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2007 Pennsylvania Retention Election: An Objective Analysis of Justice Thomas G. Saylor's Judicial Philosophy, Methodology and Jurisprudential Tendencies

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I. INTRODUCTION

In recognition of Justice Thomas G. Saylor's retention election in November 2007, this comment presents an introduction to the Pennsylvania Retention Election process as well as an introduction to Justice Saylor's background and qualifications. In addition, this comment highlights Justice Saylor's judicial philosophy, methodology and jurisprudential tendencies through an objective review of opinions he authored during his tenure on the Pennsylvania Supreme Court. Finally, this comment examines Justice Saylor's other accomplishments and writings in the last ten years.

II. PENNSYLVANIA RETENTION ELECTIONS

The Pennsylvania Supreme Court is a panel of jurists who wrestle with issues that affect voters in both obvious and subtle ways. For example, they decide: how you are taxed; how your property is zoned; how your children's schools are funded; how far police may intrude into the privacy of your home; available remedies for work-related injuries; who is to be executed in the state's death chamber; and many other issues. Despite the importance of these issues, the Pennsylvania Supreme Court general elections draw scarce attention, which could explain why voters barely notice, ignore, or are not even aware of retention elections.[1]

Voters elect each Pennsylvania Supreme Court Justice for a ten-year term in a partisan election.[2] At the expiration of the term,

1. Robert B. Rackleff, *Judicial Elections Still Fair and Balanced?*, CARNEGIE REP.: CARNEGIE CORP. OF N.Y., VOL. 3, NO. 4 (Spring 2006), *available at* http://www.carnegie.org/reporter/12/elections/index5.html. One analysis of retention elections nationwide from 1976 to 1996 found that 30 percent of those who voted at the top of a ballot did not cast votes in retention elections farther down the ballot. *Id.*

2. *See* 42 PA. CONS. STAT. § 3131 (2006). At the time Justice Saylor was elected, the Pennsylvania Supreme Court Justices earned $122,864 annually plus expenses and automatic annual raises. John M. Baer, *The Turnout Factor Lacking Issues, High Court Race Hinges on Locale*, PHILA. DAILY NEWS, Oct. 27, 1997, at 5. *See also* Jim Caroll, *ACBA Supports Retention Election Candidates*, 7 LAW. J. 1, 1(2005).

the justice is up for retention.[3] The purpose of the retention election process is to reduce the possibility that politics and outside forces will influence the judges or impact their neutrality. Thus, historically, retention has been pro forma.

Justice Saylor's retention election is approaching in November 2007, thus it seems to be an appropriate time to review his jurisprudence and the developments that occurred during his term.

It is important to begin by noting that each branch of government treats "hot issues," such as gay rights, abortion, or religion in schools, differently. It is the judge's duty as an officer of the court to apply the law of this Commonwealth and the nation to the facts of a particular case. Unlike a member of the legislative or executive branch who makes choices based on political ideals, a justice's personal view on specific "hot issues" is irrelevant because a judge has the duty to put his or her own beliefs aside and uphold the integrity of our court system. Justices may disagree with the outcome in a case, or the policies behind the applicable laws, but it is their duty to reach the outcome they believe to be required under the law. Thus, the judiciary acts as a check on the members of the other branches of government who *do act* on the basis of personal opinions and beliefs on "hot issues."

III. JUSTICE THOMAS G. SAYLOR'S BACKGROUND

Republican Justice Thomas G. Saylor, a western Pennsylvania native, resides in Camp Hill, Pennsylvania near Harrisburg.[4] Justice Saylor was the first candidate from outside Allegheny County or Southeastern Pennsylvania in sixteen years to secure election to the Pennsylvania Supreme Court.[5] Justice Saylor received his bachelor's degree from the University of Virginia and his juris doctorate from Columbia Law School.[6] Justice Saylor was admitted to the Pennsylvania Bar in 1972.[7] He spent the

3. *See* 42 PA. CONS. STAT. § 3153 (2006). In judicial retention elections voters may vote yes or no, or may abstain. *Id.*

4. Baer, *supra* note 2, at 5. *See also* Caroll, *supra* note 2, at 1.

5. Michael A. Riccardi, *Fumo, Rendell Air Opinions at Judicial Election Hearing — Voices Lowered for Attorney Contribution Cap*, Vol. 218 No. 26, LEGAL INTELLIGENCER, Feb. 9, 1998, at 1.

6. *Pennsylvania's Unified Judicial System*, http://www.courts.state.pa.us/index/supreme/saylor.asp (last visited Sept. 18, 2006) [hereinafter *Pa. U.J.S.*]. *See also* Larry King, *State Judicial Candidates Seeking a Favorable Verdict: Seats are Open on Pennsylvania's Supreme, Commonwealth and Superior Courts*, PHILA. INQUIRER, Oct. 29, 1997, at 1.

