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THE MARYLAND SURVEY: 2000-2001

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Recent Decisions

The Court of Appeals of Maryland

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A. Assessing Ineffective Assistance of Counsel as it Pertains to an Attorney's Failure to Subpoena the Defendant's Witness

In *In re Parris W.*,[1] the Court of Appeals of Maryland considered whether the defendant's counsel's failure to subpoena five corroborating alibi witnesses for the correct trial date constituted ineffective assistance of counsel.[2] The court correctly found ineffective assistance of counsel according to the standard set in *Strickland v. Washington*,[3] holding that counsel's performance was deficient and that the deficient performance prejudiced the defendant.[4] The court correctly did not presume prejudice as discussed in *United States v. Cronic*.[5] Additionally, the court's conclusive holding of ineffectiveness was correct despite its misapplication of supporting case law.[6] However, the court failed to look to the Compulsory Clause of the Sixth Amendment,[7] under which it would not have been constitutionally unfair to the defendant had the witnesses not testified on his behalf.

1. The Case.—On April 27, 1999, Trenton Anton Morton, a student at Thurgood Marshall Middle School in Temple Hills, Maryland, stood outside his school's bus stop and prepared to get on the bus.[8] Allegedly, Parris W. approached Morton from behind and punched him on the right side of the face.[9] The assailant immediately ran away, and Morton chased after him, but stopped when he was unable to catch him.[10] On July 28, 1999, the State filed a juvenile delin-

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1. 363 Md. 717, 770 A.2d 202 (2001).
2. *Id.* at 720, 770 A.2d at 203.
3. 466 U.S. 668 (1984).
4. *Parris*, 363 Md. at 730, 770 A.2d at 209-10.
5. 466 U.S. 648, 662 (1984).
6. *See Parris*, 363 Md. at 730-36, 770 A.2d at 210-14.
7. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").
8. *Parris*, 363 Md. at 720, 770 A.2d at 203. Although the State never established the time at which the assault on Morton occurred, the parties seemed to have agreed that it occurred at 3:45 p.m. *Id.* at 728, 770 A.2d at 208.
9. *Id.* at 720, 770 A.2d at 203-04.
10. *Id.*

quency petition against Parris in the Circuit Court for Prince George's County for assault and trespass in connection with this incident.[11]

During the second adjudicatory hearing scheduled on December 23, 1999, the defendant's attorney asked for a continuance on the grounds that the State had provided the incorrect offense date in its discovery responses.[12] Defendant's counsel contended that he discovered the actual date of the offense on the morning of the hearing, a date for which the defendant claimed to have an alibi defense, and thus was unprepared for trial.[13] Defendant's counsel requested the continuance so that he could summon alibi witnesses and provide notice of alibi witnesses to the State.[14] The hearing was continued until January 20, 2000; however, the court sent a notice to defendant's counsel rescheduling the hearing for January 21, 2000.[15]

On January 21, 2000, defendant's counsel again requested a continuance, stating that he had incorrectly believed that the hearing was still scheduled for January 20th and had subpoenaed a number of alibi witnesses in the case for the previous day.[16] Counsel told the court "we would like to make the request for a continuance due to an error on counsel's part. That is me."[17] Counsel requested the continuance in order for the witnesses to be present.[18] These witnesses would have supplied statements corroborating and supplementing the defendant's alibi that he was elsewhere on the day of the assault. The State immediately objected to the continuance because all of its subpoenas were issued for the correct trial date and all its potential witnesses were present.[19] The court denied the continuance on the grounds

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11. *Id.*, 770 A.2d at 204.

12. *Id.*

13. *Id.* Parris did not appear at the first adjudicatory hearing scheduled on October 21, 1999. *Id.*

14. *Id.*

15. *Id.* at 721, 770 A.2d at 204.

16. *Id.* Defense counsel further told the court:

> I got the date wrong for today's hearing. I thought it was yesterday.
>
> I issued a number of subpoenas for yesterday to witnesses in this case. These folks, the one's we've been able to contact, are not able to come today. They were prepared to come yesterday. We would request a continuance so we can get those people in.

Id.

17. *Id.*

18. *Id.* Three of the six witnesses, Tracy Robb, Florence Garrett, and Mr. W., the defendant's father, were employees at Faith Office Products in Washington, D.C. *Id.* Two others were Mr. W's friends, Jeffery Taylor and Diane Cary. *Id.* The sixth witness was a customer to whom Mr. W. made deliveries on the day of the assault. *Id.*

19. *Id.*

that the matter had been scheduled several times and had been continued on a prior occasion.[20]

At the adjudicatory hearing, the State called Morton, the victim of the assault, to the stand as its sole witness.[21] Morton testified that he knew Parris and identified him as the assailant.[22] Morton also testified that, although he did not see Parris's face at the time of the assault, he did see the back of Parris's head while on the run and he could identify him because the side of his face was visible to him as he turned the corner.[23] Furthermore, Morton testified that the clothing that Parris wore was familiar to him because he has seen Parris previously wearing it during the school year.[24]

Parris's attorney only called one witness as well—Parris's father, Anthony W.[25] Mr. W. testified that he brought Parris to school at 9:00 a.m. on the day of the assault for a meeting regarding the termination of his three-month expulsion.[26] Mr. W. stated that the vice principal of the school did not allow Parris to return to school as scheduled because Mr. W. had failed to fill out particular community service paperwork.[27] Mr. W., therefore, took his son with him on his delivery rounds.[28] After making his delivery rounds, Mr. W. said that he and his son went to the apartment of a friend, Diane Cary, in Greenbelt, where they arrived at approximately 2:15 p.m.[29] Ms. Cary was not at home when they arrived, but Mr. W. stated that they entered the house. While he talked to Ms. Cary on the phone, Parris was playing video games.[30] Ms. Cary eventually arrived at her home at approximately 4:30 p.m., and the three of them stayed at her home the rest of the day, until 11:00 p.m.[31] In concluding his testimony, Mr. W. stated that there was no time in which he could not see his son during their

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20. *Id.* at 721-22, 770 A.2d at 204.

21. *Id.* at 722, 770 A.2d at 204.

22. *Id.*, 770 A.2d at 204-05. Indeed, Morton testified that Parris had been in a few of his classes, and that a few months before the incident Parris had pulled a knife on him. *Id.*

23. *Id.*, 770 A.2d at 204.

24. *Id.*, 770 A.2d at 204-05.

25. *Id.*, 770 A.2d at 205.

26. *Id.*

27. *Id.*

28. *Id.* Mr. W. further testified that he and Parris went to his office in Northwest Washington, D.C. from approximately 10:00 to 10:30 a.m. and then proceeded to load several cases of copy paper into his van. *Id.* The two of them then delivered the copy paper to Northeast Washington, D.C. and, immediately thereafter, went to the house of a friend, Jeffery Taylor, in Southeast Washington, D.C. where they stayed from approximately 11:00 a.m. to 1:45 p.m. *Id.*

29. *Id.*

30. *Id.* at 722-23, 770 A.2d at 205.

31. *Id.* at 723, 770 A.2d at 205.

stay at Ms. Cary's apartment. Furthermore, he stated that his son was unable to drive a car and that he did not drive his son to Thurgood Marshall Middle School, which he believed was approximately thirty miles away and would take about thirty to forty minutes to reach by car.[32] During the cross-examination of Mr. W., and later in closing argument, the State stressed that Mr. W. was a biased witness, emphasizing that Mr. W. had an incentive to provide Parris with a false alibi for the assault because he was the defendant's father.[33]

The circuit court found beyond a reasonable doubt that Parris had committed the assault as alleged.[34] The court found that Morton's testimony was credible based upon his recognition of the defendant from the side and of his clothing. Furthermore, because the court believed that there was no reason for Morton to have lied about the occurrence of the assault, it found that there was no reason to disbelieve his testimony.[35] The court placed Parris under the supervision of the Department of Juvenile Justice, released him into the care and custody of his father, and ordered him to serve five successive weekends at a juvenile correctional institute.[36]

Parris appealed, and the Court of Appeals issued a writ of certiorari before the case could be heard in the Court of Special Appeals in order to determine whether Parris was denied effective assistance of counsel due to his attorney's failure to subpoena the five alibi witnesses on the correct date.[37]

2. *Legal Background.*—

a. The Established Standard of Review for Claims of Ineffective Assistance of Counsel.—The Supreme Court has long recognized that the Sixth Amendment right to counsel exists and is necessary to protect an individual's fundamental right to a fair trial.[38] Additionally, "[i]t has long been recognized that the right to counsel is the right to the

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* The court also addressed the question of whether claims of ineffective assistance of counsel may be raised on direct appeal from a finding of juvenile delinquency. *Id.* The court affirmatively chose to review the claim, explaining that although it is a general rule that a claim of ineffective assistance of counsel is raised in a post-conviction proceeding, the rule is not absolute. *Id.* at 726, 770 A.2d at 207.
38. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding that the Sixth Amendment guarantees an accused the right to the assistance of counsel in all criminal prosecutions); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (holding that the right to counsel is a fundamental right and a necessary element of due process).

effective assistance of counsel."[39] In *Strickland v. Washington*,[40] the Supreme Court formulated the modern standard to evaluate claims of ineffective assistance of counsel. Writing for the majority, Justice O'Connor stated that the main purpose of the constitutional requirement of effective assistance of counsel is to ensure a fair trial.[41] To further develop this notion, the majority created a two-pronged test for determining claims of ineffective assistance of counsel.[42] First, "the defendant must show that counsel's performance was deficient."[43] Second, the defendant must demonstrate that the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial.[44] To properly succeed on an ineffective assistance of counsel claim, a petitioner must satisfy both the "performance portion" and the "prejudice portion" of the test.[45]

To satisfy the performance portion of the test, the *Strickland* Court required that the defendant show that counsel's representation fell below an objective standard of reasonableness, which was to be measured by evaluating counsel's performance against prevailing professional norms.[46] Additionally, the Court held that judicial scrutiny of counsel's performance should be highly deferential, noting that a fair assessment of the performance portion necessitates that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[47] Due to the intrinsic complexity of this evaluation, the Court stated that the defendant must overcome the presumption that the attorney's performance was part of a reasonable trial strategy.[48] Furthermore, when

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39. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

40. 466 U.S. 668 (1984).

41. *Id.* at 686. The Court stressed:

> A number of practical considerations are important for the application of the standards we have outlined—the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Id. at 696.

42. *Id.* at 687.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 687-88. The Court stated, "As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance." *Id.* at 687.

47. *Id.* at 689.

48. *Id.* at 690. The Court instructed lower courts to presume that counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

objectively assessing the reasonableness of an attorney's performance, the reviewing court should recognize that counsel's primary function is to effectuate the adversarial testing process.[49]

With regard to the required showing of prejudice—the second prong of the test—the Court relied on *Strickland*'s companion case, *United States v. Cronic*,[50] to give more specific instructions.[51] The Court in *Cronic* explained that there are certain "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[52] Accordingly, the *Cronic* Court recognized three specific situations in which a presumption of prejudice is appropriate. The foremost example when prejudice is presumed is when the defendant is completely denied counsel.[53] Second, the Court explained that prejudice occurs if there has been a constructive denial of counsel.[54] According to the Court, constructive denial of counsel arises when an attorney "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable."[55] Finally, the Court explained that there are certain instances when counsel's assistance is available to aid the accused during trial, but surrounding circumstances make it so unlikely that any lawyer, even a competent one, could provide effective assistance, that prejudice should automatically be presumed without inquiry into actual performance.[56] The Court identified *Powell v. Alabama* as an example of when surrounding circumstances make it unlikely that any lawyer could have provided effective assistance.[57]

Absent these narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland*. According to the *Strickland* Court, actual prejudice requires the defen-

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49. *Id.* Additionally, to be efficient, the attorney cannot fail in his or her "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" or the "overarching duty to advocate the defendant's cause." *Id.* at 688.

50. 466 U.S. 648 (1984).

51. *See Strickland*, 466 U.S. at 692 (discussing the *Strickland* Court's explanation of the holding in *Cronic*).

52. *Cronic*, 466 U.S. at 658.

53. *Id.* at 659.

54. *Id.*

55. *Id.*

56. *Id.* at 659-60.

57. *Id.* at 660. In *Powell*, the defendants were several African-American men who faced the death penalty for allegedly raping a white woman. 287 U.S. 45, 49-50 (1932). The defendants in *Powell* were not asked "whether they had, or were able to employ, counsel, or wished to have counsel appointed." *Id.* at 52. Also, the trial court decided that an out-of-state lawyer would represent the defendants, but that lawyer was given no opportunity to prepare nor any time to familiarize himself with local law. *Id.* at 53-56.

dant to demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[58] The Court defined reasonable probability as a "probability sufficient to undermine confidence in the outcome."[59]

b. Alibi Witnesses and the Strickland *Standard in the Federal Courts of Appeals.*—In *Griffin v. Warden, Maryland Correctional Adjustment Center*,[60] the United States Court of Appeals for the Fourth Circuit held that the defendant was denied effective assistance of counsel when his attorney failed to contact his witnesses or provide the state with notice of alibi.[61] In the case, Donald Griffin, the defendant, had been identified by two security guards as being involved in an armed robbery that occurred on July 24, 1983 at 3:45 in the afternoon.[62] Griffin provided his trial attorney with a list of five alibi witnesses to testify regarding his whereabouts on the afternoon of the robbery.[63] However, Griffin's counsel failed to contact the witnesses or provide the State with notice of alibi.[64] Applying the *Strickland* standard, the court found that Griffin's attorney's performance was clearly deficient and concluded that there was no reasonable excuse for failing to notify the state of his client's alibi and to secure the attendance of alibi witnesses.[65] The court also found that Griffin had been prejudiced by his counsel's deficient performance.[66] Specifically, the court rejected the district court's conclusion that the evidence would not have established an alibi because it did not cover the period of the robbery based on the full chronology that the witnesses established and the distance between Griffin's friend's house and the scene of the robbery.[67]

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58. Strickland v. Washington, 466 U.S. 668, 694 (1984). The Court emphasized that "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding" because this would be too inclusive. *Id.* at 693.

59. *Id.* at 694.

60. 970 F.2d 1355 (4th Cir. 1992).

61. *Id.* at 1358.

62. *Id.* at 1356.

63. *Id.*

64. *Id.*

65. *Id.* at 1358. The court continued: "Indeed, [defense counsel's] statements at the bench conference are unambiguous admissions of unpardonable neglect." *Id.*

66. *Id.*

67. *Id.* at 1358-59. The court concluded that there was a reasonable probability that the result of Griffin's trial would have been different. *Id.* at 1359. The court explained: "Our confidence in the outcome is very much undermined. Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a

Similarly, in *Montgomery v. Petersen*,[68] the United States Court of Appeals for the Seventh Circuit held that the defendant's counsel ineffectively assisted his client when he failed to call a disinterested witness who could have corroborated the defendant's alibi testimony.[69] In that case, the defendant, Montgomery, was convicted of a burglary that was committed in Moultrie County, Illinois.[70] At trial, Montgomery's wife testified that she and her husband had spent the afternoon of the robbery shopping in Springfield, Illinois, and that her husband was home the rest of the day and evening.[71] Twelve other witnesses, all relatives or close friends of Montgomery, also testified to observing him in Springfield on the day of the robbery.[72] The defendant's trial counsel failed, however, to call the single disinterested witness, a Sears clerk that remembered selling a child's bicycle to the Montgomerys, who could have placed him in Springfield on the day of the burglary.[73] Employing the two-pronged standard, the court found that counsel's inadvertent failure to investigate the potential alibi witness was deficient due to its unreasonableness.[74] Moreover, the court believed that the attorney's failure to call the single disinterested witness to the stand prejudiced the defendant because there was a reasonable probability that the verdict would have been different if the Sears clerk had testified.[75]

In *Grooms v. Solem*,[76] the Court of Appeals for the Eighth Circuit also held that the defendant's trial counsel had been constitutionally ineffective because he failed to investigate the defendant's alibi or request a continuance for further investigation.[77] The defendant, Grooms, was convicted of selling stolen Native American artifacts on the basis of the testimony of a police informant.[78] At the time of the transaction in question, Grooms claimed to have been waiting at a repair shop while his pickup truck transmission was being repaired.[79]

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thin thread to shackle a man for forty years. Moreover, it is precisely the sort of evidence that an alibi defense refutes best." *Id.*

68. 846 F.2d 407 (7th Cir. 1988).

69. *Id.* at 411.

70. *Id.* at 408.

71. *Id.* at 409. Montgomery's wife's testimony was in direct contradiction to testimony by Montgomery's alleged coconspirators, who claimed that they had spent the day committing burglaries. *Id.* at 408-09.

72. *Id.* at 409.

73. *Id.* at 409-10.

74. *Id.* at 414.

75. *Id.* at 414-16.

76. 923 F.2d 88 (8th Cir. 1991).

77. *Id.* at 91.

78. *Id.* at 89.

79. *Id.*

The repair shop was fifty miles from the place where the transaction occurred.[80] Because Grooms's trial counsel did not check with the repair shop to establish whether anyone recalled repairing his truck on May 15th, the court found his performance deficient under the *Strickland* standard.[81] Furthermore, Grooms's ineffective assistance claim was justified when the court found that the defendant was prejudiced because the testimony of the two disinterested mechanic witnesses could have reasonably changed the outcome of the trial.[82]

In *Tosh v. Lockhart*,[83] the Eighth Circuit found that the defendant's counsel's failure to call two corroborating alibi witnesses violated the petitioner's Sixth Amendment right to counsel.[84] In that case, the defendant, Tosh, was convicted of aggravated robbery and theft of property for two campground robberies that took place at approximately 2:00 a.m. on July 5, 1981.[85] At trial, Tosh contended that he was with his girlfriend during the time of the robberies, and that he had been confronted by his girlfriend's neighbor, David Nelson, at approximately 2:00 a.m., which was witnessed by two other individuals.[86] Nonetheless, Tosh's trial counsel did not call the two witnesses of the confrontation to testify.[87] The court found that Tosh's counsel's performance was deficient because counsel did not make reasonable efforts to produce the corroborating witnesses or ask for a continuance to ensure their presence.[88] Furthermore, the court held that the deficient performance prejudiced the defendant because three of the four disinterested witnesses that could have testified did not testify, and their testimony could have changed the outcome of the trial.[89]

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80. *Id.*

81. *Id.* at 90-91. The court stated that the two employees of the repair shop could have corroborated Grooms's story by testifying that they had finished the transmission installation at approximately 7:00 or 7:30 p.m. *Id.*

82. *Id.* at 91.

83. 879 F.2d 412 (8th Cir. 1989).

84. *Id.* at 414.

85. *Id.* at 413. Following the robberies, two victims identified Tosh as a member of the group of five to seven robbers. *Id.*

86. *Id.*

87. *Id.* Tosh's counsel relied solely on Tosh's girlfriend, Becky Lumpkin, to provide Tosh's alibi. *Id.* Only at Tosh's habeas corpus hearing did Nelson corroborate Tosh's story regarding the fight. He also testified that no one could drive to or from Lumpkin's residence without being heard, and that he had not heard anyone drive in or out during the time in question. *Id.* Two other members of the Nelson family also testified at the habeas corpus hearing in a manner consistent with David Nelson's testimony. *Id.*

88. *Id.* at 414-15.

89. *Id.*

In *Johns v. Perini*,[90] a Sixth Circuit decision, the defendant had been convicted of selling marijuana in a tavern on November 30, 1964 after 11:00 p.m.[91] Two of the State's witnesses identified the defendant as the seller of the marijuana.[92] The defendant claimed that he was working that night, and that his attorney failed to investigate his alibi.[93] At trial, the prosecutor had no objections to the defendant's alibi testimony; however, he defiantly resisted any attempt to substantiate the alibi claim with favorable employment records that defense counsel had readily available.[94] Although these records did not indicate which specific days of the week the defendant worked, they did indicate that he had worked twenty-four hours over three days the week of the alleged drug sale, and that his work schedule required him to be at work at 11:00 p.m. on the days that he worked.[95] The Sixth Circuit held that counsel's failure to investigate and present the defendant's alibi deprived him of his constitutional right to effective assistance of counsel.[96]

c. Ineffective Assistance of Counsel in Maryland.—Soon after the Supreme Court established the standard for ineffective assistance of counsel, the Court of Appeals of Maryland, in *Harris v. State*,[97] applied and clarified the standard. In *Harris*, the defendant was imprisoned in the Maryland Penitentiary under a sentence of death.[98] The Circuit Court for Baltimore County accepted Harris's pleas of guilty to first-degree murder, two counts of armed robbery, and a handgun violation and consequently found him guilty on all counts.[99] The guilty pleas were entered on behalf of Harris because his attorney, Russell, determined that the evidence against Harris was overwhelming.[100]

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90. 462 F.2d 1308 (6th Cir. 1972).

91. *Id.* at 1309-10.

92. *Id.* at 1310.

93. *Id.* at 1309-10. The defendant claimed that he was at work by 11:00 p.m. *Id.* at 1310.

94. *Id.* at 1310.

95. *Id.* at 1311.

96. *Id.* at 1313-14. It is important to note that *Johns* was decided before *Strickland*'s two-pronged standard was established. Instead, the court in *Johns* employed a harmless error analysis in finding that defense counsel's failure to investigate the claimed alibi was unconstitutional. *See id.* at 1315.

97. 303 Md. 685, 496 A.2d 1074 (1985).

98. *Id.* at 690, 496 A.2d at 1076.

99. *Id.* After a sentencing hearing, the trial judge imposed the death penalty for the first-degree murder conviction and consecutive sentences of imprisonment totaling twenty years for the other offenses. *Id.*

100. *Id.* at 706-07, 496 A.2d at 1084-85. A participant in the robbery testified after a plea bargain that it was Harris who had committed the murder. *Id.* at 703, 496 A.2d at 1083. Furthermore, the police searched Harris's home and recovered ammunition, which

On subsequent remands from various appeals, Harris contended that the trial "judge erred in finding that he had not been denied the effective assistance of counsel with respect to the convictions and, therefore, the denial of the motion to withdraw his guilty plea was erroneous."[101] Specifically, Harris's allegation of error concerned his counsel's alleged unreasonable professional conduct in tendering a plea of guilty to first-degree murder as well as his failure to limit the plea on the murder charge to felony murder.[102] With regards to Russell's tendering of the plea of guilty, the court found that Harris voluntarily agreed to abide by his attorney's trial strategy, which was reasonable and therefore not indicative of deficient performance.[103] Additionally, in examining Russell's failure to limit the plea on the murder charge to felony murder, the court found that even if Russell had been successful in restricting Harris's guilty plea to felony murder, the denial of the motion would still be proper and therefore not prejudicial.[104] Thus, after making an independent constitutional appraisal of Harris's ineffective assistance of counsel claim on the totality of the circumstances taken from the trial court's record, the court determined that there was an insufficient showing of ineffective assistance of counsel.[105]

In *Bowers v. State*,[106] the court ruled on another ineffective assistance of counsel case in the context of a first-degree murder. In *Bowers*, the court held that the defendant, Bowers, was denied his Sixth Amendment right to effective assistance of counsel.[107] In reaching its conclusion, the court noted that Bowers consistently asserted that he had nothing to do with the murder of the victim, and therefore claimed ineffective assistance based on his counsel's failure to press his theory of defense in a reasonably competent manner.[108] In support of Bowers's contention, the court agreed with the trial court's

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matched cartridge casings found at the crime scene. *Id.* The court noted that "[t]he evidence . . . , when adduced by the State at a trial, would be sufficient in law, if believed, to prove, directly or by rational inference, beyond a reasonable doubt, the corpus delicti of each of the offenses charged and to establish Harris's criminal agency." *Id.* at 704, 496 A.2d at 1083.

101. *Id.* at 692, 496 A.2d at 1077.

102. *Id.* at 704, 496 A.2d at 1083. Harris made four other allegations of error; however, they are not relevant to this discussion. *Id.* at 704, 496 A.2d at 1084.

103. *Id.* at 710, 496 A.2d at 1086. Russell's advice to plead guilty was proposed to Harris, and Harris voluntarily and knowingly followed it because of the overwhelming evidence against him, including his confession to being the triggerman. *Id.* at 706, 496 A.2d at 1084.

104. *Id.* at 712, 496 A.2d 1087.

105. *Id.*

106. 320 Md. 416, 578 A.2d 734 (1990).

107. *Id.* at 418, 578 A.2d at 735.

108. *Id.* at 420-21, 578 A.2d at 736.

holding that his counsel was ineffective when he failed to introduce evidence that a "Negroid" hair from a person other than Bowers had been found on the murder victim's head.[109] Furthermore, the court found that Bowers's attorney was also deficient for not examining a witness who could have testified to the race of Bower's companion, with whom he allegedly checked into a hotel after the murder.[110] Applying the *Strickland* standard, the court held that Bowers's counsel's assistance was not reasonably competent under "prevailing professional norms," and was therefore deficient.[111] Additionally, the court found that Bowers was prejudiced because, had the evidence been admitted, the jury may have sufficiently doubted his involvement in the murder, and the result of the sentence may have been different.[112] Therefore, the court held that Bowers's counsel's performance was ineffective because he failed to appropriately introduce key evidence to the jury, and thus deprived Bowers "of the ability to bolster a potentially viable defense."[113]

In *Oken v. State*,[114] the Court of Appeals held that Oken, the defendant, was not denied effective assistance of counsel when his attorney failed to investigate his history of drug abuse and inadequately prepared two defense psychiatrists for the sentencing hearing.[115] Oken had committed two murders in Maryland and one murder in

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109. *Id.* at 427, 578 A.2d at 739. The State produced evidence that Peterson, who Bowers insisted was the actual killer of McNamara, had been in prison in another state on the day of the murder. *Id.* The court noted:

> It was of critical importance to the defense that doubt be cast upon this evidence, and the presence of the Negroid hair was a way of doing so, for that would have permitted an argument that the hair did not belong to Bowers, but instead belonged to some other person, and that the other person was Peterson.

Id. at 427-28, 578 A.2d at 739.

110. *Id.* at 428, 578 A.2d at 740.

111. *Id.* at 428-29, 578 A.2d at 740 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

112. *Id.* at 430-31, 578 A.2d at 741. The court stated:

> Had the Negroid hair evidence been presented to the jury, it might well have believed that Bowers had a companion on the fatal night. Had it believed that portion of Bowers's statement, it might well have found credible the other portions in which Bowers depicted Peterson as the prime mover of the entire incident and the sole killer of McNamara. Based on those beliefs, it follows naturally that the jury might well have concluded that Bowers had not possessed the requisite *mens rea* for premeditated murder. The jury, therefore, might well have found him to be an accessory to second degree murder . . . or perhaps guilty of second degree murder. At the very least, the jury might well have harbored reasonable doubt as to the premeditated murder charge.

Id. at 430, 578 A.2d at 741.

113. *Id.* at 430-31, 578 A.2d at 740-41.

114. 343 Md. 256, 681 A.2d 30 (1996).

115. *Id.* at 286, 290, 681 A.2d at 45, 47.

Maine.[116] After he was convicted for the Maine murder, he was returned to Maryland where he was convicted of murder and sentenced to death.[117] Oken contended that his counsel should have "investigated and presented additional readily available evidence of substance abuse" at key points of his trial.[118] Oken claimed that this evidence could have mitigated his conviction to second degree murder, making him ineligible for the death penalty.[119] However, the court ruled that substantial evidence of substance abuse was already given through the testimony of Oken's ex-wife, father, mother, acquaintances, and three medical witnesses, and any additional evidence would have simply been cumulative.[120] The court also rejected Oken's contention that his lawyer was ineffective because the lawyer failed to prepare the two psychiatrists to not make statements that were prejudicial to his case.[121] The court found the lawyer's actions to be reasonable trial strategy not rising to the level of ineffective assistance under the *Strickland* standard.[122]

d. The Compulsory Process Clause.—In 1967, the Supreme Court, in *Washington v. Texas*,[123] held that a Texas law violated the Sixth Amendment because it arbitrarily denied the defendant an opportunity to present a defense witness.[124] In *Washington*, during the defendant's murder trial, the court refused to allow the defendant to present the testimony of a certain witness on the ground that participants in the same crime were prevented from testifying for one another by a Texas statute.[125] The Supreme Court reversed the state court's decision and ruled that the Sixth Amendment right to compul-

116. *Id.* at 265, 681 A.2d at 34.

117. *Id.* at 266-67, 681 A.2d at 34-35.

118. *Id.* at 285, 681 A.2d at 44.

119. *Id.* Alternatively, Oken argued that counsel's failure to interview four lay witnesses and to perform testing of hair samples collected by the Maine police fell below an objective standard of reasonableness. *Id.*

120. *Id.* at 287, 681 A.2d at 45.

121. *Id.* at 290, 681 A.2d at 47. Oken's lawyer's strategy was to "present evidence of a mental disorder as a mitigating circumstance" through the testimony of two doctors, despite the fact that the diagnosis included a prior murder committed by Oken. *Id.* at 289, 681 A.2d at 46. Oken's previous lawyer, who was also accused of ineffective assistance of counsel, explained that a diagnosis of sexual sadism would have reinforced the contention that Oken was really sick and not dangerous in the future. *Id.*

122. *Id.* at 290-91, 681 A.2d at 47.

123. 388 U.S. 14 (1967).

124. *Id.* at 23. Specifically, the Court held that the defendant was denied his Sixth Amendment right to compulsory process for obtaining witnesses by Texas statutes providing that principals, accomplices, or accessories involved in the same crime cannot be introduced as witnesses for each other. *Id.* at 16 n.4.

125. *Id.* at 15.

sory process for obtaining witnesses in a defendant's favor was so fundamental to a fair trial that it was applicable to the states through the Fourteenth Amendment of the Constitution.[126] Specifically, the Court stated that the defendant's right to compulsory process was violated in this case because he was arbitrarily denied the "right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[127] The Court's ruling established that the right to offer the testimony of witnesses is a "fundamental element of due process of law."[128]

More than a decade later, the Supreme Court had a chance to enhance its definition of "materiality" as it pertained to a defendant's right to the compulsory process of obtaining defense witnesses. In *United States v. Valenzuela-Bernal*,[129] the defendant entered the United States illegally and drove himself and five other passengers to Los Angeles.[130] Eventually Border Patrol agents at a checkpoint caught the defendant.[131] Two of the other passengers were deported before the defendant's trial because an Assistant United States Attorney concluded that the two passengers possessed no evidence material to the prosecution or defense in the defendant's trial for transporting illegal aliens.[132] The defendant appealed his subsequent conviction, claiming that the deportation of the two passengers violated his Sixth Amendment right to compulsory process for obtaining favorable witnesses.[133] The Supreme Court focused on whether the deported witnesses could have provided testimony "material" to the defendant's defense.[134] The Court reasoned that the defendant must at least have a "plausible theory" as to how the testimony of the missing witnesses would be helpful to the defense.[135] In addition, the Court looked to a succession of cases that dealt with the constitutionally guaranteed access to evidence and explained that "materiality," as it pertains to the

126. *See id.* at 23 ("The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.").

127. *Id.*

128. *Id.* at 19.

129. 458 U.S. 858 (1982).

130. *Id.* at 860.

131. *Id.* at 861.

132. *Id.*

133. *Id.* The defendant "claimed that the deportation had deprived him of the opportunity to interview the two remaining passengers to determine whether they could aid in his defense." *Id.*

134. *Id.* at 872.

135. *Id.* at 867, 871.

withheld testimony of witnesses, is determined by whether it may have affected the outcome of the trial if it had been introduced.[136] After making these distinctions, the Court held that the defendant could not establish that there had been a violation of his right to compulsory process without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses.[137]

3. The Court's Reasoning.—In *In re Parris W.*, the Court of Appeals of Maryland, in determining ineffective assistance of counsel, held that defendant's counsel's performance was deficient when he failed to subpoena the five corroborating witnesses for the correct trial date, and that as a result of the deficient performance, the defendant was prejudiced.[138] In arriving at this conclusion, Judge Raker, writing for the court, initially established the legitimacy of a defendant's right to claim ineffective assistance of counsel, even in juvenile delinquency cases.[139] Next, the court proceeded to dictate the standard of review that it would apply in its assessment of ineffective assistance claims.[140] Drawing from *Strickland* and its Maryland progeny, the court stated that a petitioner must affirmatively prove both the "performance portion" and the "prejudice portion" of the established standard to properly demonstrate ineffective assistance of counsel.[141]

The court determined that counsel's performance was deficient under the *Strickland* standard.[142] Defendant's counsel acknowledged that he alone failed to subpoena the witnesses for the correct date.[143] The court explained that this mistake did not constitute the exercise of reasonable professional judgment.[144] Also, the court found that the attorney's failure to subpoena the witnesses on time was not consistent with counsel's primary function of effectuating the adversarial

136. *See id.* at 867-71.

137. *Id.* at 872.

138. *Parris*, 363 Md. at 730, 770 A.2d at 209-10. The court also held that ineffective assistance claims could be appropriately addressed on direct appeal; however, this is not a topic of discussion for this Note. *Id.* at 726-27, 770 A.2d at 207.

139. *Id.* at 724, 770 A.2d at 206. Judge Raker was joined in full by Judges Eldridge, Wilner, Cathell, Harrell, Battaglia, and Rodowsky.

140. *Id.* at 725-26, 770 A.2d at 206-07.

141. *Id.* at 725, 770 A.2d at 206.

142. *Id.* at 727, 770 A.2d at 208.

143. *Id.* In addition, defendant's counsel did not deny receiving the notice rescheduling the hearing that was sent to him by the court. *Id.*

144. *Id.*

process.[145] Therefore, the court found counsel's performance deficient.[146]

The court then explained that, in addition to establishing deficient performance, the defendant must establish prejudice.[147] In order to prove prejudice, the court required the defendant to show that there was "a substantial possibility that, but for counsel's error, the result of his proceeding would have been different."[148] The court had to determine whether there was a substantial possibility that the five other witnesses' testimonies, which corroborated a substantial portion of Mr. W.'s alibi testimony, would have been sufficient, along with the other evidence, to create a reasonable doubt as to Parris's involvement in the assault.[149]

Ultimately, a unanimous court determined that there was a substantial possibility that had the circuit court heard the testimonies of the five other subpoenaed witnesses, it might have found a reasonable doubt as to the defendant's involvement.[150] The court reasoned that, although three of the witnesses could not verify the defendant's whereabouts in the afternoon when the assault was committed, they could all have strengthened Mr. W.'s claim that the defendant was with his father the entire day.[151] In addition, the court stressed that Diane Cary's testimony could have significantly changed the disposition of the hearing by demonstrating to the court that it would have been a physical impossibility for the defendant to have been present at the crime scene.[152] Furthermore, the court stressed that the necessity of admitting the corroborative evidence was substantially important to elicit reasonable doubt from the trial court as to Parris's involvement, especially "in a case such as this where the evidence linking [defendant] to the crime was solely the victim's identification."[153] Therefore, the majority was convinced that the attorney's failure to subpoena the five corroborating witnesses for the correct trial date prejudiced the defendant.[154]

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145. *Id.*
146. *Id.*
147. *Id.* at 727-28, 770 A.2d at 208.
148. *Id.*
149. *Id.* at 729, 770 A.2d at 209.
150. *Id.*
151. *Id.* at 729-30, 770 A.2d at 209. The first two witnesses that the defendant intended to call were Tracy Robb and Florence Garrett, Mr. W's coworkers, and the third witness was Mr. W.'s customer. *See supra* note 18 (detailing the six witnesses that the defendant attempted to call on his behalf on the day of the hearing).
152. *Parris*, 363 Md. at 730, 770 A.2d at 209.
153. *Id.* at 729, 770 A.2d at 209.
154. *Id.* at 730, 770 A.2d at 209-10.

At the end of the decision, the court provided a discussion of cases that it viewed as similar to the facts in *Parris*.[155] A strikingly similar case, the court noted, is *Griffin v. Warden, Maryland Correctional Adjustment Center*, in which the defendant presented his lawyer with a list of witnesses to testify regarding his alibi, but his attorney failed to contact every one of those witnesses.[156] The court in *Griffin* found that the defendant's attorney's representation was ineffective.[157] The court in *Parris* also noted that the defendant's case was similar to *Montgomery v. Petersen*, *Grooms v. Solem*, and *Tosh v. Lockhart*, where the respective courts ruled that the defendants' counsels' performances were ineffective because the attorneys failed to call specific alibi witnesses that were disinterested in the outcome of the trial and could have furnished appropriate alibi testimonies.[158] Finally, the court concluded by referring to *Johns v. Perini*, in which the Sixth Circuit held that the defendant's counsel's failure to investigate and present his client's alibi, which was substantiated with positive employment records, amounted to ineffective assistance of counsel.[159]

4. Analysis.—In *Parris*, the court correctly held that defendant's counsel was ineffective when it determined that counsel's performance was deficient and that the deficient performance prejudiced the outcome of the trial.[160] However, the court failed to consider a significant issue that would have been dispositive as well as instructive in setting a future standard in resolving difficult ineffective assistance of counsel claims regarding an attorney's failure to subpoena witnesses. By looking to the Compulsory Clause of the Sixth Amendment, which insures an accused in all criminal prosecutions the fundamental right to obtain witnesses in his or her favor, the court could have explained that not allowing the witnesses to testify on the defendant's behalf would have gone against the crux of the *Strickland* analysis, namely determining the overall fairness allotted to the defendant.

This analysis will first explain that the Court of Appeals of Maryland ruled correctly. The court correctly determined that counsel's performance was deficient.[161] The court was also correct not to pre-

155. *Id.* at 730-36, 770 A.2d at 210-13.
156. *Id.* at 730-31, 770 A.2d at 210.
157. *Id.* at 731, 770 A.2d at 210.
158. *Id.* at 732-36, 770 A.2d at 210-13.
159. *Id.* at 736, 770 A.2d at 213.
160. *Id.* at 730, 770 A.2d at 209-10.
161. *Id.*, 770 A.2d at 209.

sume prejudice according to the *Cronic* standard.[162] Additionally, the court was correct in determining that the defendant was actually prejudiced under the second prong of the *Strickland* analysis by weighing the probative value of the witnesses' testimonies when it considered the ultimate focus of the analysis, fairness. The second part of this analysis explains why the federal circuit court cases that the court in *Parris* referred to after its holding were irrelevant despite the fact that the cases aid in the determination of simpler cases of ineffective assistance. Finally, the second part of this analysis also considers the pertinence of the Compulsory Clause of the Sixth Amendment to the case at hand and its ability to help future, difficult cases of ineffective assistance of counsel as they pertain to an attorney's failure to subpoena witnesses.

a. The Court of Appeals Ruled Correctly.—

(1) Determining Deficient Performance Was a No-Brainer.— The court correctly ruled that the attorney representing Parris was deficient in his performance.[163] Counsel's inadvertent forgetfulness of the correct trial date clearly fell below an objective standard of reasonableness.[164] Despite the deferential nature of the first prong of the *Strickland* test, which presumes reasonable representation, Parris's counsel's performance did not conform to prevailing professional norms.[165]

Clearly, counsel's concession that the scheduling error was completely his fault cannot be said to have been a form of trial strategy of any kind. The Court of Appeals has consistently held that a lawyer's decision to act in a particular way is often considered reasonable trial strategy, even if that strategy is not successful. For example, in *Harris v. State*, the attorney made a conscious choice, to which his client agreed, to plead guilty to first-degree murder and to throw himself at the mercy of the court.[166] This, the court determined, was considered sound trial strategy, despite the outcome of the trial.[167] Similarly, in *Oken v. State*, the court found reasonable an attorney's choice not to introduce the testimony of two psychiatrists whose testimonies, he believed, could have negatively affected the outcome of the trial.[168] *Par-*

162. *See supra* notes 50-57 and accompanying text (discussing the presumption of prejudice as explained by the *Cronic* court).

163. *Parris*, 363 Md. at 727, 770 A.2d at 207-08.

164. *Id.*

165. *Id.*

166. 303 Md. 685, 707, 496 A.2d 1074, 1085 (1985).

167. *Id.* at 710, 496 A.2d at 1086.

168. 343 Md. 256, 290, 681 A.2d 30, 47 (1996).

ris, however, is more like *Bowers v. State*, where the court ruled that the attorney's unexplained failure to both introduce evidence that hair other than the defendant's had been found on the murder victim and examine a key witness did not amount to trial strategy.[169] In *Bowers*, the attorney never explained at the post conviction hearing why he did not introduce the evidence, so the court could not ascribe the behavior to trial strategy.[170] Similarly in *In re Parris*, counsel openly admitted to his memory lapse, and therefore his failure to properly subpoena the witnesses could not be considered a form of trial strategy.[171]

Furthermore, it cannot be said that counsel's failure to subpoena the witnesses on time, irrespective of the quality of their testimony, consistently encouraged the adversarial process.[172] The court correctly stated that "counsel's single, serious error of failing to subpoena the witnesses for the correct trial date . . . was not consistent with counsel's primary function of effectuating the adversarial testing process in this case."[173] This conclusion is consistent with previous Court of Appeals rulings. For example, in *Bowers*, the court did not believe that counsel was effectuating the adversarial process as required by prevailing professional norms when he failed to press his client's desired defense by not presenting specific evidence.[174] Failing to introduce physical evidence, like a hair linking another person to the scene of a crime, or testimonial evidence, like the witnesses' testimonies in *Parris* and *Bowers*, makes the trial process unreliable and hinders the advocacy of the defendant's cause. Accordingly, the court correctly ruled that counsel's performance fell below an objective standard of reasonableness when compared with prevailing professional norms.[175]

(2) The Court Was Correct in Staying Off the Cronic *Standard.*—With regards to the prejudice prong of the *Strickland* standard, the court was correct in not presuming prejudice as outlined in *Cronic*.[176] First, Parris was not completely denied counsel; rather, his counsel represented his interests incompetently.[177] Second, the facts

169. Bowers v. State, 320 Md. 416, 427-29, 578 A.2d 734, 739-40 (1990).
170. *Id.* at 428, 578 A.2d at 740.
171. *Parris*, 363 Md. at 721, 770 A.2d at 204.
172. *Id.* at 727, 770 A.2d at 208.
173. *Id.*
174. *Bowers*, 320 Md. at 428-29, 578 A.2d at 739-40.
175. *Parris*, 363 Md. at 727, 770 A.2d at 208.
176. *See supra* notes 50-57 (discussing the *Cronic* holding and standard).
177. *See Parris*, 363 Md. at 720-23, 770 A.2d at 203-05 (detailing the legal steps taken by counsel on behalf of Parris); *see also* United States v. Cronic, 466 U.S. 648, 659 (1984) (stating that the complete denial of counsel amounts to per se prejudice).

of the case in *Parris* do not suggest that there was a constructive denial of counsel whereby counsel's efforts *entirely* failed to subject the prosecution's case to meaningful adversarial testing in such a way as to make the adversary process itself unreliable.[178] In fact, counsel seemingly fulfilled all of his representative duties except for one. For example, he contacted potential witnesses, asked for multiple continuances, cross-examined the State's sole witness, made an opening and a closing statement; the list goes on until his single yet substantial error of failing to subpoena the witnesses for the correct trial date.[179] Finally, there was no reason for the court to have believed that the surrounding circumstances made it so unlikely that any lawyer could have provided effective assistance that the court could presume prejudice without inquiry into the actual performance of counsel at trial.[180] Not only was there no evidence that Parris's attorney did not have every resource readily available for his client's representation, but he was granted a continuance to extend his preparation time, thereby proving that the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial.[181] Because the case did not meet any of the three prongs of the *Cronic* standard for finding per se prejudice, the court in *Parris* correctly relied solely on an analysis of counsel's actual performance and did not presume prejudice.[182]

(3) Proving Actual Prejudice Was Tough, But the Answers Rested in the Strickland *Text.*—Accordingly, the court scrutinized the facts of the case by strictly adhering to the prejudice analysis as outlined in *Strickland* and determined that counsel's failure to subpoena the five corroborating witnesses prejudiced the outcome of the defendant's trial.[183] To show prejudice a defendant must show that there

178. *See Cronic*, 466 U.S. at 648.

179. *Parris*, 363 Md. at 720-23, 770 A.2d at 204-05. This case was not one where the lawyer literally slept through the State's case or otherwise might as well have been absent from the proceedings.

180. *See Cronic*, 466 U.S. at 659-60.

181. *Parris*, 363 Md. at 720, 770 A.2d at 204.

182. Additionally, it is important to note that although Parris's counsel failed *Strickland*'s test of objectively reasonable performance, not every case of deficient performance under *Strickland* represents a constructive denial of the right to counsel. In fact, it will be the rare claim of ineffective assistance that is tantamount to a constructive denial of counsel when determining the prejudice portion of the standard. *Strickland* remains the norm for ineffective assistance claims, and the Supreme Court has made clear that it will not tolerate a per se prejudice exception that will swallow the *Strickland* rule. *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000) (rejecting a per se rule as inconsistent with *Strickland*'s circumstance-specific reasonableness requirement).

183. *Parris*, 363 Md. at 730, 770 A.2d 209-10.

was a reasonable probability that but for counsel's error the result of his proceeding would have been different.[184] In *Parris*, the question the court faced was whether the five corroborating witnesses' testimonies, in addition to the other evidence, was substantially sufficient to create a reasonable doubt as to Parris's involvement in the assault.[185]

In determining whether the testimonial evidence of the five witnesses would have created a reasonable doubt to the fact finder, had it been heard, the court had to overcome a huge obstacle: how does one accurately determine where to draw the line between which testimonial evidence would be sufficient to create a reasonable doubt and which would not? This question forces a court to use an outcome-determinative test that assumes the court can ascertain what the result would have been had effective assistance been provided.[186] However, to overcome this obstacle, the court took heed of the *Strickland* Court's instructions that in adjudicating a claim of ineffective assistance of counsel, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[187] Hence, the court overcame the outcome-determinative nature of *Strickland's* prejudice prong by subtly analyzing prejudice in this case to be inherently dependent upon whether the proceeding in its entirety was fair to the parties. It is seen in the court's analysis that Parris's counsel's deficient performance disadvantaged him because it would not have been inherently fair for Parris to be punished without allowing him to tell his entire story through the testimonies of his witnesses.[188] This type of inherent unfairness is especially evident in a case such as this one, in which testimonial evidence was the *only* type of evidence employed by both parties.[189] Therefore, the court was correct in concluding that the lack of evidence other than the testimonial evidence procured by both parties supports the conclusion that there is a reasonable possibility that the fact finder would have come to a different conclusion had the five corroborating witnesses testified.[190]

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184. Strickland v. Washington, 466 U.S. 668, 694 (1984).

185. *Parris*, 363 Md. at 729, 770 A.2d at 209.

186. *See Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (stating that "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent").

187. *Strickland*, 466 U.S. at 696.

188. *Parris*, 363 Md. at 730-31, 770 A.2d at 209-10.

189. *Id.* at 729, 770 A.2d at 209 ("This is particularly true in a case such as this where the evidence linking Appellant to the crime was solely the victim's identification.").

190. *Id.*

However, had the withheld testimonial evidence been heard, it would have simply reiterated large portions of Parris's alibi, which was already admitted into evidence via Parris's father's testimony.[191] That corroborative testimonial evidence from the five unsubpoenaed witnesses would have been cumulative to the testimony that Mr. W. gave indicating that Parris was with him on the day of the assault.[192] Therefore, the court had to overcome yet another obstacle; namely, how does one determine when to draw the line in admitting cumulative testimony when deciding whether that testimony would be sufficient to create a reasonable doubt? Again, the answer lies within the text of *Strickland*: "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."[193]

Having been granted this discretionary mandate, the court in *Parris* accounted for the negative effect the cumulative testimony would have had on the likelihood of introducing the five witnesses by focusing on the probative value of the withheld testimonies.[194] Essentially, the court found the withheld testimony's probative value more than sufficient to prove that if heard it might have elicited a reasonable doubt in the mind of the fact-finder.[195] Whether the court's explanations that the witnesses' withheld testimonies were necessary to strengthen Mr. W's testimony that he was with his son all day, or that Ms. Cary's possible role in providing proper alibi testimony was compelling enough to show reasonable doubt is difficult to verify. However, the flexible *Strickland* standard, which could not possibly predict every case of ineffective assistance of counsel beyond its inception in 1984, allowed this court to properly reach its conclusion by deferring to the reviewing court's discretion of what is "fair" representation.

b. Observation and Improvement.—

(1) The Circuit Court Cases.—In adhering to the federal circuit court cases in its opinion, the court in *Parris* pointed out interesting variations of ineffective assistance claims, but in doing so did

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191. *Id.* at 728, 770 A.2d at 208.

192. *Id.*; *see also* Oken v. State, 343 Md. 256, 287, 681 A.2d 30, 45 (1996) (rejecting ineffective assistance of counsel claims where evidence would have been merely cumulative).

193. Strickland v. Washington, 466 U.S. 668, 696 (1984).

194. *Parris*, 363 Md. at 729-30, 770 A.2d at 209-10.

195. *Id.* The court found that there was a "substantial possibility" that the missing witnesses' testimony would have created reasonable doubt about Parris's involvement in the assault. *Id.*

not support its analysis and holding.[196] For instance, in *Griffin*, the attorney completely failed to contact all of the defendant's witnesses.[197] These witnesses would have given alibi testimony, unheard by the court through any other witnesses' testimonies.[198] Thus, the court in *Griffin* ruled that totally withholding all witnesses amounted to actual prejudice.[199] In *Parris*, however, the court dealt with a much more complicated scenario in which counsel's partial failure to contact specific witnesses left the court to determine actual prejudice in terms of the sufficiency and necessity of the withheld testimonies. Although Parris's counsel failed to subpoena certain witnesses for the correct trial date, alibi testimony was still heard by the court through Mr. W.'s statements.[200] This, unlike in *Griffin*, allowed the defendant to tell his side of the story to refute his opponent's version of the facts. Therefore, the court's use of *Griffin* did not advance its analysis and holding because the issue was not whether an attorney completely failed to contact his or her client's witnesses.

Similarly, the court's use of *Montgomery*, *Grooms*, and *Tosh* did not adequately support its analysis and holding. In all of these federal circuit court cases, the attorneys failed to call completely disinterested witnesses.[201] In *Parris*, however, almost every single one of the unsubpoenaed witnesses had some relation to Mr. W. and his son Parris, thus making their testimony relatively biased.[202] For example, it is obvious that Jeffrey Taylor and Diane Cary were not disinterested because they were good friends with the Parrises.[203] Comparably, both Tracy Robb and Florence Garrett, Mr. W.'s co-workers, were not disinterested such that a court could conclude that they did not regard the defendant and his father with some favoritism.[204]

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196. *See id.* at 730-36, 770 A.2d at 210-13 (discussing similarities between *Parris* and various circuit court cases).

197. Griffin v. Warden, Md. Corr. Adjustment Ctr., 970 F.2d 1355, 1356 (4th Cir. 1992).

198. *Id.*

199. *Id.* at 1378.

200. *Parris*, 363 Md. at 722, 770 A.2d at 205.

201. *See* Montgomery v. Petersen, 846 F.2d 407, 410-11 (7th Cir. 1988) (indicating that counsel failed to call a Sears clerk that could have substantiated his client's alibi); Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (explaining that counsel did not verify his client's alibi although he could have contacted two employees of a repair shop who could have corroborated the alibi); Tosh v. Lockhart, 879 F.2d 412, 413 (8th Cir. 1989) (stating that Tosh's counsel did not call a man that his client argued with during the alleged robbery to confirm alibi testimony).

202. *See Parris*, 363 Md. at 721, 770 A.2d at 204 (listing the witnesses involved in the case and their relationship to the defendant).

203. *Id.* at 730, 770 A.2d at 209.

204. *Id.* at 729, 770 A.2d at 209.

The only witness not called that could be considered completely disinterested, assuming that he was not a regular client, is the Faith Office Products customer who would have verified that Parris was accompanying his father on his delivery routes.[205] However, despite his or her neutral disposition to the case, that unbiased testimony alone, if admitted, would not have had any impact on the court's ruling. The crime was committed at approximately 3:45 p.m., and Parris could have committed the assault well after accompanying his father on his delivery route to the unidentified Faith Office customer.[206]

Therefore, the court's suggestion that the *Montgomery*, *Grooms*, and *Tosh* cases were similar to the case at hand is not convincing support for its decision.[207] The significant point that they make—that ineffective assistance of counsel occurs if counsel fails to identify the single disinterested witness that could offer alibi testimony previously unheard by the court—does not pertain to *Parris*.

(2) Consider Compulsory Clause Cases.—In resolving future cases of ineffective assistance that involve an attorney's failure to subpoena witnesses, the Court of Appeals of Maryland should consider the Compulsory Clause of the Sixth Amendment in analyzing actual prejudice under the *Strickland* standard. The Sixth Amendment's Compulsory Clause insures an accused in all criminal prosecutions the fundamental right to obtain witnesses in his or her favor.[208] In *Parris*, the court ruled in a manner consistent with Compulsory Clause case law, despite the difference in subject matter, when it determined that the defendant's attorney's performance was deficient and that performance prejudiced the defendant.[209] In ruling in such a manner, the court unintentionally created a supplemental standard that should be considered in the court's future assessments of ineffective assistance claims that involve counsel's failure to subpoena witnesses.

When a court is at an impasse and struggling with the difficult determination of whether improperly subpoenaed testimonial evidence could have changed the outcome of a proceeding had it been

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205. *Id.* at 729-30, 770 A.2d at 209.

206. *Id.* at 728, 770 A.2d at 208.

207. The court also referred to *Johns v. Perini*. *See Parris*, 363 Md. at 736, 770 A.2d at 213. The *Perini* court ruled on an ineffective assistance of counsel claim before the *Strickland* standard had been adopted. Therefore, analyzing *Perini* adds nothing to the court's analysis in *Parris*. *See supra* notes 90-96 and accompanying text (discussing the facts and disposition in *Perini*).

208. U.S. CONST. amend. VI.

209. *Parris*, 363 Md. at 730, 770 A.2d at 209-10.

heard, the court should step back and ask itself a simple question: If it rules against the defendant by finding counsel's assistance to have been effective, would the court be trampling on the defendant's fundamental right to compulsory process for obtaining witnesses in his favor? By posing this question and accordingly applying the facts of a specific case, the court will guard the defendant's Sixth Amendment rights and also insure that the ultimate focus on the ineffective assistance inquiry, as stressed in *Strickland*, will be fundamental fairness.[210]

Using *Parris* as an illustration, it is likely that the Court of Appeals would affirmatively rule, in retrospect, that it would have been a violation of Parris's Sixth Amendment right to compulsory process had it determined that counsel's performance was not ineffective. According to the Supreme Court in *Washington v. Texas*, in determining whether an individual's right to compulsory process was violated, a court must establish that the defendant was arbitrarily denied the right to put on "the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[211] "Materiality," as defined in *United States v. Valenzuela-Bernal*, necessitates that the defendant at least have a "plausible theory" as to how the testimony of the missing witnesses would be helpful to the defense.[212] There is no indication that any of the alibi witnesses in *Parris* were not physically and mentally capable of testifying that they saw Mr. W. and his son the day of the assault. Furthermore, their testimonies would have been relevant and material to support Parris's alibi that he was with his father on the day of the assault. Their testimonies would have provided a "plausible theory" and demonstrated that it would have been a physical impossibility for Parris to have committed the alleged assault given the time sequence described in court and the distance of the school to Diane Cary's home where he temporarily resided.[213] Therefore, had the court concluded that counsel in *Parris* performed effectively and not allowed the testimony from the five alibi witnesses, the court would have trampled on the defendant's right to compulsory process.

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210. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (explaining that the main purpose of the constitutional requirement of effective assistance of counsel is to ensure a fair trial).

211. Washington v. Texas, 388 U.S. 14, 23 (1967) (discussing the requirements the Court looks to when determining whether a defendant's right to compulsory process was violated).

212. United States v. Valenzuela-Bernal, 458 U.S. 858, 871 (1982).

213. *See Parris*, 363 Md. at 730, 770 A.2d at 209.

5. Conclusion.—In *Parris*, the Court of Appeals correctly held that counsel ineffectively assisted the defendant when he failed to subpoena the five corroborating witnesses for the correct trial date.[214] The court was correct in its analysis of counsel's deficient performance as well as in its determination of prejudice under the *Strickland* standard. Despite referring to numerous circuit court cases whose rulings were not completely analogous to the fact pattern in *Parris*, the court correctly ruled on the evidentiary facts, weighed their probative value, and found ineffective assistance. However, the court failed to consider whether not allowing the defendant's witnesses to testify would have resulted in an infringement of the defendant's right to compulsory process as provided by the Sixth Amendment. When evaluating difficult ineffective assistance of counsel cases in which testimonial evidence is at issue, the court should look to the Compulsory Process Clause and the rulings in *Washington* and *Valenzuela-Bernal* to ensure that the fairness standard in *Strickland* is upheld.

AMIR EYAL

214. *Id.* at 730, 770 A.2d at 209-10.

II. COMMERCIAL LAW

A. Wage Garnishment in Maryland: New Burdens are a "Handful" for Garnishees

In *Shanks v. Lowe*,[1] the Court of Appeals held that under Maryland's wage garnishment law a garnishee must aggregate its employee's tips and salary before applying the mandatory exemptions.[2] By requiring garnishees to include tips when calculating an employee's total wages, the court changed the longstanding rule that a garnishee is only responsible to account for the wages in its possession.[3] The court made a significant shift away from established wage garnishment law by moving the focus from an evaluation of the garnishee's liability to an assessment of the debtor's liability.[4] Because the court in the past has declined to uphold garnishments not explicitly authorized by statute,[5] such a shift is a departure from precedent. Furthermore, although the court intended to increase the likelihood that judgment creditors will be repaid,[6] the decision may increase the administrative burden for garnishees by complicating the garnishment proceeding. For these reasons, the *Shanks* court should have placed the ultimate decision of whether tips should be included in the total wages calculation in the hands of the General Assembly.

1. The Case.—In 1998, the District Court of Maryland issued a wage garnishment on the respondent, Kibby's Restaurant and Lounge (Kibby's), at the request of the petitioner, Laura Shanks.[7] The garnishment order was to recover a judgment of $6000 against Susan Dolle entered in 1995.[8] Susan Dolle worked as a waitress at Kibby's at the time of the garnishment.[9]

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1. 364 Md. 538, 774 A.2d 411 (2001).

2. *Id.* at 548, 774 A.2d at 417.

3. *Id.* at 543, 548, 774 A.2d at 414, 417; *see also* Bendix Radio Corp. v. Hoy, 207 Md. 225, 229, 114 A.2d 45, 47 (1955) (laying out the traditional test of the garnishee's liability as being "that [the garnishee] has funds, property or credits in his hands, the property of the debtor, for which the debtor would have the right to sue").

4. *Shanks*, 364 Md. at 554, 774 A.2d at 420 (Eldridge, J., dissenting).

5. *See, e.g.*, Mayor of Baltimore v. Hooper, 312 Md. 378, 392-93, 539 A.2d 1130, 1137-38 (1988) (holding that attachments cannot reach allowances such as disability payments or similar benefits unless there is an authorizing statute).

6. *Shanks*, 364 Md. at 548, 774 A.2d at 416-17 (stating that "a contrary holding would present an unjustifiable unfairness to judgment creditors").

7. *Id.* at 540, 774 A.2d at 412.

8. *Id.*

9. *Id.*

The writ of garnishment instructed the restaurant to withhold Dolle's "attachable wages" until the judgment was satisfied.[10] The writ included a method to calculate what parts of Dolle's wages were exempt from garnishment based on section 15-601.1(b) of the Commercial Law Article.[11] The writ exempted "the greater of (1) the product of $154.50 multiplied by the number of weeks in which 'the wages due were earned,' or (2) 75% of 'the disposable wages due.'"[12] Disposable wages are the portion of wages remaining after any deductions required by law are withheld.[13]

Kibby's responded to the writ with a hand-written note to the court stating that Dolle's wages were exempt from garnishment because her weekly disposable income was approximately $35 to $40 and thus fell within the $154.50 exemption.[14] Kibby's requested that the garnishment action be dismissed.[15] Approximately five months later, Shanks served another wage garnishment on the restaurant.[16] Kibby's again responded, stating that Dolle's gross wages averaged only $95 per week and thus it could not garnish her wages.[17] In response, Shanks filed a motion to cite Kibby's for contempt.[18] The district court then issued a show cause order on Kibby's.[19]

Kibby's moved to suppress the order.[20] The restaurant maintained that it did not hold Dolle's attachable wages because they were less than the allowable exemption amount. Although Dolle earned tips, Kibby's argued that Dolle's attachable wages included only her

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10. *Id.*

11. MD. CODE ANN., COM. LAW II § 15-601.1(b) (2001); *Shanks*, 364 Md. at 540 n.1, 774 A.2d at 412 n.1. The court noted that, "for reasons that are not clear," there is a discrepancy between the figure of $154.50 that was included as exempt on the writ and the amount of $145 included in the statute. The parties, however, agreed that the $154.50 amount was correct for the purposes of this action. *Shanks*, 364 Md. at 541 n.1, 774 A.2d at 412 n.1.

12. *Shanks*, 364 Md. at 540, 774 A.2d at 412.

13. *Id.* at 540-41, 774 A.2d at 412.

14. *Id.* at 541, 774 A.2d at 412.

15. *Id.*

16. *Id.*

17. *Id.*, 774 A.2d at 413.

18. *Id.*

19. *Id.* Maryland Rule 2-646(f) provides that the court may order the garnishee to explain why the garnishee should not be held in contempt, if the garnishee fails to file a timely answer. MD. R. 2-646(f). Although Kibby's responded to the second writ, the Court of Appeals presumed the trial court found Kibby's response inadequate because Kibby's neither withheld wages nor sent a copy of its answer to the judgment debtor and the judgment creditor. *Shanks*, 364 Md. at 541 n.2, 774 A.2d at 413 n.2.

20. *Shanks*, 364 Md. at 541, 774 A.2d at 413.

hourly wage and not her tips.[21] Kibby's further argued that Dolle's tips were not attachable wages for the purposes of the wage garnishment law.[22] The restaurant alleged that, even if tips were considered attachable wages, it could not withhold the tips because it never had possession of the tips.[23] The district court agreed and suppressed the garnishment order, holding that Kibby's was "not responsible *for the collection* of any tips paid directly to its employee . . . ."[24]

On appeal, the Circuit Court for Baltimore County affirmed, holding that tips did not constitute wages under section 15-601 because the employer did not have control over them.[25] The Court of Appeals of Maryland granted certiorari to consider whether tips and salary can be aggregated for the purposes of Maryland wage garnishment law.[26]

2. Legal Background.—Garnishment enables a judgment creditor to recover a portion of the debtor's wages as a means to enforce the judgment.[27] In wage garnishment proceedings, the general rule in Maryland is that the garnishee is liable for any property or wages in its possession for which the judgment debtor would have the right to sue.[28] A third party, usually the debtor's employer, is ordered by the court to serve as a garnishee by withholding a portion of its employee's wages for the judgment creditor.[29] This allows a judgment

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21. *Id.* In response to receiving a writ of garnishment, the Maryland Rules allow the garnishee to "assert any defense that the garnishee may have to the garnishment, as well as any defense that the debtor could assert" in its answer. MD. R. 2-646(e).

22. *Shanks*, 364 Md. at 541, 774 A.2d at 413.

23. *Id.* at 542, 774 A.2d at 413.

