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A MODEST PROPOSAL FOR A CHANGE IN MARYLAND'S STATUTES QUO*

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I. INTRODUCTION

The agglutinative style,¹ formerly a product of pastepot and shears, but now made even more popular by the availability of copying machines and scotch tape, is characterized by inserting globs of old prose from earlier opinions into convenient spots in new opinions. Advocates and judges are especially apt to use the agglutinative style in discussing canons of statutory interpretation. Pick up almost any Maryland case or brief and one will find a litany of general rules on how to interpret statutes. In *Soper v. Montgomery County*,² for example, the Court of Appeals of Maryland created this glob:

The cardinal rule of statutory construction is to ascertain and effectuate the actual intent of the Legislature. Statutes are to be construed reasonably and with reference to the purposes to be accomplished That which necessarily is implied in the statute is as much a part of it as that which is expressed However, neither statutory language nor legislative intent can be stretched beyond the fair implication of the statute's words or its purpose.³

*Cearfoss v. State*⁴ is my favorite example of how a court may enunci-

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1. Cardozo, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS* 10 (1931).
2. 294 Md. 331, 449 A.2d 1158 (1982).
3. *Id.* at 335, 449 A.2d at 1160.
4. 42 Md. 403 (1875).

ate several inconsistent rules in one opinion and then reach a result without explaining how the various rules of construction were related to that particular result. *Cearfoss* reads like a law encyclopedia. The question in *Cearfoss* was simple enough: Did an alcohol control statute barring drinking on election day also prohibit social drinking between a host and his guest in a private home on election day?⁵ The court found that the statutory language was plain and inclusive and held that the statute did indeed bar drinking in intimate surroundings.⁶ But the court in *Cearfoss* also suggested in dicta that a drink given for medicinal purposes on election day would not be a violation of the statute.⁷ The court did not articulate a reason for the possible difference in result; instead, it invoked a set of miscellaneous rules of statutory construction:

There is no question, as urged by the appellant's counsel, that in construing this statute the real intent of the Legislature must prevail over the literal sense, if there be any inconsistency; a thing within the letter of the statute is not within the statute, unless it be within the intention of the makers.

But where the words are plain, they are the best evidence of what was meant. Whilst the statute is not to be followed in its literal terms, if it can be discovered that such was not the intention, yet the meaning must be ascertained by a reasonable construction to be given to the provisions of the Act, and not one founded on mere arbitrary conjecture.

Where clear words are used, to indicate the purpose, there is no necessity to resort to other aids. No man incurs a penalty unless the act which subjects him to it, is clearly, both within the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction

* * * *

Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction, for the purpose of either *limiting* or *extending* their operation.

It would be dangerous in the extreme to infer from extrin-

5. *Id.* at 406. The statute in question provided the following: That it shall not be lawful for the keeper of any hotel, tavern, store, drinking establishment, or any other place where liquors are sold, or for any person or persons, directly or indirectly, to sell, barter or give, or dispose of any spirituous or fermented liquors, ale or beer, or intoxicating drinks of any kind, on the day of any election hereafter to be held in the several counties of this State.

1865 Md. Laws ch. 191, *cited in* 42 Md. at 406.

6. 42 Md. at 408.

7. *Id.* at 406.

sic circumstances, that a case, for which the words expressly provide, shall be exempt from their operation.

It is only in cases where the meaning of a statute is doubtful, that the courts are authorized to indulge in conjecture, as to the intention of the Legislature, or to look to consequences in the construction of the law.

When the meaning is plain, the Act must be carried into effect according to its language, or the courts would be assuming legislative authority.⁸

This convoluted quotation is not unusual. Professor Llewellyn, an astute observer of judicial dogma, has catalogued twenty-eight pairs of canonical contradictions!⁹ Professor Horack in reviewing cases came to the following conclusion:

When a judicial decision is pegged on one rule of interpretation and in a succeeding case the contrary result is dictated by a conflicting but equally authoritative rule, it is time to recognize that we are dealing neither with "rules" nor with "interpretation," but with "explanations" of decisions independently determined.¹⁰

The Court of Appeals of Maryland phrases the various canons of statutory construction differently, but all of the canons have two things in common: They say that the job of the court is to discover the actual intention of the legislature; and they emphasize the importance of statutory language. These canons, particularly when strung together in a case, have a magisterial tone and an aura of the inexorable absolute. My aim is to show that these canons of construction are mere boilerplate and should be abandoned because they often are misleading and inconsistent. My proposal is perhaps impolitic, but nevertheless intended to be useful. Eminent scholars have tackled the issue of statutory construction,¹¹ and they have made sophisticated, and sometimes radical,

8. *Id.* at 406-08 (citations omitted).

9. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

10. Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 335 (1949).

11. *See, e.g.*, G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); R. KEETON, *VENTURING TO DO JUSTICE* (1969); R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (1934), *reprinted in* 2 HARV. J. ON LEGIS. 7 (1965); Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950); Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982); *see also* H. BLACK, *HANDBOOK ON THE CONSTITUTION AND INTERPRETATION OF THE LAWS* (1896); H. HART & A.

proposals concerning theories of statutory interpretation. My proposal is more modest than their analytical discussions. I merely suggest that inserting rules of interpretation helter-skelter in opinions is misleading and that the two favorite canons—one requiring a court to search for the actual intent of a legislature and the other requiring a court to divine the plain meaning of a statute—are too general to be useful in deciding whether a particular statute dictates a particular result.¹²

II. THE MYTH OF LEGISLATIVE INTENT

The Court of Appeals of Maryland has insisted that the search for “legislative intent” is the primary goal of statutory construction.¹³ The search for actual intent, however, is a myth. The legislature is not an individual with a will but an institution composed of many individuals, each with a distinct mind and personality. The legislature produces a product reflecting many different intentions and purposes. Psychoana-

SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410-1411* (tent. ed. 1958) (unpublished manuscript); Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489; Page, *Statutes as Common Law Principles*, 1944 WIS. L. REV. 175; Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Sanders & Wade, *Legal Writings on Statutory Construction*, 3 VAND. L. REV. 569, 580 (1950) (bibliography of articles on statutory construction); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

12. Cf. Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 372 (1947) (The search for legislative intent is not a rule, but rather it reflects a judicial point of view and thus the methods of statutory interpretation are more important than the metaphors used to describe the quest.).

