

# THE COURT OF APPEALS OF MARYLAND: ROLES, WORK AND PERFORMANCE

## PART II: CRAFTSMANSHIP AND DECISION-MAKING

WILLIAM L. REYNOLDS, II\*

### I. INTRODUCTION

This part of the Article<sup>1</sup> discusses the craftsmanship and decision-making processes of the Maryland Court of Appeals as reflected in its published opinions. Although much has been written on appellate decision-making, surprisingly little attention has been paid to the process as practiced by a single court, especially the highest court of a state. Such neglect is unfortunate, for these courts are responsible for the bulk of legal development in this country. In the last several years, for example, the Court of Appeals of Maryland has decided a number of cases of widespread importance; among them were decisions that substantially revised the common law of defamation,<sup>2</sup> held unconstitutional the Maryland obscenity statute<sup>3</sup> and the newly created position of state Special Prosecutor,<sup>4</sup> and important decisions in the area of medical malpractice.<sup>5</sup> The importance of those issues to our society requires that the processes by which the Court arrives at its conclusions be subjected to the checks of analysis and criticism.

The absence of systematic criticism of the decision-making process of state appellate courts can be easily explained. Karl Llewellyn ascribed the problem to a simple lack of interest: "People have not been interested in the slow job: how and why it happens, but have wanted a quick, cheap answer: the right way, without inquiry."<sup>6</sup> Judges, too, are primarily interested in deciding a case,

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\* A.B. 1967, Dartmouth College; J.D. 1970, Harvard University. Professor of Law, University of Maryland School of Law.

1. Part I of this Article, *The Court of Appeals of Maryland: Roles, Work and Performance*, was published in 37 MD. L. REV. 1 (1977).

2. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

3. *Wheeler v. State*, 281 Md. 593, 380 A.2d 1052 (1977).

4. *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975).

5. *E.g.*, *Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, 349 A.2d 245 (1975).

6. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960): I suspect that few attorneys read cases carefully. See Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftmanship*, 1 ARK. L. REV. 89 (1946): "Attorneys read . . . opinions primarily to keep abreast of the latest developments; any fleeting impulse to criticize is smothered by a groundless fear that such criticism might ultimately be detrimental to their clients." Shortly after writing that article George Rose Smith was appointed to the Arkansas Supreme Court.

that is in reaching the result they deem fair and proper, rather than considering the paths to that result.<sup>7</sup> Writing an opinion, as anyone who has tried to do so — as judge or law clerk, perhaps — knows full well, is a complex and difficult task. The writer of the majority opinion must cull from the briefs and lower court opinions relevant facts, issues, and arguments, and then weigh those data in his own mind to reach what is often a very difficult decision. Then he must present his conclusions in a way that can be understood by bench and bar alike, while holding together what may well be a coalition of judges who have disparate and, at times, conflicting points of view. All of this must be done under the very real spur of time, a pressure that intrudes into every stage of the decision-making process. It is, therefore, not surprising that questions of craftsmanship are relegated to a relatively minor position in a judge's allocation of effort, or that criticism from the bar is often withheld out of appreciation of the difficulty of the judge's task.

Criticism might also be muted by doubts that it serves any useful purpose. Undoubtedly, most members of the bar would agree with Justice Brandeis' observation that "it is more important that the applicable rule of law be settled than that it be settled right."<sup>8</sup> Does the *manner* in which the court goes about deciding, for example, that the common law of defamation must be placed on a basis of negligence have any real importance? Does craftsmanship, in other words, matter?

In response to these questions, a number of reasons can be advanced to explain why the decision-making processes of an appellate court are important. First, the manner in which a court decides an issue may be related to its understanding of the problem and, hence, the correctness of the result that is reached. A well-crafted opinion serves as a signal to both the litigants and the public that the issue has been fully and fairly considered. It helps to ensure, moreover, that the law established is indeed that which the court wishes to adopt. Clarity of thought and precision of expression are important both to the opinion writer and to those who must deal with his opinion. The Court's decision-making processes are also important to the bar, judges of lower courts, and of future Courts of

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7. A Karl Llewellyn anecdote is illustrative. When a number of his academic colleagues were appointed to the bench during the New Deal, Llewellyn asked them to take notes on how they went about deciding cases. None fulfilled his pledge to do so: "I tried it. What I could think of to put down seemed so trifling, or so silly, or unworthy." K. LLEWELLYN, *supra* note 6, at 265.

8. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

Appeals, all of whom must understand the precedent and apply it in other fact settings. In addition, the decision-making process guides the legal community when it acts in other areas, aiding, for example, the attorney who wants to know how a question of statutory construction should be analyzed. Even if the process is not important in a case for any of these reasons,<sup>9</sup> the Court as an institution should be practiced in the application of thoughtful decision-making techniques as an aid to disciplined analysis.

Because the *process* matters, it is important that a court's decision-making be subject to critical commentary. It is also desirable for the Court of Appeals to know that it is writing for a critical audience — to know that the long hours of labor put into a decision will be read by someone seeking more than a one-sentence summary of the holding, someone who is trying to follow the path taken by the Court. Finally, and perhaps most important, criticism is a necessary check on a court that is largely ignored by the popular and professional press<sup>10</sup> and subject only to very limited review by the Supreme Court.<sup>11</sup>

In examining the craftsmanship and decision-making processes of the Court, the manner in which a result is reached, rather than the result itself, this part of the Article<sup>12</sup> is loosely based on, inspired perhaps, by Dean Wigmore's essay on *Qualities of Judicial Decisions*.<sup>13</sup> Now more than sixty years old, that essay explores "some of the shortcomings of the usual opinions rendering justice in the usual State Supreme Court."<sup>14</sup> Despite its age, the essay, the

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9. This would be especially true of what Llewellyn called the "single right answer" case. K. LLEWELLYN, *supra* note 6, at 24-25.

10. Rarely does the Baltimore press, for example, examine critically the work of the Court. Even the best attempts fail to explore the Court thoroughly. See, e.g., Coltman, *Mystique of Maryland Judiciary*, *The Sun* (Baltimore) (a series that ran Sept. 5-9 & 11, 1976), reprinted in *THE MARYLAND APPELLATE PRACTICE HANDBOOK*, F-23 to F-61 (1977).

11. None of the 1975 Term cases, for example, was accepted for review by the Supreme Court, although the denial of review provoked dissent in one case, see *Cousins v. Maryland*, 429 U.S. 1027 (1976) (Brennan & Marshall, JJ., dissenting from denial of certiorari).

The Court of Special Appeals occasionally uses language that could be taken as critical of an opinion of the Court of Appeals. See, e.g., *Douglas v. State*, 37 Md. App. 557, 558-59, 378 A.2d 189, 189-90 (1977) (commenting on *Howell v. State*, 278 Md. 389, 364 A.2d 797 (1976)); *Fabritz v. State*, 30 Md. App. 1, 6 & n.1, 351 A.2d 477, 481 & n.1 (1976), *on remand from* 276 Md. 416, 348 A.2d 275 (1975).

12. Although this part of the Article concentrates on decisions handed down during the 1975 Term, it is not limited to that period.

13. 1 J. WIGMORE, *EVIDENCE* §8a (1940). Apparently the only study of a state court based on the Wigmore method is Smith, *supra* note 6.

14. 1 J. WIGMORE, *supra* note 13, §8a, at 242.

work of a scholar familiar with an immense number of cases in all jurisdictions, still provides an excellent framework for examining the quality of judicial decision-making.

The discussion that follows focuses on the depth and care the Court of Appeals gives to examining the problems before it. That examination is too often mechanical and reflexive,<sup>15</sup> showing a reluctance, even when making new law, to examine premises and policies, a method of decision-making Roscoe Pound styled "mechanical jurisprudence."<sup>16</sup> This Article will examine some manifestations of that problem in craftsmanship and analysis and finally inquire into the judgment of the Court as expressed in two cases.

## II. CRAFTSMANSHIP

A court writing an opinion is performing a difficult and complex task. The manner in which it performs that task and the skill with which it uses the techniques available to it can influence the decision-making process. Craftsmanship also matters to the bar; because a court instructs its audience in matters of craftsmanship, it is important that its techniques be well-honed.<sup>17</sup> To some extent craftsmanship is a luxury, for a court hard pressed by its workload will concentrate necessarily on the quantity, more than on the quality of its work. The Court of Appeals, however, has a caseload light enough to permit it to concentrate on the job at hand, and to do it well.<sup>18</sup>

The opinions of the current Court of Appeals are generally well-written.<sup>19</sup> They state the facts of the case so that the reader can place

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15. This is not a new observation. See Sickels, *The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals*, 59 AM. POL. SCI. REV. 100, 103 (1965): "The opinions of the judges of the Maryland Court of Appeals reflect an uncomplicated faith in legal rules and their literal application by traditional judicial methods."

16. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Pound went on to describe opinions of this school: "conceptions are used, not as premises from which to reason, but as ultimate solutions." *Id.* at 620. Wigmore in 1 J. WIGMORE, *supra* note 13, § 8a, at 244-45, spoke of the "over-emphasis on the technique of legal rules in detail with corresponding under-emphasis on policies, reasons, and principles. . . . The treatment tends to become mechanical. Reasons are lost from sight." (emphasis in original).

17. Not least important in the audience instructed in craftsmanship are law students who read the opinions. The transfer of approach from court to student is often readily apparent.

18. See Reynolds, *supra* note 1, at 27-29.

19. Because the opinion written for the majority is deemed to be that of "the Court", this Article will avoid mentioning, as far as possible, the names of individual judges. Whether an opinion does reflect a carefully crafted joint expression of those

the Court's discussion of law in context.<sup>20</sup> The holding is clearly stated and precedents used in the opinion are laid out for inspection, often with an analysis of their significance for the case at bar. By these means the Court has generally succeeded in establishing, in Llewellyn's phrase, the "situation-sense" of the issues before it.<sup>21</sup> Thus, the reader usually can follow the Court's thoughts concerning the problem at bar.

At times, however, problems in other areas of craftsmanship appear. Three that will be discussed are the Court's indiscriminate use of authority, its practice of over-abundant citation, and its propensity for adjudication by quotation.

A. *Indiscriminate Use of Authority.* The Court of Appeals laces its opinions with references to its own opinions, to those of the Court of Special Appeals, other state and federal courts, and to various secondary sources. The effort by the Court to place its decisions in the framework of existing decision and commentary is commendable, but, unfortunately, much of the authority is used in an indiscriminate fashion, and some of it should not be used at all.

Precedents come in different sizes and shapes. Consequently, a court must determine the configuration of a precedent before using it as authority in a particular situation. The depth of research and the quality of analysis, the two factors that make a work "authority," should be considered by the Court before a work — be it opinion, treatise, or encyclopedia — is cited as precedent supporting a conclusion. Wigmore found that "[a]lmost any printed pages, bound in law-buckram and well advertised or gratuitously presented, constitute authority fit to guide the Courts."<sup>22</sup> That can hardly be

who join in it is open to doubt. See Schaefer, *Precedent & Policy*, 34 U. CHI. L. REV. 3, 9-10 (1966). The Supreme Court of New Hampshire, when led by the great Charles Doe, provides an example of a court whose opinions did reflect the views of the court:

[Chief Justice] Doe put no stock in the theory that a judicial opinion is the product and sole responsibility of the judge to whom it is assigned. . . . To Doe, the author of an opinion spoke for the entire court. A colleague who thought a point needed clarification was expected to prepare a memorandum for the "author" to insert, with or without editing the language. He was not to fracture the opinion simply to show the world what ideas had originated with him . . . . Indeed, others have suggested that he wrote many of the decisions credited to colleagues, partly because he did not want his own name to appear too often.

J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE 212 (1967) (footnotes omitted).

20. However, the factual statement is, at times, overdone. In *Haraszti v. Klarman*, 277 Md. 234, 236-38, 352 A.2d 833, 834-35 (1976), for example, the Court described at extreme length the factual background of an "amber light" accident.

21. K. LLEWELLYN, *supra* note 6, at 121-26.

22. 1 J. WIGMORE, *supra* note 13, § 8a, at 243. Wigmore noted that "reliance upon anonymity is always a mark of literary and juristic crudity." *Id.*

said to be true of the Court of Appeals, however, for the quality of the works relied on by the Court is generally good.<sup>23</sup> Nevertheless, there are times when some of the sources used by the Court must be questioned.