7. *Pa. U.J.S.*, *supra* note 6.

first decade of his career in private practice before working as the First Assistant District Attorney for Somerset County.[8] In 1982 and 1983 he served as director of the Pennsylvania Bureau of Consumer Protection, and from 1983 to 1987 he was the top assistant to state Attorney General LeRoy Zimmerman.[9] Justice Saylor returned to private practice for the next few years before being elected to the Pennsylvania Superior Court in November 1993.[10] Four years later, he was elected to the Supreme Court of Pennsylvania.[11] In addition to his membership in the Pennsylvania Bar, Justice Saylor has been admitted to the bars of: the United States Court of Appeals for the Third Circuit (1985); the United States District Court for the Western District of Pennsylvania (1972); the United States District Court for the Middle District of Pennsylvania (1988); and the United States Supreme Court (1986).[12] In 2004, he received an LL.M. from the University of Virginia.[13] Justice Saylor is also a member of the American Law Institute and the Board of Overseers at Widener University School of Law.[14]

The Code of Judicial Ethics bars judicial candidates from discussing their views on issues during a campaign, thus justices must focus solely on their credentials and judicial philosophy in their attempt to garner votes.[15] During the race for the Pennsylvania Supreme Court position, Justice Saylor and former Pennsylvania Superior Court Judge Joseph A. Del Sole only engaged in one public debate.[16] There, Justice Saylor emphasized, "[t]here's not a lot of things that a candidate for judicial office can promise the public. But, if elected, I would work very hard, do my very best to judge fairly, honestly and with integrity."[17] Justice Saylor also highlighted his work as a county and state prosecutor, as well as endorsements he received from police groups and unions.[18] He also touted a "five-point plan" that, among other things, recommended state judges be elected regionally rather than statewide.[19]

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8. *Id.*
9. *Id.*
10. *Id. See also* King, *supra* note 6, at 1.
11. *Pa. U.J.S.*, *supra* note 6.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2006).
16. The debate took place in Philadelphia on October 17, 1997. Baer, *supra* note 2, at 5.
17. *Id.*
18. *Id.*
19. *Id.* His reform plan included consolidating the high court's administrative offices into one central office in Harrisburg, adopting procedures to speed up Pennsylvania Su-

Justice Saylor's plan would also have placed limits on lawyers' contributions to judicial campaigns.[20]

The debate focused on the tension between the two candidates' views on judicial independence versus judicial interference, helping to illuminate an important philosophical difference between the candidates.[21] Justice Saylor said that he believes judges must balance their responsibility for interpreting the law with respect for the legislators who write it.[22] He said, "[a] judge should extend substantial deference to the Legislature. In the legislative arena, the will of the people is expressed through their elected representatives. Judges aren't elected to deal with those kinds of issues. They're elected to decide cases, to interpret the law."[23] Justice Saylor's statement alluded to the difficulty in evaluating a judge's performance. It is important to note that a single opinion determines only the legal status of the parties to a case and is not an indication of a judge's personal beliefs; however a collective review of a judge's opinions uncovers a judge's judicial tendencies and philosophies.

IV. AN OBJECTIVE ANALYSIS OF JUSTICE SAYLOR'S JUDICIAL PHILOSOPHY, METHODOLOGY AND JURISPRUDENTIAL TENDENCIES

By way of summary, Justice Saylor's opinions expose a jurist with a sharp analytical mind who is an articulate and skilled legal writer. Justice Saylor indulges in a very thorough analysis of each issue presented to the court. Generally, his opinions are well organized and reader friendly. During his time on the Pennsylvania Supreme Court, Justice Saylor authored 424 opinions relating to

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preme Court decisions, and establishing a permanent, independent judicial ratings commission that would "provide a non-biased voters' guide" for Pennsylvania Supreme Court candidates. Justice Saylor said "[a]s a judicial candidate, you can't announce your position on any disputed legal or political issues . . . [b]ut it seems to me it is relevant to try to inject in the campaign some substantive ideas for the things that you can talk about." King, *supra* note 6, at 1.

20. Baer, *supra* note 2, at 5. "Saylor also wants political contributions from lawyers and law firms limited to one-third of a Supreme Court candidate's total contributions, saying there is a perception that 'justice is for sale' in Pennsylvania." King, *supra* note 6, at 1. Justice Saylor pledged to follow that one-third guideline in his campaign for the Pennsylvania Supreme Court. *Id.* However, when Justice Saylor ran for his previous position on the Pennsylvania Superior Court, lawyers' contributions made up roughly the same proportion of his funds as they did for Del Sole in the Pennsylvania Supreme Court Race. James O'Toole, *Sales Tax Issue Roils Voting*, PITTSBURGH POST-GAZETTE, Nov. 3, 1997, at A1.

21. Peter Jackson, *Voters to Fill Longstanding Vacancy on the Bench*, PITTSBURGH POST-GAZETTE, October 28, 1997, at V2.

22. *Id.*

23. *Id.*

criminal justice matters, 126 relating to employment/labor relations, 88 relating to constitutional law, and 82 relating to torts/negligence.[24]

In his 160 majority opinions, Justice Saylor typically sets out a clear statement of the issue presented to the court, followed by the factual background of the case, when appropriate. Next, he clearly presents each side's position, giving credit to each for strong arguments. Finally, he provides a detailed explanation of the reasons for the court's decision and where each party has gone awry. The best indication, however, of Justice Saylor's judicial philosophy, methodology and jurisprudential tendencies surfaces in his concurring and dissenting opinions. Justice Saylor has authored 128 dissenting opinions and 171 concurring opinions during his tenure on the Pennsylvania Supreme Court. Like his majority opinions, his concurrences and dissents are also well written and clearly stated.