13. See, e.g., *Bledsoe v. Bledsoe*, 294 Md. 183, 448 A.2d 353 (1982). In *Bledsoe*, the court interpreted a statute which allowed a judge to award the use and possession of the principal residence of a named couple to the spouse with custody of minor children. See MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-06(a) (1984). The purpose of the statute was to allow the “children of the family” to continue to live in a familiar environment. *Id.* The court held that “children of the family” did not include the children of one of the spouses from a previous marriage, even if the stepchildren lived in the house during the second marriage. 294 Md. at 194, 448 A.2d at 359. The court in passing noted that:

[I]t is the duty of the courts to declare the law as the General Assembly has made it, that is, to ascertain and give effect to the intention of the legislature. This we have said on many occasions is the cardinal rule of statutory construction.

Id. at 188, 448 A.2d at 356 (citation omitted).

In *Bradshaw v. Prince George's County*, 284 Md. 294, 396 A.2d 255 (1979), the court again insisted that in construing a statute the goal is to effectuate legislative intent, but was quick to add that words are the “primary” source for discovering intent. *Id.* at 300, 396 A.2d at 259. In *Bradshaw*, the court held that a county charter provision which expressly abolished the doctrine of sovereign immunity did not abolish the immunity of police officers who committed negligent acts within the scope of their employment. *Id.* at 303-05, 396 A.2d at 261-62. The court reasoned that despite the plain words of the provision, the police officers were public officials and that the county in waiving its immunity did not intend to abolish the traditional doctrine of public official immunity. *Id.* For a discussion of the various formulations of the plain meaning rule, see *infra* notes 43-45 and accompanying text.

lysts cannot always tell why individuals do the things they do; certainly inferring an overall intent from any group action is at a minimum more problematic. For example, the deletion of a provision from a statute in the course of passage may be caused by the following: legislators who are opposed to giving that provision effect; legislators who regard the provision as superfluous because they believe the law already is that way; legislators who favor the provision, but are afraid that a court will find it to be unconstitutional; and legislators who are not sure what the law is or will be on a particular point and either do not really care or are willing to allow the courts to decide. Under such circumstances, it is misleading to talk about "the intent of the legislature."

The way the legislator works also militates against a finding of "institutional intent." Legislators have various degrees of diligence. They may not read committee reports or they may misread them. They may not pay attention to or they may be absent from a crucial hearing or debate. They may reject the committee's reasoning, but vote with the committee for other reasons, which may or may not relate to the merits of the bill.

Furthermore, in the cases that reach the courts, few, if any, legislators have any specific intent directed toward the particular question for which construction is sought. The gaps in the statute arise mainly from the inability of the legislature to foresee all the specific combinations of circumstances that could arise in adjudication. The Court of Special Appeals of Maryland has on occasion candidly recognized that the legislature cannot anticipate all possible problems that may arise in litigation. In *Firestone Tire & Rubber Co. v. Cannon*,¹⁴ for example, the court was faced with a difficult issue: Did the Maryland General Assembly intend to require consumer buyers to send notice of a breach of warranty to all sellers, including the manufacturer, or would notice to the immediate seller suffice?¹⁵ The court noted that most likely the legislature "never thought about the problem" when it abrogated the privity of contract requirement in consumer buyer actions for breach of an implied warranty of merchantability under the Maryland Uniform Commercial Code.¹⁶ The court held that a buyer need not send notice to the manufacturer if notice was sent to the immediate seller.¹⁷

Professor Hart has pointed out, "In no legal system is the scope of legal rules restricted to the range of concrete instances which were

14. 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983) (per curiam).

15. *Id.* at 107, 452 A.2d at 193.

16. *Id.* at 118, 452 A.2d at 198.

17. *Id.*

present or are believed to have been present in the minds of legislators"¹⁸ The premise of the Maryland canon requiring the search for legislative intent—that a statute represents an express statement of actual intention covering all circumstances in which the application of the statute may reasonably be invoked—is simply a fiction. In *District 1199E, National Union of Hospital and Health Care Employees v. Johns Hopkins Hospital*,¹⁹ for example, the court was faced with a typical problem of statutory construction. In *Johns Hopkins Hospital*, Maryland's Anti-Injunction Act²⁰ was held to apply to a labor dispute at a nonprofit hospital. The Act referred only to labor disputes with corporations and profit-making entities.²¹ The key passage of the opinion, as far as the rules on interpretation are concerned, was:

It is undisputed that there is no express exemption for nonprofit hospitals in the Maryland Act. While it is true that statutes in derogation of the common law, and especially those depriving a court of jurisdiction should be strictly construed, it is a cardinal rule that in construing a legislative enactment courts should confine themselves to a construction of a statute as written, and not attempt, under the guise of statutory construction, to supply omissions or remedy possible defects in the statute, or to insert exceptions not made by the legislature.²²

The statute, because it did not expressly deal with the issue of applicability to nonprofit enterprises, could reasonably have been construed either way. The court's formulation is a form of question-begging, rather than an attempt to analyze the statute and apply it to the particular facts at hand.

Most courts and advocates have recognized that the search for intent is an illusory quest because intent is a meaningless metaphor for a nonexistent state of mind. One commentator has called it a hallucina-

18. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 627 (1958).

19. 293 Md. 343, 444 A.2d 448 (1982).

20. MD. ANN. CODE art. 100, § 65 (1979). The Maryland statute is modeled upon the federal Norris-LaGuardia Act.

21. The relevant statutory language was as follows:

In the interpretation and application of this subtitle, the public policy of this State is declared to be as follows: Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers the individual unorganized worker is helpless to exercise actual liberty of contract, and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom . . . to negotiate the terms and conditions of his employment

MD. ANN. CODE art. 100, § 63 (1979).