An illustration is the occasional use of encyclopedias and other general treatises.<sup>24</sup> These are useful research tools — proper places to begin work, but not to end it. The main problem with such works is that their “narrow conception of the legal process . . . assumes a mechanical jurisprudence in which the finest art is that of watching or distinguishing objectively similar or different decisions in order to put them in the proper slots, push a button, and read the answer on the slip of paper which comes out of the machine.”<sup>25</sup> Because such works collect rather than analyze, they give the impression that what is desirable is discovery of “the law.” Although that search may help the Court understand the possible impact of a decision, a court that relies on such sources is less likely to understand the reasons behind the development of the case law.<sup>26</sup> Not only is that

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23. No attempt has been made here to evaluate the substantive correctness of the Court's use of authority nor to prepare a systematic analysis of the citation practice of the Court of Appeals. Such an analysis has been made of the practices of the California Supreme Court. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970*, 50 S. CAL. L. REV. 381 (1977).

Other than the encyclopedias, see note 24 *infra*, it is unusual to find the Court citing questionable works, although it is somewhat jarring to find a reference to such a venerable piece as T. COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927), or O. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* (1935); both are relied on in *Perkins v. Eskridge*, 278 Md. 619, 627-29, 366 A.2d 21, 27-28 (1976). The *Perkins* Court found, however, that despite its age, Professor Field's book “remains the most analytical and comprehensive treatment of the subject.” *Id.* at 628, 366 A.2d 27.

24. See, e.g., *Peterson v. State*, 281 Md. 309, 319, 379 A.2d 164, 169 (1977), *cert. denied*, 435 U.S. 945 (1978) (reference *inter alia* to *American Jurisprudence 2d* and an *A.L.R. Annotation*); *Lore v. Board of Pub. Works*, 277 Md. 356, 363, 354 A.2d 812, 816 (1976) (dissenting opinion) (only support for the “general rule” that is opposed to majority opinion is a reference to *American Jurisprudence 2d*; “dicta” in a recent Court of Appeals decision was also found to be “supportive”); *Murphy v. Yates*, 276 Md. 475, 488-89, 348 A.2d 837, 844-45 (1975) (the “general rule” with respect to the ability of the legislature to vary the powers of the State's Attorney — or his equivalent in other states — is supported by two quotations from *American Jurisprudence 2d*, and by a reference to *Corpus Juris Secundum*). Reliance on such authorities was apparently more common in the past. Smith, *supra* note 6, at 91, found 616 citations to encyclopedias in four volumes of the *Arkansas Reporter*. Merryman, *supra* note 23, at 405, Table 14, notes 134 such references by the California Supreme Court in 1950, 46 in 1960, and only 25 in 1970.

25. Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 646 (1954).

26. Justice Peters of the California Supreme Court said of legal encyclopedias: “They are guides to the law, not embodiments of it. This statement of the law is no sounder than the cases that are cited to support the text. You should always go to the

understanding crucial to application of principles in new areas, it is mandatory if a court is to say that an old idea's time has ended. In addition, a court that relies on such authorities is less likely to be aware of intellectual ferment in the area. All of these problems are exacerbated by the strong possibility that judicial reliance on such sources encourages a corresponding reliance on them by attorneys,<sup>27</sup> thus further diminishing the possibility that the cogent analysis brought to bear on a problem by a Traynor or a Friendly or a Corbin will not be brought to the attention of the court.

While "the treatises of learned men"<sup>28</sup> — of authors such as Wigmore or Corbin or Prosser — are analytic enough to satisfy any standard of scholarship, they nevertheless must be handled with care, for they represent, after all, only the views of the author.<sup>29</sup> A court must still be alert for conflicting positions. The Court's extensive use of the Restatements prepared by the American Law Institute provides an example of the failure to use secondary sources carefully. The Court of Appeals has, on occasion, adopted sections wholesale to support decisions on specific problems<sup>30</sup> while ignoring or overlooking criticism and even rejection of the Restatement language by other courts and by commentators.<sup>31</sup> Although the Restatements represent the collective wisdom of a very prestigious

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primary rather than to the secondary authority." Merryman, *supra* note 23, at 405 (quoting Peters, *Introduction: A Judge's View of Appellate Advocacy*, in STATE BAR OF CALIFORNIA, COMMITTEE ON CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL APPELLATE PRACTICE at xviii-xvii [sic] (1966)).

27. The precise source of this problem is difficult to detect. A court must, of necessity, rely in large measure on research done by counsel. A glance through the briefs filed in the Court of Appeals shows a somewhat heavier reliance on doubtful sources by attorneys than by the Court. This is not surprising given the cost of maintaining an adequate law library and the relative lack of expense of the encyclopedias; but economic efficiency should not be used to justify the lack of assistance provided the Court.

28. This phrase is from a provision of the California constitution specifying the sources of the law. See Merryman, *supra* note 25, at 647.

29. In contract law, for example, a battle raged for half a century between the views of Professors Williston and Corbin. The tale of the battle as well as Corbin's ultimate victory in the *Restatement (Second) of Contracts* (1974), is told entertainingly in G. GILMORE, *THE DEATH OF CONTRACT* (1974).

30. See, e.g., *B.P. Oil Co. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1977), *rev'g* 31 Md. App. 221, 356 A.2d 304 (1976); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976) (adopting § 402A of RESTATEMENT (SECOND) TORTS (1977)) (strict liability); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97, 350 A.2d 688, 697-98 (1976) (adopting RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975)) (defamation standard).

31. See notes 114 to 132 and accompanying text *infra*.

group, they have at times been subjected to trenchant criticism,<sup>32</sup> and the Court's failure to refer to such problems does not help the reader believe that its adoption of the Restatement positions are the result of a careful examination of the issue.<sup>33</sup>

Finally, reliance on any author, no matter how prestigious, should extend no further than the establishment of the acceptance of a given doctrine and the understanding of possible lines of analysis. The rest of the job, the *decision*, belongs to the Court, for it alone is charged with responsibility for the law it adopts. That must be *its* choice, not that of Prosser, or the American Law Institute, or a majority of other courts.

B. *The String Citation*. Another problem of judicial style can be seen in opinions massively bulwarked by citation. Wigmore observed that these "opinions often give the strong impression of being discoveries by the judges . . . . The lengthy opinions redundantly quote well-settled platitudes . . . re-proving old truths, which are apparently new and therefore interesting to the writers."<sup>34</sup>

Many opinions of the Court of Appeals exhibit similar characteristics. Elementary propositions are supported by line upon line of string citations, as if the propositions involved were novel and controversial and needed to be nailed down firmly. Five cases from the Court of Appeals are cited in *Garland v. Hill*,<sup>35</sup> for example, as support for the statement that "mere inadequacy of the purchase price at a mortgage foreclosure sale is not enough to prevent the ratification of the sale . . . ." <sup>36</sup> In *Holmes v. Criminal Injuries Compensation Board*,<sup>37</sup> the Court cited fourteen of its own cases, none decided earlier than 1972, to support three elementary maxims concerning statutory construction.<sup>38</sup> *Lightfoot v. State*,<sup>39</sup> occupying less than four pages in the *Atlantic Reporter*, contains fifty-four case references, as well as numerous citations to secondary sources, to

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32. See generally Merryman, *supra* note 25, at 629-34. For a recent criticism of the *Restatement's* handling of defamation, see Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621 (1977).

33. Restatements are basically nonanalytical. Complex issues are covered in a few pages of explanation and illustration, and anyone relying solely on a Restatement will simply not be aware of all the action in the area. A thorough critique of the approach of the Restatements can be found in H. HART & A. SACKS, *THE LEGAL PROCESS* 758-66 (tent. ed. 1958).

34. 1 J. WIGMORE, *supra* note 13, § 8a, at 244.

35. 277 Md. 710, 357 A.2d 374 (1976).

36. *Id.* at 712, 357 A.2d at 375.

37. 278 Md. 60, 359 A.2d 84 (1976).

38. *Id.* at 66-67, 359 A.2d at 88.

39. 278 Md. 231, 360 A.2d 426 (1976).



support relatively simple propositions and to show the positions of various courts on the issue. Only two of the fifty-four cases are discussed at all.<sup>40</sup> *Davis v. Davis*<sup>41</sup> buttressed its statement that the "clearly erroneous" standard is to be applied in reviewing child custody determinations with thirteen citations to Court of Appeals cases going back to 1960.<sup>42</sup>

The vice of the string citation is not just aesthetic. An extensive string citation fosters a belief that the court has not given its full attention to the problem because it is difficult to believe that it has read and analyzed all the cases cited in this fashion. Instead, the collection appears to have been lifted from another source and placed in the opinion as a substitute for critical analysis of the issue at hand.<sup>43</sup> This conclusion is reinforced by the fact that the "string" cases often contain no more than a perfunctory analysis (if that) of the problem.<sup>44</sup> If a proposition is axiomatic, the Court of Appeals often seems to feel more secure in weighting the proposition with "authority" that will anchor it firmly. This should not be necessary. There is no reason why elementary propositions not fairly called into question by the issues before the Court need to be supported by authority. If the Court wishes to refer to an earlier discussion of an issue, the reference should be to a case which has analyzed the problem.<sup>45</sup> If the case at bar turns on the problem handled by a string citation, moreover, a mere listing of authority, even analytical authority, does not respond adequately to the need for analysis of the problem.<sup>46</sup>

40. *Id.* at 237, 360 A.2d at 429-30.

41. 280 Md. 119, 372 A.2d 231, *cert. denied*, 424 U.S. 934 (1977), *rehearing denied*, 434 U.S. 1025 (1978).

42. Fourteen more cases are cited in the same paragraph for more general support of the same proposition. 280 Md. at 123, 372 A.2d at 233. Rote recitation of precedent could be justified as a way to ease the work of a burdened court, but that explanation is not compelling with respect to the Court of Appeals. *See Reynolds, supra* note 1, at 27-29.

43. If so, the Court should let its audience know whose research it is using. For an example, see *Fisher v. McGuire*, 282 Md. 507, 512-14, 385 A.2d 211, 214 (1978).

44. *Cf.* G. GILMORE, *THE AGES OF AMERICAN LAW* (1977) (speaking of the period spanning the Civil War to the First World War as the "Age of Faith"):

This became the age of the string citation — quite as much in the judicial opinions as in the learned treatises . . . . Nor did the judges make any attempt to explain the reasons for their decisions. It was enough to say: The rule which we apply has long been settled in this state (citing cases).

*Id.* at 62-63.

45. This would not be true if the Court followed a rule of *stare dictis*. The Court does not.

46. Rote citation is particularly objectionable when the facts of the cases cited vary from those of the case before the Court, and the Court does not discuss the facts

Often the "string" seems to have been placed in the opinion as a counting device, to show that the decision puts the Court of Appeals firmly in the ranks of the majority on the issue and to overwhelm with numbers, in order, perhaps, to demonstrate the necessary correctness of the result.<sup>47</sup> In *Davis v. State*,<sup>48</sup> for example, the Court held that the Supreme Court's decision in *Boykin v. Alabama*,<sup>49</sup> does not require that a criminal defendant specifically waive certain rights before his guilty plea can be accepted. To support this holding the Court of Appeals cited twenty-six state and federal cases and one secondary source.<sup>50</sup> But the *Davis* Court had already presented a convincing argument for its position and very little support by reference to developments in other courts was necessary.<sup>51</sup> A citation to a source that had collected those cases, along with a quick summation of the result, would have been more effective, and perhaps would have better reflected what the Court had done. In any event, the Court of Appeals is too good a court to decide cases on the basis of counting noses and should avoid giving the impression that it does so.

A final objection to string citations is that they make the lawyer's job more difficult.<sup>52</sup> The string interrupts the flow of an opinion and unnecessarily increases its length, making the opinion more difficult to understand. In addition, encyclopedists and citators energetically collect the cited cases and make it that much more

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of those cases nor any lessons it has drawn which could be applied to the case at bar. See, e.g., *Peterson v. State*, 281 Md. 309, 318-19, 379 A.2d 164, 168-69 (1977) (citing 28 cases).

47. See also J. REID, *supra* note 19, at 403: "That Doe mesmerized the other judges by flashing a string of authorities before their eyes may seem farfetched. Yet this apparently happened." The "mesmerization" refers to the great freedom Doe employed in citation. *Id.*

48. 278 Md. 103, 361 A.2d 113 (1976).

49. 395 U.S. 238 (1969).

50. 278 Md. at 116-18, 361 A.2d at 120-21.

51. The "string" detracts from the force of the Court's opinion, for the reader wonders whether the Court is relying on its own analysis or providing a post-hoc attempt to justify a decision reached by counting the votes of other courts.

