of property rights, its language and ideas are associated with the theory. By invoking utilitarian concepts, the court has signaled that it will continue to take a more flexible approach to the doctrine of easement by necessity in the

122. Id. at 490, 889 A.2d at 412.
123. Id. at 490-91, 889 A.2d at 412.
124. Id. at 491, 889 A.2d at 412. The court also dismissed the argument that an easement by necessity was no longer warranted because MDR could not currently build structures, other than a footbridge, on Lot 10A. Id. at 493, 889 A.2d at 413. According to the Stansbury court, inability to use the property for building purposes does not negate MDR's necessity. Id. Even if the limitation was not lifted in the future, the court reasoned, the property could still be used for other activities. Id.
125. Whether an easement by necessity existed for a part of MDR's property when that portion was accessible by navigable water. Id. at 480, 889 A.2d at 406.
126. Id. at 497, 889 A.2d at 416.
127. Id. In a footnote, the court also rejected the argument that Lot 10A could be accessed by walking through the channel because Ms. Stansbury's property would still be traversed in the process. Id. at 497 n.11, 889 A.2d at 416 n.11. Furthermore, the court noted that passing through the channel may be extremely difficult depending on weather conditions. Id.
128. Id. at 497, 889 A.2d at 416.
129. See infra Part IV.A.
130. See infra Part IV.B.
future.\textsuperscript{131} The \textit{Stansbury} court's decision to relax the doctrine was appropriate because of the modern concerns associated with property rights.\textsuperscript{132}

Furthermore, the court fittingly refused to supplant the requirements of the doctrine of implied easements by necessity with a balancing approach that would weigh the interests of the involved parties.\textsuperscript{133} However, the court should have better explained this particular rejection.\textsuperscript{134} A more in-depth discussion of the balancing test would have made the court's decision more comprehensive, providing a better guide for lower courts.\textsuperscript{135}

\textbf{A. The Court Properly Determined that an Easement by Necessity Existed Because MDR Proved all of the Required Elements}

The Court of Appeals appropriately concluded that MDR met the required elements for an implied easement by necessity.\textsuperscript{136} Under Maryland law, MDR was required to prove three elements for an implied easement by necessity: (1) original unity of title—that properties in question were once one parcel; (2) severance of unity of title—that the single parcel was divided into the separate properties that form the dispute; and (3) necessity that arose at the time of severance and continues to exist—that the severance of the parcel created the necessity, and the necessity has been constant.\textsuperscript{137} Ms. Stansbury did not contest the first two elements, and MDR clearly met them because Ms. Stansbury's father originally owned all of the lots in question, and Ms. Stansbury and her brother severed the unity of title.\textsuperscript{138}

Thus, the only element in dispute was whether necessity existed when the unity of title was severed, and if so, whether the necessity continued to exist.\textsuperscript{139} Ms. Stansbury argued that there was no necessity because Lot 10A was surrounded on three sides by navigable water, and because Lot 10A was consolidated with Lot 178, which was

\textsuperscript{131} See infra Part IV.B.
\textsuperscript{132} See infra Part IV.B.
\textsuperscript{133} See infra Part IV.C.
\textsuperscript{134} See infra Part IV.C.
\textsuperscript{135} See infra Part IV.C.
\textsuperscript{136} See \textit{Stansbury}, 390 Md. at 497, 889 A.2d at 416 (holding that MDR was entitled to an easement by necessity).
\textsuperscript{137} \textit{McTavish v. Carroll}, 7 Md. 352, 360 (1855).
\textsuperscript{138} \textit{Stansbury}, 390 Md. at 490, 889 A.2d at 412.
\textsuperscript{139} \textit{Id.} at 480, 889 A.2d at 406.
accessible by a road. However, the court properly dismissed these arguments based on precedent and public policy concerns.

1. Access to Property by Navigable Water Does Not Automatically Destroy Necessity

In Stansbury, the court prudently followed previous Maryland cases holding that an easement by necessity can exist even though navigable water may provide access to the property. For example, the Stansbury court followed Hancock, which granted an easement by necessity over appellant’s property because the water route was not suitable. Similarly, in Stansbury, navigable water bordered Lot 10A. In order to access the lot through the waterways, MDR would have to cross the channel by a small boat or on foot, or purchase a boat and cross the Chesapeake Bay after traveling to a public launching ramp. While both of these methods make access possible, the court correctly determined that under a reasonable necessity standard it would be unreasonable to require MDR to go to such great lengths.

While the court properly adhered to Hancock, its reasoning is weakened by a failure to distinguish Woelfel, an important case. The court should have made some effort to either distinguish Woelfel or overturn it in part, particularly because Woelfel directly conflicts with Hancock. Instead, the court in Stansbury merely mentioned

140. Id. at 486, 889 A.2d at 409.
141. See infra Part IV.A.1–2.
142. See Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964) (holding that where a water route is unsuitable for the type of use to which the property will be put, an easement by necessity may exist); Jay v. Michael, 92 Md. 198, 210, 48 A. 61, 63–64 (1900) (finding an easement by necessity though the property bordered a creek).
143. Stansbury, 390 Md. at 496–97, 889 A.2d at 415–16.
144. Hancock, 236 Md. at 103–04, 202 A.2d at 602–03.
145. Stansbury, 390 Md. at 481–82, 889 A.2d at 407. Specifically, Lot 10A was bounded by Pleasant Lake, the Chesapeake Bay, and the channel dredged by Ms. Stansbury’s father. Id. at 481, 889 A.2d at 406.
146. Id. at 497, 889 A.2d at 416.
147. Id. This proposition is supported by Hancock, which allowed an easement by necessity where the water route, while available, was nevertheless unsuitable. Hancock, 236 Md. at 103, 202 A.2d at 602; see also Hunter Carroll, Recent Development, Property—Easements by Necessity: What Level of Necessity is Required?, 19 AMJ. TRIAL ADVOC. 475, 476 (1995) (noting that a property owner is more likely to succeed in obtaining an implied easement by necessity “in a majority jurisdiction, requiring reasonable necessity, than in one requiring strict necessity”).
149. Compare id. at 544, 158 A.2d at 313 (finding that access by water prevents the grant of an easement by necessity), with Hancock, 236 Md. at 103–04, 202 A.2d at 602–03 (distinguishing Woelfel and holding that in certain factual circumstances, access by navigable water is not a bar to an easement by necessity).
Woelfel\textsuperscript{150} without indicating if the instant case and Hancock reject the Woelfel rule or simply reach different results due to distinguishing facts. The court's failure to do so leaves lower courts with no guidance as to Woelfel's continued significance.

The court's failure to distinguish Woelfel is particularly problematic because Lot 10A seems more similar to the Woelfel property, which was marshland,\textsuperscript{151} than to the Hancock property, which was land used for cutting trees for timber and firewood.\textsuperscript{152} Access by water is unsuitable when one is hauling trees, but it may be perfectly appropriate when one is using property for duck hunting or walking.\textsuperscript{153} Therefore, as in Woelfel, MDR would appear to have less necessity for an easement because renting a small boat is arguably not an unreasonable burden.

Despite the court's misstep in failing to distinguish Woelfel, public policy reasons dictate that the court made the right decision.\textsuperscript{154} Easements by necessity are justified not only by a presumption that the parties intended the party with inaccessible land to have access,\textsuperscript{155} but also by a public policy supporting the full utilization of land, which is increasingly critical today.\textsuperscript{156} Woelfel's approach would inhibit the latter justification.\textsuperscript{157}

To recognize water access as a suitable means of reaching one's property, even when the property is only used for sightseeing, would undermine this public policy because motor vehicles are the most prevalent mode of travel today and most people do not own boats.\textsuperscript{158} Requiring a person to purchase or rent a boat solely for the purpose

\textsuperscript{150.} Stansbury, 390 Md. at 496, 889 A.2d at 415.
\textsuperscript{151.} Woelfel, 221 Md. at 543, 158 A.2d at 313.
\textsuperscript{152.} Hancock, 236 Md. at 100, 202 A.2d at 600.
\textsuperscript{153.} See id. at 103-04, 202 A.2d at 602-03 (distinguishing Woelfel in order to find that navigable water is not a reasonable route given the uses to which the property in question would be put).
\textsuperscript{154.} See Carroll, supra note 147, at 476 (public policy supports granting an easement by necessity where the land would otherwise lay useless or underused); Kirstin Kanski, Note, Property Law—Minnesota's Lakeshore Property Owners Without Road Access Find Themselves up a Creek Without a Paddle—In re Daniel for the Establishment of a Cartway, 30 WM. MITCHELL L. REV. 725, 752-53 (2003) (maintaining that in view of the growing importance of automotive transportation, Minnesota's cartway statute, which is analogous to the common law doctrine of easements by necessity, should be altered to allow an easement by necessity even though the property is accessible by navigable water).
\textsuperscript{156.} Hancock, 236 Md. at 103-04, 202 A.2d at 602; see also infra Part IV.B (discussing the issue of population growth and land use in the nation).
\textsuperscript{157.} See Kanski, supra note 154, at 751-52 (summarizing cases holding that water access is no longer considered a reasonable means of accessing property for certain land uses).
\textsuperscript{158.} Attaway v. Davis, 707 S.W.2d 302, 303 (Ark. 1986).
of reaching his property would impose an onerous burden on land-
owners. Based on precedent and public policy, therefore, the Stans-
bury court appropriately determined that water access was not a
suitable means of accessing Lot 10A.

The court also properly resolved the question of whether an ease-
ment over Ms. Stansbury’s property was reasonably necessary for MDR
to enjoy Lot 10A given that a separate conservation easement prohib-
ited the company from building on the property. The Court of Ap-
peals reasoned that the limitations could be lifted in the future, or at
the very least, the property could still be used for walking along the
waterfront and using the pier. Thus, the Stansbury court aptly rec-
ognized that unlike a denial of an easement by necessity, the existing
limitations on the property were not permanent and the land could
still be used for other purposes.

2. Consolidation of Lot 10A with Property Accessible by a Public
Road Does Not Destroy the Necessity

The court also properly rejected the contention that necessity
ceased to exist because the prior owner consolidated Lots 10A and
179. After the consolidation, the two lots merged into one and a
portion of the lot, the former Lot 179, was accessible by a public
road. However, the court refused to assign significance to the con-
solidation because the portion of property that was inaccessible prior
to the consolidation remained inaccessible after the consolidation.
Thus, the Stansbury court fittingly determined that necessity did not
cease to exist.

While this issue was one of first impression for the Court of Ap-
peals, a number of other state courts, such as Illinois and Washington,
have addressed the question and similarly concluded that an ease-
ment by necessity exists even where a portion of the property is acces-
sible. The Stansbury court properly aligned itself with these

159. Id.
160. At the time of the lawsuit, a conservation easement prohibited the construction of
any structure, except a footbridge, on Lot 10A. Stansbury, 390 Md. at 492, 889 A.2d at 413.
161. Id. at 493, 889 A.2d at 413–14.
162. Id. at 492, 889 A.2d at 413.
163. Id.
164. Id.
App. 2000) (finding an easement by necessity to exist although part of the property in
question was accessible by other means).
166. See Michael DiSabatino, Annotation, Way of Necessity Where Only Part of Land is Inac-
jurisdictions on the issue of consolidation because, like Maryland, these jurisdictions require reasonable necessity, which can exist when only a portion of the property is accessible.\textsuperscript{167} In contrast, jurisdictions that use strict necessity often hold that necessity does not exist where a portion of property is accessible.\textsuperscript{168} Thus, the court in \textit{Stansbury} correctly determined that consolidation of the properties did not frustrate the necessity because unlike strict necessity, reasonable necessity is more flexible and does not demand impossibility.\textsuperscript{169}

Moreover, the Court of Appeals appropriately recognized the utility justification underlying easements by necessity.\textsuperscript{170} As Judge Cathell noted, the ability to utilize Lot 10A does not change because of the consolidation since it continues to be impractical for MDR to access Lot 10A without crossing over Ms. Stansbury’s property.\textsuperscript{171} Even after MDR consolidated its two lots, access to Lot 10A was not improved because a channel separated the two lots and Ms. Stansbury had a property interest in the land under the water.\textsuperscript{172} Thus, the court properly concluded that consolidation of the two lots did not diminish the necessity to traverse Ms. Stansbury’s property.

\textbf{B. The Court Properly Applied the Utilitarian Theory of Modern Property Rights}

Although not explicitly stated, the Court of Appeals harmonized its decision with the utilitarian theory.\textsuperscript{173} The court indicated its preference for the utilitarian theory by requiring only reasonable necessity instead of strict necessity.\textsuperscript{174} Reasonable necessity is more conducive to full utilization of the land.\textsuperscript{175}

\textsuperscript{167} See id. at 505 & supp. at 241 (listing jurisdictions that have made similar rulings to \textit{Stansbury}).

\textsuperscript{168} Id. at 504–05.

\textsuperscript{169} See Greenwalt v. McCordell, 178 Md. 132, 138, 12 A.2d 522, 525 (1940) (applying the reasonable necessity standard).

\textsuperscript{170} See Hancock v. Henderson, 236 Md. 98, 104, 202 A.2d 599, 602 (1964) (citing the public policy of full utilization of land as justification for granting an easement to property that was accessible by water).

\textsuperscript{171} \textit{Stansbury}, 390 Md. at 495, 889 A.2d at 415.

\textsuperscript{172} Id. at 492, 889 A.2d at 413.

\textsuperscript{173} See id. at 488, 889 A.2d at 410 (alluding to the utilitarian theory by recognizing that “[t]he doctrine [of easement by necessity] is based upon public policy, which is favorable to full utilization of land,” though never expressly mentioning the theory as a basis for its conclusion).

\textsuperscript{174} Id.

\textsuperscript{175} See supra Part IV.A.1.
The Stansbury court's decision properly corresponded with the utilitarian theory because the natural rights theory is outdated in twenty-first century property law, particularly in its support of absolute rights. The natural rights theory is based on the accumulation of property through one's labor, and does not take into account how effectively that property is used. Thus, though the natural rights theory allows for limitations on the right to exclude, these limitations are very narrow.

While the right to exclude has many benefits, this right also has a number of drawbacks if left unchecked. Thus, the Stansbury court appropriately shaped its decision in accordance with the utilitarian theory, which is best able to duly consider these concerns by allowing for exclusive property rights when it is in the best interest of society. Hence, Ms. Stansbury can have an exclusive right to property if a greater benefit results than if the property were in the commons. However, if exclusivity works to the detriment of society, then it should be limited. One important limitation on the right to exclude is an easement by necessity.

In Stansbury, the Court of Appeals properly signaled to lower courts that the right of exclusivity should be limited, particularly in light of the modern concerns of overpopulation. Effective utilization of land is more necessary than ever due to the increasing scarcity of land. When the doctrine of easement by necessity first became prominent in England in the nineteenth century, it arose out of the need for rights of way over privatized land that had once been in the

179. See Richard A. Epstein, Book Review, Rights and "Rights Talk," 105 Harv. L. Rev. 1106, 1110 (1992) (discussing limitations on the right to exclude under the natural rights theory in regard to water rights, which are treated differently from rights associated with land or chattels).
180. See Carrier, supra note 178, at 29-31 (discussing incompatible uses, wealth inequality, and other potential dangers of an unchecked private property system).
181. See id. (discussing the various limitations to the property right of exclusion and the benefits of such limits).
182. Id.
183. See id. (noting the different limitations on the right to exclude and the benefits society derives from these limitations).
184. Id. at 55.
185. See infra notes 191-197 and accompanying text (discussing population growth and land utilization in America).
186. See infra notes 206-213 and accompanying text (describing the rapidly increasing need for land).
commons.\textsuperscript{187} However, the Stansbury court recognized that today's crisis in property law with respect to the need for easements resulted from the subdivision of large tracts of property into smaller lots to meet the growing demand for land.\textsuperscript{188} The Stansbury facts exemplify the subdivision trend because Nancy Stansbury and her brother divided a large tract of land after they inherited it.\textsuperscript{189} In subdividing the tract, some property was left landlocked and, without an easement, was useless.\textsuperscript{190}

Full utilization of land is increasingly critical due to the growing population and correspondingly increased need for land. Every year in the United States, "1.0 to 1.5 million acres of rural and undeveloped landscape are being converted to urban use."\textsuperscript{191} From 1945 to 2002 alone, urban land area quadrupled in size.\textsuperscript{192} Moreover, home ownership has risen by over 20% since the beginning of the twentieth century.\textsuperscript{193}

America's growing need for land utilization is not surprising given the immense population growth the country has experienced. In 1850, five years before Maryland courts decided the first implied easement by necessity cases, the United States had a population of 23 million people.\textsuperscript{194} However, at the turn of the century, the population more than tripled to 76 million.\textsuperscript{195} Currently, the population has

\begin{itemize}
  \item \textsuperscript{187} Jesse Dukeminier & James E. Krier, \textit{Property} 784 (5th ed. 2002).
  \item \textsuperscript{188} See Edward J. Heisel, Comment, \textit{Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future}, 25 \textit{Ecology L.Q.} 229, 231 n.4 (1998) (noting that many large tracts of northeastern forestland have been subdivided for vacation property); Janet Kealy, Comment, \textit{The Hudson River Valley: A Natural Resource Threatened by Sprawl}, 7 \textit{Alb. L. Envtl. Outlook} J. 154, 162-63 (2002) (projecting that population growth in the Hudson River Valley would increase the rate of "parcelization"—the subdivision of large parcels of land for development—causing open land to decline from 60% to 30% by 2050); Sean F. Nolon & Cozata Solloway, Comment, \textit{Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State}, 17 \textit{Pace L. Rev.} 591, 595 (1997) (noting that more and more farmers succumb to the pressure of developers and sell their land for subdivision).
  \item \textsuperscript{189} Stansbury, 390 Md. at 481-83, 889 A.2d at 406-07.
  \item \textsuperscript{190} Id. at 481-84, 889 A.2d at 406-08.
  \item \textsuperscript{193} U.S. Census Bureau, Historical Census of Housing Tables, http://www.census.gov/hhes/www/housing/census/historic/owner.html (indicating that in 1900, 46.5% of the population owned a home); Bureau of the Census, \textit{Census Bureau Reports on Residential Vacancies and Homeownership} 4 (2006), http://www.census.gov/hhes/www/housing/hvs/qtr3/06/q306prrs.pdf (showing that by the third quarter of 2006, homeownership rates rose to 69%).
  \item \textsuperscript{194} U.S. Census Bureau, Population and Housing Unit Counts (1993), http://www.census.gov/population/censusdata/table-2.pdf.
  \item \textsuperscript{195} Id.
\end{itemize}
risen to over 300 million people and continues to rise at a rate of 0.89% per year.

Utilitarianism is best able to address these modern concerns because of its flexibility in limiting the exclusivity right. In Stansbury, the Court of Appeals reached the most efficient end by drawing on utilitarian principles—MDR can now utilize Lot 10A because it is accessible by a footbridge, and Ms. Stansbury's property rights have only been minimally affected because the easement intrudes upon only a small portion of her property that is under water. It is doubtful that the same result would have been reached under the natural rights theory because of the theory's dominant focus on the right to exclude. Thus, the Stansbury court properly promoted the utilitarian theory and, in light of this decision, Maryland courts will likely become more sympathetic to landowners who lack reasonable access to their properties, and less concerned about protecting the property right of exclusion.

C. The Stansbury Court Properly Refused to Apply a Balancing Approach Because Easements by Necessity Inherently Consider the Parties' Rights

The Court of Appeals wisely rejected the circuit court's adoption of a balancing test to resolve whether MDR could build a footbridge over Ms. Stansbury's property. Instead of deciding the issue based on the doctrine of implied easement by necessity, the circuit court allowed MDR to build a footbridge to access Lot 10A after balancing the competing interests of the parties. Both the Court of Special Appeals and the Court of Appeals refused to follow suit, and instead found that an easement by necessity existed. This was the proper result because to do otherwise would wreak havoc on a longstanding doctrine that remains effective. Furthermore, the doctrine of ease-
The court properly eschewed a balancing approach because it would unduly infringe upon the property right of exclusion. While implied easements by necessity interfere with this right as well, a balancing approach would give lower courts far more discretion to contravene the property rights. Thus, if the Stansbury court had used a balancing test, trial courts would have less guidance in applying the standard and hence be free to ignore the right of exclusion more often.

Another argument against the circuit court's approach is that the doctrine of easement by necessity already has a balancing of rights component. The Court of Appeals expressly weighed the impact of an easement on Ms. Stansbury's property. Moreover, in determining whether MDR had met the necessity requirement, the court looked at the potential use of Lot 10A and whether current access to the lot was reasonably adequate for that use. Other Maryland cases have considered the reasonableness of constructing alternate access in relation to the value of the property. Thus, the Court of Appeals properly rejected a separate balancing test as unnecessary because the doctrine of implied easements already considers the parties' interests.

Had the Stansbury court embraced a balancing test, the result could have been confusion in the lower courts regarding the longstanding doctrine of implied easements by necessity. The doctrine of implied easements has been applied consistently by Maryland

204. See Carroll, supra note 147, at 476–77 (acknowledging that in determining whether to grant an implied easement by necessity, courts balance the needs and the burdens of the parties under the circumstances at hand).

205. See Stansbury, 390 Md. at 480 n.1, 889 A.2d at 405 n.1 (noting the importance of the right of exclusion to a private property system).


207. Id.

208. See Carroll, supra note 147, at 476–77 (explaining that the doctrine of implied easements by necessity encompasses a balancing of the interests of the parties).

209. Stansbury, 390 Md. at 497, 889 A.2d at 416 (finding the impact of an easement to be minimal).

210. Id.

211. See, e.g., Condry v. Laurie, 184 Md. 317, 322, 41 A.2d 66, 68 (1945) (determining that the cost of constructing alternative access was unreasonable).

212. See Schwab v. Timmons, 589 N.W.2d 1, 8 (Wis. 1999) (refusing to overturn the well-established doctrine of implied easement by necessity).
courts from the nineteenth through the twenty-first centuries. While some doctrines become obsolete due to societal changes, easements by necessity have retained their effectiveness because of the flexible way that Maryland courts have applied the doctrine. Thus, there was no need for the Court of Appeals to replace the doctrine because it continues to sufficiently meet contemporary concerns.

Although the court's rejection of the balancing approach was appropriate, it should have more thoroughly discussed its rejection to give more comprehensive guidance to lower courts. Appellate courts have a duty to anticipate the possible effects of their decisions and give guidance as to how decisions should be applied in future cases. Here, the Court of Appeals failed to provide such guidance and left lower courts to guess at whether use of a balancing approach was completely foreclosed or merely circumscribed in easement by necessity cases. Lower courts have only a footnote in the Stansbury decision to explain why the balancing test was rejected and in what circumstances.