22. 293 Md. at 359-60, 444 A.2d at 456.

tion,²³ and Dean Landis suggested that at times the search could be "meaningless and barbaric."²⁴

Some courts instead try to discern what the legislature would have intended if it had foreseen or faced the current problem before the court, or they try to determine what the present or a future legislature would do if called upon to legislate explicitly on the problem at hand. Other courts wisely stop using the legal fiction known as "legislative intent" and seek to discern some general purpose, aim, or policy reflected in the statute. Furthermore, as legislation ages it may become so en-crustured with judicial decisions that the focus of a court's inquiry is upon the cases and not the original statutory language or purpose. This process is likely to occur when courts must interpret broad statutory mandates contained in "constitutive" legislation, such as the antitrust laws, the National Labor Relations Act, and the various civil rights laws.

It is clear that the search for intent is a fiction because courts uniformly shut out direct evidence of the actual intent and motivation of particular legislators. Whatever the prudential reasons may be for this practice, it does eliminate a significant source of evidence of intention. It indicates that something other than actual intent is really the focus of the inquiry. Many judges frankly admit and many commentators proclaim that the courts are looking for something else. As Justice Holmes put it, "We do not inquire what the legislature meant, we ask only what the statute means."²⁵ In addition, courts often ignore the actual intent approach and apply a variety of hodge-podge rules of interpretation as the spirit moves them. The courts apply these canons almost to ensure that if there were a true or actual legislative intent, it would not be given effect. The legislators could hardly keep all the canons by which their work may be construed in mind as they work. If they kept them in mind, they would never be able to get their work done because, in order to be sure the laws express their intention, they would have to scrutinize the language of every bill in the light of all the canons to see when their actual intent might be perverted by invocation of one canon or another. If they could so scrutinize the bills, they would also have to know and keep in mind all the case law in light of which they are presumed to legislate. If they could do all that, they would have to cope with the fact that the canons come largely in contradictory pairs and the legislators would not know which of the canons a court would ultimately decide to use. For every self-evident pronouncement like Justice Holmes' statement, "We do not inquire what the Legislature or its draftsmen meant,

23. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 409 (1950).

24. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 893 (1930).

25. O.W. Holmes, *Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 207 (1921).

we ask only what the statute means,"²⁶ there is an equally self-evident and authoritative pronouncement like Justice Holmes' statement in *Johnson v. United States*:²⁷

The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusions expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it and therefore we shall go on as before.²⁸

The legislature is presumed to know all the decisional law on statutory construction and to legislate in light of it.²⁹ As a factual matter, the presumption is, to put it charitably, ridiculous. Nobody, not even the judges, meets that standard. To charge the legislature with acting in light of all the canons may actually undercut a particular legislative purpose. For example, there are canons that say repeal by implication is not favored, or that statutes in derogation of the common law are to be strictly construed. If literally applied, this latter canon would mean that all statutes are strictly construed, but fortunately there is an equally well-settled canon stating that remedial statutes, which presumably derogate most strongly from the common law, are to be liberally construed. The canon that statutes are to be construed to the fullest extent possible to avoid unconstitutionality also is an instructive example of how the cardinal rule that makes actual legislative intent the object of the search in every case does not really represent the practice of the Court of Appeals.

Smiley v. State,³⁰ for example, involved a statute that made it a misdemeanor to display for advertising purposes any visual representation depicting sadomasochistic abuse, sexual conduct, or sexual excitement.³¹ Sexual conduct is defined as "human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of a female, whether alone or between members of the same or opposite sex, or between humans

26. *Id.*

27. 163 F.2d 30 (1st Cir. 1908).

28. *Id.* at 32.

29. *See, e.g.,* *Briggs v. State*, 289 Md. 23, 33-34, 421 A.2d 1369, 1375 (1980) (legislature is presumed to have full knowledge of prior and existing law on the subject of a statute it passes).

30. 294 Md. 461, 450 A.2d 909 (1982).

31. *See* MD. ANN. CODE art. 27, § 416A(d) (1982).

and animals.”³² The Maryland General Assembly had deleted from the bill a provision that would have expressly qualified the prohibitions to cover only advertisements that were obscene.³³ The definition of sexual conduct in the legislation as enacted would include a medical text showing self-examination of the breasts, and the literal meaning of “sodomasochistic abuse” would have excluded a portrayal of the Crucifixion.³⁴ The Court of Appeals saved the day by construing back into the statute the limitation making the statute applicable only to displays that were obscene.³⁵ Obscene materials were defined as those catering to a prurient interest in sex and that taken as a whole had no serious literary, artistic, scientific, or political value.³⁶ The court reasoned that the legislative intent was to protect against obscenity, that obscenity was a concept with constitutional contours, and therefore the legislature must have intended to enact a statute consistent with the Constitution.³⁷ Judge Lowe in *State v. Randall Book Corp.*,³⁸ in following *Smiley*, justly characterized *Smiley* as “practical in result if frugal in explanation.”³⁹ While there may be a great deal to be said for the result in *Smiley* as a matter of social policy, the only thing that can be confidently said about the decision itself is that the court’s holding is the one least likely to approximate the actual contemporaneous intent of the legislators. No legislator could have imagined that the bill voted upon would mean what the court interpreted it to mean.

Not only does the court thus ignore its own requirement to discern legislative intent, it also invokes other canons that work at cross purposes to this requirement. One of the most potent instruments for frustrating actual intent is the requirement that a statute be construed in accordance with the obvious meaning of its language—the plain meaning rule. As Learned Hand has said, “There is no surer way to misread any document than to read it literally.”⁴⁰ Yet the plain meaning rule is a popular canon of statutory construction often invoked by the Court of Appeals of Maryland.⁴¹ The view that the “plain language” of a statute

32. *Id.*

33. *See State v. Randall Book Corp.*, 53 Md. App. 30, 31 n.2, 452 A.2d 187, 188 n.2 (1982).

34. *Id.* at 32-33, 452 A.2d at 189.

35. *Smiley v. State*, 294 Md. 461, 464, 450 A.2d 909, 911 (1982).

36. *Id.* at 465, 450 A.2d at 911.

37. *Id.* at 464, 450 A.2d at 911.

38. 53 Md. App. 30, 452 A.2d 187 (1982).

39. *Id.* at 33, 452 A.2d at 189.

40. *Guiseppe v. Walling*, 144 F.2d 608, 623 (2d Cir. 1944) (L. Hand, J., concurring), *aff'd sub nom. Gemsco v. Walling*, 324 U.S. 244 (1945).