52. They may also make the job of a trial court difficult. In *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977), a sale of goods case, the Court remanded for several findings concerning the Statute of Frauds. Citation, presumably to aid litigants and the trial court, was made to nineteen cases, four treatises, and two law review articles (curiously, no mention was made of RESTATEMENT (SECOND) CONTRACTS, § 217A (1973), which deals with the issue). It is doubtful that the Court of Appeals had either itself read all the cited works, or realistically expected the trial court or litigants to do so.

difficult for counsel by further complicating attempts to trace the *considered* evolution of a legal principle.<sup>53</sup>

C. *Adjudication by Quotation.* Another symptom of mechanical treatment is long quotation from other sources. A number of the Court's opinions are scissors-and-paste jobs, consisting primarily of long quotations from source material that are strung together with connecting paragraphs added by the writer of the majority opinion. Thus, in *Lightfoot v. State*,<sup>54</sup> the Court was faced with the question whether "failure to consummate the crime is one of the essential elements of criminal attempt."<sup>55</sup> The Court's holding that nonconsummation is not an essential element was grounded entirely on a lengthy quotation from a secondary source<sup>56</sup> and two short excerpts from opinions of state supreme courts.<sup>57</sup> Similarly, in *Fleming v. Prince George's County*,<sup>58</sup> a medical malpractice case, one of the questions concerned the admissibility of "life tables." The Court held that they should have been admitted at trial, but confined its explanation of this decision to a quotation from a 1915 Court of Appeals opinion and lengthy excerpts from both McCormick's *Law of Evidence* and *American Jurisprudence (Second)*.<sup>59</sup>

There is nothing wrong, of course, with the use of quoted material in an opinion. The language quoted may be memorable and may capsulize the problem neatly, or quotation may be necessary to capture the flavor of what an earlier court was doing, or what it thought it was doing. Adjudication by quotation must be particularly appealing to hardworking judges as a time-saving device, but it is also dangerous. Because the pen is a hard task master, disciplining mightily faulty analysis and careless expression, the

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53. The opinions that have been referred to in this section should be contrasted with one such as *Board of Trustees v. Sherman*, 280 Md. 373, 373 A.2d 626 (1977), a dispute over tenure status of a faculty member at Bowie State College in which the Court's discussion centered on an interpretation of the language of various documents. Only five cases were cited: one, a "strikingly similar" case, was discussed in some detail; another was used to support an axiomatic statement; and the remaining three were a form of "but see" citation to an issue the Court assumed, but did not decide.

54. 278 Md. 231, 360 A.2d 426 (1976).

55. *Id.* at 233, 360 A.2d at 427.

56. *Id.* at 235-37, 360 A.2d at 428-29 (quoting R. PERKINS, CRIMINAL LAW 552-54 (2d ed. 1969)).

57. 278 Md. at 234-35, 360 A.2d at 428 (quoting *Crump v. State*, 259 Ind. 358, 363, 287 N.E.2d 342, 345 (1972), and *State v. Mahoney*, 122 Iowa 168, 172, 97 N.W. 1089, 1091 (1904)).

58. 277 Md. 655, 358 A.2d 892 (1976).

59. *Id.* at 684-86, 358 A.2d at 907-08.

“process of justification”<sup>60</sup> — the need to decide in writing — should not be subject to short cuts. Reliance on the written work of others, in short, may shield a judge from the necessity of working through his position as clearly as he would if he had been forced to prepare for consumption by his audience, a statement of *his own* to justify the results reached.<sup>61</sup>

### III. LEGAL ANALYSIS

A. *Analytic Framework.* In reaching its decisions a court has available to aid it a wealth of material: case law, statutes, commentary, and arguments by counsel. These data, however, need a framework in which to be analyzed. It is important that the Court establish a framework within which it can evaluate such information. The framework should also be articulated, a process that serves three ends: first it helps insure that the Court receives necessary information from counsel; second, articulation in advance of decision helps avoid the appearance of *ad hoc* decision-making; and, finally, it helps sharpen the Court’s own focus when it approaches resolution of the problem.

The use of historical materials provides a good example. Many of the Court’s opinions reflect an effort to understand the historical framework of a problem. Skillful use of history can set the background for interpretation of written and unwritten law, show the development of principles and help to reach an understanding of the ends sought by earlier judges and legislators.<sup>62</sup> In *Secretary of Transportation v. Mancuso*,<sup>63</sup> for example, the Court was faced with the question whether certain bonds constituted “debt” within the meaning of a provision of the Maryland Constitution restricting the state’s debt. The Court inquired into the purpose of the insertion of the debt-restriction clause into the constitution and used its determination of that purpose to support its resolution of the case.

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60. See R. WASSERSTROM, *THE JUDICIAL DECISION* 27 (1961). Wasserstrom, in contrasting the “process of justification” with the “process of discovery,” emphasized the need to attempt to justify even intuitively derived decisions.

61. See, e.g., *Langley v. State*, 281 Md. 337, 378 A.2d 1338 (1977), in which well over half of the opinion consists of quotations from other cases. Each quotation “fits” in the opinion, but the Court failed to analyze any of them carefully. Instead, the Court at the end of the opinion constructed a holding without referring to the cases quoted or the reasons developed therein. The quotations, in other words, do not form a unit with the holding.

62. This is done, of course, even when the Court traces the elaboration of a recent doctrine. For a modern “historical” analysis, see *State v. Ensor*, 277 Md. 529, 356 A.2d 259 (1976), wherein the Court leads the reader through constitutional and legislative developments on its way to a solution of the problem.

63. 278 Md. 81, 359 A.2d 79 (1976).

On the other hand, history's lessons are often obscure and their relevance to present-day cases may be slight. Use of historical reference to demonstrate the antiquity of a concept may keep a bemused court from critically analyzing a problem.<sup>64</sup> History also has a way of presenting its lessons in a way responsive to the questions asked of it. Thus, legislative history may be turned to in order to see if the draftsmen intended a solution to the particular problem at bar, or, on the other hand, to see if they *precluded* a particular answer suggested by one of the parties.<sup>65</sup> *Murphy v. Yates*<sup>66</sup> provides an example. A divided Court of Appeals held in *Murphy* that the State Prosecutor Act unconstitutionally infringed upon the constitutional powers of the several state's attorneys. While both the majority and dissenting opinions examined historical materials, their use of that material differed significantly. The dissent resorted to history in an apparent effort to see if its interpretation of the key section of the state constitution<sup>67</sup> was precluded by the original understanding or by later developments.<sup>68</sup> The majority, on the other hand, seemingly turned to historical material in an effort to find an answer *there* — that is, an answer to be implied from the data — to the actual question presented by the case.<sup>69</sup> Because different approaches can lead to different results, it is important for the Court to develop and then articulate the reasons *why* it believes the historical material to be significant.

Development of an articulated position on an analytic issue such as historical relevance, like the development of positions on most

64. An example is *Central Collection Unit v. Atlantic Container Line, Ltd.*, 277 Md. 626, 627, 356 A.2d 555, 556 (1976), presenting the question "whether the doctrine of sovereign immunity precludes a defendant's assertion of limitations as a defense to an action brought by the State in its sovereign capacity." There the Court stated: "We begin our discussion with a reference to 21 James 2, c. #16 (1623), from which our statute of limitations is derived." That reference is the end of the discussion of the Stuart statute, except to note that it was in force in Maryland "until at least 1715," and that "[i]t is the progenitor" of several current Maryland statutes. *Id.* at 628, 356 A.2d at 556. Although interesting, the "reference" adds nothing to an opinion that makes no attempt to analyze the wisdom of sovereign immunity. Indeed, the antiquity of the doctrine may have kept the Court from analyzing the issue.

65. The legislative history may also suggest any one of a great number of in-between solutions. See generally Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

66. 276 Md. 475, 348 A.2d 837 (1975), noted in 37 MD. L. REV. 81 (1977).

67. The selection stated: "The State's Attorney shall perform such duties and receive such salary as shall be prescribed by the General Assembly . . ." MD. CONST. art. V, § 9 (prior to 1976 amendments).

68. 276 Md. at 504-10, 348 A.2d at 853-56 (Levine, J., dissenting).

69. *Id.* at 480-96, 348 A.2d at 840-48.

questions of legal philosophy, is not a common trait among lawyers; the glory of the common law has been exposition, not theory.<sup>70</sup> Consequently, it is not surprising to find little discussion in opinions of the role of the judge in our society. The lack of discussion does not, of course, necessarily indicate a lack of thought on the relationship between court and legislature and the source of values in common law decision-making. Failure to elaborate its own thinking on questions of philosophy, however, can hinder the Court's leadership of the judicial branch of government, for adequate guidance concerning these questions is not given the lower courts; and failure to reflect on those questions may hinder the Court's performance of its own role as decision-maker.

Nowhere is the reluctance to examine problems of theory more marked than in cases involving relations between the Court and legislature. One example comes from cases raising questions concerning the use that should be made of legislative action (or inaction) that has not become "law." Reliance on materials such as the text of a defeated bill or a joint resolution raises difficult questions with respect to the constitutional relationship between executive and legislature. The use of such materials is implicitly limited by the veto power of the executive — an essential component in the constitutionally prescribed method of creating law.<sup>71</sup> Although the Court has relied upon legislative actions that were not translated into law to support its opinions, it has given no hint in those cases that it recognizes the problems involved in doing so, especially those problems associated with the structure of the Maryland government.<sup>72</sup>

Another example of the Court's reluctance to address questions concerning the relationship of court and legislature is found in

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70. "It is the merit of the common law that it decides the case first and determines the principle afterwards." Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931).

71. See generally H. HART & A. SACKS, *supra* note 33, at 1394-1406.

72. See, e.g., *Calvert Assoc. Ltd. Partnership v. Department of Employment & Social Servs.*, 277 Md. 372, 376-77, 381, 357 A.2d 839, 841, 843-44 (1976), in which the Court placed great weight upon an 1858 resolution by the General Assembly and legislation passed by that body in 1974, but vetoed by the governor. Both actions were said to show ("clearly" and "plainly") the General Assembly's position on the problem. While the Court's characterization was surely correct, that should have been only the beginning of the analysis. It should also have asked *why* it was relevant — if at all — to a court exercising its decisional powers *what* the legislature thought when the thoughts were not translated into "law," that is, into a statute.

*Calvert* can be contrasted with *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07, 354 A.2d 817, 820-21 (1976). The court in *Harden* refused, with reasons given, to draw an inference from the defeat of specific legislation.

*Carpenter v. Davies*,<sup>73</sup> an action by a real estate broker for a commission allegedly due him. The seller argued that his contract with the broker was not enforceable because it lacked a "termination date," thereby violating a statute authorizing suspension of the license of any broker who "accept[s] a listing contract to sell property unless such contract provides for a definite termination date . . . ."<sup>74</sup> This argument raised the interesting question of how to define "illegal" contracts, as that definition relates to the implication of a private defense from the delegation of authority to an administrative agency.<sup>75</sup> The Court avoided consideration of the issue, however, stating that "[i]f it is the intent of the General Assembly that in circumstances such as this the broker should be precluded from recovering commissions, no doubt it will so state."<sup>76</sup> This approach, of course, begs the question of whether the General Assembly *did* so "intend." The Court, without discussing the wisdom of doing so, concluded that an enactment of a coordinate branch of government should be given no effect beyond its express terms, and should not be used as a basis for reasoning by the Court on the content of "public policy."<sup>77</sup> That may well be a sustainable proposition, but the opinion of the Court does not establish its validity, and the failure to do so may mean that the statute was not given as broad a scope as the legislature would have desired.

A more common problem requiring analysis of structural relationships is that of statutory interpretation. One of the most important jobs of any court is to apply statutes — the expressed desires of a coequal branch of government<sup>78</sup> — to problems brought

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73. 276 Md. 174, 345 A.2d 58 (1975).

74. MD. ANN. CODE art. 56, § 224(o) (1972).

75. Thus, the statute authorized the Maryland Real Estate Commission to suspend a broker's license for failure, *inter alia*, to supply a termination date. *Id.* § 224(a). Such a drastic remedy could easily be found to be a legislative expression of "public policy," contracts in violation of which have been said to be unenforceable. See 6 A. CORBIN, THE LAW OF CONTRACTS § 1375 (1951); RESTATEMENT OF CONTRACTS § 512 (1932). Certainly unenforceability would be an effective way of promoting compliance with the statutory requirement of a written termination date.