24. *Id.* Both the district and circuit courts reasoned that, because tips are neither paid nor controlled by employers, they do not constitute wages for the purposes of wage garnishment. *Id.*

25. *Id.*

26. *Id.* at 543, 774 A.2d at 414.

27. Bendix Radio Corp. v. Hoy, 207 Md. 225, 229, 114 A.2d 45, 47 (1955).

28. *Id.*

29. Parkville Fed. Sav. Bank v. Maryland Nat'l Bank, 343 Md. 412, 418, 681 A.2d 521, 524 (1996). The court described the procedural process for wage garnishment:

> A judgment creditor may obtain a writ of garnishment by filing a request for a writ with the clerk of the circuit court. The request must include: (1) the caption of the action in which the judgment was obtained; (2) the amount owed under the judgment; (3) the name and last known address of the judgment debtor; and (4) the name and address of the party holding the property (the garnishee). Upon the filing of the request, the clerk is required to issue a writ. The writ is to contain all of the information in the request, including the name and address of the judgment debtor, as well as the name and address of the person requesting the writ, and the date of issue.

Id. at 418, 681 A.2d at 524 (internal citations omitted).

creditor to "reach the assets of a judgment debtor in the hands of a third party, the garnishee."[30]

The Maryland Commercial Law Article authorizes the attachment proceeding.[31] Maryland courts' authority in attachment proceedings was based on a "special and limited statutory power"[32] for more than a century.[33] For this reason, courts have generally interpreted the wage garnishment statute narrowly, preferring to defer to the General Assembly when an attachment is not authorized by statute.[34] Numerous Maryland courts have addressed the general definition of attachable wages provided in the statute, even if none specifically considered whether tips should be deemed wages for the purposes of garnishment. When interpreting the statute, Maryland courts have endeavored to balance the often-conflicting interests of the debtor, the creditor, and the garnishee.

a. The Development of the Definition of Attachable Wages.—The Court of Appeals has generally limited wage garnishment to disposable wages, unless a statute authorized otherwise.[35] While wages are "all monetary remuneration paid to any employee for his employment,"[36] disposable wages are the amount of wages remaining after all deductions and exemptions required by law are applied.[37] An attachment serves as a lien against all "disposable wages" due when the at-

30. Northwestern Nat'l Ins. Co. v. Weatherall, Inc., 267 Md. 378, 384, 298 A.2d 1, 5 (1972).

31. MD. CODE ANN., COM. LAW II §§ 15-601 to -607 (2001); *see also* Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank, 297 Md. 691, 698-99, 467 A.2d 758, 762-63 (1983) (describing the history of Maryland's garnishment law).

32. Fico, Inc. v. Ghingher, 287 Md. 150, 159, 411 A.2d 430, 436 (1980) (internal quotation marks omitted) (citations omitted).

33. *See* Coward v. Dillinger, 56 Md. 59, 61 (1881) (explaining that "attachment proceedings must upon their face show affirmatively, that the requirements of the statute have been substantially complied with, otherwise the court issuing the attachment would be acting without jurisdiction, and the judgment thereupon rendered would be void").

34. *See* Mayor of Baltimore v. Hooper, 312 Md. 378, 380, 539 A.2d 1130, 1131 (1988) (explaining that the Court of Appeals' "historic pattern" has been to allow attachment only when the statute expressly authorizes it).

35. *See id.* at 387, 539 A.2d at 1135 (holding that allowances such as disability payments or similar benefits cannot be attached in part because there is no authorizing statute); *see also Hoffman Chevrolet*, 297 Md. at 697, 467 A.2d at 762 (explaining that a retirement check sent to the debtor's employer was not subject to garnishment because it did not represent an obligation the garnishee owed the debtor).

36. MD. CODE ANN., COM. LAW II § 15-601(c).

37. *Id.* § 15-601.1(a); *see also In re* Fishbein, 245 B.R. 36, 38 (Bankr. D. Md. 2000) (explaining that by "subjecting *disposable* wages to attachment, C.L. § 15-601.1(a) clarifies that the attachment calculation is to be applied only to funds that the debtor actually has in hand, as opposed to his or her 'gross' wages from which other deductions must be made").

tachment is served and continues to be so until the judgment is satisfied.[38]

In *United States v. Williams*,[39] the court further determined that federal military retirement pay constituted wages for purposes of enforcing wage garnishment.[40] The court found that Maryland law regarded wages as "compensation for services rendered" and that military retirement pay fell within this definition.[41] The court also explained that wages not actually due on the attachment date are not subject to attachment because "the employee's right to sue the garnishee has not matured."[42] Additionally, prior to 1979, the wage garnishment statute provided that only wages due at the time the writ was served could be attached.[43] This resulted in creditors having to issue a new writ of attachment for each pay period.[44] The General Assembly then amended the statute to include all wages that become due at the date of attachment.[45]

This amendment expanded the statute in two ways. First, the creditor now only has to file one writ of attachment because the attachment includes all wages "which become payable."[46] All wages that come into the garnishee's hands after the writ is served are garnishable until the judgment is satisfied.[47] Second, by including wages that "become due" at the date the writ was issued, the garnishee now must attach the wages in its possession as soon as the writ is issued, even in instances where a debtor appeals the judgment.[48] By requiring the garnishee to hold the debtor's assets during the time period the judgment is on appeal, the attachment prevents "the garnishee from prematurely disposing of any of the judgment debtor's assets."[49]

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38. MD. CODE ANN., COM. LAW II § 15-602(a); *see also id.* § 15-604 (providing that the attachment ends if the employee is dismissed or has resigned and is not reinstated within 90 days).

39. 279 Md. 673, 370 A.2d 1134 (1977).

40. *Id.* at 678, 370 A.2d at 1137.

41. *Id.*

42. *Id.* (citations omitted).

43. MD. CODE ANN., COM. LAW § 15-602(a)(1975); Fico, Inc. v. Ghinger, 287 Md. 150, 161 n.6, 411 A.2d 430, 437 n.6 (1980).

44. MD. CODE ANN., COM. LAW § 15-602(a); *see also* Cox v. Gen. Elec. Credit Corp. (*In re* Cox), 10 B.R. 268, 270 (Bankr. D. Md. 1981) (discussing the old and new wage garnishment statutory schemes).

45. MD. CODE ANN., COM. LAW II § 15-602 (2001).

46. *Id.* § 15-602(a).

47. *Id.*; *see also* Lewis v. State Employee Credit Union (*In re* Lewis), 116 B.R. 54, 56 (Bankr. D. Md. 1990) (describing how the statutory change allowed for a "continuing lien").

48. *See Fico*, 287 Md. at 162 n.6, 411 A.2d at 437 n.6.

49. *Id.* at 162, 411 A.2d at 437.

In 1982, the Court of Appeals decided two garnishment cases on the same day. Both upheld the principle that attachments were proper only when the garnishment statute expressly authorized garnishment. In *Mass Transit Administration v. Household Finance Corp.*,[50] the Court of Appeals found that an MTA employee's wages were not subject to garnishment by a federal creditor under the longstanding policy that public officials were not subject to garnishment proceedings.[51] Likewise, in *Mayor of Baltimore v. Comptroller of the Treasury*,[52] the court found that the Comptroller could not attach a City of Baltimore employee's wages for the same reason.[53] The court explained that the wage garnishment statute did not provide such "special authorization."[54] Consequently, because "[t]he historic pattern has been one of exclusion by construction in the absence of clear statutory inclusion," the wage attachment sought by the Comptroller was invalid.[55]

In response to these decisions, the General Assembly amended the statute in 1982 to broaden the scope of garnishable wages to include wages paid by the state or a political subdivision.[56] In *Mayor of Baltimore v. Hooper*, a case subsequent to the 1982 amendment, the court explained how the General Assembly "got the message" from *Mass Transit* and *Mayor of Baltimore v. Comptroller of the Treasury*[57] and amended the statute to include government entities.[58] The *Hooper* court then declined to find that disability payments paid by the city

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50. 292 Md. 313, 439 A.2d 1104 (1982).

51. *Id.* at 318, 439 A.2d at 1107.

52. 292 Md. 293, 439 A.2d 1095 (1982).

53. *Id.* at 311, 439 A.2d at 1104. The court explained that this policy had been established in 1855 in *Baltimore v. Root*:

> Great public inconvenience would ensue if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment and trouble that would ensue from being stopped in the routine of their business, compelled to appear in court, employ counsel, and answer interrogatories, as well as take care that the proceedings are regularly carried on, and bail to return duly given. If a precedent of this kind were set there seems no reason why the State or county treasurer, or other fiscal officers of the commonwealth, or of municipal bodies, may not be subjected to the levying of attachments, which has never been attempted nor supposed to come within the attachment law. We do not, therefore, think this is such a debt as is contemplated by that law.

Id. at 299, 439 A.2d at 1098 (quoting Baltimore v. Root, 8 Md. 95, 101 (1855)).

54. *Id.* at 311, 439 A.2d at 1104.

55. *Id.*

56. MD. CODE ANN., COM. LAW II § 15-607 (2001).

57. Mayor of Baltimore v. Hooper, 312 Md. 378, 382, 539 A.2d 1130, 1132 (1988).

58. *See id.* at 382 n.1, 539 A.2d at 1132 n.1. The court cited a letter by counsel for the House Judiciary Committee explaining that the attachment mechanism did not reach wages paid by government entities, and that amending the statute "might be the answer." *Id.* In this way, the court emphasized how the legislature understood that it was up to it, not the court, to expand the wage garnishment statute.

were subject to attachment because the statute did not expressly include disability payments in its definition of wages.[59]

In *In re Lewis*,[60] the United States Bankruptcy Court for the District of Maryland distinguished between payable and earned wages, finding that attachment occurs when wages are payable to the employee and not at the time the wages are earned.[61] The *Lewis* court explained that when the General Assembly amended the statute in 1982 it replaced "actually due" with "payable" and "which become payable."[62] The court found "payable" to be a more precise term because "it describes a particular moment, generally payday; and it focuses not on whether the wage obligation is owed, but whether there is a right to immediate payment of the obligation."[63] Similarly, in *In re Smoot*,[64] the bankruptcy court defined wages for the purpose of wage garnishment as an amount the debtor is "entitled" to receive.[65]

In conclusion, Maryland courts have consistently deferred to the General Assembly as it defined, explained, and clarified the wage garnishment statute. The courts developed a definition of wages for the purposes of wage garnishment that focused on the moment the employee was paid to determine what amount the employee was entitled to receive. Any other method was deemed "imprecise" because the employee's right to payment has not matured.

b. Defining Tips as Wages in Other Contexts.—In Maryland, whether tips are considered wages depends on the context. For the purposes of workers' compensation and unemployment insurance, tips are wages.[66] Maryland courts have explained that the statute includes tips and other payments such as room and board because its purpose is to protect workers.[67] By including tips as wages, the total

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59. *Id.* at 385-87, 539 A.2d at 1134-35.

60. 116 B.R. 54 (Bankr. D. Md. 1990).

61. *Id.* at 57; *see also* Cox v. Gen. Elec. Credit Corp. (*In re* Cox), 10 B.R. 268, 270 (Bankr. D. Md. 1981) (explaining that the transfer of wages garnished pursuant to a writ of garnishment cannot occur until the judgment debtor has earned the wages to be garnished).

62. *In re Lewis*, 116 B.R. at 56; *see also* MD. CODE ANN., COM. LAW II § 15-602 (2001).

63. *In re Lewis*, 116 B.R. at 56.

64. 237 B.R. 875 (Bankr. D. Md. 1999).

65. *Id.* at 880.

66. MD. CODE ANN., LAB. & EMPL. § 9-602(a)(2)(i) (2001).

67. *See* Westinghouse Elec. Corp. v. Callahan, 105 Md. App. 25, 36, 658 A.2d 1112, 1117 (1995) (explaining that tips are wages for the purposes of calculating unemployment benefits); *see also* Uninsured Employers' Fund v. Pennel, 133 Md. App. 279, 292, 754 A.2d 1120, 1127 (2000) (explaining that the purpose of workers' compensation is to protect the claimant and thus its provisions should be construed liberally to favor the employee).

benefit entitlement due the injured or unemployed worker is increased.[68]

Under the Wage Payment and Collection Act,[69] however, tips are not included when calculating the wages due an employee on termination of employment.[70] Rather, "wage" is defined as "all compensation that is due to an employee for employment."[71] Wage includes: "(i) a bonus; (ii) a commission; (iii) a fringe benefit; or (iv) any other remuneration *promised for service.*"[72] In *Whiting-Turner Contracting Co. v. Fitzpatrick*,[73] the Court of Appeals found that an employee was not entitled to a bonus offered by his employer in return for not resigning from the job.[74] The *Fitzpatrick* court explained that this list should be read to include payment "the employee was promised in exchange for his work."[75] The court emphasized that bonuses and commissions are properly included within the definition of wages if the employee negotiated for them as part of a total "compensation package."[76] Otherwise, the bonus "is merely a gift, a gratuity, revocable at any time before delivery."[77]

c. Balancing the Interests of the Debtor, Creditor, and the Garnishee.—Maryland courts have attempted to balance the interests of the garnishee, the judgment debtor, and the judgment creditor in wage garnishment proceedings.[78] By narrowly defining a garnishee's

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68. *See Pennel*, 133 Md. App. at 292, 754 A.2d at 1127.

69. MD. CODE ANN., LAB. & EMPL. § 3-505.

70. *See* Admiral Mortgage, Inc. v. Cooper, 357 Md. 533, 540, 745 A.2d 1026, 1029 (2000).

71. MD. CODE ANN., LAB. & EMPL. § 3-501.

72. *Id.* (emphasis added).

73. 366 Md. 295, 783 A.2d 667 (2001).

74. *Id.* at 299, 783 A.2d at 669.

75. *Id.* at 303, 783 A.2d at 671.

76. *Id.* at 306, 783 A.2d at 673.

77. *Id. See generally* Emmanuel S. Tipon & Martin J. McMahon, Annotation, *Validity, Construction, and Effect of State Laws Requiring Payment of Wages on Discharge of Employee Immediately or Within Specified Period*, 18 A.L.R. 5th 577, § 25(a)-(b) (2001) (describing how courts have reached different conclusions on whether tips are wages due to the terminated employee from the employer).

78. *See generally* Anderson v. Anderson, 285 Md. 515, 524-25, 404 A.2d 275, 280 (1979). Explaining that both the Maryland General Assembly and the United States Congress have limited wage garnishment, the *Anderson* court noted that one of the purposes when Congress enacted the Consumer Credit Protection Act was to "strike a balance between the needs of creditors, who favored liberal wage garnishment, and the needs of debtors, whose financial problems were leading to growing numbers of defaults, non-business bankruptcies and loss of jobs." *Id.* at 524, 404 A.2d at 280. The court explained that the more debtor friendly Maryland garnishment law applied because the Consumer Credit Protection Act established that "the statute which protects a greater amount of a debtor's earnings from garnishment will be controlling." *Id.* at 525, 404 A.2d at 280.

role in the wage garnishment process to only collect the amount of wages for which the employee-debtor could sue, Maryland courts have limited garnishees' liability.[79] This rule is designed to prevent the garnishee from being liable for more than the amount he owed his employee in salary in the first place.[80]

Maryland courts have also limited the garnishee's role in other ways. The garnishee, for example, is not expected to be a debt collector.[81] The garnishee is also not responsible to pay the creditor if other parties establish a superior right to the debtor's wages before the creditor does.[82] Furthermore, it is the creditor who carries the burden of establishing proof of the garnishee's liability.[83] A garnishee is also not required to volunteer information to the creditor beyond admitting or denying that it employs the debtor or that it has possession of the debtor's property.[84] These restrictions show the court's desire to limit the garnishee's role to that of a discrete "tool" responsible for no more than that of allowing a creditor to reach the debtor's assets.[85]

In addition to protecting the interests of the garnishee, Maryland courts have endeavored to protect the judgment debtor. In 1955, the Court of Appeals emphasized, in *Bendix Radio Corp. v. Hoy*,[86] that the wage garnishment statute should be interpreted in the debtor's

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79. Messall v. Suburban Trust Co., 244 Md. 502, 507-08, 224 A.2d 419, 421 (1966). In *Messall*, the court stated:

> There is nothing in the attachment law of this State to justify the conclusion that it was designed, by allowing garnishment to be made, to place the garnishee in a worse position, in reference to the rights and credits attached, than if he had been sued by the defendant. . . . Any other rule would, in many cases, work gross injustice, and might, moreover, be subject to great abuse.

Id. (quoting Farmers & Merchants Bank v. Franklin Bank, 31 Md. 404, 412-13 (1869)).

80. *Id.* at 508, 224 A.2d at 422 (citations omitted).

81. *Shanks*, 364 Md. at 544, 774 A.2d at 414 (stating that a garnishee is "under no obligation to collect anything from the judgment debtor, or anyone else, in order to satisfy a judgment").

82. Northwestern Nat'l Ins. Co. v. Weatherall, Inc., 267 Md. 378, 387, 298 A.2d 1, 7 (1972).

83. Parkville Fed. Sav. Bank v. Maryland Nat'l Bank, 343 Md. 412, 422, 681 A.2d 521, 526 (1996). In *Parkville*, the court held:

> A garnishee should not be required to engage in a questionable interpretation of a particular writ to determine whether the property of a particular judgment debtor is or is not to be garnished. The face of the writ should clearly and unambiguously identify any and all judgment debtors whose property is to be garnished. To hold otherwise would place an unfair burden on the garnishee.

Id.

84. Flat Iron Mac Assocs. v. Foley, 90 Md. App. 281, 297, 600 A.2d 1156, 1163 (1992).

85. *Weatherall*, 267 Md. at 384, 298 A.2d at 5.

86. 207 Md. 225, 114 A.2d 45 (1955).

favor.[87] The court quoted a 1929 decision stating that the "better and almost universal rule" is to favor the debtor "in order to advance the human purpose of preserving" the debtor's means of livelihood.[88] Twenty years later, in *United States v. Williams*, the Court of Appeals emphasized this policy again.[89]

Although Maryland courts and the General Assembly have worked to protect the debtor, they have also been mindful of the fact that the judgment creditor has a right to be paid. For this reason, a garnishee must hold the debtor's property once served with a writ of garnishment.[90] Failure to do so will result in the garnishee being liable to the creditor for the amount released.[91] In addition, the General Assembly has amended the wage garnishment statute several times to widen the scope of attachment.[92]

Maryland courts have been willing to tip the balance in favor of the creditor when the creditor is dependent upon another family member for support. In *Blum v. Blum*,[93] the Court of Appeals held that wage garnishment exemptions do not apply to court-ordered spousal or child support.[94] Although the court declined to consider whether spousal and child support liens constituted an attachment under of section 15-601.1 of the Commercial Law Article,[95] the *Blum* court's decision reflects an instance where the court privileged the creditor's rights (the ex-wife in this case) over the debtor's right to the exemptions. The *Blum* court followed the reasoning previously set forth in *United States v. Williams*, in which the court stated that the exemptions did not apply because the "underlying obligation is for

87. *Id.* at 232, 114 A.2d at 48.

88. *Id.* (quoting Hickman v. Hanover, 33 F.2d 873, 874 (4th Cir. 1929)).

89. *See* United States v. Williams, 279 Md. 673, 678, 370 A.2d 1134, 1137 (1977) (holding that "the very purpose of the statutory exemptions is to protect a family from being deprived of all support by attachment proceedings brought by an outsider").

90. Parkville Fed. Sav. Bank v. Maryland Nat'l Bank, 343 Md. 412, 419, 681 A.2d 521, 524 (1996).

91. Hunt Valley Masonry, Inc. v. Fred Maier Block, Inc., 108 Md. App. 100, 105, 671 A.2d 47, 49 (1996).

92. *See* Fico, Inc. v. Ghinger, 287 Md. 150, 161 n.6, 411 A.2d 430, 437 n.6 (1980) (explaining that the 1979 amendment to the wage garnishment statute expanded attachment to include wages that have not yet become due but will become due after the attachment date); Mayor of Baltimore v. Hooper, 312 Md. 378, 382-83, 539 A.2d 1130, 1132-33 (1988) (explaining the General Assembly's 1982 amendment allowing wages due from a political subdivision to be garnished).

93. 295 Md. 135, 453 A.2d 824 (1983).

94. *Id.* at 141-42, 453 A.2d at 828.

95. *Id.* at 142 n.4, 453 A.2d at 828 n.4.

intra-familial support and the very purpose of the statutory exemptions is to protect a family from being deprived of all support . . . ."[96]

In summary, Maryland courts have preferred to defer to the General Assembly when the wage garnishment statute does not explicitly authorize attachment. Under the general definition of attachable wages provided in the statute, Maryland courts have primarily focused on the date of payment to determine the amount of garnishable wages due. Balancing the often-conflicting interests of the debtor, the creditor, and the garnishee has often led Maryland courts to consider policy goals, such as easing administrative burdens on the garnishee and protecting debtors' livelihoods.

3. The Court's Reasoning.—In *Shanks v. Lowe*, the Court of Appeals held that tips and salary should be aggregated to determine the mandatory deductions under Maryland's wage garnishment law.[97] The court, however, included a caveat: Although a garnishee must aggregate tips and salary for the purposes of applying the exemption, a garnishee is not required to garnish tips that are not in its possession.[98] In so doing, the court introduced a new rule that requires garnishees to include tips when calculating an employee's total wages, but also reaffirmed the longstanding rule that a garnishee is only required to garnish wages or property in its possession.[99]

Judge Wilner, writing for the majority,[100] began the discussion by addressing the argument that its decision would result in a garnishee "paying over to the judgment creditor money that was never in its possession."[101] The court distinguished the garnishee's new responsibility of accounting for tips from its well-established obligation to only garnish wages in its possession.[102] The court explained that accounting for tips results only in establishing an aggregate wage against which the statutory exemptions would be applied.[103] Once the total is

96. United States v. Williams, 279 Md. 673, 678, 370 A.2d 1134, 1137 (1977).

97. *Shanks*, 364 Md. at 548, 774 A.2d at 417.

98. *Id.*

99. *Id.*

100. Chief Judge Bell and Judges Raker and Harrell joined Judge Wilner in the decision.

101. *Shanks*, 364 Md. at 543, 774 A.2d at 414.

102. *Id.* at 544, 774 A.2d at 414. Specifically, the court stated:

> A garnishee is under no obligation to collect anything from the judgment debtor, or anyone else, in order to satisfy a garnishment; nor is it responsible for turning over any funds or property of the judgment debtor that it does not have in its possession. It must report and, subject to allowable exemptions, withhold only property in, or coming into, its possession during the period covered by the writ.

Id.

103. *Id.* at 544, 774 A.2d at 414-15.

calculated, the garnishee's responsibility is to garnish the wages in its possession from the employee's salary.[104] The garnishee will not be responsible for garnishing tips.[105]

The effect of this rule is to raise the amount of total wages that are the basis for the calculation of the exemption.[106] Consequently, because fewer employees will fall below the exemption limit if tips are included as part of the total wage calculation, the court reasoned that this increases the likelihood that a judgment creditor will be paid by the judgment debtor.[107]

The court supported its decision to include tips in its definition of wages by examining the meaning and treatment of wages and tips in other statutes.[108] The court first noted that section 15-601(c) of the Commercial Law Article defines wages as "all monetary remuneration paid to any employee for his employment" for the purposes of Maryland wage garnishment law.[109] Finding no legislative history or intent to either limit or extend this general definition to tips, the court ex-

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104. *Id.*, 774 A.2d at 414.

105. *Id.* The majority declined to consider whether the garnishee should garnish tips in its possession left on credit cards because the issue was not raised. *Id.* at 544 n.3, 774 A.2d at 415 n.3.

106. *See id.* at 544, 774 A.2d at 414.

107. *See id.* at 548, 774 A.2d at 416-17. Examining the waitress's situation in this case makes this point clear. If tips are not included as part of her total wages, Dolle's total wages do not exceed the exemption limit provided by the statute. Thus, her salary would not be garnished. If tips are included as part of her total wages, however, she exceeds the exemption limit; her salary from Kibby's would then be garnished. If the garnishment calculation exceeds her salary from Kibby's, the restaurant is obligated to garnish only up to the amount it would have paid out to her and no more. As a result, Shanks, the judgment creditor, collects at least a portion of what she is entitled to receive from Dolle, the judgment debtor. *See id.* at 544, 774 A.2d at 414-15.

108. *Id.* at 545-47, 774 A.2d at 415-16. The court relied heavily on a Colorado opinion regarding this same issue. *Id.* at 547-48, 774 A.2d at 416-17 (citing United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d 638 (Colo. 1996) (holding that "tips" constitute earnings for the purposes of wage garnishment)). The court followed the Colorado court's reasoning closely and seemed particularly persuaded by the Colorado court's policy reasons for its decision, concurring in its conclusion that "a contrary holding would present an unjustifiable unfairness to judgment creditors." *Shanks*, 364 Md. at 548, 774 A.2d at 416-17. The Colorado court explained that "a judgment creditor garnishing the wages of an employee whose earnings included tips would not be able to collect on a judgment to the same extent as a judgment creditor of an employee earning the same salary but with no tips." *Dimmick*, 916 P.2d at 641.

109. *Shanks*, 364 Md. at 544, 774 A.2d at 415; MD. CODE ANN., COM. LAW II § 15-601(c) (2001).

amined wage and hour laws,[110] unemployment insurance and workers' compensation laws,[111] and income tax laws.[112]

In each instance, the court found that tips were regarded as wages unless provided otherwise.[113] The court reasoned that the definition of wages in section 15-601 was broad enough to include tips because the General Assembly would have made it clear if the scope of the statute was intended to be limited to periodic payments.[114]

Judge Eldridge filed a dissenting opinion, in which Judges Battaglia and Cathell joined.[115] He argued that the majority's decision was "unsound and contrary to previous opinions by this Court."[116] Judge Eldridge refused to accept the majority's conclusion that its new rule of including tips within the definition of wages did not conflict with the longstanding rule that a garnishee is only required to garnish wages in its possession.[117] Rather, he argued that the method to calculate the garnishment amount rested solely on the amount "which presently is, or in the future will be, *in the hands of the garnishee.*"[118]

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110. *Shanks*, 364 Md. at 545-46, 774 A.2d at 415. The court examined the portion of the Maryland Labor and Employment Article that requires employers to pay employees the minimum wage. *Id.*; *see* MD. CODE ANN., LAB. & EMPL. § 3-413(1) (2001). Section 3-401(e) defines "wage" as "all compensation that is due to an employee for employment," a definition, the court found, that is similar to the definition of wages found in the wage garnishment statute. *Shanks*, 364 Md. at 545, 774 A.2d at 415; *see also* MD. CODE ANN., COM. LAW II § 15-601(c) (defining wages as "all monetary remuneration paid to any employee for his employment"). The court then noted that section 3-419 includes tips as wages for the purposes of federal minimum wage laws. *Shanks*, 364 Md. at 545, 774 A.2d at 415.

111. *Shanks*, 364 Md. at 546, 774 A.2d at 415-16. The court explained that section 8-101(w) of the Labor and Employment Article defined wages to include tips for the purposes of calculating unemployment benefits. *Id.* The court then pointed to section 9-602(a)(2)(i) of the Labor and Employment Article, which includes tips as part of the average weekly wage for the purposes of calculating workers' compensation benefits. *Id.* at 546, 774 A.2d at 416.

112. *Id.* at 546-47, 774 A.2d at 416. The court noted that tips are included for the purposes of calculating state and federal income tax. *Id.* at 546, 774 A.2d at 416; *see also* I.R.C. § 61 (2001) (defining gross income to include tips for income tax purposes); *id.* § 6053(a) (providing that employees "shall report all such tips in one or more written statements furnished to his employer on or before the 10th day following such month" for income tax purposes).

113. *Shanks*, 364 Md. at 547, 774 A.2d at 416.

114. *Id.*

115. *Id.* at 549-54, 774 A.2d at 417-20 (Eldridge, J., dissenting).

116. *Id.* at 549, 774 A.2d at 417.

117. *Id.* at 549-50, 774 A.2d at 417-18.

118. *Id.* at 551, 774 A.2d at 418. Judge Eldridge maintained:

> The majority cites to no Maryland cases, and there are none of which I am aware, that have upheld a garnishment with regard to property that is not in the hands of the garnishee and will not come into the hands of the garnishee. Today's decision is the first to sustain a garnishment involving money or property that is not, and never will be, in the possession of the garnishee.

Furthermore, Judge Eldridge disputed the majority's analogy between the wage garnishment statute and several other Maryland statutes, including wage and hour laws, unemployment insurance and workers' compensation laws, and state and federal income tax laws.[119] He did not dispute the fact that tips are wages for the purposes of wage and hours laws; rather, he found the analogy not applicable in the context of wage garnishment.[120] Judge Eldridge maintained that a wage garnishment proceeding is "plainly different" because, unlike the tax and benefit collection purposes of wage and hour and income tax laws, wage garnishment is a "tool" that a judgment creditor can use to reach the judgment debtor's assets that are possessed by the garnishee, a third party.[121]

According to Judge Eldridge, garnishment should therefore be focused on the wages in the garnishee's possession, rather than the total amount of wages a debtor earns.[122] He asserted that Maryland courts have repeatedly stated that it is the garnishee's *liability* to the judgment creditor that is at issue in a garnishment proceeding.[123] The courts have done so because the garnishee, not the debtor, is responsible for the garnishment.[124]

Judge Eldridge also disagreed with the majority for policy reasons, stating that the General Assembly created the wage garnishment

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Id. at 551, 774 A.2d at 419.

119. *Id.* at 551-52, 774 A.2d at 419.

120. *Id.* at 552, 774 A.2d at 419.

121. *Id.* (quoting, in part, Northwestern Nat'l Ins. Co. v. Weatherall, Inc., 267 Md. 378, 384, 298 A.2d 1, 5 (1972)). Judge Eldridge also maintained that the fact that the General Assembly included tips in the statutes cited by the majority undercut the majority's argument. *Id.* The statutes including tips show that the General Assembly would have included tips within the definition of wages for the purposes of garnishment if it intended for them to be included. *Id.*

122. *Id.* at 552-53, 774 A.2d at 419. Judge Eldridge found the majority's decision to consider wages outside of the wages in the garnishee's possession to have "troubling" implications. *Id.* at 553, 774 A.2d at 419. For example, he argued that "[u]nder the Court's reasoning, if an individual works two part-time jobs . . . neither of which pays a wage rising above the exemption amount, the wages could be aggregated for the purpose of garnishment." *Id.*

123. *Id.* at 549, 774 A.2d at 417.

124. *Id.* Judge Eldridge wrote:

> The opinions of this Court have accordingly emphasized the principle that the creditor merely steps into the shoes of the debtor and can only recover to the same extent as could the debtor.
>
> . . . .
>
> In the instant case, the debtor-employee could not maintain an action against the garnishee-employer for payment of these tips because the employer is not liable to the employee for cash tips paid directly to the employee by her customers.

Id. at 549-50, 774 A.2d at 417-18.

proceeding "in favor of the employee."[125] He first maintained that the exemptions in the wage garnishment law itself "embod[y] a compromise to accommodate both the principle that a debtor should not abandon his or her obligations and the principle that a debtor should not be deprived of every means of obtaining life's necessities."[126] He then argued that the court in the past followed the principle that statutes creating exemptions do so to protect persons least able to protect themselves and thus should be given "a liberal and not a technical construction."[127]

Finally, Judge Eldridge argued that the court has historically declined to uphold garnishments not explicitly authorized by statute.[128] Rather than imposing its own "notions of fairness" onto the statute, Judge Eldridge maintained that the court should refrain from "engag[ing] in judicial legislation" and defer to the General Assembly's resolution of the issue.[129]

4. Analysis.—In *Shanks*, the Court of Appeals moved the focus of wage garnishment law from an evaluation of the garnishee's liability to an assessment of the debtor's liability by requiring the garnishee to include tips in its calculation of total wages.[130] This signals a significant departure from the established wage garnishment law. While this departure from precedent may be compelling in addressing what appears to be a loophole in wage garnishment law,[131] the court did not

125. *Id.* at 552, 774 A.2d at 419.

126. *Id.* (citation omitted).

127. *Id.* at 553, 774 A.2d at 420 (quoting Wilmer v. Mann, 121 Md. 239, 248, 88 A. 222, 225 (1913)).

128. *Id.*

129. *Id.* at 554, 774 A.2d at 420.

130. *Shanks*, 364 Md. at 548, 774 A.2d at 417.

131. Although courts are mindful of the creditor's interest in repayment, Professor Letsou argues that regulations over the past several decades have restricted the creditor's ability to acquire property from defaulting debtors. Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 590 (1995). The Federal Trade Commission's Credit Practices Rule, for example, limits consumer borrowers from using contractual devices to ease creditor access to remedies such as wage garnishment if they default. *Id.* at 606. Professor Letsou maintains that such restrictions harm consumers who repay their loans. *Id.* at 641. These consumers would pay less for credit if creditors had greater ability to collect from consumers who default on their loans. *Id.* Further, for example, in an article in the *Daily Record* about the ruling, Ronald Abramson, an attorney from Wolpoff & Abramson ("one of the largest debt collection firms in the state") called the decision "fantastic." Earl Kelly, *Divided Court of Appeals Says Tips Are Wages Under Garnishment Law*, DAILY REC., June 26, 2001, at 1C. He explained that many employees in the restaurant industry are young people who "tend to live with a higher margin of debt" and that much of their income comes from tips. *Id.* But see *In re Smoot*, where the bankruptcy court seemed to suggest that the statute itself addressed such loopholes by noting that the "treatment of wage attachments apart from the general exemptions prevents a debtor from con-

give due attention to how the new rule might increase a garnishee's administrative burden by both blurring a well-established, bright-line rule and complicating the garnishment proceeding. Furthermore, the court did not address the new rule's potential to open up the garnishee to increased liability for tips that do come into its possession, such as tips left on credit cards.[132] Consequently, the issue of whether tips count as wages for garnishment purposes should have been left to the General Assembly, as it is in a better position to evaluate and address the problem, especially because in the past the court has deferred to the Assembly on garnishment matters.[133]

a. A Departure from Precedent.—The Court of Appeals distinguished between a garnishee's duty to *calculate* an employee's total wages for the purposes of garnishment and its duty to *garnish* the actual wages in its possession.[134] This distinction allowed the court to accomplish two things. First, by requiring garnishees to include tips when calculating an employee's total wages, the court introduced a new method to obtain a more accurate figure to determine a debtor's ability to pay off a judgment. Second, by reaffirming the longstanding rule that a garnishee is only required to garnish wages in its possession, the court also attempted to protect the garnishee from being liable for more than the wages in its actual possession.[135]

In holding that a garnishee is responsible for including tips in the calculation of total wages, however, the *Shanks* court changed the nature of the garnishment proceeding itself. Before *Shanks*, the purpose of the garnishment proceeding was "to determine whether the gar-

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tinually claiming the full amount of wages as exempt upon each garnishment. Such a practice would effectively defeat a judgment-creditor's ability to realize the benefits of the wage garnishment [process] and thereby nullify the remedy." 237 B.R. 875, 880 (Bankr. D. Md. 1999).

132. *Shanks*, 364 Md. at 544 n.3, 774 A.2d at 415 n.3. The majority noted this issue but declined to address it as it was not raised in the underlying case. *Id.*

133. *Id.* at 554, 774 A.2d at 420 (Eldridge, J., dissenting). Judge Eldridge noted that the court has "consistently refused to uphold garnishments which were not specifically authorized by statutory provisions and rules." *Id.* at 553, 774 A.2d at 420.

134. *Shanks*, 364 Md. at 544, 774 A.2d at 414.

135. *Id.* at 548, 774 A.2d at 417; *cf.* Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc., 139 Md. App. 277, 294, 775 A.2d 458, 468 (2001). In *Bragunier*, the court stated:

> For this reason, in a garnishment proceeding, the rights of the plaintiff/judgment creditor against the defendant/garnishee, cannot rise above the rights of the judgment debtor:
>
> > The liability of the garnishee to the attaching creditor in respect of property or credits in his hands is determined ordinarily by what his accountability to the debtor would be if the debtor were in fact suing him.

Id. (quoting, in part, Messall v. Suburban Trust Co., 244 Md. 502, 506, 224 A.2d 419, 421 (1966)).

nishee has any funds, property or credits which belong to the judgment debtor."[136] Described as a "tool," the purpose of wage garnishment was clear: It allowed a judgment creditor to reach a debtor's assets that were "in the hands of a third party, the garnishee."[137] As a result of the court's decision in *Shanks*, the nature of the proceeding has changed. Instead of simply focusing on the assets in its possession, a garnishee has an additional responsibility. It must now include tips as part of a total wages calculation, in effect determining how much the judgment debtor could potentially owe.[138]

The court's departure from precedent is puzzling because the Maryland courts have generally interpreted the wage garnishment statute narrowly in deference to the General Assembly.[139] As the *Fico* court explained, "[i]n Maryland, a court's authority in attachment proceedings is derived from a 'special and limited statutory power.'"[140] In *Mayor of Baltimore v. Hooper*, for example, the majority refused to find that attachments could reach city disability allowances unless authorized by statute.[141] The *Hooper* court further noted how the General Assembly "got the message" from a previous attachment case and subsequently amended the law when the court refused to allow the attachment.[142] Because the court in the past declined to authorize an attachment not specifically authorized by the statute, the *Shanks* court should also have interpreted the statute narrowly.

In addition, the *Shanks* court's understanding of wages is markedly different from the interpretation the court has applied to the term in the past. Maryland courts have emphasized that wages are limited to the amount the employee is entitled to receive.[143] *United States v. Williams* explained that wages not due on the attachment date

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136. Fico, Inc. v. Ghingher, 287 Md. 150, 159, 411 A.2d 430, 436 (1980). In his dissent in *Shanks*, Judge Eldridge maintained that the "opinions of this Court have accordingly emphasized the principle that the creditor merely steps into the shoes of the debtor and can only recover to the same extent as could the debtor." *Shanks*, 364 Md. at 549, 774 A.2d at 417 (Eldridge, J., dissenting). He then listed twelve cases following this rule. *Id.* at 551, 774 A.2d at 418-19.

137. *Shanks*, 364 Md. at 552, 774 A.2d at 419 (Eldridge, J., dissenting) (quoting Northwestern Nat'l Ins. Co. v. Weatherall, Inc., 267 Md. 378, 384, 298 A.2d 1, 5 (1972)).

138. *Shanks*, 364 Md. at 548, 774 A.2d at 417.

139. *See, e.g.*, Mayor of Baltimore v. Comptroller of the Treasury, 292 Md. 293, 311, 439 A.2d 1095, 1104 (1982) (explaining that "[t]he historic pattern has been one of exclusion by construction in the absence of clear statutory inclusion").

140. *Fico*, 287 Md. at 158-59, 411 A.2d at 436 (quoting Belcher v. Gov't Employees' Ins. Co., 282 Md. 718, 720, 387 A.2d 770, 772 (1978)).

141. Mayor of Baltimore v. Hooper, 312 Md. 378, 387, 539 A.2d 1130, 1135 (1988).

142. *Id.* at 382, 539 A.2d at 1132.

143. *See supra* notes 50-59 and accompanying text (reviewing how the Maryland courts have generally interpreted the wage garnishment statute narrowly).

were not subject to garnishment because the employee's right to sue his employer, the garnishee, did not yet mature.[144] In *In re Lewis*, the bankruptcy court relied on the fact that the General Assembly amended the statute in 1975 to replace "actually due" with "payable."[145] This change, according to the *Lewis* court, made the definition more "precise" because it described a specific moment in time—payday—rather than whether the obligation was owed.[146]

By focusing on the amount received by the employee on payday, Maryland courts limited the definition of wages for the purposes of garnishment to a "precise" amount that is easy for the garnishee to determine. The *Shanks* court, on the other hand, created a situation involving two levels of wages: the total wage amount determined by aggregating wages and tips, and the actual amount possessed by the garnishee. Furthermore, by including tips, the *Shanks* court included an amount that the employee is not entitled to receive from the employer.[147] This is contrary to how the Maryland courts have defined wages in the past.[148]

The court in the past also adopted a limited approach to favor the debtor on public policy grounds, reasoning that construing the statute narrowly allows more debtors to retain their wages and thus support their families.[149] Given that the General Assembly chose to

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144. 279 Md. 673, 678, 370 A.2d 1134, 1137 (1977). Additionally, the *Fico* court distinguished between a contingent interest, which could not be attached, and an unmatured interest, which could be attached. *Fico*, 287 Md. at 160, 411 A.2d at 436-37. A contingent interest, the court explained, "is one in which liability is not certain and absolute, but depends upon some independent event." *Id.*, 411 A.2d at 436. An unmatured interest, on the other hand, "exists when there is no question about the fact of the garnishee's liability." *Id.*, 411 A.2d at 437. Because tips are neither "certain" nor "absolute" and depend on the "independent" event of a patron deciding to leave a tip for service, they arguably meet the *Fico* court's definition of a contingent, and thus unattachable, interest.

145. 116 B.R. 54, 56 (Bankr. D. Md. 1990).

146. *Id.*

147. *Shanks*, 364 Md. at 550, 774 A.2d at 418 (Eldridge, J., dissenting). Customers, not employers, pay tips. Further, customers generally are not obligated to pay tips.

148. *See supra* notes 60-65 and accompanying text (explaining how Maryland courts have emphasized that wages are limited to the amount the employee is entitled to receive).

149. Bendix Radio Corp. v. Hoy, 207 Md. 225, 232, 114 A.2d 45, 48 (1955). In *Bendix*, the court explained:

> [T]he better and almost universal rule is that such statutes should receive a liberal construction in favor of the debtor in order to advance the human purpose of preserving to the unfortunate or improvident debtor or his family the means of obtaining a livelihood and prevent them from becoming a charge on the public.

Id. (quoting Hickman v. Hanover, 33 F.2d 873, 874 (4th Cir. 1929)); *see also Williams*, 279 Md. at 678, 370 A.2d at 1137 (noting that the "very purpose of the statutory exemptions is to protect a family from being deprived of all support by attachment proceedings brought by an outsider"). Indeed, when Congress passed the Consumer Credit Protection Act in 1970, it placed restrictions on wage garnishment proceedings based on the finding that the

widen the scope of wage garnishment law several times in favor of the creditor,[150] the majority could have rationalized its decision based on this established trend in public policy, but it failed to do so. The *Shanks* court instead relied on an out-of-state decision,[151] reasoning that the creditor's interest in including tips in the total wage calculation should be protected in the interest of fairness.[152] Without an imminent need for changing a well-established rule, the *Shanks* court should have read Maryland wage attachment law narrowly, especially because the General Assembly has shown its willingness to amend wage garnishment provisions in the past.

b. Increasing the Administrative Burden on the Garnishee.—In its efforts to protect the creditor's interests, the *Shanks* court may have ended up complicating the garnishment proceeding in a manner that unduly burdens garnishees.[153] Given that garnishees are innocent

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personal bankruptcy rate was significantly lower in states where wage garnishment was prohibited. *See* Annotation, *Validity, Construction, and Application of §§ 301-307 of Consumer Credit Protection Act (15 U.S.C. §§ 1671-1677) Placing Restrictions on Garnishment of Individual's Earnings*, 14 A.L.R. FED. 447, 449-50 (1973) (explaining that the House Report for the Act indicated how Congress perceived a close relationship between stricter state garnishment laws and personal bankruptcy by noting that, in states with stricter garnishment proceedings, the bankruptcy rate was 200-300 persons per 100,000, while the bankruptcy rate was 5-9 persons per 100,000 in states where garnishment was prohibited); *see also* Anderson v. Anderson, 285 Md. 515, 525, 404 A.2d 275, 281 (1979) (explaining that Maryland wage garnishment protects the debtor to a greater extent than the Federal Consumer Credit Protection Act and that "where a state and the federal government have both enacted provisions which limit garnishment of wages, the statute which protects a greater amount of a debtor's earnings from garnishment will be controlling").

150. *See supra* notes 56-58 and accompanying text (explaining the recent legislative action with respect to garnishment that had the effect of widening the scope of garnishable wages in favor of the judgment creditor).

151. *Shanks*, 364 Md. at 547-48, 774 A.2d at 416-17 (citing United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d 638 (Colo. 1996)).

152. *Id.* Interestingly, the *Shanks* court noted that the Colorado court crafted its decision to include aggregate tips as part of garnishable wages based on recent changes in the wage garnishment statute's legislative history. *Id.* The *Shanks* court could have done the same, but failed to do so.

153. *See* Letsou, *supra* note 131, at 602-04 (explaining that garnishees are often "hostile" toward the debtor-employee whose wages it must garnish because of the burdensome nature of the proceeding itself). Professor Letsou notes that the "employer is forced to bear much of the administrative cost of processing the garnishment orders. These costs can be substantial, as garnishment orders often require employers to make payroll adjustments on short notice." *Id.* at 603-04. According to Professor Letsou, "[t]he average cost to an employer of complying with a garnishment order has been estimated to be approximately $22." *Id.* at 604 n.45.

See also Wage Garnishments: How to Reduce the Nightmare, PAYROLL MANAGER'S REP., Nov. 1996, at 5 (providing a good example of how garnishment laws affect garnishees on a practical level and describing the complex issues garnishees face). The article begins bluntly: "Most payroll managers would agree: Garnishments are hellish. To make matters

third parties to the dispute between the creditor and debtor,[154] overburdening the garnishee seems especially unjust as Maryland courts have avoided placing unfair burdens on garnishees in the past.[155]

The court's ruling complicates the garnishment proceeding by making the garnishee responsible for both calculating the debtor's total wage and garnishing the wages it actually pays to the debtor. The garnishee will now have to distinguish for the creditor the amount of the debtor's tips in its possession, which may be from credit cards or a tipping pool, from the amount of total tips it was required to report.[156] Unless the garnishee is able to communicate to the creditor that the "total amount" calculated for the purposes of the exemptions is not necessarily the actual garnished amount, a creditor will rightly expect to receive the stated amount until the garnishee explains otherwise.

Although the majority maintained that this calculation is no different from the calculation the garnishee must provide to state and

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worse, the many new laws mean that your usual attention to detail will be stretched to the maximum as you incorporate them into the existing complexities." *Id.* The article then describes "troublesome areas" such as "calculating garnishment limits under the two minimum wage increases; withholding on defaulted student loans; prioritizing student loans with other garnishments; and handling department of motor vehicle (DMV) garnishments." *Id.*

154. *See* 6 AM JUR. 2D *Attachment and Garnishment* § 522 (1999) ("A garnishee is regarded as an innocent person owing money to another having possession of another's property.").

155. Parkville Fed. Sav. Bank v. Maryland Nat'l Bank, 343 Md. 412, 422, 681 A.2d 521, 526 (1996). The *Parkville* court makes it clear that the garnishee's role in interpreting the writ is limited:

> A garnishee should not be required to engage in a questionable interpretation of a particular writ to determine whether the property of a particular judgment debtor is or is not to be garnished. The face of the writ should clearly and unambiguously identify any and all judgment debtors whose property is to be garnished. To hold otherwise would place an unfair burden on the garnishee.

Id.

156. *See generally* THE MARYLAND INSTITUTE FOR CONTINUING PROFESSIONAL EDUCATION OF LAWYERS, INC., ENFORCING LIENS AND COLLECTING JUDGMENTS, at A-12 to A-21 (2000) (describing the administrative procedures required for wage garnishment). The current writ of attachment form in Maryland requires the garnishee to report the debtor's wages in the following manner: "The Defendant (name) _____ is employed by this Garnishee, and the rate or basis of pay is _____." *Id.* at A55-56. It is unclear whether the "rate or basis of pay" amount should reflect the new "total wage" amount now required by *Shanks*. Unless the creditor informs the garnishee that tips are to be included as the "rate or basis of pay," it is highly unlikely that the garnishee will be aware of a duty to do so as the form now stands. The form should be revised to provide a place for the garnishee to distinguish for the creditor the total wage amount and the actual amount in its possession after removing tips. Otherwise, if the "rate or basis of pay" is to reflect the new total wage amount, the garnishee will then be in the position of explaining to the creditor why the garnished amount is less than the reported total.

federal agencies for income tax withholding purposes,[157] calculating tips may also make a garnishee liable for the tips if the garnishee makes a mistake in its calculation, even if none of the tips were ever in the garnishee's possession.[158] As the *Parkville* court explained, a garnishee impounds its employee's assets in a way similar to a banking institution.[159] If a garnishee makes a mistake, the garnishee could be liable to either the employee-debtor or the creditor for that mistake just as a banking institution would be liable.[160] For this reason, the *Parkville* court held that it was up to the creditor, not the garnishee, to make sure that the information provided on the writ of garnishment was clearly communicated and correct.[161]

The *Parkville* court explained that the need for certainty was "critical given that a writ requires the garnishee to take positive action and impound assets owned by another party."[162] In this way, the court recognized the seriousness of the garnishee's position—the garnishee is, after all, impounding assets that its employee normally has a right to receive.[163] By placing the responsibility for certainty in the writ squarely on the creditor, the *Parkville* court protected the garnishee by making the creditor liable for any assets that might be mistakenly garnished.[164] The *Shanks* decision, on the other hand, places the burden for certainty of the total wages on the garnishee.[165]

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157. *Shanks*, 364 Md. at 546-47, 774 A.2d at 416. In addition to garnishing the debtor's wages, however, garnishees are also required to file monthly reports to the court showing the amount withheld and how it was calculated. PAUL V. NEIMEYER & LINDA M. RICHARDS, MARYLAND RULES COMMENTARY 402 (1984).

158. *See* Hunt Valley Masonry, Inc. v. Fred Maier Block, Inc., 108 Md. App. 100, 107, 671 A.2d 47, 50 (1996) (explaining how the court may enter a judgment against a garnishee if the garnishee fails to withhold the debtor's wages "as the law requires").

159. *Parkville*, 343 Md. at 422-423, 681 A.2d at 526. The court explained:

> A banking institution may be held liable for damages if it improperly impounds assets of parties not covered by a writ. Hence, if a banking institution incorrectly interprets an ambiguous writ of garnishment and, as a result, impounds assets owned by a party not actually covered by the writ, the banking institution may be liable for any resulting damages. At the same time, if the banking institution erroneously interprets an ambiguous writ of garnishment as not covering a party that turns out to be covered by the writ, and hence does not impound that party's assets, the bank could be liable to the judgment creditor.

Id. (citations omitted).

160. *Id.* at 422, 681 A.2d at 526.

161. *Id.*

162. *Id.*

163. An employer may be liable for treble damages and attorneys' fees for not paying wages owed to an employee. MD. CODE ANN., LAB. & EMPL. § 3-507.1 (2001).

164. *Parkville*, 343 Md. at 422-423, 681 A.2d at 526.

165. *Shanks*, 364 Md. at 548, 774 A.2d at 417.

Furthermore, requiring garnishees to include tips runs against the established test of a garnishee's liability—"whether the garnishee has in his hands funds, property or credits for which the debtor would himself have a right to sue."[166] Although an employee could sue for tips unlawfully withheld by his or her employer,[167] the employee generally does not have a right to sue for tips because the customer, not the employer, is the source of the tips.

By requiring the garnishee to calculate tips as part of the employee's total wages, the *Shanks* court increased the total amount for which a garnishee could be liable. If the garnishee makes a mistake in the calculation, he or she could be liable to either the creditor or the employee depending upon in whose favor the mistake was made.[168] Therefore, instead of being liable for the salary it had "in its hands" as in the past, the garnishee may be liable for that amount *plus* whatever tip amount it over- or under-reported on the garnishment. This result is directly contrary to the longstanding rule in Maryland wage garnishment law that a garnishee would not be put in a "worse position" than if he had been sued directly by his employee.[169]

Finally, the court's ruling also opens up the possibility that the garnishee's administrative burden will increase because the garnishee may become responsible for both calculating and garnishing any tips that come into its possession, such as tips left on credit cards.[170] Be-

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166. Northwestern Nat'l Ins. Co. v. Weatherall, Inc., 267 Md. 378, 385, 298 A.2d 1, 6 (1972) (citations omitted).

167. MD. CODE ANN., LAB. & EMPL. § 3-507.1.

168. For example, if the garnishee over-reports an employee's tips, the garnishee could end up being liable to the employee in two ways. First, it could put the employee over the statutory exemption limit when the employee had a statutory right to have her wages exempted from garnishment. Second, over-reporting tips would increase the total amount garnished from the employee's wages. The garnishee could then be liable to the employee for this excess amount, an amount beyond what was owed the employee in salary in the first place. On the other hand, if the garnishee under-reports an employee's tips, the garnishee could end up being liable to the creditor. An under-reported amount could put an employee under the exemption limit. This would deprive the creditor from reaching the portion of the employee's earnings he is entitled to by statute. Granted, the garnishee should not make mistakes when completing the wage garnishment form. However, including tips as part of the total wages calculation greatly increases the possibility for mistakes. For this reason, the current wage garnishment form should reflect the garnishee's new duty.

169. Messall v. Suburban Trust Co., 244 Md. 502, 507, 224 A.2d 419, 421 (1966).

170. *See supra* note 132 and accompanying text (explaining how the *Shanks* majority noted this possibility and declined to address it). Should the court later determine that tips in the possession of the garnishee are subject to attachment, it then can be said that it has departed entirely from the traditional rule. Because the amount that can be garnished is based on the "monetary obligation that the garnishee owes the debtor," including tips will alter the rule entirely. Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank, 297 Md. 691, 697, 467 A.2d 758, 761 (1983). Instead of the garnishee being liable for any

cause the garnishee will now be calculating the tips for the creditor as part of the debtor's total wages, it is probable that a diligent creditor will attempt to garnish all the tips that come into the garnishee's possession as well. Garnishees will then be faced with a double bind: either garnish the tips and risk suit by the debtor, or refuse, risking a lawsuit by the creditor. As a result, the garnishee, a "neutral party" to the conflict between the judgment creditor and debtor,[171] may now be exposed to an increased risk of litigation.

5. Conclusion.—In an effort to promote the interests of the judgment creditor, the Court of Appeals shifted the focus of wage garnishment law from the evaluation of a garnishee's liability to an assessment of the debtor's liability. The court did not give due attention to how this might increase a garnishee's administrative burden by both blurring a well-established, bright-line rule and complicating the garnishment proceeding. The traditional test of the garnishee's liability is whether it held "*in his hands*, the property of the debtor, for which the debtor would have the right to sue."[172] By requiring a garnishee to account for tips as part of the total wages calculation, the ruling in effect makes a garnishee liable for assets that are out of its hands. The ruling also increases the administrative burden on garnishees. As "the historic pattern" for Maryland courts has been "one of exclusion by construction in the absence of clear statutory inclusion,"[173] the *Shanks* court should have placed the ultimate decision on this issue in the hands of the General Assembly.

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wages in its possession for which the judgment debtor would have the right to sue, the garnishee would be liable for any wages in its possession period—regardless of whether it "owed" the amounts to the debtor or not.

171. 6 AM. JUR. 2D *Attachment and Garnishment* § 473 (1999) (citations omitted).

172. Bendix Radio Corp. v. Hoy, 207 Md. 225, 229, 114 A.2d 45, 47 (1955) (emphasis added).

173. Mayor of Baltimore v. Comptroller of the Treasury, 292 Md. 293, 311, 439 A.2d 1095, 1103 (1982).

III. CONSTITUTIONAL LAW

A. *In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard*

In *Frankel v. Board of Regents of the University of Maryland System*,[1] the Court of Appeals of Maryland addressed whether the Board of Regents's (the Board) student residency policy violated the equal protection rights of Maryland residents.[2] The Board's suspect policy treated financially independent and dependent students differently; independent students were allowed to use eight domiciliary factors to prove Maryland residency, while dependent students were forced to adopt the residency of the individual who provided the majority of their financial support.[3] After examining the historical development of Maryland's equal protection doctrine, the court concluded that this classification scheme should be reviewed under a rational basis standard.[4] Rather than applying the typically "toothless" rational basis standard, however, the court actually applied a heightened standard that is normally reserved for limited types of classifications.[5] Under this heightened standard, the court not only found that the policy had "little relation" to its intended objective, but also that it lacked the required "fair and substantial relation."[6] As a result, the court found the policy unconstitutional.[7] More importantly, however, the court expanded the use of the heightened standard by applying it to an economic classification for the first time. Unfortunately, the court did not place any parameters upon the application of the standard to economic classifications, which may prove problematic in the future. Regardless, the court's application of the heightened standard was appropriate, and the determination of the policy's unconstitutionality was proper.

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1. 361 Md. 298, 761 A.2d 324 (2000).

2. *Id.* at 301, 761 A.2d at 325.

3. *Id.* at 302-03, 761 A.2d at 326.

4. *Id.* at 315, 761 A.2d at 333.

5. *See id.*

6. *Id.* at 317-18, 761 A.2d at 334.

7. *Id.* at 312, 761 A.2d at 331. The court based its decision solely on its interpretation of Article 24 of the Maryland Declaration of Rights and did not address whether the policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 313 n.3, 761 A.2d at 332 n.3.

1. The Case.—

a. Policy Procedure to Determine Residency.—The University System of Maryland consists of eleven institutions, including the University of Maryland, College Park.[8] The Board sets forth the institutions' policies and regulations.[9] For the institutions in the system that charge differently for in-state and out-of-state residents, the Board enacted a policy for determining students' state residency.[10] The University of Maryland, College Park is one such institution with tuition charge differentials between "in-state" and "out-of-state" students, and is therefore subject to the policy.[11]

The policy delineates that the source of students' financial support classifies students as being either financially dependent or independent.[12] Once determined financially independent, students have the opportunity to prove bona fide state residence through the use of eight traditional domiciliary factors, such as place of residence, voter or motor vehicle registration, property ownership, driver's license, the state to which one pays income taxes, and the receipt of public assistance from a state or local government other than one in Maryland.[13] However, financially dependent students cannot use these factors.[14] The policy considers the residence of financially dependent students

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8. MD. CODE ANN., EDUC. § 12-101(b)(4) (2001).

9. *See id.* § 12-102(b) ("The government of the University System of Maryland is vested in the Board of Regents of the University System of Maryland."); *see also Frankel*, 361 Md. at 301-02, 761 A.2d at 325-26 (describing the rule-making powers of the Board of Regents).

10. *Frankel*, 361 Md. at 302, 761 A.2d at 326.

11. *Id.*

12. BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND SYSTEM, POLICY FOR STUDENT RESIDENCY CLASSIFICATION FOR ADMISSION, TUITION AND CHARGE-DIFFERENTIAL PURPOSES, at (III)(A)-(B) (1990). The policy states that a financially independent student is not a dependent for tax purposes, receives less than one-half of his or her support "from any other person or persons," and "demonstrates that he or she provides through self-support one-half or more of his or her total expenses." *Id.* at (III)(B). The initial inquiry into a student's residency status is made by the University at the time a student's application for admission is under consideration. *Id.* at (II)(A)(1). If the student's circumstances change or the student is not satisfied with the initial classification, the student can request a re-evaluation of his or her residency status. *Id.* at (II)(B). If after the re-evaluation the student is still dissatisfied, the student may file a written appeal with the Residency Review Committee. *Id.* at (II)(B)(2).

13. *Frankel*, 361 Md. at 302, 761 A.2d at 326; *see also* BOARD OF REGENTS, *supra* note 12, at (I)(A)(1)-(8).

14. *See* BOARD OF REGENTS, *supra* note 12, at (I)(A). Defined under the policy, a "financially dependent student" is "one who is claimed as a dependent for tax purposes, or who receives more than one-half of his or her support from a parent, legal guardian, or spouse during the twelve (12) month period immediately prior to the last published date for registration for the semester or session." *Id.* at (III)(A).

as that of the individual or individuals providing the majority of the student's financial support.[15]

b. Frankel's Case.—Jeremy Frankel was born and lived in Maryland for fourteen years before moving to Rhode Island when his parents divorced.[16] At age seventeen, Frankel returned to Maryland to attend the University of Maryland, College Park. Frankel's mother continued to reside in Rhode Island while his father lived in Washington, D.C. During his four years of attendance at the University, Frankel lived year-round in Maryland, registered as a Maryland voter, possessed a Maryland driver's license, worked part-time, and paid income tax on employment wages to the State of Maryland. Although it was not clear how much support Frankel received from his parents, he did, at the very least, receive over one-half of his support from a joint Maryland bank account, owned by himself and his parents.[17]

During Frankel's first two years of attendance at the University, he paid the higher out-of-state tuition without challenge.[18] However, prior to the start of the Fall 1996 semester, Frankel, claiming to be a financially independent, permanent resident of the State of Maryland, requested a reclassification of residency status. Frankel's reclassification request was denied. Frankel appealed the decision to the "Residency Classification Office," which classified Frankel as financially

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15. *Id.* at (I)(C). In *Frankel*, Judge Eldridge also discussed a discrepancy within the policy between the definitions of "financially dependent" and "financially independent." *Frankel*, 361 Md. at 303 n.2, 761 A.2d at 327 n.2. The definition for a financially dependent student refers to one "who receives more than one-half of his or her support from a *parent, legal guardian, or spouse*," *id.* (quoting BOARD OF REGENTS, *supra* note 12, at (III)(A)), whereas a financially independent student is defined as one who receives less than one-half of his or her financial support "from *any other person or persons*." *Id.* (alteration in original) (quoting BOARD OF REGENTS, *supra* note 12, at (III)(B)). Yet, Justice Eldridge continued:

> Despite the discrepancy, the record discloses that a student who cannot prove financial independence, as defined in the Policy, will automatically be deemed financially dependent. Thus, a student who receives one-half or more of his or her support from any other person or persons, regardless of whether such persons are parents, legal guardians, or a spouse, will be deemed financially dependent and will be deemed to have the residence of such other persons.

Id. Additionally, a well-settled twelve-month durational residency requirement is imposed. *Id.* at 303, 761 A.2d at 326-27; *see also* BOARD OF REGENTS, *supra* note 12, at (I)(B). For cases discussing the reasonableness of similar durational residency requirements, see *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (stating that a durational residency requirement is valid so long as it is reasonable); *Kirk v. Bd. of Regents of Univ. of California*, 78 Cal. Rptr. 260, 269-70 (Cal. Ct. App. 1969), *appeal dismissed*, 396 U.S. 554 (1970) (holding that a one-year residency requirement set by the California Board of Regents was not unconstitutional on its face or in its application).

16. *Frankel*, 361 Md. at 304, 761 A.2d at 327.

17. *Id.*

18. *Id.* at 305, 761 A.2d at 327.

dependent and denied him in-state status because of his failure to demonstrate that he financed at least one-half of his total expenses. Frankel submitted bank documents, copies of income tax returns, his driver's license, and his voters registration card to the "Residency Review Committee" in his final appeal disputing his out-of-state residency classification. Regardless of these domiciliary factors, because he was determined financially dependent upon his parents who lived out-of-state, Frankel remained classified as a nonresident, and his appeal was denied.[19]

Exhausting his administrative remedies, Frankel and his father filed a complaint for declaratory judgment in the Circuit Court for Montgomery County alleging that Frankel was financially independent and was entitled to in-state tuition under the policy, and that Frankel's due process and equal protection rights were violated because of the policy's nonresidency presumption based on financial dependency.[20] The Board filed a motion to dismiss, or in the alternative, for summary judgment. Frankel filed a cross-motion for summary judgment.[21]

The circuit court granted summary judgment in favor of the Board, declaring that the "financially dependent" classification was not "arbitrary and capricious, illegal, or unreasonable."[22] Further, the court found that the policy violated neither due process nor Frankel's right to equal protection because there is a rational basis for treating financially dependent and independent students differently when determining residency.[23] The Frankels appealed the decision, and the Court of Special Appeals affirmed the circuit court's judgment.[24] Jeremy Frankel then filed a petition for certiorari to the Court of Appeals,[25] pleading that the policy's distinction of financial independence violated his right to due process and equal protection under both Maryland and federal law.[26] The Court of Appeals granted certiorari to consider whether a classification based upon a

19. *Id.*

20. *Id.*, 761 A.2d at 328. The complaint named the Board of Regents and the President of the University of Maryland, College Park as defendants. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 304-05, 761 A.2d at 328.