V. CONCLUSION

In Stansbury v. MDR Development, L.L.C., the Court of Appeals held that an implied easement by necessity existed where a property could not be reasonably accessed through navigable waters. The court properly found that MDR met all of the requirements for an implied easement by necessity, including that the easement was reasonably necessary for the enjoyment of the property. While the court did not explicitly ground its holding on the utilitarian theory, it correctly invoked its principles in light of the modern concerns in property law. Because the utilitarian theory allows greater flexibility in applying the doctrine of easements by necessity, the Stansbury

214. See supra Part II.B (discussing the evolution of the doctrine of easement by necessity in Maryland).
215. See supra Part IV.B (discussing how the Stansbury court’s decision corresponds with the utilitarian theory and how the theory addresses current public policy concerns).
216. See Tiller & Cross, supra note 206, at 531 (describing the judicial hierarchy of courts and the importance of higher court precedent in guiding lower courts).
217. Id.
218. See Stansbury, 390 Md. at 479–80 n.1, 889 A.2d at 405 n.1 (merely stating that the balancing of the parties' rights is irrelevant without explaining why or when).
219. Id.
220. See supra Part IV.A.
221. See supra Part IV.A.
222. See supra Part IV.B.
court properly recognized that the balancing test applied by the circuit court was unnecessary to reach the proper conclusion in this case and in future cases.\textsuperscript{223}

\textit{Viktoriya Mikityanskaya}
Recent Decisions

THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

WALTON v. JOHNSON: FAILING TO RECOGNIZE THE
IMPORTANCE OF AN ASSISTANCE REQUIREMENT TO
ADEQUATELY PROTECT MENTALLY ILL
PRISONERS ON DEATH ROW

In Walton v. Johnson,\(^1\) the United States Court of Appeals for the
Fourth Circuit considered the proper legal standard to determine
whether an inmate is mentally competent and therefore eligible to
receive the death penalty.\(^2\) The court held that to be executed a pris-
oner must understand (1) that his punishment is by execution and
(2) why he is being punished.\(^3\) The Fourth Circuit appropriately
adopted and applied this two-part test, which serves as a constitutional
baseline for evaluating the mental competency of death row
prisoners.\(^4\)

The Fourth Circuit erred, however, by not appending a third
prong to its test, which would require that prisoners be allowed to
participate in the determination of mental competence.\(^5\) Known as
an assistance requirement, this third prong is recognized in common
law and is advantageous because it furthers the rationales behind the
death penalty.\(^6\) By not adopting an assistance requirement, the
Fourth Circuit failed to consider future cases and protect against the
execution of prisoners who may be unjustly sentenced to death.\(^7\)

I. The Case

In November 1996, Percy Levar Walton murdered three individu-
als in their homes in Danville, Virginia.\(^8\) Taking into account an ex-

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\(^1\) Walton v. Johnson, 440 F.3d 160 (4th Cir. 2006) (en banc).
\(^2\) Id. at 162.
\(^3\) Id. at 162, 173.
\(^4\) See infra Part IV.A.
\(^5\) See infra Part IV.B.
\(^6\) See infra Part IV.B.
\(^7\) See infra Part IV.C.
\(^8\) Walton X, 440 F.3d at 162. In two separate incidents, Walton brutally murdered
elderly couple Elizabeth and Jessie Kendrick, and a young man, Archie Moore. Walton v.
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tensive amount of physical evidence,9 paired with Walton's own admission of guilt to several inmates,10 Walton pled guilty to all three murders.11 The Circuit Court for the City of Danville sentenced Walton to death based on the likelihood that Walton would commit violent criminal acts in the future and would continue to be a danger to society.12

Over the next several years, Walton challenged his death sentence at both the state and federal levels.13 On direct review, the Supreme Court of Virginia affirmed Walton's capital murder convictions and death sentence.14 Walton petitioned the Supreme Court of the United States for a writ of certiorari, but the Court denied his request.15 In 2000, Walton filed his first federal writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his capital murder and related convictions.16 Walton's petition argued in part that: (1) he was not competent to stand trial or be executed; (2) his guilty plea was not knowing, voluntary or intelligent; and (3) his attorney failed to serve as effective counsel.17 The United States District Court for the West-

9. Walton I, 501 S.E.2d at 137-38. The police discovered several of Moore's personal effects within Walton's bedroom. Id. at 137. Police officers also identified Walton's fingerprints on items in Moore's car and apartment and on a shotgun discovered in the Kendricks' car. Id. Additionally, the police discovered Moore's car parked across the street from Walton's home. Id. Within the car, police officers found bullets that matched the ballistics specifications of a pistol of Mr. Kendrick's and keys that fit locks in the Kendricks' car and home. Id.

10. Id. at 137-38.

11. Id. at 135. Walton also pled guilty to other counts including robbery and burglary. Id.

12. Id.

13. Walton X, 440 F.3d at 162.

14. Walton I, 501 S.E.2d at 141. The Virginia Supreme Court found that the trial court gave thorough consideration to the evidence and appropriately applied a sentence proportionate to the crime committed. Id. at 140. Specifically, the court found the gruesome factual circumstances surrounding the murders, including Walton's own admission to laughing during the shootings, to be strong evidence of his propensity for violence. Id. at 159. In affirming Walton's death sentence and establishing his future threat to society, the court noted Walton's prior convictions for burglary, grand larceny, resisting arrest, assault and battery on a police officer, and juvenile offences, as well as testimony from a fellow inmate who recounted that Walton "wanted to be famous . . . for killing a bunch of folks." Id.


16. Walton v. Angelone (Walton V), 321 F.3d 442, 452 (4th Cir. 2003). Walton's state habeas claim was filed and dismissed by the Supreme Court of Virginia in 1999. Id. at 451.

17. Walton v. Angelone (Walton III), No. Civ. A. 799CV09940, 2002 WL 467142, at *6-7 (W.D. Va. Mar. 27, 2002). Walton's petition raised additional claims concerning procedural issues with the trial court, allegations of violations based on stipulations, testimony,
ern District of Virginia failed to find merit in any of these claims. The Fourth Circuit dismissed the petition, finding that Walton was mentally competent at this trial and his counsel had performed reasonably.

In 2003, Walton filed a second federal habeas petition, asserting that his execution should be barred because: (1) he was mentally retarded; (2) he was incompetent; and (3) he was “not competent to choose his method of execution.” The district court dismissed Walton’s mental retardation claim. The court then ordered an evidentiary hearing to determine whether Walton was competent to be executed. After reviewing extensive evaluations from several psychiatric experts, including testimony from a neutral expert, the district court concluded that Walton was competent to be executed. Evidence, and outside statements, as well as the argument that the death penalty is unconstitutional. Id. The court dismissed each of these claims. Id. at *9-23.

18. Id. at *1. The district court determined that Walton’s mental competency claims were procedurally defaulted and that Walton was not prejudiced by the strategic decisions made by his attorney at trial. Id. at *10–19. The district court also refused to review Walton’s competency claim because Supreme Court precedent requires that execution must be imminent for a court to consider such a claim. Id. at *23. Three months later, the court denied Walton’s motion to alter or amend the court’s previous judgment. Walton v. Angelone (Walton IV), No. Civ. A. 7:99CV00940, 2002 WL 1398634, at *1 (W.D. Va. June 24, 2002).

19. Walton V, 321 F.3d at 446.

20. Id.

21. Id. at 460. To determine Walton’s mental competence, the Fourth Circuit applied Dusky v. United States, 362 U.S. 402 (1960), to establish that Walton had the ability to consult with his attorney and that he had a rational understanding of the facts and the proceedings against him. Walton V, 321 F.3d at 459–60.

22. Walton V, 321 F.3d at 461–62. The court concluded that Walton’s ineffective assistance of counsel claim failed both the cause and prejudice prongs of the test established in Strickland v. Washington, 466 U.S. 668 (1984). Walton V, 321 F.3d at 461. First, the court found that Walton did not prove that his counsel’s performance “fell below an objective standard of reasonableness.” Id. Second, the court determined that Walton did not demonstrate with a reasonable probability that the results of the proceedings would have been different, had it not been for his counsel’s alleged errors. Id. at 461–62.


24. Id. at 702.

25. Id.


27. Id. at 290. Dr. Mark Mills, a forensic psychiatrist, testified that Walton likely suffered from a significant psychiatric disorder, such as schizophrenia. Walton X, 440 F.3d at 167. In Dr. Mills’s opinion, however, such a disorder did not preclude Walton from realizing that he was to be executed as punishment for murdering three people. Id.

28. Walton v. Johnson (Walton VII), 306 F. Supp. 2d 597, 598 (W.D. Va. 2004). To determine Walton’s competency, the district court applied the standard from Justice Pow-
The court based its finding on Walton’s understanding that he was being punished by execution for murdering three individuals, and that to be executed means he will die.\textsuperscript{29}

Walton appealed the district court’s denial of his second federal habeas petition.\textsuperscript{30} On appeal, the Fourth Circuit determined that the district court failed to consider Walton’s ability to “prepare for his passing,” as required by \textit{Ford v. Wainwright}.\textsuperscript{31} The court vacated and remanded for further proceedings on the \textit{Ford} inquiry, as well as additional consideration of evidence of possible testing deviations that may have affected Walton’s mental retardation claim.\textsuperscript{32} The Fourth Circuit subsequently granted a rehearing en banc to review Walton’s claim that he is both mentally incompetent and mentally retarded, and thus unable to be executed based on \textit{Ford v. Wainwright} and \textit{Atkins v. Virginia}.\textsuperscript{33}

\section*{II. LEGAL BACKGROUND}

In \textit{Gregg v. Georgia},\textsuperscript{34} the Supreme Court of the United States determined that a limited application of the death penalty is constitutional.\textsuperscript{35} The Court reasoned that the use of capital punishment is justified when it serves both retributive and deterrent functions.\textsuperscript{36} To ensure that these two objectives are accomplished, the death penalty is restricted to those offenders who are the most culpable.\textsuperscript{37} In \textit{Ford v. Wainwright},\textsuperscript{38} the Court held that this restriction prohibits the execution of the mentally insane. To evaluate whether a prisoner is mentally insane, and thus unable to be executed, a majority of jurisdictions have adopted the standard proposed by Justice Powell in

\begin{itemize}
  \item 30. Walton IX, 407 F.3d at 287.
  \item 31. \textit{Id.} at 293 (quoting \textit{Ford}, 477 U.S. at 422 (Powell, J., concurring) (internal quotation marks omitted)).
  \item 32. \textit{Id.} at 293–96.
  \item 33. Walton X, 440 F.3d at 162, 168, 176.
  \item 34. 428 U.S. 153 (1976).
  \item 35. See infra Part II.A. Despite the current constitutionality of the death penalty, Justices have expressed fractured views in past opinions. See, e.g., \textit{Furman v. Georgia}, 408 U.S. 238 (1972) (including separate opinions by all nine Justices).
  \item 36. See infra Part II.A.
  \item 37. See infra Part II.A.
  \item 38. 477 U.S. 399 (1986).
\end{itemize}
his Ford concurrence: the prisoner must understand the proceedings against him and the prisoner must understand the nature of the death penalty. Some states also require that in order to receive the death penalty, a prisoner must be able to assist in his own defense.

A. Constitutionality of the Death Penalty in the United States

Throughout the history of the United States, the Supreme Court has generally recognized that capital punishment does not violate the Constitution. In 1976, Gregg v. Georgia reaffirmed that the death penalty does not violate the Eighth and Fourteenth Amendments. In Gregg, the Court upheld the imposition of the death penalty as a proportional punishment for the crime of deliberate murder. The Court emphasized that capital punishment is reserved for those individuals who commit a narrow category of the most extreme crimes. The Gregg Court also noted that when implicated, the death penalty

39. See infra Part II.B–C.
40. See infra Part II.C.
41. Gregg v. Georgia, 428 U.S. 153, 176–78 (1976) (opinion of Stewart, Powell & Stevens, JJ.). This historical recognition derives from the Framers' acceptance of capital punishment. Id. at 177. At the time of the Eighth Amendment's ratification, every state allowed the imposition of the death penalty. Id. Decades later, the Fourteenth Amendment affirmed the potential use of capital punishment by stating that no person can be deprived of life without due process. Id. Additionally, two hundred years of Supreme Court precedent recognizes that capital punishment is not per se invalid. Id. at 177–78.
42. Id. at 168–69. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In Gregg, the Court examined evolving standards of decency to establish the constitutionality of the death penalty under the Eighth and Fourteenth Amendments. 428 U.S. at 179 (opinion of Stewart, Powell & Stevens, JJ.). To support a finding of constitutionality, the Court referenced the longstanding historical acceptance of the death penalty in the United States, recent legislative endorsement of capital punishment by the states, and the proportionality of the punishment of death as a consequence for taking the life of another individual. Id. at 176, 179–80, 187.
43. Gregg, 428 U.S. at 187 (opinion of Stewart, Powell & Stevens, JJ.). The Gregg Court reviewed a conviction under an amended Georgia death penalty statute that required the identification of at least one aggravating circumstance in order for a convicted prisoner to receive a death sentence. Id. at 196–97. Only four years earlier, the Court had invalidated the arbitrary application of the death penalty based on state laws that afforded wide discretion to judges and juries. See, e.g., Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring). In response, several states reformed their death penalty statutes to enable the courts to use more guided discretion throughout the sentencing and appellate process. Gregg, 428 U.S. at 179–80 (opinion of Stewart, Powell & Stevens, JJ.). Georgia's aggravating circumstance identification requirement was an example of guided discretion. Id. at 197–98. In Gregg, the Court characterized the statutory reform by several state legislatures as a societal endorsement of the death penalty. Id. at 179–80.
44. Gregg, 428 U.S. at 187 (opinion of Stewart, Powell & Stevens, JJ.).
should serve two social purposes—retribution and deterrence.\textsuperscript{45} The Court commented that the death penalty serves a retributive function because capital punishment is a societal response to particularly egregious conduct.\textsuperscript{46} The Court in \textit{Gregg} also acknowledged that the punishment of death may serve a deterrent function by preventing individuals who fear a possible death sentence from engaging in violent crime.\textsuperscript{47}

Immediately following \textit{Gregg}, the Court continued to restrict the application of the death penalty to ensure that only the most culpable individuals are executed. For example, in \textit{Woodson v. North Carolina},\textsuperscript{48} the Court invalidated the imposition of a mandatory death penalty statute. In \textit{Woodson}, four men were involved in a convenience store robbery in which a cashier was shot and killed.\textsuperscript{49} The trial testimony differed as to which participant actually fired the fatal shot and whether coercion was involved.\textsuperscript{50} All four men were found guilty and sentenced to death, as required under North Carolina law.\textsuperscript{51} In striking down the state statute, the Court stressed that the law failed to take into account the individual character and record of each defendant, which is crucial to achieve a just result.\textsuperscript{52}

The following year, in \textit{Coker v. Georgia},\textsuperscript{53} the Court overturned a capital sentence imposed on a rapist because the Court determined that the punishment was disproportional to the crime.\textsuperscript{54} The Court emphasized that although rape is a serious and often a violent crime, sentencing a rapist to death would violate the Eighth Amendment bar on “excessive” punishments.\textsuperscript{55} The Court adhered to the position that the death penalty is reserved for the most egregious crimes and stated that capital punishment is only applicable to individuals who have taken the life of another.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{45} Id. at 183.
\item \textsuperscript{46} Id. at 183–84.
\item \textsuperscript{47} Id. at 185–86. The \textit{Gregg} Court conceded, however, that there is no substantial evidence either establishing or disproving the death penalty’s deterrent effects. Id. at 185.
\item \textsuperscript{48} 428 U.S. 280 (1976) (plurality opinion).
\item \textsuperscript{49} Id. at 282–83.
\item \textsuperscript{50} Id. at 284.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. at 303–04.
\item \textsuperscript{53} 433 U.S. 584 (1977).
\item \textsuperscript{54} Id. at 592 (plurality opinion).
\item \textsuperscript{55} Id. at 592, 597–98. A punishment is “excessive” if it: (1) fails to further the goals of punishment and simply imposes needless pain and suffering; or (2) is “grossly out of proportion to the severity of the crime.” Id. at 592.
\item \textsuperscript{56} Id. at 598.
\end{itemize}
In three subsequent cases, the Court further narrowed the imposition of the death penalty by prohibiting its application to prisoners lacking the mental capacity to further the goals of capital punishment. First, in *Roper v. Simmons*, the Court held that the death penalty cannot be imposed upon criminals who were under eighteen years old at the time of the offense. In support of this restriction, the Court noted that juveniles cannot be included among the most culpable offenders because they lack maturity and responsibility, are vulnerable to peer pressure and negative influences, and may not have formed a fixed character.

Second, in *Atkins v. Virginia*, the Court declared that the execution of individuals who are mentally retarded violates the Eighth Amendment. The Court reasoned that the execution of a mentally retarded individual calls into question the two justifications behind the death penalty. Noting that retribution is only served when a criminal acts with a depraved conscience, the Court found it unlikely that individuals with limited mental capacity could fall into this category. Moreover, the Court reasoned that deterrence is realized only when murder is the result of premeditation and deliberation, whereas mentally retarded offenders do not likely have the capacity to inhibit their conduct to further the death penalty’s deterrent effect.

Third, in *Ford v. Wainwright*, the Court held that the execution of the mentally insane is unconstitutional because it fails to comply with the rationales behind the death penalty as well as societal standards of decency. In support of its conclusion, the *Ford* Court referenced an extensive common law history prohibiting the execution of insane individuals. The Court also emphasized that there is little retributive value for society in executing an individual whose diminished mental capacity and recognition of culpability is not equivalent to the crime committed.

58. *Id.* at 569–70.
60. *Id.* at 518–19. The Court also stated that the reduced capacity of mentally retarded individuals justifies their exclusion from capital punishment. *Id.* at 320. In support of this proposition, the Court cited to the potential for mentally retarded individuals to give false confessions and their diminished ability to assist counsel and serve as meaningful witnesses. *Id.*
61. *Id.* at 319.
62. *Id.* at 319–20.
64. *Id.* at 406–08.
65. *Id.* at 408.
B. Creation of a Two-Part Test to Determine Whether an Inmate Is Mentally Competent to be Executed

Beginning in the 1600s and continuing for several centuries, common law decisions denounced the execution of those deemed mentally insane. Legal scholars such as Edward Coke and William Blackstone argued that the execution of a mentally deranged person represents extreme inhumanity and cruelty, and fails to provide an example to others. Additionally, Blackstone asserted that the execution of an insane prisoner should be suspended because if the prisoner had a clear mind, he might have been able to make allegations to stay his execution.

The Supreme Court formally recognized the restriction against executing the mentally insane in Ford v. Wainwright. As discussed above, in Ford, the Court held that the Constitution forbids the execution of insane individuals based on the Eighth Amendment ban against cruel and unusual punishment. The Court supported its decision by citing to common law history and the fact that no state statute in existence sanctioned the execution of the insane. In addition, a plurality of Justices noted that a heightened standard for

66. Id. at 406-08. In the United States, the prohibition against the execution of mentally insane individuals was accepted at both the federal and state levels. See, e.g., Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899) (recognizing as fundamental that insane prisoners cannot be punished and that their executions should be stayed); Musselwhite v. State, 60 So. 2d 807, 809-11 (Miss. 1952) (recognizing the long common law history prohibiting the execution of the mentally insane and staying the execution of a convicted murderer found to be insane after judgment against him).

67. Ford, 477 U.S. at 406-07. Legal commentators have offered numerous reasons for banning the execution of the insane over the years. Id. at 407-08. These justifications include the notion that executing the mentally ill is offensive to humanity, fails to provide an example to others, serves no deterrent value, serves no retributive purpose, and that madness is its own punishment. Id.

68. Id. at 407; see also Grammer v. Fenton, 178 N.W. 624, 626 (Neb. 1920) (noting that the prohibition against executing the insane exists because such individuals are incapable of saying anything in order to stay their execution (quoting Barker v. State, 106 N.W. 450, 451 (Neb. 1905)); Bingham v. State, 169 P.2d 311, 315 (Okla. Crim. App. 1946) (observing that as a matter of public decency, it is not appropriate to execute those who have no understanding of the nature of the punishment that is to be imposed).

69. 477 U.S. at 401. In Ford, a death row prisoner began to manifest signs of mental deterioration and challenged his ability to be executed based on a lack of mental capacity. Id. at 401-03.

70. Id. at 401, 405. The Court noted that the Eighth Amendment not only proscribes acts that were considered cruel and unusual at the time of the adoption of the Bill of Rights, but also recognizes society's evolving standards of decency. Id. at 405-06.