The *Carpenter* Court seemed bemused by the notion that even if the written contract were ineffective, an oral agreement existed. That, of course, is still not responsive to the public policy argument.

76. 276 Md. at 177, 345 A.2d at 60.

77. This would be akin to reasoning from the "equity" of a statute. See Justice Harlan's excellent opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). See generally Comment, *Civil Law Reasoning in the Common Law*, 82 YALE L.J. 258 (1972).

78. The doctrine of separation of powers is expressly provided for in the Maryland Constitution. MD. CONST., Decl. of Rts., art. 8.

before the Court. In most situations a court is not the primary addressee of the statute; instead, it is directed to other actors in society: members of the executive branch, business persons, consumers, labor leaders, and so on. Such persons need guidance concerning the manner in which statutes will be interpreted to assist them in ordering their affairs with a minimum of risk.<sup>79</sup> Because the Court of Appeals hears (and can hear) very few of the problems that involve questions of interpreting and applying statutes that come to the attention of the judiciary,<sup>80</sup> the great bulk of this work must be performed by the lower courts without effective supervision from the Court of Appeals. To ensure both uniformity of result and proper allocation of power and responsibility among the branches of government, judges should approach problems of statutory interpretation with a consistent theory articulated by the state's highest court. Unfortunately, if recent decisions are representative, the Court of Appeals of Maryland, like most American courts, has not developed and elaborated, through analysis of the constitutional roles of the branches of government, an approach to the problem of statutory interpretation.<sup>81</sup> Instead, the Court's approach in this area generally has been either to make no reference to an analytic approach or to substitute empty phrases and mechanical citations<sup>82</sup> in place of an effort to grapple with the sometimes exceedingly difficult structural and linguistic problems posed by interpretation cases.<sup>83</sup> Further, even when the Court does refer to a method of interpretation, it pays little or no attention to the test it has just identified.

In *Baltimore Gas & Electric Co. v. Board of County Commissioners*,<sup>84</sup> for example, the Court was asked to invalidate a county

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79. For a discussion of costs associated with uncertainty created by judicial opinions, see R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 419-27 (2d ed. 1977).

80. Of course the great bulk of statutory interpretation does not come to the attention of any court. The interpretations by government officials, for example, are generally accepted by those whom they affect. Acceptance, however, does not obviate the need for guidance.

81. See H. HART & A. SACKS, *supra* note 33, at 1201: "The hard truth of the matter is that American courts have no intelligible, generally accepted and consistently applied theory of statutory interpretation."

82. Mechanical citations are one facet of the "string" citation problem. See text accompanying notes 47 to 53 *supra*.

83. Failure to analyze interpretation issues can be found in other areas as well. In contract cases, for example, the court often relies on shibboleths without explaining why (and how) they have any relevance to the case at bar. See, e.g., *Canaras v. Lift Truck Servs.*, 272 Md. 337, 356, 322 A.2d 866, 876 (1974) ("language in a contract prepared and concluded by one party is to be construed against that party if there is any ambiguity or uncertainty . . .").

84. 278 Md. 26, 358 A.2d 241 (1976).



ordinance that gave “discounts” for advance payments of property taxes and made the percentage of the discount depend upon the size of the tax bill, with lower tax bills receiving a higher “discount.” A public utility (that paid sixty-three percent of the county’s real estate taxes),<sup>85</sup> asserted that this ordinance conflicted with the statute authorizing the grant of “discounts.”<sup>86</sup> The Court’s discussion of the problem was preceded by a statement concerning interpretation:

[T]he cardinal rule of construction is to ascertain and carry out the real legislative intention. In determining that intention, we consider the language of an enactment in its natural and ordinary signification; only when the statute in question is ambiguous or of doubtful meaning need we look elsewhere to ascertain the legislative intention. *Md. Nat’l Cap. P. & P. v. Rockville*, 272 Md. 550, 555-56, 325 A.2d 748 (1974); *Radio Com., Inc. v. Public Serv. Comm’n*, 271 Md. 82, 93, 314 A.2d 118 (1974); *Scoville Serv., Inc. v. Comptroller*, 269 Md. 390, 393-94; 306 A.2d 534 (1973).<sup>87</sup>

Unfortunately, the Court did not explain either how it knew what the “cardinal rule of construction” was or why the method described for “determining that intention” is a good one. Nor do the cases referred to by the Court provide answers to those questions. Thus, neither in the case at bar, nor in any case cited, did the Court give an indication that it had thought through the problems involved. Instead, it was content to substitute maxims concerning statutory interpretation for analysis. Hence, while the Court has in some cases provided an articulated standard for interpretation — unlike its practice in cases involving governmental structure — it has failed to elaborate why that is the proper standard to use.

Maxims — that is, time-tested formulae such as the “cardinal rule” quoted in the preceding paragraph — are useful because they can capture in shorthand form a common approach to a problem.<sup>88</sup> Unfortunately, they can also be used as “magic words”<sup>89</sup> incanted in

85. *Id.* at 29, 358 A.2d at 243.

86. MD. ANN. CODE art. 81, § 48(b) (1975) provides: “any county . . . as to its own taxes may allow such discounts for payments made prior to . . . October 1 . . . .”

87. 278 Md. at 31, 358 A.2d at 244.

88. As “something fundamental, something permanent,” Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 370 (1929), maxims have long been used by common law judges as evocation of deeply held and widely shared beliefs. *See id.* at 375-77.

89. *See* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 621 (1908) (quoting a passage from William James describing the great part “magic words have always played” in metaphysics) (emphasis in original).

place of reflection on a problem.<sup>90</sup> This is true even of the hoariest of doctrines; in statutory interpretation the use of maxims is tricky, indeed. References to maxims, therefore, should be made cautiously and with evidence that the Court is merely referring to its own earlier analysis of the problem. One problem with the use of maxims is that there is no general agreement among courts and commentators concerning the wisdom of the various maxims that might be selected with respect to a particular problem.<sup>91</sup> Should legislative "intent" be carried out, for example, if the result is inconsistent with deeply held values?<sup>92</sup> What does the Court mean by "intention" when it speaks of the "cardinal rule" of construction? Does this refer to a perceived hypothetical answer given by the legislature to the particular problem before the court, or does it refer to a more generalized "purpose" that body had in mind at the time of enactment?<sup>93</sup> Those questions are difficult ones; the answers to them, however, are important for the resolution of particular problems and for the light they shed on how a court views its role in our society.

In addition, a court's method of arriving at a determination of the content of legislative intention raises a number of problems that the Court does not discuss. The Court's initial focus on language with resort to extrinsic evidence only in cases of ambiguity, as illustrated by the above quotation from the tax discount case, is a restatement of the "plain meaning rule."<sup>94</sup> Like other "rules" (such as the parol evidence rule) that purport to rely only on internal evidence to discover ambiguity, it has been cogently criticized as simplistic and unworkable.<sup>95</sup> "There is no surer way to misread any

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90. See, e.g., *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975), cert. denied, 425 U.S. 942 (1976), in which the Court referred approvingly to almost every known canon of construction.

91. Even if the general acceptance of maxims selected by the Court was a valid reason for their use, see text accompanying notes 47 to 53 *supra*, such acceptance is virtually impossible. A famous list of maxims and countermaxims of statutory interpretation are found in Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). There Llewellyn listed 28 "Canons of Construction," along with a contradictory canon for each. For example, the maxim, "[a] statute cannot go beyond its text," is contrasted with, "[t]o effectuate its purpose a statute may be implemented beyond its text." *Id.* at 401.

92. That it should not be carried out in these circumstances is often referred to as the "Golden Rule" of statutory interpretation. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 230 (1975).

93. See *id.* at 87-88.

94. See *id.* at 229-33; H. HART & A. SACKS, *supra* note 33, at 1145.

95. See generally Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" & Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299

document than to read it literally,"<sup>96</sup> Learned Hand once wrote, and recognition of the need to evaluate language in context is now widespread. Moreover, it is difficult to understand the harm in looking at extrinsic evidence — though its probative value may be slight — in order to understand the goals of the legislature when it acted.

Possibly the Court recognizes these difficulties with the plain meaning rule; certainly it pays only lip service to its own formulation of it. In the tax discount case, for example, the Court, after looking at the statutory wording stated that "it is unnecessary for us to look elsewhere,"<sup>97</sup> but went on to marshal evidence of the purpose of tax discount legislation in general,<sup>98</sup> of the particular piece of legislation in question,<sup>99</sup> and of holdings in other states.<sup>100</sup> Although some of this evidence did lend support to its holding that the act forbade discriminatory "discounts,"<sup>101</sup> the Court's use of it was hardly consonant with the Court's own interpretive model.<sup>102</sup>

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(1975). Justice Marshall, speaking for a unanimous Supreme Court, expressly rejected the plain meaning rule in *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976).

For a concise and trenchant criticism of the standard formulation of the parol evidence rule, see Corbin, *The Interpretation of Words & the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

96. *Giuseppe v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944).

97. 278 Md. at 31, 358 A.2d at 244. The Court buttressed the "plain meaning" that it discovered by referring to "[a] primary meaning of the word 'discounts' in Webster's Third New International Dictionary . . ." *Id.* That reference raises two major problems, one with the case, and the other with the plain meaning rule. First, at least one other contemporary dictionary, the *Random House Dictionary of the English Language* (1966), does not define "discounts" in the way Webster's Third does. If "discounts" has such a "plain" meaning, why this discrepancy in dictionary definitions? Second, a major problem with the plain meaning rule is defining the time at which the meaning is "plain." The act in question dates back at least to 1929, but the Court did not explain why it used a contemporary (1973) dictionary as its reference, rather than one that would explain how the members of the General Assembly in 1929 might have defined the term.

98. 278 Md. at 32, 358 A.2d at 244.

99. *Id.* at 32, 358 A.2d at 245. The opinion cited the subtitle to the statute: "When Taxes are Payable." It does not explain why that subtitle precludes the interpretation of the statute offered by the county.

100. *Id.* at 32, 358 A.2d at 244-45. The Court cited a 1928 Pennsylvania case and two from Kentucky dated 1916 and 1895. Again, the Court did not explain the relevance of these cases to the problem.

101. Query the position of the Court if the county had granted a discount that favored large taxpayers such as the utility. Discounts relating to savings based on volume are of course not unusual in the business world.

102. For other cases in which extrinsic evidence is brought into an opinion after statutory language has been found to be "unambiguous" or to have a "plain meaning," see *Mazor v. State Dep't of Correction*, 279 Md. 355, 360-63, 369 A.2d 82, 86-88 (1977) (recitation of plain meaning rule followed by a notation that a finding of

The tax discount case at least provided a model for interpretation. The plain meaning rule, however, is not referred to in many decisions. In some cases, it appears to have been jettisoned because its application would have been embarrassing. In *Phifer v. State*,<sup>103</sup> for example, the petitioner had been convicted of a violation of the Maryland Fair Election Practices Act<sup>104</sup> on the ground that she had acted as a member of a "political committee" but had not filed required reports with the Election Board. The central issue in the case was the definition of "committee," defined by the statute as "any combination of two or more persons . . . formed in any . . . manner which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate . . . submitted to a vote at any election."<sup>105</sup> The petitioner's alleged "committee" had consisted of herself and one Dr. Weems, from whom she had solicited a contribution for a newspaper advertisement opposing the reelection of State Senator Edward Hall. Despite the apparent close correspondence between that conduct and that proscribed by the statutory language (a "combination . . . formed . . . to assist . . . the . . . defeat of any candidate"), the Court made no effort to explain why the "meaning" of the Act was not "plain" on "its face," before proceeding to explain why the petitioner's actions did not fall under the Act. While the Court's opinion as to why the petitioner was not involved with a "political committee" seems sensible enough, it is plainly inconsistent with earlier — and later — pronouncements by the Court on methods of statutory interpretation,<sup>106</sup> particularly with its sometimes avowed adherence to the plain meaning rule.

B. *Failure to Elaborate.* Another symptom of mechanical treatment of a problem occurs when a court slides quickly through,

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statutory policy by the Court of Special Appeals in an earlier case was "persuasive"); *Gossard v. Criminal Injuries Compensation Bd.*, 279 Md. 309, 311-12, 368 A.2d 443, 444-45 (1977) (statutory term found to be "unambiguous," following a statement that "[w]e perceive no basis in policy, precedent or common sense for [appellant's contention]"); *Maryland Auto. Ins. Fund v. Stith*, 277 Md. 595, 598, 356 A.2d 272, 274 (1976).