41. *See, e.g., Briggs v. State*, 289 Md. 23, 421 A.2d 1369 (1980). The court in *Briggs* analyzed § 12-702 of the Courts & Judicial Proceedings Article, which limited the discretion of a

is conclusive of actual intent is self-contradictory. Like any irrebuttable presumption, it means that the presumed fact is really immaterial. If the plain language is conclusive of actual intent, then actual intent does not matter. The only thing that matters is the "plain language." If one looks to the words of a statute only and ignores everything else, it is impossible to ascertain actual intent. Actual intent involves a state of mind, as to which inferences may be fairly made, and all the facts and circumstances, not just language, must be considered if actual intent is to be ascertained. The next section discusses the plain meaning rule, which the Court of Appeals is so fond of invoking.

III. THE "PLAIN MEANING" OF A STATUTE

Under the plain meaning rule, a statute is construed "according to the ordinary and natural signification of the words used."⁴² The Court of Appeals uses three different formulations of the plain meaning rule. The "strict" plain meaning rule says that when there is a plain meaning that meaning is *always* conclusive; the courts may never look to anything else to reach a construction different from the plain statutory language.⁴³ The second statement of the plain meaning rule is not so in-

trial judge after the appellate court had remanded the case for a new trial or new sentence to impose a more severe sentence than the sentence previously imposed for the offense. *Id.* at 26, 421 A.2d at 1371. Section 12-702 provided in part that the reasons for the increased sentence after a trial de novo must be "based upon objective information concerning identifiable *conduct* on the part of the defendant occurring after the original sentence was imposed." *See* MD. CTS. & JUD. PROC. CODE ANN. § 12-702(b)(2) (1984) (emphasis added). The court held that the plain statutory language barred the resentencing judge from considering an interim conviction which occurred after the imposition of the original sentence and which was based on conduct occurring before the original sentence was imposed. 289 Md. at 33, 421 A.2d at 1375.

The court briefly quoted the standard language on principles of statutory interpretation and noted that "in a State such as Maryland where debates, reports and other contemporaneous legislative history have not usually been recorded and preserved, the words of the statute itself provide the most reliable indication of its purpose." *Id.* at 31, 421 A.2d at 1374. The court argued that a "conviction" did not constitute criminal "conduct," but was merely a judicial determination of prior criminal conduct. While this semantic distinction is unconvincing, the court did pursue the more useful avenue of analyzing the statute in light of the Supreme Court cases dealing with increased sentences after retrial. *See id.* at 33, 421 A.2d at 1375.

42. *See, e.g.,* Lowenthal v. Rome, 294 Md. 277, 282, 449 A.2d 411, 413 (1982), *cert. denied*, 460 U.S. 1012 (1983) (plain language of statute indicates that any person who voluntarily appeared in a proceeding in which a marriage was annulled or a divorce obtained is disqualified from claiming under a will as a surviving spouse); *see also* Washington Suburban Sanitary Comm'n v. Elgin, 53 Md. App. 452, 454 A.2d 408 (1983) (plain language of statute indicates that WSSC did not have authority to condemn land within town of Poolesville).

43. *See, e.g.,* Koyce v. State Cent. Collection Unit, 289 Md. 134, 140, 422 A.2d 1017, 1020 (1980) (when language is plain and unambiguous it should be given effect in accordance with the plain meaning of the words; there is no need to look beyond the language of the statute);

flexible. It states that a statute whose meaning is plain will *usually* be construed in accordance with that meaning, but not always.⁴⁴ According to the third statement of the rule, a court may disregard the plain meaning of a statute, if the “real intent” of the legislature is inconsistent with the plain meaning.⁴⁵ Maryland courts refer to these rules as the

Gatewood v. State, 244 Md. 609, 617, 224 A.2d 677, 682 (1965) (“[The] construction of the statute is neither sensible nor reasonable and manifestly leads to an absurdity, but, if, that is its plain meaning and if the words are not fairly susceptible of another interpretation, we are not at liberty to depart from them.”); Taylor v. Mayor and City Council of Baltimore, 51 Md. App. 435, 447, 443 A.2d 657, 663 (1982) (court may not surmise a legislative intention contrary to the words and letters of a statute); American Casualty of Reading v. Department of Licensing & Regulation, 52 Md. App. 157, 159, 447 A.2d 484, 485 (1982) (plain language of statute indicates that the verb “file” means to deliver, not to place in transit for delivery, despite prior administrative practice allowing tax return to be deemed filed on time if mailed and postmarked on date due). The court in *American Casualty* said, “No custom, however long and generally it has been followed by officials, can nullify the plain meaning . . . of a statute.” *Id.* at 161, 447 A.2d at 486 (quoting *Bouse v. Hutzler*, 180 Md. 682, 687, 26 A.2d 767, 469 (1942)).

44. *See, e.g.*, Board of Educ. of Garrett County v. Lendo, 295 Md. 55, 62, 453 A.2d 1185, 1189 (1982) (usually no need to look elsewhere to ascertain the intent of the legislature if the language is clear); Police Comm’r v. Dowling, 281 Md. 412, 418, 379 A.2d 1007, 1011 (1977) (“[I]f there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly.”); Washington Suburban Sanitary Comm’n v. Elgin, 53 Md. App. 452, 460, 454 A.2d 408, 413 (1983) (court will look to ordinary meaning of statute and not strain to find some subtle or forced interpretation of the law).