24. *Id.* at 306, 761 A.2d at 328.

25. *Id.*

26. *Id.* at 310, 761 A.2d at 330.

student's economic status violated that student's due process and equal protection guarantees under federal and Maryland law.[27]

2. *Legal Background.*—Despite not expressly conveying an equal protection principle, it is well-settled in Maryland that Article 24 of the Maryland Declaration of Rights[28] embodies the concept of equal protection.[29] Furthermore, Maryland's equal protection analysis is analogous to that established and developed by the Equal Protection Clause of the Fourteenth Amendment.[30] However, Maryland's guarantees are independent and fully capable of a divergent application.[31]

a. The Federal Equal Protection Analysis.—The Fourteenth Amendment's Equal Protection Clause ensures that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[32] The Supreme Court has developed three differing approaches for determining whether government action violates the Equal Protection Clause: strict, intermediate, and rational basis scrutinies.[33]

Strict scrutiny, the highest level of scrutiny, is applied to government classifications that allegedly burden a "suspect class," or infringe

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27. *Id.* at 306, 761 A.2d at 328. After the Court of Appeals granted certiorari, the defendants filed a motion to dismiss arguing a lack of standing. *Id.* The Court of Appeals deferred action and addressed the motion in their opinion. *Id.* at 306-10, 761 A.2d at 328-30.

28. MD. DECL. OF RTS. art. 24. Article 24 states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." *Id.*

29. *See, e.g.*, Renko v. McLean, 346 Md. 464, 482, 697 A.2d 468, 477 (1997) (stating that Article 24 supports the concept of equal protection even though it does not expressly state it).

30. *See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 353-54, 601 A.2d 102, 107-08 (1992) (describing how Article 24, although independent from the federal Equal Protection Clause, has consistently been applied in the same way as the federal Equal Protection Clause).

31. *See, e.g.*, Verzi v. Baltimore County, 333 Md. 411, 417, 635 A.2d 967, 970 (1994) (stating that the Maryland Court of Appeals has "consistently recognized that the federal Equal Protection Clause and the Article 24 guarantee of equal protection of the laws are complementary but independent"); Kirsch v. Prince George's County, 331 Md. 89, 97, 626 A.2d 372, 376, *cert. denied*, 510 U.S. 1011 (1993) (stating that "the two provisions [the Fourteenth Amendment's Equal Protection Clause and Article 24] are independent of one another, and a violation of one is not necessarily a violation of the other").

32. U.S. CONST. amend. XIV, § 1.

33. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985) (describing the well-settled framework for equal protection analysis involving three levels of scrutiny with increasingly demanding requirements that must be satisfied if a classification is to survive a constitutional challenge).

upon a "fundamental right."[34] These "suspect classes" include race, alienage, and national origin.[35] "Fundamental rights" include, among others, the right to vote, the right to access the courts, the right to interstate travel, and the right to privacy.[36] The Court closely scrutinizes these classifications and rights because they are rarely relevant to achieving a legitimate state interest and typically prejudice an innocent class.[37] Moreover, these classifications are unlikely to be cured through the legislative process because they are directed at minority groups who have a history of political powerlessness.[38] "[T]hese laws . . . will be sustained only if they are narrowly tailored to serve a compelling state interest."[39]

An intermediate level of scrutiny has also been developed for gender and illegitimacy classifications.[40] This intermediate scrutiny requires that classifications serve "important governmental objectives" and be "substantially related" to achieving those objectives.[41] These classifications are given a heightened scrutiny because the Court has

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34. *Id.* at 440 (explaining that race, alienage, and national origin receive the strictest scrutiny because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that . . . these laws . . . will be sustained only if they are suitably tailored to serve a compelling state interest"). In addition to those rights set forth in the Bill of Rights, the Supreme Court has held that "fundamental rights" include the right to vote, the right of access to the courts, the right to interstate travel, and the right to privacy. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (affirming that the right to vote is fundamental); Lewis v. Casey, 518 U.S. 343, 348-55 (1996) (recognizing the right to court access); Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (holding that the right to travel or migrate interstate is constitutionally protected). The fundamental right to travel, however, applies only to domestic travel. Haig v. Agee, 453 U.S. 280, 306 (1981). The Supreme Court has held that international travel is not a fundamental right, and thus laws burdening such travel will be analyzed under rational basis scrutiny. *See id.* For additional examples of "fundamental rights," see *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to use contraceptives); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (right to marry); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (right to control the upbringing of one's own children); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (right to refuse medical treatment); *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (right to be free from government interference in choosing to have an abortion in limited circumstances).

35. *City of Cleburne*, 473 U.S. at 440.

36. *See supra* note 34 (listing and describing established fundamental rights).

37. *See City of Cleburne*, 473 U.S. at 440 (stating that "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

38. *See id.*

39. *Id.*

40. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications based on gender are subject to intermediate scrutiny); *see also* Lalli v. Lalli, 439 U.S. 259, 265-76 (1978) (applying an intermediate scrutiny analysis to an illegitimacy claim).

41. *Craig*, 429 U.S. at 197; *see also* Mills v. Habluetzel, 456 U.S. 91, 98-99 (1982) (deciding that classifications involving illegitimate children must be "substantially related to a legitimate state interest").

found that the basis for these classifications are often beyond a person's control and have no relation to one's ability to "participate in and contribute to society."[42]

Rational basis scrutiny is the lowest level of scrutiny and is predominantly applied to social and economic classifications.[43] Under this review, a classification is presumptively valid and remains so until the challenging party proves the classification is not "rationally related to a legitimate state interest."[44] Furthermore, the party attacking such a classification bears the burden of negating "every conceivable basis which might support it."[45]

In the mid-1980s, however, the Supreme Court developed a more strenuous rational basis review.[46] For example, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court set aside the presumptively valid rational basis analysis for a more stringent review in order to invalidate a legislative classification.[47] At issue was a zoning ordinance requiring only group homes for the mentally disabled to obtain a special operating permit. Other types of group homes were exempt from this requirement.[48] The Court first commented on the rational basis standard's characteristic presumption of legislative validity and the

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42. Mathews v. Lucas, 427 U.S. 495, 505 (1976); *see also* Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (holding that gender characteristics seldom relate to one's ability to contribute to society).

43. *See City of Cleburne*, 473 U.S. at 440 (finding that the states are given wide latitude in regulating social and economic matters); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (stating that local social and economic legislation is analyzed under the rational basis standard). For examples of other classifications where a rational basis review is applied, see *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (age); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (age); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (wealth); *Bowers v. Hardwick*, 478 U.S. 186, 190-196 (1986) (sexual orientation); *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (sexual orientation).

44. *City of Cleburne*, 473 U.S. at 440; *see also* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (holding that a challenged classification fails only if it is completely arbitrary).

45. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)); *see also* FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993).

46. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 60-65 (1982) (demonstrating the Court's application of a stricter rational basis review). For other mid-1980s decisions that demonstrate the Supreme Court's more strenuous application of the rational basis review, see *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

47. *City of Cleburne*, 473 U.S. at 450.

48. *Id.* at 447. Other group homes that the Court considered to be excluded from the ordinance included: apartment complexes, boarding and lodging houses, fraternity or sorority houses, dormitories, hospitals, sanitariums, nursing homes, private clubs, and fraternal orders. *Id.*

enormous latitude typically afforded state legislative classifications.[49] The Court then abruptly changed its tone and stated that the protections a rational basis analysis provide include preventing states from asserting attenuated goals or harming politically unpopular groups.[50] From this position, the Court explored the ordinance's relation to its proffered goals and determined that the permit requirement irrationally prejudiced the mentally disabled.[51]

Since *City of Cleburne*, the Supreme Court has clearly returned to historical form and now consistently applies the traditional and deferential rational basis standard. In *FCC v. Beach Communications, Inc.*, the Supreme Court applied the rational basis standard in upholding a cable television regulation.[52] The *Beach* Court expressed its intention to exhibit judicial restraint and grant legislative classifications their deservedly strong presumption of validity.[53] Further, the Court remarked that because legislatures are not required to articulate reasons for enacting legislation, it is irrelevant and unnecessary to explore the conceivable reasons for enacted classifications.[54] Consequently, today's federal rational basis test provides challenged classifications the luxury of presumptive validity and the safeguard that any basis may be used as support.[55]

b. Maryland's Rational Basis Standard.—

(1) Historical Development.—Since 1923, in *Havre de Grace v. Johnson*,[56] the Court of Appeals of Maryland has applied a slightly more stringent rational basis review than that applied under the federal equal protection scheme. At issue in *Havre de Grace* was a city ordinance prohibiting only nonresidents from operating automobile

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49. *Id.* at 439-40.

50. *Id.* at 446-47.

51. *Id.* at 449-50. The Court stated that although the mentally retarded suffer from disabilities not common to all, the record lacked a rational explanation as to why this "difference warrants a density regulation that others need not observe." *Id.* at 450. Further, the alleged aims of avoiding a concentrated population and street congestion failed to explain why residential facilities such as apartment complexes and fraternity or sorority houses could freely operate without a special permit. *Id.*

52. 508 U.S. 307, 317 (1993).

53. *Id.* at 314-15.

54. *Id.* at 315.

55. *See* Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127-28 (1999) (citing to the rational basis test as applied in *Beach Communications* and explaining that the Court has repeatedly held that certain classifications cannot "run afoul" of the Equal Protection Clause if they satisfy the rational basis test).

56. 143 Md. 601, 123 A. 65 (1923).

transportation-for-hire businesses on certain city streets.[57] The court found an equal protection violation after it applied a rational basis analysis and considered Havre de Grace's possible interests for enacting the ordinance: preserving order on public highways, protecting public highways from private interference, and ensuring the public peace, health, and general welfare.[58] The court would not accept that the differing treatment was reasonably or rationally related to the city's interests.[59] The court held that the more "probable view would be that it was intended to confer [a business] monopoly . . . upon residents of the town," which was clearly an unreasonable discrimination violating Marylanders' equal protection rights.[60] By investigating Havre de Grace's possible interests, rather than simply presuming legislative validity, the court made an early demonstration that Maryland courts would not simply "rubber stamp" legislation, but would actually examine whether challenged legislation was reasonably related to possible government interests.[61]

Thirteen years later, in *Schneider v. Duer*,[62] the court again showed its willingness to investigate government interests, albeit while presuming that the legislation was valid.[63] Schneider filed suit in equity alleging that a state statute imposed an elaborate and expensive scheme of regulations upon barbering schools and shops that was unequal to other technical professions.[64] The regulation established divisions, grades, and tests for those wishing to enter the trade of barbering, as well as requiring a number of new physical and manual qualifications.[65] The court applied its rational basis analysis to the challenged statute and explained "that it [was its] duty, if possible, to so construe the law as to effectuate the intention of the Legislature."[66] The court explained that an "act of the Legislature which is called in question is entitled to the benefit of every reasonable presumption in favor of its validity. If there is any rational theory upon which it can be sustained

57. *Id.* at 602-03, 123 A. at 65.

58. *Id.* at 608-09, 123 A. at 67.

59. *Id.*

60. *Id.* at 608, 123 A. at 67.

61. *See id.*

62. 170 Md. 326, 184 A. 914 (1936).

63. *Id.* at 336, 184 A. at 919.

64. *Id.* at 331-33, 184 A. at 917. Other technical professions that were not subjected to the same regulations as the barbering schools included the carpentering, bricklaying, and painting professions, which required similar technical development and experience in order to engage in the trade. *Id.* at 332, 184 A. at 917.

65. *Id.* at 329, 184 A. at 916.

66. *Id.* at 336, 184 A. at 919 (quoting State v. Tag, 100 Md. 588, 591, 60 A. 465, 466 (1904)).

consistently with constitutional limitations, it is the duty of the courts to reach that conclusion."[67] Despite the court's express intent to confer deferential treatment to government legislation, it struck down the contested regulations.[68] The court found that the classification's justifications included ensuring public health and safety, but it also found the regulations "unnecessary and unreasonable in safeguarding public health or security."[69] Again, although the court commented on the legislative deference afforded under Maryland's rational basis review, it set aside this notion and invalidated the ordinance.

In *Bruce v. Director, Department of Chesapeake Bay Affairs*,[70] the court continued to recognize the need to not "shackle the legislature," but rather provide it with the "widest discretion in classifying those who are to be regulated and taxed."[71] The challenged statute treated Maryland's tidewater and nontidewater county residents engaging in crabbing and oystering differently by imposing residential requirements and territorial restrictions on the licensing of commercial fishermen.[72] The court reviewed the challenged statute under a rational basis analysis and acknowledged that a legitimate government interest existed in distinguishing between Maryland's tidewater and nontidewater counties.[73] However, the court invalidated the statute because the respondent failed to provide a rational basis as to how the restrictions would benefit "the safety, health, moral, social or economic welfare," of the state, or further any realistic conservational scheme.[74] Despite finding the statute invalid, the *Bruce* court articulated an even stronger preference for presuming legislative validity.[75] The court explained that "[*o*]*nly if* the [classification] is without any reasonable basis, and so entirely arbitrary, is it forbidden."[76] Further, the court reiterated that a classification of this sort is presumed valid, any reasonably conceived state of facts can sustain validity, and those who challenge a classification bear the burden of proving its unreasonableness.[77]

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67. *Id.* (quoting State v. J.M. Seney Co., 134 Md. 437, 448, 107 A. 189, 193 (1919)).

68. *Id.* at 338-39, 184 A. at 920.

69. *Id.* at 332, 184 A. at 917.

70. 261 Md. 585, 276 A.2d 200 (1971).

71. *Id.* at 601-02, 276 A.2d at 209 (quoting Allied Am. Mut. Fire Ins. Co. v. Comm'r of Motor Vehicles, 219 Md. 607, 623, 150 A.2d 421, 431 (1959)).

72. *Id.* at 589-90, 276 A.2d at 202-03.

73. *Id.* at 606, 276 A.2d at 211.

74. *Id.* at 602-03, 276 A.2d at 209.

75. *Id.* at 602, 276 A.2d at 209.

76. *Id.* (emphasis added) (quoting *Allied*, 219 Md. at 623, 150 A.2d at 431).

77. *Id.*

Two years later, in 1973, the court took enormous steps towards heightening Maryland's rational basis scrutiny in *Maryland State Board of Barber Examiners v. Kuhn*.[78] In *Kuhn*, the court first required that legislative classifications be related to their actual objective.[79] This examination of the actual "object of the legislation" was a novel concept in Maryland because previously the "widest discretion" had been afforded.[80] Second, the court held that a challenged classification's validity would not satisfy a rational basis analysis if it simply related to the actual object of the legislation; rather, the court would now require that relationship to be a substantial one.[81] In *Kuhn*, the appellees challenged a statute that restricted cosmetologists from cutting men's hair but allowed barbers to cut both men and women's hair.[82] The appellants argued that the regulation was a constitutionally condoned occupational classification based upon differences in training, which protected the health, safety, and welfare of male patrons.[83] The appellees argued that the statute prohibited cosmetologists from servicing male patrons as they serviced female patrons.[84] Applying the newly formulated heightened rational basis standard, the court found the appellees' argument convincing and held that the distinction had neither a rational relationship to a legitimate state purpose nor "a fair and substantial relation to the object of the legislation."[85]

(2) Maryland's Modern-Day Rational Basis Analysis.—Beginning with the *Havre de Grace* decision in 1923, the Court of Appeals began the development of a more heightened rational basis analysis than had previously been used in Maryland or in the federal courts. However, it was not until the *Kuhn* decision in 1973 that the standard was fully articulated as applied today. Still, *Kuhn* merely established a foundation because it left undetermined what types of classifications would be subject to this new standard. *Havre de Grace* and *Bruce* dealt with geographical classifications, whereas *Schneider* and *Kuhn* dealt with employment classifications. Many other classifications, however,

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78. 270 Md. 496, 312 A.2d 216 (1973).

79. *Id.* at 511, 312 A.2d at 225.

80. *See Bruce*, 261 Md. at 601-02, 276 A.2d at 209.

81. *Kuhn*, 270 Md. at 511, 312 A.2d at 225 (holding that "if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects . . . it is our duty to so adjudge and thereby give effect to the Constitution").

82. *Id.* at 498-99, 312 A.2d at 217-18.

83. *Id.* at 507-08, 312 A.2d at 222-23.

84. *Id.* at 503, 312 A.2d at 220.

85. *Id.* at 509-10, 312 A.2d at 224.

were still subject to the "toothless" rational basis standard.[86] Over the past few decades, the court has addressed this concern and has clarified Maryland's modern-day rational basis analysis.

In 1981, the court, in *Attorney General of Maryland v. Waldron*,[87] began to clarify its modern-day approach to rational basis review. In *Waldron*, the court found that a statute denied retired judges equal protection of the laws when it prohibited them from accepting their rightfully earned pension if they chose to engage in the practice of law for compensation.[88] The court conducted a lengthy review of United States Supreme Court and Maryland case law concerning rational basis scrutiny[89] and found that both federal and Maryland case law warranted an elevated rational basis review of a legislative classification when "vital personal interests . . . are substantially affected by a statutory classification."[90] Further, the court found that, while the employment classifications at issue did not burden any recognized fundamental right,[91] they did impact vital personal interests and thus warranted a higher degree of scrutiny than mere "toothless" rational basis review.[92]

Despite employment classifications' elevated scrutiny, the court made clear that an equal protection analysis of employment classifications fell under the swath of rational basis review.[93] In line with the *Kuhn* court's employment classification analysis, the *Waldron* court expressed its intention of inquiring into the actual statutory objective of the classification rather than being satisfied with any conceivable purpose.[94] Under this elevated examination, the court found the statute

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86. *See, e.g.*, Supermarkets Gen. Corp. v. State, 286 Md. 611, 613, 409 A.2d 250, 251 (1979) (finding Sunday closing laws, a social and economic regulation, imposed against some businesses and not others not in violation of Maryland's equal protection principles).

87. 289 Md. 683, 426 A.2d 929 (1981).

88. *Id.* at 728, 426 A.2d at 953-54.

89. *See id.* at 703-15, 426 A.2d at 940-47 (detailing the history of the rational basis scrutiny in the Supreme Court and how the Court of Appeals of Maryland has developed its equal protection analysis).

90. *Id.* at 717, 426 A.2d at 948. This heightened rational basis review, in the federal equal protection scheme, would become what is known today as intermediate scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (stating that the intermediate scrutiny standard requires that applicable classifications be "substantially related to a sufficiently important governmental interest."); *see also Waldron*, 289 Md. at 708-12, 426 A.2d at 943-45 (discussing the evolution of the federal equal protection analysis). However, in Maryland, the intermediate scrutiny standard and the heightened rational basis standard have evolved separately. *See Waldron*, 289 Md. at 714-22, 426 A.2d at 946-50 (addressing how Maryland courts have and will handle the evolving equal protection analysis).

91. *Waldron*, 289 Md. at 717, 426 A.2d at 947-48.

92. *Id.*

93. *Id.*

94. *Id.* at 722, 426 A.2d at 950.

lacking the proper design of a true income maintenance scheme as was proffered by the appellee, and thus invalidated the suspect section.[95] Although similar to *Kuhn*, the *Waldron* court clarified Maryland's modern-day approach by indicating that two rational basis standards would co-exist. Thus, when vital personal interests were at stake, a classification that would otherwise be subject to the typical "toothless" rational basis analysis would receive a more heightened rational basis review.[96]

Two years later, in *Hornbeck v. Somerset County Board of Education*,[97] the Court of Appeals recognized the *Waldron* court's articulation of a more heightened rational basis standard, yet continued to show its resolve in concurrently maintaining the traditional deferential rational basis analysis.[98] The action challenged whether state regulations that called for public school financing through taxable wealth unconstitutionally deprived children living in poorer districts of an education equal to the education given children from more affluent areas.[99] The court accepted the appellant's argument that, in *Waldron*, a heightened rational basis analysis—requiring that a statute "rest upon some ground of difference having a fair and substantial relation to the object of the legislation"—was triggered when a statute affected a vital personal interest.[100] However, the court rejected the appellant's contention that the statute be reviewed under the heightened rational basis scrutiny.[101] The court explained that the heightened review was not applicable because there had been "no significant interference" with a person's right to an education.[102] Consequently, the court found that the suspect regulations' primary purpose was "to establish and maintain a substantial measure of local control over the local public school system."[103] The court held that this state interest was legitimate and one to which the financing system was reasonably related.[104]

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95. *Id.* at 723, 426 A.2d at 951.

96. *See id.* at 717, 426 A.2d at 947.

97. 295 Md. 597, 458 A.2d 758 (1983).

98. *See id.* at 641-42, 458 A.2d at 781-82 (explaining both standards of review and when they are traditionally applied).

99. *Id.* at 603, 458 A.2d at 761-62.

100. *Id.* at 641-42, 458 A.2d at 781-82.

101. *Id.* at 651-53, 458 A.2d at 787-88.

102. *Id.* at 653, 458 A.2d at 788.

103. *Id.* at 654, 458 A.2d at 788.

104. *Id.*

Ten years later, in *Kirsch v. Prince George's County*,[105] the court applied the more stringent rational basis review.[106] At issue in *Kirsch* was whether a county zoning ordinance restricting certain rental properties from college students deprived them of equal protection under the Maryland Constitution.[107] Significantly, the ordinance was framed as one "regulating the pursuit of occupations," thus justifying application of the more stringent rational basis test.[108] By applying the heightened review's "stated purpose" doctrine of *Kuhn* and *Waldron*, the court found the government interest in the ordinance—preventing or controlling detrimental effects upon neighboring properties[109]—"wholly unrelated to the stated purpose of the ordinance," and in violation of Maryland's equal protection provision.[110]

In *Verzi v. Baltimore County*,[111] the Court of Appeals invalidated a Baltimore County ordinance requiring that all tow truck operators called by the police for the towing of disabled vehicles be from Baltimore County.[112] Applying the elevated rational basis standard—requiring a "fair and substantial relation" to the actual object of the legislation[113]—the court found the regulation "unrelated to any legitimate government objective."[114] Significantly, the *Verzi* court followed *Hornbeck* and adopted the "fair and substantial relation" standard applied in *Kuhn* in combination with the statutory objective inquiry.[115] Furthermore, the *Verzi* court, by applying the elevated rational basis review, reaffirmed its use for geographic classifications.[116]

3. The Court's Reasoning.—In *Frankel v. Board of Regents of the University of Maryland System*, the Court of Appeals held that a student residency policy based on the financial dependence or independence of the student in question created an "arbitrary and irrational classification" in violation of Maryland's equal protection principle.[117] In so holding, the court concluded that a student's residency classification could not be determined solely by financial dependence or indepen-

105. 331 Md. 89, 626 A.2d 372, *cert. denied*, 510 U.S. 1011 (1993).
106. *Id.* at 104, 626 A.2d at 379-80.
107. *Id.* at 91, 626 A.2d at 373.
108. *Id.* at 104, 626 A.2d at 379-80.
109. *Id.* at 105, 626 A.2d at 380.
110. *Id.* at 108, 626 A.2d at 381.
111. 333 Md. 411, 635 A.2d 967 (1994).
112. *Id.* at 427, 635 A.2d at 975.
113. *Id.* at 425-26, 635 A.2d at 974.
114. *Id.* at 427, 635 A.2d at 975.
115. *Id.* at 419, 635 A.2d at 971.
116. *Id.* at 427, 635 A.2d at 975.
117. *Frankel*, 361 Md. at 318, 761 A.2d at 334.

dence; rather, the University must base its residency determination upon eight domiciliary factors.[118]

Writing for the majority, Judge Eldridge addressed the question of equal protection by first reviewing the arguments presented by Frankel and the counterarguments presented by the Board.[119] Frankel claimed that the Board's policy requiring the use of different standards to evaluate dependent and independent students' state residency irrationally classified students in violation of the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights.[120]

The Board argued that financial dependency is relevant when determining residency because the origin of one's financial support may be indicative of one's ties or allegiance.[121] Further, the Board argued that the state has a rational and legitimate interest in residency classification so that only bona fide Maryland residents receive the benefit of lower tuition rates.[122] The Board continued, arguing that financial dependency on out-of-state resources is "far more probative" than are the other domiciliary factors.[123] Had Frankel achieved financial independence, the Board argued that the policy's presumption of nonresidency would be completely rebutted.[124] Finally, the Board argued that the policy did not violate equal protection principles because it "easily passes the minimal test of a rational basis for the distinction between a financially independent and dependent student."[125]

Finding for Frankel on state equal protection grounds, the court decided to simply presume that the policy's classification was subject

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118. *Id.* at 318, 761 A.2d at 334-35.

119. *See id.* at 310-12, 761 A.2d at 330-31. The court initially addressed the issue of standing when deciding the Board's motion to dismiss. *Id.* at 306, 761 A.2d at 328. The Board argued that Frankel's case became moot when he graduated because he abandoned his refund claim when he amended his complaint and because he was no longer attending the University. *Id.* at 306-07, 761 A.2d at 328. The court rejected the Board's argument that "a wording change" in the amended complaint meant an abandonment of Frankel's refund claim and found Frankel's claim justiciable. *Id.* at 306, 761 A.2d at 328-29.

120. *Id.* at 310, 761 A.2d at 330. Frankel's brief stated:

> The Classification Policy's purpose is to limit in-state tuition to *bona fide* State residents. Financial dependency—whether it is on out-of-state parents, or an out-of-state bank for that matter—sheds no light on a person's choice of permanent residence. It is arbitrary, therefore, for Respondents to rely on financial dependency as a discriminating factor, let alone the sole discriminating factor in determining a person's residence.

Id. at 311, 761 A.2d at 331.

121. *Id.* at 311-12, 761 A.2d at 331.

122. *Id.*

123. *Id.* at 312, 761 A.2d at 331.

124. *Id.*

125. *Id.*

to a rational basis analysis.[126] The court recognized that even under this deferential standard, basing residency on financial dependence or independence lacked a rational basis.[127]

Applying the rational basis test, the court analogized this economic classification of bona fide Maryland residents based on the geographical origin of their financial support to a number of other geographically based regulation cases that were invalidated by the court.[128] Accordingly, the court applied the same heightened rational basis review as it had in the analogous cases and required that "a governmental regulation placing a greater burden on some Marylanders than on others based on geographical factors must 'rest upon some ground of difference having a *fair and substantial relation to the object* of the regulation.'"[129] This being the case, the Board contended that the policy's objective was to ensure that only bona fide Maryland residents received the benefits of a lower tuition rate.[130] Additionally, because Frankel did not challenge the Board's stated objective, the court assumed the objective was legitimate.[131]

The court, however, explored numerous hypothetical scenarios illustrating situations in which bona fide Maryland residents would be forced to pay the higher out-of-state tuition simply because the student's financial support was derived from out of state.[132] Consequently, the court found that the policy had "little relation," much less than that which was necessary to qualify as a fair and substantial relation, to the policy's objective,[133] and that the application of the policy

126. *Id.* at 315, 761 A.2d at 332.

127. *Id.*

128. *Id.* at 315-16, 761 A.2d at 333-34. The court relied on *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994) (invalidating a residency requirement regulating emergency towing services in Baltimore County); *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585, 276 A.2d 200 (1971) (declaring unconstitutional a residency requirement for the licensing of commercial fishermen that engage in crabbing and oystering); *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936) (striking down geographic classifications of paperhangers); and *Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65 (1923) (invalidating a city regulation prohibiting nonresidents from operating automobiles-for-hire services on certain streets of town).

129. *Frankel*, 361 Md. at 317, 761 A.2d at 334 (emphasis added) (quoting *Verzi*, 333 Md. at 419, 635 A.2d at 971).

130. *Id.*

131. *Id.*

132. *See id.* at 317-18, 761 A.2d at 334 (explaining that a Maryland born-and-raised student, financially supported primarily by one or more parents, grandparents, etc., who live outside Maryland, would be considered a financially dependent out-of-state resident and therefore forced to pay the higher out-of-state fees).

133. *Id.* at 318, 761 A.2d at 334.

would often lead to inconsistencies in providing tuition benefits for bona fide Maryland residents.[134]

4. Analysis.—In *Frankel*, the Court of Appeals used an elevated rational basis standard when examining an economic classification.[135] Prior to *Frankel*, such an elevated rational basis scrutiny had been reserved only for classifications involving "vital personal interests," such as employment classifications[136] or the prevention of discrimination due to geographical location.[137] However, the expansion of the elevated rational basis standard in *Frankel* was a necessary and appropriate step towards ensuring the equal protection of all Marylanders under the law.

a. The Policy—A Purely Economic Classification.—The *Frankel* decision is significant because it illustrates an expansion of Maryland's elevated rational basis scrutiny. Although *Frankel* deals with what may appear to be a geographic classification,[138] the actual classification created by the policy is an economic one. *Frankel* deals with the Board's unequal treatment of dependent and independent students, a classification based solely on one's income.[139] It is only after the dependency classification is made that the geographical twist—the origin of one's financial support—becomes important.[140]

The policy defines and classifies both "financially dependent" and "financially independent" students.[141] Financially dependent students are those declared dependent for tax purposes or those who receive the majority of their financial support from another.[142] Financially independent students, on the other hand, have declared themselves financially independent, do not appear on another's federal or state income taxes, have received less than half their support from

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134. *Id.* at 317, 761 A.2d at 334.

135. *See id.*

136. *See, e.g.*, Attorney Gen. of Md. v. Waldron, 289 Md. 683, 717, 426 A.2d 929, 948 (1981) (finding the heightened rational basis review applicable because it considered employment a vital personal interest).

137. Verzi v. Baltimore County, 333 Md. 411, 427, 635 A.2d 967, 975 (1994) (holding that where one chooses to reside within Maryland is a vital personal interest, and any classification burdening that choice is subject to a heightened rational basis review).

138. *See Frankel*, 361 Md. at 316, 761 A.2d at 333 (analogizing this case to prior decisions that dealt with discrimination based upon geographical factors).

139. *Frankel*, 361 Md. at 302-03, 761 A.2d at 326; *see also* BOARD OF REGENTS, *supra* note 12, at (I).

140. *Frankel*, 361 Md. at 302-03, 761 A.2d at 326; *see also* BOARD OF REGENTS, *supra* note 12, at (I)(A).

141. BOARD OF REGENTS, *supra* note 12, at (III)(A)-(B).

142. *Id.* at (III)(A).

another, and have shown that they personally provide more than half of their total expenses.[143] Based entirely upon the economic strength of students, the initial classification as either "financially dependent" or "financially independent" is the divergent point upon which students were then treated unequally.[144]

b. The Frankel *Effect.*—It seems that the *Frankel* court simply followed the applicable case law in examining the Board's suspect policy under a heightened rational basis standard.[145] The *Frankel* court did apply the applicable case law; however, neither its application nor its ramifications are simple. The *Frankel* court's holding expands Maryland's previous case law, which limited the heightened rational basis scrutiny to employment or geographical classifications involving "vital personal interests," to include economic classifications.

(1) Expanding the "Fair and Substantial Relation" Standard.—The *Frankel* court relied chiefly on *Verzi v. Baltimore County* for the rational basis standard it applied to the Board's suspect policy.[146] However, *Frankel* differs from *Verzi*, causing a further expansion of the applicable parameters of the heightened rational basis standard.

In *Waldron*, the court explored both federal and Maryland case law and concluded that an elevated rational basis standard was in use.[147] The *Waldron* court took it upon itself to express guidelines as to when this heightened rational basis standard would apply. These guidelines required the heightened standard's application when a classification did not rise to the level of affecting a fundamental interest, warranting a strict scrutiny review, but rather when it affected a "vital personal interest."[148] In *Waldron* this vital interest dealt with a person's personal interest in employment.[149]

Following *Waldron*, the *Verzi* court, although not expressing which vital personal interest invoked the heightened scrutiny, articulated the

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143. *Id.* at (III)(B).

144. Financially independent students are given the opportunity to prove bona fide Maryland residence based on eight domiciliary factors, whereas financially dependent students are prevented from making a showing of the domiciliary factors and are simply deemed residents of wherever their primary financier is a resident. *Frankel*, 361 Md. at 302-03, 761 A.2d at 326.

145. *See id.* at 316, 761 A.2d at 333-34 (citing several prior cases dealing with classifications based upon geographical factors).

146. *See id.* at 315-17, 761 A.2d at 333-34.

147. Attorney Gen. of Md. v. Waldron, 289 Md. 683, 717, 426 A.2d 929, 948 (1981).

148. *Id.*

149. *See id.* at 718-22, 426 A.2d at 948-50 (citing several cases holding that employment classifications rise to the level of vital personal interests).

same heightened standard—requiring that a fair and substantial relation to the object of the legislation exist—when it reaffirmed the use of the heightened standard on geographical classifications.[150] In *Frankel*, the court's use of the heightened rational basis standard illustrates a further expansion of this standard's use to areas of economic classifications.[151]

A clear expansion of the heightened rational basis standard in *Frankel* is difficult to see because the facts present an economic regulation with a geographic twist. This may be why the *Frankel* court mistakenly analogized the *Frankel* case with *Verzi*, a case with markedly different facts.[152] In *Frankel*, the court was confronted with a classification based entirely on an individual's financial status.[153] Directly following this financial status determination, the individual was classified into one of two groups, financially dependent and financially independent.[154] In *Verzi*, the two classes, tow-truck operators within Baltimore County and those outside of Baltimore County, were only classified by their geographic location.[155] Significantly, the classification in *Frankel* is solely an economic one. The geographical twist is merely an element for the way in which the individuals are treated differently and has no actual bearing on determining the classification. Therefore, the *Frankel* court expanded the use of the heightened rational basis scrutiny to include not only employment and geographical classifications, but economic ones as well.

(2) Ramifications of the Frankel *Expansion.*—Prior to *Frankel*, the heightened rational basis scrutiny was only applicable when "vital personal interests" were affected by a statutory classification.[156] Further, when the *Waldron* court first articulated the "vital personal interest" requirement, it explicitly stated that the standard was not to be used when vital interests were subject to economic regu-

150. *See* Verzi v. Baltimore County, 333 Md. 411, 427, 635 A.2d 967, 975 (1994).

151. *Frankel*, 361 Md. at 317, 761 A.2d at 334.

152. *See id.* at 316, 761 A.2d at 333 (comparing the case to *Verzi*'s geographic classification).

153. *See* BOARD OF REGENTS, *supra* note 12, at (III)(A)-(B) (describing the classifications for financially dependent and independent students and how they are based on financial status).

154. *See id.* at (I)(A) (explaining the tuition charge differentials based on a student's residency, which is determined by his or her financial dependence).

155. *Verzi*, 333 Md. at 414, 635 A.2d at 968.

156. *See* Attorney Gen. of Md. v. Waldron, 289 Md. 683, 717, 426 A.2d 929, 948 (1981); *see also Verzi*, 333 Md. at 419, 635 A.2d at 971 (applying the same test).

lations.[157] However, following *Frankel*, economic classifications are now included under the heightened rational basis standard's protection, so long as the differing treatment affects a "vital" interest.[158] Subsequently, the next logical question, and one that is problematic, is what is considered a "vital" interest.[159] This question has been left unanswered in the case law and, via application, seems as loose and malleable as many other widely used and amorphous legal doctrines.[160] Thus, as of a result of the *Frankel* decision, this sparingly used standard, reserved for past cases involving employment or geographical classifications, may seemingly be invoked against a vast array of classifications, possibly overshadowing the once dominantly applied deferential standard.

Although the *Frankel* court cloaked the case under the guise of a geographic classification, the truth is that the policy's classification was a purely economic one, against which the court applied the heightened rational basis standard.[161] What makes this scenario problematic is that the application of the heightened rational basis standard to economic classifications was explicitly forbidden in *Waldron*.[162]

In *Waldron*, the court adopted the federal position that, in regard to economic classifications, the courts should defer to legislative determinations.[163] So long as fundamental rights or suspect classes are not involved, the courts should not function as a "superlegislature," judging the decisions and determinations of legislative policy choices.[164] Allowing the expansion of the heightened scrutiny stan-

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157. *See Waldron*, 289 Md. at 717, 426 A.2d at 948 (stating that "where vital personal interests (other than those impacted by wholly economic regulations) are substantially affected by a statutory classification, courts should not [merely grant deference to the legislature]").

158. *See Frankel*, 361 Md. at 315-17, 761 A.2d at 333-34 (citing to *Waldron* and applying the same "vital personal interest" heightened rational basis scrutiny test to the challenged classification).

159. "Vital" was a term referred to in *Waldron*, yet it was left without a clear definition. *Waldron*, 289 Md. at 717, 426 A.2d at 948. *Waldron*'s use of the heightened standard implies that employment classifications are "vital," *id.*, as does the heightened standard's use in *Verzi* imply that choice of residence (*i.e.*, geographical classifications) is "vital." *Verzi*, 333 Md. at 427, 635 A.2d at 975.

160. Neither *Waldron* nor any of the relevant subsequent cases address what constitutes a "vital" personal interest. Rather, this language has become a doctrinal test similar to those applied in other areas of law—*e.g.*, a "compelling" state interest or "reasonable foreseeability." Consequently, consistent application of this standard may, to a great degree, be determined by less legitimate variables as opposed to the letter of the law.

161. *Frankel*, 361 Md. at 316-17, 761 A.2d at 333-34.

162. *See Waldron*, 289 Md. at 717, 426 A.2d at 948.

163. *Id.*

164. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

dard to economic classifications creates just the sort of situation the *Waldron* court feared by giving the courts the ability to second guess the broad expanse of legislative powers, including taxing and spending.[165]

Furthermore, the *Frankel* decision is problematic in that it applies the heightened rational basis scrutiny reserved for cases involving "vital personal interests," but never articulates what the vital personal interests at issue were. Although not explicitly required by the *Waldron* decision,[166] nor even articulated in *Verzi*,[167] an accounting of the vital personal interests at stake would be helpful in forming parameters for future cases. More importantly, a definition of vital personal interests would give guidance to the legislature as to what types of economic classifications could be subject to heightened rational basis scrutiny. Without such an articulation, the *Frankel* opinion leaves future courts an opportunity to construe or abuse the invisible parameters of a proper application of the heightened rational basis scrutiny.

c. Frankel *Ensures the Equal Protection of Marylanders.*—Regardless of the problems the *Frankel* decision may present in the future, the court properly applied the more stringent rational basis standard and correctly found the policy in violation of Maryland's equal protection principles.[168] Clearly, the policy imposed an unequal standard upon financially dependent students[169] who, in a number of cases, would be bona fide Maryland residents.[170] Therefore, because the classification did not fairly or substantially meet the purpose of the suspect policy, the *Frankel* court appropriately applied the heightened rational basis scrutiny.[171] The application was appropriate despite the exemption expressed in *Waldron,* which forebade the use of the heightened standard for economic classifications, because the *Waldron* exemption is so inflexible that it strips the courts of their duty to review cases.[172] Furthermore, although the court did not

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165. *See Waldron*, 289 Md. at 717, 426 A.2d at 948.

166. *Id.*

167. *See* Verzi v. Baltimore County, 333 Md. 411, 419, 423, 635 A.2d 967, 971, 973 (1994) (applying the same standard as applied in *Waldron*, but not referencing any vital personal interests at stake).

168. *Frankel*, 361 Md. at 318, 761 A.2d at 334.

169. *See* BOARD OF REGENTS, *supra* note 12, at (I)(A).

170. *See Frankel*, 361 Md. at 317-18, 761 A.2d at 334 (describing a situation where a financially dependent student may nevertheless be a bona fide Maryland resident).

171. *Id.* at 318, 761 A.2d at 334.

172. *See generally* Romer v. Evans, 517 U.S. 620, 632 (1996) (stating that regardless of the deferential standard, it is imperative for the courts to have the ability to examine legislation in order to perform their duties); *see also* Nicole Richter, Note, *A Standard for "Class of*

clearly state the vital personal interests at stake, it recognized that some vital interests did in fact exist.[173] Jeremy Frankel's access to a public education was hindered by his classification,[174] and Jeremy's father was restricted from leaving Maryland, which affected his right to travel, in order for Jeremy to receive the in-state tuition benefit.[175] However, the *Frankel* court, while successfully ensuring the rights of all Marylanders, should have better expressed its rationale for the expansion of the heightened rational basis scrutiny and placed articulable parameters on its use so as to prevent the unhindered use of the standard in the future.

5. Conclusion.—The classification at issue in *Frankel* could have been simply presumed valid, as are typical economic classifications. However, the court properly examined the *Frankel* case and appropriately applied a heightened rational basis test, ultimately invalidating the suspect policy. The court's decision could have more clearly characterized the classification as being an economic one, and further, it would have been helpful for future cases had the court better defined the parameters for when an economic classification invokes the heightened rational basis standard. Regardless, the court properly expanded the heightened rational basis standard to encompass the classification presented in *Frankel*; therefore, the court properly ensured Marylanders' equal protection under the law.

DISMAS N. LOCARIA

One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindicative State Action, 35 VAL. U. L. REV. 197, 209 n.86 (2000) (explaining that the Supreme Court "insists on knowing the relation between the classification adopted and the object to be attained," and without it substance is not given to the Equal Protection Clause nor is guidance or discipline provided to the legislature).

173. *See Frankel*, 361 Md. at 317-18, 761 A.2d at 334-35 (eluding to an interest in economic freedom that is due a more heightened rational basis test).

174. *See* Attorney Gen. of Md. v. Waldron, 289 Md. 683, 712, 426 A.2d 929, 945 (1981) (indicating that the interest in obtaining a higher education is a vital one).

175. *See id.* at 706, 426 A.2d at 942 (recognizing that the right to travel is a fundamental right).

B. *A Missed Opportunity to Take a Clear Stance on the Constitutionality of Discriminatory Employment Practices by Religious Organizations*

In *Montrose Christian School Corp. v. Walsh*,[1] the Court of Appeals of Maryland considered whether a religious school had the right, under the First Amendment,[2] to fire administrative employees because they were not members of the church affiliated with the school.[3] The court examined section 27-19 of the Montgomery County Code, which provided that employment discrimination based on religious creed is illegal, with the exception of allowing "for a religious corporation . . . to hire and employ employees of a particular religion to perform purely religious functions."[4] Relying on several Title VII[5] cases, the court held that the First Amendment requires a "ministerial exception" in discrimination statutes that allows religious organizations to hire spiritual leaders of their choice, and that section 27-19 did not contain such a constitutionally mandated exemption.[6] Because the remaining portion of the statute allowed the school to hire employees of its choice, the Montrose Christian School was found not liable for discrimination.[7] By invalidating one section of the statute, the court failed to address the more difficult constitutional question concerning the scope of religious organization exemptions from employment dis-

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1. 363 Md. 565, 770 A.2d 111 (2001).

2. The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend I.

3. *Walsh*, 363 Md. at 578, 770 A.2d at 118-19.

4. MONTGOMERY COUNTY, MD., CODE § 27-19(d)(2) (2001). Following the decision in *Walsh*, section 27-19 of the Montgomery County Code was redrafted and many of its provisions were moved or slightly modified. Section 27-19(d)(2) can now be found at section 27-19(e)(2) and, as a result of the *Walsh* decision striking the "perform purely religion functions" clause, now provides that "a religious corporation . . . [can] hire and employ employees of a particular religion . . . ." *Id.* § 27-19(e)(2).

5. The relevant portion of Title VII states:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a) (2000).

6. *Walsh*, 363 Md. at 596, 770 A.2d at 129. The court found the "purely religious functions" clause of the statute unconstitutional because no one engages in "only" religious functions, and the court held that this clause thus nullified the constitutionally required "ministerial exception." *Id.* at 593-94, 770 A.2d at 127-28.

7. *Id.* at 597, 770 A.2d at 130.

crimination laws. This decision is problematic because the court's strict interpretation of the statutory language of section 27-19 of the Montgomery County Code conflicts with established principles of statutory construction, and what remains of the statute after striking this language violates the Maryland Declaration of Rights. Had the court read section 27-19 of the Montgomery County Code as a "ministerial exception," the entire statute likely would have been found constitutional, and Maryland would have clear boundaries designating the scope of religious organizations' First Amendment right to discriminate in their hiring practices.

1. The Case.—Montrose Christian School Corporation is a private, religious school affiliated with, and operating alongside, the Montrose Baptist Church in Montgomery County, Maryland.[8] In February 1996, Ray Hope was appointed the new pastor of the Montrose Baptist Church, and soon after, in June 1996, Gregory Scheck was promoted from vice principal to principal of the school.[9] Following this change in administration, with the exception of two janitors, all employees who were not members of the Montrose Baptist Church were fired from their jobs at the school.[10]

Barbara Anne Carver worked as a teacher's aide for the Montrose Christian School, performing administrative tasks and assisting school staff from 1990 until Gregory Scheck fired her in June 1996.[11] After exhausting all administrative remedies, Ms. Carver filed a lawsuit against the school in the Circuit Court for Montgomery County, alleging employment discrimination.[12] In a separate lawsuit in the Circuit Court for Montgomery County, three additional former employees of the school filed similar discrimination claims.[13] The plaintiffs in both cases alleged that the school violated section 27-19 of the Montgomery County Code; specifically, the plaintiffs alleged that they were fired

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8. *Id.* at 573, 770 A.2d at 115-16. Although located on the same grounds, membership in the church is not a requirement for attending the school, and the majority of the students are neither members of the church nor affiliated with the Baptist religion. *Id.*

9. *Id.* According to the bylaws of the school, the principal is responsible for the school's administration and is under the direct supervision of the pastor. *Id.*

10. *Id.*

11. *Id.* at 573-74, 770 A.2d at 116. When she was hired, the school knew she was not Baptist and not a member of the church. *Id.*

12. *Id.* at 574, 770 A.2d at 116.

13. *Id.* at 576, 770 A.2d at 117. The three plaintiffs in this case were: Mary Lou Jones, a bookkeeper and principal's secretary who began working at the school in 1979; Sharon M. Walsh, a registration and administrative secretary who began working at the school in 1982; and Helen E. Poole, a cafeteria worker who began working at the school in 1989. *Id.*

from their jobs because they were not members of the Montrose Baptist Church.[14]

In response to these allegations, Montrose Christian School asserted several defenses. First, the defendants claimed that the firings fell within one of the exceptions to the Montgomery County employment discrimination law.[15] In addition, they asserted the doctrine of charitable immunity.[16] The defendants also claimed that state law preempted Montgomery County law because the county code impermissibly conflicted with the state employment discrimination law.[17] Finally, the defendants argued that the Montgomery County Code violated the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution and Article 36 of the Maryland Declaration of Rights.[18]

In Carver's case, the circuit court held that the school's actions violated section 27-19 of the Montgomery County Code and did not fall within any of the recognized exceptions to the county code.[19] The court further found that the county law did not impermissibly conflict with state law and that the defendants were not entitled to charitable immunity.[20] Finally, the court held that section 27-19 did not violate either the First Amendment of the United States Constitution or the Maryland Declaration of Rights.[21] Carver was awarded a total of $31,000 in damages, but the court denied her request for injunctive

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14. *Id.* at 574, 576, 770 A.2d at 116, 118. The relevant portion of the Montgomery County Code made it unlawful for an employer to fire an employee based on religious belief. MONTGOMERY COUNTY, MD., CODE § 27-19(a) (2001).

15. *Walsh*, 363 Md. at 574, 576, 770 A.2d at 116, 117.

16. *Id.*

17. *Id.* at 575, 576, 770 A.2d at 116, 117. The relevant portion of the Maryland Code provides that discrimination laws "shall not apply . . . to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities." MD. ANN. CODE art. 49B, § 18 (1998).

18. *Walsh*, 363 Md. at 574-75, 770 A.2d at 116-17. Article 36 of the Maryland Declaration of Rights states that:

> all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights . . . .

MD. DECL. OF RTS. art. 36.

Montgomery County intervened in both cases in order to defend both the constitutionality and the preemption claims. *Walsh*, 363 Md. at 575-76, 770 A.2d at 117.

19. *Walsh*, 363 Md. at 575, 770 A.2d at 117.

20. *Id.*

21. *Id.*

relief.[22] The Montrose Christian School and principal Gregory Scheck filed an appeal to the Court of Special Appeals, but before argument could be heard, the Court of Appeals issued a writ of certiorari.[23]

In the case involving the three additional former employees, a jury determined that the plaintiffs were fired because of their religious creed and awarded them compensatory damages.[24] After the jury verdict, the circuit court issued an opinion holding that state law did not preempt the local laws and that section 27-19 did not violate the First Amendment or the Maryland Declaration of Rights.[25] The court did find that the school was entitled to charitable immunity, but that it did not apply to the school's principal, Gregory Scheck.[26] As a result, in accordance with the jury verdict, the court issued judgments in favor of the plaintiffs and ordered Scheck to pay compensatory damages.[27] The court denied the plaintiffs' request for injunctive relief.[28] Both the defendants and the plaintiffs appealed to the Court of Special Appeals,[29] but prior to argument, the Court of Appeals granted certiorari.[30]

2. Legal Background.—The Religion Clauses of the First Amendment of the United States Constitution state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[31] These two clauses present an interesting dichotomy for judicial interpretation: how to "preserve[ ] the autonomy and freedom of religious bodies while avoiding any semblance of established religion."[32] The Supreme Court has entertained a long line of cases balancing these two interests[33] and has established a three-part test to determine whether a statute is constitutional under the

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22. *Id.*

23. *Id.* at 575-76, 770 A.2d at 117.

24. *Id.* at 577, 770 A.2d at 118.

25. *Id.* The court rejected the constitutional defenses because it was persuaded by arguments that the plaintiffs' duties were not instructional or policy oriented, but rather administrative in nature. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The court noted that it was inappropriate to take the appeal of the Montrose Christian School because the charitable immunity claim allowed for a judgment entirely in its favor. *Id.* at 577 n.3, 770 A.2d at 118 n.3.

30. *Id.* at 577-78, 770 A.2d at 118.

31. U.S. CONST. amend. I.

32. Walz v. Tax Comm'n of New York, 397 U.S. 664, 672 (1970).

33. *See infra* notes 38-68 and accompanying text (describing the relevant Supreme Court cases considering questions about the Religion Clauses of the First Amendment).

First Amendment.[34] Based on this test, several circuits have analyzed employment discrimination claims, specifically those under Title VII, by balancing the goal of preventing discrimination against upholding separation of church and state and freedom of religion.[35] From this balance arose a "ministerial exception" to employment discrimination claims, allowing religious institutions to hire and fire religious leaders and teachers of their choice.[36] Relying on the rules outlined by the Supreme Court, Maryland courts have applied their own rules of statutory construction to maintain the balance between these two interests.[37]

a. The Supreme Court's Interpretation of the Free Exercise and Establishment Clauses of the First Amendment.—The United States Supreme Court established the foundation for future rulings regarding the employment decisions of religious organizations under the Free Exercise and Establishment Clauses of the First Amendment in *Kedroff v. St. Nicholas Cathedral*.[38] The *Kedroff* Court found that religious organizations require "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[39] As a result, the Court concluded that the First Amendment allows religious organizations to select their own clergy without state interference.[40]

Having recognized that the First Amendment prevents the government from interfering in employment decisions regarding religious leaders, the Court faced questions regarding whether the First Amendment prohibited state support of religion through government benefits. In *Walz v. Tax Commission of New York*, the Supreme Court considered whether granting property tax exemptions to religious organizations for religious properties used solely for religious worship violated the First Amendment because it indirectly forced taxpayers to

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34. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

35. *See infra* notes 74-92 and accompanying text (discussing various circuit cases dealing with the Religion Clauses). The Supreme Court has yet to rule on the constitutionality of the "ministerial exception" as it applies to the First Amendment rights of religious institutions to discriminate when hiring religious leaders.

36. *See infra* note 79 (providing examples of circuits that have upheld a "ministerial exception").

37. *See infra* notes 104-115 and accompanying text (setting forth the Maryland rules of statutory construction).

38. 344 U.S. 94 (1952).

39. *Id.* at 116.

40. *Id.*

support various religions.[41] The Court noted that "[n]o perfect or absolute separation is really possible," but the job of the courts is "to mark boundaries to avoid excessive entanglement."[42] Holding that the property tax exemption neither sponsored nor inhibited a particular religion and did not result in excessive government entanglement in religious governance, the Court declared the property tax exemption constitutional.[43]

In *Lemon v. Kurtzman*, the Supreme Court adopted a three-part test to determine if a statute will pass constitutional muster under the Establishment Clause.[44] In *Lemon*, the Court considered the constitutionality of Rhode Island and Pennsylvania statutes that provided state aid to religious-sponsored private schools for instruction on secular topics.[45] The Court established a three-part test to determine the constitutionality of the statutes: (1) The statute must have a secular legislative purpose; (2) its primary effect must not be to promote or inhibit a particular religion; and (3) the statute must not create excessive state "entanglement with religion."[46] Holding that teachers have the potential to implicate religion even while teaching secular topics, the Court recognized that the Rhode Island and Pennsylvania programs presented a definite possibility of unconstitutional fostering of a religion.[47] Additionally, the Court recognized that significant government supervision would be required to monitor these statutes, constituting another violation of the constitutionally mandated separation of church and state.[48]

Following *Lemon*, in *NLRB v. Catholic Bishop of Chicago*,[49] the Supreme Court focused on the third prong of the *Lemon* analysis and considered whether it was constitutional for the NLRB to be involved in collective bargaining for teachers employed at religious private

41. 397 U.S. 664, 666-67 (1970).

42. *Id.* at 670.

43. *Id.* at 680.

44. 403 U.S. 602, 612-13 (1971).

45. *Id.* at 615-22. The Rhode Island program involved paying nonpublic school teachers a direct salary supplement of 15%. A supplemented salary could not exceed the salary paid to public school teachers. *Id.* at 607. The statute required teachers to only teach what was offered in public schools. *Id.* at 608. The Pennsylvania program authorized the state to purchase secular services and tools for nonpublic schools. *Id.* at 609. Schools seeking involvement in this program had to keep detailed accounting records and were subject to a state audit. *Id.* at 609-10.

46. *Id.* at 612-13 (quoting, in part, *Walz*, 397 U.S. at 674).

47. *Id.* at 617, 620-21. The Court noted "that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618.

48. *Id.* at 619, 621-22.

49. 440 U.S. 490 (1979).

schools.[50] Noting the potential for excessive government entanglement in religion, the Court recognized that this type of involvement would be problematic under the First Amendment.[51] Holding that there was no express congressional intent to establish such a relationship, the Court declined to consider the First Amendment questions that might arise if the Board were to have jurisdiction over church-sponsored schools.[52]

The Court further refined the three pronged test laid out in *Lemon* in *Corporation of the Presiding Bishop v. Amos*.[53] In *Amos*, the Court considered whether section 702 of the Civil Rights Act of 1964,[54] which allows religious organizations to discriminate in hiring on the basis of religion, violates the First Amendment when the exemptions are applied to the secular activities of religious organizations.[55] Finding that section 702 survived the first part of the *Lemon* analysis, the Court reasoned that the purpose of the statute was to reduce government interference with the decisions made by religious organizations.[56] Examining the second prong of the *Lemon* analysis, the Court determined that the primary effect of the statute did not advance or inhibit religion.[57] Finally, the Court held that section 702 easily passed the third prong of the *Lemon* examination—avoiding an excessive entanglement between government and religion—because the statute specifically allows religious organizations to make their own hiring decisions.[58] Holding that section 702 passed all three prongs of the *Lemon* analysis, the Court found the statute constitutional.[59]

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50. *Id.* at 491.

51. *Id.* at 502, 504.

52. *Id.* at 507.

53. 483 U.S. 327 (1987).

54. Section 702 of the Civil Rights Act of 1964 provides, in relevant part, that Title VII "shall not apply . . . to a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities." 42 U.S.C. § 2000e-1(a) (2000).

55. *Amos*, 483 U.S. at 329-30. In *Amos*, the Court determined whether a church-owned gymnasium could, without violating the First Amendment, fire an assistant building manager because he was denied membership at an affiliated temple. *Id.*

56. *Id.* at 336. The Court further noted that it would be "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one . . . ." *Id.*

57. *Id.* at 336-37. The Court explained that a statute "is not unconstitutional simply because it *allows* churches to advance religion"; a statute only crosses the boundary when "the *government itself* has advanced religion through its own activities and influence." *Id.* at 337.

58. *Id.* at 339.

59. *Id.* at 340.

The Supreme Court has used different reasoning in its Establishment Clause cases. In *Employment Division, Department of Human Resources v. Smith*,[60] the Supreme Court questioned whether Oregon could deny unemployment benefits to individuals who smoke peyote, classified as a controlled substance under Oregon law, as part of their religious rituals.[61] The Court reasoned that individuals must comply with neutral state laws, regardless of religious beliefs, when the laws are valid and involve activities the state has the right to regulate.[62] Noting that the drug enforcement law was neutral and not aimed at inhibiting any religious beliefs, the Court held that Oregon did not violate the First Amendment by enforcing its criminal laws.[63]

Three years later, the Supreme Court applied the *Smith* ruling to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[64] The Court considered whether city ordinances, passed with the intention of preventing a religious institution from establishing a church in the city, were constitutional.[65] Reasoning that the ordinances at issue could not survive a strict scrutiny inquiry[66] because they were not neutral and actually targeted a particular religion, the Court found the ordinances unconstitutional.[67] Finding that the "Free Exercise Clause commits government itself to religious tolerance" the Court found that government must ensure that laws are designed for secular purposes.[68]

b. The Evolution of the "Ministerial Exception" to Title VII Employment Discrimination Claims.—In 1964, Congress codified Title VII of the Civil Rights Act, making it illegal for employers to discriminate in employment decisions based on race, color, religion, sex, or national origin.[69] Title VII created a problem for the courts because employers

60. 494 U.S. 872 (1990).

61. *Id.* at 874.

62. *Id.* at 882.

63. *Id.*

64. 508 U.S. 520 (1993).

65. *Id.* at 531. This suit arose when the City of Hialeah passed several ordinances in an attempt to discourage the Church of Lukumi Babalu Aye from establishing a church in their city because some of the church's practices, including animal sacrifices, were not welcome. *Id.* at 526-28.

66. Any law that is not neutral and of general applicability must pass the strict scrutiny test—it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

67. *Id.* at 540. The Court also pointed out that narrower regulations could achieve the city's goals of protecting against cruelty to animals and other health code problems. *Id.* at 539.

68. *Id.* at 547.

69. 42 U.S.C. § 2000e-2(a) (1966) (amended 1972).

were not permitted to discriminate under Title VII, but the First Amendment limited the power of government to interfere in the decision-making of religious organizations.[70] In an attempt to rectify this problem, Title VII included an exemption for religious organizations, permitting them to discriminate when hiring individuals "to perform work connected with the carrying on" of the employer's "religious activities."[71] Congress amended Title VII in 1972, deleting the word "religious," so the clause now provides religious organizations an exemption from discrimination laws when hiring individuals to perform activities for the organization.[72] The legislative history of this amendment details Congress's intent to foster the separation between church and state.[73]

The conflict between the First Amendment and the states' interest in preventing and protecting against discrimination gave rise to a court-established "ministerial exception" to Title VII employment discrimination claims. The Fifth Circuit first officially recognized a "ministerial exception" to Title VII employment discrimination claims in *McClure v. Salvation Army*.[74] In *McClure*, a former minister of the Salvation Army, Ms. McClure, brought suit alleging discrimination by the Salvation Army because of her gender, in violation of Title VII.[75] The court reasoned that separation of church and state requires a church to decide "free from state interference, matters of church administration and government."[76] Asking the government to review hiring practices or salary assignments would involve a high level of government interference in church decision-making.[77] Finding that Con-

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70. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

71. 42 U.S.C. § 2000e-1.

72. 42 U.S.C. § 2000e-1 (2000).

73. *See* 118 CONG. REC. 4503 (1972) (noting that the objective of the amendment was "to take the political hands of Caesar off of the institutions of God, where they have no place to be").

74. 460 F.2d 553, 560-61 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

75. *Id.* at 555. Specifically, Ms. McClure argued that she received less salary and benefits than male officers and that she was fired because she filed complaints with the Equal Employment Opportunity Commission. *Id.*

76. *Id.* at 560. In establishing the ministerial exception, the Fifth Circuit relied on the Supreme Court's decision in *Kedroff v. St. Nicholas Cathedral*, which held that religious organizations must be granted the "power to decide for themselves, free from state interference, matters of church government." 344 U.S. 94, 116 (1952). Interpreting this to permit religious organizations to discriminate when hiring religious leaders, the court coined the "ministerial exception" to Title VII, exempting religious organizations from discrimination claims relating to hiring religious leaders. *McClure*, 460 F.2d at 560-61.

77. *McClure*, 460 F.2d at 560.

gress never intended to supervise the religious leadership choices of congregations, the court dismissed Ms. McClure's complaint.[78]

Following *McClure*, several circuits upheld a "ministerial exception" to Title VII employment discrimination cases, recognizing that religious organizations have the right under the First Amendment to choose their spiritual leaders.[79] Over time, the exception grew to include employees other than ordained ministers and clergy members.[80] The "ministerial exception" has been upheld more recently for employees whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship,"[81] or any position that is "important to the spiritual and pastoral mission" of the religious organization.[82]

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78. *Id.* at 561.

79. *See* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (holding that the Religion Clauses of the First Amendment "prohibit a church from being sued under Title VII by its clergy" and "mandate[ ] that churches retain exclusive control over strictly ecclesiastical matters"); Combs v. Cent. Texas Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999) (finding that a court cannot decide whether a ministerial employment decision was based on legitimate grounds without unconstitutionally interfering with the internal management of the church); Bell v. Presbyterian Church, 126 F.3d 328, 333 (4th Cir. 1997) (stating that decisions about the "nature, extent, administration, and termination of a religious ministry falls within the ecclesiastical sphere that the First Amendment protects from civil court intervention"); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996) (upholding the ministerial exception by dismissing a Title VII sex discrimination claim of a nun who was denied tenure); Young v. N. Illinois Conference of United Methodist Church, 21 F.3d 184, 187-88 (7th Cir. 1994) (finding that religious organizations have the right, under the First Amendment, to make their own decisions regarding the employment of clergy members); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (finding that a church-affiliated hospital has the right to choose its spiritual leader under the First Amendment); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) (holding that review of ministerial appointments would cause excessive state entanglement in religious decisions).

80. *See* EEOC v. Roman Catholic Diocese, 213 F.3d 795, 797 (4th Cir. 2000) (holding that a music teacher could not maintain a Title VII discrimination suit against her former employer because the "ministerial exception" applies to all employees whose responsibilities include teaching, spreading the faith, or any other integral portion of the spiritual message); *Catholic Univ. of Am.*, 83 F.3d at 463 (finding that the ministerial exception applies to "all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission"); Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991) (holding that an elementary school teacher at a private religious school could not maintain a suit under Title VII for employment discrimination because churches have a "constitutionally protected interest in applying religious criteria to at least some of their employees"); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-84 (5th Cir. 1981) (noting that faculty and administrative staff of a seminary are "ministers" for the purpose of the "ministerial exception").