71. Id. at 406-08.
evaluating claims of mental insanity that occur after the sentencing phase may be necessary to prevent non-meritorious claims.\textsuperscript{72}

Although a majority of the \textit{Ford} Court agreed that the Eighth Amendment prohibits the execution of mentally insane individuals,\textsuperscript{73} the Court remained split on the appropriate procedure or test to determine whether a prisoner is competent to be executed. A plurality left to the individual statues the job of crafting a specific test to assess mental competence.\textsuperscript{74} Justice Marshall, writing for the plurality, stressed that when creating a test, states must afford prisoners the opportunity to be heard through an adversarial process during competency proceedings.\textsuperscript{75} Specifically, the plurality emphasized the importance of unrestricted presentation of evidence, a neutral selection of experts, and a prisoner’s ability to present professional judgments as to his comprehension of the death penalty.\textsuperscript{76}

In a concurring opinion, Justice Powell disagreed with the plurality’s determination that an extensive procedural hearing is required to satisfy due process.\textsuperscript{77} Instead, Justice Powell argued that a significantly less elaborate inquiry is appropriate.\textsuperscript{78} In place of a formal trial, Justice Powell advocated for a procedure imbued with basic fairness.\textsuperscript{79} Justice Powell suggested that examples of basic fairness might include the selection of an impartial officer or the creation of a board to receive evidence, such as expert psychiatric evaluations of the prisoner.\textsuperscript{80}

Additionally, Justice Powell outlined a two-part test to determine whether a prisoner is mentally competent to be executed.\textsuperscript{81} He argued that the Eighth Amendment prohibits the execution of prisoners “who are unaware of the punishment they are about to suffer and

\begin{footnotesize}
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\item [72.] \textit{Id.} at 417 (plurality opinion); see, \textit{e.g.}, \textit{Bingham}, 169 P.2d at 316 (noting that unfettered right of review for insanity claims might thwart the administration of justice for an indefinite period of time).
\item [73.] \textit{Ford}, 477 U.S. at 401, 410.
\item [74.] \textit{Id.} at 416–17 (plurality opinion).
\item [75.] \textit{Id.} at 413–17. The \textit{Ford} plurality invalidated a Florida law that left the determination of a prisoner’s insanity in the hands of the Governor and certain state-appointed psychiatrists. \textit{Id.} at 413–16. In finding the Florida procedure to be deficient, the plurality was also concerned with a Florida prisoner’s inability to challenge any of the evidence against him or to cross-examine the state-appointed psychiatrists’ views on his sanity. \textit{Id.}
\item [76.] \textit{Id.} at 417.
\item [77.] \textit{Id.} at 425 (Powell, J., concurring).
\item [78.] \textit{Id.}
\item [79.] \textit{Id.} at 427.
\item [80.] \textit{Id.}
\item [81.] \textit{Id.} at 422.
\end{enumerate}
\end{footnotesize}
why they are to suffer it.\textsuperscript{82} According to Justice Powell, this standard is consistent with the rationales of the death penalty and ensures that a prisoner will be able to mentally and spiritually prepare for his passing.\textsuperscript{83}

\subsection*{C. Lower Courts' Application of Justice Powell's Ford Test as a Constitutional Minimum}

Over the past twenty years, a majority of jurisdictions have adopted the two-part mental competency test developed by Justice Powell in his \textit{Ford} concurrence. Specifically, courts require that an inmate understands the punishment he is about to suffer and why.\textsuperscript{84} Although the Supreme Court has not directly revisited the issue, the Court has subsequently cited to Justice Powell's \textit{Ford} concurrence in dicta, and noted that Powell's test is the standard for determining mental competence to be executed.\textsuperscript{85}

At the federal level, Justice Powell's test is recognized by the four circuits that have considered the issue.\textsuperscript{86} For example, in \textit{Coe v. Bell},\textsuperscript{87} the Sixth Circuit reviewed the death sentence of a prisoner who alleged that he was not competent to be executed.\textsuperscript{88} The court examined the \textit{Ford} opinion and looked to Justice Powell's concurrence as the judgment on the narrowest grounds agreed upon by a majority of the court.\textsuperscript{89} The Sixth Circuit adopted Justice Powell's test and denied the inmate's stay of execution, finding that he had the mental capacity to understand his impending death sentence and the reason behind his punishment.\textsuperscript{90}

\begin{footnotesize}
\item\textsuperscript{82} Id. Justice Powell recognized that several states have more rigorous standards. Id. at 421–22 \& n.3. However, he rejected a requirement that a defendant be able to assist in his own defense. Id. at 422 n.3.
\item\textsuperscript{83} Id. at 422.
\item\textsuperscript{84} See, e.g., \textit{Massie ex rel. Kroll v. Woodford}, 244 F.3d 1192, 1197 (9th Cir. 2001).
\item\textsuperscript{86} See, e.g., \textit{Massie}, 244 F.3d at 1197 (referring to Justice Powell's test when discussing the standard to determine mental competence for execution); \textit{Coe v. Bell}, 209 F.3d 815, 821 (6th Cir. 2000) (stating that Powell's concurring opinion in \textit{Ford} is the standard to determine mental competence); \textit{Garrett v. Collins}, 951 F.2d 57, 59 (5th Cir. 1992) (per curiam) (upholding a finding of prisoner competence to receive the death penalty under Justice Powell's test); \textit{Rector v. Clark}, 923 F.2d 570, 572 (8th Cir. 1991) (upholding a competency determination through the application of the two-part test from Justice Powell's \textit{Ford} concurrence).
\item\textsuperscript{87} 209 F.3d 815 (6th Cir. 2000).
\item\textsuperscript{88} Id. at 818.
\item\textsuperscript{89} Id. at 818–19.
\item\textsuperscript{90} Id. at 822, 827.
\end{footnotesize}
Similarly, in *Rector v. Clark*, a death row inmate challenged his capital conviction on the basis that he was mentally incompetent. The Eighth Circuit affirmed the inmate’s death sentence following a competency evaluation that confirmed that the prisoner was aware of his upcoming execution and the reason for the execution. The court agreed with the district court’s adoption of Justice Powell’s *Ford* test as the appropriate standard to evaluate the inmate’s competence. In addition to federal courts, several state courts have adopted Justice Powell’s *Ford* test to determine mental competency to be executed. For example, in *Billiot v. State*, the Supreme Court of Mississippi observed that an inmate must be able to understand the connection between his crime and punishment, and also be aware that death is approaching, in order to execute the inmate.

Justice Powell’s test is not, however, the only standard used by courts to determine competency for execution. Some courts additionally require that to receive the death penalty, an inmate must also demonstrate that he is able to assist in his own defense. In *Rector v. Bryant*, Justice Marshall dissented from the Court’s denial of certiorari. In his dissent, Justice Marshall revisited his plurality opinion in *Ford* and commented on the historical significance and general importance of an assistance requirement. Justice Marshall noted that in *Ford*, a plurality of the Court approved of an assistance requirement, which is essential to ensure that a prisoner can convey facts or information that could demonstrate that his death sentence is either unlawful or unjust.

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91. 923 F.2d 570 (8th Cir. 1991).
92. Id. at 571.
93. Id. at 572–73.
94. Id. at 573.
95. See, e.g., Commonwealth v. Jermyn, 652 A.2d 821, 823 (Pa. 1995) (finding that a version of Justice Powell’s *Ford* formulation was the only necessary inquiry when determining competence for execution).
96. 655 So. 2d 1 (Miss. 1995).
97. Id. at 16.
98. See, e.g., Singleton v. State, 437 S.E.2d 53, 58 (S.C. 1993) (adopting a two-prong test to determine mental competence that includes a cognitive prong similar to the Powell test and a second assistance prong that Justice Powell expressly rejected in *Ford*).
99. Id. *But see* Coe v. Bell, 209 F.3d 815, 826 (6th Cir. 2000) (striking down any need for an assistance requirement); *Rector*, 923 F.2d at 572–73 (rejecting an assistance of counsel requirement on the basis that it is not required under *Ford*); *Jermyn*, 652 A.2d at 823 (concluding that an assistance requirement is unnecessary when determining a prisoner’s competence for execution).
101. Id. (Marshall, J., dissenting from denial of certiorari).
102. Id. at 1241–42.
103. Id. at 1241.
Utilizing similar reasoning, some state courts also require an assistance prong. In *State v. Harris*, the Supreme Court of Washington adopted a version of the Powell test, and added the requirement that an inmate have the ability to communicate with counsel in order to be competent to receive the death penalty. The *Harris* court noted that at trial, a defendant's ability to assist in his defense is a minimum requirement because it ensures that the defendant is able to relate past events to his attorney. The *Harris* court determined that a similar showing is necessary in post conviction proceedings to preserve fairness and defendants' due process rights, as well as to protect state interests in the finality of judicial decisions. Similarly, in *Singleton v. State*, the Supreme Court of South Carolina adopted an "assistance prong," requiring that to be found competent, a prisoner must have the capacity to rationally communicate with counsel. In support of this requirement, the court cited to American Bar Association (ABA) standards that include an assistance requirement, and the assistance prong’s extensive common law background.

III. THE COURT’S REASONING

In *Walton v. Johnson*, the Fourth Circuit affirmed the decision of the district court and held that Walton, a death row prisoner, was mentally competent to be executed. In finding that the district court applied the proper legal standard, the Fourth Circuit adopted the test for mental competency that Justice Powell proposed in his concurrence in *Ford v. Wainwright*. Under this standard, in order to

104. 789 P.2d 60 (Wash. 1990).
105. *Id.* at 66.
106. *Id.* at 65–66; see also *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). In *Dusky*, the Supreme Court clarified that to be competent to stand trial, a petitioner must have an adequate ability to consult with his attorney, reasonably understand their communications, and “maintain a rational as well as factual understanding of the proceedings against him.” *Dusky*, 362 U.S. at 402; see also *Godinez v. Moran*, 509 U.S. 389, 402 (1993) (noting that a competency requirement aims to ensure that the defendant understands the proceedings and can help counsel); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (observing that a defendant’s competency to stand trial must be tied to his understanding of the type of proceedings against him, his ability to consult with his counsel, and his capacity to assist in his defense).
109. *Id.* at 58.
110. *Id.* at 56–58. The ABA standards explain that the assistance requirement ensures that prisoners maintain the capacity to understand and convey circumstances that would cause their execution to be unjust. *Id.* at 55.
111. *Walton X*, 440 F.3d at 162.
112. *Id.* at 170.
receive the death penalty, a prisoner must understand (1) that he is to be punished by execution and (2) the reason why he is being punished.\textsuperscript{113}

Writing for the majority, Judge Shedd opened by addressing Walton's argument that his mental incompetence and mental retardation blocked his execution under \textit{Ford v. Wainwright} and \textit{Atkins v. Virginia}.\textsuperscript{114} The court first considered Walton's mental incompetence claim under \textit{Ford}.\textsuperscript{115} Judge Shedd noted that in \textit{Ford}, the Supreme Court recognized that the Eighth Amendment prohibits the execution of the insane, and that states must provide an inmate with a constitutionally sufficient level of due process to determine the inmate's level of mental competence.\textsuperscript{116} In the present case, Judge Shedd emphasized, the court treated Walton in accordance with the constitutionally appropriate level of due process.\textsuperscript{117}

The court then discussed the appropriate standard for determining whether an inmate is mentally competent and therefore eligible for execution.\textsuperscript{118} Although \textit{Ford} lacked a majority agreement, Judge Shedd asserted that the Supreme Court effectively adopted the test outlined in Justice Powell's concurrence.\textsuperscript{119} The court therefore determined that in order to be found mentally competent to be exe-

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\textsuperscript{113} Id. at 173.

\textsuperscript{114} Id. at 162 (citing \textit{Ford v. Wainwright}, 477 U.S. 399, 401 (1986) (prohibiting the execution of insane inmates); and \textit{Atkins v. Virginia}, 536 U.S. 304, 321 (2002) (prohibiting the execution of mentally retarded inmates)).

\textsuperscript{115} Id. at 168.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 169. The court noted that contrary to the Florida system struck down in \textit{Ford}, the district court provided Walton with an evidentiary hearing and appointed a neutral expert to examine his mental state. \textit{Id.}

\textsuperscript{118} Id. at 170–73.

\textsuperscript{119} Id. at 170–71 n.10. In reaching this conclusion, the court referred to \textit{Gregg v. Georgia}, 428 U.S. 153 (1976), where the Supreme Court explained that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," to support the idea that Justice Powell's test in \textit{Ford} represents the narrowest agreed upon standard. \textit{Walton X}, 440 F.3d at 170 (citing \textit{Gregg}, 428 U.S. at 169 n.15 (opinion of Stewart, Powell & Stevens, JJ.)). Judge Shedd also emphasized the agreement between the plurality and concurring opinions in \textit{Ford} as to the rationales behind prohibiting the execution of the insane, which include a lack of retributive value and the fact that the mentally ill cannot comprehend the justifications for the death penalty. \textit{Id.} Additionally, the court referred to the Supreme Court's acknowledgment of Justice Powell's test in dicta in \textit{Penry v. Lynaugh}, 492 U.S. 302, 333 (1989), as well as the test's adoption by several circuits, state legislatures, and state courts. \textit{Walton X}, 440 F.3d at 171 & nn.11–12. Finally, Judge Shedd dismissed the import of subsequent statements made by Justice Marshall, who argued that \textit{Ford} did not actually establish a test for determining mental incompetence. \textit{Id.} at 170 n.10.
cuted, the sole test is whether an inmate comprehends that he is being sentenced to death and the reasons why.\textsuperscript{120}

After finding the above test to be the only necessary inquiry, the court rejected Walton’s contention that two additional requirements were needed to determine competency.\textsuperscript{121} The court first denied Walton’s contention that an inmate must be able to assist in his own defense to be deemed competent.\textsuperscript{122} Judge Shedd instead reasoned that such a requirement is unnecessary, given the inherent series of safeguards and procedures in the current criminal system that are designed to protect condemned inmates.\textsuperscript{123} In light of these safeguards, the court deemed it unlikely that a defendant could be executed with knowledge of information or error that might have stayed his execution.\textsuperscript{124}

Next, the court rejected Walton’s proposal that an inmate must be able to mentally and spiritually prepare for his passing in order to be executed.\textsuperscript{125} In refusing to adopt this requirement, the court concluded that there is nothing in \textit{Ford} to suggest such a specific inquiry,\textsuperscript{126} and as a result, the Eighth Amendment does not mandate that an inmate must have the mental capacity to prepare for his passing in order to be executed.\textsuperscript{127}

Finding that the correct legal test had been applied, the court evaluated the district court’s factual findings using a narrow scope of review.\textsuperscript{128} Judge Shedd noted that the district court made a thorough examination into Walton’s mental state, which included hearings and the appointment of a neutral expert.\textsuperscript{129} Consequently, Judge Shedd concluded that it was unlikely that the lower court made a mistake when it determined that Walton was competent to be executed.\textsuperscript{130}

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  \item \textsuperscript{120} \textit{Id.} at 173.
  \item \textsuperscript{121} \textit{Id.} at 172.
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{Id.} For example, Judge Shedd referred to the extensive procedural history of Walton’s case as evidence of the protective nature of the criminal justice system. \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} (citing \textit{Ford v. Wainwright}, 477 U.S. 399, 420 (1986) (Powell, J., concurring)).
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.} at 173.
  \item \textsuperscript{128} \textit{Id.} The court applied the clear error standard of review. \textit{Id.} (citing \textit{Jiminez v. Mary Washington Coll.}, 57 F.3d 369, 378–79 (4th Cir. 1995) (noting that factual findings by district courts are determinative on appeal “unless they are plainly wrong”). Under such a standard, a district court’s factual determination may be reversed only if the appellate court is left with a “definite and firm conviction that a mistake has been committed.” \textit{Id.} at 173–74 (quoting \textit{United States v. U.S. Gypsum Co.}, 333 U.S. 364, 395 (1948)).
  \item \textsuperscript{129} \textit{Id.} at 174.
  \item \textsuperscript{130} \textit{Id.}
\end{itemize}
The court also responded to the dissent’s proposed requirement that an inmate’s competency should be tied to an understanding that his execution will result in the end of his physical life.\textsuperscript{131} The court dismissed this proposition, noting that case law does not support the dissent’s assertion that a broader inquiry into the meaning of death is necessary.\textsuperscript{132} Finally, the court addressed whether Walton was mentally retarded under Virginia law.\textsuperscript{133} The court found that Walton had failed to allege sufficient facts to uphold such a claim, and affirmed the district court’s dismissal of Walton’s mental retardation claim.\textsuperscript{134}

Judge Wilkinson concurred in the judgment, but wrote individually to stress that the court’s application of the Powell test was appropriate because it did not venture into philosophical spheres.\textsuperscript{135} Judge Wilkinson emphasized that a more specific inquiry into the meaning of death was not only beyond the scope of judicial responsibility, but also unrealistic due to the abundance of viewpoints on death.\textsuperscript{136}

In a separate concurrence, Judge Williams discussed why she believed the dissent’s proposed test on the meaning of death was flawed.\textsuperscript{137} Judge Williams explained that Justice Powell’s \textit{Ford} test does not require a definition of death.\textsuperscript{138} She also stated that the dissent’s test failed to recognize that many individuals understand death in unscientific terms, and thus, requiring such a definition would force district courts to evaluate the meaning of complicated non-legal concepts.\textsuperscript{139}

In a dissenting opinion, Chief Judge Wilkins argued that based on the evidence, Walton may not understand that execution will result

\begin{itemize}
\item\textsuperscript{131} Id. at 175.
\item\textsuperscript{132} Id.
\item\textsuperscript{133} Id. at 176. The current Virginia statute prohibits the execution of an inmate who can demonstrate significant “subaverage intellectual functioning” and “significant limitations in adaptive behavior” by the age of eighteen. \textit{Va. Code Ann.} § 19.2-264.3:1.1(A) (2006).
\item\textsuperscript{134} \textit{Walton X}, 440 F.3d at 178. To support this finding, the court observed that Walton did not produce sufficient evidence that his IQ score before the age of eighteen was equivalent to that of a mentally retarded individual. \textit{Id.} at 177–78.
\item\textsuperscript{135} Id. at 179 (Wilkinson, J., concurring).
\item\textsuperscript{136} Id.
\item\textsuperscript{137} Id. at 179 (Williams, J., concurring).
\item\textsuperscript{138} Id. at 179–80. Judge Williams also observed that the cases cited by the dissent in support of its position simply require that a defendant must understand the “nature” of the death penalty, and do not include a definition of death. \textit{Id.} at 180.
\item\textsuperscript{139} Id. at 180. Judge Williams believed that the dissent’s test would require a judicial inquiry into a religious, poetic, or metaphysical examination of death and afterlife that is inappropriate and unrealistic. \textit{Id.} at 180–81.
\end{itemize}
in the end of his physical life. Thus, Judge Wilkins proposed that Walton’s case should be remanded to determine Walton’s understanding of death. Chief Judge Wilkins disputed the perspective in Judge Williams’s concurrence that the physical life inquiry is too subjective by arguing that the definition focuses strictly on the physical state of the body. According to Chief Judge Wilkins, because of the rarity of this particular case, and the conflicting testimony of the many psychiatrists who examined Walton, the evidence necessitated a further inquiry into Walton’s understanding that execution will put an end to his physical existence.

IV. ANALYSIS

In Walton v. Johnson, the Fourth Circuit adopted and applied Justice Powell’s Ford test to an inmate’s mental incompetence claim. The court’s adoption of Justice Powell’s test was appropriate because it is consistent with both Supreme Court precedent and the objectives of capital punishment. However, the Fourth Circuit should have also adopted a third prong to the test, requiring that an inmate be able to assist in his own defense. Adding an assistance requirement furthers the rationales behind the death penalty and promotes consistency across the criminal process. By rejecting an assistance requirement, the Fourth Circuit failed to look beyond the specific facts of Walton’s case and include a crucial safeguard to prevent the execution of prisoners who may be unjustly sentenced to death.

140. Id. at 182 (Wilkins, C.J., dissenting). Judges Michael, Motz, Traxler, King, and Gregory also joined in dissent. Id. at 162. Although Chief Judge Wilkins agreed with the majority’s adoption of the Powell test, he explained that a prisoner about to be executed must also understand that death means “the end of his physical life.” Id. at 184 (Wilkins, C.J., dissenting).

141. Id. at 183. Judge Wilkins cited several cases to support his view that in order to be executed, Walton must understand that death will result in the end of his physical life. Id. at 184–85.

142. Id. at 187. Objectively, in Chief Judge Wilkins’s view, this refers to a cessation of heart and brain activity. Id.

143. Chief Judge Wilkins observed that this could be the rare case where the prisoner could state that he is to be executed, but not understand that this means the end of his physical life. Id. at 186.

144. Id. at 187–91.

145. Id. at 170, 173 (majority opinion); see infra Part IV.A.

146. See infra Part IV.A.

147. See infra Part IV.B.

148. See infra Part IV.B.

149. See infra Part IV.C.
A. The Fourth Circuit Appropriately Adopted and Applied Justice Powell's Test to Determine an Inmate's Mental Competence

In Walton v. Johnson, the Fourth Circuit correctly adopted and used Justice Powell's two-part Ford test to determine whether a prisoner is mentally competent to be executed.\textsuperscript{150} The court properly adopted Justice Powell's test because his standard represents the Supreme Court's narrowest common position in Ford v. Wainwright.\textsuperscript{151} In Gregg v. Georgia, the Supreme Court observed that when the Court fails to reach a majority decision, the holding is viewed as the position taken by the members who concurred in the judgment on the narrowest grounds.\textsuperscript{152} In Ford, Justice Powell believed that at a minimum, a prisoner must be aware of the punishment he is about to suffer and must understand why he is to suffer such punishment.\textsuperscript{153} The Ford Court's four member plurality also observed that there is no value in executing a prisoner who does not understand why he is being punished by death.\textsuperscript{154} As a result, five members of the Court agreed upon the premise behind Justice Powell's concurrence\textsuperscript{155} and therefore, the Fourth Circuit properly adopted Justice Powell's test in Walton.

The Walton court's use of Justice Powell's test was also prudent because the test is consistent with the rationales behind the death penalty.\textsuperscript{156} In Gregg and subsequent cases, the Supreme Court emphasized that only the most culpable individuals should be sentenced to death in order to advance the retributive and deterrent goals of capital punishment.\textsuperscript{157} Justice Powell's test as applied in Walton aims to ensure that an inmate is aware of the connection between his crime and punishment.\textsuperscript{158} An acknowledgement of a prisoner's awareness of the association between his crime and death sentence satisfies the

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\item \textsuperscript{150} Walton X, 440 F.3d at 170, 173.
\item \textsuperscript{151} 477 U.S. 399, 422 (1986) (Powell, J., concurring).
\item \textsuperscript{152} 428 U.S. 153, 169 n.15 (1976) (plurality opinion). The Court subsequently recognized the narrowest grounds doctrine in Marks v. United States, 430 U.S. 188, 193 (1977).
\item \textsuperscript{153} Ford, 477 U.S. at 422 (Powell, J., concurring).
\item \textsuperscript{154} Id. at 417 (plurality opinion).
\item \textsuperscript{155} See Coe v. Bell, 209 F.3d 815, 818 (6th Cir. 2000) (stating that federal courts are obligated to adopt Justice Powell's test because it is the position taken by the majority of the members of the court who concurred in the judgment on the narrowest grounds).
\item \textsuperscript{156} See, e.g., Richard J. Bonnie, Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures, 54 Cath. U. L. Rev. 1169, 1172 (2005) (noting that a majority of commentators agree that Justice Powell's competence test is based on the retributive goal of punishment).
\item \textsuperscript{157} See supra Part II.A.
\item \textsuperscript{158} See Walton X, 440 F.3d at 172-73; see also Martin v. Dugger, 686 F. Supp. 1523, 1570 (S.D. Fla. 1988) (noting that when a defendant understands the connection between his crime and punishment, the retributive and deterrent aspects of the death penalty are served).
\end{itemize}
goals of the death penalty by confirming that a prisoner is conscious of his actions.\textsuperscript{159}

Moreover, the Fourth Circuit appropriately employed Justice Powell's two-part test because this narrow interpretation promotes a relatively objective inquiry into a prisoner's mental state.\textsuperscript{160} The use of an objective standard is advantageous because it allows a court to utilize straightforward language and refrain from inquiries into the meaning of death.\textsuperscript{161} The court properly rejected the dissent's proposal of a broader interpretation of Justice Powell's test, including a demonstration that an inmate understands the meaning of death.\textsuperscript{162} A broader inquiry could venture into highly subjective discussions about death and the afterlife.\textsuperscript{163} Potentially subjective discussions would place an unnecessary burden on the judiciary by requiring courts to examine non-scientific standards and beliefs on death.\textsuperscript{164} Also, a broader inquiry would inappropriately permit judges to insert their personal opinions and beliefs into an end-of-life analysis that is beyond the scope of the judiciary.\textsuperscript{165}

Additionally, the Fourth Circuit's narrow application of Justice Powell's test is beneficial not only to courts, but also to mental health professionals who must engage in competency determinations.\textsuperscript{166} A number of mental health professionals are critical of the relationship between law and psychiatry, especially within the context of insanity proceedings and the death penalty.\textsuperscript{167} One commentator notes that the absence of coherent or workable standards contributes to the problem.\textsuperscript{168} Thus, the Fourth Circuit's attempt to remain objective through the adoption of Justice Powell's test furthers the goal of estab-

\begin{itemize}
\item \textsuperscript{159} See Ford, 477 U.S. at 422 (Powell, J., concurring).
\item \textsuperscript{160} Walton X, 440 F.3d at 179 (Wilkinson, J., concurring).
\item \textsuperscript{161} Cf. Roberta M. Harding, "Endgame": Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment, 14 St. Louis U. Pub. L. Rev. 105, 135 (1994) (finding Justice Powell's standard to be narrow and noting that the competence test focuses exclusively on a prisoner's cognitive abilities).
\item \textsuperscript{162} Walton X, 440 F.3d at 175.
\item \textsuperscript{163} Id. at 180–81 (Williams, J., concurring).
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 179 (Wilkinson, J., concurring).
\item \textsuperscript{166} Cf. Douglas Mossman, The Psychiatrist and Execution Competency: Fording Murky Ethical Waters, 43 Case W. Res. L. Rev. 1, 8–9 (1992) (noting that mental competency determinations for prisoners raise considerable practical and procedural problems and as a result many professionals believe that psychiatrists should not participate in such proceedings).
\item \textsuperscript{167} See Barbara A. Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 76 (1986) (recognizing a "heated debate" behind the participation of mental health professionals in competency proceedings).
\item \textsuperscript{168} Id.
\end{itemize}
lishing a practical standard for psychiatrists to use when evaluating prisoners' competency on death row.