45. *See, e.g.*, State v. Fabritz, 276 Md. 416, 422, 348 A.2d 275, 279 (1975) (“In construing statutes . . . results that are unreasonable, illogical, or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with the real legislative intention prevailing over the intention indicated by the literal meaning.”); Sanza v. Maryland State Bd. of Censors, 245 Md. 319, 340, 226 A.2d 317, 328 (1966) (“real legislative intent” may prevail over “literal intent”) (quoting *Height v. State*, 225 Md. 251, 257, 170 A.2d 212, 214 (1961)). *See also* Criminal Injuries Compensation Bd. v. Gould, 273 Md. 486, 331 A.2d 55 (1975) (Eldridge, J., dissenting). In *Gould*, the court interpreted a statute that provided for judicial review of decisions of the Criminal Injuries Compensation Board *only* when the Attorney General or the Secretary of Public Safety and Correctional Services believed that an award was improper, as allowing judicial review by mandamus or certiorari for an arbitrary denial of benefits. The statute said: “There shall be no other judicial review of any decision made or action taken by the Board” MD. ANN. CODE art. 100, § 10(a) (1981). The court disregarded the plain words of the statute and reasoned that the legislature did not intend to deprive the courts of their inherent right to review arbitrary agency action. 273 Md. at 512, 331 A.2d at 71. Judge Eldridge in dissent noted that “no judicial review” meant exactly what it said and should not be construed otherwise. *Id.* at 522, 331 A.2d at 76 (Eldridge, J., dissenting).

But in *Lett v. State*, 51 Md. App. 668, 680, 445 A.2d 1050, 1057 (1982), the Court of Special Appeals of Maryland was unwilling to disregard the plain language of a statute even though it readily admitted that the statute was inartfully drafted. The statute in part provided for mandatory sentencing if (1) a defendant had been convicted on two separate occasions of a crime of violence where the convictions did not arise from a single incident; and (2) the defendant had served at least one term in prison as a result of a conviction for a crime of violence. *See* MD. ANN. CODE art. 27, § 643B(c) (1983) (emphasis added). The defendant had committed two separate violent crimes, but he had been convicted for them on the same

need arises, but there is no genuine guidance on how to select one of the three approaches for reading a particular statute.

An argument, of course, can be made for the strict plain meaning rule. It tends to put off the age of Newspeak and the spread of Alice-in-Wonderland language. It assumes that words have reasonably uniform and understandable meanings and forces a legislature to be careful in deciding how a statute is phrased.⁴⁶ It acts as a prudential constraint on the judicial search for legislative intent because no intent may be "discovered" that would cause the statute to be read in a manner that conflicts with the plain meaning.

A strict plain meaning rule also helps to legitimize judicial interpretation, because it confines a judge to the role of legal exegetist—an accepted judicial task. The judiciary is less likely to be charged with usurping the legislative function if it adopts a literalistic attitude toward every statute.⁴⁷ Although the line between pure statutory interpretation and judicial lawmaking is not clear, the plain meaning rule, by encouraging a conservative attitude toward interpretation, may keep the courts out of policy areas when they flirt with the danger of misreading the legislative aim. Difficult issues, such as whether the statute is in harmony with prior law or consistent with other legislative policies, are avoided. Additionally, a strict literalism would obviate Justice Jackson's complaint that allowing the search for specific "intent" to roam beyond the face of the statute to a vast array of background materials puts out of the reach of all but the government and a few large law offices the knowledge of the law necessary to help conduct clients' affairs and unjustifiably increases the cost of the legal services.⁴⁸

Despite these advantages, the trouble with strict literalism is that a ruthlessly consistent application is impractical. Judges, who have a responsibility to reach fair and sensible conclusions, cannot use this approach consistently because they cannot stomach the results. The

day. 51 Md. App. at 678-79, 445 A.2d at 1056. The court refused to disregard the literal language of the statute and held that the mandatory sentence could not be imposed because the defendant was not convicted on "two separate occasions" for the prior two separate violent crimes. *Id.*

46. See Horack, *supra* note 10, at 337 (Words are symbols and therefore have no intrinsic meaning; nevertheless, words have a commonly accepted meaning and it is fair for the judiciary to expect the legislature to adopt the common meaning of a word.).

47. Cf. Cox, *supra* note 12, at 376. (Literalism is part of the conservative tradition in that it limits the possible scope of judicial legislation.) *But see* Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 227 (1968) (Under the guise of literal interpretation, a court may easily thwart the purpose of a statute.).

48. See Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 537-39 (1948) (advocating adoption of uniform principles of statutory construction in federal courts).

injustice or absurdity of a strict reading of a statute not carefully written is often too high a price to pay for certainty in the law and for a judiciary secure against charges of encroaching upon legislative functions.

Examples of cases in which applying the plain meaning rule would prove almost humorous are easy to find. The most famous example is the Bologna statute that forbade the shedding of blood on the streets.⁴⁹ Did that statute apply to a doctor bleeding his patient? Would it apply today now that bloodletting is no longer an approved medical treatment? Is a statute forbidding vehicles to pass except on the left, enacted before the day of multi-lane highways, applicable in a case where a driver passes a slow car in the left-most lane on an eight-lane highway?⁵⁰ Does a statute of descent and distribution give a victim's estate to an heir who has murdered him?⁵¹ There is only one plain meaning to a statute forbidding the discharge of loaded firearms on a public road or highway "except for the purpose of killing some noxious or dangerous animal or an officer in the pursuit of his duty."⁵² But no court would allow a defendant who shot an officer to take refuge behind a literal interpretation of the statute.

The courts easily resolve these amusing examples; however, they are more often pressed with the difficult problem of how to apply general statutory language to a particular set of facts.⁵³ For example, does a transaction which meets every statutory requirement of a tax-free corporate reorganization qualify as such when the transaction has no business purpose, and in fact has no purpose at all except to turn a transaction that is taxable into one that is not?⁵⁴ Does a statute requiring Chinese immigrants to have a permit to enter this country bar a child born at sea on the way to the United States from entering without a permit?⁵⁵ Does a statute barring any legal action against a person who reports child abuse protect one who turns himself in for the rape of a child?⁵⁶ Invok-

49. G. CALABRESI, *supra* note 11, at 31.

50. *See, e.g.*, *Mooney v. American Auto. Ins. Co.*, 81 So. 2d 625 (La. App. 1955). For a discussion of the facts of the case, see *Tate*, *supra* note 47, at 229-30.

51. *See, e.g.*, *Price v. Hitaffer*, 164 Md. 505, 509-10, 165 A. 470, 471-72 (1933) (The court refused to construe a descent and distribution statute to permit the heirs of a husband who murdered his wife to inherit their statutory portion of the estate even though the plain words of the statute allowed the heirs to inherit.)

52. 3 R. POUND, *JURISPRUDENCE* 490 (1959).