81. *Rayburn*, 772 F.2d at 1169.

82. *Id.*

Although Title VII now allows religious organizations to discriminate when hiring certain employees, the Supreme Court recognized, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,[83] that religious schools are not totally free from state governance.[84] In *Dayton Christian Schools*, the Court held that Ohio's Civil Rights Commission could investigate the procedures of a religious school without violating the constitutional rights of the members of the school.[85] The Court further noted that it is within a state's interest to prevent employment discrimination, and that state procedures to investigate such discrimination do not on their face violate the Religion Clauses of the Constitution, even if the investigation involves a religious school.[86] Several circuit courts have recognized that the prohibitions in Title VII regarding discrimination based on race, color, sex, or national origin still apply to religious organizations.[87] Moreover, the Court has recognized that states, in their individual constitutions, can provide their citizens with greater protections than those guaranteed in the federal constitution.[88]

The "ministerial exception" has preempted many Title VII claims against religious employers, but courts have maintained the protections guaranteed in Title VII by limiting the scope of the exception to "what is necessary to comply with the First Amendment."[89] The Fourth Circuit noted, in *Rayburn v. General Conference of Seventh-Day Adventists*, that Congress could have exempted religious organizations from all Title VII discrimination claims, but it did not, leaving them open to suits based on discrimination on the basis of race, national origin, or sex.[90] Attempting to guard against erosion of the protections found in Title VII, the Fourth Circuit noted, in *EEOC v. Roman Catholic Diocese*, that the "ministerial exception" would "not apply to employment decisions concerning purely custodial or administrative

83. 477 U.S. 619 (1986).

84. *Id.* at 628.

85. *Id.*

86. *Id.*

87. *See, e.g., Rayburn*, 772 F.2d at 1166 (noting that "Title VII does not confer upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin"); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (finding that both the language and legislative history of the Civil Rights Act indicate that Congress intended religious organizations to be liable for discrimination on the basis of race, color, sex, and national origin).

88. *See, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983); Kreimer v. Bureau of Police, 958 F.2d 1242, 1269 (3d Cir. 1992).

89. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999).

90. *Rayburn*, 772 F.2d at 1166.

personnel."[91] Other circuits have also precluded the application of the "ministerial exception" to the employment of lay people and others who are not central to the religious mission of the organization.[92] The Supreme Court has yet to consider a case regarding the constitutionality of the "ministerial exception" as it applies to the required separation of church and state mandated by the Constitution.

c. Maryland Law Regarding Issues Presented in the Instant Case.—

(1) Maryland Constitutional Cases.—Much like the Supreme Court, Maryland courts have entertained many cases challenging the limits of the First Amendment, and the courts have attempted to maintain a balance between individual freedoms and society's desire to legislate for the general good. Addressing the tension between these two ideals, the Court of Appeals, in *Hopkins v. State*,[93] stressed that the First Amendment provides an absolute freedom to believe, but limited freedom to act.[94] Like the Supreme Court in *Employment Division, Department of Human Resources v. Smith*, the *Hopkins* court recognized that under the First Amendment, individuals must follow laws of general applicability, even if they have the effect of violating personal religious beliefs.[95]

Expanding upon the idea that the First Amendment does not provide individuals a blanket exemption to general laws under the guise of religious freedom, the Court of Appeals held, in *Craig v. State*,[96] that personal conduct is subject to state regulation so long as the laws are general and nondiscriminatory.[97] *Craig* questioned whether a husband and wife were guilty of involuntary manslaughter

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91. 213 F.3d 795, 801 (4th Cir. 2000). When the issue does not involve First Amendment rights, Title VII still applies to religious employers unless Congress provides otherwise. *Id.*

92. *See* Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 n.3 (8th Cir. 1991) (noting the importance of stricter statutory scrutiny when questions arise about nonreligious employment decisions made by religious institutions); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (finding that the "ministerial exception" does not apply to support staff at a religious seminary because they are not typically engaged in "ecclesiastical or religious" activities); EEOC v. Mississippi Coll., 626 F.2d 477, 485 (5th Cir. 1980) (upholding a Title VII claim brought by a secular teacher against a religious college because the "ministerial exception" does not apply to faculty members who are not ministers).

93. 193 Md. 489, 69 A.2d 456 (1949).

94. *Id.* at 496, 69 A.2d at 459. This case considered whether a local ordinance preventing ministers from advertising marriage services violated the First Amendment. *Id.* at 495, 69 A.2d at 458.

95. *Id.* at 496-97, 69 A.2d at 459.

96. 220 Md. 590, 155 A.2d 684 (1959).

97. *Id.* at 599, 155 A.2d at 690.

when they failed to render medical care to their child, who later died, because it was not in accordance with their religious beliefs.[98] The court held that individuals are prohibited from citing religious beliefs as an excuse for violating religiously neutral, general safety laws.[99]

In upholding individuals' freedom of worship, the Maryland courts have also recognized the First Amendment right to discriminate in the hiring practices of religious leaders. A former candidate for priesthood filed suit against the Roman Catholic Archbishop of Baltimore in *Downs v. Roman Catholic Archbishop*,[100] seeking to demonstrate that defamatory statements were made against him, ruining his reputation in the community and preventing him from becoming ordained as a priest.[101] The court rejected this claim, noting that even if the statements were defamatory, the statements were made in an effort to prevent Downs from becoming a priest.[102] Because the statements related to the appointment of religious leaders, the court felt it was out of its realm of authority.[103] Although no direct reference to a "ministerial exception" was made, this case is the closest Maryland courts have come to finding that religious organizations have the right to hire religious leaders of their choice, even while violating other laws.

(2) Maryland Law Regarding Statutory Interpretation.— There are several rules of construction that Maryland courts apply to determine the meaning of a statute. The guiding principle regarding statutory interpretation is that a statute should be construed as the legislature intended when the statute was written.[104] All the rules of construction must give way to this intention.[105]

The best way to ascertain legislative intent is to look at the actual wording of the statute itself.[106] When the wording of a statute is clear and unambiguous, courts must apply the plain meaning of the statute without inserting or omitting words.[107] The clear and plain meaning

98. *Id.* at 593, 155 A.2d at 686.

99. *Id.* at 599, 155 A.2d at 690.

100. 111 Md. App. 616, 683 A.2d 808 (1996).

101. *Id.* at 619-20, 683 A.2d at 810.

102. *Id.* at 625, 683 A.2d at 813.

103. *Id.* at 624-25, 683 A.2d at 812-13.

104. *See, e.g.*, Welsh v. Kuntz, 196 Md. 86, 93, 75 A.2d 343, 345 (1950) ("The cardinal rule of statutory construction is that statutes should always be construed to effectuate the intention of the Legislature.").

105. McKeon v. State, 211 Md. 437, 443, 127 A.2d 635, 638 (1956).

106. Jones v. State, 311 Md. 398, 405, 535 A.2d 471, 474 (1988).

107. *Welsh*, 196 Md. at 93, 75 A.2d at 345 (noting that "[t]he manifest intention will always prevail over the rules of grammatical construction"); *see also* Grimm v. State, 212 Md.

of the statute is to be determined by reviewing the contextual meaning of each word, and it should be interpreted so as to evince the intentions of the statute as a whole.[108] Only when the wording of a statute is unclear will courts look to legislative history to determine legislative intent.[109] Overall, a statute should be construed such "that all its parts harmonize with each other," resulting in an interpretation that is consistent with the intent of the legislature.[110]

Because the legislature presumably intends its statutes to be valid and enforceable, and thereby constitutional, a construction that renders a statute constitutional is always preferred to an interpretation producing an unconstitutional result.[111] In *Davis v. State*,[112] the Court of Appeals emphasized that a constitutional construction, however, must be "reasonable" within the plain meaning of the statute and can only be construed as such where the "language permits."[113] The *Davis* court noted that courts are not permitted to redraft statutes by fixing defective language or inserting words or phrases not originally present within the statute.[114] Finally, if a portion of a statute is deemed unconstitutional, there is a strong presumption that the constitutional portions can be severed from those that are not constitutional.[115]

3. The Court's Reasoning.—In *Montrose Christian School Corp. v. Walsh*, the Court of Appeals held the clause "to perform purely religious functions" in section 27-19(d)(2) of the Montgomery County

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243, 246, 129 A.2d 128, 129 (1957) (noting that courts are not permitted to apply rules of construction when the wording of a statue is unambiguous); Maguire v. State, 192 Md. 615, 622, 65 A.2d 299, 302 (1949) (reasoning that courts can only resort to judicial construction when ambiguity exists).

108. *See Maguire*, 192 Md. at 623, 65 A.2d at 302 (noting that words should not be isolated for purposes of interpretation, and that a statute must be construed as a whole, rather than just as individual parts); *Jones*, 311 Md. at 405, 535 A.2d at 474 ("When construing a provision that is part of a single statutory scheme, the legislative intent must be gathered from the entire statute, rather than from only one part.").

109. *Welsh*, 196 Md. at 93, 75 A.2d at 345.

110. *Maguire*, 192 Md. at 623, 65 A.2d at 302.

111. *See* Mayor of Baltimore v. Concord Baptist Church, Inc., 257 Md. 132, 140, 262 A.2d 755, 760 (1970) (stating that there is a strong presumption of the constitutionality of a statute, and that adopting a construction that avoids a conflict with the Constitution is always preferred to one that does not); Becker v. State, 363 Md. 77, 92, 767 A.2d 816, 824 (2001) (emphasizing that courts prefer to construe a statute as constitutional rather than casting doubt on its constitutionality).

112. 294 Md. 370, 451 A.2d 107 (1982).

113. *Id.* at 377-78, 451 A.2d at 111.

114. *Id.* at 378, 451 A.2d at 111.

115. *See* Bd. of Supervisors of Elections of Anne Arundel County v. Smallwood, 327 Md. 220, 245, 608 A.2d 1222, 1234 (1992) (holding that invalid portions of a statute should be severed so as to allow the remaining portions to be enforced).

Code unconstitutional, finding that it nullified the rights of members of religious organizations to hire spiritual and religious leaders of a particular religion.[116] Having consolidated both the *Carver* and *Walsh* cases because of the similarity of issues on appellate review, the Court of Appeals reversed the decisions of the Circuit Court for Montgomery County in both cases.[117]

After reviewing the relevant portions of the First Amendment and the Maryland Constitution, the court began its analysis by recognizing that religious organizations do not have the right to "'ignore neutral laws of general applicability' even when such laws have an incidental effect of burdening a particular religious activity."[118] The court pointed out, however, that the First Amendment prevents the government from regulating religious beliefs as such and noted the unconstitutionality under both the United States and Maryland constitutions of government interference with the regulation and management of religious organizations.[119]

Relying on the "ministerial exception" upheld in several Title VII employment discrimination cases, the court explained that the First Amendment ensures a constitutional right for religious organizations to be free from government interference when it comes to the hiring and firing of spiritual and religious leaders.[120] By strictly interpreting the words "purely religious functions" in the Montgomery County Code and noting that all religious heads perform both secular and religious duties as part of their jobs, the court held that the Montgomery County Code prevents religious organizations from ever discriminating because no employees engage in "purely" religious functions.[121] As a result, the clause was deemed unconstitutional and

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116. *Walsh*, 363 Md. at 584, 770 A.2d at 122.

117. *Id.* Adhering to the principle that a court should decide a case on constitutional grounds only when it is not possible to resolve the issue on nonconstitutional grounds, the court examined the preemption and charitable immunity issues before looking to the question of constitutionality. *Id.* at 578, 770 A.2d at 119 (citing Baltimore Sun v. Mayor of Baltimore, 359 Md. 653, 659, 755 A.2d 1130, 1133-34 (2000)). First, the court considered whether state law conflicted with, and thus preempted, section 27-19 of the Montgomery County Code. *Id.* at 579-81, 770 A.2d at 119-20. Using Maryland's controlling preemption principles, the court found that no conflict existed between the state and local laws. *Id.* at 581, 770 A.2d at 120. Considering next whether the doctrine of charitable immunity prevented both the school and Scheck from being liable to the former employees, the court concluded that charitable immunity only applies to tort actions and was therefore inapplicable to this statutory employment discrimination claim. *Id.* at 581-84, 770 A.2d at 121-22.

118. *Id.* at 585-86, 770 A.2d at 123 (quoting, in part, City of Boerne v. Flores, 521 U.S. 507, 513 (1997)).

119. *Id.* at 586-87, 770 A.2d at 123-24.

120. *Id.* at 590-92, 770 A.2d at 126-27.

121. *Id.* at 594, 770 A.2d at 128.

severed from the rest of the statute.[122] The remaining portion of the statute provided that religious organizations could "employ employees of a particular religion," allowing the Montrose Christian School to hire only those employees who are members of the Montrose Baptist Church.[123] The decisions of the circuit court were thereby reversed, and judgment was entered for the defendants.[124]

4. Analysis.—In *Walsh,* the Court of Appeals of Maryland missed an opportunity to establish a clear rule on the scope of religious organizations' right to discriminate under the First Amendment. The *Walsh* court rested its decision entirely on a strict interpretation of the words "purely religious functions" and was unwilling to interpret the phrase to mean anything other than individuals who engage in "only" religious functions.[125] Reasoning that no employee engages in only religious duties, the court held this part of the statute unconstitutional because it did not allow religious organizations to discriminate even in the hiring of their spiritual leader, a clear violation of the First Amendment.[126] By focusing on this interpretation, the court ignored several of Maryland's statutory construction principles and retained a statute that violates the Maryland Declaration of Rights. Had the court instead analyzed section 27-19 as a ministerial exception, it is likely that the statute would have been found constitutional. The *Walsh* decision could have provided much needed guidance in Maryland regarding the scope of employment discrimination under the First Amendment.

a. The Court's Strict Interpretation of Section 27-19 Ignores Principles of Statutory Construction and Results in a Statute that Conflicts with the Maryland Declaration of Rights.—

(1) The Court Failed to Comply with Established Statutory Construction Principles.—The *Walsh* decision is problematic because it

122. *Id.* at 596-97, 770 A.2d at 129-30. The court relied on the general presumption that the legislature would intend for invalid portions of a statute to be severed such that the remaining portion is still enforceable. *Id.* at 596, 770 A.2d at 129. The court also recognized that not severing the invalid portion would lead to the exact result it was trying to prevent: no exemption for religious organizations in their employment decisions. *Id.* at 596-97, 770 A.2d at 129-30.

123. *Id.* at 597, 770 A.2d at 130.

124. *Id.*

125. *Id.* at 594, 770 A.2d at 128.

126. *Id.* The court noted: "Even ministers, pastors, priests, rabbis, and other theological heads of religious organizations occasionally perform functions which would not ordinarily be characterized as 'religious.' Many other employees of religious organizations, such as teachers, may perform both religious and non-religious functions." *Id.*

failed to follow Maryland's established statutory interpretation principles when holding the "purely religious functions" clause of section 27-19 of the Montgomery County Code unconstitutional. It is well-settled in Maryland that the main purpose of statutory interpretation is for the court to determine what the legislature intended when enacting the statute.[127] Additionally, it is well-established that a reading of a statute that is constitutional is always preferred to one that raises issues of its constitutionality.[128] Section 27-19 specifically noted that although religious discrimination is illegal in Montgomery County, religious organizations are permitted to discriminate when hiring individuals to perform purely religious functions.[129] Although the legislative history is unavailable, the wording of section 27-19 indicates that the Montgomery County Council was attempting to establish a "ministerial exception," allowing religious institutions to hire individuals of their choice, provided they were to perform religious, as opposed to administrative, tasks.[130] Had the court interpreted this clause as a "ministerial exception," it would have read the statute as the legislature intended and likely would have avoided an unconstitutional ruling.

Even if the court had concluded that the wording of the statute was ambiguous as to the legislature's intent, it violated principles of statutory construction by failing to consider the meaning of the word "purely" in the context of the rest of the statute. The *Walsh* court cited to *Davis v. State*, where the Court of Appeals refused to read a sentence into a statute where no such clause was present.[131] The reasoning used in *Davis* does not apply in *Walsh*, however, because the *Walsh* court interpreted the actual wording of a clause, rather than adding, substituting, or deleting words as in *Davis*. However, the *Walsh* court relied on *Davis*, stating that it is not permitted to substitute or insert words, and refused to interpret the word "purely" as anything other than "only."[132] While it is understandable that the court would not want to reinvent the statute, principles of statutory construction mandate that when the wording of a statute is ambiguous, a court should look to the entire statute in context to determine

127. *See, e.g.*, McKeon v. State, 211 Md. 437, 443, 127 A.2d 635, 638 (1956).

128. *See, e.g.*, Becker v. State, 363 Md. 77, 92, 767 A.2d 816, 824 (2001).

129. MONTGOMERY COUNTY, MD., CODE § 27-19(e) (2001).

130. *See id.*

131. Davis v. State, 294 Md. 370, 378, 451 A.2d 107, 111 (1982). The *Davis* court refused to replace a clause stating "the tenets and practice of a recognized church or religious denomination of which he is an adherent or member" with the phrase "his religious beliefs." *Id.*

132. *Walsh*, 363 Md. at 594-95, 770 A.2d at 128-29.

the legislative intent.[133] By providing a clause that exempts religious organizations from the general discrimination rules when they hire individuals who engage in "purely religious functions," the Montgomery County legislature was clearly trying to establish a "ministerial exception." The court disregarded this intent by interpreting the clause "purely religious functions" without considering the meaning of this clause in the context of the statute as a whole.

(2) The Remaining Portion of the Statute Violates the Maryland Declaration of Rights.—The redacted version of section 27-19 of the Montgomery County Code created by the *Walsh* court clearly violates the Maryland Declaration of Rights.[134] The statute as it reads now provides a total exemption for religious organizations to discriminate in their hiring practices for both religious and administrative employees.[135] Although this redacted statute is arguably constitutional under the federal constitution, it violates the Maryland Declaration of Rights. The Maryland Declaration of Rights is narrower than the First Amendment to the U.S. Constitution in that it provides individuals with religious freedom so long as they do not "injure others in their natural, civil or religious rights . . . ."[136] Allowing religious organizations to discriminate in all of their hiring decisions clearly infringes on the religious and civil rights of individuals seeking jobs who are not members of that particular religious organization.

Although the Maryland Constitution provides for narrower religious protections than the First Amendment,[137] it is well-settled that states can provide more protection to their citizens than the federal

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133. *See, e.g.*, Jones v. State, 311 Md. 398, 405, 535 A.2d 471, 474 (1988).

134. The Maryland Declaration of Rights provides, in relevant part:

> all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights . . . .

MD. DECL. OF RTS. art. 36.

135. After the "purely religious function" clause is stricken, section 27-19(d) of the Montgomery County Code reads: "Notwithstanding any other provision of this division, it shall not be an unlawful employment practice: . . . (2) For a religious corporation . . . to hire and employ employees of a particular religion." *See Walsh*, 363 Md. at 597, 770 A.2d at 130.

136. MD. DECL. OF RTS. art. 36.

137. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), *with* MD. DECL. OF RTS. art. 36 ("[A]ll persons are equally entitled to protection in their religious liberty; . . .unless, under the color of religion, he shall . . . injure others in their natural, civil or religious rights . . . .").

government without violating the United States Constitution.[138] As such, assuming that the statute is constitutional under the federal Constitution, it is permissible for the Maryland Constitution to provide more religious and civil freedoms to its citizens than the federal constitution. The *Walsh* court stated that section 27-19 of the Montgomery County Code violated the Maryland Declaration of Rights because the state should not interfere with the management of religious organizations.[139] This interpretation fails to consider the possibility that the Maryland Constitution could provide citizens more protection from discrimination than the First Amendment. Additionally, it conflicts with both the Supreme Court's decision in *Ohio Civil Rights Commission v. Dayton Christian Schools* and circuit decisions that have held that it is within a state's interest to prevent employment discrimination and that the provisions of Title VII still apply to religious organizations.[140]

b. Reading Section 27-19 of the Montgomery County Code as a "Ministerial Exception" Would Likely Be Constitutional Under Lemon *and its Progeny.*—Based on *Lemon v. Kurtzman* and its progeny, it is likely that section 27-19 of the Montgomery County Code would have passed constitutional muster had the court viewed it as a "ministerial exception." In *Lemon*, the Supreme Court established a three-part test to determine whether a statute violates the First Amendment's Establishment Clause.[141] The first prong of the analysis requires that the purpose of the statute must be secular; the second prong dictates that the primary effect of the statute must not promote or inhibit particular religious beliefs or practices; and finally, the statute must not foster "an excessive government entanglement with religion."[142]

The first prong of the *Lemon* analysis, requiring that a statute have a "secular legislative purpose," does not pose an insurmountable hurdle for section 27-19. This test has been interpreted to require that

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138. *See, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983) (noting that states can provide more protections to criminals than federal law requires); Kreimer v. Bureau of Police, 958 F.2d 1242, 1269 (3d Cir. 1992) (noting that states are free to provide more constitutional rights than the federal constitution).

139. *Walsh*, 363 Md. at 588, 770 A.2d at 124.

140. *See supra* notes 83-87 and accompanying text (discussing the Supreme Court's decision in *Dayton Christian Schools* and citing to the circuits that have upheld Title VII claims against religious employers).

141. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

142. *Id.* (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 674 (1970)). The Supreme Court has not yet considered the constitutionality of a "ministerial exception," but numerous circuit courts have justified its constitutionality. *See supra* note 79 (setting forth cases from the numerous circuits that have accepted a "ministerial exception").

the government remain neutral when enacting legislation, preventing state endorsement or promotion of a particular religious belief.[143] Clearly section 27-19 of the Montgomery County Code does not have the purpose of advancing a particular religion because it gives blanket permission to all religions to discriminate when hiring individuals to perform "purely religious functions."

The second prong of the *Lemon* analysis requires that the statute's "principal or primary effect must be one that neither advances nor inhibits religion."[144] This prong does not forbid a statute that allows churches to advance religion; rather, it prevents the government itself from advancing religion.[145] The Supreme Court held that section 702 of the Civil Rights Act of 1964, which permitted much broader discrimination by religious groups in the hiring of individuals to perform work connected with the activities of the religious organization, was constitutional.[146] Based on this holding, section 27-19 of the Montgomery County Code would pass the second prong of the *Lemon* test because its allowance for discrimination is much narrower than section 702.

The third prong of the *Lemon* test poses more of a challenge for demonstrating the constitutionality of section 27-19 of the Montgomery County Code. This prong requires a court to examine whether the statute fosters "an excessive government entanglement with religion."[147] This test results from the Court's holding in *Kedroff v. St. Nicholas Cathedral* that religious organizations must have the power to decide for themselves, free from state interference, matters of church governance.[148] In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court interpreted this to mean that it is inappropriate for government officials to be involved in the supervision of religious management.[149] Citing to these decisions, the *Walsh* court stated that determining whether individuals are engaged in "purely" or "primarily" religious

143. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

144. *Lemon*, 403 U.S. at 612.

145. *Amos*, 483 U.S. at 337. Justice O'Connor recognized in her concurring opinion that this is not a bright line distinction because "[a]lmost any government benefit to religion could be recharacterized as simply 'allowing' a religion to better advance itself . . . ." *Id.* at 347 (O'Connor, J., concurring).

146. *Amos*, 483 U.S. at 337.

147. *Lemon*, 403 U.S. at 613 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 674 (1970)).

148. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

149. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979). The Court found that one of the problems with the NLRB's involvement in the collective bargaining process for religious schools would be forcing the state to get involved with issues of religious management. *Id.*

activities would involve excessive government entanglement in religious affairs.[150] However, this analysis is problematic because it fails to consider that a "ministerial exception" will always require such considerations.

Despite the extensions of the "ministerial exception" to teachers and other educators, no circuit has gone so far as to hold that employment discrimination laws do not apply to religious organizations. A "ministerial exception" applies only to individuals whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[151] As such, when examining whether a "ministerial exception" applies, a court will always be faced with deciding whether the individual who was discriminated against is engaged in religious or secular activities.

The *Walsh* court correctly noted that section 27-19 requires some judicial determination regarding what is a "purely religious function."[152] Such a determination, however, is no different than one that any court would have to make when questioning whether an individual who was discriminated against was a religious leader, and therefore out of the realm of state governance, or an administrative employee protected by employment discrimination laws. To make such a determination, a court would have to review the activities of the individual and determine whether his or her activities were primarily religious or administrative. Thus, if the "ministerial exception" is constitutionally mandated, as the *Walsh* court held,[153] courts will always be forced to make the very determinations that the court held problematic in this case. Under the third prong of *Lemon*, the *Walsh* court should have found that such judicial determinations would always be part of the "ministerial exception" question, and therefore did not involve excessive government entanglement in religious affairs. Had the court made this decision, section 27-19 of the Montgomery County Code would likely pass constitutional muster.

5. Conclusion.—The Court of Appeals rested its entire decision in *Walsh* on the strict interpretation of the word "purely."[154] The *Walsh* court spent considerable time explaining the need for a consti-

150. *Walsh*, 363 Md. at 596 n.10, 770 A.2d at 129 n.10.

151. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

152. *Walsh*, 363 Md. at 596 n.10, 770 A.2d at 129 n.10.

153. *Id.* at 594, 770 A.2d at 128.

154. *Id.* at 594-96, 770 A.2d at 128-29.

tutionally mandated "ministerial exception" to discrimination laws providing religious organizations the right to hire spiritual leaders of their choice.[155] In failing to recognize that the "purely religious functions" clause was a "ministerial exception" to Montgomery County's employment discrimination law, the *Walsh* court eradicated the very exception it was trying to uphold. This failure resulted in a decision that provides little guidance as to the scope of religious organizations' rights to discriminate under the First Amendment in Maryland and leaves behind a statute that clearly conflicts with legislative intent and the Maryland Constitution. It is up to the Montgomery County Council to amend the code to include a narrowly tailored "ministerial exception" or to do nothing and allow religious organizations to discriminate in all of their hiring practices until someone else brings a First Amendment challenge.

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155. *Id.* at 590-93, 770 A.2d at 126-28.

IV. CRIMINAL LAW

A. *A Partial Abrogation of Maryland's Justifiable Homicide Doctrine*

In *Sydnor v. State*,[1] the Court of Appeals of Maryland considered whether a robbery victim may use deadly force to prevent a robber from consummating a robbery.[2] The court held that a robbery victim may only employ deadly force when facing an imminent threat of death or serious bodily injury.[3] The court concluded that because the robber was running away when he was killed, the robbery victim was not facing an imminent threat of death or serious bodily injury at the moment he employed deadly force.[4] Having determined that the victim's act of killing was not justifiable homicide, the court affirmed the conviction.[5] The court's decision does not follow the common law. The court's analysis is led astray by its inaccurate reading of the origins of justifiable homicide doctrine and its incorrect application of excusable homicide doctrine. Notwithstanding that the court's decision diverges from the common law, it is a proper reformulation of an antiquated doctrine, developed centuries ago under a philosophy that society has long since discarded.

1. The Case.—Late in the evening on December 9, 1988, Roosevelt Preston Sydnor was sitting with some friends on the front steps of a rowhouse in east Baltimore when he was approached by Anthony Jackson.[6] Jackson asked Sydnor whether he had any marijuana for sale, and Sydnor responded that he did not. Jackson then pulled out a gun and ordered Sydnor to give him the gold chain Sydnor was wearing around his neck.[7] Jackson then threatened to shoot Sydnor and began to hit him on the head with the gun. Jackson removed thirty dollars from Sydnor's possession without incident, but when Jackson reached for Sydnor's chain, a struggle ensued. Sydnor and two friends grabbed both Jackson and the gun.[8] After having the gun wrestled away from him, Jackson turned to flee. He ran approxi-

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1. 365 Md. 205, 776 A.2d 669 (2001).
2. *Id.* at 210-11, 776 A.2d at 671-72.
3. *Id.* at 211, 776 A.2d at 672.
4. *Id.* at 219-20, 776 A.2d at 677.
5. *Id.* at 220, 776 A.2d at 677. The defendant, Sydnor, was convicted of voluntary manslaughter and use of a handgun in the commission of a felony. *Id.* at 208, 776 A.2d at 670.
6. *Id.* at 207, 776 A.2d at 670.
7. *Id.*
8. *Id.*

mately twenty feet before he was shot four times by Sydnor; once in the front of his thigh, once in the forearm, and twice in the back.[9] One of the shots was later found to have been fired from close range. Jackson died approximately forty yards from where the robbery occurred.[10]

The circumstances surrounding the shooting were generally not in dispute.[11] One witness testified that she saw the men struggling for the gun and heard one of them say "if you have a gun you better use it."[12] After backing away from the window, the witness heard the sound of running feet and several gunshots. Another witness testified that she saw Jackson approach Sydnor and pull out a gun and then saw Sydnor wrestle the gun away from Jackson. The witness also testified that Jackson "tried to run and [Sydnor] shot him in his back and then . . . ran in the opposite direction."[13]

Nearby police officers heard the shots and responded to the scene.[14] They pursued Sydnor, who witnesses identified as the shooter.[15] After being apprehended, Sydnor informed one of the police officers, "I shot [Jackson] because he was beating me with a gun and robbed me for $30 so I took the gun from him and shot him."[16]

Sydnor was tried in the Circuit Court for Baltimore City.[17] At the end of the trial, the judge instructed the jury on the law of murder and manslaughter before explaining the defense of self-defense.[18] Describing the defense, the trial judge gave the following instructions:

> [B]efore using deadly force, the defendant is required to make all reasonable effort to retreat. Defendant does not have to retreat if the defendant was in his home or retreat

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9. *Id.* In all, five shots were fired. *Id.*

10. *Id.* Sydnor's thirty dollars were recovered by the police from Jackson's body. Sydnor v. State, 133 Md. App. 173, 178, 754 A.2d 1064, 1067 (2000).

11. *Sydnor*, 365 Md. at 208, 776 A.2d at 670.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 209, 776 A.2d at 671. In a statement later given to the police at the police station, Sydnor stated:

> I twisted the gun out of his hand. . . . After that I panicked I just shot at him, as soon as I got the gun from him. You know, I didn't know whether or not he had . . . another gun on him or not. . . . Like I said I looked at it like this, it would be my life or his life. He said he was going to kill me.

Sydnor v. State, 133 Md. App. 173, 178, 754 A.2d 1064, 1066 (2000).

17. *Sydnor*, 365 Md. at 208, 776 A.2d at 670.

18. *Id.* at 209, 776 A.2d at 671. Self-defense can either serve as a complete defense to homicide or mitigate murder to manslaughter. *See infra* notes 89-96 and accompanying text.

> was unsafe or the avenue of retreat was unknown to the defendant *or the defendant was being robbed at the moment that the force was used* or the defendant was lawfully arresting the victim.[19]

Later, during deliberations, the jury asked for additional instructions.[20] In response, the judge provided a slightly different instruction:

> [B]efore using deadly force, the defendant is required to make all reasonable effort to retreat. The defendant does not have to retreat if the defendant was in his home or retreat was unsafe or if the avenue was unknown to the defendant or *if at the moment that the shots were fired the defendant was being robbed*, or the defendant was lawfully arresting the victim.[21]

The defense objected to this change, arguing that it represented commentary by the court.[22] The trial judge asserted that the change was immaterial, and the jury convicted Sydnor of voluntary manslaughter and use of a handgun in the commission of a felony.[23]

On appeal, the defendant claimed that the jury instruction was legally incorrect because the defendant had no obligation to retreat, but instead could resist the robbery and use deadly force until such point as the robber made his escape.[24] The defense predicated its argument on English common law and American cases which note that a robbery victim is justified in killing his attacker, as well as the Court of Appeals's previous application of the felony-murder rule.[25] The Court of Special Appeals rejected Sydnor's argument.[26] Relying upon established self-defense doctrine, the Court of Special Appeals held that a robbery victim may use deadly force to repel a robber up to the point at which the threat of death or serious bodily injury is no

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19. *Sydnor*, 365 Md. at 209-10, 776 A.2d at 671. The instruction given by the judge reflected nearly verbatim the language recommended by the Maryland Criminal Pattern Jury Instructions. *Id.* at 210, 776 A.2d at 671.

20. *Id.*

21. *Id.* at 210, 776 A.2d at 671.

22. *Id.* The defense did not elaborate on its objection until later on appeal. *Id.*

23. *Id.* at 208, 776 A.2d at 670. The jury acquitted Sydnor of first and second-degree murder and of carrying a handgun. *Id.*

24. *Id.* at 210, 776 A.2d at 671-72.

25. *Id.* Noting that the Court of Appeals previously held that the period during which a robbery is considered ongoing continues up to the point at which the robber has "made good his or her escape and reached a place of temporary safety," Sydnor claimed that because Jackson had not yet made his escape, he was entitled to use deadly force to prevent the robbery from being carried out. *Id.*, 776 A.2d at 672.

26. *Id.*, 776 A.2d at 672.

longer imminent.[27] The intermediate appellate court concluded that absent an imminent threat, deadly force "is the *sine qua non* of proof of excessive force."[28]

The Court of Appeals granted certiorari to decide whether the victim of a robbery is entitled to use deadly force to prevent his attacker's escape.[29]

2. Legal Background.—Since the early days of English common law, the law has recognized three different categories of homicide: felonious homicide, justifiable homicide, and excusable homicide.[30] The law distinguishes these categories based on the circumstances in which the homicide is committed and the degree of blame that society attaches to perpetrators.[31] While felonious homicide is considered the highest crime man can commit, the law forgives, either completely or partially, perpetrators of justifiable and excusable homicide.[32] These categories, which permeated the English common law, were implicitly adopted by Maryland through the language of its constitution.[33]

a. Justifiable Homicide.—Justifiable homicides originally included killings committed in execution of the law according to the king's authority, such as when an officer attempting to apprehend a felon killed the felon to prevent his escape.[34] A slight variation also covers situations where the homicide is committed for the advancement of public justice, such as when an officer kills to repel an assault.[35] Homicides committed to prevent some "forcible and atrocious crime" were also justified.[36] While this legal privilege was originally limited to officers of the law, over time the concept was extended to ordinary persons faced with becoming victims of certain felonies.[37] Presently, the category of "forcible and atrocious" crimes

27. Sydnor v. State, 133 Md. App. 173, 191-92, 754 A.2d 1064, 1074 (2000).

28. *Id.* at 185, 754 A.2d at 1070.

29. *Sydnor*, 365 Md. at 210-11, 776 A.2d at 672.

30. 4 WILLIAM BLACKSTONE, COMMENTARIES *177.

31. *See id.* at *177-204 (describing the different types of homicide).

32. *Id.* at *177-78.

33. *See* MD. CONST. art. V (providing that "the inhabitants of Maryland are entitled to the Common Law of England").

34. 4 BLACKSTONE, *supra* note 30, at *178-79.

35. *Id.* at *179.

36. *Id.*

37. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 572 (1903).

includes offenses such as murder, burglary, and rape;[38] however, the doctrine of justifiable homicide as a defense by private persons originally applied "almost without exception" to robbery cases.[39] Thus, a robbery victim who killed his attacker in the course of the robbery was, historically, held blameless for his actions.[40] Such a killing was permissible to prevent the robber from perpetrating the taking of the victim's property or from taking flight after the taking was complete.[41]

Historically, the law has treated persons committing justifiable homicides as though they were performing some legal necessity, or even a civic duty.[42] Accordingly, perpetrators of such killings faced no negative repercussions for their actions.[43] Their act was not only blameless, it was commendable.[44] All other killings warranted conviction.[45]

In response to perceived attempts to stretch justifiable homicide beyond its historical underpinnings, some jurisdictions have sought to clarify the applicability of the doctrine. In *People v. Ceballos*, the Supreme Court of California affirmed the conviction of a man who set a trap gun in his garage that shot a boy attempting to break into the garage.[46] The court held that deadly force is only justifiable if necessary to protect a victim of a forcible and atrocious crime from "death or serious bodily harm."[47] Because the defendant was not home when the burglary, which would be classified as a forcible and atrocious crime, took place, the court concluded that deadly force was employed solely for the protection of personal property and not for protecting the defendant against death or serious bodily harm.[48]

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38. *See* Law v. State, 21 Md. App. 13, 27, 318 A.2d 859, 867 (1974) (noting that the prevention of certain felonies may justify homicide); People v. Ceballos, 526 P.2d 241, 245 (Cal. 1974) (listing murder, mayhem, rape, and robbery as examples of forcible and atrocious crimes); State v. Moore, 31 Conn. 479, 483 (1863) (noting that murder, robbery, burglary, arson, breaking into a house in the daytime with intent to rob, sodomy, and rape are forcible and atrocious crimes).

39. Beale, *supra* note 37, at 572.

40. *Id.*

41. *Id.* at 572-73.

42. 4 BLACKSTONE, *supra* note 30, at *178.

43. *Id.*

44. *Id.*

45. Beale, *supra* note 37, at 568.

46. 526 P.2d 241, 243 (Cal. 1974).

47. *Id.* at 249; *see also* State v. Marfaudille, 92 P. 939, 941 (Wash. 1907) (noting that in all felonies to which the defense of justifiable homicide applies, "human life either is, or is presumed to be in peril" and "a person has no right to take human life directly or indirectly to prevent . . . theft of property").

48. *Ceballos*, 526 P.2d at 249.

Accordingly, the court concluded that the killing was not justifiable homicide.[49]

Unlike the *Ceballos* court, a number of jurisdictions have not limited the application of a justifiable homicide defense to only those situations where a person is faced with an imminent threat of death or serious bodily injury, but have applied it more broadly. In *People v. Cook*,[50] the Michigan Supreme Court rejected the defendant's contention that he was justified in using deadly force to prevent his daughter from running off with her beau.[51] The court noted that the defendant would have been justified in using deadly force only under one of three circumstances: "[He] supposed that his life was in danger, or that he would receive grievous bodily harm, or that immediate action on his part was necessary to prevent a felony attempted by violence."[52] The court affirmed the defendant's conviction, having determined that this situation did not constitute a felony or pose a threat of death or injury to anyone.[53]

Similarly, in *Commonwealth v. Harris*,[54] the Pennsylvania Supreme Court observed that a defense of justifiable homicide may be available in two types of situations.[55] The first situation combines the first two situations described above in *Cook*: when one is faced with an imminent threat of death or serious bodily injury.[56] The *Harris* court further observed that one is justified in killing when he or she believes "that a felony is in process of commission, which can only be averted by the death of the supposed felon."[57] It is the latter situation that most jurisdictions agree falls within the ambit of justifiable homicide.[58]

While these common law notions have existed in America since the earliest days of the republic,[59] cases involving robbery victims

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49. *Id.*
50. 39 Mich. 236 (1878).
51. *Id.* at 241.
52. *Id.* at 242.
53. *Id.* at 240.
54. 281 A.2d 879 (Pa. 1971).
55. *Id.* at 881.
56. *Id.*
57. *Id.* (internal quotation marks omitted) (citation omitted).
58. *See, e.g.*, Flynn v. Commonwealth, 264 S.W. 1111, 1112 (Ky. 1924) (noting that the right to kill a robber to prevent a robbery has existed since the earliest days of the common law); *Cook*, 39 Mich. at 243 (observing that numerous authorities recognize the right of a robbery victim to kill his attacker to prevent the robbery); Weaver v. State, 19 Tex. Ct. App. 547, 568-69 (1885) (reviewing English common law on justifiable homicide); State v. Marfaudille, 92 P. 939, 940-41 (Wash. 1907) (observing that most authorities agree that a robbery victim may kill his attacker to prevent the robbery).
59. *See Flynn*, 264 S.W. at 1112.

shooting their robbers are relatively few. In *Crawford v. State*,[60] the Georgia Supreme Court reversed the conviction of a man who killed another man who had just robbed him of a large piece of meat.[61] The court acknowledged the common law notion that it is justifiable to kill "one who manifestly intends, by violence or surprise, to commit a felony" provided that the killing is necessary to prevent that felony.[62] The court determined that the trial court's jury instruction, which stated that the right to kill ended with the transfer of possession of the property from the victim to the robber, was improper.[63] The court concluded that "[t]he taking was not a past, but a present and progressing, injury."[64] Consequently, the court held that the robbery victim need not yield after the property has changed possession, but may kill the robber to prevent the property from being carried away.[65]

In *Flynn v. Commonwealth*, the Kentucky Supreme Court took a similar position in reversing the murder conviction of a defendant for killing a man who had just robbed him and was making his escape.[66] The court noted that the victim:

> had the right, so long as the deceased remained in his immediate presence with the property, to use such force as was necessary, or reasonably appeared to him to be necessary, to prevent the deceased from carrying the money away, even to the taking of the life of the deceased.[67]

This, the court noted, has been justifiable homicide "[f]rom the earliest days of common law . . . ."[68]

Justifiable homicide doctrine, in its historical form, has been the subject of little discussion in the Maryland courts. Before *Sydnor*, only one Maryland case, *Law v. State*,[69] a Court of Special Appeals case, discussed the right of a victim of robbery to kill his attacker to prevent the commission of the robbery.[70] The *Law* court observed that forci-

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60. 17 S.E. 628 (Ga. 1893).
61. *Id.* at 631.
62. *Id.* (internal quotation marks omitted) (citation omitted).
63. *Id.* at 629-30.
64. *Id.* at 630.
65. *Id.*
66. 264 S.W. 1111, 1112 (Ky. 1924).
67. *Id.*
68. *Id.*
69. 21 Md. App. 13, 318 A.2d 859 (1974).
70. *Id.* at 26-27, 318 A.2d at 867. Two previous Court of Special Appeals decisions recognized that a victim of a forcible felony is justified in killing his or her attacker. *See* Thomas v. State, 9 Md. App. 94, 95-96, 262 A.2d 797, 799 (1970); Whitehead v. State, 9 Md. App. 7, 10, 262 A.2d 316, 319 (1970). Nevertheless, *Law v. State* was the first to enumerate robbery as one such forcible felony. 21 Md. App. at 26-27, 318 A.2d at 867.

ble felonies, such as murder, robbery, burglary, rape, or arson, may justifiably be resisted with deadly force.[71] However, the court noted that this right is not absolute and that deadly force may be applied only when it is necessary to prevent such offenses.[72] Thus, Maryland's formulation of justifiable homicide doctrine mirrors its historical predecessor.[73]

b. Excusable Homicide.—Excusable homicide is of two varieties: misadventure and self-defense.[74] A homicide in the course of a legal act that accidentally results in death is homicide by misadventure,[75] while self-defense involves the victim of an assault or sudden quarrel killing the one who assaults him.[76]

Historically, perpetrators of excusable homicide, unlike perpetrators of justifiable homicide, were deemed, to some degree, blameworthy for their acts.[77] Perpetrators were subject to conviction and were forced to forfeit their personal goods.[78] Nevertheless, in cases of excusable homicide, the king would issue pardons in the name of equity to the convicted.[79] These pardons became so common that by the reign of Henry VIII, the equitable defense, through statutory enactments, became a legal defense.[80]

Thereafter, instead of being subject to conviction, forfeiture, and pardon, charges against perpetrators of excusable homicide were dismissed and no forfeiture or pardon followed.[81] In this respect, the practical distinction between excusable and justifiable homicide ceased to exist, although the distinction between their historical roots remains.

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71. *Law*, 21 Md. App. at 27, 318 A.2d at 867.

72. *Id.*

73. *See supra* notes 34-45 and accompanying text (describing the origins of justifiable homicide doctrine).

74. 4 BLACKSTONE, *supra* note 30, at *182.

75. According to Blackstone, misadventure is "where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head therefore flies off and kills a standerby." *Id.*

76. *Id.* at *184.

77. Beale, *supra* note 37, at 569.

78. *Id.*

79. *Id.*

80. *Id.* at 571. By the reign of Edward III, the Clerk of Chancery ceased giving notice to the king of pardons made in self-defense cases. *Id.* at 570. Pardons in these cases continued as a mere formality for some 200 years until the reign of Henry VII. *Id.* at 570-71. Around this time, courts began to dismiss charges for killing in self-defense, and the need for a pardon became obsolete. *Id.* at 570. Eventually, the defense was codified. *Id.* at 571.

81. *Id.* at 571.

The principle underlying self-defense, one form of excusable homicide, is that "a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him."[82] This doctrine became a part of the common law of Maryland with the adoption of the Maryland Constitution,[83] and existed unrefined until 1970, when the Court of Special Appeals, in *Whitehead v. State*,[84] bifurcated self-defense into two types: justifiable and excusable.[85] In *Whitehead*, the court considered whether the defendant, convicted of second-degree murder, acted in self-defense during a fistfight that resulted in his opponent's death. According to the Court of Special Appeals:

> Justifiable self defense is where a person is feloniously assaulted, being without fault himself, and necessarily kills his assailant to save himself from death or great harm, or from other felony attempted by force or surprise. Excusable self defense is where a person becomes engaged in a sudden affray or combat, and in the course of the affray or combat, necessarily, or under reasonably apparent necessity, kills his adversary to save himself from death or great bodily harm . . . .[86]

The court noted that there was no practical difference between justifiable and excusable self-defense: in either case the defendant is not culpable.[87] Because the defendant participated in the fight intentionally, the court held that he did not act in self-defense, thus the killing was neither justifiable nor excusable.[88]

Later, in *State v. Faulkner*,[89] the Court of Appeals also divided self-defense into two categories: perfect and imperfect self-defense.[90] In

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82. 4 BLACKSTONE, *supra* note 30, at *184.

83. MD. CONST. art. V. This article states "[t]hat the inhabitants of Maryland are entitled to the Common Law of England . . . ."

84. In *Whitehead*, the defendant was confronted by the decedent, who accused the defendant of stealing the wallet of the decedent's wife. 9 Md. App. 7, 12, 262 A.2d 316, 319 (1970). The two men began to fight, and as a result of blows sustained during the fight, the decedent died. *Id.*, 262 A.2d at 320. The defendant claimed self-defense. *Id.* at 9, 262 A.2d at 318.

85. *Id.* at 10, 262 A.2d at 319.

86. *Id.*

87. *Id.*

88. *Id.*

89. 301 Md. 482, 483 A.2d 759 (1984).

90. *Id.* at 485-86, 483 A.2d at 761. When the *Faulkner* case reached the Court of Special Appeals, the court reaffirmed the distinction between justifiable and excusable self-defense it had established in *Whitehead*. Faulkner v. State, 54 Md. App. 113, 115, 458 A.2d 81, 82 (1983). The Court of Appeals, however, did not address the Court of Special Appeals's new dichotomy.

Faulkner, the court observed that to succeed on a claim of perfect self-defense, a defendant must establish the following:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
> (2) The accused must have in fact believed himself in this danger;
> (3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.[91]

The court distinguished imperfect self-defense as a situation where the killer's belief that he faced an imminent threat of death or serious bodily injury is not objectively reasonable; rather, the killer possesses a subjectively honest but unreasonable belief that such danger exists.[92] The practical distinction between perfect and imperfect self-defense is that the former is a complete defense, while the latter merely serves as mitigation from murder to manslaughter.[93]

Thus, in Maryland, a homicide committed in perfect self-defense diverges from the original formulation of self-defense because no guilt attaches to one who commits it.[94] Maryland's imperfect self-defense doctrine, by contrast, more closely resembles its historical ancestor.[95] A homicide committed in imperfect self-defense is worthy of some blame, and the perpetrator of it remains subject to conviction and punishment.[96]

In *Gray v. State*,[97] the Court of Special Appeals encountered a self-defense claim similar to the defendant in *Sydnor*.[98] In *Gray*, a father

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91. 301 Md. at 485-86, 483 A.2d at 761.

92. *Id.* at 499-500, 483 A.2d at 768-69.

93. *Id.* at 486, 483 A.2d at 761.

94. Perfect self-defense is a complete defense to homicide and results in a defendant's acquittal. *Id.* at 485, 483 A.2d at 761. Originally, someone killing in self-defense was subject to conviction. *See supra* notes 77-78 and accompanying text.

95. Imperfect self-defense is a partial defense to homicide, mitigating murder to manslaughter. *Faulkner*, 301 Md. at 486, 483 A.2d at 761. Thus, one killing in imperfect self-defense is not as blameworthy as someone committing a felonious murder, but more blameworthy than someone killing in perfect self-defense. *See id.* The perfect/imperfect self-defense dichotomy thus mirrors the historical treatment of perpetrators of justifiable homicide and excusable homicide; while the former were completely without blame, the latter were only partially so. Beale, *supra* note 37, at 568-69.

96. *Faulkner*, 301 Md. at 486, 483 A.2d at 761.

97. 4 Md. App. 175, 241 A.2d 909 (1968).

98. *Id.* at 180, 241 A.2d at 912.

became enraged when he returned home to find his daughter's boyfriend, who was visiting the daughter, in the house, shirtless.[99] The father and the boyfriend began to argue and each drew a gun.[100] The boyfriend fired a shot, and the father turned to flee down the stairs leading to the basement.[101] While the father fled, the boyfriend continued shooting, killing the father.[102] The defendant claimed he had fired in self-defense.[103] The Court of Special Appeals affirmed the defendant's conviction for second-degree murder, concluding that Gray had not acted in self-defense because when the father turned to flee, regardless of whether he still possessed a gun, the defendant was no longer facing an imminent threat of death or serious bodily injury.[104]

In *Souffie v. State*,[105] the Court of Special Appeals rejected a similar claim by a woman convicted of second-degree murder.[106] The defendant and a friend were hitchhiking when they were picked up by the victim.[107] After having intercourse with the victim, the defendant shot and killed him.[108] The defendant claimed she shot the victim after he had raped her, and thus the shooting was in self-defense.[109] Following its reasoning in *Law*, the *Souffie* court observed that had the defendant killed her supposed assailant to prevent the rape, the killing may have been justified.[110] Notwithstanding, the court noted that the defendant killed her accused rapist after the act.[111] The court thus rejected the defendant's argument, concluding that "[t]he short answer to [a claim of self-defense] is that one does not defend oneself from a rape by killing the rapist after the act has been perpetrated .... [T]he right of self-defense does not extend to punishment or revenge for an act already perpetrated."[112]

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99. *Id.* at 178, 241 A.2d at 911.
100. *Id.*
101. *Id.* at 180, 241 A.2d at 912-13.
102. *Id.*, 241 A.2d at 913.
103. *Id.*, 241 A.2d at 912.
104. *Id.*, 241 A.2d at 912-13.
105. 50 Md. App. 547, 439 A.2d 1127 (1982).
106. *Id.* at 564, 439 A.2d at 1136.
107. *Id.* at 548, 439 A.2d at 1129.
108. *Id.* at 549, 439 A.2d at 1129.
109. *Id.*
110. *Id.* at 564, 439 A.2d at 1136. As noted by the Court of Special Appeals in *Law*, Maryland common law has recognized rape as a forcible and atrocious crime, and a killing committed to prevent the commission of a rape would be justifiable homicide. Law v. State, 21 Md. App. 13, 27, 318 A.2d 859, 867 (1974).
111. *Souffie*, 50 Md. App. at 564, 439 A.2d at 1136.
112. *Id.* at 564, 439 A.2d at 1136. Despite rejecting the defendant's self-defense claim, the court did observe that "[t]he argument may give rise to an issue of mitigation in the

3. The Court's Reasoning.—In *Sydnor*, the Court of Appeals rejected the defendant's contention that the jury instruction offered by the trial court inaccurately represented Maryland's justifiable homicide doctrine.[113] The court determined that deadly force within the context of self-defense may only be employed at the moment that the individual is faced with a threat of death or serious bodily injury.[114] This requirement, the court noted, extends to all killings done in self-defense, regardless of whether the killing is committed in resistance of a robbery.[115] The court observed that the trial court's jury instruction correctly reflected this legal principle.[116] Consequently, the court determined that because Sydnor used deadly force while the defendant was fleeing, the use of deadly force was not justifiable.[117]

The court rejected Sydnor's contention that the trial court incorrectly instructed the jury on excusable rather than justifiable homicide doctrine.[118] The court recognized the English common law distinctions between justifiable and excusable homicide, particularly that at common law justifiable homicide permitted the killing of a robber in the course of the robbery.[119] The court determined, however, that the justifiable homicide doctrine "was based on the presumed imminent threat to life or limb posed by such felonies, not on the fact that they may entail the loss of property."[120] In this respect, the court concluded that the right of a robbery victim to repel his attacker mirrors the right of one to repel another in self-defense.[121] Accordingly, the court determined that the availability of deadly force as a method of repelling any attacker is contingent upon the victim of the attack being faced with an imminent threat of death or serious bodily injury, and the victim reasonably believing that deadly force is necessary to repel that threat.[122]

The court concluded that because the victim had turned to flee, Sydnor's actions were not in defense of his person, but rather his

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nature of justifiable homicide to prevent the rape." *Id.* However, the defendant did not raise justifiable homicide as a defense, and the court did not consider the issue *sua sponte*. *Id.*

113. *Sydnor*, 365 Md. at 219, 776 A.2d at 677.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 219-20, 776 A.2d at 677.
118. *Id.* at 219, 776 A.2d at 677.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 218, 776 A.2d at 676-77.

property,[123] and deadly force, absent an imminent threat of death or serious bodily injury, is not permitted.[124] Additionally, notwithstanding its original distinctions, the court noted that the concepts of justifiable and excusable homicide have long since blurred, and their historical distinctions have lost practical effect.[125] Consequently, the court noted that even if the robbery were still in progress, unless Sydnor was faced with an imminent threat of death or serious bodily injury, deadly force was not justifiable.[126] For these reasons, the court held that the jury instruction, which accurately reflected Maryland's conceptualization of justifiable homicide, was proper and affirmed the defendant's conviction.[127]

In her concurrence, Judge Raker joined with the majority in affirming Sydnor's conviction, but only because she concluded that the issue of whether the jury instructions regarding the law of self-defense were legally correct was not preserved for appeal.[128] Judge Raker noted that while Sydnor's attorney objected to the supplemental jury instruction at trial, that objection failed to raise the issue of whether Sydnor had a right to resist the robbery through the use of deadly force.[129] Instead, Judge Raker observed, Sydnor first advanced this theory at the Court of Special Appeals.[130] Because this theory was not advanced at trial, Judge Raker determined that the Court of Appeals should not have decided the issue.[131]

In his dissent, Judge Cathell objected to what he perceived to be a misapplication of the law by the majority.[132] Judge Cathell asserted that while the majority's recitation of self-defense doctrine may have been on point, it was improperly applied.[133] Judge Cathell argued that self-defense doctrine is not applicable to the use of deadly force to stop a robbery, but instead that the rules governing deadly force to prevent a robbery are, and always have been, different.[134]

Judge Cathell emphasized the fact that the cases cited by the majority in defense of its position are all traditional self-defense cases, none of which involve a victim killing his attacker to prevent the com-

123. *Id.* at 219-20, 776 A.2d at 677.
124. *Id.*
125. *Id.* at 219, 776 A.2d at 677.
126. *Id.*
127. *Id.*
128. *Id.* at 222, 776 A.2d at 679 (Raker, J., concurring).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 228, 776 A.2d at 682 (Cathell, J., dissenting).
133. *Id.*
134. *Id.*

mission of a robbery, and are inapposite to this case.[135] He concluded that because self-defense law was incorrectly applied, the majority had provided no authority for its proposition that deadly force may only be applied by a person faced with an imminent threat of death or serious bodily injury, regardless of the context in which the killing occurs.[136]

Judge Cathell argued that by sweeping killings committed to prevent a robbery under the auspices of self-defense doctrine—thereby merging justifiable and excusable homicide—the majority has created an impractical rule whereby victims of robbery are precluded from preventing the asportation of their property as of the moment possession changes hands from the victim to his robber.[137] This, Judge Cathell noted, is not the common law of other states.[138]

Additionally, Judge Cathell objected to the inconsistency of this new rule with the "continuous offense" theory of robbery advocated by the court in *Ball v. State*.[139] Had Jackson shot and killed Sydnor while he was fleeing, rather than Sydnor killing Jackson, under the "continuing offense" theory espoused in *Ball*, Jackson would have committed felony-murder.[140] Accordingly, Judge Cathell disagreed with the majority's conclusion that the robbery was not ongoing when

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135. *Id.* at 228, 776 A.2d at 683. Shooting a robber in the course of a robbery had, until *Sydnor*, been a case of justifiable homicide, not self-defense. *See supra* notes 34-41, 69-73 and accompanying text (discussing the historical formulation of the justifiable homicide defense and Maryland's similar formulation).

136. *Sydnor*, 365 Md. at 228-29, 776 A.2d at 683 (Cathell, J., dissenting).

137. *Id.* at 230, 776 A.2d at 683. Judge Cathell noted that at the time the shooting took place, although Jackson had already taken possession of Sydnor's money, the robbery was still in progress because the elements of robbery include not only taking by force, but also the *carrying away* of the property. *Id.* at 227-28, 776 A.2d at 682.

138. *Id.* at 226-27, 776 A.2d at 681-82.

139. 347 Md. 156, 699 A.2d 1170 (1997). In *Ball*, the Court of Appeals addressed the question of whether force employed after property was taken in a robbery attempt to effectuate an escape, rather than to obtain possession of the property, satisfies the requisite forcible taking element of common law robbery. *Id.* at 184-85, 699 A.2d at 1183. The defendant, Ball, asserted that because he had taken the items before he killed the daughter of the homeowner (who returned home and interrupted the robbery), the force he employed did not further the taking of the items, but merely aided in his escape. *Id.* The court evaluated two differing theories adopted by various jurisdictions. *Id.* at 185-86, 699 A.2d at 1183-84. The first approach propounds that robbery is not committed when an individual peaceably gains possession of property then employs violence to effectuate his escape. *Id.* at 185, 699 A.2d at 1183-84. In contrast, the other approach asserts that force employed to aid in an escape satisfies the elements for a robbery conviction. *Id.* at 185-86, 699 A.2d at 1184. This latter theory, labeled the "continuing offense" theory by the *Ball* court, treats robbery as "a continuous transaction that is not complete until the perpetrator reaches a place of temporary safety." *Id.* at 185, 699 A.2d at 1184. The *Ball* court adopted the "continuing offense" theory. *Id.* at 188, 699 A.2d at 1185.

140. *Sydnor*, 365 Md. at 231, 776 A.2d at 684 (Cathell, J., dissenting).

Sydnor shot Jackson.[141] Judge Cathell observed that this distinction made no sense and was unjust, concluding:

> To proffer that a robbery is continuous because the commission of a robbery is needed to support a conviction for felony murder . . . , but not continuous when it would support the acquittal of a person defending against the same robbery, is simply, in my view, with all due respect to the majority, unacceptable in terms of consistency, intellectual honesty, fairness, and due process. There should not be differing standards supporting the State's desire for conviction and a defendant's desire for an acquittal. Both the State and the defendant should be subject to the same rules.[142]

Judge Cathell noted that the majority concluded that the "continuous offense" theory does not trump or expand the self-defense rule, but rejects the notion as irrelevant.[143] He observed that the right to shoot a robber to prevent a robbery and the right to kill in self-defense are different concepts and have always coexisted.[144] Judge Cathell noted that ironically it was the majority who sought to limit or trump the justifiable homicide rule.[145] In so doing, Judge Cathell lamented that with its holding, the majority, "under the guise of asserting that the concept never existed," restricted the rights of crime victims to protect themselves for no legitimate reason.[146]

4. Analysis.—In *Sydnor,* the Court of Appeals held that a victim of a robbery may only employ deadly force to repel his attacker when the victim reasonably believes that the robber presents an imminent threat of death or serious bodily injury.[147] In arriving at this rule, the court misapplied self-defense doctrine to a situation for which it was never intended. Applying self-defense principles to a robbery situation is a departure from English common law, adopted by the people of Maryland as part of the Maryland Constitution.[148] Before *Sydnor,* robbery victims could use deadly force to prevent the consummation of the robbery.[149] The rule espoused in *Sydnor* takes away this right. After *Sydnor,* the right to use deadly force only arises when a robbery

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141. *Id.*
142. *Id.* at 229, 776 A.2d at 683.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 229-30, 776 A.2d at 683.
147. *Sydnor,* 365 Md.. at 218, 776 A.2d at 676.
148. *See* MD. CONST. art. V.
149. *See* Law v. State, 21 Md. App. 13, 27, 318 A.2d 859, 867 (1974) (noting that the prevention of a robbery justifies the taking of a life).

victim is faced with an imminent threat of death or serious bodily injury.[150] *Sydnor* thus has the effect of merging the historically distinct categories of justifiable and excusable homicide, placing robbery victims who kill to prevent the commission of a robbery in the same position as persons using deadly force in self-defense. Notwithstanding this departure from the common law, the court's decision was proper because the robbery rule was archaic, based on principles that have long since been rejected by modern society.

a. A Misunderstanding of the Historical Underpinnings of Justifiable Homicide.—The court's analysis is led astray by its misinterpretation of the origins of justifiable homicide and excusable homicide doctrine. The court premised its decision on the mistaken conclusion that the impetus of justifiable homicide doctrine "was always the necessity . . . to protect oneself. That is the only premise that reasonably can justify the use of deadly force."[151] The court acknowledged the historical differences between the justifiable homicide and excusable homicide doctrines, but quickly discounted these differences as insubstantial and no longer applicable.[152] A review of the common law of Maryland and other states reveals that these differences are substantial and have, until this decision, remained applicable.[153] As Judge Cathell accurately concluded in his dissent, "The majority confuses the law of self-defense, with the different and separate rules relating to the use of force by a victim to prevent a robbery . . . . This is a robbery case—the rules are, and have always been, different."[154]

Contrary to the majority's assertion, the doctrine of justifiable homicide was not based solely on the desire to protect "life or limb."[155] As the court correctly observed, justifiable homicide historically applied to killings committed to prevent forcible and atrocious crimes.[156] While it is true that crimes included under this umbrella, such as murder, robbery, burglary, rape, and arson,[157] are those that pose the potential for great personal injury,[158] the prevention of injury was not the only consideration behind this doctrine's origin; pre-

150. *Sydnor*, 365 Md. at 218, 776 A.2d at 676.

151. *Id.* at 219, 776 A.2d at 677.

152. *Id.* at 215, 776 A.2d at 674-75.

153. *See supra* notes 34-112 and accompanying text.

154. *Sydnor*, 365 Md. at 228, 776 A.2d at 682 (Cathell, J., dissenting).

155. *Sydnor*, 365 Md. . at 219, 776 A.2d at 677.

156. *See id.* at 211-12, 776 A.2d at 672 (reviewing the history of justifiable homicide). The court acknowledged that robbery was a forcible and atrocious crime. *Id.* at 212, 776 A.2d at 672.

157. Law v. State, 21 Md. App. 13, 27, 318 A.2d 859, 867 (1974).

158. People v. Ceballos, 526 P.2d 241, 245 (Cal. 1974).

vention of the crime itself was another consideration, one unrecognized by the *Sydnor* court.[159]

Not all forcible and atrocious crimes inherently pose a risk of death or serious bodily injury to the victim.[160] Some forcible and atrocious crimes, such as murder and rape, are by definition crimes against persons.[161] For these offenses, personal injury is an inherent component. Accordingly, using deadly force to prevent these crimes would prevent personal injury. Thus, were Jackson trying to kill Sydnor, rather than rob him, when Sydnor used deadly force, that force would have been employed to protect life and limb.