Taken as a whole, Justice Saylor's opinions tend to be deferential to precedent and controlling legislation. He rarely employs a moral vocabulary in his writing. Thus, it is difficult to speculate on his philosophical leanings on contested issues, which is common for disciplined jurists. The following is an attempt to illuminate Justice Saylor's judicial philosophy, methodology and jurisprudential tendencies though an analysis of his written opinions.

A. Justice Saylor Typically Uses the "Plain Meaning" Approach to Statutory Interpretation and Consistently Defers to the Legislature When Policy Concerns Arise from Such an Interpretation.

Justice Saylor's jurisprudence provides a clear pattern of statutory interpretation based on the "plain meaning" of a statute. Justice Saylor only turns to outside sources for clarification when he

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24. *Litigation History Report: Justice Thomas G. Saylor*, www.westlaw.com (search the PROFILER – WLD database for search terms "Thomas G. Saylor") (last visited Sept. 17, 2006). The breakdown of Justice Saylor's opinions relating to other areas of law is as follows: real property, 59; domestic relations/family law, 56; insurance, 47; transportation, 46; government, 41; legal services, 40; health, 35; tax, 30; communications, 21; commercial law and contracts, 20; elections, 20; education, 18; professional responsibility, 18; civil rights, 17; business organizations, 15; writs, 14; energy and utilities, 12; personal property, 11; science, computers and technology, 11; environmental, 7; wills, trusts and estates, 6; bankruptcy, 5; construction, 4; finance and banking, 4; antitrust/trade regulation, 3; intellectual property – generally, 3; art, entertainment and sports law, 2; veterans, 2; agriculture, 1; indigenous peoples, 1; intellectual property – copyrights, 1; maritime law, 1; and military law, 1. *Id.* These and all statistics that follow are as of October 1, 2006.

finds the statute to be ambiguous. For example, in *In re De Facto Condemnation & Taking of Lands of WFB Associates*,[25] Justice Saylor disagreed with the majority's interpretation of section 609 of the Eminent Domain Code.[26] The majority stated that this section applied to mortgage interest.[27] Section 609 provides that:

> Where proceedings are instituted by a condemnee under section 502(e), a judgment awarding compensation to the condemnee for the taking of property shall include reimbursement of reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred.[28]

In response, Justice Saylor stated that he "read the statute as [being] addressed to litigation expenses which are specially incurred by a condemnee who is forced to invoke the judicial process, and not to distinct holding and/or carrying costs associated with property ownership."[29] He reasoned that based on the principle of *ejusdem generis*, "general words in a statute are construed to take their meaning and be restricted by preceding, particular words."[30]

Likewise, Justice Saylor joined the substance of Justice Eakin's dissenting opinion in *Freundt v. DOT, Bureau of Driver Licensing*,[31] opining that an "offense" is a crime or other violation of the law and finding no "basis arising from the statutory text or its context in Section 1532(c) of the Vehicle Code that supports construing the term 'offense' (or 'conviction of any offense') as embodying the single-criminal-episode concept."[32] He further noted, "the majority's reliance on the Legislature's use of the phrase 'conviction of any offense' as opposed to 'conviction' to support the inquiry into one based on episode . . . seems strained."[33] Justice Saylor reasoned that the Legislature chose that phrase because the context called for the phrase in its "ordinary usage." The Leg-

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25. 903 A.2d 1192 (Pa. 2006).

26. *In re De Facto Condemnation*, 903 A.2d at 1202-03. *See also*, 26 PA. CONS. STAT. § 1-609 (*repealed by* 26 PA. CONS. STAT. § 709).

27. *In re De Facto Condemnation*, 903 A.2d at 1216 (Saylor, J., concurring in part and dissenting in part).

28. 26 PA. CONS. STAT. § 1-609.

29. *In re De Facto Condemnation*, 903 A.2d at 1216 (Saylor, J., dissenting).

30. *Id.* at 1216 (citing 1 PA. CONS. STAT. § 1903(b) (2006); Indep. Oil and Gas Ass'n of Pa. v. Bd. of Assessment Apps. of Fayette County, 814 A.2d 180, 183-84 (Pa. 2002)).

31. 883 A.2d 503 (Pa. 2005).

32. *Freundt*, 883 A.2d at 508 (Saylor, J., dissenting).

33. *Id.*

islature later referred to an "offense" specifically when naming the offenses that require a license suspension.[34]

Justice Saylor again exhibited his preference for "plain meaning" statutory interpretation in *Reifsnyder v. Workers' Compensation Appeal Board (Dana Corp.).*[35] In *Reifsnyder*, Justice Saylor dissented and stated that he would affirm the commonwealth court's decision because it employed a plain meaning interpretation of the statutory provisions at issue.[36] Justice Saylor noted that the majority also claimed to employ a plain meaning approach when interpreting the statute, but he did not agree with that characterization of the majority's method.[37] Justice Saylor preferred the commonwealth court's treatment of the statutory terms because it stemmed from the analysis of the specific provisions along with the fact that there are competing policy interests in reducing employer tort liability in worker's compensation cases and loss spreading.[38] He concluded that it would be better for the court to defer to the Legislature for any necessary policy-based adjustments to the statute.[39] In the aforementioned cases, Justice Saylor found the statutes to be unambiguous. The following case exemplifies Justice Saylor's approach to ambiguous statutes.

When Justice Saylor determines that the words of a statute are ambiguous, he consistently looks to other sources for guidance. In *Commonwealth v. Robinson,*[40] the appellant argued that the in-perpetration-of-a-felony aggravating circumstance found in the relevant section of the Pennsylvania Sentencing Code did not in-

34. *Id.* (citing 75 PA. CONS. STAT. § 1532(c) (2006)).