53. *Nathanson*, *supra* note 11, at 473-75.

54. *See, e.g.*, *Helvering v. Gregory*, 69 F.2d 809, 811 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) (transaction held not to be "reorganization" within meaning of the statute).

55. *Curtis*, *supra* note 23, at 413. (quoting L. LOWELL, *CONFLICTS OF PRINCIPLE* 82 (1932)).

56. *See* MD. ANN. CODE art. 27, § 35A(j) (1982) (providing that any person making a good faith report of child abuse or participating in an investigation shall be immune from

ing the plain meaning rule will answer none of these subtle questions of how to apply the law to the facts.

The Court of Appeals of Maryland has rejected the plain language construction of a statute in numerous cases. In *Guardian Life Insurance Co. of America v. Insurance Commissioner*,⁵⁷ for example, the court construed a Maryland statute which required that a group health policy "delivered or issued for deliverance" to any person in Maryland include coverage for the cost of mental health outpatient services.⁵⁸ The health insurance company argued that the policy was not delivered or issued for deliverance in Maryland.⁵⁹ Another section of the Maryland statute provided that in certain cases when a policy is issued to a trustee then "the [trustee] shall be deemed the policyholder."⁶⁰ The insurance company set up a Rhode Island bank as trustee and delivered the policy to the trustee in Rhode Island. Thus, the insurance company maintained that the policy was issued and delivered in Rhode Island, not Maryland, and the Maryland statutes requiring mental health benefits to be included did not apply even though the ultimate beneficiaries were the employees of a Maryland corporation which had its principal place of business in Maryland.⁶¹ The Court of Appeals, in an approach reminiscent of the business purpose doctrine in tax law, held that the statute meant more than it said—it contemplated a "bona fide" trust, not a scheme to use the trust form to avoid the mandated coverage.⁶² The court sagely suggested, "[T]hat which necessarily is implicit in a statute is as much a part of it as that which is expressed."⁶³

A second example is *In re James D.*,⁶⁴ in which the court held that a

civil liability or a criminal penalty "that might otherwise be incurred or imposed as a result thereof").

57. 293 Md. 629, 446 A.2d 1140 (1982).

58. *Id.* at 636, 446 A.2d at 1144. The Maryland statute provided the following:

Every hospital or major medical insurance policy delivered or issued for delivance [sic] . . . to any person in this State must include benefits for expenses arising from treatment of acute mental illness and emotional disorders which in the professional judgment of practitioners are subject to significant improvement through short-term therapy.

MD. ANN. CODE art. 48A, § 477E (1979). The provision has been reenacted with the words "delivered or issued for deliverance within this State" replacing "delivered or issued for delivance to any person within this State." See MD. ANN. CODE art. 48A, § 477E (Supp. 1983).

59. 293 Md. at 636, 446 A.2d at 1144.

60. *Id.* See MD. ANN. CODE art. 48A, § 471(3)(1979). The statute provided: "Under a policy issued to the trustees of a fund established by two (2) or more employers in the same or related industry . . . [the] trustees shall be deemed the policyholder . . ." *Id.*

61. 293 Md. at 636, 446 A.2d at 1144.

62. *Id.* at 644, 446 A.2d at 1148.

63. *Id.* at 643, 446 A.2d at 1148.

64. 295 Md. 314, 455 A.2d 966 (1983) (juvenile set fire to a model home while he was in the custody of the Juvenile Services Administration).

statute making parents liable for the delinquent acts of their children did not apply when the child was in the custody of the state.⁶⁵ Because of constitutional considerations, the court construed the statute more narrowly than a literal reading would require.⁶⁶

And a third example is the court's frequent disregard of the plain language of express severability clauses. It does so under the theory that the clause is merely declaratory of an established rule of construction and is an exhortation to the courts, not a command. The test is whether the court thinks that the legislature would have enacted the statute if it knew that part of it was invalid.⁶⁷ In *Mayor and City Council of Baltimore v. A.S. Abell Co.*,⁶⁸ for example, the court said that a severability clause was "merely an aid to interpretation."⁶⁹ The severability issue in *Abell* involved city ordinances that imposed sales and gross receipts taxes on advertising in various media by local and out-of-state advertisers. The court held that the tax as applied to newspapers and radio and television broadcasts was unconstitutional because it placed an unreasonable burden upon freedom of speech as guaranteed by the first amendment.⁷⁰ The court, despite the presence of an express severability clause, held that the City Council would not have adopted the remaining provisions of the ordinances if it had known that only the remaining provisions could be effective.⁷¹ The upshot is that the presence or absence of a clause plainly stating that a statute is severable makes no difference. The inexorability of plain meaning, in this context at least, is lost.⁷²

There are numerous other cases in which the court has abandoned

65. *Id.* at 328, 455 A.2d at 972. See MD. CTS. & JUD. PROC. CODE ANN. § 3-829 (1984).

66. 295 Md. at 327, 455 A.2d at 972.

67. See, e.g., *Sanza v. Maryland State Bd. of Censors*, 245 Md. 319, 338, 226 A.2d 317, 327 (1966) (state statute requiring film operators to obtain a license from Board of Censors found to be unconstitutional only to the extent that criteria other than obscenity were used as standards for disapproval).

68. 218 Md. 273, 145 A.2d 111 (1958) (city ordinance imposing 4% tax upon purchasers of advertising space held to violate first amendment of the United States Constitution).

69. *Id.* at 290, 145 A.2d at 120.

70. *Id.* at 288-89, 145 A.2d at 119.

71. *Id.* at 290-91, 145 A.2d at 120.