Using deadly force in the course of other forcible and atrocious crimes, such as robbery and burglary, does not necessarily protect life and limb. While these felonies all possess a risk of great personal injury,[162] they are by definition crimes involving property,[163] which can be committed without resulting in physical injury. A slight change in the facts of *Sydnor* exemplify this point. Had Jackson not hit Sydnor with the gun, and had he escaped, he would have committed the robbery, a forcible and atrocious crime, without causing any personal injury.

Notwithstanding the inherent differences in these forcible and atrocious crimes, the common law in this country provided that victims of these felonies were justified in killing the perpetrators provided that the commission of the crime was imminent,[164] which does not necessarily mean that death or serious bodily injury was imminent.[165] Killings committed for the prevention of robbery, historically the type of situation in which justifiable homicide doctrine was applied, were permitted "solely to prevent the consummation of the rob-

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159. *See* People v. Cook, 39 Mich. 236, 243 (1878) (noting that "it is the duty of every one who sees a felony attempted by violence to prevent it if possible, and that life may be taken in so doing if necessary").

160. *See* State v. Korzep, 799 P.2d 831, 833 (Ariz. 1990) (noting that a justification defense applies to killings committed to prevent offenses that are not inherently life threatening).

161. *See generally* ROLLIN M. PERKINS, CRIMINAL LAW 34-51, 152-71 (2d ed. 1969) (describing different categories of criminal acts).

162. *See Ceballos*, 526 P.2d at 245.

163. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 692-704, 708-17 (1972) (describing different categories of criminal acts).

164. *See, e.g.*, State v. Sundberg, 611 P.2d 44, 47-48 (Alaska 1980) (noting that a person may use deadly force to prevent a crime, rather than wait until the crime has been committed); Weaver v. State, 19 Tex. Ct. App. 547, 570 (1885) (noting that killing to prevent a felony is not justifiable unless that felony is imminent).

165. *See Sundberg*, 611 P.2d at 48 (noting that originally the common law provided for a justification defense regardless of whether the offense sought to be prevented posed a danger to the victim).

bery."[166] Accordingly, to prevent the commission of these crimes, contrary to the *Sydnor* court's assertion, justifiable homicide doctrine has never required a robbery victim, such as Sydnor, to wait until such time as he is imminently threatened with death or serious bodily injury. Instead, Sydnor was free to kill Jackson provided that the felony was imminent. Thus, if Jackson were still in the process of committing the robbery, Sydnor would have been justified in using deadly force. As Maryland's common law indicates, Jackson was still in the process of committing the robbery, thus Sydnor was justified in using deadly force.

In *Ball v. State*, the Court of Appeals determined that a robbery is still being consummated while the robber is trying to make his escape, and the robbery is not complete until after the escape is complete.[167] The rules espoused in *Crawford v. State* and *Flynn v. Commonwealth* mirror the *Ball* court's conclusion. In *Crawford*, the Georgia Supreme Court, relying on the common law, observed that a robbery victim's right to kill his attacker does not end when the stolen property changes possession.[168] Instead, the right continues so long as the property is in the victim's immediate presence, during which time the robbery is "a present and progressing, injury."[169] The rule in *Flynn* was nearly identical.[170] Thus, although he was fleeing, Jackson was still in the course of consummating the robbery.[171] Consequently, Sydnor was justified in using deadly force.

The progressing nature of the felony in *Sydnor* distinguishes this case from *Souffie v. State*, where the Court of Special Appeals affirmed a woman's conviction for murder because she shot her supposed rapist after his forcible and atrocious crime had been completed.[172] Because Sydnor's injury was ongoing, whereas Souffie's was not, under traditional justifiable homicide doctrine, Sydnor, unlike Souffie, was justified in killing his attacker. The principle of justifiable homicide doctrine, thus, was based on more than just the need to protect one-

166. Beale, *supra* note 37, at 572.

167. 347 Md. 156, 185, 699 A.2d 1170, 1184 (1997); *see also supra* note 139 and accompanying text (discussing *Ball*'s holding that a robbery is considered ongoing until such time as the robber makes good his escape).

168. 17 S.E. 628, 630 (Ga. 1893).

169. *Id.*

170. *See* Flynn v. Commonwealth, 264 S.W. 1111, 1112 (Ky. 1924) (noting that a robbery victim may kill his robber to prevent his goods from being carried away).

171. Sydnor shot Jackson as Jackson was running away. *Sydnor*, 365 Md. at 207, 776 A.2d at 670.

172. 50 Md. App. 547, 564, 439 A.2d 1127, 1136 (1982).

self from personal injury, which the majority mistakenly claimed was the doctrine's singular purpose.[173] Crime prevention is also its object.

Recognizing that certain homicides were justifiable to prevent criminal acts, including robbery, from being carried out, one commentator noted, "if the killing were to prevent robbery it could not properly be avoided by leaving the robber in possession of the booty, since the object of the law in giving the justification would not then be attained."[174] As noted by the Alaska Supreme Court in *Sundberg*:

> The use of force has historically been justified when its purpose is the prevention of a criminal act . . . . Thus the effect of the crime-prevention privilege is to allow a person to use force in preventing a crime, rather than compel him to await the commission of the unlawful act.[175]

The *Sundberg* court explained that this privilege is granted because of society's general interest in preventing criminal acts.[176] Had he allowed Jackson to flee with his property, Sydnor would have allowed the crime to be completed, violating the principle that originally justified killings to prevent robbery. Thus, killing a robber is an act committed not to protect life and limb, but rather "for the advancement of public justice,"[177] namely, preventing the criminal from accomplishing his task.

Justifiable homicide was clearly developed for this type of situation. In killing Jackson to prevent the robbery, Sydnor was exercising his "natural right" to protect his property from being carried away.[178] To claim otherwise would run contrary to the rule that "a man shall never give way to a *thief*."[179] With its decision, the Court of Appeals made clear that crime prevention is no longer a sufficient reason to justify killing a felon attempting to flee,[180] and that today a man must give way to a thief. In declaring that a robbery victim may not employ

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173. *Sydnor*, 365 Md. at 219, 776 A.2d at 677.

174. Beale, *supra* note 37, at 574; *see also* People v. Cook, 39 Mich. 236, 243 (1878) (noting that it is one's duty to try to prevent the commission of a violent felony, even if it requires taking the life of the felon to do so).

175. 611 P.2d 44, 47 (Alaska 1980) (quoting Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 568 (1961)).

176. *Id.*; *see also* State v. W.J.B., 276 S.E.2d 550, 555 (W. Va. 1981) ("The taking of life to prevent the commission of a felony . . . is part of a more general rule relating to crime prevention.").

177. 4 BLACKSTONE, *supra* note 30, at *179.

178. *See* State v. Moore, 31 Conn. 479, 482 (1863).

179. Beale, *supra* note 37, at 572 (internal quotation marks and citations omitted) (emphasis added).

180. In Maryland, law enforcement officers are still justified in killing a fleeing felon. *See infra* note 186 and accompanying text.

deadly force to prevent the consummation of the robbery absent a threat of death or serious bodily injury, the court has failed to advance public justice.

The existence of the dual doctrines of justifiable homicide and excusable homicide, and the clear philosophy behind each, casts into doubt the majority's claim that the defense of justifiable homicide was intended to protect people, not property, from injury and to prevent death. Originally, justifiable homicide was the only type of homicide literally endorsed by the criminal law.[181] Someone killing to prevent certain atrocious crimes was not only without blame, the killer was satisfying a social duty.[182] Notably excluded from the ambit of justifiable homicide were killings committed in self-defense.[183] Were the court correct in its assertion that the origins of justifiable homicide doctrine was solely the desire to protect "life and limb," there would seem no reason to explicitly exclude from this doctrine homicides committed in self-defense—the quintessential situation where the protection of life and limb is the only consideration. Thus, in spite of the majority's claim to the contrary, it is clear that originally the prevention of physical assaults was not the only situation where justifiable homicide would apply.[184]

The court's own words also call into question its assertion that the purpose for early justifiable homicide doctrine "was always the necessity . . . to protect oneself."[185] The *Sydnor* court acknowledged that deadly force may be used by law enforcement in the execution of their duties, noting that an officer may, without blame, kill a fleeing felon.[186] This right was also recognized by English common law.[187] In such a situation, there is no inherent risk or threat to life or limb. Thus, both English and Maryland common law have recognized that in certain circumstances, killings may be committed for a purpose other than to protect life and limb. Additionally, while English common law originally only exempted from punishment law enforcement

181. Beale, *supra* note 37, at 568. The doctrine of excusable homicide developed much later. *Id.* at 568-70.

182. *See, e.g.*, People v. Cook, 39 Mich. 236, 243 (1878).

183. Beale, *supra* note 37, at 568.

184. The majority concluded that this doctrine was developed solely to protect life, not property. *See Sydnor*, 365 Md. at 219, 776 A.2d at 677.

185. *Id.*

186. *See id.* at 216-17, 776 A.2d at 675 (noting that one may kill pursuant to "command of the law," which includes killing a fleeing felon).

187. Beale, *supra* note 37, at 572.

officers killing to prevent a felon from escaping, this right was expanded to include private persons killing felons.[188]

Nevertheless, it is clear by its refusal to excuse Sydnor for killing Jackson that the court is unwilling to allow a person to exercise deadly force in the absence of an imminent threat of death or serious bodily injury unless the person is acting under "an absolute command of the law."[189] The lone distinction, then, between English common law and Maryland common law pre-*Sydnor*, and Maryland common law post-*Sydnor*, is that Maryland courts are no longer willing to grant this right, available to officers of the law, to private persons. Thus, with its decision in *Sydnor*, the court limited the rights of Maryland citizens to protect themselves, their property, and other potential robbery victims. Before *Sydnor*, Maryland citizens were granted the right to kill in execution of the law. They are now expressly excluded from that right.[190]

The court's rationale would be appropriate had Jackson's assault on Sydnor not included a robbery. Jackson did commit an assault and battery upon Sydnor, hitting him on the head with the gun. If Jackson did not try to take anything from Sydnor, but merely hit him with the gun, lose the gun in the struggle, then turn to flee, Sydnor would not have been permitted to kill Jackson. This scenario would mirror *Gray v. State*, a self-defense case decided by the Court of Special Appeals involving a man who was shot in the back and killed after turning to run from a man upon whom the deceased had pulled a gun.[191] Notwithstanding the similarities between *Sydnor* and *Gray*, the same doctrine should not have been applied to both cases. *Gray* involved an assault with a gun that resulted in a homicide, an excusable homicide, self-defense situation.[192] Jackson's assault on Sydnor, however, did not stop after he committed an assault and battery by hitting Sydnor with the gun.[193] The assault progressed into a robbery, and when it did, the situation was brought within the ambit of justifiable homicide.[194] Self-defense no longer applied. Shooting a robber and shooting an assailant who is committing no robbery are unique situations, and different laws apply to each.[195]

The *Sydnor* court's reasoning was led astray by its confusing the law of self-defense with the distinct law governing the right of a rob-

188. *Id.*
189. *Sydnor*, 365 Md. at 217, 776 A.2d at 675.
190. *Id.* at 219, 776 A.2d at 677.
191. 4 Md. App. 175, 180, 241 A.2d 909, 912-13 (1968).
192. *Id.* at 178, 241 A.2d at 911.
193. *Sydnor*, 365 Md. at 207, 776 A.2d at 670.
194. *Id.* at 226, 776 A.2d at 681 (Cathell, J., dissenting).
195. *Id.* at 228, 776 A.2d at 682.

bery victim to use deadly force to prevent the robbery from being carried out. According to the common law of Maryland, these situations are different, and different law applies.[196] Despite this, the Court of Appeals treated *Sydnor* as indistinguishable from *Gray*, although the two cases are clearly different. Self-defense doctrine was correctly applied to the latter, but incorrectly applied to the former.

Applying the same law to *Gray* and *Sydnor* reveals the court's misunderstanding of the origins of justifiable homicide doctrine. Historically, someone killing in self-defense was subject to conviction and forfeiture,[197] while someone killing a robber in the course of a robbery was acquitted, "with commendation rather than blame."[198] Thus, it is clear that at the time justifiable homicide doctrine originally developed, the common law provided that Sydnor could have been convicted for killing Jackson if Jackson had only tried to murder him, a self-defense situation, but not if, as was the case, Jackson was robbing him, a justifiable homicide situation.[199] While it is true that with the development of self-defense doctrine, Sydnor would not have been convicted had Jackson been attempting to murder him, it is equally true that the common law, prior to *Sydnor*, provided that one was justified in killing a robber in the course of a robbery.[200] In denying the existence of the clear philosophical distinctions between these two scenarios, both historical and modern, the weight of the *Sydnor* court's reasoning is diminished.

b. The Place of Justifiable Homicide in Modern Times.—The court could have limited the right to kill a robber in the course of a robbery merely by limiting the application of the felony-murder rule outlined in *Ball*,[201] rather than by gutting the doctrine of justifiable homicide.[202] By limiting the period during which a robbery is considered ongoing—classifying the robbery as complete upon the taking of

196. *Id.*

197. Beale, *supra* note 37, at 569.

198. 4 BLACKSTONE, *supra* note 30, at *182.

199. Beale, *supra* note 37, at 572. Beale observed, "There seems no sufficient reason for distinguishing between killing a robber and killing a felon who is attempting murder . . . but the law is explicit." *Id.*

200. *See, e.g.*, Law v. State, 21 Md. App. 13, 27, 318 A.2d 859, 867 (1974).

201. According to *Ball*, a robbery is considered ongoing even after the property is taken, until such time as the robber escapes. Ball v. State, 347 Md. 156, 188, 699 A.2d 1170, 1185 (1997).

202. The dissent would still object to this reformulation, which would make the right to use deadly force depend on "a mere second, and mere feet or even inches" by preventing its use once the property changes possession and the robber turns to flee. *Sydnor*, 365 Md. at 226, 776 A.2d at 681 (Cathell, J., dissenting).

the victim's property—the court could have achieved its desired result in this case. Had the court done so, the robbery would have been over, and Sydnor could not have justifiably shot Jackson. But the court did not take this course. Instead, the court elected to limit the applicability of justifiable homicide doctrine rather than limit the period during which a robbery is considered ongoing. The court's failure to do the latter seems to indicate a general rejection of the historical ideology that led to the original formulation of the concept. Despite being a clear departure from existing common law, given changes in the law since the development of justifiable homicide doctrine, which are reflective of changes in social ideology, the court's decision in *Sydnor* was an appropriate one.

As previously noted, homicide was considered justifiable to prevent the commission of certain forcible and atrocious crimes, including murder, burglary, rape, arson, and robbery.[203] Killings committed to prevent these offenses were justifiable because these were capital crimes, punishable by death. In the early days of English and American common law, the philosophy underlying justifiable homicide was "that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting."[204] In Maryland, each of these offenses is now punishable, pursuant to statute, only by a term of incarceration, with the exception of murder, which is still a capital crime under certain circumstances.[205] To endorse a rule that allows for the killing of an offender of a noncapital crime would be to endorse "a state of uncivilized nature."[206]

Indeed, for decades legal commentators have called for limits on the availability of a justification defense to only situations in which there is a threat of death or serious bodily injury.[207] Specifically, commentators have called for limits on the availability of a justification defense even related to police officers attempting to make an arrest.[208] These commentators have called for this defense to be availa-

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203. *See supra* notes 36-38 and accompanying text.

204. 4 BLACKSTONE, *supra* note 30, at *181; *see also* State v. Sundberg, 611 P.2d 44, 47 (Alaska 1980); Weaver v. State, 19 Tex. Ct. App. 547, 568 (1885).

205. Burglary in the first degree is punishable by not more than 20 years imprisonment. MD. ANN. CODE art. 27, § 29(b) (1996). Rape in the first degree is punishable by not more than life imprisonment. *Id.* § 462(b). Arson is punishable by not more than 30 years imprisonment. *Id.* § 6(b). Robbery with a deadly weapon is punishable by not more than 20 years imprisonment. *Id.* § 488. Murder in the first degree is punishable by death or life imprisonment. *Id.* § 412(b).

206. 4 BLACKSTONE, *supra* note 30, at *181.

207. *Sundberg*, 611 P.2d at 48 & n.12.

208. *Id.*; *see, e.g.*, Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71 (1980).

ble only when officer killings are necessary to protect others from death or serious bodily injury.[209]

Such proposals are significant in light of the historical context of justifiable homicide doctrine. The early common law originally provided that only those homicides committed by officers of the law were justifiable. Only later was this right expanded to include ordinary citizens.[210] Accordingly, calling for limits on the availability of this defense to police officers represents a significant philosophical shift from the early common law, a shift that mirrors a movement within recent decades emphasizing individual rights, including the rights of criminals, over the absolute need to ensure law and order.[211]

This shift was recognized by the United States Supreme Court in *Tennessee v. Garner*.[212] In *Garner*, the Court adopted these calls for limitations on police officers' use of deadly force, noting that absent an imminent threat to an officer or others, the officer may not employ deadly force.[213] The Court took note of the historical justification behind an officer's right to use deadly force, observing that "the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death,"[214] a principle that mirrors the origins of justifiable homicide doctrine.[215] The Court concluded, however, that modern changes to legal doctrine have rendered many of the principles that originally gave rise to the doctrine of justifiable homicide obsolete, and the use of deadly force can no longer be justified as it was centuries ago.[216]

The *Sydnor* court could have similarly rejected the historical roots of justifiable homicide as antiquated in modern times. Yet, the court failed to take advantage of the path that *Garner* paved. However, notwithstanding its flawed reasoning, *Sydnor* was a proper revision of an outmoded rule.[217]

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209. *Sundberg*, 611 P.2d at 48 & n.12.

210. Beale, *supra* note 37, at 572.

211. *See* Sherman, *supra* note 208, at 91-93 (noting how "the evolving standards of a maturing society" have become less tolerant of killings by police that have historically been considered justifiable).

212. 471 U.S. 1 (1985).

213. *Id.* at 11.

214. *Id.* at 13-14.

215. *See supra* note 204 and accompanying text.

216. *See Garner*, 471 U.S. at 14.

217. *Cf.* Boblitz v. Boblitz, 296 Md. 242, 258-59, 462 A.2d 506, 514 (1983) (quoting Lewis v. Lewis, 351 N.E.2d 526, 531 (Mass. 1976)).

> When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of

Additionally, allowing private citizens to execute the law, as they would when killing a robber to prevent the commission of a robbery,[218] was more of a practical necessity centuries ago than it is today. When the justifiable homicide doctrine was originally formulated, the largely rural society was more diffuse, and law enforcement was less capable of providing the degree of protection it provides today.[219] At that time, private enforcement of the law was a greater necessity. Today, with rapid urbanization and technological advances, law enforcement has become more capable of providing protections unavailable centuries ago.[220] Accordingly, today, granting private citizens the same privileges as law enforcement, such as the ability to kill a fleeing felon, is less tenable.

5. Conclusion.—In equating justifiable homicide with self-defense, the majority ignored the historical underpinnings of each doctrine. As aptly noted by Judge Cathell in his dissent, until this decision these doctrines were and always had been different.[221] They are different no more. Nevertheless, the concepts of justifiable and excusable homicide have evolved over the centuries. The moral and normative ideology permeating society differs considerably from that of the thirteenth century, and much of the criminal law has evolved as a consequence. In *Sydnor*, the Court of Appeals elected to make an appropriate adaptation of the antiquated doctrine for modern time. In rejecting the archaic origins of justifiable homicide, the court's decision brings Maryland law more in line with modern social and legal ideology.

Notwithstanding, *Sydnor* is a clear departure from the common law. The court refused to acknowledge this, ignoring the historical distinctions between justifiable homicide and self-defense. Under the guise of bringing clarity to a dichotomy that the court asserted had become "blurred,"[222] the court offered nothing more than a thin veil for its true purpose—abrogating a policy out of step with modern ideology. The court did not need to hide its true reasoning, for "a court not only has the authority but also the duty to reexamine its prece-

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contemporary society, a court not only has the authority but also the duty to reexamine its precedents rather than to apply by rote an antiquated formula.

Id.

218. Beale, *supra* note 37, at 572.

219. *Cf.* Sherman, *supra* note 208, at 74 (discussing law enforcement's limited capacity to protect the public centuries ago).

220. *Id.*

221. *Sydnor*, 365 Md. at 228, 776 A.2d at 682 (Cathell, J., dissenting).

222. *Sydnor*, 365 Md. . at 215, 776 A.2d at 674.

dents rather than to apply by rote an antiquated formula."[223] While the result of the decision would be the same regardless of motive, the court needlessly subjected itself to skepticism and attacks on the legitimacy of this decision.

AARON C. STORM

223. Boblitz v. Boblitz, 296 Md. 242, 259, 462 A.2d 506, 514 (1983) (quoting Lewis v. Lewis, 351 N.E.2d 526, 531 (Mass. 1976)).

V. ELECTION LAW

A. *Choosing the Lesser of Two Evils to Preserve the Integrity of Election Laws*

In *City of Seat Pleasant v. Jones*,[1] the Court of Appeals of Maryland dismissed a writ of mandamus compelling the City Board of Supervisors of Elections (City Board) to count a vote in a recent mayoral election, holding that the actions taken by the City Board, though possibly negligent, were neither arbitrary nor capricious.[2] The court recognized that while no allegations of fraud were made in this case,[3] the City Board had committed administrative errors in denying a voter her right to cast a ballot.[4] When confronted with those errors, however, the City Board's actions were in conformity with provisions in the Seat Pleasant City Charter (City Charter) mandating how city elections were to be conducted.[5] Though denying even one voter his or her right to vote is certainly not a satisfying result, especially in a case where the vote would have changed the outcome of the election, "the greater evil" would have been to disregard the law in favor of correcting the mistake.[6] Because the City Board's response to the administrative errors was neither arbitrary nor capricious, the writ of mandamus was not an appropriate remedy.[7]

1. The Case.—In an election conducted by the City Board on September 11, 2000, Thurman D. Jones lost the election for the office of mayor of the City of Seat Pleasant in Prince George's County to the incumbent, Eugene F. Kennedy, by one vote.[8] A supporter of Jones, Brenda Smith, was not permitted to vote despite being a registered voter at the time of the election.[9]

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1. 364 Md. 663, 774 A.2d 1167 (2001).

2. *Id.* at 667, 774 A.2d at 1169.

3. *Id.* at 685, 774 A.2d at 1180.

4. *See id.* at 684, 774 A.2d at 1179. The circuit court's issuance of a writ of mandamus was based solely on its finding that the City Board had acted arbitrarily and capriciously in denying a voter her fundamental right to vote. *Id.* at 671-72, 774 A.2d at 1172.

5. *Id.* at 684, 774 A.2d at 1179.

6. Hammond v. Love, 187 Md. 138, 149, 49 A.2d 75, 80 (1946).

7. *City of Seat Pleasant*, 364 Md. at 684-85, 774 A.2d at 1179-80 (holding that the City Board's response to its administrative errors was in compliance with the City Charter, and therefore was not arbitrary or capricious).

8. *Id.* at 669, 774 A.2d at 1170. Kennedy received 247 votes and Jones received 246. *Id.*

9. *Id.* at 667-69, 774 A.2d at 1169-70.

When Smith went to the polling place for Seat Pleasant on September 11, 2000, around 5 p.m., with the intention of voting for Jones in the mayoral election, she found that her name was neither on the voter registration list nor the voter registration cards.[10] At all times relevant to the case, Smith both resided in the City of Seat Pleasant and was registered to vote with the Prince George's County Board of Elections (County Board).[11] However, because Smith, who had moved from one address to another within the City of Seat Pleasant, had forwarded her change of address form after the deadline for registration, the computer at the County Board failed to recognize her residency.[12] As a result, Smith's name was omitted from the County Board's printed voter registration list and voter authority cards.[13] The County Board also failed to provide the City Board with an "extract" file that would have contained the names of voters whose names may otherwise have been omitted because of address changes.[14]

The chairperson of the City Board, Yvonne Sumner, who was at the polling place when Smith arrived, attempted unsuccessfully to telephone the County Board to ascertain whether Smith was registered to vote in Seat Pleasant.[15] The County Board had closed at 4 p.m. and could not be reached.[16] Sumner then told Smith that she "would not be allowed to vote," and Smith left without casting a ballot.[17]

After the polls closed, the City Board tallied the ballots and certified the results to the Clerk of the City, reporting that Kennedy had been elected Mayor.[18] Jones wrote a letter to Sumner on September

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10. *Id.* at 667-68, 774 A.2d at 1169.

11. *Id.*

12. *Id.* at 668 & n.2, 774 A.2d at 1169 & n.2.

13. *Id.*

14. *Id.* at 668, 774 A.2d at 1170. According to the acting Administrator of the County Board, an extract file should automatically be generated when the voter registration list is generated. The County Board usually provides the extract file printout with the voter registration list, but did not prepare one for the City of Seat Pleasant election. *Id.* at 668 n.3, 774 A.2d at 1170 n.3.

15. *Id.* at 668, 774 A.2d at 1170.

16. *Id.* at 668-69, 774 A.2d at 1170. Though no advance request had been made to the County Board to have someone available after hours, Sumner testified that she had made an oral request shortly before the County Board closed for the day. *Id.* at 669 & n.5, 774 A.2d at 1170 & n.5. Sumner also testified that she had been instructed by the County Board to call the direct number of the staff member at the County Board with whom she usually dealt. *Id.* at 669 n.5, 774 A.2d at 1170 n.5.

17. *Id.* at 669, 774 A.2d at 1170.

18. *Id.* Section C-616 of the City Charter states that "[t]he Board of Supervisors of Elections shall begin counting the votes immediately after the polls have closed" and "shall complete the vote count within twenty-four (24) hours after the polls have closed." The charter further specifies that the candidate with the highest number of votes shall be "de-

13, 2000, requesting a recount because Smith, one of his supporters, was not allowed to vote.[19] On September 20, 2000, Jones's attorney wrote a letter to the City Board requesting that the board hold a hearing and make formal findings as to the number of votes cast and that Smith had been denied the right to vote.[20] He further requested that the Board refuse to certify the result of the election and make a formal recommendation to the City Counsel that a new election be held.[21]

On September 25, 2000, the City Council held a special meeting, which Jones and his counsel apparently did not attend.[22] At the special meeting, the City Board reported the results of the election and discussed Jones's challenge.[23] The City Council determined that Jones "would have to pursue his challenge through judicial action."[24]

Jones then filed a two count Verified Petition for Declaratory Relief, Temporary Restraining Order, and Permanent Injunction with the Circuit Court for Prince George's County.[25] In the first count, he sought a judgment that the City Board, by preventing Smith, a "duly registered and qualified voter," from voting in the mayoral election, had caused a significant irregularity in election procedure that had changed the outcome of the election.[26] He asked the court to find that the City Board's actions were "arbitrary, capricious, illegal, and undertaken without any rational basis"[27] and requested relief in the form of a run-off election or a new special election in accordance with

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clared elected," and that a tie will be decided "by special election between the tied candidates." SEAT PLEASANT, MD., CODE § C-616 (1976).

19. *City of Seat Pleasant*, 364 Md. at 669, 774 A.2d at 1170. Smith signed an affidavit stating that she had been denied the right to vote, and that if she had been allowed to vote she would have voted for Jones. *Id.* The affidavit was attached to the letter Jones sent to Sumner. *Id.*

20. *Id.*

21. *Id.* The letter also suggested that upon receiving the recommendation, the City Board should either hold a new election or seek "declaratory judgment from the Circuit Court for Prince George's County upon the facts as found by the board." *Id.* at 669, 774 A.2d at 1170-71.

22. An allegation was made that the City Board was to hold a hearing the same night. *Id.* at 669-70, 774 A.2d at 1171. Jones's attorney sent a letter to the City Board, with a copy to the City Council, stating that his client would be unable to attend the hearing and requesting that it be postponed until all interested parties could be present. *Id.* at 670, 774 A.2d at 1171. Whether Jones actually attended the City Council special meeting, in light of this letter, is unclear.

23. *Id.* at 670, 774 A.2d at 1171.

24. *Id.*

25. *Id.* The circuit court noted that, in a memorandum of law, Jones also requested mandamus relief. *Id.* at 670 n.7, 774 A.2d at 1171 n.7.

26. *Id.* at 670-71, 774 A.2d at 1171.

27. *Id.* at 671 n.8, 774 A.2d at 1171 n.8.

the City Charter.[28] In the second count, Jones requested a temporary restraining order precluding the city from swearing in Kennedy as the new mayor and, after a hearing on the merits, a permanent injunction requiring the city to conduct the run-off or special election.[29]

The circuit court granted the request for a temporary injunction, and the city was prevented from swearing Kennedy in as the new mayor.[30] The circuit court further ordered that Kennedy, as the incumbent, would remain mayor until the conclusion of the proceedings.[31] After a hearing on the merits, the circuit court found that the City Board and County Board had, by way of their collective errors, "wrongfully infringed upon Ms. Smith's fundamental right to vote."[32] Specifically, the court faulted Sumner's failure to follow proper procedure in not arranging for someone at the County Board to stay late and for only making one call.[33] The circuit court also noted the County Board's failure to provide a complete list of voters or an extract file.[34] Further, the circuit court found that there was sufficient evidence that Smith would have voted for Jones, which would have materially affected the result of the election.[35] Finding that the City and County Board's actions were "arbitrary and capricious," the circuit court issued a writ of mandamus ordering that the city allow Smith to vote, and that a run-off election be held in accordance with the city charter in the event of a tie.[36]

The City of Seat Pleasant appealed to the Court of Special Appeals, but prior to any proceedings in that court, both parties petitioned for certiorari.[37] The Court of Appeals granted certiorari to the City of Seat Pleasant[38] to consider whether a writ of mandamus was an appropriate remedy when a citizen, whose vote would have changed the outcome of the election, was denied her right to vote due to administrative errors.[39]

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28. *Id.* at 671, 774 A.2d at 1171.
29. *Id.*
30. *Id.*, 774 A.2d at 1171-72.
31. *Id.*
32. *Id.*, 774 A.2d at 1172.
33. *Id.* at 671-72, 774 A.2d at 1172.
34. *Id.* at 672, 774 A.2d at 1172.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* The court denied Jones's petition for certiorari. *Id.*
39. *Id.* at 667, 774 A.2d at 1169.

2. *Legal Background.*—

a. The Writ of Mandamus Generally.—The writ of mandamus is generally used by a court to compel administrative agencies and public officials to perform their functions or the obligatory duties that do not involve the exercise of judgment or discretion to which the applicant has a clear legal right.[40] Maryland courts have recognized that mandamus is an original action, as opposed to an appeal.[41] Mandamus may not be used "as a substitute for an appeal or a writ of error."[42] As far back as 1883, in *George's Creek Coal & Iron Co. v. County Commissioners*,[43] the Maryland Court of Appeals recognized the "extraordinary" nature of mandamus relief and ruled that in cases where it might "be doubtful or the duty discretionary, or of a nature to require the exercise of judgement," or if there is any other legal recourse, a writ of mandamus will not be granted.[44] The court held that a writ of mandamus was inappropriate when a corporation tried to compel the state to refund taxes paid after a statute had been passed requiring the stockholders to pay the tax instead because the corporation had other legal recourse.[45] The court noted that the policies behind and reason for a law should be taken into account when determining whether a writ should be issued to compel a party to act.[46] Also, the court stated that a writ should not be issued unless the "[c]ourt is satisfied that it is necessary to secure the ends of justice," or to serve some "useful purpose."[47]

b. Mandamus in Election Cases.—Maryland courts have used the writ of mandamus in cases involving election challenges. The actions of election supervisors, however, are not subject to mandamus

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40. Criminal Injuries Comp. Bd. v. Gould, 273 Md. 486, 514, 331 A.2d 55, 72 (1975).

41. Goodwich v. Nolan, 343 Md. 130, 145, 680 A.2d 1040, 1047 (1996). The *Goodwich* court held that a writ of mandamus was not an appropriate remedy to protect privileged information when the plaintiff had other options available, such as seeking a protective order. *Id.* at 152, 680 A.2d at 1051.

42. *Id.* at 145, 680 A.2d at 1047.

43. 59 Md. 255 (1883).

44. *Id.* at 259.

45. *Id.* at 261. The court determined that the corporation only sought the writ because it had not pursued the matter through judicial channels before the three-year statute of limitations had run out; therefore, other legal recourse was, or had been, available. *Id.* at 258-59. The court held that mandamus was not an appropriate remedy, and the remainder of the discussion regarding mandamus in *George's Creek Coal* is dicta. Subsequent Maryland cases, however, have cited the discussion as the basis for their rulings. As a result, *George's Creek Coal* has become the seminal Maryland case on when a writ of mandamus can be used to compel an administrative agency or public official to act. *See, e.g., Gould*, 273 Md. at 514, 331 A.2d at 72.

46. *George's Creek Coal*, 59 Md. at 262.

47. *Id.* at 259.

review unless those actions are fraudulent, arbitrary, or illegal.[48] Absent fraud or illegality, the writ may only be used to correct abuses of discretion and "arbitrary, illegal, capricious or unreasonable acts" by election officials.[49] When doing so, however, care must be taken not to interfere with legislative intent or administrative discretion.[50] In addition, the party requesting the writ must have had no other procedure for obtaining review.[51]

Over sixty years after *George's Creek Coal*, in *Hammond v. Love*,[52] the Court of Appeals held that a writ of mandamus was an appropriate form of relief to prohibit a board of election supervisors from counting ballots lacking a judge's initials when the controlling statute stated that a judge must initial all ballots.[53] The court recognized that election supervisors are only empowered to execute election laws, and that their actions, similar to those of an administrative agency, are subject to judicial review and thus the possibility of a writ of mandamus.[54] In doing so, the court rejected the board of election's argument that its actions were discretionary when they were in direct conflict with the governing statute.[55] The court stated that "a clear mistake of law, however honest, is 'arbitrary' action."[56] The court concluded that although it was unfortunate that the voters whose ballots did not bear the initials of a judge, through error on the part of the election officials, were denied their right to vote, the greater evil would be to allow election officials to ignore statutes "designed to safeguard the integrity of elections, *i.e.*, the rights of all the voters."[57]

In *Hammond*, the court examined a case with an error on the part of both election officials and voters. The court drew a distinction between statutes that are directory and statutes that are, by their word, mandatory, such as the law requiring a judge's initials on all ballots.[58] If the election law in question is mandatory, a writ of mandamus may clearly be issued.[59] If the election law is directory in nature, however,

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48. *See, e.g.*, Mahoney v. Bd. of Supervisors of Elections, 205 Md. 325, 336, 108 A.2d 143, 147-48 (1954).

49. Hecht v. Crook, 184 Md. 271, 280, 40 A.2d 673, 677 (1945).

50. *Id.* at 280-81, 40 A.2d at 677.

51. Goodwich v. Nolan, 343 Md. 130, 146, 680 A.2d 1040, 1048 (1996).

52. 187 Md. 138, 49 A.2d 75 (1946).

53. *Id.* at 149, 49 A.2d at 80.

54. *Id.* at 144, 49 A.2d at 77.

55. *See id.* ("Decisions contrary to law . . . are not within the exercise of sound administrative discretion . . . but are arbitrary and illegal acts.").

56. *Id.* at 145, 49 A.2d at 78.

57. *Id.* at 149, 49 A.2d at 80.

58. *Id.* at 145-46, 49 A.2d at 78.

59. *Id.* at 145, 49 A.2d at 78.

the court must decide if the alleged mistake "probably prevented a free and full expression of the popular will" before deciding whether a writ of mandamus is an appropriate remedy.[60] The court noted that although it had inherent power to issue writs of mandamus to correct abuses of discretion and "arbitrary, illegal, capricious or unreasonable acts; . . . care must be taken not to interfere with the legislative perogative, or with the exercise of sound administrative discretion."[61]

In *Mahoney v. Board of Supervisors of Elections*,[62] the court held that when an election board has made "an obvious mistake of law in counting or rejecting ballots," the court has the power to correct the mistake.[63] The court also ruled that a writ of mandamus should only be issued when the petitioner has an absolute legal right and would derive a substantial benefit.[64] The petitioner in this case clearly had an absolute legal right because if the illegal ballots were counted, he would have lost the election.[65]

In *McNulty v. Board of Supervisors of Elections*,[66] voters were allegedly denied their right to vote through the error of the election officials, but not the shared error of the voters.[67] The court held that a writ of mandamus was not appropriate where the results of the election were irregular due to negligence and administrative error, but not illegal action, by election officials.[68] In *McNulty*, the petitioner argued that he should have been awarded 136 votes cast on the blank line below his name.[69] He had campaigned under the slogan "vote the bottom line" because his name should have appeared last on the democratic ballot.[70] Voters were unable to vote for the petitioner on the last line because, due to a shortage of covers on the majority of the machines, election officials neglected to cover and lock the space below the petitioner's name.[71] In holding that a writ of mandamus was not appropriate under the circumstances, the court noted that no

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60. *Id.* (quoting Soper v. Jones, 171 Md. 643, 648, 187 A. 833, 836 (1937) (quoting Bowers v. Smith, 20 S.W. 101, 105 (Mo. 1892))).

61. *Id.* at 144, 49 A.2d at 77 (quoting Hecht v. Crook, 184 Md. 271, 281, 40 A.2d 673, 677 (1945)).

62. 205 Md. 325, 108 A.2d 143 (1954).

63. *Id.* at 336, 108 A.2d at 148.

64. *Id.* at 335, 108 A.2d at 147.

65. *Id.* If the petitioner had a legal, but abstract, right and the exercise of that right would "be unaccompanied by any substantial benefit," a writ of mandamus should not be issued. *Id.*

66. 245 Md. 1, 224 A.2d 844 (1966).

67. *Id.* at 4-8, 224 A.2d at 846-48.

68. *Id.* at 8-9, 224 A.2d at 848.

69. *Id.* at 7, 224 A.2d at 847.

70. *Id.*, 224 A.2d at 848.

71. *Id.* at 5-6, 224 A.2d at 846.

voter was denied their chance to vote because each voter could have read the instructions and voted in the space next to the petitioners name.[72] The court found that the error was neither arbitrary nor capricious, and that a writ of mandamus was not appropriate.[73] The court expressed regret for the negligence and administrative error of election officials, but ruled that mandamus did not lie absent "any hint of fraud or chicanery attributable to any of the parties."[74]

In the case of *Fowler v. Board of Supervisors of Elections*,[75] the court again held that mandamus was not an appropriate remedy when administrative error on the part of election officials caused an irregular election result.[76] The record established that some voting machines had not been properly zeroed, that some machines had been misprogrammed, that Republican candidates in one sub-district appeared on machines in a different sub-district, that some machines had levers which were locked, that unauthorized persons repaired and adjusted the machines, and numerous other counts of error.[77] The court ruled that even in cases where the administrative errors may be extremely serious, in the absence of illegality, fraud, or any evidence that a specific individual attempted to vote and was not permitted to, mandamus was not an appropriate remedy.[78] It based its finding both on the fact that there was no indication of fraud or illegal action on the part of the election officials and on the failure to show that any "specific individual" had been denied his or her right to vote.[79]

In *Lamb v. Hammond*,[80] the court returned to the issue of whether election officials had the discretion to count ballots that did not conform with statutory constraints.[81] In *Lamb*, the nonconformity was

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72. *Id.* at 9, 224 A.2d at 848-49. The instructions were published in the newspaper, on specimen ballots, and were posted at the polling place. *Id.*

73. *Id.* The court also expressed concern that it had no way, short of the "occult," of knowing if the 136 people who had voted in the blank line had actually intended to vote for the petitioner. *Id.* at 10, 224 A.2d at 849.

74. *Id.* at 9, 224 A.2d at 848.

75. 259 Md. 615, 270 A.2d 660 (1970).

76. *Id.* at 618-19, 270 A.2d at 661-62.

77. *Id.* at 617, 270 A.2d at 661.

78. *Id.* at 618-19, 270 A.2d at 662.

79. *Id.* at 618, 270 A.2d at 662. The court noted that there was evidence that some people who wanted to vote were unable to do so at the time they went to the polling place, and that they may not have returned. *Id.* However, no evidence was proffered that any specific person was unable to vote. *Id.* Similarly, there was no evidence to show that the election would have turned out any differently if the errors had not occurred. *Id.* at 618-19, 270 A.2d at 662.

80. 308 Md. 286, 518 A.2d 1057 (1987).

81. *Id.* at 308-12, 518 A.2d at 1068-70.

due entirely to the error of election officials.[82] The court held that mandamus was not appropriate to compel an election board to count twelve absentee ballots that did not comply with statutory requirements despite the misleading nature of the instructions that had been given to the absentee voters.[83] In response to the appellant's argument that the statutes in question were merely directory, the court replied that in recent times it has "departed from the notion that clear commands or conditions imposed by a legislative body may be disregarded on the theory that they are merely 'directory.'"[84] Expressing regret that innocent voters would be denied their right to vote due to the error of election officials, the court ruled that this was a lesser evil than overturning statutes enacted to protect "the integrity of elections."[85] The court found that disenfranchising the voters for technical noncompliance was still a lesser evil than allowing the election officials to "effectively change the law by giving erroneous, ambiguous, or misleading instructions to the voters," or to allow a court to command election officials to "credit the improper instructions rather than the law."[86]

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82. *Id.* at 290, 518 A.2d at 1059.

83. *Id.* at 308, 518 A.2d at 1068. Of the twelve absentee ballots that were in dispute, nine ballots were mailed from within the United States.

> The timeliness of those ballots is governed by Md. Code Ann. art. 33, § 27-9(c)(1), which . . . regards an absentee ballot as timely if:
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> (i) It has been received by the board prior to the closing of the polls on election day; *or*
>
> (ii)1. It was mailed before election day;
>
> 2. The United State[s] Postal Service, or the postal service of any other country, has provided verification of that fact by affixing a mark so indicating on the covering envelope; *and*
>
> 3. The board receives the ballot from the United States Postal Service not later than 4 p.m. on the Wednesday following election day.

Id. at 305-06, 518 A.2d at 1066-67. The postmark on the ballots showed that, although they had been received by the Wednesday deadline, they had not been mailed before election day. *Id.* at 306, 518 A.2d at 1067. Therefore, the election officials were correct not to count the absentee ballots, even though the instructions given to absentee voters were "at best ambiguous" regarding the actual deadline. *Id.* at 305-06, 518 A.2d at 1066-67. The three ballots mailed from outside the United States were similarly mailed after the statutory deadline, and the absentee voters had been given similarly misleading instructions. *Id.* at 307-08, 518 A.2d at 1067-68.

84. *Id.* at 309, 518 A.2d at 1068.

85. *Id.* at 311, 518 A.2d at 1069 (quoting Hammond v. Love, 187 Md. 138, 149, 49 A.2d 75, 80 (1946)).

86. *Id.* at 311-12, 518 A.2d at 1069-70. The court noted that other states, confronted with the case of a person disenfranchised for technical noncompliance with the law because of error on the part of the election officials, allowed mandamus to correct the error. *Id.* at 310, 518 A.2d at 1069. *See, e.g., In re* Recount of Ballots Cast in Gen. Election, 325 A.2d 303 (Pa. 1974); *In re* Contest of 1979 Gen. Election, 414 A.2d 310 (Pa. 1980); Hawkins v. Persons, 484 So. 2d 1072 (Ala. 1986).

3. The Court's Reasoning.—In *City of Seat Pleasant*, the Court of Appeals held that a writ of mandamus was not an appropriate remedy when the errors of an election board do not rise to the level of being arbitrary and capricious, even when those errors denied a specific voter her right to vote and that vote would have changed the outcome of the election.[87]

The court reviewed the circumstances in which a writ of mandamus may be used to correct an error in an election, observing that although the decision is within "the sound judicial discretion of the court, all the circumstances of the case must be considered."[88] Applying the standards set out in mandamus cases to situations involving error in counting or rejecting ballots, the court stated that the action of the election supervisors was not subject to "review by mandamus in the absence of conduct that is fraudulent, arbitrary or in violation of law."[89]

In examining previous applications of the standard to election cases, the court differentiated between cases of irregular elections where officials committed errors of law, and cases where the error was administrative in nature.[90] The court observed that in cases like *Mahoney*, where election officials made "an obvious mistake of law in counting or rejecting ballots," a writ of mandamus was appropriate to "correct such mistake."[91] On the other hand, the court noted that in cases like *McNulty* and *Fowler*, where the election officials' error was negligent and of an administrative nature, but not in violation of the law or amounting to fraud or arbitrary conduct, mandamus was not an appropriate remedy.[92]

In reversing the circuit court's ruling with an instruction to dismiss the writ of mandamus, the Court of Appeals first examined whether the City Board acted arbitrarily and capriciously in infringing on the right of Smith, a registered voter, to cast her ballot.[93] The Court of Appeals observed that information regarding Smith's regis-

87. *City of Seat Pleasant*, 364 Md. at 667, 774 A.2d at 1169.

88. *Id.* at 673, 774 A.2d at 1172 (quoting George's Creek Coal & Iron Co. v. County Comm'rs, 59 Md. 255, 259 (1883)).

89. *Id.* at 675, 774 A.2d at 1174.

90. *Id.* at 676, 774 A.2d at 1175.

91. *Id.* at 675, 774 A.2d at 1174 (quoting Mahoney v. Bd. of Supervisors of Elections, 205 Md. 325, 336, 108 A.2d 143, 148 (1954)).

92. *Id.* at 676-79, 774 A.2d at 1175-76. The court noted that other states, confronted with the situation of a person disenfranchised for technical noncompliance with the law because of error on the part of the election officials, allowed mandamus to correct the error. *Id.* at 681, 774 A.2d at 1178.

93. *Id.* at 684, 774 A.2d at 1179.

tration was unavailable at the time she tried to vote.[94] According to the City Charter,[95] a person must be registered to vote.[96] Smith's name did not appear on the list provided by the County Board; therefore, the court reasoned that "it was neither arbitrary nor capricious" for the City Board, based on the information available at the time, to turn Smith away.[97] "Acting in accordance with the dictates of the Charter," the court noted, "can hardly be deemed arbitrary and capricious."[98] The court observed that allowing Smith to vote without proof of her registration would have been arbitrary and capricious.[99]

The court observed that there was no allegation or evidence that the City Board acted fraudulently or that it made any attempt to increase or to influence the number of votes for any mayoral candidate.[100] Although Sumner's neglect in failing to make arrangements to have someone at the County Board remain at the office after hours may have been an administrative error, the court further found that there was no proof that Sumner's behavior under the circumstances was "arbitrary and capricious conduct justifying the issuance of the writ of mandamus."[101]

The Court of Appeals turned to the City Charter in finding that the City Board's actions were not arbitrary or capricious when it certified the result of the election knowing that Smith had been turned away from the polls.[102] The applicable section of the Charter requires the City Board to begin counting the ballots immediately after the polls close and to continue counting until all votes are counted.[103] The Charter then instructs the City Board to certify the result to the Clerk of the City.[104] The court observed that nowhere in the City

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94. *Id.*

95. Section C-602 of the Seat Pleasant Charter specifies that "[e]very person who . . . is registered in accordance with the provisions of this Charter . . . shall be entitled to vote in any or all city elections." SEAT PLEASANT, MD., CODE § C-602 (1976). Section C-607 reiterates that "[no] person is entitled to vote in city elections unless he/she is registered." *Id.* § C-607.

96. *City of Seat Pleasant*, 364 Md. at 684, 774 A.2d at 1179.

97. *Id.* The court noted that the City Charter did not grant Sumner the discretion to allow Smith to vote without proof of her registration. *Id.*

98. *Id.*

99. *Id.* Although the circuit court suggested that Sumner should have allowed Smith to make a "contingent vote," the Court of Appeals observed that the City Charter does not allow for "such a contingency." *Id.* at 685, 774 A.2d at 1179.

100. *Id.* at 685, 774 A.2d at 1180.

101. *Id.*

102. *Id.*

103. SEAT PLEASANT, MD., CODE § C-616 (1976).

104. *Id.*

Charter is the City Board vested with judicial power to correct errors of election officers in the performance of their duties.[105]

The Court of Appeals next found that the circuit court's reliance on certain statements in *Fowler* and *McNulty*—those implying that the determinative questions in deciding whether mandamus was an appropriate remedy in cases of error on the part of election officials were whether a specific voter had been denied his or her right to vote and whether that vote would have affected the result of the election—was misplaced.[106] While the circuit court found this outcome-oriented test dispositive, the Court of Appeals found it inapplicable because the *Fowler* court found no fraud, illegal action, or specific evidence of any person whose vote had not been counted and because, in that case, the court had dismissed the election challenge; thus, the test was dictum.[107] In addition, the court noted that the *Fowler* court was concerned that unquestionably qualified voters may have been denied their right to vote, whereas the *Seat Pleasant* court was faced with a voter whose qualifications could not be verified due to administrative error.[108]

Finally, the court observed that the circuit court relied on a particular statement in *McNulty*: "[W]herever an ambiguity arises with regard to election results, every effort should be made to reasonably ascertain the intention of voters and this is the initial duty of the Board."[109] In ruling that this standard was not applicable in this case, the court observed that, in *McNulty*, the court was "referring to voters who had actually voted," as opposed to a person who had not been "allowed to vote because . . . her registration could not be verified."[110]

In dissent, Judge Wilner stated he would have held that, because Smith's vote "may well have changed the result of the election," mandamus was an appropriate remedy.[111] Judge Wilner based his dissent on his reading of *McNulty* and *Fowler*.[112] He disagreed with the majority's interpretation of *McNulty*, believing the court's dismissal of the

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105. *City of Seat Pleasant*, 364 Md. at 686, 774 A.2d at 1180.

106. *See id.* at 686-87, 774 A.2d at 1181. In *Fowler*, the court stated that "the decisive question was whether or not eligible voters who sought to cast a vote . . . were deprived of votes and whether or not, had they voted, this vote would have changed the outcome of the election." Fowler v. Bd. of Supervisors of Elections, 259 Md. 615, 618-19, 270 A.2d 660, 662 (1970) (alteration in original) (internal quotation marks omitted).

107. *City of Seat Pleasant*, 364 Md. at 687, 774 A.2d at 1181.

108. *Id.*

109. *Id.* (quoting McNulty v. Bd. of Supervisors of Elections, 245 Md. 1, 8, 224 A.2d 844, 848 (1966)).

110. *Id.*

111. *Id.* at 688, 774 A.2d at 1181 (Wilner, J., dissenting).

112. *See id.* at 689-91, 774 A.2d at 1182-83.

trial court's writ in that case was based on "*whether or not eligible voters who sought to cast a vote . . . were deprived of votes and whether or not, had they voted, this vote would have changed the outcome of the election.*"[113] In Judge Wilner's opinion, the *McNulty* court refused to issue a writ of mandamus because "*no voter was actually prevented from voting for the candidate of his choice.*"[114]

Judge Wilner also disagreed with the majority's interpretation of *Fowler*, observing that the court again seemed to base its refusal to issue a writ of mandamus on the fact that no qualified voter, whose vote would have changed the outcome of the election, was denied his or her right to vote.[115] Judge Wilner based his dissent on the fact that, in the case at hand, a citizen was denied her right to vote through no fault of her own and, more importantly, that her vote would have changed the outcome of the election.[116] Therefore, according to Judge Wilner, mandamus would have been an appropriate remedy to compel the City Board to count Smith's vote.[117]

4. Analysis.—In *City of Seat Pleasant*, the Court of Appeals correctly held that a writ of mandamus was not an appropriate remedy because the City and County Board's actions were neither arbitrary nor capricious.[118] Although the test from *McNulty* and *Fowler*, which asks whether a specific person was denied his or her right to vote in deciding whether mandamus was an appropriate remedy in an election case, was not irrelevant to this case (as the court suggests), neither was it determinative. Instead, the test was a threshold requirement to determine whether the applicant had a substantial right in need of protection. After answering the question in the affirmative, the court correctly applied the remainder of the test, asking if the board's actions were arbitrary and capricious, to determine that mandamus was not an appropriate remedy.

a. The Court Improperly Dismissed the Test from Fowler *and* McNulty.—The Court of Appeals based its decision, in part, on incorrect interpretations of the holding of two previous cases. Both *Fowler* and

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113. *Id.* at 690, 774 A.2d at 1182-83 (quoting Fowler v. Bd. of Supervisors of Elections, 259 Md. 615, 618-19, 270 A.2d 660, 662 (1970)).

114. *Id.* at 689, 774 A.2d at 1182 (quoting *McNulty*, 245 Md. at 9, 224 A.2d at 848).

115. *Id.*

116. *See id.* at 690, 774 A.2d at 1183.

117. *See id.* at 691, 774 A.2d at 1183. The case at hand, Judge Wilner believed, was the case foreseen in *Fowler* and *McNulty* and "needs to be treated accordingly" by following the test applied in those cases. *Id.*

118. *City of Seat Pleasant*, 364 Md. at 685, 774 A.2d at 1180.

McNulty, which the court dismissed as not being relevant to the facts of this case, were cases where voters were potentially denied their right to vote, based on the error of election officials.[119] The court in *Fowler* clearly stated that its reason for not allowing a writ of mandamus was that no specific voter could be shown to have been denied his or her right to vote, and therefore there was no evidence that irregularities changed the result of the election.[120] Similarly, the court in *McNulty* largely based its ruling on the fact that no voter was "actually prevented from voting for the candidate of his choice" because they could have followed the instructions at the polling place and on the ballot.[121]

The *Seat Pleasant* court's contention that the comments in *Fowler* and *McNulty* were dictum because the courts in those cases answered the test in the negative is not convincing because the results of the tests were necessary to the holdings of both cases.[122] Furthermore, the facts of the two cases are not significantly different from the facts in *Seat Pleasant*.[123] Whether, as the court suggests, the issue before the court concerned voters whose qualifications were not at issue being prevented from voting, as was the case in *Fowler*,[124] or whether the issue concerned a voter whose registration could not be verified, as in the case at hand,[125] the court was still ruling on a case of whether mandamus is appropriate in situations where citizens' fundamental right to vote has been denied due to administrative error. The differ-

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119. *See* Fowler v. Bd. of Supervisors of Elections, 259 Md. 615, 619, 270 A.2d 660, 662 (1970) (ruling that numerous irregularities involving voting machines were not sufficient to justify a writ of mandamus); *McNulty*, 245 Md. at 13, 224 A.2d at 851 (ruling that mandamus was not an appropriate remedy when the bottom windows of voting machines were locked, potentially causing voters voting "the bottom line" to put their mark on the wrong space of the ballot).

120. *Fowler*, 259 Md. at 618-19, 270 A.2d at 661-62.

121. *McNulty*, 245 Md. at 9, 224 A.2d at 848-49.

122. *City of Seat Pleasant*, 364 Md. at 687, 774 A.2d at 1181; *Fowler*, 259 Md. at 618-19, 270 A.2d at 662 (holding that because there was "no showing that any specific individual" had been deprived of his or her right to vote and that the errors had not affected the outcome of the election, mandamus was not an appropriate remedy); *McNulty*, 245 Md. at 9, 224 A.2d at 848 (noting that ordering a special election was not an appropriate remedy because no voter was prevented from voting for the candidate of his or her choice).

123. *See City of Seat Pleasant*, 364 Md. at 690, 774 A.2d at 1183 (Wilner, J., dissenting).

124. *See Fowler*, 259 Md. at 618, 270 A.2d at 662 (noting the trial judge's determination that, due to the election official's errors, there may have been some voters who wished to vote and were not able).

125. *City of Seat Pleasant*, 364 Md. at 687, 774 A.2d at 1181. In response to the court's assertion that this case was different than *Fowler* because Smith did not vote, Judge Wilner pointed out that the only reason Smith did not vote was that she was not permitted to do so. *Id.* at 689, 774 A.2d at 1182 (Wilner, J., dissenting).

ence between a case where voters "had actually voted"[126] but possibly cast their ballots for the wrong candidate due to maintenance problems with the ballot boxes, as in *McNulty*,[127] and a case where a person has been denied the right to vote because her registration could not be verified, as in the present case, is also illusory. A voter was still denied her opportunity to vote for the candidate of her choice due to negligence or administrative error on the part of election officials. Therefore, the substantial right test was relevant to the case at hand.

b. Application of the "Substantial Right" Threshold.—The Court of Appeals has ruled that, in election cases not involving fraud or illegal behavior on the part of the election officials, mandamus is not an appropriate remedy for an abstract right "unaccompanied by any substantial benefit."[128] Although the courts have referred to this need for a benefit in different ways, authorities often refer to it as a substantial right in need of protection.[129] The Court of Appeals in *City of Seat Pleasant* correctly applied the test for substantial right, asking whether Smith had been denied her right to vote and whether that vote would have changed the result of the election, as a mere threshold test,[130] although the court did not articulate that that was what it was doing in the opinion. If the determinative test was whether a voter has been denied his or her right to vote due to administrative error, and whether that vote would have changed the outcome of the election, Judge Wilner would be correct that this *is* the case that was foreseen in *Fowler* and *McNulty*, and that the circuit court correctly issued the writ of mandamus.[131] A careful reading of these cases, however, reveals that the test, while pertinent to the resolution of the case, was actually a threshold test. In *Fowler*, the court first asked whether the administrative error that allegedly denied voters their right to vote stemmed from either fraudulent or illegal action.[132] When the answer was no,

126. *Id.* at 687, 774 A.2d at 1181.

127. *McNulty*, 245 Md. at 11-13, 224 A.2d at 850-51.

128. Mahoney v. Bd. of Supervisors of Elections, 205 Md. 325, 335, 108 A.2d 143, 147 (1954).

129. *See* S.S. MERRILL, LAW OF MANDAMUS § 49 (1892) (stating that mandamus generally "will only be used to protect a person from substantial injury or protect substantial rights" and "will not issue unless temporal rights are involved").

130. *See City of Seat Pleasant*, 364 Md. at 684, 774 A.2d at 1179.

131. *See id.* at 691, 774 A.2d at 1183 (Wilner, J., dissenting).

132. *See* Fowler v. Bd. of Supervisors of Elections, 259 Md. 615, 618-19, 270 A.2d 660, 661-62 (1970). The kind of fraud the court was concerned with was that "which would result in some one or more people causing the candidate who should have been elected to be rejected and some other candidate elected instead." *Id.*

the court then asked whether a specific person could be shown to have been denied his or her right to vote and whether that vote would have changed the outcome of the election.[133] Again answering in the negative, the *Fowler* court ruled that mandamus was not appropriate under the circumstances.[134] After similar reasoning, the court in *McNulty* came to substantially the same result.[135] However, even if the courts had found that a specific voter had been denied his or her right to vote and that the vote would have changed the result of the election, the court would not necessarily rule that mandamus was proper under the facts of the case without applying the remainder of the test for mandamus, which further asks whether the administrative error was arbitrary and capricious or an abuse of discretion.

Under this reasoning, the courts in *Fowler* and *McNulty* can be seen as asking if the petitioner had a substantial right in need of protection and, when the answer was no, ruling that mandamus was not an appropriate remedy.[136] Applying the same standard to the *City of Seat Pleasant*, the court effectively found that Jones had a substantial right in need of protection because a specific voter, Smith, was denied her right to vote.[137] Had that vote been cast, the result of the mayoral election may have changed.[138] Therefore, the "substantial right" threshold was met, and the court proceeded to apply the remainder of the test, asking whether the election official's conduct was arbitrary and capricious or an abuse of discretion.[139]

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133. *Id.* at 618-19, 270 A.2d at 662.

134. *See id.*

135. *See* McNulty v. Bd. of Supervisors of Elections, 245 Md. 1, 9, 224 A.2d 844, 848 (1966).

136. Although the court in *Fowler* recognized that there was some evidence that some voters were turned away and did not return, no specific voter could be shown to have been denied his or her right to vote; therefore, there was no substantial evidence that the result of the election would have changed. *Fowler*, 259 Md. at 618, 270 A.2d at 662. Similarly, in *McNulty*, although the election board thought that the intent of the voters who put their mark in the unlocked bottom space was likely to vote for the petitioner, their actual intent was impossible to ascertain, so they could not be shown to have actually been denied their right to vote. *See McNulty*, 245 Md. at 10, 224 A.2d at 849.

137. *City of Seat Pleasant*, 364 Md. at 669, 774 A.2d at 1170.

138. *Id.*

139. *Id.* at 684-86, 774 A.2d at 1179-81. If this was the test the court adopted, a court would first ask if the actions of the election officials were illegal or fraudulent. If the answer was yes, the court would rule mandamus appropriate regardless of whether the petitioner could show he or she had been denied a substantial right. If the answer was no, the court would ask if the petitioner had been denied a substantial and verifiable right. Only after this threshold requirement had been affirmed would the court proceed to apply the remainder of the test, asking whether the election official's conduct was arbitrary or capricious, or an abuse of discretion.

c. The Court Correctly Found that the City Board's Actions Were Neither Arbitrary nor Capricious.—Once past the threshold test for substantial right, the court applied the remainder of the test for the appropriateness of a writ of mandamus and determined that the actions taken by the City and County Boards, though possibly negligent, were not arbitrary, capricious, or an abuse of discretion.[140] Maryland courts have discarded the notion that "commands or conditions imposed by a legislative body" are ever merely directory.[141] Therefore, all provisions of the governing statute must be considered mandatory, and a voting board is restricted to exercising the powers and procedures expressly granted in that statute.[142] Because the relevant sections of the City Charter[143] contain no provision granting the City Board judicial power to correct errors and mistakes previously made by officers,[144] the actions of the City Board could not be discretionary because it had not been granted any discretion to abuse.[145]

The Court of Appeals did not deny that administrative errors led to Smith's name being left off the voter registration list. Instead, the court asked whether Sumner's and the City Board's actions in addressing these mistakes were arbitrary and capricious.[146] In deciding whether the behavior of an election official was arbitrary and capricious, the court looked to whether, after the administrative mistakes were discovered, the City Board obeyed the relevant election laws.[147] The court has long recognized that "the reason and policy" of a statute should be considered in determining the right of the applicant to obtain the benefit of the writ of mandamus.[148] The election procedures contained in the City Charter were instituted to ensure the efficient flow of the election process and to safeguard the integrity of the election for the registered voters.[149] When laws designed to protect the voters are involved, the court has ruled that it would be a greater

140. *Id.* at 684-86, 774 A.2d at 1179-80.

141. Lamb v. Hammond, 308 Md. 286, 309, 518 A.2d 1057, 1068 (1987).

142. *See id.*

143. *See supra* note 95 (setting forth the relevant provisions of the City Charter).

144. *City of Seat Pleasant*, 364 Md. at 686, 774 A.2d at 1180. "The Board's duty, as a canvassing board, 'is purely ministerial and extends only to the casting up of the votes and awarding the certificate to the person having the highest number; [it] has no judicial power.'" *Id.* (quoting GEORGE W. MCCRARY, TREATISE ON THE AMERICAN LAW OF ELECTIONS § 261, at 198 (4th ed. 1897)).

145. *See id.*

146. *See id.* at 684-85, 774 A.2d at 1179-80.

147. *See id.* at 685-86, 774 A.2d at 1180.