35. 883 A.2d 537 (Pa. 2005). *See also* Commonwealth v. Magliocco, 883 A.2d 479, 494 (Pa. 2005) (Saylor, J., dissenting) ("[T]he corrective construction of the possession-of-an-instrument-of-crime statute applied by the majority is too remote from the statute's prescribed terms to justify departure from those plain terms to support the imposition of criminal punishment"); Borough of Pottstown and Pottstown Police Pension Fund v. Pa. Mun. Ret. Bd., 712 A.2d 741, 744 (Pa. 1998) (Justice Saylor, writing for the majority, stated, "[w]e are obliged, however, to construe a statute according to its plain meaning and in such a manner as to give effect to all of its provisions.").

36. *Reifsnyder*, 883 A.2d at 549-50 (Saylor, J., dissenting) (citing Reifsnyder v. WCAB (Dana Corp.), 826 A.2d 16 (Pa. Commw. Ct. 2003)). *Accord* Bethlehem Structural Prods v. WCAB (Vernon), 789 A.2d 767 (Pa. Commw. Ct. 2001).

37. *Reifsnyder*, 883 A.2d at 549-50 (Saylor, J., dissenting) (stating "In this regard, while on the one hand the majority gives effect to the substantial difference in connotation between the terms 'work' and 'employment' in some aspects of its analysis . . . it nevertheless proceeds to equate these two terms in a pivotal passage construing Section 309(d.2)." The majority equated "employees who worked less than a single complete period of thirteen calendar weeks at the time they suffered a work injury" exclusively with "recent hires" for purposes of section 309(d.2)).

38. *Id.*

39. *Id.*

40. 877 A.2d 433 (Pa. 2005).

clude the felony of which he was convicted because it was not one of the six enumerated felonies in 18 PA. CONS. STAT. section 2502(d).[41] The majority found that, even though criminal trespass was not listed in the Pennsylvania Sentencing Code as a felony, the jury's finding that criminal trespass is an aggravating circumstance was permitted because it is listed in the Pennsylvania Crimes Code as a felony.[42] Justice Saylor dissented, arguing that the ambiguity found in several definitions in section 2502(d) of the Pennsylvania Crimes Code[43] made the entire statute ambiguous.[44] Under these circumstances, Justice Saylor stated that the court must use principles of statutory construction to clarify the definitions.[45] After reviewing the legislative history, Justice Saylor determined that the aggravating circumstance of in-perpetration-of-a-felony should be stricken because the appellant was not convicted of a felony as defined in the statute.[46]

Justice Saylor respects the role of the Legislature, as alluded to in his dissent in *Reifsnyder,* and is careful not to misuse judicial power by essentially drafting or re-writing legislation through his opinions. For example, in *Egger v. Gulf Insurance Company,*[47] Justice Saylor disagreed with the majority's use of public policy to prohibit the enforcement of a contract provision. In his dissent, Justice Saylor stated:

> public policy determinations are usually better suited to the legislative, rather than the judicial forum . . . [t]hus, a high threshold must be met prerequisite to judicial intervention into private contractual affairs on public policy grounds. In

41. *Robinson*, 877 A.2d at 445-46 (citing 42 PA. CONS. STAT. § 9711(d)(6) (2007)) (noting, also, that its holding is consistent with Commonwealth v. Walker, 656 A.2d 90 (Pa. 1995)).

42. *Id.* (citing 42 PA. CONS. STAT. § 9711(d)(6) (1998); 18 PA. CONS. STAT. § 101 (2007)).

43. 18 PA. CONS. STAT. § 2502(d) (2006).

44. *Robinson*, 877 A.2d at 450-54 (Saylor, J., dissenting) (citing 1 PA. CONS. STAT. § 1922(2) (2006) (setting forth the presumption that the General Assembly intends the entire statute to be effective and certain)).

45. *Id.* (citing 1 PA. CONS. STAT. § 1921(c)(7) (2006)).

46. *Id.* ("In review of that history, it is apparent that, in fashioning the Pennsylvania death penalty statute the General Assembly was responding to constitutional requirements as explained in decisions of the United States Supreme Court dictating the maintenance of carefully defined, narrowing criteria as the threshold to death eligibility. Section 2502(d)'s narrowing definition of perpetration of a felony aligns precisely with this approach, and I agree with Appellant that the provision gains full meaning only when read in conjunction with the death penalty statute. The approach of reading Sections 2502 and 9711 in conjunction also comports with this Court's obligation to construe the death penalty statute narrowly." (citing Legis. J. -- Senate at 721-23 (June 26, 1978) (setting forth a formal statement of the legislative history surrounding former § 1311 of the Crimes Code))).

47. 903 A.2d 1219 (Pa. 2006).

> this regard, the Court has explained that avoidance of unambiguous contractual terms on public policy grounds requires the demonstration of an overriding public policy deriving from the laws and legal precedents, long governmental practice, or obvious ethical or moral standards. Further, it is only in cases in which there is a near unanimity of opinion concerning the applicability and importance of the salient policy that action is to be taken.[48]

Justice Saylor's preferred method of statutory interpretation is just one aspect of his judicial record. The following section illustrates Justice Saylor's judicial tendencies when deciding whether to follow or overrule precedent.