72. The Maryland legislature in 1973 enacted a general severability statute, which provides that statutes enacted after July 1, 1973, are severable unless the statute specifically says the contrary. MD. ANN. CODE art. 1, § 23 (1981). The statute provides:

The provisions of all statutes enacted after July 1, 1973, are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds out that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent.

the plain meaning rule. In *Francois v. Alberti Van & Storage Co.*,⁷³ for example, the court rejected a literal interpretation of a workman's compensation statute which provided that "[i]f a motion for rehearing is filed, the time within which an appeal can be taken . . . shall commence from the time of the ruling . . . on the motion."⁷⁴ The statute required that the motion for a rehearing be filed within seven days of the agency's decision. The petitioner filed his motion for a rehearing *late*, but nevertheless argued that the time within which an appeal could be taken did not begin until the motion for a rehearing was decided.⁷⁵ The court held that the unqualified language did not extend the time for filing an appeal when the rehearing motion was not filed within seven days.⁷⁶ The court was quick to note that "it would be absurd and inconsistent to acknowledge the seven day requirement for the purpose of making a motion for rehearing and then to read the same requirement out of the statute for the purpose of determining how the time for an appeal is affected by such motion."⁷⁷ Of course, the court should be applauded for abandoning the plain meaning in such a case.

Another example is *State v. Fabritz*,⁷⁸ in which a mother who did not abuse her child, but who failed to take the injured child to the hospital, was found guilty under a child abuse statute which provided that a parent who causes abuse to a minor child shall be guilty of a felony.⁷⁹ It made no difference to the court that literally the defendant did not "cause any physical injury," but rather caused death by failure to take steps to mitigate the physical injury caused by someone else.⁸⁰ In a different case, *Pan American Sulphur Co. v. State Department of Assessments and Taxation*,⁸¹ the court held that a statutory tax exemption for personal property "used entirely or chiefly in connection with manufacturing in Baltimore City" was available only when the taxpayer was the one using the property for manufacturing purposes.⁸² The taxpayer claiming the exemption in *Pan American* was a supplier of sulfur who stored the sulfur in warehouses and then shipped it to manufacturers.⁸³

73. 285 Md. 663, 404 A.2d 1058 (1979).

74. See MD. ANN. CODE art. 101, § 56(e) (Supp. 1982).

75. 285 Md. at 669-70, 404 A.2d at 1062.

76. *Id.* at 670, 404 A.2d at 1062.

77. *Id.*

78. 276 Md. 416, 348 A.2d 275 (1975).

79. See MD. ANN. CODE art. 27, § 35A(b)(7) (1982), in which the term "abuse" is defined as "any physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts . . ."

80. 276 Md. at 423-24, 348 A.2d at 279-80.

81. 251 Md. 620, 248 A.2d 354 (1967).

82. *Id.* at 625, 248 A.2d at 357 (quoting MD. ANN. CODE art. 81, § 9(23) (1965)).

83. *Id.* at 626, 248 A.2d at 358.

Perhaps one final example will illustrate that it is impossible to apply the plain meaning rule in some cases. In *B.F. Saul v. West End Park North, Inc.*,⁸⁴ the Court of Appeals of Maryland interpreted a new usury statute specifically requiring a lender's disclosure of interest rates on loans to be "stated in percentage calculated to the nearest 2/10 of 1%,"⁸⁵ as *not* requiring such disclosure in the case of construction loans. It appeared that construction loans were released in stages with interest subject to final adjustment and thus were not subject to such precise statements in advance.⁸⁶ The court adopted the "sensible" and "practical" solution of requiring the disclosure to set forth the maximum amount to be collected as anticipated under the contract of indebtedness at the date of execution.⁸⁷

The plain meaning rule has been criticized as an illusory theoretical guide to interpreting a statute.⁸⁸ Furthermore, its use also poses practical problems for both lawyers and courts. Courts frequently tend to find the meaning plain so that they can reach the desired result quickly. The court simply quotes the rule and authoritatively declares that the meaning is plain. A good rule of thumb is: Look for the ambiguity in what is labeled the plain meaning. In *American Tobacco Co. v. Patterson*,⁸⁹ for example, the Supreme Court was unanimous in finding that the statute was plain and unambiguous.⁹⁰ The only thing the justices disagreed

84. 250 Md. 707, 246 A.2d 591 (1968).

85. *See id.* at 722, 246 A.2d at 600 (quoting MD. ANN. CODE art. 49, § 10(a)(2) (1968), repealed by MD. COM. LAW CODE ANN. § 12-103 (1983)).

86. *Id.* at 722-23, 246 A.2d at 600-01.

87. *Id.*

88. *See, e.g.*, Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423, 426 (1983) (law dictionary is a symbol not of precision of legal language but of the myth of precision); Nutting, *supra* note 11, at 521 (in writing statutes, creating phrases that are free from doubt is impossible). For a specific discussion of the problem inherent in interpreting certain "meaningless" terms in a controversial statute, see Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 999 (1984).

89. 456 U.S. 63 (1982). In *American Tobacco*, the Court had to determine if § 703(h) of the Civil Rights Act of 1964, which created an exemption for bona fide seniority systems, was limited to seniority systems adopted and in force prior to the effective date of the Act. *Id.* at 69. Section 703(h) provided:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race

42 U.S.C. § 2000e-2(h) (1976 & Supp. IV 1981).

90. *See* 456 U.S. at 77, 79. The United States Court of Appeals for the Fourth Circuit found that Congress intended the exemption to apply only to those seniority systems in existence at the time of the Act's effective date. *See Patterson v. American Tobacco Co.*, 634 F.2d 744, 749 (4th Cir. 1980) (en banc). The Supreme Court majority concluded the opposite and

upon in the 5-4 decision was what was that plain meaning. Labeling statutes as plain tends to increase judicial divisiveness because dissenters are accused of being stupid for not seeing what is plain. Respect for the court as an institution is not enhanced when the court persists in labeling as plain the meaning of a statute as to which the court is almost evenly divided.

Additionally, the strict plain meaning rule is based upon a false notion that words can have one intrinsic ideal meaning regardless of context.⁹¹ Of course, words do have an accepted definition formed through common usage that may well provide a reference point for ascertaining meaning. The real question, however, is: How shall one determine the meaning of a text in light of the particular facts at hand? The plain meaning rule does not give the answer. Professor Lon Fuller has contended that it is impossible to interpret the words in a statute without knowing the statute's aim.⁹² A court must look at the background, legislative history, and other independent evidence of purpose to decipher the meaning of statutory words. Invoking the plain meaning rule merely keeps the court from the task at hand—developing a reasoned analysis of the statute's history and purpose.