148. George's Creek Coal & Iron Co. v. County Comm'rs, 59 Md. 255, 262 (1883).

149. *See City of Seat Pleasant*, 364 Md. at 682-86, 774 A.2d at 1178-80. Section C-607 of the City Charter provides that "[n]o person is entitled to vote unless he/she is registered." SEAT PLEASANT, MD., CODE § C-607 (1976).

evil to allow "election officials to ignore statutory requirements designed to safeguard the integrity of elections, *i.e.*, the rights of all the voters" than to allow election officials to ignore an individual voter's right to vote.[150]

Although the City Board clearly made administrative errors, in each circumstance when the error came to light, the representatives of the Board just as clearly did their best to act in accordance with the dictates of the City Charter.[151] When Sumner discovered Smith's name was not on the list of registered voters, she acted in accordance with the City Charter in not allowing her to vote.[152] The charter did not grant Sumner the discretion to allow Smith to cast a "contingent vote."[153] And when the City Board, knowing of a potential irregularity, certified the results of the election to the Clerk of the City Council, they were again acting according to the dictates of the City Charter.[154] The provisions in the City Charter mandating that the City Board count the votes and immediately report the results to the Clerk of the City cannot be seen as discretionary;[155] Maryland courts have "departed from the notion that clear commands or conditions imposed by a legislative body may be disregarded on the theory that they are merely 'directory.'"[156]

Even viewed in light of prior administrative errors, obeying the mandatory provisions of the City Charter from the time that Smith arrived at the polling place can hardly be seen as arbitrary and capricious behavior.[157] Indeed, as the court observed, failing to follow the provisions of the City Charter would have been arbitrary and capricious.[158]

d. The Court's Denial of Mandamus Chooses Lesser of Two Evils.—While denying a voter her right to vote is not a desirable outcome, it is still the lesser of two evils when compared to weakening

150. Hammond v. Love, 187 Md. 138, 149, 49 A.2d 75, 80 (1946).

151. *City of Seat Pleasant*, 364 Md. at 684-86, 774 A.2d at 1179-80.

152. *Id.* at 684, 774 A.2d at 1179. The court's conclusion that Sumner's failure to arrange for someone from the County Board to stay after hours was unfortunate, but not arbitrary or capricious, is persuasive. If the result of any election could be overturned by the failure to make a single phone call, the results of many elections would be called into question.

153. *Id.* at 685, 774 A.2d at 1179.

154. *Id.* at 685-86, 774 A.2d at 1180.

155. *Id.*; *see also supra* note 105 and accompanying text (noting that the City Board is not empowered to correct the errors of election officials).

156. Lamb v. Hammond, 308 Md. 286, 309, 518 A.2d 1057, 1068 (1987).

157. *See City of Seat Pleasant*, 364 Md. at 684, 774 A.2d at 1179.

158. *Id.*

laws designed to protect the integrity of the election process for all voters. Maryland courts have often discussed the conflict between denying individuals their right to vote and obeying election law in terms of lesser and greater evils.[159] Mandamus is an extreme remedy that should only be used "to secure the ends of justice, or to [ ]serve some just or useful purpose."[160] In this case, counting Ms. Smith's vote would have resulted in the court effectively mandating that portions of the City Charter were discretionary. This result would open the door for losing candidates to second guess election results in future elections and ultimately weaken the power of the election laws. Therefore, the results of allowing the writ of mandamus would arguably be neither just nor useful. The Court of Appeals properly restrained itself from using its power of mandamus to substitute its own judgment for that of the City Board. Denying a person his or her right to vote is hardly a satisfactory result, but compared to chipping away at laws designed as an important safeguard to protect all voters, it is certainly the lesser of the two evils.[161]

5. Conclusion.—In *City of Seat Pleasant*, the court correctly ruled that a writ of mandamus was not an appropriate remedy when election officials, despite administrative error, did their best to conform to statutes when confronted with the results of that error.[162] To allow the writ to stand would be to allow the court to substitute its own judgement for the dictates of the City Charter, a situation certainly as bad as allowing election officials, through their error, to effectively change the election laws.[163] The court also established that in cases where election irregularities occur because of error on the part of election officials, the questions of whether a specific voter was denied his or her right to vote and whether that vote would have changed the outcome of the election are merely threshold questions to determine if the petitioner has a substantial right. They are not determinative questions that conclusively establish whether a writ of mandamus is an appropriate remedy.

JOHN G. POPE

159. *See* Hammond v. Love, 187 Md. 138, 149, 49 A.2d 75, 80 (1946); *Lamb*, 308 Md. at 311, 518 A.2d at 1069.

160. George's Creek Coal & Iron Co. v. County Comm'rs, 59 Md. 255, 259 (1883).

161. *Love*, 187 Md. at 149, 49 A.2d at 80.

162. *City of Seat Pleasant*, 364 Md. at 667, 774 A.2d at 1169.

163. *See Lamb*, 308 Md. at 311-12, 518 A.2d at 1069-70 (holding that confusing instructions on mail-in ballots do not overcome election statutes when ballots are mailed-in past the statutory deadline).

VI. HEALTH CARE

A. *The Court Refrains from Judicial Policymaking in Medicaid*

In *Department of Health and Mental Hygiene v. Campbell*,[1] the Court of Appeals of Maryland addressed the issue of whether commissions and attorneys' fees for court-appointed guardians over the property of mentally incompetent Medicaid recipients should be deducted from those recipients' "available income" under the Maryland Medicaid Assistance Program.[2] Specifically, the court considered whether guardianship commissions were an allowable deduction as part of the Medical Assistance recipient's "personal needs allowance" under the Code of Maryland Administrative Regulations (COMAR) section 10.09.24.10D(2)(d).[3] While noting that it was not bound by an administrative agency's conclusions of law,[4] the court reversed the circuit court and agreed with the Department of Health and Mental Hygiene (the Department) and the Office of Administrative Hearings (OAH) in holding that guardianship commissions and legal fees are not the type of "personal needs" expenses contemplated by COMAR section 10.09.24.10D.[5] The court held that the forty dollar monthly allowance for "personal needs" was intended to cover essential items necessary for maintaining one's personal hygiene and was not enough to accommodate the costs of guardianship fees.[6]

In *Campbell*, the Court of Appeals again signaled its unwillingness to venture into or even approach the judicial policymaking arena and declined an invitation to adopt a legal rule based on public policy considerations.[7] The *Campbell* court declined to read into the Medicaid provisions an allowance that would cover the costs of court-appointed guardians despite the numerous public policy arguments in favor of such a finding.[8] While courts in at least two other states have

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1. 364 Md. 108, 771 A.2d 1051 (2001).

2. *Id.* at 111, 771 A.2d at 1052-53; MD. CODE ANN., HEALTH-GEN. I § 15-103 (2000) (amended 2001).

3. *Campbell*, 364 Md. at 111-12 & n.1, 771 A.2d at 1052-53 & n.1. The personal allowance is not defined in the Maryland regulations. However, 42 U.S.C. § 1396a(q)(1)(A)(i) (2000) requires that the allowance be "reasonable in amount for clothing and other personal needs of the individual (or couple) while in an institution . . . ."

4. *Campbell*, 364 Md. at 118, 771 A.2d at 1057.

5. *Id.* at 122, 771 A.2d at 1059.

6. *Id.*

7. *Id.* at 118-22, 771 A.2d at 1057-59.

8. *Id.* at 111-12, 119, 771 A.2d at 1053, 1057. The policy issues were given more attention at the trial court level. *See id.* at 116-17, 771 A.2d at 1056 (reviewing the trial judge's memorandum opinion). Although the trial court outwardly rejected the various public

been willing to allow a deduction from Medicaid recipients' "available income" for the fees of court-appointed guardians,[9] the Court of Appeals has commendably refused to resort to such judicial activism.

1. The Case.—Arthur L. Drager was appointed guardian of the property for seven mentally incompetent Medicaid recipients.[10] The Maryland rules governing the appointment of guardians over the property of disabled or incompetent persons are set forth in section 13-705 of the Estates and Trusts Article,[11] which provides that a court may appoint a guardian if it determines that an individual lacks sufficient mental capacity to make or communicate basic decisions necessary to support him or herself, and that no less intrusive alternative is available.[12]

All of the recipients were residents of long-term care nursing facilities and received Medicaid benefits to help pay for their institutional care and medical needs.[13] The amount of assistance provided to each recipient is based on that recipient's "available income," the amount of which is determined by various regulations.[14] The recipient is required to contribute all of his or her "available income" to the nursing facility to cover the cost of care, while the Medicaid assistance

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policy arguments raised by the recipients and suggested that courts were an improper forum for resolving legislative or regulatory issues, the trial court went on to assume a policy position in supporting its finding that the guardianship fees should be deductible. *Id.* at 117, 771 A.2d at 1056. The trial judge opined that the services of many court-appointed guardians are "essential to life and living," and that income allowances permitting Medicaid recipients to compensate these guardians for their services were vital to the continued functioning and effectiveness of the guardianship system. *Id.*

9. *See infra* notes 74-97 and accompanying text (discussing Massachusetts and Missouri cases in which the courts permitted guardianship fees to be deducted from Medicaid recipients' income contributions).

10. *Campbell*, 364 Md. at 114-15, 771 A.2d at 1055. The Medicaid recipients and the dates on which Drager was appointed their guardian are: Minnie Campbell, May 1996; Lillian Cheatham, September 1993; Melster Dysart, September 1993; Mahalia LaCruze, May 1996; Thomas Roundtree, August 1995; Vivian Tazewell, February 1996; and Daisy Watts, April 1991. *Id.* at 115 n.7, 771 A.2d at 1055 n.7.

11. MD. CODE ANN., EST. & TRUSTS § 13-705 (2001).

12. *Id.* Section 13-705(b) provides that on petition and after any notice or hearing required by law, a court may appoint a guardian for an individual if the court determines

> from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, senility, other mental weakness, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.

Id. § 13-705(b).

13. *Campbell*, 364 Md. at 115, 771 A.2d at 1055.

14. *See id.* at 113, 771 A.2d at 1054; *see also* MD. REGS. CODE tit. 10, § .09.24.10D (2000).

makes up the difference.[15] Certain deductions from this "available income" are permitted to cover other expenses and needs.[16]

Acting in his capacity as guardian for the Medicaid recipients, Arthur L. Drager requested that the Maryland Medical Assistance Program (the Program) of the Department permit his wards to deduct his guardianship commissions from the amount of their "available income," thereby awarding his commissions priority over other costs.[17] Commissions were sought by Drager in the amounts of: $522.78 for Minnie Campbell, $294.62 for Lillian Cheatham, $416.27 for Melster Dystart, $689.04 for Mahalia LaCruze, $263.42 for Thomas Roundtree, $925.36 for Vivian Tazewell, and $829.37 for Daisy Watts.[18]

Advising him that there were no provisions in the applicable regulations that would allow for such deductions, the Department denied Drager's requests and refused to allow the recipients to deduct his commissions from their available income.[19] Drager appealed to the OAH on the grounds that deduction of the commissions should be permitted as part of the "personal needs" allowance awarded to each Medicaid recipient.[20] Drager also argued that the OAH should follow prior OAH, Board of Review, and circuit court decisions that permitted the deduction of such commissions.[21] Finally, Drager set forth a number of public policy arguments to support his appeal.[22] The Administrative Law Judge (ALJ) affirmed the Department's decision that the guardianship fees could not be deducted in each case, determining that the Department had correctly found that guardianship com-

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15. *Campbell*, 364 Md. at 113, 771 A.2d at 1054; MD. REGS. CODE tit. 10, § .09.24.10D (3).

16. *See infra* notes 101-110 and accompanying text (discussing the specific income deductions or allowances recognized by the applicable regulations).

17. *Campbell*, 364 Md. at 115, 771 A.2d at 1055. Each claim was processed separately before the Department and OAH and heard separately before several administrative law judges. *Id.* at 115 n.8, 771 A.2d at 1055 n.8. The cases were later consolidated for judicial review proceedings in the Circuit Court for Baltimore City. *Id.*

18. *Id.* at 115, 771 A.2d at 1055. Thus, the total amount of combined guardianship fees sought by Mr. Drager from the seven individual recipients was $3,251.82. For comparison, if the monthly personal needs allowances of all seven of these recipients were combined, they would only amount to $280. Assuming each individual contributed 100% of his or her personal needs allowance toward the guardianship costs, it would take almost twelve months to pay off the fees. Individually it would have taken Mr. Roundtree (who owed over $900, the most out of any recipient) two years to pay the guardianship fees owed to Mr. Drager.

19. *Id.*

20. *Id.*

21. *Id.* at 115-16, 771 A.2d at 1055.

22. *Id.* at 116, 771 A.2d at 1055. Specific details of these policy arguments are not mentioned anywhere in the *Campbell* opinnion, and they were flatly ignored in the court's decision and reasoning.

missions were not within the scope of "personal needs" as contemplated by the regulations, and therefore were not a permissible deduction in calculating a Medicaid recipient's available income.[23] The additional arguments advanced by the recipients were also rejected.[24] The recipients appealed the ALJ's decisions to the Board of Review, which affirmed on the grounds that the personal needs allowance did not cover the cost of guardianship services.[25]

The recipients then sought judicial review of the administrative decisions in the Circuit Court for Baltimore City, at which time the individual cases were consolidated for hearing.[26] In addition to seeking a deduction of the guardianship commissions, the recipients also sought a similar deduction for attorney's fees.[27] The circuit court judge agreed with the recipients' claim that guardianship commissions should be deducted from a recipient's available income as part of the personal needs allowance and reversed the administrative decision.[28] The court reasoned that its experience with the guardianship

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23. *Id.* at 116 & n.9, 771 A.2d at 1055-56 & n.9. The ALJs that decided the Campbell, Cheatham, and Tazewell cases found that the personal needs covered by the statutory allowance were "incidental items used for clothing or for grooming one's body," such as haircuts, shampoos, and chewing gum, and not legal fees. *Id.* at 116 n.9, 771 A.2d at 1055 n.9. The ALJs in the LaCruze, Dysart, and Watts cases further determined that the Department's reading of the regulations was not only correct, but was also "bolstered by the State's need to comply with federal requirements . . . ." *Id.*

24. *Id.* at 116, 771 A.2d at 1056.

25. *Id.*

26. *Id.*

27. *Id.* The appellees requested that the trial court grant reasonable attorneys' fees in the amount of $600 per case, plus court costs. *Id.* at 123, 771 A.2d at 1059. The trial court granted the request and signed an order directing the Department to "allow a counsel fee in the amount of six Hundred Dollars ($600,00) [sic] to be paid unto Arthur L. Drager for services rendered by him in his capacity as Guardian of the Property." *Id.*, 771 A.2d at 1059-60. On appeal, the Court of Appeals determined that the order of attorneys' fees was ambiguous and reversed. *Id.* at 123-25, 771 A.2d at 1060-61. The court found that it was not clear from the order "whether . . . the court considered the fees as a part of the 'personal needs allowance' and, as such, deductible from the appellees' income to determine their 'available income,' or whether the court awarded the attorneys' fees in respect to the prosecution of the appeal." *Id.* at 123, 771 A.2d at 1060. Ultimately, however, the court held that the award could not withstand review in either event. *Id.* at 123, 771 A.2d at 1060. First, the court held that because the issue of attorneys' fees was presented to the circuit court for the first time without first being raised in, or decided by, the administrative tribunal, the trial court erred in awarding them beecause a court "may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency." *Id.* The court went on to determine that the award of attorneys' fees must be denied because it is "contrary to the established practice in this country," and that nothing in the applicable statutory provisions in this case authorized such action. *Id.* at 124, 771 A.2d at 1060. However, the issue of attorneys' fees was of secondary importance in this case; accordingly, this Note will focus exclusively on the Medicaid deduction issues.

28. *Id.* at 117, 771 A.2d at 1056.

docket suggested that the services provided by court-appointed guardians were "essential to life and to living," without which countless indigent, elderly, and mentally incompetent individuals would otherwise be living on the streets.[29] The trial court did not view an income allowance for Medicaid recipients to pay for the services of their guardians as a "sort of gilding the lily," but rather as a basic necessity.[30]

The Department appealed the circuit court's decision to the Court of Special Appeals.[31] The Court of Appeals issued a writ of certiorari while the case was still pending in the Court of Special Appeals to address the issue of whether guardianship fees are part of a Medicaid recipient's personal needs allowance, and therefore properly deductible from the recipient's "available income."[32]

2. Legal Background.—Medicaid is composed of a complex web of statutory laws and administrative regulations at both the state and federal level that govern the administration of this significant social welfare program.

a. The Medicaid Program.—Medicaid is a jointly funded program operated by individual states and the federal government that provides medical and financial assistance to low-income persons (particularly seniors) who are unable to fund their medical care.[33] The program is structured on a voluntary, opt-in basis in that states may elect, but are not required, to participate.[34] If a state elects to participate, it is required to develop and submit its own State Medicaid Plan for approval by the Health Care Financing Administration (HCFA), the federal agency charged with administering the Medicaid program.[35] The State Medicaid Plan outlining the provision of medical assistance to beneficiaries must comply with the Medicaid Act and the various regulations promulgated by the Secretary of the Department

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The court made a point of acknowledging that it "issued the writ of certiorari on [its] own motion, while this case was pending in the Court of Special Appeals." *Id.*

33. *See* 42 U.S.C. § 1396 (2000) (identifying Medicaid as a program for "enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependant children and aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . .").

34. *See id.* ("The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.").

35. *Id.* § 1396a(a); 42 C.F.R. §§ 430-456 (2001).

of Health and Human Services.[36] Upon HCFA approval of the plan, the state qualifies to receive federal funding.[37] Once the plan is approved, however, subsequent unapproved alterations may jeopardize its federal funding.[38]

b. Maryland's Medicaid Program: The Maryland Medical Assistance Program.—Maryland has elected to participate in the Medicaid program and has done so through the creation and implementation of the Maryland Medical Assistance Program, which is administered by the Department of Health and Mental Hygiene.[39] The Medical Assistance Program administers Medicaid by providing certain persons, such as indigent or medically indigent persons, with reimbursements for the cost of their health care services.[40]

Under the program guidelines, elderly, blind, or disabled individuals with an income of less than $2500 will qualify for Medical Assistance Benefits.[41] An individual with an income that exceeds these limits but who is still unable to meet his or her health care costs may enter a nursing home or other long-term care facility.[42] These individuals are then required to contribute all of their "available income" to pay for the costs of the nursing facility, while the Medical Assistance Program makes up the difference between the recipient's available income and the cost of their care.[43]

Although no concrete definition of "available income" exists, a formula for determining "available income" for individual recipients is set forth in the applicable regulations.[44] The regulations define "income" as "any property or service received by a person in cash or in-

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36. 42 U.S.C. § 1396a(a); 42 C.F.R. §§ 430-456. For instance, the Medicaid statute mandates that in determining the extent of coverage, a state's plan must include "reasonable standards" for determining the extent of available medical assistance in accordance with the objectives and purpose of the Medicaid program. 42 U.S.C. § 1396a(a)(17).

37. 42 U.S.C. § 1396a(b).

38. *Id.* § 1396c.

39. *See generally* Md. Code Ann., Health-Gen. I § 15-103 (2000) (amended 2001) (outlining the basic framework for the implementation and administration of Maryland's Medicaid program).

40. *See id.* § 15-103(a)(2)(i). "Indigent" or "medically indigent" persons are not defined by the code, but the Secretary is authorized to adopt rules and regulations to carry out the provisions of the code. *Id.* § 2-104(b)(1); *see also* MD. REGS. CODE tit. 10, §§ .09.24.01-.10 (2000) (setting forth the program's eligibility requirements in detail).

41. MD. CODE ANN., HEALTH-GEN. I § 15-109(b)(1); *see also* MD. REGS. CODE tit. 10, § .09.24.08 (setting forth detailed guidelines for determining "income" or "resource" levels with respect to medical assistance eligibility).

42. MD. REGS. CODE tit. 10, § .09.24.10D(3).

43. *Id.*; *see also* 42 C.F.R. § 435.832(a) (2001) (setting forth similar federal regulatory guidelines).

44. MD. REGS. CODE tit. 10, § .09.24.10D(2).

kind which can be applied directly, or by sale or conversion, to meet basic needs for food, shelter, and medical expenses."[45] "Available income," therefore, can be defined as the difference between total gross income and any allowable deductions.[46] The regulations also provide for various deductions that may be taken from an individual's income in arriving at the amount of "available income" they are required to contribute to their cost of care.[47] Institutionalized recipients are allowed to deduct the following: a personal needs allowance; a spousal or family allowance; a residential maintenance allowance; and incurred medical expenses that are not subject to payment by a third-party insurer.[48]

The federal Medicaid statute mandates the provision of a "personal needs allowance" in the state program by providing that a state plan will not receive federal approval unless certain deductions or "allowances" are allowed to be taken from a recipient's monthly income, including a "personal needs" allowance.[49] Thus, the state is required to provide a minimal personal needs allowance in order to remain in compliance with federal guidelines.[50]

c. Medicaid in Maryland Courts: How Maryland's Appellate Courts Have Interpreted the Laws and Regulations Governing the State's Medical Assistance Program.—The Court of Appeals and the Court of Special Appeals have often been asked to interpret the myriad of statutory provisions and the regulatory scheme governing the administration of Maryland's health care subsidy programs in various other areas.[51]

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45. *Id.* § .09.24.02B(23)(a).

46. *See id.*; *Campbell*, 364 Md. at 114, 771 A.2d at 1054.

47. MD. REGS. CODE tit. 10, § .09.24.10D(2)(a)-(d).

48. *Id.*

49. 42 U.S.C. § 1396a(q)(1)(A) (2000). The federal statute provides, in pertinent part, that:

> [i]n order to meet the requirement of subsection (a)(50), the State plan must provide that, in the case of an institutionalized individual or couple described in subparagraph (B), in determining the amount of the individual's or couple's income to be applied monthly to payment for the cost of care in an institution, there shall be deducted from the monthly income (in addition to other allowances otherwise provided under the State plan) a monthly personal needs allowance—
>
> (i) which is reasonable in amount for clothing and other personal needs . . . .

Id.

50. *Id.*

51. Prior to *Campbell*, the Maryland courts had not had an opportunity to interpret the regulations governing the calculation of a Medicaid recipient's "available income" and the various deductions included therein. *See Campbell*, 364 Md. at 111, 771 A.2d at 1052-53. The lack of any cited precedent for interpreting the "available income" provisions is noteworthy.

In *Callahan v. Department of Health and Mental Hygiene*,[52] the Court of Special Appeals was asked to interpret the rules for determining eligibility for Medicaid benefits under Maryland's program.[53] The Medicaid regulations giving rise to the dispute in *Callahan* permitted applicants to offset medical expenses against their income to meet program eligibility requirements, but did not allow applicants to deduct these expenses from their "resource level" in order to become eligible for assistance.[54] Thus, if an applicant had $50,000 of "resources" making them ineligible for assistance, he or she could not deduct $20,000 of medical expenses to bring him or herself below the minimum eligibility level and thereby qualify for public assistance.[55] The plaintiffs (an elderly couple) were denied MASO coverage[56] because their "resources" exceeded the minimum level.[57] The plaintiffs sought review of the denial, challenging, *inter alia*, the constitutionality of the regulations permitting spend-down for income and not resource levels on the grounds that the distinction created between those who earn and those who, like the plaintiffs, save, violated the plaintiffs' equal protection rights.[58] The court rejected this argument.[59] The court applied the lowest level of equal protection scrutiny to the challenged regulations and, after determining that there was a rational basis for the regulation, deferred to the judgment of the legislative and administrative bodies charged with administering public medical assistance under the various programs.[60]

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52. 69 Md. App. 316, 517 A.2d 781 (1986).

53. *Id.* at 320, 517 A.2d at 783.

54. *Id.* at 318-19, 517 A.2d at 782.

55. *See* MD. REGS. CODE tit. 10, § .09.24.09C (setting forth qualification guidelines).

56. MASO is the Medical Assistance State Only Program. MASO is essentially an alternative version of Medicaid funded entirely by the state. Its purpose is to provide alternative medical coverage to those who meet certain income and resource limitations of the federal-state Medicaid program, but who nonetheless do not qualify for Medicaid because they are not determined to be "categorically needy" or "medically needy." *Callahan*, 69 Md. App. at 319, 517 A.2d at 782. Essentially the same laws and regulations otherwise apply, however, to MASO and Medicaid. *Id.*

57. *Id.* The Callahans' "resources" were determined to be $6255, which exceeded the eligibility limitation of $2600 for a family of two. *Id.* (citing MD. REGS. CODE tit. 10, § .09.25.08J for the statutory limit for eligibility).

58. *Id.* at 321-22, 517 A.2d at 784. Plaintiffs also argued that their application was improperly considered under MASO instead of the Medicaid program. *Id.* at 320, 517 A.2d at 783.

59. *Id.* at 322, 517 A.2d at 784.

60. *Id.* at 322-25, 517 A.2d at 784-85. The court reached this conclusion by first determining that the classification between those who save and those who earn and spend is not the type of suspect classification that the Supreme Court has subjected to a heightened level of scrutiny. *Id.* at 323-24, 517 A.2d at 784-85. The court further declined to apply a "middle tier" scrutiny analysis and held that the challenged classification was subject to review under the rational basis test. *Id.* Applying this test, the court concluded that the

In *Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc.*,[61] the Court of Special Appeals was asked to resolve a claim brought by Riverview (a nursing home that was a participant in the Maryland Medical Assistance Program) regarding the Department's disallowance of a portion of Riverview's claimed Medicaid reimbursement for services rendered to indigent or medically indigent persons.[62] Maryland's reimbursement guidelines pay nursing homes a per diem rate for each Medicaid patient receiving services.[63] This per diem rate is calculated by totaling four cost categories: administrative and routine costs, direct nursing care costs, other patient costs, and capital costs.[64]

The dispute in *Riverview Nursing* revolved around the Department's method of calculating reimbursement figures in the capital costs category.[65] Specifically, Riverview challenged the Department's application of an interest offset rule in calculating the home's net interest expenses under the capital cost category.[66] Riverview argued that the Department's interpretation and application of these regulations to "non-investor operated" facilities such as Riverview were in conflict with the general principle underlying Medicaid reimbursement and did not further program purposes.[67] In response, the Department maintained that although the COMAR regulations did not expressly call for the challenged application of the offset rule, the offset of interest income against interest expense was required under the state Medicaid laws, and the offset rule had been consistently applied in this manner since the inception of the current reimbursement rules.[68]

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state had a legitimate interest in providing additional medical benefits to supplement those provided under Medicaid and held that the state regulations establishing eligibility for such benefits were rationally related to that legitimate state purpose. *Id.* at 324, 517 A.2d at 785.

61. 104 Md. App. 593, 657 A.2d 372 (1995).

62. *Id.* at 597, 657 A.2d at 374. A significant aspect of the Medicaid program is the reimbursement of medical providers, including nursing homes, for medical care rendered to persons who are considered indigent or "medically indigent" and thus qualify for assistance. *See* 42 U.S.C. § 1396a(a)(13)(A) (2000). In Maryland, the Department is the designated agency that has a statutory responsibility to adopt rules and regulations governing the reimbursement of Medicaid care providers under the state's Medical Assistance Program. MD. CODE ANN., HEALTH-GEN. I § 15-103(a) (2000) (amended 2001).

63. *Riverview Nursing*, 104 Md. App. at 599, 657 A.2d at 375.

64. *Id.*

65. *Id.*

66. *Id.* at 600, 657 A.2d at 375.

67. *Id.*

68. *Id.* at 600-01, 657 A.2d at 375-76.

The court upheld the Department's interpretation and application of the reimbursement rules.[69] In reaching its decision, the court relied heavily on the expertise of the Department in the complex field of Medicaid reimbursement and gave great deference to the Department's interpretation of the applicable regulations.[70] The court reasoned that although it could substitute its judgment for that of an administrative agency when interpreting a regulation, it was obligated to ascertain the "intent of the State in adopting the regulation."[71] The court identified its "primary goal" in examining regulatory policy issues as effectuating the intent of the Legislature.[72] Ultimately, the court deferred to the Department's determination of such legislative intent and its long-standing and consistent interpretation of the reimbursement rules.[73]

d. The Deductibility of Guardianship Fees In Other States.—The Supreme Judicial Court of Massachusetts, in *Rudow v. Commissioner of the Division of Medical Assistance*,[74] and the Court of Appeals of Missouri, in *Missouri State Division of Family Services v. Barclay*,[75] have considered the question of whether court-appointed guardian fees could be deducted from the "available income" of Medicaid recipients under the appropriate state programs.[76]

The plaintiffs in *Rudow* were two elderly Medicaid recipients adjudicated to be incompetent.[77] The attorney acting as guardian sought, on behalf of the recipients, authorization from the State's Division of Medical Assistance for her fees and costs (which had been approved by a probate judge) to be deducted as guardianship expenses from each plaintiff's "patient paid amount" (PPA), the amount recipients were required to contribute to their cost of care.[78] The administrative agency denied the requests, and a welfare appeals referee affirmed the denial, holding that recipients would have to pay for such expenses out of their $60 per month "personal needs allowance."[79]

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69. *Id.* at 607, 657 A.2d at 379.

70. *Id.*

71. *Id.* at 604, 657 A.2d at 377 (citing Genstar Stone Paving Prods. Co. v. State Highway Admin., 94 Md. App. 594, 602, 618 A.2d 256, 259 (1993)).

72. *Id.*

73. *Id.* at 606-07, 657 A.2d at 378-79.

74. 707 N.E.2d 339 (Mass. 1999).

75. 705 S.W.2d 518 (Mo. Ct. App. 1985).

76. *Rudow*, 707 N.E.2d at 341-44; *Barclay*, 705 S.W.2d at 521-23.

77. *Rudow*, 707 N.E.2d at 341.

78. *Id.*

79. *Id.* at 342.

The plaintiffs sought judicial review of the decision, and the trial court held that the guardianship costs should be considered medical or remedial and, subject to certain limits, allowed to be deducted under the incurred medical expenses allowance.[80] The trial court then remanded the case to the administrative board of hearings for further proceedings, and the Division appealed the decision.[81] On appeal, the Supreme Judicial Court of Massachusetts affirmed.[82] The court reasoned that the appointment of guardians to act on behalf of incompetent persons who require medical treatment is "an integral part of the law in Massachusetts concerning medical treatment for incompetent patients."[83] The court went on to note that without a court-appointed guardian, the plaintiffs would never have been able to obtain necessary and appropriate medical treatment; therefore, the guardianship fees must be considered necessary medical expenses.[84]

The Missouri Court of Appeals also wrestled with the issue of allowing deductions from Medicaid recipients' income calculations for guardianship fees in *Missouri State Division of Family Services v. Barclay*. Like the *Rudow* court, the *Barclay* court concluded that the guardianship fees should be deductible.[85] Betty Barclay, a deaf mute with numerous physical and mental impairments, was forced to move into a long-term care facility when her grandmother passed away.[86] When the funds from her grandmother's estate were exhausted, Barclay was adjudicated incompetent by a probate judge, and Mr. A. B. Musik was appointed to act as her legal guardian.[87]

Musik was able to procure social security benefits and Medicaid assistance through the Division of Family Services (DFS) to subsidize the cost of Barclay's institutional care.[88] Thereafter, the guardian successfully petitioned the probate court to allow him to withhold and set aside a portion of Barclay's monthly income to pay for certain expenditures.[89] On review, however, the DFS determined that the only allowable deductions were a $25 personal needs allowance and $14.60 for Barclay's Medicaid insurance premium.[90] This determination was

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 344.
84. *Id.* at 345.
85. Missouri State Div. of Family Servs. v. Barclay, 705 S.W.2d 518, 523 (Mo. Ct. App. 1985).
86. *Id.* at 519.
87. *Id.*
88. *Id.*
89. *Id.* at 520.
90. *Id.*

reached based on an application of the formula set forth in the DFS Income Maintenance Manual (IMM) for determining the amount of "available income" Medicaid recipients would be required to contribute towards the cost of their care.[91] The director of the DFS later affirmed this decision after an evidentiary hearing.[92]

The guardian appealed the decision of the DFS to the circuit court, which reversed the DFS director's findings and held that the withholdings ordered by the probate courts were permissible deductions.[93] DFS appealed to the Court of Appeals, challenging the lower court's reversal of the director's decision on the grounds that the court exceeded its customarily limited role in reviewing and determining the validity of administrative bodies' decisions.[94] The Court of Appeals held that while the provisions in the IMM at issue would be valid rules with the force and effect of law if properly implemented, "the asserted portion of IMM has no controlling force due to the noncompliance with the required procedures."[95] Rather than simply end its discussion there, however, the *Barclay* court dove into a policy debate.[96] The court went on to state, in dicta, "Assuming arguendo that the [IMM] provisions had effective legal force, the director's decision to limit the deductions to $25 from Betty's social security check is contrary to law in view of the Medicaid statutes and accompanying regulations."[97]

3. The Court's Reasoning.—In *Department of Health and Mental Hygiene v. Campbell*, the Court of Appeals held that the "personal needs" allowance was intended to allow recipients to pay for incidental personal items such as haircuts or shampoo, and that nothing in the regulations suggested that the allowance could be extended to cover items such as guardianship fees.[98] The court began by disposing of various issues improperly presented for review. The court declined to consider the recipients' new alternative argument that the guardianship fees should be deductible under the "incurred medical expenses" al-

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 521.
96. *Id.*
97. *Id.*
98. *Campbell*, 364 Md. at 122, 771 A.2d at 1059.

lowance because the recipients waived this argument by not presenting it at the lower levels of review.[99]

After narrowing its focus to the issue of whether the guardian commissions could be deducted from available income as part of a recipient's "personal needs allowance," the court first examined the relevant provisions of the Medical Assistance Program and its accompanying regulations.[100] Based on this review, the court determined that the Maryland regulations (the validity of which were not at issue) failed to provide any explanatory definition of the "personal needs allowance."[101] For insight into the meaning of this provision, the court resorted to a "perusal of the pertinent sections of the federal [Medicaid] statute and the accompanying regulations."[102] In the court's view, the federal regulation[103] requiring states to allow a personal needs deduction is intended to cover clothing and other personal items or needs of individual recipients that are not provided while they are in the institution.[104] The court, therefore, adopted this as the proper interpretation of the personal needs allowance under Maryland's Medicaid regulations.[105]

In support of its finding that "[g]uardianship commissions are not clothing, and they are not the kind of personal needs contemplated by the COMAR 10.09.24.10D," the court noted that the amount of the personal needs allowance was only $40.[106] In the court's view, that amount would undoubtedly accommodate the cost of "personal items" necessary for personal hygiene, grooming, or even to pay for some limited entertainment.[107] The court resolved that such an

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99. *Id.* at 111-12 n.1, 771 A.2d at 1053 n.1. In their brief, the recipients changed the approach they had taken at the administrative hearings and the lower court and for the first time argued that the guardianship commissions should be deducted from the allowance for "incurred medical expenses." *Id.* The court pointed out that throughout the prior stages of the proceedings (before the ALJs, the review board, and the circuit court) the only basis upon which the recipients relied was the argument that the commission should be considered as part of the recipients' "personal needs allowance." *Id.* The court simply refused to consider this new argument, noting that "[w]e have said time and time again, that we will review an adjudicatory agency decision solely on the grounds relied upon by the agency." *Id.* The court did, however, expressly point out that its "refusal to address the 'incurred medical expense' issue is without prejudice to it, or any other basis . . . ." *Id.* at 112 n.1, 771 A.2d at 1053 n.1.

100. *Id.* at 119-22, 771 A.2d at 1057-59.

101. *Id.* at 121, 771 A.2d at 1058.

102. *Id.* (citing 42 U.S.C. § 1396a(a)(50) (2000)).

103. 42 C.F.R. § 435.832(c)(1) (2001).

104. *Campbell*, 364 Md. at 122, 771 A.2d at 1059.

105. *Id.*

106. *Id.*

107. *Id.*

amount would clearly be inadequate, however, to accommodate the cost of items such as guardianship fees, which, as they did in the present case, are likely to considerably exceed the maximum amount of the personal needs allowance.[108] The court went on to maintain that the regulatory scheme of Maryland's Medical Assistance Program demonstrates that the regulation is not intended to include guardianship within the personal needs allowance.[109] Had the regulation been intended in any way to permit or accommodate payments for items such as guardianship fees, the court concluded that the regulation "would have provided for a deduction larger than $40 per month."[110]

4. Analysis.—In *Campbell*, the Court of Appeals was confronted with a policy issue as opposed to a classic legal problem: should Medicaid be used to subsidize the costs of court-appointed guardians over the property of needy recipients? The court refused to acknowledge such policy implications and, assuming the traditional role of the judiciary, applied a classic legal analysis to reach its decision.[111] Other courts that have considered the same issue have done so by engaging in "judicial policymaking," with little adherence to the well-established principles of statutory interpretation and legal analysis.[112] Thus, it appears that the Court of Appeals' ideological convictions with regard to the proper function of the courts in deciding questions saturated in public policy played a pivotal role in shaping the interpretation of Maryland's Medicaid law.

a. The Policy Implications of Campbell.—On its face, the question presented in *Campbell* appears relatively benign and straightforward. The court was merely asked to decide whether Medicaid recipients who benefit from the services of court-appointed guardians should be permitted to take a monthly deduction from their "available income" to pay the commissions or fees of their guardians.[113] Beneath the surface of this question, however, are a myriad of conflicting policy considerations and arguments.

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108. *Id.*

109. *Id.*

110. *Id.* (internal quotation marks and citation omitted).

111. *See id.*

112. *See supra* notes 74-97 and accompanying text (discussing cases in which courts stretched applicable regulations and refused to defer to administrative agencies' interpretations of regulations in an effort to include guardianship fees within the permissible deductions).

113. *Campbell*, 364 Md. at 111, 771 A.2d at 1052-53.

On the one hand, guardians are rightfully entitled to some measure of compensation for their services.[114] The reasonableness of the commissions (calculated in accordance with the Maryland Code) was not contested.[115] Moreover, the services and functions of court-appointed guardians are truly necessary and immeasurably beneficial to recipients.[116] In fact, the circuit court, in setting forth its reasons for allowing the guardianship fees to be deducted as part of the personal needs allowance, noted that:

> [A] lot of indigent people would be out on the street but for our appointing guardians and having Counsel represent the guardian, and then be able to get the benefits that they're entitled to under the law. So, I don't view [deducting the fees as part of the personal needs allowance] as sort of gilding the lily, I view it as essential to life and to living . . . .[117]

Chief Judge Bell's opinion for the court in *Campbell* carefully avoided this issue and, aside from quoting the foregoing language of the trial court, did not directly address the value or usefulness of the guardianship system.

Complicating this situation is the fact that any decision rejecting a deduction of the guardianship commissions from the available income of recipients will ultimately mean that the guardians will not be paid for their services.[118] Under Medicaid, recipients must hand over all of their available income to the Medical Assistance Program.[119] Thus, recipients of Medicaid assistance under Maryland's program essentially have no income with which to pay personal debts or obligations outside of their medical needs unless the regulations permit a deduction of such amounts from their "available income."[120] This creates a situation where recipients are unable to compensate those

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114. The guardianship commissions were calculated in accordance with MD. CODE ANN., EST. & TRUSTS §§ 13-218, 14-103 (2001), and approved by the Trust Clerk for the Circuit Court of Baltimore City. *Campbell*, 364 Md. at 116-17, 771 A.2d at 1056.

115. *See Campbell*, 364 Md. at 115-18, 771 A.2d at 1054-57.

116. *See id.* at 117, 771 A.2d at 1056 (citing the trial court judge's praise of the services provided by court-appointed guardians).

117. *Id.*

118. The statutes governing the appointment of guardians and the calculation of their fees do not provide for any alternative source of compensation in the event that a ward is unable to pay. *See* MD. CODE ANN., EST. & TRUSTS §§ 13-218, 13-705, 14-103 (2001) (governing the appointment of guardians and the calculation of their fees).

119. *See* MD. REGS. CODE tit. 10, § .09.24.10D (2000). Aside from the recognized deductions or allowances, Medicaid recipients are required to contribute all of their income to pay for the cost of care, leaving them with virtually nothing to pay for other items, except for the $40 they are permitted to withhold through the personal needs allowance. *Id.*

120. *Id.* § .09.24.10D(3).

who provide services for them, such as court-appointed guardians, unless some sort of deduction from the income they must contribute to the cost of their care is allowed.

On the other side of the coin, however, is the fact that any deductions that are allowed to be taken from the "available income" of recipients to pay for certain goods or services will, in effect, act as government subsidies of such services.[121] Consider the following example: *A* is a qualified Medicaid recipient with a total monthly income of $500, and the total monthly costs of his medical care amount to $1000. If *A* contributed all of his $500 monthly income to pay for his care, it would cost the taxpayers $500 per month to provide Medicaid assistance for him. The legislature and administrative agencies have chosen, however, to allow *A* to "keep" a certain amount of his $500 monthly gross income by way of "deductions."[122] Thus, *A* is permitted to keep $40 for "personal needs," and a "residential maintenance allowance."[123] Now *A* is keeping $200 and only contributing $300. The net effect is that the government has essentially provided *A* with an indirect subsidy at a cost of $200 per month.

Therefore, every deduction that is allowed to be taken from a Medicaid recipient's "available income" amounts to an indirect government expenditure. The approval of public expenditures has traditionally been an area of government decision-making delegated to elected officials, and the courts have been understandably reluctant to play an active role in such decisions.[124]

The Court of Special Appeals of Maryland demonstrated this reluctance in *Callahan v. Department of Health and Mental Hygiene*,[125] an-

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121. *See id.* Any difference between the recipient's aggregate cost of care and the amount of available income he or she will contribute to cover such cost is made up by Medicaid. *Id.* Medicaid is ultimately funded by state and federal tax revenues. *See* 42 U.S.C. § 1396 (2000).

122. *See* MD. REGS. CODE tit. 10, § .09.24.10D.

123. *Id.*

124. *See* Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr., Inc., 104 Md. App. 593, 602-04, 657 A.2d 372, 376-77, *cert. denied*, 340 Md. 215, 665 A.2d 1058 (1995) (recognizing the Department's superior ability to understand its own rules and regulations and suggesting that courts should be reluctant to substitute their judgment for the expertise of the administrative agency); Dep't of Health & Mental Hygiene v. Reeders Mem'l Home, Inc., 86 Md. App. 447, 453, 586 A.2d 1295, 1297-98 (1991) (acknowledging and deferring to the "expertise" of the Nursing Home Appeal Board, which hears disputes regarding reimbursement under Medicaid, in interpreting and applying the complex Medicaid reimbursement regulations); Baltimore & Ohio R.R. Co. v. Bowen, 60 Md. App. 299, 305, 482 A.2d 921, 924 (1984) (noting that a court should defer to an agency's interpretation of a statute because agencies have special expertise).

125. 69 Md. App. 316, 517 A.2d 781 (1986), *cert. denied*, 308 Md. 382, 519 A.2d 1283 (1987).

other case in which the court was asked to render a decision that would impact the State's medical assistance expenditures.[126] Despite the persuasive policy arguments advanced by the plaintiff and the seemingly illogical effect of the eligibility regulations, the Court of Special Appeals declined to "second-guess those officials who are responsible for the allocation of limited public funds 'among the myriad of potential recipients.'"[127] While acknowledging the legitimate policy debate surrounding the issue, the court noted that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of the Court . . . ."[128]

On a more general level, Maryland courts have acknowledged that the primary responsibility for interpreting, shaping, and administering the state's Medicaid program falls not on the courts, but on the Department.[129] In *Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc.*, the Court of Special Appeals deferred to the Department on a decision concerning the reimbursement of health care providers under certain provisions of the Medicaid program.[130] In fact, the court suggested that judges may not even be qualified to assume a significant role in at least some aspects of the Medicaid program.[131] The court determined that the complexity of Medicaid reimbursement required a special level of agency "expertise," and therefore the Department was better able to interpret and apply the applicable laws and regulations in this area.[132]

b. Judicial Activism in Medicaid: Contrasting Campbell *with the Proactive Decision-Making Displayed by Courts in Other States.*—Courts in other states have been much more willing than the Court of Appeals of Maryland to assume a proactive role in interpreting and applying the same provisions of their own Medicaid statutes and regulations.[133] A close examination of these decisions and the reasoning used to sup-

126. *Id.* at 320, 517 A.2d at 783.

127. *Id.* at 325, 517 A.2d at 785 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

128. *Id.* (quoting *Dandridge*, 397 U.S. at 487).

129. *See supra* note 124 (highlighting several cases in which Maryland courts have expressed deference to the Department and the agencies and boards under it that are charged with promulgating, interpreting, and administering the regulations governing the Medicaid program).

130. 104 Md. App. 593, 602-03, 657 A.2d 372, 376-77 (1995).

131. *See id.* at 603, 657 A.2d at 377.

132. *Id.* at 603, 607, 657 A.2d at 376-77, 378-79.

133. *See supra* notes 74-97 and accompanying text (discussing the proactive approaches taken by other courts in interpreting similar Medicaid provisions).

port them will, when contrasted to the *Campbell* decision, highlight the notable level of judicial self-restraint exercised by the *Campbell* court.

In *Rudow v. Commissioner of the Division of Medical Assistance*,[134] a case that presented factual and legal issues virtually identical to those in *Campbell*, the Supreme Judicial Court of Massachusetts found a way to permit deductions from Medicaid recipients' "patient paid amount" (the equivalent of "available income") to cover the costs of guardianship commissions.[135] The *Rudow* decision and the analysis the court employed in reaching that decision stands in stark contrast to the deferential, restrained interpretation of the applicable regulations displayed by the Court of Appeals in *Campbell*.[136]

The *Rudow* court refused to defer to legislative action, noting that "[w]e also are not persuaded that the appropriate resolution of this issue is legislative rather than judicial."[137] The court hastily dismissed the division's claim that a proper resolution of the issue could only come through a legislative enactment increasing the "personal needs allowance" for recipients who require court-appointed guardians to obtain necessary medical treatment.[138] The court's inadequate justification for this position was that the personal needs allowance was never intended to cover such costs and that such an alteration would not be in harmony with the federal regulations.[139] Based on an examination of the federal and state statutory and regulatory provisions pertaining to the personal needs allowance, the *Rudow* court simply determined that the items and services that could be charged to a recipient's personal needs allowance "are not analogous to guardianship expenses necessitated by the incapacity of a nursing home resident to consent to her own medically necessary treatment."[140]

In reaching its decision, the *Rudow* court ignored evidence which indicated that allowing deductions for guardianship fees under Medicaid would be in conflict with the Health Care Financing Administration's (HCFA) policy interpretations of the cognate Federal Medicaid

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134. 707 N.E.2d 339 (Mass. 1999)

135. *Id.* at 347.

136. *Compare id.* at 340-47 (displaying a clear willingness to consider policy implications in its legal analysis), *with Campbell*, 364 Md. at 122, 771 A.2d at 1059 (employing a more mechanical approach when interpreting the applicable language in the regulation).

137. *Rudow*, 707 N.E.2d at 346.

138. *Id.*

139. *Id.* at 346-47 (citing 42 U.S.C. § 1396a(q)(1)(A)(i) (2000) when defining the proper scope of the personal needs allowance as a monthly deduction "reasonable in amount for clothing and other personal needs of the individual (or couple) while in an institution").

140. *Id.* at 347.

statute and implementing regulations.[141] In its brief, the division pointed to two separate instances in which the HCFA clearly and unequivocally indicated that expenses such as guardianship fees were not deductible from a recipients' requisite income contribution under the current provisions.[142]

In 1997 (the first instance in which the HCFA indicated its position), the Massachusetts Attorney General formally requested that the HCFA interpret allowable deductions from a Medicaid recipient's income for "'necessary medical and remedial care' to include guardianship expenses."[143] The HCFA definitively declined to issue the requested interpretation, responding that:

> [a]lthough various medical evaluations, certifications, and data are required as part of the process of appointing a . . . guardian, appointment of a guardian is nevertheless a legal proceeding. . . . [G]uardianship costs do not in any way meet the definition of medical and remedial care, and thus cannot be deducted from the individual's income under that category.[144]

The division also cited a second, similar refusal by the HCFA to approve a proposed amendment to Missouri's Medicaid program in 1987 as indicative of the conflict between HCFA's interpretation of applicable federal law and the decision ultimately reached by the court in *Rudow*.[145] The proposed amendments to the Missouri Medicaid plan would have expressly permitted the deduction of "guardianship-related services" and expenses from the calculation of institutionalized recipients' "available income" contributions.[146] The HCFA, interpreting the applicable federal regulations, concluded that guardianship-related services were not the type of "necessary medical or remedial care" contemplated under state law because "[t]he services of a guardian are plainly legal or administrative even though they may be quite important to necessary medical care."[147] As further support for its position, the HCFA noted that guardianship services do not require medical expertise or serve any medical purpose, and that for tax purposes guardianship fees would not be included in the cate-

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141. *Id.* at 345-46. The HCFA is a subsidiary agency of the United States Department of Health and Human Services and is charged with administering the Medicaid program and promulgating regulations for its implementation. *Id.* at 346 n.14.

142. *Id.* at 345-46 & nn.15 & 16.

143. *Id.* at 346 n.15.

144. *Id.* (alterations in original).

145. *Id.* at 346.

146. *Id.* at 346 n.16.

147. *Id.* (alteration in original).

gory of "deductible medical expenses" recognized under federal tax law.[148]

Choosing to essentially ignore the position of the HCFA and reach an entirely different conclusion, the *Rudow* court pointed to the absence of any express HCFA regulations embodying its view on the issue to justify its decision.[149] The court went on to find that HCFA's policy was not compelling in the absence of regulation and, while administrative interpretations are rightfully accorded some deference, "interpretive rule making is not controlling upon the courts."[150] The court ultimately concluded that "[w]e do not consider ourselves bound by HCFA's policy position particularly where, as here, we conclude that position conflicts with the controlling Federal statutory scheme."[151]

The deductibility of guardianship expenses incurred by Medicaid recipients has also been addressed by the Missouri Court of Appeals in *Missouri State Division of Family Services v. Barclay*.[152] That tribunal, like the *Rudow* court in Massachusetts, displayed a much stronger inclination to interject itself into the policymaking process than did Maryland's high court.[153] The *Barclay* court initially held that the provisions of Missouri's IMM with respect to the deductibility of expenses such as guardianship fees were invalid on a very technical basis.[154] The court relied in the alternative, however, on what essentially amounted to a public policy justification for allowing guardianship fees to be deductible.[155]

Although the court framed its "arguendo" holding as a determination of Medicaid "law," its reasoning clearly reveals that this purported conclusion of law was motivated not by statutory interpretation, but by public policy considerations.[156] First, the court outlined the "purpose" of the Medicaid program and made an unpersuasive attempt to argue that the DFS deduction rules applied to Barclay somehow conflicted with federal regulatory guidelines.[157] The court relied heavily on its conclusion that it would be a violation of the

148. *Id.*
149. *Id.* at 345-46.
150. *Id.* at 346.
151. *Id.*
152. 705 S.W.2d 518 (Mo. Ct. App. 1985).
153. *Id.* at 521-23.
154. *See id.* at 521 (finding that the IMM provisions were invalid because they did not satisfy certain publication and filing requirements for regulatory rules).
155. *Id.* at 521-23.
156. *See id.*
157. *Id.* at 521-22.

federal regulations if the state were to allow the minimum "personal needs" allowance of recipients' to be "invaded" to cover expenses such as guardianship fees.[158] Thus, the court determined that the regulations must provide for a reasonable deduction for necessary or remedial medical care over and above the $25 personal needs allowance.[159] The court ultimately remanded the case to DFS and instructed it to allow Barclay to take an allowance for "medical and remedial care," instructing that the scope of the allowance cover the withholdings authorized by the probate court (which included guardian and attorneys' fees).[160]

Inherent in the *Barclay* court's decision is a policy determination by the court.[161] By instructing the administrative agency to create a deduction under which guardianship fees would be included, the court implicitly held that such expenses *should* be deductible and that the Medicaid program *should* be extended to effectively subsidize guardianship services for recipients.[162] In so doing, the *Barclay* court demonstrated its willingness to assume a hands-on, active role in administrative policy formation.

c. Judicial Restraint and Deference on Display in Campbell.— The analysis and legal reasoning employed by the Court of Appeals of Maryland in reaching its decision in *Campbell* stands in stark contrast to that displayed in both *Barclay* and *Rudow* and is indicative of the legal traditionalism and discipline that has come to characterize the decisions of Maryland's high court.[163] Upon reading the opinions in *Rudow* and *Barclay*, there are some indications that the judges deciding those cases, particularly in *Rudow*, simply determined that Medicaid recipients *should* be permitted to deduct guardianship expenses from their income and then proceeded to formulate a legal basis for that conclusion.[164] Thus, the decisions in *Rudow* and *Barclay* reflect the courts' view of what the Medicaid policy *should* be with respect to

158. *Id.* at 522-23 (quoting Potter v. James, 499 F. Supp. 607, 611 (N.D. Ala. 1980), in which the court invalidated an Alabama statute requiring Medicaid recipients to pay part of their prescription drug expenses out of their $25 personal allowance).

159. *Id.* at 523.

160. *Id.*

161. *See id.*

162. *See id.*

163. *See* Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, U. BALT. L.F. Spring/Summer 2002, at 4, 35-37 (pointing to the Court of Appeals's focus on discerning and effectuating legislative intent in interpreting statutes and regulations as a model for statutory interpretation).

164. *See* Rudow v. Comm'r of the Div. of Med. Assistance, 707 N.E.2d 339, 343-47 (Mass. 1999); *Barclay*, 705 S.W.2d at 521-23.

deductions for guardianship fees and not what the policy *is* under the applicable law.

In contrast, the decision of the Court of Appeals in *Campbell* is a clarification of what the state's policy *is* as declared in the Medicaid laws enacted and administered by the legislative and administrative bodies empowered by the citizens of Maryland to make such determinations.[165] Nothing in the laws or regulations governing the calculation and distribution of public benefits under Maryland's Medicaid program suggests that the legislature or the Department of Health and Mental Hygiene ever intended the personal needs allowance to cover items such as guardianship or attorney's fees.[166] Upon making this determination, the court obviously felt compelled to end its interpretive inquiry.[167]

The *Campbell* court could have easily reached the opposite conclusion and held that guardianship fees *should* be deductible. The volume of ambiguities in the Medicaid statutes and regulations leaves ample room for judicial interpretation, which, as evidenced in *Rudow,* can serve as a tool for the courts to engage in both intentional and inadvertent policymaking. Admittedly, the plaintiffs' (recipients) initial reliance on the personal needs allowance as the source of the guardianship deduction (as opposed to the incurred medical expenses deduction) may have, at least in the court's view, tied the court's hands in some respects.[168] However, the action in *Rudow* also came before the appellate court after having been decided below on the basis of the personal needs allowance, but the court nevertheless based its holding on the incurred medical expenses allowance.[169] In any event, the *Campbell* court refused to find a deduction for guardianship expenses and, in light of the court's opinion, it would seem unlikely that the outcome would have been different had the incurred medical expenses allowance been at issue.[170]

The Court of Appeals's decision in *Campbell* deserves praise because it establishes precedent for judicial restraint in the field of social

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165. *See Campbell,* 364 Md. at 122, 771 A.2d at 1059.

166. *See id.*

167. *Id.*

168. *See id.* at 111-12 n.1, 771 A.2d at 1053 n.1 (noting that the failure to raise the incurred medical expenses argument at any prior stage of the proceedings precluded its consideration at the appellate level).

169. *See Rudow,* 707 N.E.2d at 342, 347. The court's opinion, however, does not address this potential waiver issue or offer a clear explanation of the exact parameters of the administrative decisions. *See id.*

170. *See Campbell,* 364 Md. at 122, 771 A.2d at 1059 (describing the court's ultimate decision on the matter).

welfare programs, which are infused with politically charged policy issues, and thereby preserves the credibility and prestige of the court.[171] The decision in *Campbell* can be described as an example, albeit a relatively mundane one, of the exercise of "judicial restraint."[172]

The responsibility for deciding political issues and formulating public policy is allocated to the legislative branch of government, and the courts' role in this area must necessarily be limited to objective interpretation guided by legislative intent.[173] The courts are not structurally equipped to make policy decisions in areas such as Medicaid.[174] Courts are not representative bodies, and therefore they are not politically responsive to the popular will that is supposed to navigate a democratic society.[175] The essential characteristics of the courts are independence and political isolation.[176] The United States Supreme Court itself has noted that "[h]istory teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[177]

A long line of notable legal minds and scholars have advocated an adherence to judicial restraint by contemporary courts.[178] These scholars argue that judicial activism creates the risk that citizens will begin to view the courts as just another partisan branch of government, courts will lose their position as impartial resolvers of conflicts,

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171. *See* Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 695-704 (1999) (discussing the proper functioning of the state courts in the American political system and highlighting the necessity of exercising judicial restraint in deciding issues with political or public policy overtones).

172. *See id.* at 698-99 (explaining why judicial restraint is crucial when considering the core functions of the courts).

173. *See id.* at 697 (explaining that the primary reason for courts to exercise judicial restraint "is the separation of powers inherent in our political structure").

174. *See, e.g.*, Dep't of Health & Mental Hygiene v. Riverview Nursing Ctr., Inc., 104 Md. App. 593, 603, 657 A.2d 372, 377 (1995) (acknowledging the courts' lack of competence and expertise compared to the Nursing Home Appeal Board in interpreting and applying Medicaid reimbursement provisions).

175. Talmadge, *supra* note 171, at 696 n.1 (citing Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

176. *Id.*

177. *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).

178. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767 (1998); John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437 (1985).

and respect for the authority of the courts will erode.[179] In recent years, some commentators have noticed a trend of increased judicial activism from both the left and the right.[180] Some judges seem to view themselves as "quasi-legislators" with a broad charge to address all issues and resolve all types of controversies that litigants bring before the courts.[181] According to one author, "what has emerged too often is a cowboy judiciary riding roughshod over separation of powers in its zeal to save every damsel in distress and to right every wrong."[182]

The Court of Appeals of Maryland, however, has consistently bucked this apparent trend toward activism, and the court's decision in *Campbell* is merely one example of this practice.[183] The *Campbell* decision is nonetheless noteworthy in that the court was able to resist the temptation to overextend its proper authority to come to the rescue of the recipients and their guardians, who undoubtedly commanded a great deal of sympathy.[184] Moreover, the fact that the regulatory policies at issue in *Campbell* were relatively minor suggests that the court's deference was not induced by any significant political pressure.[185]

Campbell is not a watershed decision destined to permanently alter the shape of Maryland's Medical Assistance Program. Nor is *Campbell* likely to have a devastating impact on lives of Medicaid recipients or the court-appointed guardian system.[186] The *Campbell* decision is significant, however, to the extent that it signifies the court's view of its proper role in the regulatory process. In this respect, *Campbell* may

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179. *See, e.g.*, Talmadge, *supra* note 171, at 696. Talmadge warns that when little known and often non-elected judges render policy decisions using a process that is not clearly understood, and those decisions conflict with determinations made by a majority of the popularly elected legislature, "some people in the body politic will undoubtedly be upset." *Id.* at 700.

180. *See, e.g., id.* at 695.

181. *Id.*

182. *Id.* at 696.

183. *See* Ogune, *supra* note 163, at 36-37 (describing the Court of Appeals's adherence to the strictures of statutory interpretation in 163 cases reviewed by the author).

184. *See Campbell*, 364 Md. at 122, 771 A.2d at 1059 (reaching its decision based on an interpretation of the applicable regulations).

185. *Cf.* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 308-12 (1997) (discussing political pressures imposed on judges when confronted with hot-button political issues).

186. In fact, the decision in *Campbell* did not ultimately end the debate over the deductibility of guardianship fees from the income of Medicaid recipients because the court's decision does not preclude a future case being brought on a theory that the guardianship fees should be deductible under the "incurred medical expenses" allowance. *Campbell*, 364 Md. at 112 n.1, 771 A.2d at 1053 n.1.

serve as a guidepost to future litigants hoping to use the courts as a forum for shaping Maryland's regulatory policy.

5. Conclusion.—In *Campbell*, the Court of Appeals prudently refrained from judicial policymaking and assumed the proper, limited role required of the courts in the field of public welfare policy. The Court of Appeals's deferential decision in *Campbell* may serve as a guidepost for future Maryland courts when interjecting themselves into the social policymaking domain. *Campbell* may also serve as a signal to those seeking to shape the state's social welfare policy at the regulatory level that litigation cannot be relied upon as an effective strategy for promoting such changes. The decision in *Campbell* clearly suggests that the proper forum for such policy change lies in the legislative or administrative domain and not in the courts, whose role will be limited to interpreting and effectuating the policies enacted by those bodies. Thus, *Campbell* offers clear guidance (if not articulable standards) as to the proper role of the courts vis-à-vis the relevant administrative bodies in the field of Medicaid, where the complex distribution of rule and policymaking authority can easily blur the boundaries of judicial authority.

BRIEN M. PENN

VII. PRIVILEGE

A. *The* Hamilton *Balancing Test Revisited: A Further Restriction on the Use of Executive Privilege Under the Public Information Act*

In *Office of the Governor v. Washington Post Co.*,[1] the Court of Appeals of Maryland addressed the issue of whether telephone and scheduling records from the Office of the Governor and from Governor Parris Glendening were protected from disclosure to the Washington Post under the Maryland Public Information Act.[2] In deciding that the Governor was not entitled to a broad claim of executive privilege, the court revisited the *Hamilton v. Verdow* balancing test[3] and further restricted the Executive's ability to utilize the doctrine of executive privilege, particularly when the information being sought is more factual in nature than deliberative.[4] Thus, in situations such as that in *Office of the Governor*, the disclosure of factual information, such as telephone and scheduling records, will have to be explicitly proven to impinge upon the deliberative process in order for the documents to be privileged from disclosure.[5] The court in *Office of the Governor* erred by failing to examine the chilling effect such broad disclosure would have on the Governor's deliberative process.

1. The Case.—In November and December 1996, reporters from the Washington Post (the Post) contacted the Maryland Governor's Office and requested telephone and scheduling records from the Office of the Governor (the Office) under Maryland's Public Information Act (the Act).[6] The records requested included the telephone records and "call detail"[7] of the Governor and his staff over two years, including records from phones in the Governor's Mansion, his State House offices, his Baltimore and Washington offices, and all car phones and cellular phones used by the Governor and his staff.[8] The

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1. 360 Md. 520, 759 A.2d 249 (2000).

2. *Id.* at 526, 759 A.2d at 252; *see also* MD. CODE ANN., STATE GOV'T §§ 10-611 to -619 (1999 & Supp. 2001) (explaining the type of information that is subject to disclosure under Maryland law).

3. *See* Hamilton v. Verdow, 287 Md. 544, 563-66, 414 A.2d 914, 925-26 (1980) (establishing a balancing test to determine whether requested documents contain factual or deliberative information).

4. *Office of the Governor*, 360 Md. at 565, 759 A.2d at 273.

5. *Id.* at 563-65, 759 A.2d at 272-73.

6. *Id.* at 526, 759 A.2d at 252; *see also* MD. CODE ANN., STATE GOV'T §§ 10-611 to -630.

7. Call detail includes the date and time that each call took place, as well as the length of each call and the party contacted. *Office of the Governor*, 360 Md. at 527, 759 A.2d at 253.

8. *Id.* at 526, 759 A.2d at 252-53.