103. 278 Md. 72, 359 A.2d 210 (1976).

104. MD. CODE ANN. art. 33, §§ 26-1 to -21 (1976).

105. *Id.* § 1-1(a)(14).

106. Inconsistent application (or nonapplication) of other canons of construction can be found. Compare, e.g., *State v. Fabritz*, 276 Md. 416, 348 A.2d 275, cert. denied, 425 U.S. 942 (1976) with *Howell v. State*, 278 Md. 389, 364 A.2d 797 (1976). Both cases involved construction of penal statutes, and both invoked the maxim calling for "strict construction of penal statutes." In *Fabritz*, however, the Court believed it proper to consider the question of legislative intent in order to give effect to "the objectives and purposes of the enactment." 276 Md. at 422, 348 A.2d at 279. No such statement or search was made in *Howell*. Not surprisingly, the state won in *Fabritz* and lost in *Howell*.

or skips entirely, important steps in its explanation of the road to its result. A fully reasoned explanation serves several important functions: it helps legal consumers understand what the court was trying to do; it provides a basis for analysis, criticism, and analogy; and most important, it is a necessary aid to the court's understanding and resolution of the problem.<sup>107</sup> Our common law system of precedent, in short, depends upon reasoned articulation by judges of the reasons for the decision.<sup>108</sup> While it is impossible — and unnecessary — for a court to explain everything conceivably at issue in a case, a court's expression of the important steps in its reasoning on the problems central to its resolution of the case is essential to the performance of its tasks. Unfortunately, the Court of Appeals sometimes fails to do this, instead reaching its results by a quick conclusion. Opinions decided in that fashion are often buttressed by authority, but frequently give no indication that the Court has thought about *why* it has reached the result. *Harris v Jones*,<sup>109</sup> for example, presented, as "a case of first impression in Maryland," the question whether "intentional infliction of emotional distress" should be recognized as a "new and independent tort."<sup>110</sup> In agreeing with the Court of Special Appeals that the tort should be recognized, the Court of Appeals made copious references to the *Restatement (Second) of Torts*,<sup>111</sup> to several cases from other jurisdictions, and to law review articles.<sup>112</sup> Those references were employed, however, to show the sweep and limits of the new tort. While the Court's discussion is interesting and instructive, it does not give much aid to the reader trying to understand why it was thought wise to adopt the tort in the first place. To be sure, the reader can work backwards: the discussion of the scope of the rule aids an understanding of why it was adopted. Nevertheless, it would be reassuring and helpful if the Court were to lead its audience down the path it took, the path that

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107. See note 60 *supra*.

108. If authority is needed for this proposition, see Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 751 (1970):

In sum, judicial responsibility connotes far more than a mechanical application of given rules to new sets of facts. It connotes the recurring formulation of new rules to supplement or displace the old. It connotes the recurring choice of one policy over another in that formulation, and an articulation of the reasons therefor.

109. 281 Md. 560, 380 A.2d 611 (1977).

110. *Id.* at 561, 380 A.2d at 611.

111. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

112. 281 Md. at 565-72, 380 A.2d at 613-17.

led the Court to conclude that the establishment of this rule would help achieve a better society.<sup>113</sup>

The absence of that type of analysis on essential points can be found even in the best opinions. In *Jacron Sales Co. v. Sindorf*,<sup>114</sup> a private, nonmedia defamation case, the Court of Appeals discussed fully and thoroughly the Supreme Court's decisions in the area, concluding that those opinions left state courts free to impose liability in such circumstances.<sup>115</sup> After noting decisions in several other states in recent years on the issue of whether to adopt either a common law negligence or a *New York Times v. Sullivan*<sup>116</sup> standard, the Court held that "a standard of negligence, as set forth in Restatement (Second) of Torts § 580B (Tent. Draft No. 21, 1975) . . . must be applied in cases of purely private defamation."<sup>117</sup> The only explanation offered for this choice was that "adoption of a negligence standard in cases of purely private defamation hardly introduces a radical concept to tort law."<sup>118</sup> However desirable symmetry with other areas of tort law may be, that by itself hardly compelled adoption of the negligence standard,<sup>119</sup> especially in light of the existence of contrary decisions in other jurisdictions.<sup>120</sup> The Court should have asked questions that went to the wisdom of choosing one standard over another: Why are defamation actions permitted at all? What are the costs to free speech and reputation likely to be under either standard? How successful was the common law rule in achieving these goals? Those are difficult questions to be sure, but they are the types of questions that should be faced by a court engaged in the declaration of law;<sup>121</sup> in addressing them the

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113. Such an explanation should also tell the reader why the Court believes that it should attempt to achieve such a society.

114. 276 Md. 580, 350 A.2d 688 (1976).

115. *Id.* at 594, 350 A.2d at 696.

116. 376 U.S. 254 (1964).

117. 276 Md. at 596, 350 A.2d at 697.

118. *Id.* The Court also noted that a negligence standard is now applied to determine whether a publication is defamatory and, in some jurisdictions, to defeat common law conditional privilege.

119. Ironically, the Court moved away from the negligence standard in another area of tort law, products liability, some months after the *Jacron* decision when it adopted the strict liability approach of RESTATEMENT (SECOND) OF TORTS § 402A (1965). *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976), discussed at notes 123 to 132 and accompanying text *infra*.

120. Several of these decisions were noted by the Court. 276 Md. at 595, 350 A.2d at 697.

121. The *Jacron* Court in fact engaged in such an analysis with respect to another question — whether a distinction should be made between media and nonmedia defendants. 276 Md. at 590-94, 350 A.2d at 694-96.

Court would have helped satisfy several institutional needs. The most important of these is the need to analyze the problem in an effort to achieve the best result possible; the issues may be difficult but they are not incapable of analysis. Second, the reasoning employed by the Court has an important impact in deciding analogous cases that may arise in the future. Third, the *process* of reasoning may help the Court perceive problems with one of the standards that might make that choice seem unwise.<sup>122</sup>

A more subtle form of this problem is illustrated by *Phipps v. General Motors Corp.*,<sup>123</sup> the case in which the Court adopted the doctrine of strict products liability as set out in section 402A of the *Restatement (Second) of Torts*.<sup>124</sup> The importance of the decision, its departure from settled common law principles, as well as the criticism occasionally leveled at the concept of strict liability,<sup>125</sup> would lead the reader to expect a complete explanation of the decision to adopt the *Restatement's* position. That did not happen in *Phipps*. Instead, the Court justified its adoption of strict liability by listing several reasons advanced by other courts for adopting strict liability, by referring to several law review articles, and by quoting from the official comment to section 402A.<sup>126</sup> It then concluded: "We find [these] reasons persuasive,"<sup>127</sup> restating the reasons given in the Comment.<sup>128</sup> What the *Phipps* opinion failed to do was to explain why the listed justifications were proper premises for the Court to employ,<sup>129</sup> why, in other words, our society views the results that will

122. This is true of the standard adopted in *Jacron*. See Comment, *The Maryland Court of Appeals: State Defamation Law in the Wake of Gertz v. Robert Welch, Inc.*, 36 MD. L. REV. 622, 632-36 (1977).

123. 278 Md. 337, 363 A.2d 955 (1976), noted in 37 MD. L. REV. 158 (1977).

124. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

125. See, e.g., R. POSNER, *supra* note 79, at 134-42, which contains a summary of arguments for and against strict liability. A critical article is McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970).

126. 278 Md. at 351-52, 363 A.2d at 962-63. Earlier, the Court had said that "various justifications for imposing strict liability in tort on manufacturers have been advanced by the Courts." *Id.* at 343, 363 A.2d at 958. The Court then listed four reasons substantially repeated in the Comments to § 402A. *Id.*

127. 278 Md. at 352, 363 A.2d at 963.

128. *Id.* at 352-53, 363 A.2d at 963. Brushed off in equally conclusory fashion was the contention that enactment of the Uniform Commercial Code preempted the Court's assertion of common law powers in the area of products liability. *Id.* at 349-50, 363 A.2d at 962. In fact, the Court devoted more attention to an analysis of its own precedents in the area and to a damage issue concerning loss of consortium.

129. The Court's only rationalization of strict liability was apparently this assertion:

[T]here is no reason why a party injured by a defective and unreasonably dangerous product, which when placed on the market is impliedly represented

be achieved by section 402A as proper ones to seek. As in *Jacron*, that type of explanation would have been difficult, for it requires inquiry into the sources and content of values and goals<sup>130</sup> and can lead to the recognition of conflict among competing basic principles. It is beside the point that excellent arguments for section 402A can be found in some of the cited material, for it is the job of the Court to develop, analyze, and resolve those arguments in its opinion, both as a disciplinary aid to its own decision-making and in order to explain to its constituency how it has determined which principles of society led it to "find [these] reasons persuasive." An opinion, in short, should provide internal evidence that the court has wrestled with the problem sufficiently so as to understand fully what it is doing. *Phipps* does not provide that evidence.<sup>131</sup>

The failure by the Court adequately to underpin its decision in *Phipps* presents other difficulties. A number of courts have found serious deficiencies in section 402A, leading in some cases to the adoption of significant modifications of the *Restatement* language.<sup>132</sup> The *Phipps* opinion, however, gave no hint that the Court was aware of such problems; instead, it suggests that the Court adopted the *Restatement* position on strict liability blindly — through wholesale incorporation unaccompanied by objective criticism. It would be comforting to know that the Court had recognized the deficiencies in section 402A and had then explained why those problems did not lead to a rejection of some of the language of that section. That analysis would have helped maintain confidence in the thoroughness and thoughtfulness of the Court's decision-making. The discussion would also have helped instruct

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as safe, should bear the loss of that injury when the seller of that product is in a better position to take precautions and protect against the defect.

*Id.* at 352-53, 366 A.2d at 963. Absent an attempt to explain the bases for this assertion, it is nothing more than an appeal to the reader's intuition ("we hold these truths to be self-evident").

130. This could be done, for example, by reference to statutory developments that suggest, by analogy, the way society feels about such conflicts.

131. Appropriate here is the comment of a seasoned appellate judge that "there is no test of a decision equal to the discipline of having to compose an opinion. Without written opinions judicial mistakes would proliferate beyond knowing and beyond knowability." Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV., 197, 201 (1967).

132. This is particularly true with respect to the "unreasonably dangerous" language of § 402A(1). See, e.g., *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-35, 501 P.2d 1153, 1161-63, 104 Cal. Rptr. 433, 441-43 (1972). *Phipps* does discuss in some detail the question of design defects, the alleged basis for liability in the case. 278 Md. at 344-45, 363 A.2d at 959. A summary of problems with the language of § 402A can be found in 37 MD. L. REV. 158, 163-64 (1977).



lower courts and litigants in how to handle problems that may arise in the future, and would provide a source of analogical reasoning for problems arising in related areas. Finally, a legislator concerned about the problem could have been guided in his actions by the Court's elaboration of those.

C. *Rush to Judgment.* Several cases decided by the Court of Appeals in the last few years have followed the questionable procedure of handing down an order soon after argument, and then following the order sometime later with an opinion. The use of this process is understandable, for there is often pressure on the Court to reach a decision, to settle an issue quickly. There are, however, serious problems with that process. First, the Court in making its decision has denied itself, the litigants, and the public the benefit of a decision whose analytic input has been tested in writing — a process that can often lead to a change in viewpoint as the writer attempts to justify the decision. There is also the danger that the analysis of the problem found in the opinion will be influenced by the result already reached. It is hard after all, if one has publicly pronounced a statute unconstitutional, to retract that statement.<sup>133</sup> Thus, the writer in such a situation will settle down to sustained research and analysis much as an attorney sits down to write a brief: not to search for truth, but to make an advocate's argument for a position already staked out.<sup>134</sup> Not only will this deny justice in the case at bar,<sup>135</sup> but, because the decision has precedential value, it may affect other decisions as well. It is impossible to say whether those problems are present in any of the cases decided in this fashion by the Court of Appeals. Several such cases have significant defects, however, and it is possible that this mode of decision-making contributed to those problems.<sup>136</sup>

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133. This is surely one of the reasons for the rigid secrecy surrounding judges' decision conferences.

134. As the British Holmes observed, "it is an error to argue in front of your data. You find yourself insensibly twisting them round to fit your theories." A. DOYLE, *The Adventure of Wisteria Lodge*, in *THE COMPLETE SHERLOCK HOLMES* 876 (1930).

135. A description of machinations on the Supreme Court occasioned by this type of decision can be found in Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 813-31 (1956).