B. The Fourth Circuit Should Have Adopted an Additional Assistance Requirement to Determine Mental Competence to be Executed

Although the Fourth Circuit properly required that a prisoner be aware of the punishment he is about to suffer and why, the Walton court erred by failing to add a third prong mandating that a prisoner be able to assist in his own defense. The Fourth Circuit should have adopted a third prong in Walton because an assistance requirement serves to further the rationales behind the death penalty and promotes consistency throughout criminal proceedings.

An assistance requirement promotes the justifications for the death penalty by ensuring that only the most blameworthy criminals will be executed. An assistance prong accomplishes this goal by certifying that an inmate is able to convey any information or circumstances that might diminish his level of culpability. Without an assistance requirement, there is a grave danger of executing a prisoner who is not categorized among the most culpable. This danger was historically recognized as the primary motivation behind the prohibition against executing the insane. In Walton, the Fourth Circuit

169. See Walton X, 440 F.3d at 172 (rejecting an assistance requirement). See generally Bonnie, supra note 156, at 1177 (noting that many courts and commentators have added an assistance requirement to Justice Powell's test).
170. See infra notes 171, 182.
171. Cf. Harding, supra note 161, at 136 (explaining that a "functional" assistance requirement examines a prisoner's ability to communicate possibly "exculpatory or mitigating information").
172. Id.
173. Id. at 136–37. An example of this possibility is illustrated in a study by psychiatrist Dorothy Lewis. Id. at 136. The study focused on condemned inmates and found that all study participants suffered from various psychiatric disorders that were not discovered before trial. Id. Several of the inmates reported that they did not realize that information on their mental status was relevant and as a result did not convey the information to counsel. Id. at 136–37. The results of the Lewis study demonstrate that individuals may be able to understand why something is occurring, but they may not have the capacity to communicate effectively with their attorneys. Id. at 137. If these inmates had effectively communicated with their counsel prior to trial and sentencing, the inmates may not have received a death sentence. Id. Instead, without an assistance requirement the same injustice continues at post-sentencing proceedings. Id. at 136–37.
174. See id. at 137 (suggesting that history supports the addition of an assistance requirement to the Ford test); John E. Theuman, Annotation, Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals, 111 A.L.R. 5th 491, 500 (2003) (noting that early common law decisions regarding mental competence to be executed applied a dual test—first, whether the prisoner was able to comprehend the nature and purpose of the proceedings and the penalty, and second, whether the prisoner could assist in his own defense); see also Grammer v. Fenton, 178 N.W. 624, 626 (Neb. 1920) (noting the prohibition
failed to consider the historical importance of an assistance requirement and its direct connection to the objectives of the death penalty. The court should have adopted a third prong to ensure that a prisoner’s punishment is proportional to his crime and that the prisoner deserves the death sentence.\footnote{175}

Further support for the adoption of a third prong is found in the recent case of \textit{Atkins v. Virginia}, in which the Supreme Court recognized a connection between an assistance requirement and the rationales behind the death penalty.\footnote{176} In \textit{Atkins}, the Court acknowledged two justifications in support of the restriction against executing mentally retarded individuals.\footnote{177} These justifications centered on the notion that individuals with a reduced mental capacity are unable to fulfill the goals of retribution and deterrence, and additionally may be unable to provide meaningful assistance to their attorneys.\footnote{178} Although the mentally retarded and mentally insane are two separate classifications of individuals, commentators suggest that the principles and reasoning supporting the Court’s decision in \textit{Atkins} are applicable to the mentally ill.\footnote{179} In \textit{Walton}, the Fourth Circuit should have acknowledged the Court’s recent emphasis on the importance of an assistance requirement in the context of mental capacity and extended it to prisoners who are mentally ill in order to ensure that only the most blameworthy prisoners are executed.

Furthermore, the Fourth Circuit should have adopted an assistance requirement because the standard promotes consistency and

\begin{itemize}
  \item against executing the insane exists because such individuals are incapable of saying anything to stay their execution; \cite{Bingham v. State, 169 P.2d 311, 314 (Okla. Crim. App. 1946)} (recognizing that common law deemed it inappropriate to execute those who cannot make a defense, and instead required that inmates have the intelligence to convey information to their attorneys or the court).
  \item \footnote{176} 536 U.S. 304, 319–20 (2002).
  \item \footnote{177} \textit{Id.} at 318–21.
  \item \footnote{178} \textit{Id.} at 320–21.
  \item \footnote{179} E.g., Ronald J. Tabak, \textit{Overview of Task Force Proposal on Mental Disability and the Death Penalty}, 54 \texttt{CATH. U. L. REv.} 1123, 1123 (2005). Following the \textit{Atkins} decision, the ABA established a Task Force to consider issues of mental competence and the death penalty. \textit{Id.}; \textit{see also Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty}, 54 \texttt{CATH. U. L. REv.} 1115 (2005). The Task Force concluded that when a mental disorder arises after sentencing, a prisoner’s ability to assist counsel by understanding and communicating relevant information in relation to legal proceedings is essential for a competency determination. \textit{Id.} at 1116. Tabak suggests that the Task Force determined that without an assistance requirement, it would be “fundamentally unfair” to decide claims against a mentally ill prisoner because a different outcome may have been reached had the prisoner been able to properly communicate with his attorney. Tabak, \textit{supra}, at 1131.
\end{itemize}
uniformity throughout the criminal justice process. At trial, a defendant is required to be able to consult with his lawyer and assist in the preparation of his own defense. Extending an assistance requirement to post-sentencing competency determinations would allow courts to apply a uniform standard throughout the criminal proceedings. Thus, the Fourth Circuit should have adopted an assistance requirement to create a threshold standard for competence that serves to promote the death penalty's goal of executing only those prisoners who are most culpable.

C. The Fourth Circuit's Failure to Adopt an Assistance Requirement Puts Future Prisoners at Risk

In eschewing an assistance requirement, the Fourth Circuit failed to consider future mental competency cases in which prisoners may be unjustly sentenced to death. The court should have adopted an assistance requirement to protect subsequent inmates whose guilt or factual circumstances may not be as certain as Walton's case. An assistance requirement is necessary to protect inmates in future cases who have knowledge that could make their death sentence unjust, but as a result of insanity, are unable to convey that information to their lawyers.

Instead, the Fourth Circuit dismissed the benefits of an assistance requirement. In his majority opinion in Walton, Judge Shedd cited to Walton's high number of direct appeals and habeas petitions and argued that such procedures served as a safeguard for prisoners, rendering an assistance prong unnecessary. While these safeguards

180. Cf. State v. Harris, 789 P.2d 60, 65–66 (Wash. 1990) (suggesting that a defendant's ability to assist counsel at post-conviction proceedings is equally as important as the same ability at trial).

181. See Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (explaining that the proper test for competency to stand trial is whether a defendant has sufficient ability to consult with his lawyer and a rational understanding of the charges against him).

182. See, e.g., Godinez v. Moran, 509 U.S. 389, 408 (1993) (Kennedy, J., concurring) (noting that a single standard for competency in both the pleading and trial processes will likely promote fairness in the criminal justice system).

183. In Walton's case, the physical evidence establishing his participation in multiple murders was overwhelming and Walton pled guilty to the charges. See supra Part I. However, it is not difficult to imagine a case with less convincing physical evidence and where the defendant refutes the charges.

184. See Harding, supra note 161, at 137 (noting that the prevalence of unknown mental conditions in convicted prisoners suggests that an assistance requirement will help ferret out those that are unable to communicate possible exculpatory information with counsel).

185. Walton X, 440 F.3d at 172.

186. Id.
may have been in place for Walton, not all inmates are afforded the same protection.\textsuperscript{187}

In Walton, the evidence of Walton’s guilt was overwhelming. Not only did Walton himself plead guilty to three murders, but the police also obtained substantial physical evidence linking Walton to the crimes.\textsuperscript{188} However, such convincing guilt is not always present.\textsuperscript{189} The United States criminal justice system grants judges and juries broad discretion to make guilt and sentencing determinations.\textsuperscript{190} As a result, human error may cause innocent individuals to be punished.\textsuperscript{191} Some experts have estimated that one innocent person may be exonerated for every seven individuals who are executed.\textsuperscript{192} One study on the execution of innocent inmates cites to over four hundred cases in which individuals were wrongfully convicted in capital or potentially capital cases.\textsuperscript{193} The real potential of executing innocent individuals militates against the Fourth Circuit’s narrow focus on Walton’s case and should have prompted the majority to adopt an assistance requirement to protect future inmates who are unable to convey information that could potentially reduce a death sentence.

The Walton court should have also considered two additional realities of the criminal justice system that bolster the need for an assistance requirement. First, the presence of mentally ill prisoners on death row is not an isolated problem.\textsuperscript{194} Facts in certain cases indicate that a positive correlation may exist between mental illness and imprisonment on death row.\textsuperscript{195} Often capital inmates live in seclusion and “experience a lack of exercise, poor diet,” and strained social interactions,\textsuperscript{196} all of which are conditions conducive to insanity.\textsuperscript{197} For example, “it has been estimated that as many as fifty percent of Florida’s death row inmates become intermittently insane.”\textsuperscript{198} As a conse-

\begin{itemize}
\item \textsuperscript{187} See infra notes 200–202 and accompanying text.
\item \textsuperscript{188} See supra Part I.
\item \textsuperscript{189} See generally Bernard A. Williams, Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals, 18 J.L. & POL. 773 (2002) (reviewing the death penalty trial process and finding that mistakes often result in death sentences for innocent defendants).
\item \textsuperscript{190} Id. at 787–89.
\item \textsuperscript{191} Furman v. Georgia, 408 U.S. 238, 367 & n.158 (1972) (Marshall, J., concurring).
\item \textsuperscript{192} Jean Coleman Blackerby, Note, Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration, 56 Vand. L. Rev. 1179, 1183–84 (2003).
\item \textsuperscript{194} See Ward, supra note 167, at 37–38.
\item \textsuperscript{195} Id. at 42.
\item \textsuperscript{196} Id. at 38.
\item \textsuperscript{197} Harding, supra note 161, at 115–16 (suggesting that confinement on death row creates an environment conducive to mental incapacitation).
\item \textsuperscript{198} See Ward, supra note 167, at 42.
\end{itemize}
quence, these individuals are often too mentally ill to assist in the preparation of their own appeals.199

Second, in a significant number of capital cases, defendants fail to receive adequate representation.200 Statistics reveal that a number of death row prisoners receive representation from attorneys who are later disbarred or disciplined.201 For example, in Kentucky, this number is estimated at almost twenty-five percent.202 In capital cases, an assistance requirement is essential to ensure that inmates are able to effectively convey information to the court, regardless of the quality of counsel.

In Walton, the Fourth Circuit should have considered the statistical probability that there are inmates on death row who are unjustly sentenced to death and who may have a heightened possibility of mental illness and received inadequate representation. An assistance requirement could combat these potential problems and reduce the probability of unjust death sentences.

V. CONCLUSION

In Walton v. Johnson, the Fourth Circuit held that in order to be competent to be executed, a prisoner must be aware of the punishment he is about to suffer and why.203 Taken from Justice Powell's concurrence in Ford v. Wainwright, this legal standard has been adopted by a majority of courts that have considered the same issue.204 Although the Fourth Circuit appropriately adopted and applied this two-part test, the Walton court should have additionally required that a prisoner demonstrate that he is able to assist in his own defense.205 Requiring that a prisoner be able to assist in his own defense finds support in common law, serves to further the rationales behind the death penalty, and promotes consistency across criminal proceedings.206 By failing to adopt an assistance requirement, the

199. Id.
200. Michael L. Perlin, "The Executioner's Face is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies, 41 N.Y.L. Sch. L. Rev. 201, 202 (1996). Problems with inadequate representation in capital cases include inexperienced representation, lack of legal knowledge, failure to investigate basic threshold issues, a lack of advocacy on questions of guilt, and the failure to present arguments for life at sentencing. Id. at 205 (quoting American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, 40 Am. U. L. Rev. 53, 66 (1990)).
201. Id. at 204.
202. Id.
203. Walton X, 440 F.3d at 170, 173.
204. See supra Part II.C.
205. See supra Part IV.A-B.
206. See supra Part IV.B.
court neglected to protect future prisoners who may be unjustly sentenced to death.\footnote{207}

\textbf{Christine I. Betzing}
BALTIMORE SUN CO. v. EHRLICH: A DEPARTURE FROM UNIFORM FIRST AMENDMENT PROTECTIONS AT THE EXPENSE OF A DISFAVORED PROFESSION

In Baltimore Sun Co. v. Ehrlich, the United States Court of Appeals for the Fourth Circuit considered whether a Governor-issued directive instructing all executive state government employees to cease communications with two Baltimore Sun reporters constituted unconstitutional retaliation for the reporters' exercise of their First Amendment rights. The court held that the Governor's action did not constitute retaliation because a government official may freely deny a reporter access to discretionarily afforded information when he or she disagrees with the reporter's published viewpoint. Although the Fourth Circuit ostensibly followed the settled test for First Amendment retaliation claims, it significantly altered the test by creating an entirely new distinction between the ordinary citizen and the ordinary reporter.

The court's creation of such a distinction is problematic in three ways. First, the court overlooked First Amendment precedent indicating that no legal distinction exists between reporters and ordinary citizens. Second, the court allowed the distinction to influence its conclusion that accepting the plaintiff's case would create a cause of action for virtually every interaction between the Governor and the press, and thus overburden the courts and seriously interfere with regular business operations of executive governments. Finally, the court ignored the judicially articulated purposes of the objective adverse impact test by expressing the relevant standard as that of an ordinary reporter, rather than that of an ordinary citizen. Ultimately, by inventing a distinction between reporters and ordinary citizens for purposes of retaliation jurisprudence, the court carved out a particular class of plaintiffs—in this case, reporters—and excluded them from having recourse for what would normally be considered retaliatory action if taken against an ordinary citizen.

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1. 437 F.3d 410 (4th Cir. 2006).
2. Id. at 413.
3. Id. at 420.
4. See infra Part IV.A.
5. See infra Part IV.A.
6. See infra Part IV.B.
7. See infra Part IV.C.
8. See infra Part IV.C.
I. THE CASE

On November 18, 2004, Maryland Governor Robert L. Ehrlich, Jr. issued a directive prohibiting any employee in the state government executive department or its agencies from speaking with Baltimore Sun reporter David Nitkin or columnist Michael Olesker. Governor Ehrlich indicated that he drafted the directive in response to Nitkin and Olesker's past articles criticizing the Governor's administration. After the Governor issued the directive, state government employees who regularly spoke to Nitkin and Olesker refused to do so. Olesker and Nitkin alleged that the employees in the Governor's Press Office who had formerly communicated with them refused to answer their phone calls or e-mails. Moreover, when Nitkin was able to reach executive employees, those employees told him that they could not speak to him because of the Governor's ban.

The directive applied only to Nitkin and Olesker, as all other Sun reporters' communications with the executive department remained unchanged. For example, Nitkin testified that the Governor excluded him from several press briefings that were open to other Sun reporters. The directive, however, did not cut off all access to information, as the state government continued to respond to requests under Maryland's Public Information Act as legally required.

In December 2004, the Baltimore Sun Company, Nitkin, and Olesker (collectively, the Sun) sued Governor Ehrlich, Deputy Director of Communications Gregory Massoni, and Press Secretary Shareese DeLeaver (collectively, the Governor) in response to the directive. The Sun sought preliminary and permanent injunctions against enforcement of the Governor's directive, claiming that the di-

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9. Balt. Sun, 437 F.3d at 413.
10. Id. Explaining the reason for the ban, the directive stated: "The Governor's Press Office feels that currently both [Nitkin and Olesker] are failing to objectively report on any issue dealing with the Ehrlich-Lieutenant Governor Michael] Steele Administration." Id. (internal quotation marks omitted). Additionally, during a press interview, Ehrlich expressly referred to limiting reporters' access as the only "arrow in [his] quiver," which suggested that the ban against Olesker and Nitkin was intended to chill future speech by the two reporters. Id. at 420 (alteration in original) (internal quotation marks omitted).
12. See Balt. Sun, 437 F.3d at 413-14.
13. Id.
14. Id. at 414.
15. Id. Although Nitkin received invitations to public press conferences and press briefings, he was excluded from several press briefings conducted in the Governor's conference room in December 2004 and early January 2005. Id.; Balt. Sun, 356 F. Supp. 2d at 579-80.
17. Balt. Sun, 437 F.3d at 413.
rective was an unconstitutional retaliation against the reporters for exercising their First Amendment right of free speech.\(^{18}\)

The United States District Court for the District of Maryland granted the Governor's motion to dismiss for failure to state a claim upon which relief can be granted, and denied the Sun's request for a preliminary injunction.\(^{19}\) In so doing, the district court focused primarily on the absence of any constitutionally protected right of access to information.\(^{20}\) The district court emphasized that reporters have no legal right of access to any information within an administration's control.\(^{21}\) Furthermore, the opinion stated that in bringing suit, the Sun was demanding a greater degree of access than that accorded to ordinary citizens.\(^{22}\) The Sun appealed the decision to the United States Court of Appeals for the Fourth Circuit.\(^{23}\) The issue on appeal was whether the district court erred in finding that a reporter has no actionable claim when a government official issues a directive denying access to information regularly supplied to other, similarly situated reporters for the stated reason that the public official disagrees with the reporter's published point of view.\(^{24}\)

II. LEGAL BACKGROUND

The First Amendment protects citizens from governmental actions that "abridge[ ] the freedom of speech."\(^{25}\) Initially, First Amendment retaliation jurisprudence was concentrated most frequently in the employment context.\(^{26}\) Subsequently, courts began to apply the principles of the retaliation claim to situations outside the employment context based on the underlying policy reasons for the rule.\(^{27}\) After expanding the retaliation claim to both employment and non-employment situations, courts arrived at the modern state of retaliation jurisprudence which incorporates not only the basic rule, but also two limiting principles to balance the competing speech rights of actors and claimants.\(^{28}\) Throughout the evolution of First Amendment

\(^{18}\) Id.

\(^{19}\) Balt. Sun, 356 F. Supp. 2d at 578.

\(^{20}\) Id. at 580.

\(^{21}\) Id.

\(^{22}\) Id. at 582.

\(^{23}\) Balt. Sun, 437 F.3d at 415.

\(^{24}\) See id. at 413–15.


\(^{26}\) See infra Part II.A.

\(^{27}\) See infra Part II.B.

\(^{28}\) See infra Part II.C.
jurisprudence, the Supreme Court of the United States has consistently held that members of the press enjoy no greater or lesser speech protections than those enjoyed by the public generally.29

A. Origin of the Pickering Balancing Test

In New York Times Co. v. Sullivan,30 the Supreme Court endorsed a broad reading of the First Amendment to accomplish the fundamental goal of uninhibited debate on matters of public importance.31 New York Times involved a libel claim brought by a city commissioner of Montgomery, Alabama, against the New York Times for running a series of editorial advertisements in favor of the civil rights movement and critical of government officials.32 The Supreme Court ruled against the commissioner, denying his libel claims and curtailing the availability of damages for libel to protect the newspaper's free speech interests.33 The New York Times Court emphasized the importance of uninhibited public debate in the representational form of government, even when that speech is critical of government officials.34 The Court further noted that criticism of government in particular is a central concern of free speech protections.35

On the heels of the New York Times decision, the Supreme Court recognized the retaliation cause of action in Pickering v. Board of Education.36 In Pickering, the Supreme Court examined whether a county board of education could legally dismiss Pickering, a teacher, for writing and publishing a letter in a local newspaper criticizing the board's handling of fundraising.37 In finding a clear infringement of Pickering's right to free speech, the Court emphasized that the threat of discharge from public employment was as effective a limitation on free speech as an outright prohibition of that speech.38

The Court in Pickering cited New York Times in its discussion of the reasoning behind the retaliation rule.39 Relying on the underlying

29. See infra Part II.D.
31. See id. at 270 (noting that the Constitution evinces a “profound national commitment” to the protection of free speech, that free and open debate is a cornerstone of an effective democracy, and that such debate often centers around criticism of government officials).
32. Id. at 256.
33. Id. at 279–80, 292.
34. Id. at 270.
35. See id.
37. Id. at 564.
38. Id. at 574.
39. Id. at 573–74.
principle that the First Amendment protection of free speech should be interpreted broadly, the Pickering Court accepted Pickering's retaliation claim.\textsuperscript{40} The Court noted that without the retaliation cause of action, the government could inhibit free speech simply by threatening dismissal, and employees will temper their speech to avoid adverse government action.\textsuperscript{41} Thus, the Pickering Court articulated a balancing test for retaliation claims where the government's interest in maintaining workplace order is balanced against the employee's speech interest.\textsuperscript{42}

The Supreme Court reaffirmed the Pickering balancing test and added an additional element in Perry v. Sindermann.\textsuperscript{43} In Perry, the Court examined whether an untenured junior college professor's dismissal for his public criticism of the college's policies ran afoul of the First Amendment.\textsuperscript{44} In finding for the professor, the Court stated that there was no constitutional significance to the professor's lack of tenure and, thus, lack of a legally protected right to continued employment.\textsuperscript{45} The Court emphasized that the retaliation rule was not grounded in a right to a particular benefit, but rather in preventing government officials from denying valuable benefits for the purpose of curtailing citizens' future exercises of their speech rights.\textsuperscript{46}

Thus, the Supreme Court's original articulation of the Pickering test involved a balancing of the employer's right to maintain an orderly workplace against the employee's right to freely comment on matters of public concern where those comments do not interfere with his or her work, recognizing that the employee need not have a legally enforceable right to employment in order to have a cognizable retaliation claim.\textsuperscript{47}

\subsection*{B. Extension of the Pickering Test to Cases Outside of the Employment Context}

After developing the basic contours of the retaliation claim in the employment context, the Supreme Court subsequently extended the retaliation claim to protect against indirect infringement of First Amendment rights in other settings. This extension began incre-
mentally with *Board of County Commissioners v. Umbehr*, in which the Supreme Court confronted the issue of whether to apply the *Pickering* test to the Board of County Commissioners' decision not to renew a contract with an independent contractor who exercised his speech rights to criticize the Board. The Court analogized the independent contractors' relationship with the government to that of employees, emphasizing that the government cannot withhold valuable benefits in order to suppress the exercise of speech rights, even where there is no legal entitlement to those benefits. In *Umbehr*, the Court applied the *Pickering* test to the independent contractor, noting that the government's interest as employer and the contractor's interest as speaker are similar to the interests involved in an actual employment context.