B. *Justice Saylor Generally Defers to Precedent and the Role of Stare Decisis, but Is Open to Change in Certain Circumstances.*

While the Pennsylvania Supreme Court is permitted to retreat from its earlier decisions, it does so rarely and only in very special circumstances. Justice Saylor expressed his views on the Pennsylvania Supreme Court's function as an appellate court and the deference it should give to precedent in *Bilt-Rite Contractors v. Architectural Studio.*[49] In his dissent, Justice Saylor stated:

> [a]t the outset, in addressing the issues in this appeal, I believe that it is important to maintain the perspective that the Court is engaged in the evaluation of substantive principles under the common law, and that the nature of this exercise favors adherence to reasoned precedent. This approach reflects that the fashioning of substantive rules in matters involving weighty and competing interests (as to which inquiry must be made into the varying consequences that will attend implementation of the different options) is often best suited to the legislative province. It is also significant that the General Assembly is aware of our precedents, and obviously, may choose to alter course in substantive affairs subject only to constitutional constraints.[50]

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48. *Egger*, 903 A.2d at 1230 (Saylor, J., dissenting) (citing Muschany v. United States, 324 U.S. 49, 66-67 (1945); Hall v. Amica Mut. Ins. Co., 648 A.2d 755, 760 (Pa. 1994)).

49. 866 A.2d 270 (Pa. 2005).

50. *Bilt-Rite*, 866 A.2d at 290-92 (Saylor, J., dissenting).

Justice Saylor generally follows his opinion as expressed in *Bilt-Rite Contractors*. For example, Justice Saylor, joined by Justices Nigro and Baer, dissented to the majority's decision in *Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach)*[51] because he believed the result was inconsistent with precedent.[52] In *Westinghouse*, the majority enforced the statute of limitations set forth in section 413(a) of the Workers' Compensation Act[53] to preclude the relief awarded to the employee by the workers' compensation judge.[54] Justice Saylor disagreed and said he would affirm the commonwealth court's decision:

> to invoke equitable principles to preclude enforcement of such limitation solely with respect to a claim pertaining to a defined category of medical expenses that Employer paid throughout the statutory limitations period (and for an additional five years), with the plain implication that such payment was pursuant [sic] the express terms of a commutation order mandating that "Defendant/Employer will remain responsible for payment of reasonable and necessary medical expenses related to the claimant's work-related injuries as required by the terms of the Pennsylvania Workers' Compensation Act."[55]

He stated that the commonwealth court correctly observed that its result is consistent with prevailing precedent.[56] He noted that the majority relied on section 306(f.1)(9) of the Workers' Compensation Act[57] to support its decision to foreclose the award; however, Justice Saylor believed this section outlines an employee's entitlement to benefits based on "gratuitous or mistaken payments made after the expiration of an applicable statute of limitations" and not under circumstances where, as in this case, payments were made within the limitations period.[58]

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51. 883 A.2d 579 (Pa. 2005).

52. *Westinghouse*, 883 A.2d at 593 (Saylor, J., dissenting).

53. 77 PA. CONS. STAT. § 531 (2006).

54. *Westinghouse*, 883 A.2d at 592 (majority opinion).

55. *Id.* at 593 (Saylor, J., dissenting).

56. *Id.* (stating that "the employer or its carrier may be estopped from raising [the section 413(a) statute of limitations defense] if their actions, or the action of either of them, have intentionally or unintentionally caused the claimant to believe that his claim would be attended to." (citing Workers' Comp. Appeal Bd. (Reedy) v. SWIF, 349 A.2d 920, 924 (Pa. Commw. Ct. 1976))).

57. 77 PA. CONS. STAT. § 531.

58. *Westinghouse*, 883 A.2d at 593 (Saylor, J., dissenting). ("The payment by an insurer or employer for any medical, surgical or hospital services or supplies after any statute of

While Justice Saylor usually adheres to precedent, he did agree with the majority's departure from existing precedent in *401 Fourth Street, Inc. v. Investors Insurance Group.*[59] In *401 Fourth Street*, the majority broadened the scope of the term "collapse" as it is used in property insurance policies to include "imminent collapse."[60] The previous definition only included property, or part of that property, that actually fell down.[61] Justice Saylor, however, dissented from the majority opinion because he would only apply this broader definition prospectively and not under circumstances, such as in this case, where the insurers were entitled to rely on the existing precedent.[62]

Justice Saylor again evinced his openness to change in *Grady v. Frito-Lay, Inc.*,[63] which dealt with the *Frye/Daubert* debate.[64] While he did not believe the circumstances of that case warranted a departure from existing precedent mandating the use of the *Frye* rule in Pennsylvania, he suggested the possibility of change in the future.[65] He said:

> I take the position that the *Frye* rule is and remains the law of the Commonwealth, unless and until informed advocacy is presented that would favor a new direction, with due reference to the substantial body of information that has developed concerning the experience of the federal courts and others under *Daubert*.[66]

While the previous examples of Justice Saylor's methodology concerned cases where there was established Pennsylvania

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limitations provided for in this act shall have expired shall not act to reopen or revive the compensation rights for purposes of such limitations." (citing *Reedy*, 349 A.2d at 924)).

59. 879 A.2d 166 (Pa. 2005).

60. *401 Fourth St.*, 879 A.2d at 168.