136. In addition to the cases discussed in the text, haste may have had an impact on decision-making in two other cases: *Mayor of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977); *Saint Paul Fire & Marine Ins. Co. v. Insurance Comm'r*, 275 Md. 130, 339 A.2d 291 (1975) (for criticism, see the dissenting opinion, *id.* at 144, 339 A.2d at 299). The former case presented *inter alia* the question whether a statute that had been passed after the end of the constitutionally limited 90-day legislative session was valid. See MD. CONST. art. III, § 15(1). The Court's opinion cited several precedents from Maryland and other states to support its holding that an affidavit from a

There are, of course, some rare cases that raise issues — such as whether a name should be placed on an election ballot — in which a quick decision is indeed necessary. In those instances<sup>137</sup> the caseload of the Court is such that it can drop everything else and devote its complete attention to the resolution of the problem at bar.<sup>138</sup> The Court should decide and expose the reasons for its decisions in such cases at the same time. Its audience would then know that, because the decision was rendered with haste, this is a “precedent *pianissimo*.”<sup>139</sup>

Similar to the common rush to judgment cases are those in which the Court of Appeals “jumps” the case out of the Court of Special Appeals.<sup>140</sup> Again, this is generally an undesirable practice, for the decision is rendered under less than optimal conditions. Because both types of cases increase the possibility of imperfect decisions, the wisdom of the Court in expediting cases in this manner is questionable. In addition, this type of expedition can leave the impression that the Court is more interested in deciding the *issue* than the case.

legislator is insufficient to rebut “the strong presumption of validity which attaches to a duly authenticated act in Maryland.” 281 Md. at 238, 378 A.2d at 1336. The Court failed, however, to analyze the separation of powers problems beyond its reliance on the stated presumption. An issue that raises the question of who is to be the ultimate arbiter of the state’s constitution deserved better handling.

The three other decisions since 1975 decided in this fashion are *State Dep’t of Health and Mental Hygiene v. Baltimore County*, 281 Md. 548, 383 A.2d 51 (1978); *Mayor of Baltimore v. American Fed. of State, County, and Mun. Employees*, 281 Md. 463, 379 A.2d 1031 (1977); *In re Appeals Nos. 1022 & 1081*, 278 Md. 174, 359 A.2d 556 (1976) (per curium).

137. Only in *Mayor of Baltimore v. American Fed. of State, County, and Mun. Employees*, 281 Md. 463, 379 A.2d 1031 (1977), and *Saint Paul Fire & Marine Ins. Co. v. Insurance Comm’r*, 275 Md. 130, 339 A.2d 291 (1975), is the argument for rapid decision at all persuasive. There were, to be sure, political pressures in most cases to decide quickly. The Court, however, should be able to resist such pressure.

138. This is the practice in the Supreme Court. *See, e.g., United States v. New York Times Co.*, 403 U.S. 713 (1971). At oral argument in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the steel seizure case), the Court was urged to issue an immediate opinion. Justice Jackson responded:

It frequently happens — I myself have changed my opinion after reading opinions of the other members of this Court. And I am as stubborn as most. But I sometimes wind up not voting the way I voted in conference because the reasons of the majority didn’t satisfy me. I would oppose handing down any decision in this case until the opinions are ready because the opinions are even more important than the decisions.

*Quoted in A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 123–24 (1958).*

139. The phrase is Justice Schaefer’s, from Schaefer, *Precedent & Policy*, 34 U. CHI. L. REV. 3, 7 (1966).

140. *See Reynolds, supra* note 1, at 19–24.

Two cases concerning automatic removal in Maryland illustrate well the problems of expediting decisions. In *Davidson v. Miller*,<sup>141</sup> the Court of Appeals held that section 8 of article IV of the Maryland Constitution, which provides for the automatic removal of civil actions to "another court," was unenforceable because it deprived Baltimore City litigants of the equal protection of the laws under the fourteenth amendment. The basis of the decision was that because there was no other court in each county to which the case could be transferred, residents of any of the state's counties were effectively guaranteed a transfer out of that county; Baltimore City residents, however, had no such guarantee because the City's multiple court system permitted intra-city transfers.<sup>142</sup> The wisdom of the Court both in reaching and in deciding this constitutional issue in *Davidson* is open to serious question. In the first place, that claim was not a central feature of *Davidson* as presented to the Court of Appeals. The equal protection argument was advanced in a short argument at the end of the brief for the appellant in that case.<sup>143</sup> Although the appellee in *Davidson* devoted a portion of a good brief to the equal protection problem, there were other important issues in the case and attention could not be concentrated on that one issue. In that posture it is possible that important factual and legal arguments were not developed for the Court. Such development was important because in "jumping" *Davidson* out of the Court of Special Appeals, the Court of Appeals lost the opportunity to have the lower court refine and discuss the issues.<sup>144</sup> Thus, the Court rendered an important decision without insuring that optimum conditions for decision-making had been established. Even after resolution by the Court of Special Appeals, the Court of Appeals might have concluded that the issue as presented was not ripe for decision and exercised its "discretion" not to grant certiorari and hear the case.<sup>145</sup> If certiorari were granted, the order doing so could have limited discussion to the equal protection issue and thus insured that the litigants' attention would be focused on that issue alone.<sup>146</sup>

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141. 276 Md. 54, 344 A.2d 422 (1975). An excellent review of the case is found in 37 Md. L. Rev. 69 (1977).

142. See 37 Md. L. Rev. 69, 70 (1977).

143. Only two pages were devoted to the claim. Brief for Appellant at 16-18.

144. See generally Reynolds, *supra* note 1, at 19-21.

145. See *id.* at 7-14. *Davidson* eventually held that the trial judge had not abused his discretion in not sending the case outside Baltimore City; hence the entire decision could be said to have been unnecessary.

146. It would also have been possible to secure the assistance of briefs *amici curiae*.

The failure of the Court to set the stage properly before decision assumes more importance when the method of analysis used in finding the provision unconstitutional is examined. The Court, despite its recognition that the party challenging a legislative classification must adduce proof overcoming the presumption of validity,<sup>147</sup> stated that the area of removal was one peculiarly within the realm of judicial expertise; it then took judicial notice of facts which showed the classification to be invalid.<sup>148</sup> The critic may wonder whether further briefs from the bar and an opinion from the Court of Special Appeals may have aided the Court here; certainly, in the opinion of the dissenting judge, the opinion accomplished "too much on a record devoid of supporting evidentiary justification."<sup>149</sup>

Finally, the decision itself is vulnerable. The Court did not reexamine its earlier decisions holding that removal from one to another of the multiple Baltimore City courts satisfied Maryland's constitution. Given the equal protection problem, however, surely that inquiry should have taken place. A court should, of course, always reexamine controlling precedent. Such a reexamination was particularly important here: first, because federal constitutional questions should not be reached unless necessary,<sup>150</sup> and, second, because such an inquiry might have led to a reversal of those precedents. If a reexamination had led to reversal the apparent purpose of the removal provision — to nullify any jury prejudice occasioned by plaintiff's selection of a forum<sup>151</sup> — would have been satisfied. A reversal of those precedents would, arguably, seem compatible with the language of the provision<sup>152</sup> and conform to the need to construe enactments in accordance with superior law.<sup>153</sup>

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147. 276 Md. at 79, 344 A.2d at 437.

148. *Id.* The Court's application of equal protection law to those justifications is open to serious criticism. See 37 MD. L. REV. 69, 72-76 (1977).

149. 276 Md. at 88, 344 A.2d at 442 (Murphy, C. J., dissenting).

150. See, e.g., *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

151. See 33 MD. L. REV. 116, 117 (1973).

152. The constitution only provides for removal "to some other court having jurisdiction . . ."; limiting the number of courts to which the action could be removed does not necessarily seem inconsistent with that language. 33 MD. L. REV. 116, 118-19 (1973), argues that the "intent" of the draftsmen of the provision in its current form (1874) was to permit the removing party to elect to have the case removed to a different circuit. The wording of the provision, however, does not *preclude* compulsory removal to another circuit.

153. The problem of construction to satisfy superior law usually arises in statutory interpretation, especially in the area of free speech. See, e.g., P. BREST, PROCESSES OF CONSTITUTIONAL DECISION MAKING 1266 (1975). There appears to be no reason why the technique should not be used in constitutional cases. In each situation the

Thus, although it might well have been possible to satisfy the equal protection clause and section 8 at the same time,<sup>154</sup> the *Davidson* Court did not actively consider doing so.

The General Assembly responded to *Davidson* by enacting a law providing for automatic removal "to a court of some other county within the circuit or to some other judicial circuit."<sup>155</sup> That law became effective on July 1, 1976. On September 24 of that year the Court held the statute unconstitutional, issuing an opinion dated December 1, 1976. In that case, *Perkins v. Eskridge*,<sup>156</sup> the Court found that, "although the effect of *Davidson* was to relegate article IV, section 8 [of the Maryland constitution] . . . unenforceable by litigants in civil law actions, it did not have the effect of freeing the General Assembly from whatever limitations are imposed by that section."<sup>167</sup> The Court then compared the constitutional provision to the post-*Davidson* statute:

Whereas § 6-204(a) provides for removals "to a court of some other county within the circuit or to some other judicial circuit," Article IV, section 8 permits transfers "to some other court" regardless of whether it is within the circuit. In light of the express conflict between the two, we discern no manner in which the law may be harmonized with the constitutional provision, and thus we have no choice but to declare § 6-204 invalid.<sup>158</sup>

*Perkins* also represents a combination of hasty decision-making and questionable analysis. The litigation in *Perkins* had been transferred to "some other court" — from Baltimore City to Garrett County. Although the hearing of an interlocutory appeal was proper, the Court's opinion did not justify the haste with which the decision was rendered.

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essential question should be: would limiting the provision to conform it to federal law defeat the purposes for which the provision was enacted?

154. The equal protection argument adopted in *Davidson* was advanced in 33 MD. L. REV. 116, 124 n.41. That Recent Decision also suggested the reconciliation set forth in the text. See *id.* at 124.

155. MD. CTS. & JUD. PROC. CODE ANN. § 6-204 (Cum. Supp. 1978).

156. 278 Md. 619, 366 A.2d 21 (1976), noted in 37 MD. L. REV. 69 (1977).

157. 278 Md. at 651, 366 A.2d at 40.

158. *Id.* at 652, 366 A.2d at 40-41. The only other justification offered by the Court was a reference to *Heslop v. State*, 202 Md. 123, 95 A.2d 880 (1953). *Heslop* invalidated a statute granting an absolute right of removal to defendants in criminal cases. The problem there was quite different from that in *Perkins*, however, for MD. CONST. art. IV, § 8 provides that in criminal cases the defendant, in order to remove, must establish prejudice. Thus, although automatic removal in civil cases is provided for in the constitution, it is constitutionally forbidden, absent prejudice, in criminal cases. *Perkins* does not mention the distinction.

The *Perkins* opinion does not tell us what "the express conflict" between statute and constitution was. Presumably, the problem lay in the constitution's implied prohibition of transfer to another "court" within the same circuit. Thus, what was wrong with the statute was that it prohibited the procedure found defective in *Davidson*.<sup>159</sup> The new statute, however, effectively achieved the purpose behind the state constitutional provision by permitting the automatic removal of civil cases from the court in which the action was filed. At the same time the statute avoided the problem that the *Davidson* Court found offensive to the equal protection clause of the Federal Constitution. Hence, validation of the new statute was at least arguably the preferable course,<sup>160</sup> for it kept alive the goal of *automatic* removal as much as possible — it "harmonized" the state constitution with the limits imposed by federal law.<sup>161</sup> That approach would also have avoided the bizarre result of *Perkins* and *Davidson* when put together: the only effect the constitutional provision has is to insure that it cannot be implemented.<sup>162</sup> Failure

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159. Arguably, the "conflict" inhered in the statute's grant of permission to remove to another county within the same circuit: is that removal to another "court"? As the term "court" is commonly used by Maryland lawyers, the answer is, at least arguably, "yes." The Court of Appeals, for example, referred to a decision rendered in "the Circuit Court for X County." In any event, if that were the conflict perceived in *Perkins*, it raises the same conceptual issue discussed in the text regarding construction of a state constitutional provision in accordance with federal constitutional law.