In its opinion, the *Umbehr* Court recognized that the level of deference owed to the government in retaliation cases depends directly upon the closeness of the government's relationship with the speaker. The Court explained that where the government acts as an employer, the retaliation analysis requires a balancing of interests; however, where the government interacts with an ordinary citizen, the government rarely has a legitimate reason for suppressing speech.

The Fourth Circuit echoed the Supreme Court's emphasis on the relationship between the retaliated-against and the retaliator in *Suarez Corp. Industries v. McGraw*. The *Suarez* court addressed the question of whether allegedly defamatory remarks made by two high-ranking individuals in the West Virginia Attorney General's office against a direct mail marketer constituted unconstitutional retaliation. The *Suarez* court stated that the retaliation analysis turns in part on a factual inquiry as to the relationship between the government and the retaliated-against, specifically noting that an employment relationship involves competing interests not relevant in a non-employment context.

The Fourth Circuit applied its reasoning in *Suarez* to the actions taken by a law school against a student in *Constantine v. Rectors and*
Visitors of George Mason University. The student alleged that she was improperly denied certain grade grievance procedures because of her public criticism of the school’s policies. The court did not engage in a Pickering balancing analysis due to the lack of an employee-employer relationship as was found in Umbehr. Instead, the court focused solely on the adverse effect of the government’s action. Specifically, the analysis focused on whether the school’s actions had the effect of “chilling” the student’s exercise of her speech rights, with no mention of whether the school had a legitimate interest in curtailing her speech. Thus, the Constantine court, like the Suarez court, implicitly differentiated between retaliation claims in an employment context and those arising where the government acts solely as sovereign against a private citizen.

The Constantine court articulated the modern test for retaliation claims outside the employment setting as distinct from the Pickering balancing test. Under the Constantine court’s formulation, a plaintiff in a non-employment context seeking to recover for First Amendment retaliation must show: (1) that the plaintiff’s speech was protected; (2) that the government official’s alleged retaliatory action “adversely affected” the plaintiff’s protected speech rights; and (3) that a causal relationship existed between the plaintiff’s speech and the defendant’s retaliatory action.

57. 411 F.3d 474, 500–01 (4th Cir. 2005).
58. Id. at 478, 499. Carin Constantine suffered from “intractable migraine syndrome” and experienced a migraine during her constitutional law final examination. Id. at 478. As a result, she requested a re-examination pursuant to George Mason University’s grade appeals process. See id. When her initial request was denied, Constantine publicly criticized the school’s grade grievance process in the law school newspaper. Id. When Constantine’s request for a re-examination was accepted, the school refused to accommodate her request to change the date for the re-examination to accommodate her other already scheduled exams. Id. at 478–79. Constantine claimed that the school had determined in advance to give her a failing grade on the exam in retaliation for her public criticism of their policies. Id. at 479.
59. See id. at 500.
60. Id.
61. Id.
62. See id. at 500–01 (applying a “chilling” test in the non-employment context rather than the Pickering balancing test); see also Waters v. Churchill, 511 U.S. 661, 664, 671 (1994) (plurality opinion) (noting that government employers have more freedom to regulate employee speech than the speech of the general public); Kirby v. City of Elizabeth City, 388 F.3d 440, 445–46 (4th Cir. 2004) (stating that the Pickering balancing test is utilized in the employment context because the government, when acting as employer, has legitimate reasons for restricting employee speech, whereas those reasons are not present in its interactions with general citizens).
63. See Constantine, 411 F.3d at 499 (using a chilling, rather than balancing, analysis).
64. Id.
C. Modern Retaliation Jurisprudence—Two Limiting Principles

The modern test for a First Amendment retaliation claim both inside and outside of the employment context involves a consideration of whether a person of ordinary firmness would feel inhibited in exercising his or her First Amendment rights because of the government official’s actions.\(^{65}\) Whether an employment relationship exists has a direct effect on the latitude given to the government to curtail First Amendment rights—in the employment context, the government is granted far more deference than when it is interacting with an ordinary citizen.\(^{66}\) The retaliation analysis is limited in two ways. First, the Supreme Court limits liability in the employment context where the alleged retaliatory activity is commonplace.\(^{67}\) Second, though never expressly adopted by the Supreme Court, most circuit courts limit liability to only those cases where a sufficient adverse impact can be shown objectively.\(^{68}\)

1. The Everyday Interchange Exception

After the initial balancing test articulated in *Pickering*, the Supreme Court created a limitation on the general rule of retaliation liability to protect the government workplace from a flood of litigation.\(^{69}\) Courts limit liability when the challenged government action is so commonplace that finding retaliation liability would create a cause of action in virtually every day-to-day interaction in the workplace.\(^{70}\)

Fifteen years after the landmark *Pickering* case, the Supreme Court articulated this limiting principle in *Connick v. Myers*.\(^{71}\) In *Connick*, the Court examined whether the New Orleans District Attorney’s Office violated the First Amendment by dismissing an assistant district attorney for circulating a questionnaire on employee job satisfaction.\(^{72}\) The Court found that although the assistant district attorney, as a government employee, had some limited First Amendment rights in the employment setting, these rights were overcome by the government employer’s important interest in maintaining working relation-

\(^{65}\) See supra Part II.A.
\(^{66}\) See supra Part II.B.
\(^{67}\) See infra Part II.C.1.
\(^{68}\) See infra Part II.C.2.
\(^{69}\) See Connick v. Myers, 461 U.S. 138, 146–49 (1983) (restricting the type of speech deemed to be of public concern to quell the potential tide of retaliation litigation).
\(^{70}\) See id. (emphasizing the danger of turning every instance of work-related criticism in a governmental office into a constitutional claim).
\(^{71}\) 461 U.S. 138 (1983).
\(^{72}\) Id. at 140–41.
ships within the office and preventing workplace disruptions. Thus, the Court found no retaliation claim, emphasizing that the suit was essentially a case of employee grievance based on a personnel decision. The Court’s implication was that to constitutionalize such a conflict would tend to seriously interfere with the efficient operation of government.

The Fourth Circuit reiterated the Supreme Court’s reasoning in the government-employee retaliation context in DiMeglio v. Haines. In DiMeglio, the court found little merit to a county zoning inspector’s retaliation claim, in which he alleged that he was reassigned and denied promotions for exercising his free speech rights. The DiMeglio court reasoned that limiting retaliation liability in circumstances of day-to-day operations preserves the government-employer’s ability to make business-related personnel decisions without a fear of litigation.

2. The Objective Adverse Impact Test

The second limit on the scope of liability in a retaliation claim in both the employment and non-employment context, though never expressly adopted by the Supreme Court, is an objective adverse impact test. Under this test, the existence of a sufficient adverse impact giving rise to a retaliation claim depends on whether the government action “would likely deter ‘a person of ordinary firmness’ from the exercise of First Amendment rights,” and not upon the actual effect on the plaintiff. To satisfy the test, the plaintiff need not produce actual proof that he or she individually was discouraged from exercis-

73. Id. at 150-52.
74. Id. at 148, 154.
75. Id. at 149-50.
76. 45 F.3d 790 (4th Cir. 1995).
77. Id. at 794, 805-06.
78. Id. at 806; see also Rankin v. McPherson, 483 U.S. 378, 384-88 (1987) (emphasizing that where the government is acting as an employer, retaliation liability is limited to speech touching upon matters of public concern, so as to avoid interfering with the normal operation of the place of employment).
79. See, e.g., Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (citing Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) (emphasizing that analysis of whether the plaintiff was sufficiently adversely affected by government action is an objective examination)); Keenan v. Tejeda, 290 F.3d 252, 258-59 (5th Cir. 2002) (using an objective test to determine whether a plaintiff was adversely affected by government action); Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001) (same); Smith v. Plati, 258 F.3d 1167, 1176 (10th Cir. 2001) (same); Suppan v. Dadonna, 205 F.3d 228, 255 (3d Cir. 2000) (same); Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998) (same); Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) (same).
ing free speech rights, but rather, need only show that the government action would tend to chill speech as an objective matter.80

The Fourth Circuit adopted the objective adverse impact rule in Constantine.81 The Constantine court reasoned that a subjective standard would shift the focus of litigation from the legal issue of the alleged retaliatory act to the factual issue of whether the particular plaintiff involved felt sufficient pressure to curtail his or her speech.82 The Constantine court also feared that a subjective inquiry would leave public officials confused about their obligations under the First Amendment, because those obligations might shift depending on the firmness of any particular person with whom they interacted.83 Thus, the adverse impact test requires an objective examination of how the government's retaliatory act would affect a person of ordinary firmness, rather than a fact-intensive inquiry into the actual impact of the act on the individual.84

D. Journalists' Rights under the First Amendment

The Supreme Court has deemed journalists no different from the general public for purposes of First Amendment analysis.85 First, members of the press have no special immunity from universally applicable laws.86 Second, members of the press have no right of access to information above and beyond that afforded to the public.87

As early as 1937, the Supreme Court in Associated Press v. NLRB88 rejected a claim by the Associated Press that as a news gathering entity, the First Amendment should exempt it from having to comply with the regulations of the National Labor Relations Board.89 The NLRB Court emphasized that the First Amendment erects no special immunity for members of the press from generally applicable laws.90

80. Constantine, 411 F.3d at 500.
81. Id.
82. Id.
83. Id.
84. Id.
85. E.g., Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978) (plurality opinion) (finding that a television station did not have an unbridled right of access to speak with prisoners at a county jail).
86. See, e.g., Assoc. Press v. NLRB, 301 U.S. 103, 132 (1937) (holding that the First Amendment does not require that journalists be held immune from labor laws).
87. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (stating that reporters have no special right to access information beyond that enjoyed by ordinary citizens).
88. 301 U.S. 103 (1937).
89. Id. at 130–33.
90. Id. at 132. The Court went on to list several different areas of the law, emphasizing that members of the press received no special exemption from any of them. Id. at 132–33.
The Supreme Court reaffirmed the NLRB holding in *Oklahoma Press Publishing Co. v. Walling* when it held that application of the Fair Labor Standards Act to newspaper publishing did not abridge First Amendment rights.91 Thus, the Supreme Court established a general rule of evenhanded application of laws to members of the press and members of the public.92

In addition to holding the press liable in the same manner as ordinary citizens, the Supreme Court has also held that journalists enjoy no special right of access to information beyond that enjoyed by the general public.93 For instance, in *Saxbe v. Washington Post Co.*,94 the Supreme Court rejected a claim by journalists that a prison regulation barring interviews with inmates violated their First Amendment rights.95 The *Washington Post* Court emphasized that members of the press were given equal access as that enjoyed by the general public, and that the First Amendment required no special access for the press above and beyond that afforded to the public.96 The Supreme Court subsequently reaffirmed these principles in *Richmond Newspapers, Inc. v. Virginia*,97 explaining that the access rights of the media in the context of public trials are the same as those of the public generally.

### III. The Court’s Reasoning

In *Baltimore Sun Co. v. Ehrlich*, the Fourth Circuit affirmed the judgment of the U.S. District Court for the District of Maryland and held that the *Sun* had no actionable retaliation claim against the Governor.98 Writing for a unanimous panel, Judge Niemeyer first de-

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91. 327 U.S. 186 (1946); see also Assoc. Press v. United States, 326 U.S. 1, 19–20 (1945) (rejecting claims that application of the Sherman Act to newspapers would violate publishers’ First Amendment rights).
92. See, e.g., *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846–47, 850 (1974) (finding a prison regulation prohibiting interviews by the media with certain prisoners nonviolative of the First Amendment, noting that it was applied equally to members of the general public and members of the press).
93. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (stating that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally").
95. *Id.* at 850.
96. *Id.* at 846–47, 850.
97. 448 U.S. 555, 572–74 (1980) (plurality opinion); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (noting that the right to attend criminal trials has the same scope for the press and the public); *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (plurality opinion) (emphasizing that the media have no greater right of access to visit prisoners than the public generally); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (same).
98. *Balt. Sun*, 437 F.3d at 421.
scribed the elements of a retaliation claim. Judge Niemeyer stated that to prove a retaliation claim, a plaintiff must establish that: (1) he or she was engaged in a constitutionally protected activity; (2) the government official responded to that activity with conduct or speech; and (3) that conduct or speech would tend to chill or adversely affect the protected activity.

The court next articulated that successful retaliation claims require that a plaintiff show more than a \textit{de minimis} inconvenience so that the government's conduct amounts to a substantial adverse effect. The court also noted that the alleged retaliatory conduct must not be so "pervasive, mundane, and universal in government operations" that accepting the Sun's argument would allow for retaliation claims in any government interaction. Moreover, the court explained that no retaliation liability attaches when the allegedly retaliatory action by the government is speech, unless the government's speech touches upon "private information about an individual," or is "threatening, coercive, or intimidating."

After outlining the elements of a retaliation claim, the court turned to the facts of the case at hand. First, the court considered whether allowing the Sun's retaliation claim would create constitutional claims arising from nearly any interaction between the Governor and the press. The court answered this question in the affirmative, reasoning that permitting such a claim would encourage reporters to bring suit when denied access by government officials for any reason. Additionally, the court stated that government officials commonly favor and disfavor certain reporters with important information based on the reporters' past work. Thus, the court found that the Governor's actions were too commonplace to warrant a cause of action.

\begin{itemize}
  \item[99.] Id. at 416.
  \item[100.] Id. at 415–16.
  \item[101.] Id. at 416–17.
  \item[102.] Id. at 416 (citing Connick v. Myers, 461 U.S. 138, 148–49 (1983)).
  \item[103.] Id. at 417 (quoting Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 689 (4th Cir. 2000)) (internal quotation marks omitted).
  \item[104.] Id.
  \item[105.] Id. at 418. Specifically, the court analyzed whether treating the Governor's directive as unconstitutional would lead to lawsuits every time a government official denied access to a reporter. Id.
  \item[106.] Id.
  \item[107.] Id. at 417–18.
  \item[108.] Id. at 418.
\end{itemize}
Second, the court determined whether the directive adversely impacted the Sun's exercise of its First Amendment rights. The court found the Governor's directive and its effect on Nitkin and Olesker to be more similar to a *de minimis* inconvenience than an actual chilling effect. The court explained that it is normal practice among journalists to curry favor from government officials in order to cultivate useful sources. Thus, the court held that the journalists who were denied access by the Governor's directive suffered no more harm than is customary for journalists who fall out of favor in their trade. Because the harm suffered was no more severe than that routinely experienced by journalists, the court found that the limitation of access would not deter the ordinary journalist from exercising his or her First Amendment rights.

Finally, the court evaluated whether the Governor's response itself was protected government speech, and therefore not subject to retaliation liability. The court determined that the Governor's challenged action constituted speech that was protected by the First Amendment just as the reporters' speech was protected. Citing *Sauerez*, the court maintained that the Governor's protected speech could only give rise to a retaliation claim if the speech revealed private information about the reporters, or was so threatening as to suggest that some sort of punishment by the Governor was imminent. The court concluded that the Governor's speech, while demonstrating annoyance with the reporters, did not constitute an actual threat rising to the required level for a successful retaliation claim based upon government speech.

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109. *Id.* at 419.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 419–20.
114. *Id.* at 420.
115. *Id.*
116. *Id.* (citing *Sauerez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 687 (4th Cir. 2000)).
117. The court analyzed the actual directive and several comments that the Governor made about the directive. *Id.* Specifically, the court focused on a comment the Governor made, referring to the directive as "the only arrow in [his] quiver" against critical reporters. *Id.* (alteration in original).
118. *Id.* The court concluded by reiterating that the Governor's speech and directive were not actionable under a First Amendment retaliation claim because the Governor was free to express his opinion and to select those reporters with whom he chose to speak. *Id.* at 421.
IV. Analysis

In Baltimore Sun Co. v. Ehrlich, the Fourth Circuit held that no retaliation claim exists where a government official cuts off access to discretionarily provided information from certain reporters based on their past work. The Baltimore Sun court purported to follow the settled test for First Amendment retaliation claims; however, the court created a wholly new distinction between the ordinary citizen and the ordinary reporter when applying the test. This distinction is problematic for three reasons. First, the court overlooked precedent suggesting that there is no difference of constitutional magnitude between reporters and ordinary citizens. Second, the court’s creation of such a distinction prompted it to apply the “everyday interchange” limiting principle to situations outside of the employment setting, thereby ignoring the purpose of that principle. Finally, determining whether the allegedly retaliatory acts had an adverse impact, the court’s invented distinction contradicted the purposes behind the objective adverse impact test. The impact of the Fourth Circuit’s decision to distinguish between reporters and ordinary citizens is that reporters may be precluded from having recourse for what would normally be considered retaliatory action if taken against ordinary citizens.

A. The Court Failed to Follow Precedent Indicating that There Is No Distinction Between Reporters and Ordinary Citizens for First Amendment Purposes

The Fourth Circuit in Baltimore Sun Co. v. Ehrlich erred by failing to follow precedent suggesting that there is no difference of constitutional significance between reporters and ordinary citizens for purposes of retaliation claims. This failure to adhere to precedent is problematic because the creation of a distinction between reporters

119. Id. at 418.
120. See infra Part IV.A.
121. See infra Part IV.A.
122. See infra Part IV.B.
123. See infra Part IV.C.
124. See infra Part IV.C.
125. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion) (finding that the media and the public generally enjoy the same First Amendment right of access to criminal trials).
and ordinary citizens limits reporters' First Amendment protections.\textsuperscript{126}

In First Amendment retaliation jurisprudence, the illegality of any government act depends upon the identity of the retaliator, the identity of the speaker, and the relationship between the two.\textsuperscript{127} Retaliation cases offer a spectrum of relationships between the government and speaker, spanning from the tight relationship of government employee and employer, to the minimal relationship between an ordinary citizen and a government official.\textsuperscript{128} This spectrum is reflected in retaliation cases such as \textit{Board of County Commissioners v. Umbeh}, in which the Supreme Court recognized that where the government acts as employer, the government is more likely to have a legitimate interest in curbing certain exercises of First Amendment rights.\textsuperscript{129} Thus, courts grant more deference to government actions which might give rise to retaliation claims outside of the employment context.\textsuperscript{130} Conversely, where the government is interacting with ordinary citizens outside the employment context, such as the law student in \textit{Constantine}, courts grant little deference to any potentially retaliatory acts against those citizens for exercising their free speech rights.\textsuperscript{131} In \textit{Baltimore Sun}, the court erroneously treated the two reporters more similarly to government employees than ordinary citizens, granting the government far more deference than is mandated by precedent.\textsuperscript{132}

The \textit{Baltimore Sun} court erred because reporters are far more similar to the student in \textit{Constantine} than to government employees or the independent contractor in \textit{Umbeh}. Reporters, like students and other ordinary citizens, are not charged with the duty of speaking as repre-

\begin{itemize}
  \item \textsuperscript{126} See Stephanie L. Hogan et al., \textit{Litigating Retaliation Claims After Baltimore Sun v. Ehrlich}, COMM. LAW., Winter 2006, at 7, 8–9 (arguing that the \textit{Baltimore Sun} decision singles out members of the press in curtailing their First Amendment protections).
  \item \textsuperscript{127} See, e.g., \textit{Suarez Corp. Indus. v. McGraw}, 202 F.3d 676, 686 (4th Cir. 2000) (stating that a retaliation determination is a factual inquiry focusing in large part upon the relationship between the speaker and the alleged retaliator).
  \item \textsuperscript{128} See \textit{Bd. of County Comm'rs v. Umbeh}, 518 U.S. 668, 680 (1996).
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Waters v. Churchill}, 511 U.S. 661, 673 (1994) (plurality opinion); see also \textit{Pickering v. Bd. of Educ.}, 391 U.S. 569, 568 (1968) (noting that where the government acts as employer, it may have a legitimate interest in regulating employee speech, but that no such interest exists with respect to the speech rights of the public generally).
  \item \textsuperscript{131} \textit{See Constantine v. Rectors and Visitors of George Mason Univ.}, 411 F.3d 474, 500–01 (4th Cir. 2005) (finding in favor of a student's retaliation claim); see also \textit{Umbeh}, 518 U.S. at 678 (emphasizing that government action taken against private citizens involving their First Amendment rights is subject to strict scrutiny).
  \item \textsuperscript{132} \textit{See \textit{Balt. Sun}}, 437 F.3d at 418–19 (focusing on the reporters' status as reporters, rather than as ordinary citizens, in analyzing the elements of their retaliation claim).
\end{itemize}
sentatives of the government the way employees are often understood to represent their employers. Indeed, the government has an asserted interest in encouraging reporters’ speech, unlike its interest in curtailing employees’ speech, because of the universally accepted belief in the primacy of free debate on matters of public importance in a representative democracy.

Further, the Baltimore Sun court ignored the oft-reinforced rule that members of the press are to be granted the same privileges as members of the public in terms of First Amendment rights to access and gather information. Instead of treating the reporters as ordinary citizens, the Baltimore Sun court improperly relied on their status as reporters for purposes of its retaliation analysis. This is seen in the court’s articulation of the adverse impact test as whether the Governor’s actions would chill a “reporter[] of ordinary firmness,” rather than a person of ordinary firmness. Phrasing the test in such a way creates a specific subclass of plaintiffs for purposes of retaliation analysis, categorizing reporters as somehow different from ordinary citizens in a legally relevant way.

Because there is no difference of constitutional importance between reporters and ordinary citizens, the Fourth Circuit’s differentiation between the two for purposes of its retaliation analysis was improper. The troubling result of the Baltimore Sun court’s distinction between the two classes is a lesser level of First Amendment protection for reporters than for ordinary citizens; reporters are expected to have a higher degree of tolerance for retaliatory acts than would be ex-

133. See Thomas E. Wheeler II, Striking a Faustian Bargain: The Boundaries of Public Employee Free Speech Rights, RES Gestae, Sept. 2006, at 13, 18 (noting that government employees have broad latitude to limit employment-related speech because employee speech is often thought of as “attributable to the employer”).