61. *Id.* at 176 (Saylor, J., dissenting) (citing Kattelman v. Nat'l Union Fire Ins. Co. of Pittsburgh, 202 A.2d 66, 67 (Pa. 1964); Skelly v. Fid. & Cas. Co. of N.Y., 169 A. 78 (Pa. 1933); Dominick v. Statesman Ins. Co., 692 A.2d 188, 190-91 (Pa. Super. Ct. 1997)).

62. *Id.*

63. 839 A.2d 1038 (Pa. 2003).

64. *Grady*, 839 A.2d at 1052 (Saylor, J., concurring) (explaining that the *Frye* test, under which scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community, differs from the *Daubert* test, which calls for a balancing of several factors, including whether the evidence will assist the trier of fact and whether the evidence is reliable and scientifically valid (citing PA. R. EVID. 702; Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923))).

65. *Id.*

66. *Id.*

precedent, the next group of cases illustrates Justice Saylor's tendencies when faced with a lack of Pennsylvania precedent.

C. *Justice Saylor Often Looks to Other Jurisdictions for Guidance on Contested Issues or When Faced with a Lack of Pennsylvania Precedent.*

When faced with a lack of Pennsylvania precedent on an issue, Justice Saylor often looks to other jurisdictions for guidance. For example, when considering the extent to which the Pennsylvania Supreme Court should "recognize contractual, flow-through indemnity as a general proposition in the construction law setting," Justice Saylor noted that the competing points of view can be examined "by way of reference to decisional law of other jurisdictions."[67] Although he expressed his view that "at least in certain circumstances flow-through indemnification should be recognized in the construction law setting to give appropriate effect to the parties' intentions and common practices," he did not believe that issue needed to be decided in the instant case because the subcontract contained an express indemnification provision.[68]

Similarly, Justice Saylor looked to procedures in other jurisdictions when faced with the issue of the admissibility of statements made by a defendant while under the influence of sodium amitol or "truth serum."[69] Justice Saylor noted that many other jurisdictions exclude evidence adduced through a procedure that has not been recognized by the court as a reliable scientific methodology.[70] Because the use of "truth serum" is not recognized by the court as a reliable scientific methodology, Justice Saylor disapproved of casual references made by the prosecution to the defendant's failure to utilize the statements he made while under the influence of the "truth serum" as a cross-examination tactic.[71]

As noted, Justice Saylor tends to examine the laws of other jurisdictions when faced with a lack of Pennsylvania precedent in all

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67. Bernotas v. Super Fresh Food Mkts., Inc., 863 A.2d 478, 484-87 (Pa. 2004) (Saylor, J., dissenting) (citing Howe v. Lever Bros. Co., 851 S.W.2d 769, 774 (Mo. Ct. App. 1993); Whittle v. Pagani Bros. Constr. Co., 422 N.E.2d 779, 781 (Mass. 1981); Binswanger Glass Co. v. Beers Constr. Co., 234 S.E.2d 363, 365 (Ga. Ct. App. 1977)).

68. *Bernotas*, 863 A.2d at 485.

69. Commonwealth v. Cox, 863 A.2d 536, 559 (Pa. 2004) (Saylor, J., dissenting) (citing Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315, 319-29, 342 (1953); 23 C.J.S. *Criminal Law* § 971 (2004)).

70. *Cox*, 863 A.2d at 559 (Saylor, J., dissenting).

71. *Id.*

areas of the law. The next group of cases focuses on Justice Saylor's opinions in cases dealing with criminal law issues.

D. Justice Saylor's Opinions in Criminal Cases Exhibit No Patterns; However, His Opinions Regarding Personal Rights of Privacy and Expression Exhibit a Pattern of Expanding the State's Police Power.

One might think a jurist's past experiences working as a prosecutor or defense attorney would be an indication of that jurist's views. Justice Saylor clearly strives to separate his experiences working for the government from his decisions on the bench. Justice Saylor's past experience working for the government does not appear to influence his opinions in criminal cases. For example, in determining whether defendants in criminal cases should be awarded a new penalty hearing, Justice Saylor's opinions do not indicate a pattern or bias.[72]

On the contrary, an evaluation of cases addressing personal privacy issues does indicate a pattern. More than other members of the court, Justice Saylor typically affords government agents greater power to regulate citizens' conduct and more leniency in enforcing procedures.

In *Pap's A.M. v. Erie*,[73] the Pennsylvania Supreme Court held that an ordinance banning nudity in public places was unconstitutional when challenged by the owner of an establishment that showcased nude dancers.[74] The court found that article 1, section 7 of the Pennsylvania Constitution affords more protection than the First Amendment of the United States Constitution; thus, use

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72. *See, e.g.*, Commonwealth v. Chmiel, 889 A.2d 501, 549-50 (Pa. 2005) (Saylor, J., dissenting) (disagreeing with the majority, Saylor noted in his dissent that under *Kelly v. South Carolina*, the defendant should receive a new penalty hearing because the circumstances surrounding the killings committed by the present defendant arguably met the United States Supreme Court's test for implication of future dangerousness (citing Kelly v. South Carolina, 534 U.S. 246, 253-54 (2002))). *See also* Commonwealth v. Speight, 854 A.2d 450, 461-64 (Pa. 2004) (Saylor, J., concurring) (holding that Post Conviction Relief Act court erred in awarding defendant a new penalty hearing because none of its findings concerned prejudice to the defendant); Commonwealth v. Ligons, 773 A.2d 1231 (Pa. 2001) (holding that defendant was not entitled to a new penalty hearing because the prosecution's arguments were offered to counter the sympathy of defendant's mitigating evidence; and, the prosecution's description of the death penalty statute did not seek to circumvent the judicial process by interjecting considerations outside the sentencing statute); Commonwealth v. Keaton, 729 A.2d 529 (Pa. 1999) (holding that defendant was not entitled to a new penalty hearing because there was no evidence that the appellant was denied an impartial trial).