160. That result also seems more plausible linguistically, as § 8 does not expressly prohibit limiting the courts to which an action could be removed — it merely specifies removal to another court. The suggested interpretation may be more difficult to square with the possible "intent" of the draftsmen to prevent automatic removal by litigants outside of Baltimore City. See 33 Md. L. Rev. 116, 117 (1973). If that is so, the question can be formulated this way: would it do more violence to the purpose of the draftsmen of § 8 to uphold the statute or to eliminate automatic removal? Given the long history of automatic removal in Maryland, it would appear that the latter option is the more objectionable on these grounds; what matters, however, is thinking about the question.

161. The Court of Appeals, in fact, recognized this at the very end of its opinion in *Perkins*. *Id.* at 653, 366 A.2d at 41. The Court had shortly before recognized that it had a duty to "attempt to harmonize the law with the Constitution." *Id.* at 652, 366 A.2d at 40. The only place "harmonization" was addressed, however, was in connection with a discussion of whether "the people of Maryland would intend to relinquish their direct control over the removal right to the legislature . . ." 278 Md. at 649-50, 366 A.2d at 39. That question, whether the legislature is entirely outside its purview, is different from the inquiry suggested in the text.

"Harmonization" would also have been possible in *Davidson* by requiring removal of the Baltimore City litigation to a court outside the city. The Court did not believe it could do so consistently with the language of the provision, 276 Md. at 82, 344 A.2d at 439, and the possibility of harmonization along those lines was not discussed.

162. *Perkins* recognized that the provision could not be implemented. 278 Md. at 651, 366 A.2d at 40.

to address — and perhaps even to see — that problem may well have been a function of the Court's rendition of a decision without first reducing it to writing, a casualty of the rush to judgment.

Taken together, *Davidson* and *Perkins* suggest, at best, poor judgment by the Court in deciding cases when optimum grounds for good decision-making were not present — with predictable problems in the resulting opinions. At worst they suggest a court more interested in reacting to a perceived problem — abuse of automatic removal<sup>163</sup> — than in understanding the issues presented.

#### IV. JUDGMENT

The vast majority of legal decisions involve no difficult or complex problems and it is now commonly recognized that, in terms of the multitude of legal problems confronted by society, courts see only the tip of the iceberg.<sup>164</sup> While legal problems that ripen into cases generally involve some difficulty, it is relatively rare for there to be much dispute concerning the result to be reached.<sup>165</sup> Even those cases that filter through to the Court of Appeals generally seem fairly ordinary.<sup>166</sup> It is in handling difficult cases that the Court earns its keep: because of their very nature the results in such cases are arguable, neither “clearly” right or wrong. Good craftsmanship can ensure that the court *sets the problem up* correctly, and good analytic technique can help the court *work through* the problem correctly. Without good craftsmanship and without good analytic techniques, good decisions come only through serendipity. This Article has attempted to classify and illustrate common problems in the Court's mode of analysis and craftsmanship. But part of a judge's job goes further than craftsmanship, requiring evaluation of closely competing interests and a subtle appreciation of sometimes

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163. A hint of this concern is found in the observation in *Davidson* that the removal privilege had been abused. 276 Md. at 81, 344 A.2d at 438.

164. See, e.g., H. HART & A. SACKS, *supra* note 33, at 312-13.

165. Part of this phenomenon can be attributed to the toughness of the “taught tradition” of common lawyers — our common training leading to common approaches to problems. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 82-84 (1938). See also Cardozo's observation, “[i]n countless litigations the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps.” B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921).

166. In 1975-76 the Court of Appeals reversed only 48% of the cases coming to it from the Court of Special Appeals. Reynolds, *supra* note 1, at 46-47. A different datum tending to reinforce the same conclusion is that the opinions of the Court of Appeals were unanimous approximately 75% of the time. *Id.* at 31-35, 48.

elusive factors, an exercise that makes judging more art than science.<sup>167</sup>

Of course, most of the problems examined here could be classified as errors of judgment. It seems, however, that there are times when a court — collectively — gets off on the wrong track, and stays there, for reasons that defy classification. Because it is useful to remember always that a human element is at work in judging, it is worthwhile to discuss two illustrative cases.<sup>168</sup> In the first, it appears that the judgment of the Court was clearly wrong; in the second, less clearly so — despite the presence of two forceful dissents.

The first example, *First National Bank v. Fidelity & Deposit Co.*,<sup>169</sup> presented the Court of Appeals, apparently for the first time, with the question whether “the public policy of this State” prohibited insurance coverage of punitive damages for malicious prosecution. The majority held that it did not, despite a forceful and persuasive dissent. One reason suggested by the Court to support its conclusion was the absence of statutory or constitutional guides as to what constitutes public policy,<sup>170</sup> coupled with a suggestion that a court should not, except in unusual cases, determine the content of “public policy.”<sup>171</sup> That is wrong, of course, for *all* common law adjudication is a recognition and expression of public policy. How else, one wonders, can developments in tort and contract law be justified? If a court is not in the public policy business it is in no business at all.<sup>172</sup>

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167. Much of the earlier discussion on technique can be said to relate to the exercise of judgment. Thus, a failure to analyze a structural problem, *see* notes 62 to 106 *supra*, can also be seen as a failure of “judgment.”

168. The two cases in the text are illustrative; others could equally well have been chosen. *E.g.*, *Wheeler v. State*, 281 Md. 593, 380 A.2d 1052 (1977); *State v. Williams*, 278 Md. 180, 361 A.2d 122 (1976).

169. 283 Md. 228, 389 A.2d 359 (1978).

170. *Id.* at 243, 389 A.2d at 367.

171. *Id.*

172. It should not have been unduly difficult for the Court to elaborate standards for application of public policy. Inquiry into the purposes of malicious prosecution actions and punitive damages should have provided an answer. An eloquent statement on the duty of a court to formulate public policy in this area is 8 A. CORBIN, CONTRACTS § 1375 (1950).

Ironically, the Court had just prior to *First Nat'l Bank* made a major effort in the field of public policy with respect to contracts. *Maryland-Nat'l Capital Park and Planning Comm. v. Washington Nat'l Arena*, 282 Md. 588, 386 A.2d 1216 (1978). As the dissent in *First Nat'l Bank* pointed out:

[t]he majority has, for some reason, completely ignored the principles laid down in the *Arena* decision, resurrecting an ill-defined century old standard . . . . Why the majority deems it necessary to abandon controlling authority barely two months old in favor of such outmoded and patently inadequate



The problem in *First National Bank* simply presented one facet of that continued inquiry.<sup>173</sup>

The second and primary theme of the opinion was what the dissent termed "a noble but rather misplaced solicitude for the economic well-being of small businessmen":<sup>174</sup> a worry that unsophisticated shopkeepers, for example, might be financially ruined by malicious prosecution actions. Two responses to the argument underlying this concern are in order. The simpler one is that the goal of punitive damages is to punish in order to deter further wrongful conduct through fear;<sup>175</sup> thus, in order to achieve the goal of deterrence, the focus should be on the wrongfulness of the tortfeasor's conduct, not on the effect of an award on the wrongdoer. A second response to the majority's concern is that the problem, if there is one, is with the substantive law of malicious prosecution or the standard for punitive damages or both.<sup>176</sup> Those are judicially created doctrines and it is the task of the Court to see that they work properly. If small businesses are in danger from those rules then the rules should be changed. The problem should be attacked at its source, and if the rules are good they should not be undermined by permitting insurance coverage in the situation before the Court in *First National Bank*. Any other result is a disclaimer of judicial responsibility to guide and correct the course of the common law.

*First National Bank* contains many of the problems in craftsmanship discussed earlier. The Court cited many cases, and quoted a few at length, but discussed none. The Court relied on very old case law<sup>177</sup> and commentary, and on questionable authority.<sup>178</sup>

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precedent defies explanation and, furthermore, contravenes the principle of *stare decisis*.

283 Md. at 244-45 n.2, 389 A.2d at 368 n.2 (Levine, J., dissenting).

173. And, of course, enforcement of the contract in question itself expresses "public policy."

174. *Id.* at 247, 389 A.2d at 369 (Levine, J., dissenting). That concern is, on the facts of the case, hard to understand. As the dissent pointed out with some glee, the tortfeasor at bar was one of the largest banks in southern Maryland. *Id.* at 247 n.4, 389 A.2d at 369 n.4.

175. Other goals, e.g., providing a source of attorney's fees for the plaintiff, are possible. But the majority focused on prevention and deterrence. *Id.* at 232, 389 A.2d at 361.

176. Maryland law in this area may be harsher than that of most jurisdictions, see *First Nat'l Bank v. Todd*, 283 Md. 251, 255-56, 389 A.2d 371, 374 (1978), and change may be in order. Such change could not have been accomplished in *First Nat'l Bank v. Fidelity & Deposit Co.* because the issues had not been preserved for appeal. *Id.* That background makes the Court's concern for small business in this case even more curious.

177. This fact was noted by the dissent. See note 172 *supra*.

178. E.g., the works referred to at 283 Md. at 238-40, 389 A.2d at 364-65. Another example, *Patton v. United States*, 281 U.S. 276, 306 (1930), quoted in *First Nat'l Bank*

But most disheartening was the failure of the Court to come to grips with its role in government and its responsibility for channeling the content of judge-made law. That failure apparently stemmed from its "noble, but misplaced" preoccupation with the impact of the decision on small businesses, an error in judgment that infected the result.

The second example, and the more difficult one to deal with, is *Johnson v. State*.<sup>179</sup> The majority opinion there is generally well crafted. The Court examined policies in detail, noted contrary authority, and took responsibility properly upon itself. The decision, however, can be questioned. The petitioner in *Johnson*, wanted on a number of criminal charges, turned himself in to police in Annapolis. After he had rested in a cell (at his request) for about eighteen hours, his interrogation began. Six hours later, and twenty-four and one-half hours after his surrender, Johnson signed a lengthy incriminating statement. He was then taken to a commissioner for his initial appearance in court — even though a commissioner had apparently been available at all times only a short distance away. Shortly thereafter, Johnson confessed outright to a shooting and robbery.<sup>180</sup> At the time, Maryland District Rule 709a<sup>181</sup> provided:

A defendant who is detained pursuant to an arrest shall be taken before a judicial officer without unnecessary delay and in no event later than the earlier of (1) 24 hours after arrest or (2) the first session of court after the defendant's arrest upon a warrant or, where an arrest has been made without a warrant, the first session of court after the charging document is filed. A charging document shall be filed promptly after arrest if not already filed.

On these facts the Court held that: 1) rule 709a was mandatory, and had been violated on the facts described; 2) an exclusionary rule must be applied to all statements obtained during a period of unnecessary delay in bringing a person before a judicial officer after he has been arrested. The first part of the holding seems reasona-

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v. Fidelity & Deposit Co., 283 Md. at 239, 389 A.2d at 365, involved a completely different question: the "public policy" implications of the waiver of a twelfth juror in a criminal trial.

179. 282 Md. 314, 384 A.2d 709 (1978).

180. The statement of facts comes from *id.* at 317-18, 384 A.2d at 711-12.

181. The rule is currently identified as MD. DIST. R. 723a. The change in designation was not accompanied by a change in substance, as the Court pointed out. 282 Md. at 316 n.1, 384 A.2d at 710 n.1.

ble,<sup>182</sup> as is the Court's method of reaching it — by an examination of “the role played by the initial appearance in our system of justice,”<sup>183</sup> and then relating that role to the purpose of the rule in question.

The Court's decision to adopt an exclusionary rule, however, requires a different conclusion. It can be traced back — as the Court did — to *Mallory v. United States*<sup>184</sup> and *McNabb v. United States*,<sup>185</sup> two cases that represent an attempt by the Supreme Court to deal with problems involving confessions in federal criminal prosecutions in the early days of the “revolution” in criminal procedure that culminated in *Miranda v. Arizona*.<sup>186</sup> Since then, however, the Supreme Court has shifted the focus of its inquiry from rigid, prophylactic rules to an inquiry into the voluntariness of the proffered confession.<sup>187</sup> The shift in focus, as the Court of Appeals noted, would permit the introduction of statements if voluntary. As a result “the vast majority of state courts passing on the question have rejected *McNabb-Mallory* outright, opting instead for a traditional due process voluntariness test of the admissibility of confessions.”<sup>188</sup> The Court of Appeals, however, noted that “several states have elected in recent years to adopt a per se exclusionary rule in order to combat what many perceive to be an increase in the number of flagrant violations of the prompt production requirements.”<sup>189</sup> The Court then asserted that the exclusionary rule serves the goals of deterrence of such violations<sup>190</sup> and prevention of “the debasement of the judicial process,”<sup>191</sup> and concluded that statements made by a defendant<sup>192</sup> more than twenty-four hours after his arrest were per se excludable while statements made within the period but before presentment should be tested by an “unnecessary delay” standard.