134. Pickering, 391 U.S. at 573; see also Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (asserting that the press acts as an agent of the general public in its information-gathering activities, and that those activities are essential to meaningful democratic processes); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating that the press serves as a check on government power and abuse, and that the First Amendment is designed in part to maintain the integrity of political processes).

135. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion) (noting that the rights of the media are the same as those of the public generally with respect to access to public trials).

136. Balt. Sun, 437 F.3d at 419.

137. Id.

138. See Hogan et al., supra note 126, at 8–9 (noting that the Baltimore Sun decision creates an altogether unprecedented distinction between reporters and ordinary citizens).
pected of an ordinary citizen. To preserve the rights of reporters, the Fourth Circuit should have treated them as legally equal to ordinary citizens for the purposes of retaliation analysis.

B. The Court's Distinction Between Ordinary Citizens and the Press Led to Its Inappropriate Application of the Everyday Interchange Exception

In addition to curtailing reporters' First Amendment rights by drawing a distinction between reporters and ordinary citizens, the Fourth Circuit's differentiation further limited reporters' rights by applying the everyday interchange exception to claims outside the employment context. The Baltimore Sun court's reasoning is flawed because the court ignored the purposes behind the everyday interchange exception to the retaliation rule. The everyday interchange rule is uniquely relevant to situations of employer-employee conflict. This is evidenced by the fact that courts analyzing the everyday interchange question have rarely treated the retaliated-against differently from an ordinary citizen except in cases of an employment-type relationship.

The purpose of the everyday interchange exception is not, as the Fourth Circuit suggests in Baltimore Sun, to de-constitutionalize any and all acts which, when taken for neutral reasons, would be permissible curtailments of speech. Rather, the purpose of this exception, uniquely rooted in employment retaliation claims, is to allow employ-

139. See Hogan et al., supra note 126, at 9 (stating that the Baltimore Sun opinion "is unique in doling out First Amendment rights less protectively to journalists than to 'ordinary' people").

140. See Balt. Sun, 473 F.3d at 418 (applying the "everyday interchange" exception).

141. See, e.g., Connick v. Myers, 461 U.S. 138, 149 (1983) (emphasizing that the First Amendment retaliation claim should not be used to insert a legal cause of action into every intra-office interchange).

142. See, e.g., id. at 148–49 (finding that most of an employee's questionnaire was not a matter of public concern and thus no retaliation claims were available on those questions because such a finding would constitutionalize virtually every critical remark made by an employee against her employer); Kirby v. City of Elizabeth City, 388 F.3d 440, 448 (4th Cir. 2004) (refusing to extend constitutional protection to public employees' petitions for redress for fear of allowing employees to constitutionalize private employment disputes by simply filing a lawsuit).

143. Compare Balt. Sun, 437 F.3d at 419 (emphasizing that the Governor has every right to cut reporters off from "discretionarily afforded information," thus, no retaliation claim arises from such commonplace, permissive actions), with ACLU of Md., Inc. v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993) (noting that action taken by public officials in retaliation for the exercise of a constitutional right is actionable whether or not the government act would be permissible if taken for other, nonretaliatory reasons).
ers to conduct day-to-day business “without fear of reprisal in the form of lawsuits” brought by affected employees.\textsuperscript{144}

For example, in \textit{Connick}, the Supreme Court analyzed whether allowing a plaintiff to recover for retaliation when she was dismissed for circulating an allegedly disruptive questionnaire around her office would tend to create a lawsuit out of everyday interactions between employer and employee.\textsuperscript{145} The \textit{Connick} Court emphasized that judicial interference in a government office with respect to every matter concerning office personnel would seriously impede the efficiency and effectiveness of such places of business.\textsuperscript{146} Thus, the purpose of the everyday interchange rule is to keep disgruntled employees from disturbing the workplace by bringing retaliation claims in response to every unfavorable personnel decision.\textsuperscript{147} Indeed, the Fourth Circuit in \textit{Baltimore Sun} entirely relies on cases employing the everyday interchange limitation on retaliation liability only in the employee-employer context.\textsuperscript{148} Courts are hesitant to interfere with day-to-day personnel decisions, and thus use the everyday interchange rule to avoid such interference.\textsuperscript{149} This is reflected in \textit{Kirby v. City of Elizabeth City}, where the Fourth Circuit narrowly interpreted a police officer’s public statement to be outside the realm of public concern, and thus not actionable as a First Amendment retaliation claim.\textsuperscript{150}

The \textit{Baltimore Sun} case is markedly different from the situations in \textit{Kirby} and \textit{Connick}, which required the everyday interchange exception to maintain order in the workplace. Specifically, the relationship between reporters and the government is factually distinguishable from the relationship between employers and employees.\textsuperscript{151} Although employers have an interest in curbing employees’ speech when necessary to maintain order,\textsuperscript{152} the Governor has no need to control the contents of newspapers to enable state government to function prop-

\begin{itemize}
\item \textsuperscript{144} DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995).
\item \textsuperscript{145} \textit{Connick}, 461 U.S. at 148–49.
\item \textsuperscript{146} \textit{See id.} at 149.
\item \textsuperscript{147} \textit{Id.; see also Bd. of County Comm’rs v. Umbehr}, 518 U.S. 668, 676 (1996) (noting the significant interests of the government in maintaining workplace control and the deference given to government claims of disruption in the employment context).
\item \textsuperscript{148} \textit{Balt. Sun}, 473 F.3d at 416.
\item \textsuperscript{149} \textit{See, e.g., Connick}, 461 U.S. at 149 (warning against the dangers of creating grounds for a constitutional challenge for every word spoken in a governmental office).
\item \textsuperscript{150} 388 F.3d 440, 445–47 & n.4 (4th Cir. 2004).
\item \textsuperscript{151} \textit{See Wheeler, supra} note 133, at 19 (explaining that government employees are treated differently from ordinary citizens under the First Amendment partially because employees must cede some of their First Amendment rights while acting (and speaking) as agents of their employers).
\item \textsuperscript{152} \textit{See id.} at 18 (noting that employers’ interest in maintaining order in the workplace often enables them to curtail employees’ exercises of speech).
\end{itemize}
Furthermore, the Governor has no authority to deny reporters the full exercise of their speech rights because reporters are the same as ordinary citizens for First Amendment purposes.\footnote{153 See Potter Stewart, "Or of the Press," 26 Hastings L.J. 631, 634 (1975) (positing that the Framers intended friction between press and government when they drafted the Free Press Clause, and that the purpose of a free press was to create a "fourth institution outside the Government" to act as a check on government processes).} Moreover, courts have emphasized that fear of excessive future litigation by a particular class of plaintiffs is not a legitimate reason for excluding that class of people from the protections of the First Amendment.\footnote{154 Branzburg v. Hayes, 408 U.S. 665, 704-05 (1972) (noting that members of the press and members of the general public who publish any type of written expression are both equally protected from government interference).} For example, in \textit{Board of County Commissioners v. Umbehr}, the Supreme Court refused to carve out an exception to the retaliation rule excluding a particular class of plaintiffs (independent contractors) from the First Amendment’s protections, even in the face of arguments suggesting that allowing the claim to go forward would increase caseloads.\footnote{155 See Bd. of County Comm’rs v. Umbehr, 518 U.S. 668, 681 (1996) (emphasizing that “fears of excessive litigation . . . cannot justify a special exception” to First Amendment retaliation liability).} Importantly, \textit{Umbehr} involved an independent contractor, whom the Court treated as similarly situated to a government employee.\footnote{156 See id. at 681.} Yet, even in a situation so closely resembling the employment context, the Supreme Court refused to allow the fear of excess litigation to lead to an application of the everyday interchange exception precluding retaliation liability.\footnote{157 Id. at 677.} In light of \textit{Umbehr}, the Fourth Circuit’s view that allowing the reporters’ retaliation claims to go forward would cause an unmanageable amount of future litigation was an impermissible basis for applying the everyday interchange exception to a circumstance outside the employment setting.

Because there is no difference of constitutional magnitude between reporters and ordinary citizens and the everyday interchange rule is uniquely intended for situations of employment, the Fourth Circuit’s special treatment of reporters as different from ordinary citizens and its decision to apply the everyday interchange rule is problematic.\footnote{158 See id. at 681.} By applying this limiting principle to the \textit{Sun} reporters, a situation not involving employment, the Fourth Circuit improperly ex-
panded the principle beyond the bounds of its limited use in personnel decisions.  

C. The Court’s Distinction Between the Ordinary Reporter and the Ordinary Citizen Ignores the Objective Nature of the Adverse Impact Test and Curtails Reporters’ First Amendment Rights

The Fourth Circuit’s distinction between the ordinary reporter and the ordinary citizen is problematic because such a distinction negates the purposes of an objective adverse impact test. Under the established objective adverse impact standard, courts analyze whether the government’s conduct “tends to chill the exercise of constitutional rights.”

The objective nature of the test is evident in Constantine, where the Fourth Circuit emphasized that an individual need not show that a particular government action actually resulted in complete cessation of her First Amendment exercises. The Constantine court clearly explained the reasons behind the objective nature of the rule: uniformity of application in the adverse impact test ensures that the results of retaliation claims do not vary depending on the firmness of any particular plaintiff. Thus, public officials can more easily be aware of their obligations under the First Amendment and their susceptibility to liability. Additionally, an objective standard ensures that even where a particular plaintiff may not subjectively have ceased or slowed First Amendment activities, government officials cannot use a favorable result to chill similarly situated plaintiffs from exercising their constitutional rights. Importantly, to retain the objectiveness of the test, the Constantine court framed the adverse impact test in

160. See supra Part IV.B.
161. See, e.g., Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (stating that an objective examination based on a person of ordinary firmness standard focuses on the conduct at issue, while a subjective, fact-intensive inquiry would impose liability depending upon a plaintiff’s firmness, rather than the underlying conduct itself).
162. Id.
163. Id.
164. Id.
165. Id.
166. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that the objective retaliation claim keeps government officials from indirectly restricting speech that could not be directly prohibited); see also Kirby v. City of Elizabeth City, 388 F.3d 440, 449 (4th Cir. 2004) (emphasizing that allowing a police chief to reprimand an officer for his testimony at a public hearing was a form of indirect pressure that could seriously inhibit truthful testimony by officers in the future).
The *Baltimore Sun* court abandoned the *Constantine* precedent and created an exception to the rule of objectivity by treating the plaintiffs’ profession as a relevant factor in the adverse impact analysis. In its articulation of the adverse impact test, the *Baltimore Sun* court referred to the “reporter of ordinary firmness,” rather than the “person of ordinary firmness.” The court emphasized that such a reporter operating in the “rough and tumble” of political reporting would not feel any harm from the Governor’s actions. Thus, by assuming that reporters have a “thicker skin” than ordinary citizens, and applying that assumption to its finding of no adverse impact, the *Baltimore Sun* court created a higher standard of proof for reporters attempting to establish a retaliation claim than that required for the ordinary citizen. Creating such an exception to the adverse impact rule for journalists undermines both of the stated purposes of the objective standard and, thus, the protections of the retaliation claim itself.

First, the *Baltimore Sun* court’s decision undermines the purpose of achieving uniformity of application in the adverse impact test. In drawing a distinction between reporters and ordinary citizens under the adverse impact test, the court inappropriately mandates that any particular case’s outcome turn on the identity of the plaintiff rather than on the retaliatory nature of the act. As a result, future courts grappling with retaliation claims will no longer focus on the nature of the government’s act, and will instead focus on whether the plaintiff’s identity—specifically the competitive nature of the plaintiff’s profession—places him or her in such a position as to be hardened against

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167. See *Constantine*, 411 F.3d at 500 (articulating the adverse impact test without referring to the plaintiff’s specific profession or status).

168. See *Balt. Sun*, 437 F.3d at 419 (stating the adverse impact test in terms of the profession of the plaintiffs).

169. Id. (internal quotation marks omitted).

170. Id.

171. See Hogan et al., supra note 126, at 8 (stating that the *Baltimore Sun* decision replaced the standard of a person of ordinary firmness with a new standard specifically measuring a plaintiff’s firmness based on his or her vocation, thereby undercutting the objective nature of the test).

172. See id. at 8–9 (noting that under the *Baltimore Sun* decision, journalists are distinguished from the public generally, undercutting the purposes of the adverse impact test, which is generally accepted as an assessment of whether the government act would tend to deter the First Amendment activity of an ordinary citizen).

173. See *Balt. Sun*, 437 F.3d at 420 (phrasing its holding in terms of whether the government’s actions are retaliatory against a reporter, rather than analyzing the actions themselves as retaliatory regardless of the identity of the plaintiff).
feeling the suppressive effects of such treatment by the government.\textsuperscript{174} This, in turn, inserts an element of uncertainty for government officials attempting to navigate which acts are permissible and which are retaliatory.\textsuperscript{175} After the \textit{Baltimore Sun} decision, government officials' exposure to liability for the very same conduct will differ depending upon the profession of the plaintiff, and how hardened against the chilling effect a particular profession makes its practitioners.\textsuperscript{176}

Second, the \textit{Baltimore Sun} court's insertion of a profession-oriented element into what was formerly an objective standard diminishes protection for all members of a class of plaintiffs simply by virtue of their profession.\textsuperscript{177} In the future, reporters not as "firm" as Nitkin and Olesker might temper their criticism of governmental officials to preserve their access to information and avoid being singled out and punished for unpopular opinions.\textsuperscript{178}

By undermining the two purposes of the objective adverse impact test, the \textit{Baltimore Sun} court weakens the retaliation claim itself. Because there is no difference of constitutional magnitude between reporters and ordinary citizens, there is no rational reason to distinguish between reporters and ordinary citizens for purposes of the adverse impact test.\textsuperscript{179} Introducing a subjective element of profession into the test inserts an element of uncertainty into what is supposed to be an objective and therefore straightforward standard.\textsuperscript{180} After the Fourth Circuit's decision in \textit{Baltimore Sun}, government officials will not only have to consider the nature of their speech, but also the profession of

\textsuperscript{174} See id. at 417–19 (emphasizing that reporting is a competitive profession in which reporters are accustomed to vying for favor from government officials, and, as such, reporters suffer no harm from instances of disfavor).

\textsuperscript{175} See Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (noting that a subjective standard for adverse impact would result in differing assignments of liability based solely on individual plaintiffs' firmness).

\textsuperscript{176} See Hogan et al., supra note 126, at 9 (noting that the Fourth Circuit essentially creates a rule that sorts out plaintiffs according to their "tenacity to litigate").

\textsuperscript{177} See \textit{Batt. Sun}, 437 F.3d at 419–20 (rejecting a retaliation claim by reporters assumed to be hardened against retaliation by public officials).

\textsuperscript{178} See Brief of Amici Curiae for the Washington Post et al. in Support of Appellants Urging Reversal at 20–21, \textit{Balt. Sun}, 437 F.3d 410 (No. 05-1297) (asserting that the Governor's actions in this case serve as a warning to all members of the press against public criticism of the administration, noting that the punishment for such criticism is denial of access to information required for performance of their jobs).

\textsuperscript{179} See supra Part IV.A.

\textsuperscript{180} See Constantine v. Rectors and Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (articulating the reasoning behind the objective standard for the adverse impact test, and emphasizing that an objective standard better instructs officials as to the boundaries of permissible and impermissible conduct).
the citizen they interact with and whether that profession will be considered less-protected than the ordinary citizen.\textsuperscript{181}

Ultimately, the *Baltimore Sun* court should have applied the adverse impact test absent any differentiation between the ordinary reporter and the ordinary citizen.\textsuperscript{182} In so doing, the court would have recognized what the Governor admitted in the district court: that "he could not constitutionally subject an ordinary citizen to the very same edict he ha[d] issued against" Nitkin and Olesker.\textsuperscript{183} By drawing a distinction between reporters and ordinary citizens for purposes of the retaliation claim, the Fourth Circuit in *Baltimore Sun* made subjective the otherwise uniformly objective adverse impact test and significantly lessened reporters' First Amendment protections.

V. CONCLUSION

In *Baltimore Sun Co. v. Ehrlich*, the Fourth Circuit held that a department-wide directive instructing executive employees to cut off communication with two reporters was not an instance of actionable First Amendment retaliation.\textsuperscript{184} The *Baltimore Sun* court drew a sharp distinction between reporters and ordinary citizens for purposes of the First Amendment retaliation cause of action.\textsuperscript{185} By failing to recognize the constitutional equality of ordinary citizens and reporters,\textsuperscript{186} ignoring the purposes behind the limiting rules in retaliation jurisprudence,\textsuperscript{187} and eschewing an objective adverse impact standard,\textsuperscript{188} the court created a new exception to the retaliation claim, significantly curtailing the First Amendment protections of the press.\textsuperscript{189} By making such an exception, the court not only diminished the First Amendment rights of the press, but also set a precedent for

\begin{itemize}
\item \textsuperscript{181} See *Balt. Sun*, 437 F.3d at 419 (finding no retaliation claim because reporters are accustomed to competing for information from government sources and, therefore, are hardened against the effects of retaliatory government action).
\item \textsuperscript{182} See supra Part IV.B.
\item \textsuperscript{183} Reply Brief of Appellants at 15, *Balt. Sun*, 437 F.3d 410 (No. 05-1297).
\item \textsuperscript{184} 437 F.3d at 420.
\item \textsuperscript{185} See id. at 419 (suggesting that reporters should have a stronger will to resist against government action that would create a First Amendment retaliation claim if taken against an ordinary citizen).
\item \textsuperscript{186} See supra Part IV.A.
\item \textsuperscript{187} See supra Part IV.B.
\item \textsuperscript{188} See supra Part IV.C.
\item \textsuperscript{189} See supra Part IV.C.
\end{itemize}
future curtailment of constitutional rights based on mere membership in a particular, unfavored profession.\textsuperscript{190}

\textsc{Amalia L. Fenton}

\textsuperscript{190} See \textit{supra} Part IV.C.
I. INTRODUCTION

Congress passed the Clean Water Act (CWA)1 in 1972 to address the nation's growing water quality problems.2 Through the CWA, Congress developed several mechanisms for improving water quality, including a requirement for states to develop "total maximum daily loads" (TMDLs) for pollutants in impaired waters.3 Despite the TMDL mechanism, nearly 40% of the nation's waters4 and 20,000 individual water bodies fail to meet state water quality standards.5 This lack of progress is the result of lenient implementation of the TMDL provision by the Environmental Protection Agency (EPA) and states, which has been characterized by lax compliance with strict statutory deadlines and preparation of grossly inadequate TMDLs.6

The poor management of the TMDL program by both the EPA and states has led to several lawsuits challenging TMDL implementation and these lawsuits have compelled the EPA and states to prepare more adequate TMDLs.7 In Friends of the Earth, Inc. v. EPA,8 the United States Court of Appeals for the District of Columbia Circuit held that TMDLs must be developed as daily pollutant limitations,9

3. Id. § 1313(d)(1)(C).
6. See infra Part II.B.
8. (Friends of the Earth III), 446 F.3d 140 (D.C. Cir. 2006).
9. Id. at 144, 148.
rather than as annual or seasonal limitations, a view that many states, including Maryland, have followed in the past. The D.C. Circuit properly decided Friends of the Earth because the plain text of the CWA indicates that TMDLs should be daily loads. Maryland should follow the D.C. Circuit’s interpretation of the CWA, rather than the Second Circuit’s approach in Natural Resources Defense Council, Inc. (NRDC) v. Muszynski, which permitted seasonal and annual loads. Unlike the Second Circuit’s decision in NRDC, the Friends of the Earth court properly applied canons of statutory interpretation to ascertain the meaning of the TMDL provision. Accordingly, Maryland should ensure that all existing and future TMDLs set forth daily load requirements for Maryland’s impaired waters.

Even though developing daily load requirements could be costly and time-consuming, these potential downsides are outweighed by the benefits of adhering to the plain text of the CWA: (1) improvement of state water quality, (2) government accountability, (3) consistency among states in the implementation of TMDLs, and (4) avoidance of lengthy and costly litigation in the future.

10. See Initial Brief for National Association of Clean Water Agencies as Amici Curiae in Support of Affirmance of Decision of the District Court at 10–11, Friends of the Earth, 446 F.3d 140 (No. 05-5015) [hereinafter NACWA Brief] (referencing annual or seasonal TMDL load approaches in Maryland, Virginia, and other states); see also Md. Dep’t of the Env’t, Total Maximum Daily Loads of Biochemical Oxygen Demand (BOD), Nitrogen and Phosphorus for Town Creek into which the Town of Oxford Wastewater Treatment Plant Discharges in Talbot County, Maryland, at iv (2002) [hereinafter Town Creek TMDL] (discussing Maryland TMDLs containing annual and monthly limitations); Md. Dep’t of the Env’t, Total Maximum Daily Loads of Nitrogen, Phosphorus and Biochemical Oxygen Demand for Breton Bay in St. Mary’s County, Maryland, at iii (2005) [hereinafter Breton Bay TMDL] (discussing Maryland TMDLs containing annual and growing season limitations).

12. 268 F.3d 91, 98–99 (2d Cir. 2001).
13. See infra Part III.
14. In developing TMDLs, Maryland has followed a variety of approaches that have led to the adoption of daily TMDLs, seasonal TMDLs, and annual TMDLs. E.g., Md. Dep’t of the Env’t, Total Maximum Daily Loads of Fecal Coliform for the Restricted Shellfish Harvesting Area in Laws Thorofare and Upper Thorofare of the Tangier Sound Basin in Somerset County, Maryland, at iv (2006) [hereinafter Tangier Sound Basin TMDL] (daily loads); Town Creek TMDL, supra note 10, at iv (monthly and annual loads); Breton Bay TMDL, supra note 10, at iii (annual and growing season loads).
15. See infra Part III.
II. BACKGROUND

A. The Clean Water Act

1. History

In the early 1970s, the United States was in the midst of a water quality crisis. The indelible image of the burning Cuyahoga River was the embodiment of this crisis, as it caught fire in 1969 due to industrial pollutants. But the water quality crisis spread far beyond the Cuyahoga River and waters in industrialized areas, ultimately pervading the entire nation. In 1971, only 10% of the nation's waters were rated as unpolluted, and in 1972, only 36% of the nation's stream miles were considered safe for swimming. Although Congress had regulated water quality in the past through the Rivers and Harbors Appropriation Act and the Federal Water Pollution Control Act of 1948 (FWPCA), the poor state of the nation's waters compelled Congress to adopt a more comprehensive regulatory scheme.