Even if a strict plain meaning rule could be consistently applied, it would not be an unmixed blessing. Courts should, to some extent, protect the legislature as well as the people against minor drafting errors, inadvertencies, and slips of language. The modern legislature has little time to correct such details.

According to the second, more flexible, Maryland plain meaning rule, a court will *usually* stop inquiry when the words of a statute appear to have a plain meaning.⁹³ This rule is often stated in the following form:

The principles of statutory construction have been stated many times by this Court. . . . The ones applicable to this proceeding include: The cardinal rule of statutory construction is to ascertain and carry out the real legislative intent. In determining that intent, the Court considers the language of an enactment in its natural and ordinary signification. A

held that employers who adopted new seniority systems after the effective date of the act could also claim an exemption under § 703(h). See *American Tobacco*, 456 U.S. at 77.

91. Horack, *supra* note 10, at 337.

92. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664-65 (1958).

93. See *Cannon v. McKen*, 296 Md. 27, 34, 459 A.2d 196, 200 (1983) (plaintiff who was injured when part of a dentist's x-ray machine fell on her head did not have to submit her negligence claim to arbitration as the arbitration statute on its face only applied to traditional medical malpractice claims).

corollary to this rule is that if there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly.⁹⁴

It will be noticed that this glob is not a rule, but an observation. As an observation it is probably correct. In any particular case, however, it gives no guidance on the crucial question: What are the characteristics that make a case the unusual one in which courts are not finished their job, notwithstanding the fact that they have examined the language and found it to have a plain meaning?

The third articulated approach used in Maryland is a positive denial of the supremacy of a statute's plain meaning in certain cases. Little guidance is given as to when the words of a statute should be ignored. The court usually maintains that the "real intent" of the legislature is not in accordance with the plain meaning of the statute. Because the search for the "real intent" is as futile as the search for a strict plain meaning is delusive, this criterion may be of little help. In the cases in which the court takes this third approach, needless to say, the court says nothing about the strict plain meaning rule.

A typical illustration of this third approach is found in *Darnall v. Connor*,⁹⁵ in which the court said, "[C]onsiderations such as a known general purpose of a statute have led the court to find and give effect to legislative intentions in tax and penal statutes, not entirely conforming to words used"⁹⁶ This theme is repeated in the more recent case of *Sanza v. Maryland State Board of Censors*,⁹⁷ in which the court said that the setting, the objectives and purposes of the enactment may require that the "real" legislative intent prevail over the "literal" legislative intent.⁹⁸

94. *Board of Educ. of Garrett County v. Lendo*, 295 Md. 55, 62, 453 A.2d 1185, 1188-89 (1982) (citation omitted).

95. 161 Md. 210, 155 A. 894 (1931) (statute providing for collateral inheritance tax when grantor "died seized and possessed" of the estate interpreted broadly to include equitable interests).

96. *Id.* at 216, 155 A. at 897.

97. 245 Md. 319, 340, 226 A.2d 317, 329 (1966) (statute requiring films to be submitted to the Board of Censors, if literally construed, would require a father to obtain state approval before showing home movies to his children). *See also* *State v. Fabritz*, 276 Md. 416, 422, 348 A.2d 275, 279 (1975) (The real intention may prevail over the literal intention "even though such a construction may seem to be contrary to the letter of the statute.").

98. 245 Md. at 340, 226 A.2d at 328 (quoting *Height v. State*, 225 Md. 251, 257, 170 A.2d 212, 214 (1961)).

IV. CONCLUSION

In truth, neither the literal language of a statute nor some general statements concerning the intent of the legislature provide specific answers to the difficult questions of statutory construction. What, then, is my proposal to the Court of Appeals of Maryland? Excise the globs, and tell every other court in the state to do the same. These globs, like almost all general propositions, do not, as Justice Holmes noted, decide concrete cases. The best that can be said for them is that they are surplusage. If so, the cases would not be decided differently if the globs were deleted, nor would the opinions be less intelligible if shortened by the deletion. The West Publishing Company would get a little less rich, the lawyers a little less poor, the secretaries and law clerks a little less tired, and everyone's eyes a little more rested. These are real, if modest, gains.

The globs, however, are less innocent than mere surplusage. Their real vice is that they do not speak truth, and especially if taken seriously, they are confusing and misleading. They do not describe the actual conduct of the court; they are often inconsistent with each other, and on close analysis, they are self-contradictory. They are proof that agglutination inhibits ratiocination.

Chuck the canons too. They are *not* principles of interpretation. The language, style, and jurisprudential stance of the cases purporting to be guided by the canons are unfortunate. The canons obscure the factors actually at work in the construction of statutes. The real work of construction comes before a particular canon is chosen to be determinative. Statutory construction is a matter of analysis and judgment in each case. The factors justifying the conclusion that one construction is preferred should be discussed directly without being obscured by a useless conceptual screen. Fictions have had their usefulness in legal history, and as Dean Pound has pointed out, were the only "permissible" method of legal growth when the law was sacred, legislatures were less active, and there were rigid theories of the judicial function that would have made candor about the judicial task unacceptable.⁹⁹ But as Professor Calabresi has pointed out, the fictions are subject to manipulation, and are a cover for sub silentio arbitrariness.¹⁰⁰ They darken the path of the lawyer or the judge and complicate the job because the canons are just another dangerous diversion from the real task. Justice Frankfurter summed up the problem when he said:

To strip the task of judicial reading of statutes of rules that

99. R. POUND, *supra* note 52, at 479-84.

100. G. CALABRESI, *supra* note 11, at 175.

partake of the mysteries of a craft serves to reveal the true elements of our problem. It defines more accurately the nature of the intellectual responsibility of a judge and thereby subjects him to more relevant criteria of criticism. Rigorous analysis also sharpens the respective duties of legislature and courts in relation to the making of laws and to their enforcement.¹⁰¹

Courts must come to grips directly with their relationship to legislatures. It will not help to solve these problems by concealing them with fictions compounded of equal parts of hyperbole and hypocrisy. Repetition of confusing and meaningless tenets of construction cannot help but undermine confidence in the judicial process. The Court of Appeals should turn instead to the task of explaining more forthrightly its reasons for adopting a particular construction in an individual case.

101. Frankfurter, *supra* note 11, at 545.