73. 812 A.2d 591 (Pa. 2002).

74. *Pap's A.M.*, 812 A.2d at 596.

of the strict scrutiny test is appropriate to evaluate whether a regulation of symbolic speech is justified.[75] Applying strict scrutiny, the court held that the regulation was not narrowly tailored to achieve the state's compelling interest in curbing rape and prostitution.[76] The majority stated that there were other, less restrictive, ways to combat rape and prostitution that did not involve "barring the expressive activity of nude dancing."[77] Justice Saylor dissented in *Pap's A.M.*, opining that an intermediate level of scrutiny is the appropriate analysis to be used when evaluating regulations of symbolic speech.[78] Justice Saylor acknowledged the Pennsylvania Supreme Court's history of affording more privacy protections under the Pennsylvania Constitution than under the United States Constitution; however, he believed that symbolic speech should not be afforded as much protection as pure speech.[79] In sum, Justice Saylor would have awarded legislative bodies in Pennsylvania more latitude in regulating symbolic speech than the majority would have in *Pap's A.M.*

Justice Saylor again voted to give more power to the government in *Todd v. Department of Transportation*.[80] Writing for the majority, Justice Saylor gave the police additional discretion when enforcing Pennsylvania's Implied Consent Law.[81] In *Todd*, police stopped the defendant for a traffic violation that ultimately led to a driver's license suspension for driving under the influence of alcohol.[82] After the defendant pulled over, he fled the scene on foot, but was ultimately detained.[83] The defendant consented to a breath test, which measured his blood alcohol content over a pe-

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75. *Id.* at 612.
76. *Id.*
77. *Id.* at 596.
78. *Id.* at 613 (Saylor, J., dissenting).
79. *Pap's A.M.*, 812 A.2d at 613. ("Rather than extending the strict scrutiny test to this area, however, I would adopt as a matter of our constitutional jurisprudence under Article I, Section 7, the more stringent application of the *O'Brien* test proposed by Mr. Justice Souter . . . and require an evidentiary basis for the alleged secondary effects and the remedial effect of the proposed regulation." (citing City of Erie v. Pap's A.M., 529 U.S. 277, 310-13 (2000) (Souter, J., concurring); United States v. O'Brien, 391 U.S. 367 (1968))).
80. 723 A.2d 655 (Pa. 1999).
81. *Todd*, 723 A.2d at 656. *See* 75 PA. CONS. STAT. § 1547 (2006) ("Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle.").
82. *Todd*, 723 A.2d at 656.
83. *Id.* at 657.

riod of three minutes.[84] The Pennsylvania Department of Transportation regulations require two consecutive breath tests.[85] The defendant successfully completed the first test, but made two additional inadequate attempts for the second test.[86] The officer informed the defendant that since he did not have two adequate samples, the officer considered it a refusal to consent.[87] The trial court reinstated the defendant's operating privileges and the commonwealth court affirmed, reasoning that where the machine has a set time of operation for testing and there is no overt manifestation indicating that the driver has abandoned efforts to complete the test, then the driver must be given the requisite time to complete the test before a failure to comply will be deemed a refusal.[88]

The Pennsylvania Supreme Court reversed this decision. Justice Saylor, writing for the majority, reasoned that:

> to effectuate the purposes of the Implied Consent Law, testing officers must be afforded a degree of flexibility in obtaining satisfactory breath samples for a proper test, thereby enabling them to deal realistically with drivers who agree to submit to chemical testing, yet repeatedly fail to provide sufficient breath samples for analysis.[89]

The court found that even though the police officer terminated the test before the three-minute cycle ended, the defendant failed to provide the necessary breath samples, warranting the suspension of his operating privileges.[90]

In a third case, also dealing with police power, Justice Saylor dissented from the majority's decision to reverse the defendant's conviction.[91] The majority reasoned that the circumstances surrounding an anonymous tip were not enough to establish reasonable suspicion that criminal activity was afoot, and the fact that the appellant fled was not a relevant consideration in making that

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Todd*, 723 A.2d at 657.
88. *Id.*
89. *Id.* at 659.
90. *Id.* (holding that the trial court erred in sustaining his license suspension appeal because (1) the Department of Transportation met its prima facie burden of establishing that the defendant was provided with a "reasonable and sufficient opportunity to take and complete the breath test," and (2) the defendant made "no attempt to establish a reasonable explanation for his failure").
91. In the Interest of D.M., 743 A.2d 422 (Pa. 1999).

determination.[92] Both the majority and Justice Saylor, in his dissent, agreed that neither the anonymous tip nor the unprovoked flight, independently, amounted to reasonable suspicion.[93] When considering the totality of the circumstances, however, the majority found that the description given of the suspect, "a black male, wearing a white t-shirt, blue jeans and white sneakers," along with the officer's observations and the anonymous tip was insufficient to rise to the level of reasonable suspicion necessary for the investigatory detention of the defendant.[94] Justice Saylor disagreed and stated that:

> [i]t is unclear . . . in what sense the majority employs the word "suspicion" . . . . I believe that, prior to D.M.'s departure, based upon the partially corroborated tip, the officer did in fact "suspect" (in the subjective, common sense usage of that word) that the juvenile . . . might possess a weapon and therefore be engaged in a criminal act.[95]

Thus, Justice Saylor opined that the totality of the circumstances did amount to a reasonable suspicion of criminal activity and the police action was justified.[96]

The next section examines Justice Saylor's activities and accomplishments off the bench during his tenure on the Pennsylvania Supreme Court.