23. See 1971 Water Pollution Hearings, supra note 19, at 1149 (statement of David Zwick, Project Director, The Nader Water Pollution Project) (describing the nation's water quality problems and suggesting the need for an improved regulatory scheme). Before the House Committee on Public Works, David Zwick stated:

After 15 years of Federal efforts and longer than that of State and local efforts with the problem, we are informed by the Council on Environmental Quality in their latest report that only some 10 percent of the Nation's water can be rated as unpolluted, or even moderately polluted.

Federal officials have, in regarding their own problem, had a difficult time naming a place where the Federal abatement efforts, particularly in the enforcement area, brought about a sufficient improvement in the lakes, rivers, and
In response to the water quality crisis, Congress passed the Federal Water Pollution Control Act Amendments of 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."24 To meet this objective, Congress enumerated several goals, which included: (1) eliminating "the discharge of pollutants into the navigable waters" by 1985; (2) attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by 1983; (3) prohibiting "the discharge of toxic pollutants in toxic amounts"; (4) providing "[f]ederal financial assistance . . . to construct publicly owned waste treatment works"; (5) creating and implementing "area-wide waste treatment management planning processes"; and (6) developing technology "to eliminate the discharge of pollutants into the navigable waters."25 These amendments later became known as the Clean Water Act when the FWPCA was amended again in 1977.26

2. Substantive Provisions

The CWA contains several mechanisms to meet its goals of improving water quality. These mechanisms include research programs,27 funding programs,28 water quality standard and effluent limitations programs,29 and permit and licensing programs.30 In addition, the CWA allows private citizens to seek review of the EPA’s deci-

streams in this country to return any of them to their original uses as fishing spots, recreation spots, or public drinking water sources.

The question we have to consider is how to reverse that pattern before we are overwhelmed with the cost, the health costs, the property damage costs, the cost in livelihood, the cost in beauty and pleasure to everyone.

I think the key lesson to be learned is that we cannot count on good, effective, strong administration. We have to design laws that will, to the greatest extent possible, defy administrative timidity and incompetence.

Id.

25. Id. § 2, 86 Stat. at 816.
28. See id. §§ 1281-1301 (establishing municipalities in the construction of sewage treatment works).
29. See id. § 1311 (prohibiting the discharge of point source pollutants into navigable waters without a permit); id. § 1313 (requiring states and tribes to adopt water quality standards for all waters and total maximum daily loads for impaired waters); id. § 1314 (mandating that states and the EPA develop control strategies for waters with toxic pollution); id. § 1329 (charging states to develop water management plans for nonpoint pollutant sources).
30. See id. § 1342 (establishing the national pollutant discharge elimination system (NPDES) permit program); id. § 1344 (creating the permit program for the dredge and fill of wetlands).
sions under the Act, to sue the EPA for nonperformance of a statutory duty under the Act, and to sue an entity in violation of the Act.

The CWA's provisions on water quality standards and effluent limitations are especially important in meeting the Act's goals because they provide a mechanism for states and the EPA to succeed if other procedures—such as the National Pollution Discharge Elimination System (NPDES) permitting process—fail to achieve water quality standards. Under section 303 of the CWA, each state is required to adopt water quality standards for its intrastate waters. In adopting water quality standards, the state must identify "the desired use for each stream segment . . . and the amount of pollution [which] would impair [this] use." Then, each state must review its water quality standards on a triennial basis and identify waters where the current effluent limits are insufficient to meet applicable standards. These waters are considered to be water quality limited segments (WQLSs). After identifying WQLSs, the state must rank the priority for cleaning each segment. Then, in order of priority, the state must establish TMDLs of pollutants that can enter each WQLS, for those pollutants that the EPA has identified as suitable for TMDL calculation. States must submit these TMDLs to the EPA for approval before they can go into effect. If the EPA disapproves of a state's WQLS identification and TMDL development, the EPA will instead establish TMDLs for that state.

31. Id. § 1369(b)(1).
32. Id. § 1365(a)(2).
33. Id. § 1365(a)(1).
34. See Michael M. Wenig, How "Total" Are "Total Maximum Daily Loads"?—Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act, 12 TUL. ENVTL. L.J. 87, 98 (1998) (stating that the NPDES permitting program has "fall[en] far short" of meeting the "holistic" water quality goals of the CWA); id. at 113–14 (suggesting that the EPA considers the TMDL program to be the "primary mechanism" for addressing these broad water quality concerns) (internal quotation marks omitted).
37. 33 U.S.C. § 1313(c).
38. Id. § 1313(d)(1)(A).
40. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(4).
41. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).
42. 33 U.S.C. § 1313(d)(2).
43. Id.
B. Implementation of the TMDL Provisions by the EPA

1. The EPA’s Early Efforts at TMDL Implementation

Even though TMDLs are important in meeting the CWA’s water quality goals, the EPA’s implementation of TMDL provisions has been plagued by inaction and indifference. Under section 303 of the CWA, the EPA was required to identify pollutants for which TMDL calculations were suitable by October 18, 1973. Once these pollutants were identified, states were then required to begin submitting WQLSs and TMDLs to the EPA within 180 days. However, the EPA failed to meet this statutory deadline. Although the EPA outlined initial regulatory guidelines for developing TMDLs in 1975, it still had not identified those pollutants for which TMDLs were suitable.

In 1978, five years after the statutory deadline, a court order finally compelled the EPA to identify those pollutants. Still, the EPA did not issue its first regulation pertaining to the TMDL program, which involved nonpoint source pollutants and load allocations, until 1985. In 1992, the EPA issued additional regulations, requiring states to submit lists of impaired waters and their priority for TMDL development to the EPA on a biennial basis.

Like the EPA, states were lax with statutory requirements of the CWA and failed to timely implement TMDL programs. Most states either ignored the TMDL requirements or confused the TMDL program with other programs. As a result, most states failed to submit

44. See Linda A. Malone, The Myths and Truths that Ended the 2000 TMDL Program, 20 PACE ENVTL. L. REV. 63, 63 (2002) (recognizing that, thirty years after the enactment of the CWA, the TMDL program “has never seemed farther from effective implementation”).


46. Id. § 1313(d)(2).

47. See Conway, supra note 36, at 98 (noting that by 1975, the EPA had not identified pollutants that were suitable for calculation as TMDLs).


49. See Conway, supra note 36, at 98. The EPA failed to take action regarding TMDLs because it was overwhelmed with implementing the other provisions of the CWA. Id.


53. Conway, supra note 36, at 93.

lists of impaired waters, prioritize the cleanup of those waters, and promulgate TMDLs.\footnote{55}

2. \textit{Lawsuits Challenging the Failure of States and the EPA to Develop TMDLs}

As a result of state and federal inaction regarding TMDL development,\footnote{56} in the late 1970s environmental groups began to file lawsuits against the EPA, alleging that the EPA had failed to exercise its statutory duty to develop TMDLs when states failed to develop their own.\footnote{57} Until 1984, these lawsuits failed because courts either decided that the issues were not ripe for decision or that TMDLs were not required.\footnote{58}

Beginning in 1984 with \textit{Scott v. City of Hammond},\footnote{59} courts began to recognize that the EPA had a duty under the "constructive submission" theory to develop TMDLs when states failed to develop their own.\footnote{60} In \textit{Scott}, the plaintiff complained about severe pollution in Lake Michigan that led to beach closures in 1980 and alleged that the EPA had a duty to promulgate a TMDL for the lake.\footnote{61} The plaintiff argued that notwithstanding the failure of Illinois and Indiana to develop a TMDL for Lake Michigan,\footnote{62} the EPA had a nondiscretionary duty to achieve water quality standards to protect health and public welfare.\footnote{63} The Seventh Circuit agreed with the plaintiff's rationale, finding that under the constructive submission theory, a state's failure to develop TMDLs was equivalent to the state affirmatively submitting "no TMDLs" for a WQLS.\footnote{64} Accordingly, the Seventh Circuit determined that if the district court agreed that the states' failure to promulgate TMDLs amounted to a constructive submission of no TMDLs for Lake Michigan, the EPA was required by law to approve or disapp-
prove of that submission and to develop a TMDL for the lake if it deemed one was necessary.65

After Scott, environmental groups filed numerous successful lawsuits compelling the EPA to promulgate TMDLs for states that failed to do so themselves.66 Many of these lawsuits resulted in settlement agreements, which forced the EPA to work with the states to develop TMDLs.67 In further response to these lawsuits, the EPA issued guidelines to states, including revised regulations requiring states to list impaired waters and TMDLs every two years68 and a draft TMDL Program Implementation Strategy.69

By 1993, a series of court rulings beginning with Sierra Club v. Browner70 temporarily stalled the initial success seen in Scott and subsequent cases.71 In Sierra Club, the United States District Court for the District of Minnesota considered whether the EPA’s approval of Minnesota’s TMDLs was arbitrary and capricious,72 and whether the EPA had the duty to develop TMDLs for Minnesota because the state had only developed forty-three TMDLs in thirteen years.73 Although the court found that the EPA had a mandatory statutory duty to implement TMDLs in the face of inadequate state action, the court determined that the EPA’s approval was not arbitrary and capricious because Minnesota had submitted TMDLs and was working to develop more.74 On this ground, the court distinguished Scott and held that state action in proposing and implementing TMDLs displaced the EPA’s duty to develop TMDLs for the state.75

3. Lawsuits Challenging the Inadequacy of TMDLs

Despite the temporary setback in Sierra Club, the EPA and states were forced to develop TMDLs as environmental groups began to suc-
cessfully challenge the adequacy and quality of TMDLs. In 1996, in *Idaho Sportsmen's Coalition v. Browner*, the United States District Court for the Western District of Washington determined that the EPA's approval of Idaho's list of three TMDLs—despite the fact that there were 962 Idaho WQLSs—was arbitrary and capricious. Additionally, the court found that a proposed twenty-five year implementation schedule for TMDLs was unreasonable, and that five years was a reasonable amount of time to develop all Idaho TMDLs.

Likewise, in *Sierra Club v. Hankinson*, environmental groups mounted a successful challenge to the adequacy of TMDLs in Georgia. In *Hankinson*, the court found that Georgia's proposed TMDL implementation schedule, which would take over 100 years to complete, was insufficient under the CWA. Accordingly, the court ordered Georgia and the EPA to establish all Georgia TMDLs within five years. Such cases led to an explosion of successful litigation, as environmental groups prevailed in obtaining consent decrees for TMDL implementation. By 2004, over forty suits had been filed in thirty-eight states.

4. The EPA's Response to Early TMDL Litigation

Legal challenges to the implementation of the TMDL program also prompted the EPA to make improvements. In 1997, the EPA recommended that states receive eight to thirteen years to prepare TMDLs for all impaired waters and appointed an advisory committee to study the TMDL program. Three years later, the EPA promulgated a new rule pertaining to TMDLs. This rule, which was later

76. See Hale, supra note 7, at 989.
78. Id. at 967, 969.
79. Id.
83. See Conway, supra note 36, at 97.
84. See May, supra note 54, at 10,247.
85. Murchison, supra note 50, at 575.
86. Id. at 576.
87. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program, 65 Fed. Reg. 43,586 (July 13, 2000). The EPA recognized that although the TMDL program had significantly improved water quality nationwide, more comprehensive regulations were necessary to improve the efficacy of the program. Id. at 43,587–88.
withdrawn in 2003, included nonpoint pollution sources within the TMDL framework, set ten-year timetables for state TMDL implementation, required the placement of impaired waters not needing TMDLs on a prioritized list, and obliged states to provide reasonable assurances that TMDLs would be properly implemented. To date, the EPA has prepared over twenty technical support and guidance documents pertaining to TMDL development.

While litigation efforts have compelled the EPA and states to implement the TMDL program more diligently, the EPA and states still face several challenges. In 2002, the EPA recognized that 40% of the nation's assessed waters still do not meet state water quality standards. Similarly, states have indicated that 20,000 individual water bodies fail to meet state water quality standards. In Maryland, for example, 473 individual water bodies do not meet state water quality standards. Furthermore, as of 2004, despite the implementation of TMDLs, no impaired waters have improved to the extent that they now meet water quality standards. Thus, litigants continue to challenge the adequacy of TMDLs with the goal of improving the efficacy of the TMDL program.

C. Recent Challenges to the Implementation of TMDL Provisions

The most recent challenges to the adequacy of TMDLs involve whether TMDLs can take the form of seasonal or annual limits on pollutants entering regulated waters as opposed to daily limits on pol-

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88. Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program, 68 Fed. Reg. 13,608 (Mar. 19, 2003). The EPA withdrew the July 2000 rule because it recognized that the rule would not succeed in making the TMDL program more efficient and effective. Id. at 13,612. In addition, the EPA needed more time to review and revise implementing regulations so that it could determine the best way to achieve the goals of the CWA. Id.
89. Id. at 13,591.
90. Id. at 13,590.
91. Id. at 13,591.
92. Id. at 13,591.
94. Twenty Needs Report, supra note 4, at 36.
95. Birkeland, supra note 5, at 303.
97. May, supra note 54, at 10,247.
98. See infra Part II.C.
lutants. In 2001, the Second Circuit was the first court to address this issue in *NRDC v. Muszynski*, suggesting that TMDLs could be expressed in terms of seasonal and annual loads. In contrast, when the D.C. Circuit confronted the same issue in *Friends of the Earth v. EPA*, it determined that TMDLs must take the form of daily loads, in accordance with the plain meaning of the CWA.

I. NRDC v. Muszynski

*NRDC v. Muszynski* involved a challenge to the EPA’s approval of TMDLs for phosphorus in eight New York reservoirs. These reservoirs and eleven others suffered from increasing phosphorus pollution from sewage discharge and runoff from nonpoint pollution sources. Despite the increasing threat to the water quality of the reservoirs, New York failed to implement TMDLs. In 1994, the NRDC filed a citizen suit in the United States District Court for the Southern District of New York, under the constructive submission theory, to compel the EPA to develop TMDLs for these nineteen reservoirs. After the district court denied the NRDC’s motion for summary judgment, New York designated all nineteen reservoirs as waters falling below state water quality standards and accorded them priority for TMDL development.

By January 1997, New York had submitted TMDLs for eighteen of the nineteen reservoirs to the EPA. In April 1997, the EPA approved the TMDLs for the eight phosphorus-polluted reservoirs that were the focus of the litigation. In response to the EPA approval, the NRDC amended its complaint to challenge the adequacy of the eight approved TMDLs. Specifically, the NRDC claimed that the EPA did not have the authority to approve the TMDLs because they were expressed in terms of annual rather than daily loads. In May

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99. 268 F.3d 91, 99 (2d Cir. 2001).
100. *Friends of the Earth III*, 446 F.3d 140, 148 (D.C. Cir. 2006).
101. *NRDC*, 268 F.3d at 93.
102. *Id.* at 94.
103. *Id.* at 95.
104. *Id.* The NRDC argued that New York’s failure to develop TMDLs for these waters “amounted to a constructive submission of no TMDLs.” *Id.* Under this theory, the NRDC contended that the EPA had a duty to develop TMDLs for the waters itself. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* EPA rejected TMDLs for the other ten reservoirs because it determined that pollution levels in those reservoirs did not exceed water quality standards requiring TMDL implementation. *Id.*
108. *Id.*
109. *Id.* at 96.
2000, the district court ruled that the EPA's approval of the TMDLs was valid because the EPA reasonably concluded that in some instances, "total maximum load" could have a flexible meaning encompassing more than a daily expression. The court further found that the EPA's decision to approve the phosphorus TMDLs as annual TMDLs in terms of mass per year was reasonable.

On appeal, the Second Circuit affirmed the decision of the district court and accorded deference to the EPA's interpretation of the TMDL provision. The Second Circuit examined the plain meaning of the TMDL provision and determined that it was ambiguous. In light of this ambiguity, the court examined the reasonableness of the EPA's interpretation of the statute, which allowed annual limitations. Rather than adopting the NRDC's view that TMDLs are daily load calculations, the Second Circuit determined that Congress would not have confined the EPA to such a narrow position. Further, the NRDC court found that the EPA needs the discretion to analyze pollutants requiring TMDLs and to regulate them using the most appropriate time increment. Thus, the court deferred to the EPA's interpretation of the CWA, and held that the annual TMDLs were valid so long as the TMDLs took seasonal variations into account.

2. Friends of the Earth v. EPA

In Friends of the Earth v. EPA, the D.C. Circuit held that TMDLs must take the form of daily loads. In so doing, the court rejected the NRDC court's reasoning that TMDLs could take the form of seasonal or annual loads. Friends of the Earth involved a challenge to EPA-approved TMDLs for the Anacostia River. The Anacostia River

110. Id. (internal quotation marks omitted).
111. Id.
112. Id. at 103.
113. Id. at 98. The Second Circuit perceived the term "total maximum daily load" to be ambiguous because the structure of the CWA required the EPA to apply its expertise to a large number of different pollutants. Id. at 98–99.
114. Id. at 98–99.
115. Id. at 98.
116. Id. at 98–99. The Second Circuit observed that phosphorus is an example of a pollutant that is more effectively regulated by nondaily periodic measures. Id. at 98. The court reasoned that the varying seasonal tolerance level of water bodies and the unpredictable latency periods of phosphorus suggest that an annual measure would be more effective. Id.
117. Id. at 99. The court remanded the case so that the EPA could explain why phosphorus was best regulated by annual TMDLs. Id. at 103.
118. Friends of the Earth III, 446 F.3d 140, 148 (D.C. Cir. 2006).
119. See id. at 146.
120. Id. at 143.
flows through Maryland and the District of Columbia, and has "the
dubious distinction of being one of the ten most polluted rivers in the
country." In 1998, the District of Columbia began developing
TMDLs for dissolved oxygen and turbidity in the Anacostia River
because the river was in violation of the District's water quality
standards for these pollutants. In 2001, the District submitted and the
EPA approved a TMDL for dissolved oxygen that limited the annual
discharge of oxygen-depleting pollutants. The EPA established a
subsequent TMDL for turbidity in 2002, that limited the seasonal dis-
charge of pollutants contributing to turbidity.

After the EPA issued its final decision approving the TMDLs,
Friends of the Earth sought review of the approval in the D.C. Circuit,
arguing that the TMDLs were insufficient and would fail to meet water
quality standards. Specifically, Friends of the Earth alleged that the
TMDLs were inadequate because they were calculated on annual and
seasonal bases rather than on a daily basis. The court held that it
lacked original jurisdiction to review the EPA decision and trans-
ferred the case to the district court for review under the Administra-
tive Procedure Act (APA).

The district court held that the EPA is not restricted by the CWA
to develop only daily TMDLs, and that the EPA's use of seasonal
and annual TMDLs was a reasonable interpretation of the CWA. In
reaching its holding, the court found that Congress did not intend for
TMDLs to be calculations of daily loads for water pollutants "for all
circumstances, at any regulatory cost, and for zero or trivial regulatory

121. Id. at 142 (quoting Kingman Park Civic Ass'n v. EPA, 84 F. Supp. 2d 1, 4 (D.D.C. 1999)).
123. Friends of the Earth II, 346 F. Supp. 2d at 186.
124. Id.
125. Id.
126. Friends of the Earth v. EPA (Friends of the Earth I), 333 F.3d 184, 187 (D.C. Cir. 2003).
127. Friends of the Earth III, 446 F.3d 140, 143 (D.C. Cir. 2006).
128. Friends of the Earth I, 333 F.3d at 193. Under the CWA, the federal courts of appeals have original jurisdiction to review EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." 33 U.S.C. § 1369(b)(1)(E).
129. Friends of the Earth I, 333 F.3d at 185.
130. Friends of the Earth II, 346 F. Supp. 2d at 189.
131. Id. at 195.
benefit.” Further, the court found that the annual and seasonal loads approved by the EPA would not jeopardize daily water quality standards. Therefore, the district court held that the annual and seasonal TMDLs were sufficient and that the EPA’s approval of the TMDLs was neither arbitrary nor capricious.

On appeal, the D.C. Circuit reversed, finding that the plain meaning of the CWA requires daily TMDLs. In accordance with the test for reviewing agency decisionmaking set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the D.C. Circuit examined the text of the CWA to determine if Congress clearly spoke to the issue of whether seasonal or annual TMDLs are permissible. The D.C. Circuit found that the use of the word “daily” in “total maximum daily load” was clear and unambiguous, and that regulations for daily loads of pollutants were required under the statute. Furthermore, the D.C. Circuit determined that there was no indication in the text of the statute that the EPA has the authority to approve maximum or annual TMDLs. The court found that because Congress spoke directly to the issue of whether TMDLs should be daily, it need not look beyond the text to ascertain the meaning of the TMDL provision. Therefore, the D.C. Circuit reversed the district court’s decision and remanded the case with instructions to vacate the annual and seasonal TMDLs.

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132. *Id.* at 190.
133. *Id.* at 195, 198, 202.
134. *Id.* at 188, 195.
135. *Friends of the Earth III*, 446 F.3d 140, 142 (D.C. Cir. 2006).
137. *Friends of the Earth III*, 446 F.3d at 144.
138. *Id.*
139. *Id.*
141. *Friends of the Earth III*, 446 F.3d at 142, 148.
D. Implementation of the Clean Water Act's TMDL Provisions in Maryland

TMDL implementation in the states has generally mirrored the inaction and indifference exhibited by the EPA. Accordingly, many states have had to defend multiple lawsuits that have compelled them to enter into various consent decrees. However, Maryland has been more responsive to the TMDL program than the EPA and most other states. In Maryland, lawsuits regarding TMDLs have been limited and courts have not forced Maryland to enter any consent decrees to develop TMDLs under the "constructive submission" doctrine. In fact, the United States District Court for the District of Maryland has recognized that Maryland has complied with TMDL requirements to a greater degree than other states.

Maryland began implementation of its TMDL program in 1992 and the courts quickly upheld it. Maryland, through the Maryland Department of the Environment (MDE), published its first list of impaired waters in 1992. Several years later, the Sierra Club challenged the EPA's approval of Maryland's 1996 and 1998 lists of impaired waters. The Sierra Club alleged that the EPA's approval of the lists was arbitrary and capricious because the lists did not contain all impaired waters in Maryland. The district court rejected these allegations, finding that the EPA's approval of Maryland's impaired water lists was reasonable because Maryland complied with EPA regulations and the CWA. Accordingly, the court upheld the EPA's approval of the impaired water lists.