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182. The Court began its discussion with an analysis of language based on “principles of statutory construction.” *Id.* at 320–21, 384 A.2d at 713. That analysis, however, does not appear to be the major underpinning of that part of the holding.

183. *Id.* at 321, 384 A.2d at 713.

184. 354 U.S. 449 (1957).

185. 318 U.S. 332 (1943).

186. 384 U.S. 436 (1966).

187. See *Michigan v. Mosley*, 423 U.S. 96 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); Stone, *The Miranda Doctrine in The Burger Court*, 1977 SUP. CT. REV. 99, 168–69.

188. 282 Md. at 324, 384 A.2d at 715.

189. *Id.* at 325, 384 A.2d at 715.

190. *Id.* at 326, 384 A.2d at 716.

191. *Id.*

192. Both majority and dissent use the term “arrestee.” The reader can only hope that another bit of jargon will not be added to an overburdened tongue.

It is difficult to agree with that result. In the first place, the result is one that has been rejected by most courts, state and federal.<sup>193</sup> Although the Court recognized the widespread rejection of a per se exclusionary rule, it did not delve deeply into the reasons for that rejection. Further, the Court talked of the need for an exclusionary rule in order to deter illegal police action and prevent judicial debasement, but did not show that such problems exist in Maryland. Nor did the Court show that exclusion would in fact deter such conduct. In *Johnson*, the defendant, before making his statement, was twice given *Miranda* warnings, and, as the Court noted, there was "no substantial evidence" that the police coerced the defendant or elicited the confession by deception. In the absence of some hard evidence of abuse in *this* state (and not simply a reference to problems that *may* exist in some other jurisdictions), it is difficult to understand the imposition of an exclusionary rule for this reason.<sup>194</sup>

A third argument found in the majority opinion<sup>195</sup> must, then, justify the rule. That argument centers on the beneficial impact of a "rights" warning from a judicial officer. That impact, however, does not argue strongly for an exclusionary rule because the absence of the warning goes to the question of voluntariness. In addition, the commitment of the Court to the value of the judicial admonition is questionable, for the majority suggested a number of situations in which delay not caused by physical problems might be "necessary."<sup>196</sup> If the Court believed strongly in the potency of the judicial warning it would simply exclude *all* confessions made before that warning. Its unwillingness to go that far suggests that it simply had not thought through the problem sufficiently.

A final problem of judgment in *Johnson* was the use of the facts of the case to establish a prophylactic rule for delays longer than twenty-four hours.<sup>197</sup> Normally, a court with discretionary jurisdic-

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193. Cf. *Phipps v. General Motors Corp.*, 278 Md. 337, 352, 363 A.2d 955, 963 (1976) (the Court relied heavily on the fact that strict liability in tort had been adopted in most other states). *Phipps* is discussed at notes 123 to 133 and accompanying text *supra*.

194. The "debasement" argument becomes circular, of course, if no such misconduct exists.

195. 282 Md. at 322, 384 A.2d at 713-14.

196. *Id.* at 329, 384 A.2d at 717.

197. A problem that will not be discussed concerns the involvement of the Court of Appeals in the promulgation of the rule in question. Some practical problems are pointed out by one dissent. See 282 Md. at 347-50, 384 A.2d at 727-28 (Murphy, C.J., dissenting). Indeed, the dissent argued that even under the majority's per se rule, the statements should not have been per se excluded because the defendant confessed

tion would wait until it was presented a compelling case for review; the facts in *Johnson*, however, did not present such a case. Further, from the facts as stated by the majority, Johnson, leaving aside his "rest" period, was closeted continually with police, apparently while making a statement. That process lasted six hours. It is difficult to understand the value of a rule that would apparently permit the introduction of a statement made in those circumstances by a person in custody who did not sleep following his arrest, but not that made by Johnson. There simply is no functional difference between the two, and, in the absence of police compulsion, no reason to distinguish them. From that observation it can be seen that the twenty-four hour prophylactic rule eventually established by the Court makes little sense. If the Court was worried about police compulsion there was no reason for it to distinguish between cases on the basis of whether twenty-four hours had elapsed. In short, the violation here seems so *de minimis*, so "technical", as to suggest that the Court of Appeals was seeking a case to establish its rule. That inference suggests another: that "twenty-four hour cases" are so rare<sup>198</sup> as to cast doubt on the need for the prophylactic rule established by the case.

Most of the problems with the majority opinion in *Johnson* were pointed out in the dissenting opinions. Why, then, did the majority persist in its effort to establish an exclusionary rule? While a number of reasons can be postulated, one important factor was the failure of the majority to analyze the policy of its rule in terms of any demonstrated need for it. That failure was perhaps caused by an intuitive leap in the decision-making process, a leap from the *duty* imposed on police to present arrested persons promptly to the creation of a complete *remedy* for violation of that duty, a remedy whose content seems to reflect an hypnotic fascination with a time period contained in a rule of the Court.

## V. THE ROLE OF THE BAR

A court depends upon its bar for basic research and for the organization of a problem into a form that can be readily comprehended. While a court may in any case reject the posture of the problem as presented by counsel, careful preparation by the bar is necessary if a court is to perform satisfactorily its institutional

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orally before the lapse of the 24-hour period. *Id.* at 348-49, 384 A.2d at 728 (Murphy, C.J., dissenting).

198. *Johnson* is the only reported case involving the prompt presentment rule.

functions.<sup>199</sup> Unfortunately, the bar fails all too often in this task. A number of good briefs have been filed in recent terms, but there have also been a number of briefs that were quite simply bad. Bad briefs require the Court to develop its own theory of the case and conduct its own search through the record. Bad briefs mean that opposing views are not subjected to the rigorous analysis that the adversarial process can provide.

Although truly bad briefs have been rare, many can best be labeled mediocre — briefs that recited the facts and hornbook law well enough but did not adequately analyze the problems raised by the case. Indeed, much of the mechanical treatment of problems by the Court perhaps can be traced to the apparent confusion among the bar concerning the difference between *stare decisis* and *stare dictis*.<sup>200</sup> Until the bar improves the quality of the work it submits,<sup>201</sup> the Court of Appeals will be handicapped in realizing its potential.

## VI. CONCLUSION

This Article has been in preparation off and on for two years. During that time initial pleasure over the quality of the Court's work was replaced by disappointment that it was not availing itself fully of the opportunities provided by its relatively light caseload to think about its *role* as the highest court of a state. An overburdened court can be excused for some of the shortcomings described in this part of the Article, but that excuse is not available to the present Court of Appeals.

Still, the critic often tends to dwell too much in the negative. It is worth repeating<sup>202</sup> that the Court performs its basic job quite well. At argument the Court is well-informed and incisive. Its opinions are to a very large degree well-written and understandable. Of more importance, the Court does not let the dead weight of the past hold it back. The willingness of the Court to resist the routine of the job is perhaps its most impressive accomplishment. It ungrudgingly

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199. See generally *Re, The Partnership of Bench and Bar*, 16 CATH. LAW. 194 (1970).

200. There is a chicken-and-egg problem here, for most attorneys will frame their briefs to respond to what *they* expect the Court wants.

201. A number of solutions are possible. One, a specialized appellate bar does not seem possible in Maryland; apart from institutional litigants such as the Attorney General or the Public Defender, it is doubtful that there is sufficient work available to support such a bar. The Court of Appeals does have the power, however, to express its displeasure with the work of an attorney. While extreme sanctions such as public censure should be handled with great care, surely the Court can refuse, for example, to accept inadequate work.

202. See text accompanying notes 20 to 21 & 62 to 63 *supra*.

implements Supreme Court decisions.<sup>203</sup> Finally, the opinions generally show a real effort to reach solutions to problems, an effort not based on ideological reaction, but instead on an attempt at comprehension. Despite some problems of craftsmanship the Court is a good one. If the Court of Appeals were to take advantage of the opportunities provided by the control it has over its own docket, it could be a very good one indeed. Forty years ago, Dean Wigmore placed the Court of Appeals of Maryland in his top category of state courts.<sup>204</sup> While perhaps only Wigmore could attempt a comparison of all state courts, a scattered reading of cases from other jurisdictions does suggest that the Court, in comparative terms, would not fare badly today.

Many opinions over the past several years could be singled out for special praise. *Sard v. Hardy*,<sup>205</sup> for example, was a fine discussion of the informed consent and express warranty problems in doctor/patient litigation. The discussion of statutory severability in *Ocean City Taxpayers v. Mayor of Ocean City*<sup>206</sup> provided a sound theoretical grounding for the decision, as did the analytic framework set up by the Court in *Perkins v. Eskridge*<sup>207</sup> to solve the question whether there is any residual effect to a state constitutional provision held invalid under the Federal Constitution. Interesting also was the Court's workmanlike analysis of the multipronged constitutional attack on the new Maryland Medical Malpractice Arbitration Act.<sup>208</sup> *State v. Evans*<sup>209</sup> provided a sound, thorough reworking of the allocation of burden of proof in criminal cases, following the changes set in motion by the Supreme Court in *Mullaney v. Wilbur*<sup>210</sup> and *Governor of Maryland v. Exxon Corp.*<sup>211</sup>

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203. See, e.g., *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976). See generally Frank & McManus, *Balancing Almost Two Hundred Years of Economic Policy Against Contemporary Due Process Standards — Mechanics' Liens in Maryland After Barry Properties*, 36 MD. L. REV. 733 (1977).

204. Wigmore, *Grading Our State Supreme Courts: A Tentative Method*, 22 A.B.A.J. 227 (1936). Forty-six jurisdictions were evaluated on the basis of their evidence opinions. These were divided into four groups. Maryland's group, the highest, had 19 members. Special praise was given to 23 judges, one of whom was Judge Parke of the Maryland Court of Appeals. *Id.* at 231.

205. 281 Md. 432, 379 A.2d 1014 (1977).

206. 280 Md. 585, 375 A.2d 541 (1977).

207. 278 Md. 619, 366 A.2d 21 (1976), noted in 37 MD. L. REV. 69 (1977).

208. *Attorney Gen. v. Johnson*, 282 Md. 168, 385 A.2d 57 (1978). The opinion does, however, have a number of problems in craftsmanship.

209. 278 Md. 197, 362 A.2d 629 (1976).

210. 421 U.S. 684 (1975).

211. 279 Md. 410, 370 A.2d 1102 (1977). Particularly impressive was the Court's handling of the Robinson-Patman Act, analyzing for itself the impact of that most

was a showpiece opinion, deftly analyzing a number of thorny federal constitutional and statutory problems.

In its long and distinguished history the Court of Appeals of Maryland has been graced by names such as Chase,<sup>212</sup> Alvey,<sup>213</sup> Parke,<sup>214</sup> and Bond.<sup>215</sup> This year the Court celebrates its bicentennial.<sup>216</sup> The judges of the Court today, primarily because of the control they can exercise over their own caseload, have the opportunity to carry on in the fine tradition of their predecessors. It is a good court, but it can be better. It is hoped that this Article will help stimulate interest in the Court and lead to a tradition of scholarly analysis of its product.

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difficult federal law. *Id.* at 444-53, 370 A.2d at 1121-25. The *Exxon* decision was affirmed by the Supreme Court, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978). The decision of the Court of Appeals was also adopted by the Supreme Court of New Hampshire in *Opinion of the Justices*, 117 N.H. 533, 376 A.2d 118 (1977).

212. Jeremiah Townley Chase (Chief Judge, 1806-1824), author of *Whittington v. Polk*, 1 H. & J. 236 (Md. 1802), a very early authority for judicial review. See P. CLARKSON & R. JETT, *LUTHER MARTIN OF MARYLAND* 198-200 (1970).

213. Richard Henry Alvey (Associate Judge, 1867-1883; Chief Judge 1883-1893). Judge Bond wrote that President Cleveland planned to appoint Alvey to the Supreme Court, but that the nomination was blocked by one of Maryland's Senators. See C. BOND, *THE COURT OF APPEALS OF MARYLAND, A HISTORY* 181 (1928).

214. Francis Neal Parke (Associate Judge, 1924-1941). See note 204 *supra*.

215. Carroll Taney Bond (Chief Judge, 1924-1943). See Lewis, *Roundtable Reminiscences II*, 9 Md. B.J. 4 (1976).

216. C. BOND, *supra* note 213, at 63.