V. JUSTICE SAYLOR'S ACCOMPLISHMENTS AND CONTRIBUTIONS TO THE LEGAL PROFESSION OFF THE BENCH

A judge's personal publications and activities are generally not common knowledge. In fact, it is rather uncommon for justices to publish scholarly articles while on the court.[97] However, during his time on the Pennsylvania Supreme Court, Justice Saylor has published several articles to educate both the legal community

92. *In re D.M.*, 743 A.2d at 426.
93. *Id.*
94. *Id.* at 424.
95. *Id.* at 428-29 (Saylor, J., dissenting). *See also* Commonwealth v. Cook, 735 A.2d 673, 679 (Pa. 1999) (Saylor, J., concurring) (affirming the denial of defendant's motion to suppress contraband he abandoned while fleeing from police officers).
96. *In re D.M.*, 743 A.2d at 429 (Saylor, J., dissenting).
97. *But see* Ken Gormley, *The Forgotten Supreme Court Justices*, 68 ALB. L. REV. 295, 302 (2005).

and the public about recent developments in Pennsylvania law, specifically outlining the appropriate manner to approach new laws.[98]

In his article, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, Justice Saylor concludes that "state courts may legitimately consider employment of acknowledged, prophylactic rules affording greater protections to individual rights than are available under the United States Constitution, particularly where they are charged with broad supervisory duties under the state constitution," and that "there is stronger justification for the employment of prophylactic rules to safeguard individual liberties from government intrusion by states as opposed to federal courts."[99]

In *Policing Auto Repair Services Under Pennsylvania Law*, Justice Saylor and his co-author, Amy J. Greer, attempt to inform lawyers who represent automobile repair shop owners, franchisees, franchisors or consumers of auto repair services about the relevant rights and remedies available under Pennsylvania law.[100]

Additionally, Justice Saylor did a great service to members of the bar and the public when he authored the article entitled *Post Conviction Relief in Pennsylvania.* In the article, Justice Saylor explains the process for Post Conviction Relief claims under the Post Conviction Relief Act (PCRA) and illuminates certain provisions that are typically overlooked and misunderstood by attorneys and the courts.[101] He notes that most of the confusion that arises in PCRA cases is caused by a failure to keep in mind the purpose of the statute.[102] He explains:

> [The PCRA] is not a means of re-litigating issues that have already been addressed on direct appeal, or which could have been raised earlier. Nor is it a tool to correct technical or procedural errors that occurred during the conviction process. Its

98. *See, e.g.*, Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003) [hereinafter *Prophylaxis*]; Thomas G. Saylor, *Post Conviction Relief in Pennsylvania*, 69 PA BAR ASSN. Q. 1:1-6 (1998) [hereinafter *Post Conviction Relief*]; Thomas G. Saylor & Amy J. Greer, *Policing Auto Repair Services Under Pennsylvania Law*, 64 PA BAR ASSN. Q. 42:42-46 (1993) [hereinafter *Policing Auto Repair*].

99. *Prophylaxis*, *supra* note 98, at 308. Justice Saylor submitted this article for partial fulfillment of the requirements for an LL.M. degree at the University of Virginia School of Law. *Id.*

100. *Policing Auto Repair*, *supra* note 98, at 42-46.

101. *Post Conviction Relief*, *supra* note 98, at 1-6.

102. *Id.* at 1.

> sole purpose is to provide relief to those individuals who did not commit the crimes for which they have been convicted, or who are serving sentences longer than the legal maximum.[103]

In this article, Justice Saylor distinguishes the procedural aspects of a PCRA case from an ordinary appeal and presents an overview of the PCRA's provisions, the relevant grounds for relief, and interpretive Pennsylvania case law on the matter of collateral review of a PCRA court decision in a Pennsylvania state court.[104] His explanation of a criminal defendant's rights regarding PCRA claims as well as filing deadlines, pleading requirements, and specific evidentiary concerns provides litigators and members of the public with a great starting point in understanding Pennsylvania's PCRA.

VI. CONCLUSION

Few of the cases that come before the Pennsylvania Supreme Court are "slam dunks" one way or the other. Most cases that make it to the highest court in the state involve answering difficult questions, over which reasonable persons may disagree. Like the officials in striped shirts at professional football games who must make fair calls against their favorite teams or players, a Pennsylvania Supreme Court Justice is charged with the responsibility of being an impartial referee, making fair decisions even though he or she may not agree with the outcome of the case or the underlying policy reasons for the relevant law. Due to the non-political nature of retention elections, it is important to review a justice's judicial philosophy and methodology in order to evaluate its impact on the court system.

Beth A. Dodson

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103. *Id.*
104. *Id.*