In 2006, a federal district court in Maryland again upheld Maryland's TMDL program in Potomac Riverkeeper, Inc. v. EPA. Potomac Riverkeeper, a nonprofit organization, challenged Maryland's pace in implementing the TMDL program and Maryland's priority designa-

142. See Conway, supra note 36, at 93 (noting that states have avoided implementation of the TMDL program).
143. See May, supra note 54, at 10,247. There are nearly thirty consent decrees forcing action by the EPA and the states. Id.
144. See, e.g., Sierra Club v. EPA, 162 F. Supp. 2d 406, 418 n.18 (D. Md. 2001) (finding the constructive submission doctrine inapplicable because Maryland had made several TMDL submissions).
146. Sierra Club, 162 F. Supp. at 412.
147. Id. at 413.
148. Id.
149. See id. at 413–16.
150. Id. at 416.
tions for impaired waters under the program. Specifically, Potomac Riverkeeper alleged that the EPA’s approvals of Maryland’s 2002 and 2004 lists of impaired waters were arbitrary and capricious because the MDE was taking too long to develop TMDLs for impaired waters. The court rejected these claims, finding that the EPA’s approvals of Maryland’s 2002 and 2004 lists were not unreasonable because Maryland was completing TMDLs on the basis of priority, and that the MDE was doing a better job developing TMDLs for high priority impaired waters than it had in the past.

Along with the courts, the EPA has also determined that Maryland is making good progress with its TMDL program. In 2004, the EPA acknowledged that Maryland had made “significant progress” in developing TMDLs since 1998. The EPA found that Maryland was committed to developing TMDLs for the state’s impaired waters and that it was unnecessary for the EPA to interfere with TMDL implementation.

Currently, Maryland lists 473 impaired waters and 134 impaired watersheds that need to be addressed by the TMDL program. These waters are impaired by nutrients, sediment, pathogens, metals, pH, oxygen depletion, polychlorinated biphenyls, mercury, pesticides, sulfates, toxic inorganics, total toxicity, and turbidity. The most common sources of pollutants are nutrients, sediments, pathogens, and metals. As a result, these waters will require the development of over 655 potential TMDLs.

The MDE has already developed TMDLs for 168 impaired waters following a variety of approaches that have resulted in annual
TMDLs, seasonal TMDLs, and daily TMDLs.\(^{164}\) For example, the MDE has developed TMDLs for fecal coliform as daily load limitations;\(^{165}\) TMDLs for nitrogen, phosphorus, and biochemical oxygen demand as monthly load limitations;\(^{166}\) and TMDLs for nitrogen, phosphorus, and biochemical oxygen demand as annual load limitations.\(^{167}\) Some of the TMDLs that are represented as both monthly and annual loads include those for (1) nitrogen and dissolved oxygen in the Manokin River,\(^{168}\) (2) nitrogen, phosphorus, and dissolved oxygen in the Lower Wicomico River,\(^{169}\) (3) nitrogen and phosphorus in the Corsica River,\(^{170}\) (4) phosphorus in the Sassafras River,\(^{171}\) and (5) nitrogen and phosphorus in the Chicamacomico River.\(^{172}\)

MDE is expected to develop TMDLs for the remaining waters and pollutants by 2011.\(^{173}\) Currently, Maryland is waiting on the EPA to approve twenty-three TMDLs,\(^{174}\) and is in the process of developing an additional thirty-seven TMDLs.\(^{175}\) These additional TMDLs are addressing some of the most pressing water quality issues in Maryland and the surrounding region, and are focused on pervasive pollutants in Maryland’s waters and the tributaries of the Chesapeake Bay. For example, Maryland is working with the District of Columbia to develop a TMDL for PCBs in the Potomac River and its tributaries.\(^{176}\) Maryland and Virginia volunteered to aid the District of Columbia in

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\(^{164}\) E.g., Breton Bay TMDL, supra note 10, at iii (annual and growing season loads); Tangier Sound Basin TMDL, supra note 14, at iv (daily loads); Town Creek TMDL, supra note 10, at iv (monthly and annual loads).

\(^{165}\) Tangier Sound Basin TMDL, supra note 14, at iv.

\(^{166}\) Town Creek TMDL, supra note 10, at iv.

\(^{167}\) Breton Bay TMDL, supra note 10, at iii.

\(^{168}\) Md. Dep’t of the Env’t, Total Maximum Daily Loads of Nitrogen and Biochemical Oxygen Demand for the Manokin River, Somerset County, Maryland, at iv (2000).

\(^{169}\) Md. Dep’t of the Env’t, Total Maximum Daily Loads of Nitrogen, Phosphorus and Biochemical Oxygen Demand for the Lower Wicomico River, Wicomico County and Somerset County, Maryland, at iv (2000).


\(^{171}\) Md. Dep’t of the Env’t, Total Maximum Daily Loads of Phosphorus for the Sassafras River, Cecil and Kent Counties, Maryland, at iii (2002).

\(^{172}\) Md. Dep’t of the Env’t, Total Maximum Daily Loads of Nitrogen and Phosphorus for the Chicamacomico River, Dorchester, Maryland, at iv (2000).


\(^{174}\) MDE, Current Status of TMDL Development in Maryland, http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/Sumittals/index.asp (last visited Apr. 15, 2007) [hereinafter Current Maryland TMDL Development].

\(^{175}\) Id.

developing these water quality standards for the Potomac River.177 Likewise, Maryland is developing TMDLs for PCBs in the Back River, the Baltimore Harbor, Bear Creek, and Curtis Creek; TMDLs for nutrients in the Pocomoke River; and TMDLs for mercury in fish tissue in various waters.178

In the future, Maryland could be involved in the EPA's development of a TMDL for the entire Chesapeake Bay. If the Chesapeake Bay fails to meet water quality standards by 2010, the terms of the 2000 Chesapeake Bay Agreement between the EPA and states in the Chesapeake Bay watershed will require the EPA to establish TMDLs for the Chesapeake Bay.179 Because most of Maryland lies within the Chesapeake Bay watershed, it will likely have input into the TMDL.

III. Analysis

As Maryland continues to develop TMDLs, it should look to the guidance set forth by the D.C. Circuit in Friends of the Earth v. EPA, and develop TMDLs as daily limitations rather than as seasonal or annual limitations.180 Maryland should adhere to the D.C. Circuit's interpretation of the CWA rather than the interpretation allowing for seasonal and annual loads set forth in NRDC v. Muszynski.181 Even though developing daily TMDLs could be costly and time-consuming,182 the costs are outweighed by the benefits, which include: (1) improvement of state water quality, (2) government accountability, (3) consistency among states in the implementation of TMDLs, and (4) avoidance of lengthy and costly litigation in the future.183

A. Maryland Should Adhere to the Interpretation of TMDLs in Friends of the Earth Because it is Faithful to the Clear Meaning and Congressional Intent of the CWA

As Maryland continues to implement its TMDL program, it should adhere to the D.C. Circuit's interpretation of TMDLs in Friends of the Earth. The D.C. Circuit properly determined that TMDLs must be daily limitations by examining the plain meaning of the statute.184

177. Id.
180. See infra Part III.A.
181. See infra Part III.B.
182. See infra Part III.C.
183. See infra Part III.D.
184. Friends of the Earth III, 446 F.3d 140, 144 (D.C. Cir. 2006).
It is a well-settled rule of law that statutes should be interpreted in accordance with their plain meaning when they are clear and unambiguous.\textsuperscript{185} Moreover, as the Supreme Court asserted in \textit{Chevron}, when “Congress has directly spoken to the precise question at issue” in the statute, the agency must adhere to congressional intent.\textsuperscript{186}

In accordance with these canons of statutory interpretation, the D.C. Circuit held that the text of the CWA is clear and unambiguous.\textsuperscript{187} The text of the CWA clearly states: “Each State shall establish . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation.”\textsuperscript{188} As the D.C. Circuit correctly acknowledged, there is nothing ambiguous about the word “daily” in the statute.\textsuperscript{189} Thus, it is clear that Congress intended states to develop daily limitations for pollutants in impaired waters and that states must adhere to this intent. Given this clarity, Maryland should adhere to the D.C. Circuit’s interpretation that TMDLs must be expressed as daily limitations.

\textbf{B. Maryland Should Not Adhere to the Interpretation of TMDLs in \textit{NRDC v. Muszynski} Because it is Inconsistent with the Text of the CWA}

Maryland should not follow the broad approach of the Second Circuit in \textit{NRDC v. Muszynski} that allowed for seasonal and annual loads because it conflicts with the text of the CWA. In \textit{NRDC}, the Second Circuit improperly found that the word “daily” in “total maximum daily load” could be interpreted more broadly to allow for seasonal or annual limitations on pollutants.\textsuperscript{190} It ignored the basic canon of statutory construction as described by the \textit{Chevron} Court, that when Congress speaks directly to the issue, “that is the end of the matter.”\textsuperscript{191} Instead, the Second Circuit looked beyond the text and determined that Congress did not intend for TMDLs to be daily limitations on pollutants, because such an interpretation would “lose[] sight of the overall structure and purpose of the CWA.”\textsuperscript{192} The Second Circuit further found that interpreting “total maximum daily

\begin{itemize}
  \item \textsuperscript{185} \textit{See cases cited supra note 140.}
  \item \textsuperscript{187} \textit{Friends of the Earth III}, 446 F.3d at 144.
  \item \textsuperscript{188} 33 U.S.C. § 1313(d)(1)(C) (2000).
  \item \textsuperscript{189} \textit{See Friends of the Earth III}, 446 F.3d at 144.
  \item \textsuperscript{190} \textit{See NRDC v. Muszynski}, 268 F.3d 91, 98-99 (2d Cir. 2001) (finding that “the term 'total maximum daily load' is susceptible to a broader range of meanings” than “daily” loads).
  \item \textsuperscript{191} \textit{Chevron}, 467 U.S. at 842.
  \item \textsuperscript{192} \textit{NRDC}, 268 F.3d at 98.
\end{itemize}
loads" to require daily limitations would be “absurd” because some pollutants could be better regulated by other periodic increments.\footnote{198}{Id. at 98–99.}

However, the text of the CWA and congressional intent belie the Second Circuit’s erroneous interpretation. Congress enacted the CWA during a national water quality crisis with goals of eliminating pollutant discharges into navigable waters and making water safe for swimming and fishing.\footnote{194}{See 33 U.S.C. § 1251(a) (2000) (stating that the purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”).} Members of Congress acknowledged that the CWA was a “tough law,” and provided “precise standards and definite guidelines on how the environment should be protected.”\footnote{195}{E.g., 117 Cong. Rec. 38797, 38804–805 (1971) (statement of Sen. Randolph).} Given these ambitious goals of restoring and maintaining water quality at a level that is safe for swimming and fishing,\footnote{196}{See 33 U.S.C. § 1251 (a).} and Congress’s belief that the standards set forth in the texts of the law were precise and definite,\footnote{197}{117 Cong. Rec. 38797, 38804–805 (1971) (statement of Sen. Randolph).} it is unreasonable to think that Congress intended for “total maximum daily load” to be construed imprecisely as a total maximum seasonal load or total maximum annual load on pollution discharges. Therefore, Maryland should not develop annual or seasonal TMDLs in accordance with NRDC.

C. The Friends of the Earth Court Appropriately Elevated the Clear Statutory Mandate of the CWA over Potential Financial Burdens of Daily TMDL Implementation

Maryland should also adhere to the Friends of the Earth approach to TMDLs despite concerns over the cost of daily TMDLs, because of the clear statutory mandate for daily TMDLs and because Maryland may have other alternatives for reducing costs associated with daily TMDLs. Advocates for seasonal and annual TMDLs cite cost as a reason to ignore the plain meaning of the statute.\footnote{198}{See NACWA Brief, supra note 10, at 14–15 (citing the billions of dollars already spent on TMDLs using average annual loads).} For example, in an amicus brief in Friends of the Earth, the National Association of Clean Water Agencies (NACWA) argued that requiring states to develop daily TMDLs would slow the pace of TMDL development because the states and the EPA have adhered to seasonal and annual TMDL approaches in the past.\footnote{199}{See id. at 11.} The NACWA also argued that the costs of TMDL development, which already range from $4,000 to $1 million
per TMDL, could increase with a requirement for daily TMDLs. The NAWCA explains that this cost will increase as past monetary investments into the TMDL program targeting annual TMDLs would essentially become meaningless.

No matter how compelling these economic arguments are, annual and seasonal approaches are not permitted under the statutory mandate of the CWA. As the D.C. Circuit correctly recognized in Friends of the Earth, the term "total maximum daily load" is clear and unambiguous. It cannot be read more broadly, as the Second Circuit asserted in NRDC, to mean some violation of hourly, weekly, monthly, or annual load. Thus, under Chevron, implementing agencies are required to adhere to these plain terms when developing TMDLs. Therefore, Maryland should implement its TMDL program in accordance with the statutory mandate of the CWA and ensure that it adopts daily TMDLs, rather than the seasonal or annual variety.

If Maryland wants to address economic concerns, it can look to alternatives other than seasonal or annual TMDLs. For instance, Maryland could create pollution trading schemes that would provide economic incentives for polluters to reduce daily pollutant levels. Maryland could also petition the EPA to reexamine its regulations pertaining to the TMDL program. The text of the CWA provides that states shall establish "the total maximum daily load, for those pollutants which the Administrator identifies ... as suitable for such calculation." Therefore, if pollutants are not technically or economically suitable for calculations as TMDLs, the EPA might consider eliminat-

201. See NACWA Brief, supra note 10, at 11.
202. Id.
203. Friends of the Earth III, 446 F.3d 140, 144 (D.C. Cir. 2006).
205. See Friends of the Earth III, 446 F.3d at 144.
207. See Wenig, supra note 34, at 111–12. Pollution trading is a pollution reduction scheme that sets a limit on the quantity of a pollutant that may be emitted, allocates allowances for pollutant sources to emit the given pollutant within the set limit, and then allows for sources to trade those allowances so that pollution reductions occur at the lowest cost. Dallas Burtraw et al., Economics of Pollution Trading for SO2 and NOx, at 2-4 (2005), available at http://www.rff.org/documents/RFF-DP-05-05.pdf.
208. See Friends of the Earth III, 446 F.3d at 146 (noting that although the CWA restricts TMDL development that is not based on daily loads, the EPA has the authority to define which pollutants are suitable for TMDL calculation).
ing them from the list of pollutants. These alternatives would be acceptable for Maryland, and would not contravene the CWA’s requirement for daily TMDLs.

D. Following the “Daily” Approach to TMDL Development Will Improve Water Policy in Maryland

Even if Maryland considers the statute’s mandate to be ambiguous, Maryland should adhere to the Friends of the Earth court’s interpretation of the CWA because it will improve water quality and government accountability, create more consistency in the implementation of the TMDL program, and reduce future litigation.

1. The Implementation of Daily TMDLs Will Improve Water Quality in Maryland

Maryland will improve water quality more effectively by developing daily TMDLs rather than seasonal or annual TMDLs. By limiting the pollution that enters impaired waters on a daily basis, the MDE will ensure that every day of the year, water quality remains at acceptable levels. But, if the MDE allows for seasonal or annual loads of pollutants, there could be peaks and valleys in water quality that could be dangerous to wildlife or humans. The goal of the CWA is to provide for consistently good water quality, and Congress created the TMDL provision to allow for such consistency. Because daily load TMDLs produce consistently high water quality, Maryland should follow this approach over an annual or seasonal TMDL calculation.

210. The Friends of the Earth court emphasized that the EPA’s own regulations had forced them into making the argument that non-daily loads were “daily.” Friends of the Earth III, 446 F.3d at 146 (citing Total Maximum Daily Loads under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978)).

211. See infra Part III.D.1.

212. See infra Part III.D.2.

213. See infra Part III.D.3.


215. Limiting pollution discharges on a daily basis keeps water quality acceptable by maintaining safe levels of pollutants and restricting the possibility of large pollutant dumps over a short period of time that can quickly contribute to water quality decline. See Chesapeake Bay Program, Nutrient Pollution, http://www.chesapeakebay.net/info/nutrl.cfm (last visited May 11, 2007) (noting that excessive concentrations of pollutants and nutrients can cause rapid algae growth and impair water quality).

216. See, e.g., id. (noting that excessive amounts of nitrogen and phosphorus cause rapid growth of algae, deplete water oxygen, and cause fish to die). In the past, excessive amounts of nutrients such as nitrogen and phosphorus have caused algae blooms and outbreaks of diseases like Pfiesteria, endangering wildlife and humans. Christine Mlot, The Rise in Toxic Tides: What's Behind the Ocean Blooms?, 152 Sci. News 202, 204 (1997).

217. See supra note 195 and accompanying text.
2. The Implementation of Daily TMDLs Will Improve Government Accountability in Maryland

Maryland should also develop daily TMDLs for the purpose of governmental accountability. When Congress passed the CWA in 1972, it intended that these water quality standards be stringent requirements. Following the letter of the CWA requires Maryland to strictly adhere to the CWA’s water quality and TMDL provisions instead of finding ways to avoid its clear mandates. The implementation of TMDL provisions by the federal government and the states has generally been weak. The EPA and the states did not take the TMDL program seriously until environmental groups secured key victories compelling TMDL implementation. Although implementation of the TMDL provisions has been better in Maryland than in other states and has been upheld in courts, Maryland still needs to develop TMDLs for the majority of its waters. Maryland is faced with this large burden because it did not begin listing impaired waters until 1992, twenty years after the CWA’s enactment. Maryland still can take steps to improve its accountability. Failure to follow Congress’s clear mandate in this context diminishes Maryland’s accountability, as it puts Maryland’s environmental programs into question and shows a disregard for the clear meaning of the law.

3. The Implementation of Daily TMDLs Will Promote Consistency in State Water Pollution Control Efforts

The development of daily TMDLs will also help Maryland promote consistency in state environmental efforts. Currently, state water pollution control efforts in the TMDL context are inconsistent, and such inconsistency could circumvent the purpose of the CWA by leading to differences in water quality standards and water quality levels in

219. See supra Part II.B.
220. See supra notes 59–69, 77–82 and accompanying text.
221. See supra Part II.D.
223. See 2004 Maryland Fact Sheet, supra note 96 (listing that of the 473 impaired waters in Maryland, only 175 TMDLs have been approved by the EPA).
224. See supra Part II.D; see also Potomac Riverkeeper, EPA and Maryland, http://www.potomacrivkeeper.org/cms/index.php?option=com_content&task=view&id=75&Itemid =50 (last visited Apr. 16, 2007) (stating that it will take fifty-two years for Maryland to develop TMDLs for all of its water bodies because of deadline extensions).
225. See Malone, supra note 44, at 75–76 (discussing the varied state definitions for measuring impaired water quality and different data sources for load calculations).
Maryland should develop daily TMDLs and share this information with other states in an effort to improve regional and national water quality. Such cooperation will reduce the costs that are feared in requiring daily TMDLs, and will lead to greater consistency and uniformity in pollution control measures.

Consistency is important for achieving compliance with TMDLs for downstream waters and regional water bodies that cross state lines. As a result of the D.C. Circuit's ruling in Friends of the Earth, the District of Columbia is now required to develop daily TMDLs for impaired water bodies. Several water bodies in the District of Columbia, including the Anacostia River (the subject of the Friends of the Earth litigation), and the Potomac River, flow from Maryland into the District of Columbia. These water bodies include the Potomac River, Rock Creek, and Paint Branch. Once the District of Columbia sets daily TMDLs for these waters, they can only be met if upstream pollutants in Maryland enter the waters in accordance with daily limitations. This concern will be especially pressing if the EPA is required to develop a TMDL for the Chesapeake Bay in 2011, because most of Maryland's waters are tributaries to the Chesapeake Bay. Unless Maryland develops daily TMDLs, it will be unable to adhere to its responsibility of meeting TMDLs in downstream locations like the District of Columbia. Daily TMDL implementation will help promote uniform water pollution control efforts across state lines.

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227. See Conway, supra note 36, at 120 (noting that by sharing TMDL pollution control measures, states can reduce costs by avoiding missteps made by other states).

228. Id.

229. When a state develops TMDLs, it must consider all sources of pollution when allocating limitations. See 40 C.F.R. § 130.2(i) (2006) (defining a TMDL as the sum of all waste allocations designated to point sources of pollution and load allocations designated to nonpoint sources of pollution). Thus, since upstream states have pollution sources that affect downstream states, the loads in the upstream states would have to be allocated in a consistent manner to comply with the TMDLs in the downstream state.

230. See Friends of the Earth III, 446 F.3d 140, 148 (D.C. Cir. 2006) (remanding the case to the district court to determine whether the District of Columbia should be given a reasonable period of time to establish daily TMDLs).

231. See supra note 229 and accompanying text.

232. See Day, supra note 179, at B-1 (stating that the EPA will be required to develop a TMDL for the Chesapeake Bay if it is not restored to "health" by 2010).

233. See Maryland Public Television, Maryland Public Television Presents Bayville, http://bayville.thinkport.org/resourcelibrary/faq.aspx (last visited May 11, 2007) (stating that 93.3% of Maryland is in the Chesapeake Bay watershed).
4. The Implementation of Daily TMDLs Will Prevent Costly and Lengthy Lawsuits in the Future

Daily TMDL implementation will also help Maryland avoid future costly and lengthy litigation. Environmental groups will continue to bring legal challenges until states are meeting the requirements of the CWA. Because Maryland has developed daily TMDLs for some impaired waters but seasonal or annual TMDLs for others, it could be the subject of lawsuits employing the *Friends of the Earth* court’s approach. In addition, Maryland could be involved in litigation challenging the adequacy of a proposed TMDL for the Chesapeake Bay, if that water body fails to reach water quality standards by 2010. It is likely that there will be litigation challenging the adequacy of any proposed TMDL for the Chesapeake Bay because of the Bay’s high value to the State of the Maryland.

As the EPA acknowledged in a memorandum responding to the *Friends of the Earth* decision, it is uncertain whether the courts will adhere to the narrow view of the D.C. Circuit or the broad approach of the Second Circuit to TMDL implementation. Therefore, the EPA recommends that states develop daily TMDLs to avoid litigation, even though the EPA itself adopts the position that TMDLs can be expressed in non-daily increments. Accordingly, Maryland should develop daily TMDLs, as this policy adheres to the EPA’s recommendation and the provisions of the CWA, and will help avoid costly litigation concerning the development of future TMDLs.

IV. CONCLUSION

In *Friends of the Earth*, the D.C. Circuit properly interpreted the CWA when it decided that TMDLs must be daily limitations on pollutants entering impaired waters. Maryland should follow this inter-
pretation and develop daily TMDLs for its impaired waters, in contrast to the view of the Second Circuit in NRDC v. Muszynski allowing for seasonal and annual loads. This interpretation is warranted because the plain text of the CWA unambiguously requires states to develop daily TMDLs. Even though developing daily load requirements could be costly, Maryland must develop TMDLs for several important reasons. Daily TMDLs will help improve state water quality, ensure the environmental accountability of the state and the MDE, foster consistency among states in the development and implementation of TMDLs, and prevent future litigation which may prove costly and time consuming. For improved water quality in Maryland and the region, it is imperative that Maryland adhere to the reasoning of the Friends of the Earth court and develop daily TMDLs for its impaired waters.

Jayni A. Shah

241. See supra Part III.B.
242. See supra Part III.B.
243. See supra Part III.C.
244. See supra Part III.D.
245. See supra Part III.D.1.
246. See supra Part III.D.2.
247. See supra Part III.D.3.