Office denied part of the request for any "call detail," claiming executive privilege under *Hamilton v. Verdow* and section 10-618(b) of the Act.[9]

The Post also requested the scheduling records of the Governor, including calendars that would indicate with whom the Governor met, for how long, and the locations of the meetings.[10] "The Office released the Governor's public agendas . . . but denied the remainder of [the] request, stating that [such] records were not 'public records' within the meaning of § 10-611(g) of the Act, and also invoking executive privilege, citing § 10-618(b) and *Hamilton*."[11]

In 1997, while negotiations between the Post and the Office were ongoing, the Post limited its request to the telephone records pertaining to the Governor, his Chief of Staff, his Senior Advisor, and the Secretary of State during a six month period from February 1, 1996 to July 31, 1996, and to appointment records during the same period.[12] Nevertheless, the Office continued to deny the Post's request.[13]

The Post filed suit against the Office of the Governor and against Governor Parris Glendening on December 4, 1997, in the Circuit Court for Anne Arundel County.[14] The Office moved for summary judgment, arguing that the records the Post requested were exempt from disclosure under section 10-618(b) of the Act. The Office further asserted that the documents sought would be exempt from disclosure under the doctrine of executive privilege.[15] Additionally, the Office argued that publicizing the Governor's schedule, even after the

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9. *Id.* at 527, 759 A.2d at 253; *see also* Hamilton v. Verdow, 287 Md. 544, 563-66, 414 A.2d 914, 925-26 (1980) (concluding that a balancing test must be applied to determine the effect disclosure of factual material would have on the executive's deliberative process before such information may be released). Section 10-618(b) of the Act reads: "A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." MD. CODE ANN., STATE GOV'T § 10-618(b). The Governor also argued that executive privilege was incorporated into the Act under section 10-618(b). *Office of the Governor*, 360 Md. at 527, 759 A.2d at 253. The Governor also argued that case law from other states further supported his claim of executive privilege over telephone and scheduling records. *Id.*

10. *Office of the Governor*, 360 Md. at 526-27, 759 A.2d at 253.

11. *Id.* at 527, 759 A.2d at 253.

12. *Id.* at 527-28, 759 A.2d at 253.

13. *Id.* at 528, 759 A.2d at 253.

14. *Id.*

15. *Id.* The Office also claimed that some of the requested documents fell under other exemptions to the Act, including exemptions for records containing personnel information, confidential commercial information, home address and telephone numbers of public employees, and confidential information on finances of individuals. *Id.* at 528-29, 759 A.2d at 254.

fact, would threaten the security of the Governor and those around him.[16]

At the same time, the Post filed a cross motion for summary judgment. In it, the Post argued that the documents at issue were not "interagency or intra-agency letter[s] or memorand[a]" within the meaning of section 10-618(b) of the Act, and that the documents were not privileged.[17] Furthermore, the Post argued that any threat to the Governor's security was not a recognized exemption to the Act, and that the other exemptions that the Governor and the Office were claiming did not apply to the records at issue.[18] After a hearing on the motions for summary judgment, the court denied both motions in July 1998.[19] The court ordered the Office and the Governor to provide to the Post all telephone and scheduling records that they had not claimed fell within executive privilege, and to submit to the court, for *in camera* review, those documents that they claimed were privileged.[20] The Office and the Governor submitted limited records to the Post, and submitted to the court, for *in camera* review, unredacted copies of the telephone and calendar records, as well as records with proposed redactions highlighted and memorandum in support of those redactions.[21] On September 15, 1998, the Post filed a motion to unseal the *in camera* explanations for the redactions, and arguments were heard soon thereafter.[22]

On October 23, 1998, the court issued its final order, stating "that the Defendants, with limited exceptions, have failed to make a particularized showing as to executive privilege."[23] The court continued,

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16. *Id.* at 528, 759 A.2d at 253. The argument that the Governor's security would be threatened is not inherently different from the argument that disclosure would impair the Governor's ability to effectively perform his duties because both are based on the harm that might occur to the Governor. *Id.* However, the latter argument focuses more on the effect disclosure would have on the deliberative processes of the Governor and his staff, instead of the actual harm that may occur to the Governor himself.

17. *Id.* at 529, 759 A.2d at 254.

18. *Id.*

19. *Id.* Two weeks after the court issued its opinion, the Post asked the court to set a compliance deadline for the Office. *Id.* at 530, 759 A.2d at 255. The Office filed a motion for clarification and reconsideration, again asking the court to recognize the doctrine of executive privilege with respect to all of the documents requested. *Id.* The court granted the Post's motion and set a compliance deadline of September 1998. *Id.* The court also denied the defendants' motion for reconsideration, holding that the Governor was not entitled to a broad claim of executive privilege unless he could prove that "disclosure of particular information [would] adversely affect [his ability] to effectively carry-out his Constitutional duties." *Id.*

20. *Id.* at 530, 759 A.2d at 255.

21. *Id.* at 531, 759 A.2d at 255.

22. *Id.*

23. *Id.*

finding that the defendants had failed to demonstrate that the records at issue were exempt from mandatory disclosure, therefore not satisfying their burden under the Act.[24] The Office and the Governor immediately appealed and requested a stay of the circuit court's judgment.[25] The Court of Special Appeals granted the stay.[26]

Before proceedings could continue in the Court of Special Appeals, however, the Court of Appeals issued a writ of certiorari to consider whether the Governor was entitled to executive privilege under the deliberative process privilege enunciated in *Hamilton*.[27] The court also considered whether the Act applied to the Governor and his Office at all, even though the Act is usually construed in favor of a broad policy of public disclosure.[28]

2. *Legal Background.*—The Act was originally enacted and codified in 1970, and, to some extent, was modeled after the Federal Freedom of Information Act (FOIA).[29] The Act entitles all persons access to information about the affairs of the government and the acts of public officials and employees while acting in an official capacity.[30] The Act is to be construed in favor of disclosure.[31]

This section will proceed as follows. First, it will examine the applicability of state and federal public information acts to executive offices. Second, it will examine whether several exemptions in the Maryland Public Information Act allow the Governor to prevent disclosure of certain documents. Third, it will examine the doctrine of executive privilege in Maryland and other states. Finally, it will briefly discuss separation of powers in Maryland.

a. Applicability of Public Information Acts to Executive Offices.—In *Kissinger v. Reporters Committee for Freedom of the Press*,[32] the Supreme Court held that FOIA did "render the 'Executive Office of the President' an agency subject to the Act," and "that the President's immedi-

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24. *Id.* "The court granted the *Post*'s motions to unseal the *in camera* explanations, ordering the Office and the Governor to produce to the Post 'complete and unredacted copies of all of the telephone and calendar records at issue . . . .'" *Id.* "[I]n anticipation of appeal, the court stayed the execution of the order and retained the records submitted *in camera* for ninety-six hours." *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 532, 759 A.2d at 256.

29. *Id.* at 533, 759 A.2d at 256; *see also* 5 U.S.C. § 552 (2000).

30. *See* MD. CODE ANN., STATE GOV'T §§ 10-611 to -628 (1999 & Supp. 2001).

31. *See id.* § 10-612(b).

32. 445 U.S. 136 (1980).

ate personal staff or units in the Executive Office whose sole function is to advise and assist the President are not included within the term 'agency' under the FOIA."[33] In *Kissinger*, the Court addressed whether summaries of telephone conversations, made by Henry Kissinger's secretaries during his tenure as Assistant to the President for National Security Affairs and Secretary of State and involving both personal matters and official business, were subject to disclosure under FOIA.[34] The Court found that FOIA renders the "Executive Office of the President" subject to the Act.[35] However, the Court distinguished the Executive Office of the President from the Office of the President; thus, the Court found that the President's personal staff would not fit within the definition of a government agency.[36] Because Kissinger's notes were taken at the time he was serving as an advisor to the President, and because he was not acting as an independent government agency, the notes were subject to disclosure under FOIA.[37]

Unlike FOIA, the Act applies to "public records," as opposed to "agency records."[38] Section 10-611(g) of the Act defines "public records" as "any documentary material that . . . is made by a unit or instrumentality of the State government."[39] As a result of this distinction, Maryland courts have construed the Act much more broadly than the Supreme Court has construed FOIA.[40]

In *A.S. Abell v. Mezzanote*,[41] the Court of Appeals of Maryland addressed whether the Maryland Insurance Guaranty Association would be considered "an agency or instrumentality of the State of Maryland," thus subjecting documents produced by the Association to disclosure under the Act.[42] The court, in interpreting the Act, stated that it allows the public to inspect the records of any branch of the state government,[43] and that "the Public Information Act expressly states that its provisions shall be broadly construed in every instance with the

33. *Id.* at 156 (internal quotation marks omitted). Under FOIA, "agency" is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1).

34. *Kissinger*, 445 U.S. at 139-40.

35. *Id.* at 156.

36. *Id.*

37. *Id.*

38. MD. CODE ANN., STATE GOV'T § 10-611(g)(i) (1999 & Supp. 2001).

39. *Id.*

40. *See infra* notes 41-47 and accompanying text (discussing how broadly Maryland courts have interpreted the Public Information Act).

41. 297 Md. 26, 464 A.2d 1068 (1983).

42. *Id.* at 27, 464 A.2d at 1068-69.

43. *Id.* at 32, 464 A.2d at 1071.

view toward public access."[44] Similarly, in *Moberly v. Herboldsheimer*,[45] where the court determined that a hospital was considered a public agency, and thus subject to the requirements of the Act, a broad interpretation of the Act was emphasized.[46] In broadly interpreting the Act, the court stated that "if the General Assembly did not intend this [broad] interpretation when it enacted this far reaching statute, it should [have] so state[d]."[47]

b. Specific Exemptions in Maryland's Public Information Act Favor Disclosure.—Given that the Act has been broadly held to apply to any unit of the government, cases involving the Act require courts to consider whether the party can withhold documents based on certain exemptions within the Act. Section 10-615 allows a custodian to deny inspection of a public record if the record is privileged or confidential, or if the disclosure is in violation of a federal or state statute.[48] Section 10-616 allows for an exemption from disclosure for particular types of documents,[49] and section 10-617 allows for exemptions from disclosure for records containing certain types or specific categories of information.[50] Section 10-618(a) allows for an exemption from disclosure if such a denial would be in the public interest, as provided by the section.[51] Because the Act has a policy of broad construction, however, exemptions have been narrowly construed.[52]

Unlike some other states' public information acts, which grant an exemption in cases where disclosure would be against the public interest,[53] the Act has been interpreted not to have such a general public interest "catchall." Instead, for a record to be exempt for public interest reasons under the Act, it must fall within one of the categories of

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44. *Id.* (internal quotation marks omitted).

45. 276 Md. 211, 345 A.2d 855 (1975).

46. *Id.* at 213, 345 A.2d at 856.

47. *Id.* at 228, 345 A.2d at 864.

48. MD. CODE ANN., STATE GOV'T § 10-615 (1999).

49. The types of documents excluded from disclosure include adoption records, welfare records, letters of reference, circulation records, gifts, retirement records, hospital records, and motor vehicle records containing personal information. *Id.* § 10-616.

50. Section 10-617 allows a custodian to deny inspection of a record if it contains medical and psychological information, sociological information, commercial information, information about public employees, financial information, information systems, or licensing records. *Id.* § 10-617.

51. *Id.* § 10-618(a).

52. *See, e.g.*, Fioretti v. Bd. of Dental Exam'rs, 351 Md. 66, 77, 716 A.2d 258, 264 (1998) ("[C]ourts must interpret the exemptions narrowly and in favor of disclosure.").

53. *See, e.g.*, Times Mirror Co. v. Superior Court, 813 P.2d 240, 241 (Cal. 1991).

permissible denials specified in section 10-618.[54] If the records sought do not fall clearly within a specified exemption, the custodian has no authority to deny inspection based solely on public interest.[55]

Citing the fact that only certain documents were designated for exemptions from disclosure, the *Kirwan* court acknowledged that this reflected the legislative intent that "citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government."[56] The *Kirwan* court stated that "the policy of the Public Information Act is to allow access to public records . . . [and] the statute should be interpreted to favor disclosure."[57] Similarly, the *Cranford* court stated that "without a doubt the bias of the [Maryland] Act is toward disclosure."[58] The court explained that a document may not be exempt from disclosure merely because its disclosure may be contrary to the public interest. Instead, the Act's specified exemptions encompass situations where irreparable harm to the public interest is greater than any benefits. The court stated that it is because of this that "[t]he custodian who withholds public documents carries the burden of justifying nondisclosure."[59]

This public policy has been reiterated by Maryland courts time and time again.[60] It is clearly the policy of Maryland to ensure its citizens access to information on government affairs. In furthering that policy, the courts interpret the exemptions to the Act narrowly.[61]

c. The Executive Privilege Doctrine in Maryland.—While the doctrine of executive privilege was not expressly addressed by the Maryland courts until *Hamilton v. Verdow* in 1980,[62] the doctrine finds its

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54. *See, e.g.*, Kirwan v. The Diamondback, 352 Md. 74, 88, 721 A.2d 196, 202-03 (1998) (explaining that inspection of documents can be denied under § 10-618 only under certain specified conditions).

55. *See id.*

56. *Id.* at 81, 721 A.2d at 199 (quoting *Fioretti*, 351 Md. at 73, 716 A.2d at 262 (quoting A.S. Abell v. Mezzanote, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983))).

57. *Id.* at 84, 721 A.2d at 200.

58. Cranford v. Montgomery County, 300 Md. 759, 771, 481 A.2d 221, 227 (1984).

59. *Id.*

60. *See* Office of the Attorney Gen. v. Gallagher, 359 Md. 341, 343, 753 A.2d 1036, 1037 (2000); Office of the State Prosecutor v. Judicial Watch, Inc., 356 Md. 118, 134, 737 A.2d 592, 601 (1999); *Fioretti*, 351 Md. at 73, 716 A.2d at 262; *Cranford*, 300 Md. at 771, 481 A.2d at 227.

61. *See, e.g., Fioretti*, 351 Md. at 73, 716 A.2d at 262 (describing the legislative intent of the Act).

62. 287 Md. 544, 414 A.2d 914 (1980). *See generally* JoAnn Ellinghaus-Jones, Note, *Privilege of Executive to Shield Information from Discovery—Doctrine of Executive Privilege Recognized in Maryland to Prevent Disclosure of Official Information*, 10 U. BALT. L. REV. 385 (1981) (discussing *Hamilton* and its implications on future court decisions).

roots in Article 8 of the Maryland Declaration of Rights.[63] Executive privilege is also implicated by section 10-615 of the Act.[64]

Hamilton involved an action for monetary damages in a wrongful death suit after a patient, who was recently released from a state mental hospital, killed a young boy.[65] The boy's estate brought suit, arguing that the superintendent of the hospital and two staff psychiatrists negligently recommended that the patient be treated at a mental hospital rather than sent to a maximum security prison.[66] The document at issue was an investigative report prepared after the murder by a member of the Governor's staff.[67] The report was prepared to identify and assess deficiencies in the government system that allowed such an event to occur and to determine what future executive action could be done to remedy the situation.[68] The defendants argued that the document was privileged because it was prepared for the purpose of discussing future action to prevent other similar occurrences at state facilities and contained opinions and recommendations for the Governor's use.[69]

The *Hamilton* court recognized that certain documents would be protected by executive privilege.[70] The court stated that confidential advisory and deliberative communications, formulated between government officials and their advisors to determine future government action, need to be protected from disclosure.[71] The *Hamilton* court also recognized that just as the President is entitled to a degree of executive privilege, the Governor, who has the same relation to the state as the President has to the United States, should enjoy a similar degree of executive privilege.[72]

The *Hamilton* court stated that "protection from disclosure clearly extends to confidential advisory and deliberative communications be-

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63. Article 8 provides: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no persons exercising the functions of one of said Departments shall assume or discharge the duties of any other." MD. DECL. OF RTS. art. 8.

64. Section 10-615 of the Act allows for an exemption from disclosure if the material in question is, "by law, . . . privileged." MD. CODE ANN., STATE GOV'T § 10-615 (1999).

65. *Hamilton*, 287 Md. at 546-47, 414 A.2d at 917.

66. *Id.* at 547, 414 A.2d at 917.

67. *Id.*

68. *Id.* at 554, 414 A.2d at 920.

69. *Id.* at 548, 414 A.2d at 917.

70. *Id.* at 558, 414 A.2d at 922.

71. *Id.*

72. *Id.* at 556, 414 A.2d at 921. The court also recognized that the doctrine of executive privilege is founded on the principle of separation of powers enumerated in Article 8 of the Maryland Declaration of Rights, which limits the court's power to review or interfere with coordinate branches of government. *Id.*

tween officials and those who assist them in formulating and deciding upon future governmental action."[73] The court noted that advisory communications from a subordinate to a government officer, examining and analyzing different options and alternatives in the decision-making process, are essential to the deliberative process.[74] The court explained that the public policy behind nondisclosure is the desire to allow both aides and executives to have frank discussions in developing plans for government action.[75] Such frank discussions would be hampered if the communications were required to become public.[76] Thus, with regard to advisory or deliberative communications, a presumptive privilege exists, and the burden rests on those seeking access to the information in question.[77] The court declined, however, to extend the privilege to material that is solely factual in nature.[78] The court stated that factual material contained in deliberative memoranda can be severed from the rest of the memoranda and is available for discovery.[79] However, because "material cannot always 'easily be separated into fact finding and decision making categories,'"[80] material that is factual in nature may still be entitled to a degree of protection.[81]

For example, executive privilege may apply when factual material is obtained with a promise of confidentiality, or when facts are so intertwined with opinions and advice that disclosure would "impinge on the deliberative process."[82] In these situations, the *Hamilton* court reasoned that a balancing test should be employed.[83] The balancing test requires a court examining such material to weigh the government's reasons for disclosure against the litigant's need for discovery under

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73. *Id.* at 558, 414 A.2d at 922.

74. *Id.*

75. *Id.* at 558-59, 414 A.2d at 922-23.

76. *Id.* at 558, 414 A.2d at 922.

77. *Id.* at 563, 414 A.2d at 925.

78. *Id.* at 564, 414 A.2d at 925.

79. *Id.*

80. *Id.*, 414 A.2d at 925-26 (quoting Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 662 (D.C. Cir. 1960)).

81. *Id.*, 414 A.2d at 926.

82. *Id.* at 564-65, 414 A.2d at 926. The *Hamilton* court subsequently held that although the report at issue contained confidentially obtained factual information, including hospital records, statements of witnesses, conviction records, and psychiatric evaluations, as well as deliberative information advising the Governor on what course of action to take in response to the murder, an *in camera* review to determine whether the report would be privileged under the newly formulated balancing test would not be inconsistent with Maryland law. *Id.* at 569-70, 414 A.2d at 928.

83. *Id.* at 565, 414 A.2d at 926.

the facts of each case.[84] If a court determines that the government's reasons for disclosure outweigh the litigant's need for discovery, the privilege should attach.[85]

d. The Doctrine of Executive Privilege Under the Public Information Acts of Other States.—Other states that have addressed whether telephone and scheduling records are exempt from disclosure under their public information acts have employed a balancing test similar to the *Hamilton* balancing test. For example, in *Times Mirror Co. v. Superior Court*,[86] the California Supreme Court addressed the issue of whether the Governor was required, under the California Records Act, to disclose his appointment calendars and schedules when requested to do so by a newspaper.[87] The court held that disclosure of the documents was not in the public interest because disclosure of the identity of persons with whom the Governor met and consulted was the "functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes."[88] The court found that such material would divulge the interests and information the Governor deemed to be of significance to the issues being addressed at the time.[89] Despite the fact that such information is factual in nature, the California court found that it was essentially deliberative, and therefore executive privilege prevented the disclosure of the documents in question.[90]

Similarly, the Virginia Supreme Court, in *Taylor v. Worrell Enterprises, Inc.*,[91] stated that data which would show the originating and terminating location of a call placed by the Governor's office, when disclosed to a newspaper, would "provide a basis for public speculation . . . [and] provide an information base for further investigation which could subject recipients of such calls to inquiries regarding the calls and their content."[92] In *Taylor*, the special projects editor of *The Daily Progress* requested copies of the Governor's Office's monthly telephone bills.[93] The office agreed to release the bill's cover sheet, which showed the aggregate calls, but denied the request for the item-

84. *Id.*
85. *Id.*
86. 813 P.2d 240 (Cal. 1991).
87. *Id.* at 241.
88. *Id.*
89. *Id.*
90. *Id.* at 251-52.
91. 409 S.E.2d 136 (Va. 1991).
92. *Id.* at 138.
93. *Id.* at 137.

ized billings for each call claiming executive privilege.[94] The court found that releasing the requested data could have a chilling effect on the Governor's use of the telephone to conduct business for the Commonwealth.[95] Both the Virginia and California courts based their decisions, in part, on the potential chilling effect that disclosure of the documents would have on the ability of the Governors' offices to execute their official duties.[96]

e. The Doctrine of Separation of Powers.—The doctrine of separation of powers is found in Article 8 of the Maryland Declaration of Rights, which states "[t]hat the Legislative, Executive, and Judicial powers of Government ought to be forever distinct from each other . . . ."[97] Separation of powers has a lengthy history in Maryland.[98] The doctrine places a limit on the "court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government" when that branch is acting within its own sphere of authority.[99] Thus, if the Governor chooses to act within his own sphere of authority, neither the legislature nor the judiciary can require him to disclose certain information that he believes to be privileged.

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94. *Id.*

95. *Id.* at 138.

96. Times Mirror Co. v. Superior Court, 813 P.2d 240, 251 (Cal. 1991); *Taylor*, 409 S.E.2d at 138.

97. MD. DECL. OF RTS. art. 8.

98. The importance of the separation of powers doctrine was stressed in the early cases of *Miller v. State ex rel. Fiery*, 8 Gill 145, 148 (1849) (holding that the legislative and judicial powers, under the constitution of the state, are confined to different branches of government, and that the legislature is incompetent to exercise judicial powers) and *Regents of the University of Maryland v. Williams*, 9 G. & J. 365, 410 (1838) (discussing the duties of the legislature).

99. Hamilton v. Verdow, 287 Md. 544, 556, 414 A.2d 914, 921 (1980); *see also* Dep't of Natural Res. v. Linchester, 274 Md. 211, 223-24, 334 A.2d 514, 522-23 (1975) (observing that courts have the power to review decisions of administrative agencies within limits, but courts may not substitute their own judgment for that of the agencies); Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945) (stating that as the legislature may not divest the judiciary of the ability to review actions of quasi-legislative boards, the courts are "without authority to interfere with any exercise of the legislative prerogative within constitutional limits, or with the lawful exercise of administrative authority or discretion"); Miles v. Bradford, 22 Md. 170, 184-85 (1864) (holding that the judiciary has no control or revisory power over the Governor when he is acting within his discretionary authority); Watkins v. Watkins, 2 Md. 341, 356 (1852) (stating that the judiciary's power does not include the ability to compel action from a coordinate branch of government, only the power to restrain the other branches when their actions exceed their constitutional authority). *But see* Magruder v. Swann, 25 Md. 173, 212 (1866) (concluding that while the Governor has political and discretionary powers, he is not exempt from judicial process).

The mandates of Article 8, however, are not absolute. In *Judy v. Schaefer*,[100] the court stated that Article 8 does not impose a "complete separation between the branches of government."[101] In *McCulloch v. Glendening*,[102] the court reiterated that Article 8 has never been rigidly applied.[103] The purpose of the separation of powers doctrine is to preserve the functioning of each branch of government and to prohibit another branch from interfering with or usurping those functions, but not to create "clear lines of 'demarcation.'"[104]

3. The Court's Reasoning.—In *Office of the Governor*, the Court of Appeals held that the Governor was not entitled to a general claim of executive privilege because the material requested was factual in nature.[105] The court further held that unless the Governor could show, on remand, that specific parts of the records were privileged under the principles set forth in *Hamilton*, the requested documents would have to be disclosed.[106]

The majority began its reasoning by addressing the threshold matter of whether the Act applied to the Office.[107] Because the Act is modeled, in part, after FOIA,[108] which has been held not to apply to the Office of the President, the Office, by analogy, argued that the Act should not apply to it.[109] The court found this analogy flawed, drawing a distinction between the Act's use of the term "public records" and FOIA's use of the term "agency records."[110] Thus, the court determined that coverage under the Act turns on the definition of "public records," not on whether the government body holding the records is considered an agency.[111]

The court broadly construed the Act, which applies to any "unit or instrumentality of the State government," to include "[t]he offices of the Governor and his staff in the State House and Shaw House in Annapolis, as well as their offices in Baltimore and Washington."[112]

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100. 331 Md. 239, 627 A.2d 1039 (1993).

101. *Id.* at 261, 627 A.2d at 1050 (internal quotation marks and citations omitted).

102. 347 Md. 272, 701 A.2d 99 (1997).

103. *Id.* at 283, 701 A.2d at 104.

104. *Id.*

105. *Office of the Governor*, 360 Md. at 561-62, 759 A.2d at 272.

106. *Id.* at 565, 759 A.2d at 273.

107. The court addressed this issue on its own questioning at oral argument. *Id.* at 532, 759 A.2d at 256. The parties did not raise or brief the issue. *Id.*

108. 5 U.S.C. § 552 (2000).

109. *Office of the Governor*, 360 Md. at 533, 759 A.2d at 256.

110. *Id.* at 533-34, 759 A.2d at 256-57.

111. *Id.* at 534-35, 759 A.2d at 257.

112. *Id.* at 536, 759 A.2d at 258; *see also* MD. CODE ANN., STATE GOV'T § 10-611(g)(i) (1999 & Supp. 2001). Despite the broad statement of coverage, the court found that cer-

The court further stated that "[u]nlike the Federal Act, there is no statutory language or legislative history suggesting that any unit of the Maryland Government is exempt from the Public Information Act's coverage."[113] Thus, the court reasoned that the Act would apply to the Governor and the Office.[114]

Having found that the Act applied to the Governor and the Office, the court addressed whether portions of the requested telephone and scheduling records fell within certain recognized exemptions of the Act.[115] The court examined section 10-618(b), which gives the custodian the right to deny inspection if such inspection is of a "letter or memorandum that would not be available by law to a private party in litigation with the unit."[116] As the court stated, this exemption is a reflection of the executive privilege doctrine that encompasses letters, memoranda, or other government documents containing confidential information.[117] The court determined that a telephone company bill is not a government agency document, and that bills and listings of the Governor's appointments could not be considered letters or memoranda within the meaning of the statute.[118]

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tain records requested by the Post were not made "in connection with the transaction of public business" under the Act. *Office of the Governor*, 360 Md. at 538 n.8, 759 A.2d at 259 n.8. Specifically, the court excluded records of telephone calls made from telephones in the Governor's mansion because it was the family's private home, and such calls were made with the reasonable expectation of privacy that one has in his or her own home. *Id.* at 537-38, 759 A.2d at 258-59. The court stated that the Governor and his family were not required to relinquish normal expectations of privacy simply because their home and telephone services were furnished by the state. *Id.* at 537, 759 A.2d at 259. The court further held that the circuit court "should have excluded certain documents, or portions of documents, from disclosure based upon the unavailability of the documents or the Post's own limitations on the scope of its requests." *Id.* at 539, 759 A.2d at 259. Those records included telephone records from outside of the State House, the fourteen telephone lines the Governor, Ms. Smith-Bauk, and Mr. Riddick had access to in the State House, and the cellular telephones assigned to the three. *Id.* at 539-42, 759 A.2d at 259-61.

113. *Office of the Governor*, 360 Md. at 536, 759 A.2d at 258.

114. *Id.*

115. *Id.* at 543-44, 759 A.2d at 262.

116. *Id.* at 551, 759 A.2d at 266. Section 10-618 reads:

> (a) In general.—Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part, as provided in this section.
>
> (b) Interagency and intra-agency documents.—A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.

MD. CODE ANN., STATE GOV'T § 10-618(a)-(b) (1999).

117. *Office of the Governor*, 360 Md. at 551, 759 A.2d at 266.

118. *Id.* at 552, 759 A.2d at 266-67.

Furthermore, the court distinguished the Act from other states' public information acts that contain general public interest "catch-alls." Because Maryland's public interest exemption only applies to items falling within a statutorily defined category, it is not a general "catchall."[119] Because the records at issue in *Office of the Governor* did not fall into any of the specified categories,[120] and the Governor could not withhold the records on the basis of the general public interest, the court then examined whether the doctrine of executive privilege, and consequently section 10-615(1) of the Act, prevented the documents from being disclosed.[121]

Section 10-615(1) of the Act provides that the custodian of a public record may deny inspection if "by law, the record is privileged."[122] As a result, the court stated that if the records or any part of the records cannot be disclosed because of executive privilege, the records cannot be disclosed under section 10-615(1).[123] The court recognized the doctrine of executive privilege as a part of Maryland common law and found that the privilege is also rooted in the separation of powers doctrine.[124] The court then stated that the purpose of executive privilege is to protect confidential advisory communications between state officials, as well as military and diplomatic secrets.[125] The court reasoned that the protection of some documents from disclosure is necessary to protect the decision-making process by allowing

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119. *Id.* at 553-54, 759 A.2d at 267-68.

120. Specified categories of exemptions include sections 10-616 (d) and (i) (letters of reference and personnel records), 10-617(d) (commercial information), and 10-617(e) (home addresses and telephone numbers of state or local government employees). MD. CODE ANN., STATE GOV'T §§ 10-616 to -617. The court found that the mere fact that the Governor telephoned or met with an identified person to obtain information about a prospective employee did not constitute a letter of reference under section 10-616(d), nor did a telephone call concerning possible future employment with the Office or a judgeship constitute a personnel record. *Office of the Governor*, 360 Md. at 547-48, 759 A.2d at 264. Furthermore, the court concluded that the fact that the Governor made a telephone call to a particular person did not constitute "commercial" information; for the call to be considered "commercial information," the Governor would have to prove *in camera* why such information would jeopardize government projects or negotiations at critical stages of development. *Id.* at 549, 759 A.2d at 265. The court did state, however, that the telephone numbers given were the personal numbers of state employees, and thus should be redacted from the record under section 10-617(e). *Id.* at 550, 759 A.2d at 265-66.

121. *Office of the Governor*, 360 Md. at 556-57, 759 A.2d at 269.

122. MD. CODE ANN., STATE GOV'T § 10-615(1).

123. *Office of the Governor*, 360 Md. at 557, 759 A.2d at 269.

124. *Id.*

125. *Id.* at 557, 759 A.2d at 269-70.

the free consideration of different alternatives and candid communication by government officials without fear of public scrutiny.[126]

The court's discussion of *Hamilton* first recognized that while executive privilege is not absolute, in order to protect deliberative processes, courts must engage in a balancing test, "weighing the need for confidentiality against the . . . need for disclosure and the impact of nondisclosure upon the fair administration of justice."[127] The court limited this privilege mainly to advisory or deliberative documents, distinguishing factual material, which is subject to disclosure.[128] The court held that factual material subject to executive privilege, albeit not to the same degree as deliberative material, is that which is either obtained upon a promise of confidentiality or investigative facts that underlie opinions or advice, which by disclosure would encroach upon the deliberative process.[129] Because telephone and scheduling records are not deliberative or advisory in nature, the court reasoned that no blanket executive privilege would attach, and the burden remained on the defendants to establish that the records were privileged.[130] Furthermore, even if the defendants asserted executive privilege on an item-by-item basis, the court would still apply the balancing test, particularly because the Act generally favors disclosure.[131]

The court was very careful to guard against granting the privilege to material that was factual in nature. The defendants argued that disclosure of the telephone and scheduling records would encroach upon the deliberative process because the names of persons with whom the Governor and his staff met would become public knowledge, thus making persons reluctant in the future to offer advice to the Governor.[132] The court rejected this argument, reasoning that the purpose of executive privilege is not to protect public officials, but is rather "for the benefit of the public."[133] Although the substance of what an adviser tells the Governor would be protected by the doctrine, the court found that the simple revealing of a name would not fall

126. *Id.* at 558, 759 A.2d at 270 (citing Hamilton v. Verdow, 287 Md. 544, 558, 414 A.2d 914, 922 (1980)). Courts throughout the country have recognized that the executive privilege doctrine "gives a measure of protection to the deliberative and mental processes of decision-makers." *Id.* (quoting *Hamilton*, 287 Md. at 561, 414 A.2d at 924).

127. *Id.* at 558, 759 A.2d at 270 (quoting *Hamilton*, 287 Md. at 563, 414 A.2d at 925).

128. *Id.*

129. *Id.* at 559, 759 A.2d at 270 (citing *Hamilton*, 287 Md. at 564-65, 414 A.2d at 925-26).

130. *Id.* at 561, 759 A.2d at 271.

131. *Id.*

132. *Id.* at 562, 759 A.2d at 272.

133. *Id.* at 563, 759 A.2d at 272 (quoting *Hamilton*, 287 Md. at 563, 414 A.2d at 924).

under executive privilege.[134] Unwilling to recognize a general executive privilege for the Governor's telephone and scheduling records, the court left the door open for the defendants to show the trial court, on remand, that disclosure of a particular telephone number or scheduling record would interfere with the Governor's deliberative process in a particular circumstance.[135]

Judge Cathell, joined by Chief Judge Bell, dissented. The dissent focused on how the separation of powers doctrine prohibits the legislature from enacting laws that would require the Governor to make his nonpublic activities public and asking the judiciary to enforce such laws.[136] Judge Cathell reasoned that the separation of powers doctrine prevents both the legislature and the judiciary from directing the Governor how to behave.[137] Thus, the documents at issue would not be disclosable because the legislature would be prohibited from requiring disclosure under the Act. Similarly, under the doctrine of executive privilege, the judiciary would be prohibited from instructing the Governor to disclose the documents.[138]

In Judge Cathell's view, the majority did not sufficiently defer to the mandates of separation of powers,[139] and therefore erred by applying the Act to the Governor.[140] Given that separation of powers is expressly designated in the Maryland Declaration of Rights,[141] Judge Cathell reasoned that the majority should have adhered more rigidly to the doctrine of separation of powers, and by extension, the doctrine of executive privilege.[142] Judge Cathell opined that the fact that the Supreme Court declined to apply FOIA to the Office of the President, even though separation of powers is only implied in the federal

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134. *Id.*

135. *Id.* at 563-64, 759 A.2d at 273.

136. *Id.* at 565, 759 A.2d at 274 (Cathell, J., dissenting). While the majority recognized that the doctrine of executive privilege is due in part to the principle of separation of powers enumerated in Article 8 of the Maryland Declaration of Rights, the majority did not explicitly address separation of powers. *See Office of the Governor*, 360 Md. at 557, 759 A.2d at 269-70.

137. Judge Cathell stated specifically that the separation of powers doctrine

> does not permit the Legislature to create laws that can be used directly to require the Governor to make his nonpublic activities public . . . including his duties of appointment, scheduling of private interviews and many of the other duties inherent to the position of Chief Officer of the . . . separate and independent executive branch.

Id. at 565, 759 A.2d at 274 (Cathell, J., dissenting).

138. *See id.*

139. *Id.* at 566, 759 A.2d at 274.

140. *Id.* at 592, 759 A.2d at 288.

141. As opposed to being implied as in the federal Constitution.

142. *Id.* at 573, 759 A.2d at 278.

Constitution, supported his position that the majority erred by applying the Act to the Governor, particularly because separation of powers is explicit in the Maryland Declaration of Rights.[143]

Judge Cathell stated that the information sought in the case was in direct suit with the Governor.[144] Judge Cathell reasoned that the Post was seeking to have the judiciary "*compel* the Governor to cooperate in the furnishing of information to [the Post]."[145] Because the information the Post was seeking to compel was that "which is to the detriment of the Chief Executive and his or her power to formulate policy and gather information necessary to perform his or her functions effectively,"[146] Judge Cathell reasoned that compelling disclosure would violate the principle of separation of powers.[147]

Judge Cathell went on to claim that the majority's distinction between the word "agency" as defined in FOIA and "instrumentalit[ies] of the State government," in the Act was similarly flawed.[148] In his view, neither act contemplated an application to the executive office.[149] Given that the Act is based in part on FOIA, Judge Cathell reasoned that the application of the Act to the Governor should be decided similarly to the application of FOIA to the Office of the President.[150] Furthermore, because the Act itself does not expressly include the Office of the Governor, Judge Cathell would not find the Governor subject to the Act.[151]

In a separate dissent, Judge Raker stated that all of the records at issue should be exempt from disclosure under the doctrine of executive privilege described in *Hamilton* and incorporated into the Act under section 10-615(1).[152] Judge Raker stated that *Hamilton* recognized that while executive privilege was not absolute, "the interest in protecting confidential government communications justified a presumptive privilege."[153] Judge Raker further opined that the burden of negating the privilege would be on those seeking to compel disclo-

143. *Id.* at 565-66, 759 A.2d at 274.

144. *Id.* at 583, 759 A.2d at 283.

145. *Id.*

146. *Id.* at 584, 759 A.2d at 284.

147. *See id.*

148. *Id.* at 590, 759 A.2d at 287.

149. *Id.*

150. *Id.*

151. *Id.* at 592, 759 A.2d at 288. Judge Cathell would find the Office exempt from the Act given the statute's "textual silence" on the issue. *Id.*

152. *Id.* at 593, 759 A.2d at 289 (Raker, J., dissenting).

153. *Id.* at 593-94, 759 A.2d at 289.

sure.[154] For documents factual in nature, Judge Raker believed that a balancing test should be applied, weighing "the government's need for confidentiality . . . against the litigant's need for disclosure."[155] Judge Raker reasoned that while the documents sought were factual in nature, compiling them together would reveal the Governor's deliberative processes.[156] Citing the reasoning of the California Supreme Court in *Times Mirror Co. v. Superior Court*, Judge Raker stated:

> Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or information he deemed to be of significance with respect to critical issues of the moment.[157]

Judge Raker also agreed with the reasoning of the Virginia Supreme Court in *Taylor v. Worrell Enterprises*, writing:

> "[D]ata which show the time and the originating and terminating location of a call is information concerning the activity of the Governor's office," since "[t]he data, standing alone, could provide a basis for public speculation" and "an information base for further investigation which could subject recipients of the calls to inquiries regarding the calls and their content."[158]

Sharing the Virginia court's concern, Judge Raker feared the "chilling effect" disclosure of information would have on the Governor's deliberative process. Judge Raker believed that disclosure of even seemingly factual information would impact the ability of executive officials to do their jobs properly.[159] Given the potential disruption of "essential communicative, investigative, and deliberative functions of the Governor's office,"[160] Judge Raker concluded with the premise that the burden should rest on the Post to show why it had requested all of the Governor's schedules and telephone records for a six month period.[161] In order to overcome the presumptive priv-

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154. *Id.* at 594, 759 A.2d at 289 (citing Hamilton v. Verdow, 287 Md. 544, 563, 414 A.2d 914, 925 (1980)).

155. *Id.*

156. *Id.* at 595, 759 A.2d at 290.

157. *Id.* at 596, 759 A.2d at 290 (quoting Times Mirror Co. v. Superior Court, 813 P.2d 240, 251 (Cal. 1991)).

158. *Id.* at 597, 759 A.2d at 291 (quoting Taylor v. Worrell Enters., Inc., 409 S.E.2d 136, 138 (Va., 1991).

159. *Id.* at 597-98, 759 A.2d at 291.

160. *Id.* at 598, 759 A.2d at 292.

161. *Id.* at 598-99, 759 A.2d at 292.

ilege, Judge Raker asserted that the party seeking disclosure must offer evidence to dispute the Governor's initial showing that the documents are protected by executive privilege.[162] Judge Raker believed that the Post had failed to make a sufficient showing of necessity to overcome the presumption of executive privilege.[163]

4. Analysis.—In *Office of the Governor*, the Court of Appeals erred by failing to examine the chilling effect broad disclosure would have on the Governor's deliberative process. While the court continued to recognize the availability of executive privilege in limited circumstances, it failed to adequately balance the Governor's reasons for nondisclosure against the litigant's need for discovery as required by the test established in *Hamilton v. Verdow*.[164] The court focused primarily on the public policy goal of the Act, which is to allow citizens wide-ranging access to affairs of the government, and therefore did not adequately consider the effect disclosure would have on the Governor's deliberative process as required by *Hamilton*.

a. Executive Privilege and the Hamilton *Balancing Test.*—The Court first addressed the issue of executive privilege in *Hamilton v. Verdow*, stating that "the policy and decision-making processes of the Governor and the Executive Branch would be totally thwarted if they were required to reveal the opinions, recommendations, and deliberations used in arriving at policy decisions."[165] Two reasons exist to protect such information: (1) to encourage aides and colleagues to give candid advice and (2) to give the Executive officer the freedom to "think out loud."[166]

The *Hamilton* court acknowledged that material which is solely factual in nature is not usually privileged unless disclosure would "impinge on the deliberative process."[167] Thus, the court established a balancing test to determine if the privilege attaches when material is

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162. *Id.* at 599, 759 A.2d at 292.

163. *Id.* at 599-600, 759 A.2d at 292-93. Given the sweeping scope of the Post's demands and the lack of a specified public interest in the requested documents, Judge Raker stated that the policy concerns in favor of nondisclosure were particularly compelling. *Id.*

164. The *Hamilton* balancing test protects material from disclosure, even if factual in nature, that would "impinge on the deliberative process." Hamilton v. Verdow, 287 Md. 544, 564-65, 414 A.2d 914, 926 (1980).

165. *Id.* at 555, 414 A.2d at 921.

166. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1410 (1974). Thinking "out loud" allows the President or other executive officer to test ideas and debate policy uninhibited by the fear that this thought process will be exposed to public critique and comment. *Id.*

167. *Hamilton*, 287 Md. at 564-65, 414 A.2d at 926.

factual in nature and would impinge the deliberative process if disclosed.[168] The balancing test requires a court examining potentially privileged material to weigh the government's reasons for nondisclosure against the litigant's need for discovery under the facts of each case.[169] Under this test, if a court determines that the government's reasons for disclosure outweigh the litigants need for discovery, executive privilege should attach.[170]

Documents that would expose the deliberative process of the Governor are privileged, and the burden rests upon those seeking the documents to compel disclosure.[171] *Hamilton* clearly articulated that even if material is both factual and deliberative in nature, the court should examine the effect disclosure of the material would have on the deliberative process.[172] Given the deliberative nature of government, a legitimate need exists to protect certain kinds of government information from public disclosure.[173] If the effect of disclosure would be to "chill" the deliberative process, the material should be privileged.[174]

b. How the Office of the Governor *Court Should have Analyzed this Case.*—Because *Hamilton* established a balancing test for factual information, the court in *Office of the Governor* should have expanded its inquiry beyond the nature of the documents requested. The material at issue in *Office of the Governor* was factual in nature because the substantive content of the calls and meetings was not requested. However, disclosing the names of people who called and met with the Governor could reveal the deliberative processes of the Governor or the Office.[175] Although the scheduling and telephone records appear factual on the surface—only containing information about who the Governor met or spoke with, for how long, and on what dates—the disclosure of the documents would impinge on the deliberative process because the release of such detail would expose the thought processes of the Governor and provide a basis for public specula-

168. *Id.* at 565, 414 A.2d at 926.

169. *Id.*

170. *Id.*

171. *Id.* at 563, 566, 414 A.2d at 925-26.

172. *Id.* at 564-65, 414 A.2d at 925-26.

173. *Id.* at 556, 414 A.2d at 921; *see also* United States v. Nixon, 418 U.S. 683, 708 (1974) ("The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

174. *See Office of the Governor*, 360 Md. at 597, 759 A.2d at 291 (Raker, J., dissenting).

175. *Id.* at 595, 759 A.2d at 290.

tion.[176] Thus, the court in *Office of the Governor* should have examined whether disclosure of the names of those the Governor called or met with, on what dates they spoke or met, and length of the calls or meetings would have "chilled" those parties from meeting with him in the future.

Examining all telephone calls the Governor made in six months, who was called, how long the conversations lasted, and on what date they took place could disclose a great deal of deliberative information, such as what options or policies the Governor was considering.[177] It would not be difficult to compare the policy decisions that have been publicly released to the telephone calls and the meetings that the Governor conducted before those policies were instituted in order to determine the deliberative process of the Governor.

Having made such comparisons, one with current access to the Governor's telephone and scheduling records could continue to draw conclusions about the Governor's deliberative process because "if you know what information people seek, you can usually determine why they seek it."[178] As the California Supreme Court stated in *Times Mirror*:

> Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or information he deemed to be of significance with respect to critical issues of the moment.[179]

Thus, by requiring the Governor to release his scheduling records and call detail in *Office of the Governor*, the court essentially

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176. *See* Times Mirror Co. v. Superior Court, 813 P.2d 240, 251 (Cal. 1991); Taylor v. Worrell Enters., Inc., 409 S.E.2d 136, 138 (Va. 1991). The Virginia Supreme Court, in examining an issue similar to that in *Office of the Governor*, continued its analysis beyond whether the material was factual in nature. It examined the effect disclosure would have on the deliberative process and found that the potential disruption to the execution of the Governor's duties outweighed the public's interest in open government. *Taylor*, 409 S.E.2d at 138-39.

177. *See Times Mirror Co.*, 813 P.2d at 251. *Office of the Governor* also seems to focus on what type of information can be gleaned from the Governor's telephone records. The majority concluded that little information could be found, and thus was unwilling to hold the telephone and scheduling records exempt from public disclosure under the doctrine of executive privilege. 360 Md. at 561-62, 759 A.2d at 271-72. In contrast, the dissent believed that certain patterns could be inferred from those with whom the Governor and the Office calls and meets. *See id.* at 595, 759 A.2d at 290 (Raker, J., dissenting).

178. *Office of the Governor*, 360 Md. at 596, 759 A.2d at 291 (Raker, J., dissenting) (quoting Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993)).

179. *Times Mirror Co.*, 813 P.2d at 251.

revealed what the Governor was thinking about and when. Particularly in the aggregate, it is likely that the Post will be able to determine with whom the Governor meets to discuss certain issues. As a result, the deliberative process has been compromised.

As the dissenting opinions pointed out, the disclosure of the Governor's telephone and scheduling records would impinge on the deliberative process because they would reveal the Governor's thought process.[180] For example, as Judge Cathell discussed in his dissent, in the riots of the 1960s in Maryland, the Governor had to meet with military advisors in order to deploy the National Guard.[181] If the public or the press could access the Governor's scheduling or telephone records, such meetings could be compromised.[182] Also, the deliberative process could have been compromised when, during Governor Glendening's tenure, the office of the president of the University of Maryland, College Park became vacant.[183] If the Post requested meeting schedules and telephone logs indicating the names of officials from other universities that the Governor was interviewing and subsequently released the names, the candidates may have withdrawn from consideration because of the negative consequences of their candidacy.[184] Moreover, the Post obviously believed that the documents requested contained substantive information about the Governor's deliberative process; otherwise, the documents would not have been requested.[185]

The Governor's deliberative process is similarly affected by the "chilling effect" such disclosure would have on those who engage in deliberations with the Governor. As the *Hamilton* court discussed, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[186] Even though the substance of the communications may not be exposed, the fact that the meeting or the call

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180. *Office of the Governor*, 360 Md. at 592, 759 A.2d at 288 (Cathell, J., dissenting); *id.* at 595, 759 A.2d at 290 (Raker, J., dissenting).

181. *Id.* at 592, 759 A.2d at 288 (Cathell, J., dissenting).

182. *See id.* The dissent pointed out that allowing access to information about past events would open the door for granting access to information on current events in real time. *Id.*

183. Brief for Appellant at 25, *Office of the Governor* (No. 117).

184. *Id.*

185. *See* Times Mirror Co. v. Superior Court, 813 P.2d 240, 252 n.13 (Cal. 1991) (observing that the Los Angeles Times's persistence in obtaining the Governor's scheduling records was in itself indicative of the information's substantive relevance).

186. Hamilton v. Verdow, 287 Md. 544, 558-59, 414 A.2d 914, 922 (1980) (quoting United States v. Nixon, 418 U.S. 683, 705 (1974)).

took place is still significant. If private meetings and telephone calls were required to be disclosed, many groups would be deterred from meeting with the Governor, and consequently particular viewpoints might be eliminated from the Governor's consideration.[187] Even routine meetings might be inhibited if the meetings were revealed to the public and those groups were subjected to scrutiny by the press.[188] Thus, the material in question in this case should be barred from disclosure under the doctrine of executive privilege.

One of the reasons that the court failed to adequately examine the chilling effect disclosure of the requested documents would have on the Governor's deliberative process was the competing desire to allow Maryland citizens wide-ranging access to public information concerning the operation of their government.[189] Ultimately, *Office of the Governor* represents the confusion that arises when separate values come into conflict. This case illustrates the tension between the public policy in favor of disclosure—a policy allowing citizens to have access to affairs of the government under the Act—and the doctrine of executive privilege, as enunciated by the court in *Hamilton*. In *Office of the Governor*, the court reiterated that "[t]he Maryland Public Information Act establishes a public policy and a general presumption in favor of disclosure of government or public documents."[190] In so doing, however, the court erred by failing to examine the chilling effect broad disclosure would have on the Governor's deliberative process.

5. Conclusion.—The majority did not completely prohibit the Governor from arguing executive privilege if he or she can show that "because of identified special circumstances, disclosure of a specific telephone number, or certain specific numbers, or disclosure of specific scheduling records," would "interfere with the deliberative process in the Governor's office."[191] In failing to adequately address the chilling effect disclosure of call detail and meeting schedules would have on the Governor's deliberative process, however, the majority's narrow interpretation of executive privilege sets a very high standard

187. *See Office of the Governor*, 360 Md. at 597-98, 759 A.2d at 291-92 (Raker, J., dissenting).

188. *Id.*

189. *Office of the Governor*, 360 Md. at 544, 759 A.2d at 262; *see also* Kirwan v. The Diamondback, 352 Md. 74, 80-81, 721 A.2d 196, 199 (1998) (explaining the presumption in favor of disclosure of public documents).

190. *Office of the Governor*, 360 Md. at 544, 759 A.2d at 262 (quoting *Kirwan*, 352 Md. at 80, 721 A.2d at 199).

191. *Id.* at 563, 759 A.2d at 273.

for the Governor to overcome both on remand and in future cases where information is sought under the Act.[192]

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192. *See id.* at 565, 759 A.2d at 274 (Cathell, J., dissenting).

VIII. PROPERTY

A. *Res Judicata Prematurely Bars Review of a Fair Housing Act Claim*

In *Colandrea v. Wilde Lake Community Ass'n*,[1] the Court of Appeals of Maryland considered whether claim or issue preclusion barred a Fair Housing Act (FHA) claim in a dispute involving enforcement of a restrictive covenant on a group home.[2] After examining the opinions of the lower courts in the case *sub judice* and a prior case between the litigants, the court decided that both claim and issue preclusion applied[3] and affirmed the lower court's issuance of a permanent injunction.[4] However, the court's conclusion was premature, given its cursory application of the appropriate tests for determining whether the claims and issues in both suits were the same. Had the court carefully applied these tests to the circumstances of this case, rather than simply laying them out, the court would have found that claim preclusion did not apply and that the central issue in the second suit was not precluded.

1. The Case.—The case involved a dispute between Richard Colandrea, owner of two residential properties in the Bryant Woods section of the Village of Wilde Lake, in Columbia, Maryland, and the Village of Wilde Lake Community Association (Wilde Lake).[5] The controversy arose over the applicability of a restrictive covenant to the two properties, which contained group homes for the elderly.[6] Wilde Lake filed suit against Colandrea twice—once in 1993 and again in 1996—on the grounds that Colandrea's operation of the group

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1. 361 Md. 371, 761 A.2d 899 (2000).

2. *Id.* at 385-93, 761 A.2d at 906-10.

3. *Id.* at 393, 761 A.2d at 910.

4. *Id.* at 402-03, 761 A.2d at 915.

5. *Id.* at 378, 761 A.2d at 902.

6. *Id.* As part of the larger planned community of Columbia, the properties are governed by a community association that imposes various covenants, including a restrictive covenant that provides:

> Section 11.02. *No profession or home industry* shall be conducted in or on any part of a Lot or in any improvement thereon the Property without the specific written approval of the Architectural Committee. . . . No such profession or home industry shall be permitted, however, unless it is considered, by the Architectural Committee, to be compatible with a high quality residential neighborhood.

Id. at 377, 761 A.2d at 902.

homes violated the restrictive covenant.[7] These cases will be discussed in turn.

a. Columbia Ass'n v. Colandrea.—Richard Colandrea has maintained the two homes in Bryant Woods for over ten years.[8] The house at 10461 Waterfowl Terrace has been a group home for disabled elderly since 1989.[9] The other house, located at 10433 Waterfowl Terrace, has been a group home since 1992.[10] The homes provide assistance to seniors who require help with basic chores but do not require nursing-care.[11] Each home houses up to eight senior residents.[12]

In 1993, the Columbia Association and Wilde Lake filed suit in the Circuit Court for Howard County to enjoin Colandrea from operating the two facilities.[13] Colandrea filed a counterclaim alleging the restrictive covenant violated provisions of the FHA.[14] The circuit court denied the counterclaim and ruled that the FHA did not exempt Colandrea from complying with the covenant provisions.[15] However, the court did not enjoin operation of the homes; rather, the court ordered Colandrea to apply to the Wilde Lake Architectural Committee (the Committee) for approval.[16] Instead of applying to the Committee, however, Colandrea filed an appeal with the Maryland Court of Special Appeals. He later voluntarily dismissed it.[17]

b. Colandrea v. Wilde Lake Community Ass'n.—Colandrea relented and petitioned the Committee for approval of the use of the homes in 1996.[18] The Committee held two public meetings to consider Colandrea's application.[19] Residents expressed concerns about trash, noise, traffic, and inadequate street parking at both meetings.[20] During the second meeting, some residents expressed concern over

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7. Columbia Ass'n v. Colandrea, No. 93-CA-21562, slip op. (Howard County, Md., Cir. Ct. Feb. 16, 1995); *Colandrea*, 361 Md. at 371, 761 A.2d at 899.

8. Brief for Appellant at 2-3, *Colandrea* (No. 00-24).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Columbia Ass'n v. Colandrea, No. 93-CA-21562, slip op. at 1 (Howard County, Md., Cir. Ct. Feb. 16, 1995).

14. *Id.* at 2.

15. *Id.* at 6-7.

16. *Id.* at 7.

17. *Colandrea*, 361 Md. at 386, 761 A.2d at 907.

18. *Id.* at 378, 761 A.2d at 902.

19. *Id.* at 379, 761 A.2d at 903.

20. *Id.* at 379-80, 761 A.2d at 903.

medical waste and adult diapers.[21] One member of the Committee proposed to approve both homes on certain conditions.[22] This proposal was ultimately rejected, however, when the Committee voted to approve the house at 10461 Waterfowl Terrace but not the one at 10433 Waterfowl Terrace.[23] The Committee sent a letter detailing its decision to Colandrea on March 19, 1996.[24] In the letter, the Committee stated that its decision was based on "the incremental increase in the amount of traffic, congestion, noise, trash and waste, as well as parking problems attributable to an additional facility."[25]

After Colandrea refused to comply with the Committee's decision, Wilde Lake filed suit in the Circuit Court for Howard County in April 1996. In its complaint, Wilde Lake asked for an injunction barring Colandrea from operating a senior-assisted home at 10433 Waterfowl Terrace.[26] Colandrea filed a counterclaim on the grounds that the decision of the Committee was arbitrary and capricious and violated the FHA.[27] Colandrea asserted in his counterclaim that two members of the Committee had a conflict of interest because they were the founders of the Waterfowl Neighborhood Association, an organization allegedly founded to stop Colandrea from operating the group homes.[28]

With respect to Colandrea's counterclaim, the circuit court held that "the decision of the Committee was a reasonable, good faith exercise of discretion, based upon legitimate concerns regarding the impact of the facility upon the surrounding neighborhood."[29] The court also held that the Committee's decision did not violate the FHA because maintenance of the second group home was not reasonable as compared to the impact on the neighborhood, nor necessary to accommodate disabled elderly.[30] Accordingly, the court granted the permanent injunction.[31] Colandrea appealed to the Court of Special Appeals, but the Court of Appeals granted certiorari *sua sponte* before the intermediate court could review the case.[32] The court granted

21. *Id.* at 379, 761 A.2d at 903.
22. Brief for Appellant at 5, *Colandrea* (No. 00-24).
23. *Id.* at 5-6.
24. *Id.* at 6.
25. *Colandrea*, 361 Md. at 378-79, 761 A.2d at 902-03.
26. *Id.* at 379, 761 A.2d at 903.
27. *Id.* at 382, 761 A.2d at 904-05.
28. Brief for Appellant at 4-5, *Colandrea* (No. 00-24).
29. *Colandrea*, 361 Md. at 381, 761 A.2d at 904.
30. *Id.* at 383-85, 761 A.2d at 905-06.
31. *Id.* at 382, 761 A.2d at 904.
32. *Id.* at 376, 761 A.2d at 901.

certiorari to consider whether the restrictive covenant and its enforcement on the group homes violated the FHA.[33]

2. Legal Background.—The term *res judicata* has been used broadly in the past to describe two separate doctrines: claim and issue preclusion.[34] Claim preclusion bars the re-litigation of the same cause of action or claim between the same parties or those in privity.[35] Under issue preclusion, on the other hand, a party may not re-litigate an issue that has already been decided by a court of competent jurisdiction in an action with the same parties, even if the causes of action are different.[36] Claim preclusion is broader than issue preclusion in that it works to preclude not only the same claim but also any issues that were raised or could have been raised in the litigation of the claim.[37] The policies behind these doctrines are to prevent the expense of repetitive litigation, to preserve judicial resources, to minimize inconsistency in judicial decisions, and to maintain the integrity of the legal system.[38]

a. The Elements of Claim Preclusion and Their Application.—Courts have generally recognized three elements for claim preclusion to apply: the same parties or those in privity with the parties to the earlier suit; the same cause of action or claim as the previous suit; and "a final judgment on the merits" in the prior suit.[39] Disputes over the first requirement usually center on whether a party was in privity with the party in the first proceeding. Privity "refers to a cluster of relationships, . . . under which the preclusive effects of a judgment extend beyond a party to the original action."[40] Such relationships include trustee to beneficiary, guardian to ward, and property owner to subsequent property owner.[41]

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33. *Id.* at 376 n.1, 761 A.2d at 901 n.1.

34. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (observing that *res judicata* has been used in a broad sense to describe the preclusive effect of prior adjudication and in a narrow sense to refer to issue preclusion alone).

35. Montana v. United States, 440 U.S. 147, 153 (1979).

36. Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393 (1955). Issue preclusion has been referred to in the past as collateral estoppel. *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (1981 & Supp. 1999) (noting the different terminology used to refer to claim and issue preclusion).

37. Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948).

38. *See, e.g., Montana*, 440 U.S. at 153-54.

39. *See, e.g., id.* at 153.

40. 1 RESTATEMENT (SECOND) OF JUDGMENTS, ch. 1, intro. (1980).

41. 1 RESTATEMENT (SECOND) OF JUDGMENTS § 41; 2 RESTATEMENT (SECOND) OF JUDGMENTS §§ 43-44.

What constitutes the same claim can also be subject to debate.[42] The *Restatement (Second) of Judgments* adopted the "transaction" test, which focuses on the transaction from which the claims arose.[43] According to the *Restatement*, the claims in two separate suits are the same if they arose from the same transaction or series of related transactions.[44] A transaction or series of transactions is a set of occurrences or facts that are related either in time, space, origin, or motivation, and form a natural unit.[45] Some jurisdictions now apply the transactional test, while some courts still follow older tests.[46]

Prior to 1987, Maryland courts applied the "same evidence" test.[47] However, in *Kent County Board of Education v. Bilbrough*, the Court of Appeals adopted the *Restatement*'s "transaction" test for determining whether a subsequent suit presents the same claim for preclusion purposes.[48] *Bilbrough* involved a suit by a Kent County maintenance employee who had been terminated in 1981.[49] After losing his section 1983 claim in federal court, Bilbrough brought an action in Maryland circuit court for invasion of privacy.[50] The state trial court held this action barred by the earlier federal judgment. Relying on the same evidence test, the Court of Special Appeals reversed in part.[51] Be-

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42. *See generally* Ernst Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 OR. L. REV. 319 (1942) (discussing various tests to determine what is a cause of action). Early analyses of what constituted the same claim relied on the "primary right" test, wherein a claim or cause of action consists of the violation of a primary right. Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 495, 525 A.2d 232, 236 (1987) (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. a). Another approach is the "same evidence" or "identity of evidence" test, which requires an examination of the evidence necessary to make a prima facie case. *See, e.g.*, Klein v. Whitehead, 40 Md. App. 1, 18, 389 A.2d 374, 384 (1978) (stating that the test "is whether the same evidentiary facts would sustain both actions").

43. 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24(1).

44. *Id.*

45. *Id.* § 24(2). This section provides:

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id.

46. *See* Flora, Flora & Montague, Inc. v. Saunders, 367 S.E.2d 493, 495 (Va. 1988) (stating that under Virginia law the principal test to determine whether two causes of action are identical is the same evidence test); Huggett v. Dep't of Natural Resources, 590 N.W.2d 747, 752 (Mich. Ct. App. 1998) (stating that claims are identical if "the same facts or evidence are essential to the maintenance of the two claims").

47. *See, e.g.*, MPC Inc. v. Kenny, 279 Md. 29, 33, 367 A.2d 486, 489 (1977).

48. 309 Md. 487, 499, 525 A.2d 232, 238 (1987).

49. *Id.* at 490, 525 A.2d at 234.

50. *Id.*

51. *Id.* at 493, 525 A.2d at 235.

cause the evidence required to establish Bilbrough's federal action was different from that needed to sustain his claim for invasion of privacy, the Court of Special Appeals held that the latter claim was not precluded.[52] The Court of Appeals agreed with this result, but decided to jettison the same evidence test because it was under-inclusive.[53] That is, the test allowed parties to evade preclusion simply by a "mere change in the legal theory, applied to the same set of facts previously litigated."[54] In its place, the court adopted the test recommended by the *Restatement*, wherein claims are defined in terms of the factual transaction from which they arose.[55] Applying this test, the court concluded that the two claims arose out of two distinct transactions because they grew out of events occurring at different times and places.[56] Thus, even under the more inclusive transaction test, Bilbrough's invasion of privacy claim in state court was not barred by the federal action.[57]

More recently, the Court of Appeals applied the transaction test in *Gertz v. Anne Arundel County*.[58] In *Gertz*, a farmer, who was filling his land with stumpage and organic material to create pastureland for his horse boarding operation, sued for declaratory relief against Anne Arundel County.[59] The county had passed an ordinance requiring application for a permit to conduct land filling in 1990, soon after it had lost a petition for contempt against Gertz for exceeding the terms of a 1985 consent agreement.[60] After the ordinance was passed, the county informed Gertz that he would have to apply for a permit.[61] Gertz responded by filing for declaratory relief that the ordinance did not apply to him, and the County filed a counterclaim for injunctive relief to stop filling operations.[62] The first circuit court judge found

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52. *Id.*

53. *Id.* at 494, 525 A.2d at 236 ("[W]e are concerned that sole reliance on [the same evidence test] . . . may improperly narrow the scope of a claim in the preclusion context.").

54. *Id.* at 495, 525 A.2d at 236.

55. *Id.* at 499, 525 A.2d at 238.

56. *Id.* at 500, 525 A.2d at 238-39.

57. *Id.*

58. 339 Md. 261, 661 A.2d 1157 (1995).

59. *Id.* at 263-64, 661 A.2d at 1158.

60. *Id.* at 264-65, 661 A.2d at 1159. After engaging in a dispute over the grading of his land, Gertz entered into a consent decree with the county, which allowed him to continue filling the land with tree stumps and similar organic material. *Id.* at 264, 661 A.2d at 1159. However, the county filed suit in 1989 on the grounds that Gertz was not adhering to the agreement. *Id.* The court concluded that Gertz's activities were bona fide farming activities allowed by the consent decree. *Id.*

61. *Id.* at 265, 661 A.2d at 1159.

62. *Id.*

for Gertz on one of the claims but did not address the other claims.[63] The second circuit judge, however, found for the county on all the claims.[64]

Based on *res judicata*, the Court of Special Appeals reversed the second judge's decision in an unpublished opinion.[65] The Court of Special Appeals reasoned that Gertz's activities had not changed since the 1989 dispute.[66] Because the lower court determined in the 1989 case that Gertz's activities were permissible under the consent decree, the Court of Special Appeals concluded that the 1989 decision barred the county's counterclaim.[67]

The Court of Appeals, however, disagreed after finding that the claims in the two actions arose from two distinct transactions.[68] The Court of Appeals observed that the claims involved different conduct that occurred at different times: violation of a consent decree versus violation of an ordinance enacted much later.[69] Moreover, the court found that the motives behind the two actions differed. In the earlier action, the county sought to enforce a consent decree for the grading of the property, while in the second action the county sought to enforce an ordinance requiring permits for land filling activities.[70] The court further found that the county's claims in the two actions would not form a convenient trial unit because the ordinance did not exist in 1989 when the first action was filed.[71] Finally, the court concluded that treating the facts as separate trial units conformed to the parties' expectations based on the 1989 trial court's decision, which only settled that Gertz's activities were farming activities, not whether they constituted operation of a landfill.[72]

b. The Elements of Issue Preclusion and Their Application.— Under issue preclusion, a party may not re-litigate an issue that has already been decided by a court of competent jurisdiction in an action with the same parties, even if the causes of action are different.[73] For issue preclusion to apply, generally five elements must be satisfied. The issue of fact or law must have been "*actually litigated* and *determined*

63. *Id.* at 266, 661 A.2d at 1160.
64. *Id.*
65. *Id.*
66. *Id.* at 266-67, 661 A.2d at 1160.
67. *Id.* at 267, 661 A.2d at 1160.
68. *Id.* at 270, 661 A.2d at 1162.
69. *Id.*
70. *Id.* at 270-71, 661 A.2d at 1162.
71. *Id.* at 271, 661 A.2d at 1162.
72. *Id.* at 271-72, 661 A.2d at 1162.
73. Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393 (1955).

by a *valid and final judgment*, and the determination [must have been] *essential to the judgment* . . . ."[74] Courts also require that the issue presented in the latter proceeding be identical to the issue decided in the prior proceeding,[75] and that "the party against whom estoppel is asserted have had a full and fair opportunity to litigate" the issue in the previous forum.[76]

Issue preclusion is closely related to claim preclusion. However, issue preclusion is narrower than claim preclusion in application because it only bars raising a particular issue in the second suit, whereas claim preclusion is an absolute bar to the entire suit.[77] Hence, if claim preclusion were inapplicable, issue preclusion might still apply.[78]

The Court of Appeals has adopted a four-prong test to determine if issue preclusion applies: whether the issue decided in the prior suit is the same as the one presented in the present action; whether there was a final judgment on the merits in the previous suit; whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and whether the party against whom the plea is asserted was given a fair opportunity to be heard on the issue.[79]

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74. 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) (emphasis added); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (stating the elements necessary for the application of issue preclusion).

75. As the question of similarity of claims often arises under claim preclusion, the question of whether the issues are the same can also arise under issue preclusion. The *Restatement (Second) of Judgments* suggests that courts consider the following factors when deciding whether the issue in the present action is the same as the issue that has already been litigated: whether there is substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first; whether the new evidence or argument involves application of the same rule of law as that involved in the prior proceeding; whether the pretrial preparation and discovery relating to the matter presented in the first action can reasonably be expected to have embraced the matter sought to be presented in the second; and whether the claims in the two suits are closely related. 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c.

76. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

77. *See* Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597-98 (1948) (explaining that "where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly"); MPC, Inc. v. Kenny, 279 Md. 29, 32-33, 367 A.2d 486, 488-89 (1977) (explaining the doctrines and their differences).

78. Wolfe v. Anne Arundel County, 135 Md. App. 1, 28, 761 A.2d 935, 948-49 (2000).

79. Prescott v. Coppage, 266 Md. 562, 571, 296 A.2d 150, 154 (1972) (quoting State v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967)).

In *Mackall v. Zayre Corp.*,[80] the Court of Appeals stressed that the issues must be identical for issue preclusion to apply.[81] Mackall was an employee of the Alden Corporation, which operated concession stands within Zayre stores.[82] She suffered back injuries when she slipped and fell during a shift at an Alden concession counter in a Zayre store.[83] Mackall filed a worker's compensation claim against Alden Corporation, and after finding that Mackall was an Alden employee, the Workers' Compensation Commission ordered Alden to pay benefits to Mackall.[84] Subsequent to this determination, Mackall filed a negligence suit against Zayre Corporation. Zayre contended that Mackall was their employee as well, and thus she could not sue Zayre in tort.[85] Mackall argued that the Workers' Compensation Board's determination of her employment status precluded Zayre from raising the issue of her status as an employee.[86] The trial court, however, granted Zayre's motion for a trial on the employment issue,[87] and concluding from the facts that Mackall was an employee of both Alden and Zayre, a jury found on behalf of Zayre.[88] The Court of Appeals affirmed.[89] The court reasoned that the proceeding before the Workers' Compensation Commission addressed the issue of Alden's status as Mackall's employer, not the issue of Zayre's status as Mackall's employer.[90] On this basis, the court concluded that issue preclusion did not apply, and Zayre could litigate the issue of whether it was Mackall's employer.[91]

In *Washington Suburban Sanitary Commission v. TKU Associates*,[92] the Court of Appeals stressed the importance of a fair opportunity to be heard. There, a developer sought a sewer permit for its redevelopment of a retail department store property.[93] When the Washington Suburban Sanitary Commission (WSSC) denied the permit, the developer sued for a decree mandating that the WSSC issue the permit.[94]

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80. 293 Md. 221, 443 A.2d 98 (1982).

81. *See id.* at 229, 443 A.2d at 102 (holding that issue preclusion did not apply in a tort action for damages resulting from an employee's slip-and-fall injury).

82. *Id.* at 222-23, 443 A.2d at 99.

83. *Id.* at 223, 443 A.2d at 99.

84. *Id.*

85. *Id.* at 223-24, 443 A.2d at 99-100.

86. *Id.* at 227, 443 A.2d at 101.

87. *Id.* at 224, 443 A.2d at 100.

88. *Id.* at 226, 443 A.2d at 101.

89. *Id.*

90. *Id.* at 228-29, 443 A.2d at 102.

91. *Id.*

92. 281 Md. 1, 376 A.2d 505 (1977).

93. *Id.* at 4-6, 376 A.2d at 507-08.

94. *Id.* at 12, 376 A.2d at 511.

After the Circuit Court for Montgomery County ruled in the developer's favor,[95] the developer sued the county planning commission for declaratory relief on the grounds that the commission had conspired with the WSSC to delay the development until the property could be down-zoned.[96]

At the trial in this second suit, the developer argued that the planning commission was collaterally estopped from raising the issue of the WSSC's conduct in denying the sewer permit.[97] However, the court found that even if the first two parts of the test were met, the third element, same party or party in privity, and the fourth element, a fair opportunity to be heard, were not satisfied.[98] Specifically, the court found that Montgomery County, the county council, and the planning commission were separate government units from the WSSC, and thus they were not in privity with the sewer commission.[99] The court rejected the developer's argument that the agencies were in fact part of a single government or that one was subordinate to another such that one was bound by the outcome of the earlier litigation involving the other.[100] Consequently, WSSC did not have a fair opportunity to litigate the issue.[101]

c. The Fair Housing Act.—The analysis of whether claim or issue preclusion applies is case-specific. Thus, an examination of the substantive provisions of the FHA is necessary to decide whether either claim or issue preclusion applies in this case. The provision of the FHA most pertinent to this discussion is § 3604.[102] Section 3604 prohibits discrimination against the disabled and their agents in the provision of housing.[103] The FHA defines discrimination, in part, as

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95. *Id.* at 13-14, 376 A.2d at 511-12.
96. *Id.* at 14, 376 A.2d at 512.
97. *Id.* at 18, 376 A.2d at 514.
98. *Id.* at 19, 376 A.2d at 514.
99. *Id.* at 19-20, 376 A.2d at 514-15.
100. *Id.*
101. *Id.* at 19, 376 A.2d at 514.
102. Colandrea could have possibly brought a claim under § 3617 but failed to do so. Section 3617 is an anti-intimidation provision that prohibits retaliation against those who exercise their rights under the FHA. 42 U.S.C. § 3617 (2000). Accordingly, the circuit court, and subsequently the Court of Appeals in *Colandrea*, analyzed Colandrea's case solely in light of § 3604. *See Colandrea*, 361 Md. at 385-86, 392-93, 761 A.2d at 906-07, 910.
103. 42 U.S.C. § 3604(f)(1). Section 3604(f) makes it unlawful:

> To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter, . . . a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or . . . any person associated with that buyer or renter.

Id. § 3406(f).

"a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ."[104] Courts have interpreted § 3604(f) as creating three causes of action: disparate treatment, disparate impact, and refusal to make reasonable accommodations.[105]

For a disparate treatment claim, a plaintiff must demonstrate that the disability played a role in the adverse action.[106] Moreover, a plaintiff must demonstrate discriminatory intent.[107] As the United States District Court for the District of Maryland has summarized, "the inquiry under a disparate treatment analysis is whether similarly situated persons or groups are subject to differential treatment."[108] On the other hand, a disparate impact claim necessitates a showing of discriminatory effect.[109] Under a disparate impact claim, a plaintiff does not need to show discriminatory intent.[110] Rather, to determine discriminatory impact, a court must focus on four factors:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of intent, though not enough to satisfy the constitutional standard . . . ; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide housing.[111]

Finally, reasonable accommodation claims involve attempts to "chang[e] some rule that is generally applicable so as to make its burden less onerous on the handicapped individual."[112] Courts have interpreted reasonable to mean that the accommodation does not require "a fundamental alteration in the nature of the program" and

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104. *Id.* § 3604(f)(3)(B).

105. *See, e.g.*, Hill v. Cmty. of Damien of Molokai, 911 P.2d 861, 871 (N.M. 1996) (describing the three distinct claims under § 3604). Disparate treatment and disparate impact claims arise under § 3604(f)(1), while reasonable accommodation claims arise under § 3604(f)(3). *Id.* at 872.

106. Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1295 (D. Md. 1993).

107. *Id.*

108. *Id.*

109. *See Hill*, 911 P.2d at 872-73.

110. *Potomac Group Home*, 823 F. Supp. at 1295.

111. *Id.* (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982))

112. Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

does not "impose undue financial or administrative burdens."[113] In determining reasonableness, the United States Court of Appeals for the Fourth Circuit has found that a court may consider: (1) whether an accommodation would undermine existing zoning regulations; (2) the benefits of the accommodation to the handicapped; (3) whether more efficient alternatives exist; and (4) the cost of the accommodation.[114]

3. The Court's Reasoning.—In *Colandrea v. Wilde Lake Community Ass'n*, the Court of Appeals granted certiorari to address three issues: (1) whether the Village of Wilde Lake's enforcement of the restrictive covenant was a violation of § 3604 of the FHA; (2) whether the circuit court erred in granting a permanent injunction to enforce the restrictive covenant;[115] and (3) whether the circuit court erred in holding that the Committee's decision to deny approval for one of the homes was reasonable, in good faith, and not "pretext for improper motives."[116] As to the first issue, the court concluded that the FHA issues had already been previously and finally litigated in *Columbia Ass'n v. Colandrea*.[117] Consequently, the court affirmed the circuit court's holding that issue and claim preclusion operated to preclude relitigation of Colandrea's FHA counterclaims.[118] As to the second and third issues, the court upheld the issuance of an injunction to enforce the covenant, as well as the trial court's finding of "reasonableness."[119]

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113. United States v. City of Philadelphia, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (citing Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 412-13 (1979)).

114. Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 604 (4th Cir. 1997).

115. *Colandrea*, 361 Md. at 376, 761 A.2d at 901. The court addressed this second issue, but because the focus of this Note is preclusion, the court's use of injunctions to enforce restrictive covenants will not be discussed further.

116. *Id.* at 376-77, 761 A.2d at 901-02.

117. *Id.* at 393, 761 A.2d at 910-11.

118. *Id.*

119. *Id.* at 401-02, 761 A.2d at 915. Although the court addressed each separately, its discussion of the last two issues seemed intertwined. The court partly relied on *Kirkley v. Siepelt*, 212 Md. 127, 128 A.2d 430 (1957), when discussing both injunctive relief for private covenants and the decision of the Committee. In *Kirkley* the plaintiff appealed the enforcement of a restrictive covenant that prevented her from installing metal awnings on the front of her house. The *Kirkley* court upheld the injunction after holding that

> refusal to approve the external design or location of development would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and . . . be a *reasonable* determination made in good faith, and not high-handed whimsical or captious in manner.

Id. at 133, 128 A.2d at 434 (emphasis added). In *Colandrea*, the court deferred to the trial court's assessment of the credibility of the witnesses in drawing its conclusions. *Colandrea*, 361 Md. at 402, 761 A.2d at 915.

The court began by extensively reviewing the circuit court's decision.[120] The circuit court had determined that the issue of whether the restrictive covenant violated the FHA had been resolved in *Columbia Ass'n v. Colandrea*.[121] The circuit court also found that the presence of several senior assisted-living facilities in the county and the twenty-five percent vacancy rate in such facilities contravened Colandrea's assertion that his group homes were necessary.[122] After reviewing the decision below, the court then reviewed Judge Sybert's decision in *Columbia Ass'n v. Colandrea*.[123] The court specifically noted Judge Sybert's conclusion that the Committee's approval process was "a legitimate way of addressing the issue of discrimination under the FHA," and that Colandrea did not appeal the decision.[124] The court also noted that during the pendency of *Columbia Ass'n v. Colandrea*, the United States Department of Housing and Urban Development (HUD) was investigating a complaint of discrimination filed with them by Colandrea.[125] With these previous cases in mind, the court determined that the FHA issues were finally resolved and stated, "to the extent we address FHA related issues, . . . it is limited to the Association's actions occurring after the final judgment in [*Columbia Ass'n v. Colandrea*]."[126]

This being said, the court went on to explain Maryland case law regarding claim and issue preclusion. Turning first to collateral estoppel, or issue preclusion, the court looked to its decision in *Janes v. State*, where it defined issue preclusion as barring the re-litigation of "an issue of fact or law [that was] actually litigated and determined by a valid and final judgment, and the determination [was] essential to the judgment."[127] After defining issue preclusion, the court explained the difference between issue and claim preclusion by extensively quoting *Mackall v. Zayre Corp.*[128] To further clarify the distinction, the court proceeded to describe claim preclusion by quot-

120. *Colandrea*, 361 Md. at 379-85, 761 A.2d at 903-06.

121. *Id.* at 384, 761 A.2d at 906. In *Columbia Ass'n*, the circuit court concluded that the restrictive covenant did not violate the FHA because it was "facially neutral." *Id.*

122. *Id.* at 382-84, 761 A.2d at 905-06.

123. *Id.* at 385-86, 761 A.2d at 906-07.

124. *Id.*

125. *Id.* Colandrea had filed a complaint alleging violation of the FHA against the Village of Wilde Lake. *Id.* HUD dismissed the complaint after finding that "reasonable cause does not exist to believe that a discriminatory housing practice has occurred." *Id.*

126. *Id.*

127. 350 Md. 284, 295, 711 A.2d 1319, 1324 (1998) (quoting Murray Int'l Freight Corp. v. Graham, 315 Md. 543, 547, 555 A.2d 502, 504 (1989)).

128. *Colandrea*, 361 Md. at 387-89, 761 A.2d at 907-08 (quoting Mackall v. Zayre Corp., 293 Md. 221, 227-28, 443 A.2d 98, 101-02 (1982)).

ing *FWB Bank v. Richman*.[129] In *FWB Bank*, the court stressed that claim preclusion bars the second claim completely, whereas issue preclusion will bar only those issues actually decided between the same parties in a prior suit.[130]

The court also found Judge Wilner's explanation in *Klein v. Whitehead* helpful.[131] In that Court of Special Appeals decision, Judge Wilner described the related, yet distinct, concepts of *res judicata*, collateral estoppel, and collateral attack on judgments.[132] The court summarized Judge Wilner's observations by stating that "[c]ollateral estoppel is concerned with the issue implications of the earlier litigation of a different case, while *res judicata* is concerned with the legal consequences of a judgment entered earlier in the same cause."[133]

Having described the distinction between these doctrines, the court returned to the subject of collateral estoppel (issue preclusion).[134] Citing its decision in *Washington Suburban Sanitary Commission v. TKU Associates*, the court laid out the four-part test for the application of collateral estoppel.[135] The court then listed the elements of claim preclusion.[136] Finally, the court explained that a party had to assert all legal theories in the first suit to avoid the application of *res judicata* in future actions between the same parties.[137]

Turning to the instant case, the court found that the parties in *Colandrea* were the same as those in both *Columbia Ass'n v. Colandrea* and the HUD complaint, thus meeting the third element of issue pre-

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129. *Id.* at 389-90, 761 A.2d at 908-09.

130. FWB Bank v. Richman, 354 Md. 472, 492-93, 731 A.2d 916, 927-28 (1999).

131. *Colandrea*, 361 Md. at 390, 761 A.2d at 909.

132. *See* Klein v. Whitehead, 40 Md. App. 1, 12, 389 A.2d 374, 381 (1978) ("These three doctrines, though related, are different; they apply in different circumstances and they prevent different things.").

133. *Colandrea*, 361 Md. at 390-91, 761 A.2d at 909.

134. *Id.* at 391, 761 A.2d at 909-10.

135. *Id.* The court summarized the four requirements for collateral estoppel as follows:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
> 2. Was there a final judgment on the merits?
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id., 761 A.2d at 909.

136. *Id.* at 392, 761 A.2d at 910. The court stated that the requirements of *res judicata* or claim preclusion are: "1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; 2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and 3) that there was a final judgment on the merits." *Id.*

137. *Id.*

clusion and the first element of claim preclusion.[138] The court further noted that Colandrea could have appealed the circuit court's decision in *Columbia Ass'n v. Colandrea* but declined to pursue it.[139] Thus, the court concluded that the issue of whether the restrictive covenant, "its procedural requirements, or its effects" violated the FHA had already been finally determined, meeting the second element of issue preclusion and the third element of claim preclusion.[140] The court then determined that the issue in *Colandrea* was the same as that presented in *Columbia Ass'n v. Colandrea.*[141] After making these determinations, the court concluded that issue preclusion controlled.[142] However, the court refused to discuss further any of the FHA issues by stating, "[t]o the extent that appellant may argue that not every nuance was presented to the court in the prior case, every nuance should have been presented under appellant's then [FHA] counter-claim. The judgment in the prior case has collateral estoppel effects on all issues there raised, or that should have been raised."[143] Last, the court concluded that *Colandrea* involved the same cause of action as *Columbia Ass'n v. Colandrea* and expressed agreement with the circuit court's disposition of the FHA arguments in *Colandrea.*[144]

4. Analysis.—In affirming the circuit court's holding that the FHA claims raised by Colandrea were precluded from litigation by the 1995 proceeding,[145] the Court of Appeals missed an opportunity to address restrictive covenants under Maryland law in light of the Fair Housing Act. Had the Court of Appeals applied the relevant tests for claim and issue preclusion more thoroughly, it would have found that Colandrea's claim that discriminatory motives were the basis for the Committee's decision in the second proceeding was distinct from the claim that the restrictive covenant was a violation of the FHA in the first proceeding. The court also would have found that the issues associated with these claims were distinct.

a. The Claim in Colandrea *Was Not Identical to that In* Columbia Ass'n v. Colandrea.—The parties and courts confused the issues,

138. *Id.* at 392-93, 761 A.2d at 910.
139. *Id.* at 393, 761 A.2d at 910.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

facts, and law in this case.[146] While the counterclaim that Colandrea brought in the first suit shared some elements with that brought in the second suit, the latter was nonetheless "separate and distinct" under the "transaction" test followed in Maryland, and thus should not have been precluded.[147]

In *Columbia Ass'n v. Colandrea*, the controversy centered on the restrictive covenant.[148] The first question was whether a group home qualified as commercial or residential.[149] If commercial, then the group homes at 10461 and 10433 Waterfowl Terrace were subject to the restrictive covenant, which required application to the Committee for approval.[150] Colandrea contended that his group homes were residential and made essentially a reasonable accommodation claim that the application of the restrictive covenant to the group homes violated § 3604(f)(3) of the FHA.[151] The circuit court ruled that these group homes were commercial in nature and thus subject to the restrictive covenant, but did not grant an injunction to the neighborhood association.[152] Rather, the circuit court ordered that Colandrea apply to the Committee for approval.[153] In regard to Colandrea's reasonable accommodation claim, the circuit court reasoned that the covenant was facially neutral and was therefore not a violation of the FHA.[154]

In contrast, the *Colandrea* trial court focused on whether the Committee's decision to deny approval for 10433 Waterfowl Terrace

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146. *See id.* at 392-93, 761 A.2d at 910-11. The court seemed to apply the rules of claim preclusion (*res judicata*) to conclude that issue preclusion (collateral estoppel) applied. *See id.*

147. *See* Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 498-99, 525 A.2d 232, 238 (1987) (adopting the transaction test in Maryland).

148. Columbia Ass'n v. Colandrea, No. 93-CA-21562, slip op. at 1-2 (Howard County, Md., Cir. Ct. Feb. 16, 1995).

149. *Id.* at 2.

150. *Id.*

151. *Id.*

152. *Id.* at 6-7.

153. *Id.* at 7.

154. *Id.* at 6. Building upon its conclusion that Colandrea's group homes were businesses subject to the restrictive covenant, the circuit court found that the covenant was not discriminatory because it applied to all other business and professional activities. *Id.* This analysis does not settle the FHA dispute, however. The abridgment of a restrictive covenant is not relevant to the question of whether there is a violation of the FHA. Skipper v. Hambleton Meadows Architectural Review Comm., 996 F. Supp. 478, 484 (D. Md. 1998). Furthermore, the facial neutrality of a restrictive covenant does not automatically defeat an FHA claim. *See* Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152, 1168-69 (D.P.R. 1990) (holding that enforcement of a neutral restrictive covenant still violated the FHA).

was reasonable.[155] Colandrea raised a reasonable accommodation counterclaim here as well, but unlike the prior suit, he also made discriminatory intent and disparate impact claims under § 3604(f)(1). In short, Colandrea claimed that discriminatory motives were the basis for the Committee's decision to close 10433 Waterfowl Terrace and that the Committee's decision was not a reasonable accommodation; he did not claim that the enforcement of the restrictive covenant violated the reasonable accommodation requirement of the FHA.[156]

Application of the "transaction" test, as set forth in the *Restatement (Second) of Judgments* and adopted by the Court of Appeals in *Bilbrough*, helps to elucidate the differences between the claims in the two actions.[157] The determination of what is a "transaction" or "series of transactions" involves weighing a variety of factors: the relationship of the facts in time, space, origin, motivation; the formation of the facts into a convenient trial unit; and the conformity of the facts as a unit with the parties' expectations.[158] In this case, the facts that were relevant to the issue in *Columbia Ass'n* included operation of the group homes, their nature and character, activities occurring in the homes, the fees the inhabitants pay, and Colandrea's relationship to the residents.[159] The facts that were relevant to the issue in *Colandrea* included the Committee's process and criteria for granting approval to in-home businesses, past Committee approvals and denials, the procedure for election of Committee members, qualifications of Committee members, and the basis of the Committee decision in this particular instance.[160] Only *Colandrea* presented facts pertinent to the motivations of the neighborhood association, which was necessary for the evaluation of a discriminatory intent or disparate impact claim under § 3604(f)(1) of the FHA.[161] Thus, any overlap of facts relating to the reasonable accommodation claims in the two suits should not have

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155. Wilde Lake Cmty. Ass'n v. Colandrea, No. 13-C-96-30540, slip op. at 5 (Howard County, Md., Cir. Ct. Sept. 8, 1999). Judge Kane's opinion extensively discussed the Committee proceedings and the testimony. He concluded that "the decision of the Architectural Committee denying the application as to 10433 was made in good faith and was reasonable." *Id.*

156. *Id.* at 10; Brief for Appellant at 8-9, *Colandrea* (No. 24).

157. Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 498-99, 525 A.2d 232, 238 (1987); 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980).

158. *Bilbrough*, 309 Md. at 498, 525 A.2d at 238 (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24).

159. *See* Columbia Ass'n v. Colandrea, No. 93-CA-21562, slip op. at 4-5 (Howard County, Md., Cir. Ct. Feb. 16, 1995) (listing facts considered in determining the nature of the group homes).

160. Brief for Appellant at 3-7, *Colandrea* (No. 00-24).

161. *Id.*; *see also supra* notes 102-114 and accompanying text (discussing the elements of § 3604 claims).

prevented adjudication of the discriminatory intent and disparate impact claims under § 3604(f)(1) in *Colandrea*. Indeed, the facts pertaining to the decision of the Committee did not exist at the time *Columbia Ass'n* was decided because the Committee had not yet reviewed Colandrea's application.[162]

In terms of the time factor, even if the events of *Colandrea* depended upon the occurrence of events in *Columbia Ass'n*, the suits arose from incidents occurring at different times.[163] The first suit arose in 1993, five years earlier than the second. Yet, while the time factor favors treating the claims as distinct, the space consideration does not, as the two actions involved the same group homes, even though the second action revolved around only one of the group homes.[164] So too with motivation; in both actions, Colandrea averred that the neighborhood association's enforcement of the restrictive covenant was motivated in part by discrimination against the elderly.[165]

Another consideration in the "transaction" test is whether the factual grouping is a convenient trial unit.[166] The timing of the suits must figure into the analysis of this factor.[167] Co-adjudication of the two incidents in the instant matter would be a difficult task because one occurred in the past with no certain expectation that the second incident would occur. It would be impossible to properly adjudicate whether the Committee's review process violated § 3604 before it made any decisions.[168] Even if raised in *Columbia Ass'n*, the legality of the Committee decision process was not actually litigated or essential

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162. *Columbia Ass'n*, No. 93-CA-21562, slip op. at 6.

163. *Colandrea*, 361 Md. at 378 n.3, 761 A.2d at 902 n.3.

164. *Id.*

165. *See* Brief for Appellant at 8, *Colandrea* (No. 24); *Columbia Ass'n*, No. 93-CA-21562, slip op. at 2.

166. Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 498, 525 A.2d 232, 238 (1987); *see also* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980) (explaining the convenience of a unit for trial requires an inquiry into whether "the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first").

167. *See* Gertz v. Anne Arundel County, 339 Md. 261, 271, 661 A.2d 1157, 1162 (1995) (concluding that the facts in that case could not form a convenient trial unit in the first litigation because the rights at issue in the second litigation did not exist until after the first suit was decided).

168. *See* Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328 (1955) (observing that while a prior "judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case"); *Bilbrough*, 309 Md. at 499, 525 A.2d at 238 (concluding that claim preclusion "is justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined" (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a)).

to the judgment in *Columbia Ass'n*, and thus was not reviewable.[169] It was possible to adjudicate whether the restrictive covenant as applied to a group home in *Columbia Ass'n* was valid without deciding whether the Committee's decision had a reasonable basis.[170] For these reasons, the facts underlying the two claims could not form a convenient trial unit.

In summary, the central concerns of each suit were different. *Columbia Ass'n* asked whether Colandrea's group homes were commercial and if the restrictive covenant violated the FHA, while *Colandrea* asked whether the Committee's denial of permission for one group home was based on improper motives. Consideration of the time factors also suggests distinguishing the claims in the two suits. Even though the two actions involved the same properties and parties, there were two distinct transactions, and thus claims. Therefore, claim preclusion was not applicable.

b. Issue Preclusion Did Not Apply to All Issues in Colandrea.—Issue preclusion may apply even if claim preclusion does not.[171] Here, the two suits involved the same parties, but the critical issues in each case were different. The questions of whether the group home was a business to which the restrictive covenant applied and whether the FHA exempted the group home from enforcement of the restrictive covenant were actually litigated and determined in *Columbia Ass'n*.[172] Hence, Colandrea could not have raised these questions again in *Colandrea*.

However, Colandrea could have litigated whether the Committee's decision was based on discriminatory motives in violation of the FHA without danger of preclusion in *Colandrea*. This issue is not identical to those in *Columbia Ass'n* and was not actually litigated and deter-

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169. *See* Murray Int'l Freight Corp. v. Graham, 315 Md. 543, 552, 555 A.2d 502, 506 (1989) (stating that issue preclusion is not applicable if the "party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action . . ." (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 28(1))).

170. *Columbia Ass'n*, No. 93-CA-21562, slip op. at 6-7; *see also Murray Int'l Freight Corp.*, 315 Md. at 551, 555 A.2d at 505 (explaining that re-adjudication of issues determined but not essential to the judgment in a prior proceeding is not barred in a later proceeding) (citing 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h).

171. *See, e.g.*, Wolfe v. Anne Arundel County, 135 Md. App. 1, 28, 761 A.2d 935, 948-49 (2000).

172. *Columbia Ass'n*, No. 93-CA-21562, slip op. at 6-7.

mined in *Columbia Ass'n*.[173] Moreover, the issue was not essential to the judgment in *Columbia Ass'n*.[174]

The issue of whether the Committee's decision in Colandrea's case was based on discriminatory motives shared some facts with the primary issue in *Columbia Ass'n*; however, this does not mean they were identical. The crucial distinction is that the Committee had yet to make a decision on the group homes when *Columbia Ass'n* was adjudicated.[175] Thus, discovery for the two issues would have differed.[176] The applicable rule of law for each issue also differs.[177]

In fact, the *Columbia Ass'n* court did not fully consider the decision-making process of the Committee, nor did the parties brief that issue.[178] Given these circumstances, Colandrea was not given a fair opportunity in *Columbia Ass'n* to be heard on this issue, and the issue of the Committee's decision and decision-making process raised in *Colandrea* should have survived issue preclusion.

Finally, the issue of whether the Committee's decision process was arbitrary was not essential to the judgment in *Columbia Ass'n*. Application of issue preclusion requires that the issue be essential to the determination of the prior proceeding.[179] In regard to the FHA claim, the *Columbia Ass'n* court based its decision solely on the facial neutrality of the restrictive covenant.[180]

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173. *See* Wilde Lake Cmty. Ass'n v. Colandrea, No. 13-C-96-30540, slip op. at 10 (Howard County, Md., Cir. Ct. Sept. 8, 1999) (noting that *Columbia Ass'n* only "ruled . . . the FHA did not relieve Colandrea from complying with the requirements of the covenants and seeking approval of the Architectural Review Committee" and admitting that claims arising from events occurring after *Columbia Ass'n* were not precluded from decision in *Colandrea*); *see also Colandrea*, 361 Md. at 386, 761 A.2d at 907 ("[T]o the extent we address FHA related issues, if we do, it is limited to the Association's actions occurring after the final judgment in the prior case.").

174. *Columbia Ass'n*, No. 93-CA-21562, slip. op. at 6-7. There is simply no mention of Wilde Lake's motives or intent in the opinion. *Id.* The claim in the first suit was a reasonable accommodation claim, which does not require consideration of intent. *See* Hill v. Cmty. of Damien of Molokai, 911 P.2d 861, 874-75 (N.M. 1996) (discussing the elements of § 3604 claims).

175. *See Columbia Ass'n*, No. 93-CA-21562, slip op. at 7 (ordering Colandrea to apply to the Committee).

176. *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982); *see also supra* note 75 (explaining factors to consider when evaluating whether the issue is the same in two different cases).

177. The first suit relied on the reasonable accommodation aspect of § 3604(f)(1), but the second suit relied more on the claims arising under § 3604(f)(3). *See Hill*, 911 P.2d at 872.

178. *See Columbia Ass'n*, No. 93-CA-21562, slip op. at 6.

179. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

180. *Columbia Ass'n*, No. 93-CA-21562, slip op. at 6-7 (stating that the covenant in question did not violate the FHA because it was applicable to any in-home business, not merely group homes).

5. Conclusion.—The Court of Appeals affirmed the lower court's decision too quickly when it concluded that claim and issue preclusion controlled. Analysis under the "transaction" test shows that the claims in *Columbia Ass'n* and *Colandrea* were distinct, even though facts in the two cases overlapped. Last, the central issues in each suit were not the same. As such, the Court of Appeals missed an opportunity to examine a relatively new and important area of law.

KARYN S. BERGMANN

IX. STATUTORY INTERPRETATION

A. *Assuming the Role of the Legislature and Unjustifiably Changing the Definition of "Willfully" in the Maryland Wiretap Statute*

In *Deibler v. State*,[1] the Court of Appeals of Maryland considered whether the term "willfully,"[2] for purposes of the Maryland wiretap statute,[3] requires the defendant to knowingly violate the statute or simply intend to carry out his acts.[4] The court held that "willfully," in the Maryland wiretap statute, means an act that is "done intentionally-purposely."[5] In making its decision, the court focused on Maryland cases defining the term "willfully" and Congress's intended definition of "willfully" in the current federal wiretap statute.[6] Although the court analyzed the federal wiretap statute and Congress's intent, it erroneously failed to engage in an in-depth analysis of the legislative intent behind the Maryland wiretap statute. The court's decision is problematic because it deferred to Congress's current definition in the federal statute instead of focusing on the intent of the Maryland legislature. Thus, the court exceeded its judicial powers by assuming the role of the legislature and changing the Maryland legislature's intended definition of "willfull" in the Maryland statute.

1. The Case.—While at the home of his friend, Scott Bagdasian, Thomas Deibler planted a video camera in the Bagdasian family bathroom.[7] Deibler hid the camera, which contained an audio recording device, in a bathroom sink drawer.[8] Some time after Deibler hid the video camera in the bathroom, Scott Bagdasian's aunt, Mary Bagdasian, went into the bathroom to take a shower.[9] Mary Bagdasian

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1. 365 Md. 185, 776 A.2d 657 (2001).

2. As the Maryland Court of Appeals noted in *Perry v. State*, 357 Md. 37, 52 n.7, 741 A.2d 1162, 1170 n.7 (1999), the word "willful" can be spelled "willful" or "wilful." The word is spelled with only one "l" in the Maryland wiretap statute. Throughout this Note, the word will be spelled "willful."

3. Section 10-402(a)(1) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland provides that ". . . it is unlawful for any person to . . . [w]ilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication[.]" MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (1998 & Supp. 2001).

4. *Deibler*, 365 Md. at 188, 776 A.2d at 659.

5. *Id.* at 199, 776 A.2d at 665.

6. *See id.* at 193-99, 776 A.2d at 661-65.

7. *Id.* at 188-89, 776 A.2d at 658-59.

8. *Id.*

9. *Id.* at 188, 776 A.2d at 659.

showered, used the bathroom, and dried herself while the video camera recorded her private moments.[10]

After showering, Mary Bagdasian noticed a book of matches underneath a basket on the bathroom sink counter.[11] She removed the matches, fearing a child may pick them up, and discovered a black box in the basket.[12] Not understanding what the box was, Mary Bagdasian dressed and called her father to examine it.[13] Noticing that the wires ran behind the splash panel of the sink, Mary Bagdasian and her father opened the cabinet drawers and discovered the hidden video camera.[14] Mary watched the tape, and on it she saw herself going to the bathroom, taking a shower, and drying off.[15] The tape also recorded Mary Bagdasian and her father examining the box and recorded their conversation.[16] In addition, the tape recorded Deibler setting up the video camera; therefore, there was no question as to who set up the video camera.[17] Mary Bagdasian then waited for Deibler to go back into the bathroom and, while listening at the door, she heard him rummaging through the drawers.[18] When Deibler came out of the bathroom, Mary Bagdasian described him as, "turning in circles and as white as a ghost, because he knew that the camera was gone."[19] Shortly thereafter, Mary Bagdasian handed the tape over to the State's Attorney's Office.[20]

At trial, Deibler stated that he indeed placed the camera in the bathroom, and that the camera recorded voices, including his own voice, and his person.[21] Both Mary Bagdasian and her father testified that neither gave permission to Deibler, or anyone else, to place a video camera in the bathroom or record their conversation.[22] Based upon the evidence, the trial court, sitting without a jury, convicted Deibler of violating the Maryland wiretap statute, "by wilfully intercepting an oral communication."[23] Deibler appealed directly to the

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10. *See id.* at 189, 776 A.2d at 659.
11. *Id.* at 188, 776 A.2d at 659.
12. *Id.* at 188-89, 776 A.2d at 659.
13. *Id.* at 189, 776 A.2d at 659.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* (internal quotation marks omitted).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 191, 776 A.2d at 660; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (1998 & Supp. 2001) (providing that individuals violate the wiretap statute if

Court of Appeals of Maryland, which granted certiorari to consider whether a "willfull" violation of the Maryland wiretap statute requires the defendant to know that his or her action is unlawful, or whether mere intent to commit the interception is sufficient for a conviction.[24]

2. *Legal Background.*—

a. *The History of the Maryland and Federal Wiretap Statutes.*—

(1) *The Maryland Wiretap Statute.*—In 1977, Maryland adopted its present Wiretap and Electronic Surveillance Act.[25] Section 10-402 of the Maryland wiretap law makes it unlawful for any person to "wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[26]

Maryland's wiretap statute was modeled on the federal wiretap statute[27] found in The Omnibus Crime Control and Safe Streets Act of 1968.[28] Basing itself on the federal act, the Maryland wiretap statute closely tracks the provisions of the federal statute.[29] While the Maryland and federal statutes are essentially the same in content, the Maryland legislature made some of its provisions more restrictive than the federal statute.[30] These more restrictive provisions were instituted to afford greater protection to the privacy of Maryland citizens.[31]

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they "[w]ilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication").

24. *See Deibler*, 365 Md. at 188, 776 A.2d at 659. In addition, the trial court also convicted Deibler of violating Article 27, section 555A(2) of the Annotated Code of Maryland for making repeated telephone calls to the chief criminal investigating officer, David Cordle, and intentionally harassing him. *Id.* at 190-91, 776 A.2d at 659-60. Deibler also appealed his harassment conviction. *Id.* at 191, 776 A.2d at 660. This Note will not discuss the court's decision on the harassment appeal.

25. Act of July 1, 1977, ch. 692, 1977 Md. Laws 2818 (providing the text and enactment date of Maryland's wiretap statute).

26. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1).

27. 18 U.S.C. §§ 2510-2520 (2000).

28. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 tit. III, 82 Stat. 197, 212-24.

29. Ricks v. State, 312 Md. 11, 15, 537 A.2d 612, 614, *cert denied*, 488 U.S. 832 (1988). Thus, when interpreting and applying the Maryland wiretap statute, Maryland courts look to the federal courts for guidance. *See, e.g.*, Standiford v. Standiford, 89 Md. App. 326, 334, 598 A.2d 495, 498-99 (1991).

30. *Ricks*, 312 Md. at 15, 537 A.2d at 614. *Compare* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (making it unlawful in Maryland for a person to intercept an oral communication unless all parties to the communication have given their prior consent to the interception), *with* 18 U.S.C. § 2511(2)(d) (reflecting the 1986 amendment making an oral interception lawful where only one person or party to the communication has given prior consent to the interception).

31. *Standiford*, 89 Md. App. at 334, 598 A.2d at 499. For example, section 10-402(c) of the Maryland statute is more restrictive than its federal counterpart with respect to the

(2) The Federal Wiretap Statute.—The 1968 federal wiretap statute, which was the basis for Maryland's statute, prohibited any person from "willfully" intercepting any wire or oral communication.[32] The term "willfully" in the 1968 federal wiretap statute remained part of the statute for two decades.[33] In 1986, Congress amended the wiretap statute by omitting the term "willfully," as it appeared in § 2511, and replacing it with the term "intentionally."[34]

b. Federal Courts' Interpretation of "Willfulness" in the Federal Wiretap Statute.—

(1) Pre-1986 Amendment.—The 1968 Senate Judiciary Committee Report parenthetically cited *United States v. Murdock* for the meaning of "willfully" in § 2511 of the Omnibus Crime Control and Safe Streets Act of 1968.[35] The *Murdock* Court defined willful as

> an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.[36]

State's Attorney's ability to obtain a grant from a judge to intercept a wire or oral communication. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(1)-(2). Section 10-402(c) of the Maryland wiretap statute allows the Attorney General or the State's Attorney to apply to a judge for authorization to intercept when the interception may provide evidence of, *inter alia*, murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in controlled substances. *Id.* Section 2516 of the Federal Wiretap Act allows any designated Assistant Attorney General to apply for authorization when such interception may provide evidence of any offense punishable by death or imprisonment for more than one year. 18 U.S.C. § 2516.

32. 18 U.S.C. § 2511 (1968) (amended 1986). The statute created criminal liability for anyone who: "(a) *willfully* intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication." 18 U.S.C. § 2511(1)(a) (emphasis added). In addition, parts (b) and (c) prohibited the *willful* use or disclosure of such intercepted communications.

33. *Compare* 18 U.S.C. § 2511 (1986), *with* 18 U.S.C. § 2511 (1968) (replacing the term "willfully" with "intentionally").

34. 18 U.S.C. § 2511 (2000). The amended federal wiretap statute states that a person is subject to criminal liability if he "(a) *intentionally* intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . ." *Id.* § 2511(1)(a) (emphasis added).

35. S. REP. NO. 90-1097, at 93 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2181.

36. United States v. Murdock, 290 U.S. 389, 394-95 (1933) (citations omitted). In *Murdock*, the United States Supreme Court interpreted the meaning of "willful" in the context of a federal criminal tax statute. *See id.* at 392.

In 1983, in *Citron v. Citron*,[37] the United States Court of Appeals for the Second Circuit interpreted the term "willful" using the Supreme Court's definition in *Murdock* to establish civil liability for a violation of the federal wiretap statute.[38] The *Citron* court defined the term by stating that "[the reference to *Murdock* in the Senate Report] makes it clear that congress [sic] employed the term 'willfully' to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty."[39] In addition, the court held that this definition of "willful" should apply to civil, as well as criminal, violations of the statute.[40]

In *Malouche v. JH Management Co., Inc.*,[41] the United States Court of Appeals for the Fourth Circuit agreed with the Second Circuit's interpretation in the context of civil liability under 18 U.S.C. § 2520.[42] Holding that the criminal "willful" standard applied to the civil component of the federal wiretap statute, the *Malouche* court required the plaintiff to establish that the defendant intentionally or recklessly disregarded his or her legal obligation.[43]

(2) Post-1986 Amendment.—Following the 1986 amendment, which replaced "willfully" with "intentionally" in § 2511, courts interpreted the statute differently by distinguishing between the two *mens rea* requirements.[44] Congress's intent behind the amendment was to emphasize that inadvertent interceptions are not violations of the Act.[45] "Intentionally," as used in the amended wiretap statute, has

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37. 722 F.2d 14 (2d Cir. 1983).

38. *See id.* at 16.

39. *Id.*

40. *Id.* In addition to defining "willful," the *Citron* court responded to the plaintiff's appeal that "willful" should not mean the same when used in a civil and criminal context. *Id.* The court rejected this argument, explaining that liability under the civil provision of the statute requires a finding that the defendant also violated the criminal portion of the Act. *Id.* Thus, the court decided that a defendant cannot be found civilly liable unless he or she "willfully" violated the criminal statute. *Id.*

41. 839 F.2d 1024 (4th Cir. 1988).

42. *Id.* at 1025. "The question presented [was] whether civil liability sought pursuant to 18 U.S.C. § 2520, for alleged unlawful wiretapping *occurring prior* to the 1986 amendment of 18 U.S.C. § 2511, require[d] proof of criminal 'willfulness.'" *Id.* (emphasis added).

43. *Id.* at 1026. The *Malouche* court also stated that nothing in the statute's language or history suggests that Congress intended "willfulness" to have different meanings when applied in the civil and criminal context. *Id.*

44. *See, e.g.*, Adams v. Sumner, 39 F.3d 933, 935-36 & n.1 (9th Cir. 1994) (recognizing the need to treat federal wiretap law violations occurring before 1986 differently than those occurring after 1986 and analyzing the act occurring under the pre-1986 amendment in accord with the *Murdock* definition of "willful").

45. S. REP. NO. 99-541, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577.

a narrower definition than the dictionary definition; it means that "one's state of mind is intentional as to one's conduct or the result of one's conduct if such conduct or result is one's conscious objective."[46]

The replacement of the term "willfully" has changed the way federal courts interpret the *mens rea* element of the federal wiretap statute. In *United States v. Townsend*,[47] the court defined the requisite intent for the amended wiretap statute as "act[ing] deliberately and purposefully; that is, defendant's act must have been the product of defendant's conscious objective . . . ."[48] Similarly, in *Sanders v. Robert Bosch Corp.*,[49] the court acknowledged the changed *mens rea* by stating that the amended "section 2511 proscribes only 'intentional[ ]' interceptions."[50] In *Abraham v. County of Greenville*,[51] the Fourth Circuit further acknowledged the difference in treatment accorded to pre-1986 amendment and post-1986 amendment cases when it noted that now the statute requires only that interceptions be "intentional" as opposed to "willful."[52] The *Abraham* court upheld a trial court's jury instruction defining an intentional act as an act that is done when "it is the conscious objective of the person to do the act or cause the result" and when "it is done knowingly or purposefully."[53]

c. Maryland's Interpretation of "Willfulness" in the Maryland Wiretap Statute.—Before *Deibler v. State*, the Court of Appeals of Maryland had never specifically interpreted "willfull" for purposes of the Maryland wiretap statute.[54] Nevertheless, the Court of Special Ap-

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46. *Id.*
47. 987 F.2d 927 (2d Cir. 1993).
48. *Id.* at 930.
49. 38 F.3d 736 (4th Cir. 1994).
50. *Id.* at 742 (alteration in original).
51. 237 F.3d 386 (4th Cir. 2001).
52. *Id.* at 391.
53. *Id.*
54. In 1999, in *Perry v. State*, the Court of Appeals reviewed "willful" in the wiretap statute to consider whether a taped conversation between a defendant and co-conspirator should be admissible. 357 Md. 37, 40, 741 A.2d 1162, 1164 (1999). In making a decision, the court considered whether the taped conversation violated the wiretap statute. *Id.* at 63, 741 A.2d at 1176. The State argued that because the conversation was recorded "inadvertently," it was not recorded "willfully"; thus, the tape was properly admitted. *Id.* However, defendant Perry argued the willfulness standard only applies to civil or criminal actions, not questions regarding admissibility of evidence. *Id.* at 64, 741 A.2d at 1176. The court agreed with Perry; thus, it did not define "willful" because the case was decided on other grounds. *See id.* at 66-67, 741 A.2d at 1178. Despite the court's refusal to fully examine "willful," the court concluded that the "interception of the conversation with Perry was deliberate, purposeful, and intentional, and therefore willful." *Id.* at 69, 741 A.2d at 1179. However, the court did not comment as to whether "willful" required any particular degree of knowledge regarding the unlawful violation. *See id.*

peals of Maryland has, on at least three occasions, reviewed and interpreted the willfulness standard of the Maryland wiretap statute. In *Petric v. State*,[55] the court essentially affirmed a definition for "willful" which required that the defendant have known, or should have known, he was violating the law when he recorded a conversation without consent.[56] In *Petric*, the court considered the propriety of a jury instruction wherein the trial court instructed the jury to find the defendant not guilty if he lacked the *mens rea* required for a conviction of the Maryland wiretap statute.[57] As to the *mens rea*, the jury was instructed that if the defendant recorded the conversations without knowing that he was violating the law, then the jury should find that he lacked the requisite intent for a conviction.[58] The jury was further instructed that "if [they were to] find beyond a reasonable doubt that the defendant knew or should have known that he was violating the law . . . , it would not be a valid defense that [the defendant] did so for . . . any . . . purpose which appeared to him . . . to justify his actions when he knowingly and *willfully* broke the law."[59] The Court of Special Appeals affirmed the jury instructions and found no error because the jury believed that the defendant knew he was violating the Maryland law.[60]

A few years later, in *Fearnow v. Chesapeake & Potomac Telephone Co.*,[61] the Court of Special Appeals explicitly defined "willful" in the Maryland wiretap statute.[62] In *Fearnow*, the defendant argued that a "willful" violation only required intention to intercept the oral communication and did not include a reckless disregard standard.[63] However, the court held "willful" to mean "more than intentional or voluntary. It denotes either an intentional violation *or* a reckless disregard of a known legal duty."[64] The court clearly stated that the defini-

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55. 66 Md. App. 470, 504 A.2d 1168 (1986).

56. *Id.* at 477, 504 A.2d at 1172.

57. *Id.*

58. *Id.*

59. *Id.* (emphasis added).

60. *Id.* at 477-78, 504 A.2d at 1172.

61. 104 Md. App. 1, 655 A.2d 1 (1995), *rev'd on other grounds*, 342 Md. 363, 676 A.2d 65 (1996).

62. *Id.* at 23, 655 A.2d at 12.

63. *Id.* at 23 n.20, 655 A.2d at 12 n.20.

64. *Id.* at 23, 655 A.2d at 12 (quoting Earley v. Smoot, 846 F. Supp. 451, 453 (D. Md. 1994) and Benford v. Am. Broad. Co., 649 F. Supp. 9, 10 (D. Md. 1986) (internal quotation marks omitted)). The *Fearnow* court restricted this interpretation of willful to the Maryland wiretap statute, so as not to affect other statutes using the term "willful." *Id.* at 24 n.20, 655 A.2d at 12 n.20.

tion of willfulness includes knowledge of the law, which is an element that must be specifically proven.[65]

In *Hawes v. Carberry*,[66] the Court of Special Appeals agreed with the *Fearnow* court's interpretation of "willful" in the Maryland wiretap statute.[67] The *Hawes* court established, after examining the *Fearnow* decision, that the word "willful" means "an intentional violation or a reckless disregard of a known legal duty."[68]

d. Federal Courts' Interpretation of "Willful" in the Maryland Wiretap Statute.—The United States District Court for the District of Maryland has reviewed the willfulness standard of the Maryland wiretap statute on two separate occasions. *Benford v. American Broadcasting Co.*[69] was the first case to interpret the term "willful" in the context of the Maryland wiretap statute.[70] The *Benford* court turned to the legislative history of the federal wiretap statute for guidance in interpreting the word "willful" because there was no helpful legislative history in Maryland.[71] Accordingly, the court applied the definition of "willful" as courts had employed it in the federal statute, defining the Maryland willfulness standard as "denot[ing] either an intentional violation or a reckless disregard of a known legal duty."[72]

In 1994, the federal district court again interpreted the meaning of willfulness in the Maryland wiretap statute. In *Earley v. Smoot*,[73] the court examined both the Maryland wiretap statute and the 1986 amended federal statute.[74] In so doing, it acknowledged that under the Maryland statute, the plaintiff must prove the defendant knew that

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65. *See id.* at 42-43, 655 A.2d at 21. The court in *Fearnow* stated, "[w]hen the law makes knowledge of some requirement an element of the offense, it is totally incorrect to say that ignorance of such law is no excuse or that everyone is presumed to know such law." *Id.* (quoting United States v. Golitschek, 808 F.2d 195, 203 (2d Cir. 1986)) (internal quotation marks omitted). In 1996, the Court of Appeals granted certiorari to reconsider some of the provisions of the Maryland Wiretap Act interpreted by the Court of Special Appeals in the *Fearnow* decision. Fearnow v. Chesapeake & Potomac Tel. Co., 342 Md. 363, 368, 676 A.2d 65, 67 (1996). The court did not review a jury instruction specifically as to the willfulness standard. *See id.* at 388, 676 A.2d at 77. However, the court suggested its agreement with the Court of Special Appeals's definition of willfulness when it stated that the issue of the defendant's willfulness turned on whether "he consciously disregard[ed] a known legal duty." *Id.*

66. 103 Md. App. 214, 653 A.2d 479 (1995).

67. *See id.* at 222, 653 A.2d at 483.

68. *Id.* (citations omitted).

69. 649 F. Supp. 9 (D. Md. 1986).

70. *See id.* at 10.

71. *Id.*

72. *Id.*

73. 846 F. Supp. 451 (D. Md. 1994).

74. *See id.* at 453.

taping the proceedings without all parties' consent was unlawful.[75] The *Earley* court distinguished the Maryland statute from the 1986 amended federal wiretap statute by explaining that a defendant is criminally liable for "intentional—in the traditional sense of purposeful—conduct, without a showing of disregard of a known legal duty" under the federal statute.[76] In distinguishing the Maryland *mens rea* requirement from the post-1986 federal requirement, the court stated that Congress's purpose in adopting the 1986 wiretap amendment was to "dilute the standard of proof from willfulness to mere intent" in the federal wiretap statute.[77]

e. Maryland's Interpretation of "Willful" in Other Criminal Statutes.—The term "willful" in Maryland criminal statutes has been interpreted various ways by the Court of Appeals. Specifically, some cases define "willful" as only requiring mere intent to commit the act. In the context of prosecution for destruction of property, the Court of Appeals, in *Rosenberg v. State*,[78] defined a "willful" criminal act as "an act done with deliberate intention for which there is no reasonable excuse."[79] In *State v. Devers*,[80] the court again interpreted "willful" to mean intentional.[81] The court defined the willfulness necessary for a conviction of perjury to require that "the false oath must be deliberate and not the result of surprise, confusion or bona fide mistake."[82] The Court of Appeals, in *Brown v. State*,[83] distinguished between the terms "maliciously" and "willfully," and noted that "willfully" is "commonly interpreted as meaning 'intentionally.'"[84]

In *Tichnell v. State*,[85] the Court of Appeals held that the element of willfulness for the crime of murder requires "a specific purpose and intent to kill."[86] In *Shell v. State*,[87] the Court of Appeals similarly inter-

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75. *Id.*

76. *Id.*

77. *Id.* The *Earley* court made no mention of how, or even if, the 1986 amendment to the federal wiretap statute affected the Maryland wiretap statute. *See id.*

78. 164 Md. 473, 165 A. 306 (1933).

79. *Id.* at 476, 165 A.2d at 307; *see also* Ewell v. State, 207 Md. 288, 299, 114 A.2d 66, 72 (1954) (interpreting willful neglect in a Maryland criminal statute and citing to *Rosenberg* for its definition of willful).

80. 260 Md. 360, 272 A.2d 794, *cert. denied*, 404 U.S. 824 (1971).

81. *Id.* at 372, 272 A.2d at 800.

82. *Id.*

83. 285 Md. 469, 403 A.2d 788 (1979).

84. *Id.* at 475, 403 A.2d at 792. In *Brown*, the Court of Appeals was called upon to decide whether the burning of an abandoned clubhouse was "maliciously caused or procured within the meaning of [the Maryland arson statute]." *Id.* at 470, 403 A.2d at 789.

85. 287 Md. 695, 415 A.2d 830 (1980).

86. *Id.* at 717, 415 A.2d at 842.

preted "willful" in an arson statute to require "both a deliberate intention to injure the property of another and malice."[88] Further defining "willful" in the context of a first-degree murder case, the Court of Appeals affirmed a conviction, finding no error with a jury instruction that "[w]ilful means that the act which caused the death was done intentionally and with purpose."[89]

Finally, the Court of Appeals has also interpreted "willful" as requiring a violation of a known legal duty.[90] In *Johnson v. State*,[91] the court interpreted the willfulness requirement in Maryland Code, Article 81, section 320[92] by looking to the Maryland statute's federal counterpart.[93] The court determined that the "meaning accorded to [willful] by the federal courts under [the federal statute] comports with the legislative intention in enacting [the Maryland statute]."[94] The court then concluded that "wilfulness may be established through proof that the accused's failure to file constituted a voluntary intentional violation of a known legal duty."[95]

3. The Court's Reasoning.—In *Deibler v. State*, the Court of Appeals of Maryland held that the term "willful," for purposes of section 10-402(a), and for sections 10-405, 10-408(i), and 10-410 of the Courts and Judicial Proceedings Article of the Maryland Code, means an interception that is done "intentionally-purposely," regardless of whether the offender knows he is breaching a legal duty.[96]

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87. 307 Md. 46, 512 A.2d 358 (1986).

88. *Id.* at 68, 512 A.2d at 369. In *Shell*, the court again noted that "wilfully . . . is commonly interpreted as meaning intentionally." *Id.* at 67, 512 A.2d at 369 (citations omitted) (internal quotation marks omitted).

89. Hunt v. State, 345 Md. 122, 162, 691 A.2d 1255, 1274 (1997).

90. *See, e.g.*, Reisch v. State, 107 Md. App. 464, 476, 668 A.2d 970, 976 (1995) (defining "willful" in a home improvement licensing statute and overturning the conviction when the State failed to prove that the defendant acted "willfully, i.e., with the intent to violate a *known* legal duty").

91. 294 Md. 515, 451 A.2d 330 (1982).

92. MD. ANN. CODE art. 81, § 320 (1980) (repealed 1997) (making it a crime to "willfully" fail to file a tax return).

93. *Johnson*, 294 Md. at 518-19, 451 A.2d at 332; *see also* I.R.C. § 7203 (2000) (making it unlawful for a person to "willfully" fail to file a tax return).

94. *Johnson*, 294 Md. at 518, 451 A.2d at 332.

95. *Id.* at 518-19, 451 A.2d at 332.

96. *Deibler*, 365 Md. at 199, 776 A.2d at 665; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 10-405 (1998) (refusing to allow into evidence any communications derived from information obtained in violation of the wiretap statute); *id.* § 10-408(i) (allowing for an aggrieved party to move for the suppression of an unlawfully intercepted communication); *id.* § 10-410 (imposing civil liability on an individual intercepting a communication in violation of the wiretap statute).

Writing for the majority, Judge Wilner stated that "willful," as used in Maryland statutes, including the Maryland wiretap statute, appears in a "variety of contexts" and can be construed in "several different ways."[97] The court further stated that it uses varying constructions of "willful."[98] The court listed several Maryland cases interpreting "willful," in varying criminal statutes, to show that "willful" generally means an act committed with a deliberate intent.[99] Further supporting its position that "willful" should be defined as "intentional," the court relied on *McBurney v. State*[100] to show that its interpretation of willfulness allows that the commission of the prohibited acts is sufficient for a conviction.[101]

Next, the court delineated the necessary steps for construing a statutory term, namely, the need to give "willful" its most probable contextual meaning intended by the legislature.[102] In its statutory analysis, the court focused primarily on the federal wiretap statute, 18 U.S.C. §§ 2510-2520, because the Maryland wiretap statute is based substantially on its federal counterpart.[103]

In its analysis of the federal wiretap statute, the court examined the federal legislative history and federal courts' interpretations of the statute.[104] The majority looked to the Senate Judiciary Committee Report on the federal wiretap law and *United States v. Murdock* to support its interpretation of the Maryland wiretap statute's willfulness requirement.[105] The *Deibler* court concluded that Congress did not mean for

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97. *Deibler*, 365 Md. at 192-94, 776 A.2d at 661-62 (noting that the term "willful" "appears 547 times in the Maryland Constitution, Code, and Rules in a variety of contexts"). The court further noted the complexity of the term by relying on the Supreme Court's articulation that "[willful] is a word of many meanings, and its construction [is] often . . . influenced by its context." *Id.* (quoting Ratzalf v. United States, 510 U.S. 135, 141 (1994) (quoting Spies v. United States, 317 U.S. 492, 497 (1943))) (internal quotation marks omitted).

98. *Id.* at 194, 776 A.2d at 662.

99. *See id.* at 194-95, 776 A.2d at 662.

100. 281 Md. 21, 371 A.2d 129 (1977).

101. *Deibler*, 365 Md. at 194-95, 776 A.2d at 662.

102. *Id.* at 195, 776 A.2d at 663.

103. *Id.*

104. *Id.* at 196-99, 776 A.2d at 663-66.

105. *Id.* at 196, 776 A.2d at 663. The Senate Judiciary Committee Report on the federal wiretap law did not include any explanation along with the notation that a violation of the law be "willful" other than a parenthetical citation to *United States v. Murdock*, 290 U.S. 389 (1933). *See* S. REP. NO. 68-1097, at 93 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2181. The Court in *Murdock* defined "willful" in a criminal statute as "an act done with a bad purpose; without justifiable excuse . . . . The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act." *Murdock*, 290 U.S. at 394-95 (citations omitted).

"willfully" to be so restrictive as to require a defendant to know that the interception is unlawful.[106]

In support of its assertion that Congress intended a much less restrictive definition of "willful," the majority relied on Congress's 1986 amendment to the federal wiretap statute, which eliminated the term "willfully" and replaced it with "intentionally."[107] Explaining Congress's purpose for the 1986 amendment, the court quoted a Senate Report stating that Congress's intent was "to underscore that *inadvertent* interceptions are not crimes under the [amended federal wiretap law]."[108] The court then concluded that the 1986 amendment meant to return the standard to Congress's original intent, which was to require purposeful conduct.[109]

After concluding that the 1986 amendment to the federal statute was intended to return the meaning to Congress's original intent, the court found that the federal definition—purposeful conduct—is consistent with Maryland's definition of willfulness in other criminal statutes.[110] Thus, the court held "willful" in the Maryland wiretap statute to mean "intentionally-purposely."[111]

In a dissenting opinion, Judge Harrell disagreed with the majority's definition of willfulness.[112] Judge Harrell disapproved of the majority's departure from the "clear definition" of willfulness that was

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106. *Deibler*, 365 Md. at 197, 776 A.2d at 664. The court noted that federal courts and the Court of Special Appeals of Maryland interpret *Murdock* as indicating that "willfully" means at least an intentional violation of a known legal duty. *See, e.g.*, Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983), *cert. denied*, 466 U.S. 973 (1984) (noting that the Senate Committee's reference to *Murdock* "makes it clear that congress [sic] employed the term 'willfully' to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty"); Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1, 23-24, 655 A.2d 1, 12 (1995), *rev'd on other grounds*, 342 Md. 363, 676 A.2d 65 (1996) (explaining that the violator must know that what he or she is doing is illegal to be liable under the Maryland wiretap statute).

107. *Deibler*, 365 Md. at 197, 776 A.2d at 664. The *Deibler* court stated that Congress found the term "willfully" to be "too amorphous." *Id.*

108. *Id.* at 198, 776 A.2d at 664 (quoting S. REP. NO. 99-541, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577 (emphasis added)) (internal quotation marks omitted).

109. *Id.* at 198-99, 776 A.2d at 665. In *Earley v. Smoot*, 846 F. Supp. 451, 453 (D. Md. 1994), the court viewed Congress's replacement of the term "willful" as "dilut[ing] the standard." However, the majority in *Deibler* firmly concluded that Congress was returning to its original intent because the federal courts had so often misconstrued the statute's true meaning. *Deibler*, 365 Md. at 198-99, 776 A.2d at 665.

110. *Deibler*, 365 Md. at 199, 776 A.2d at 665.

111. *Id.* The majority found this to be a sensible and appropriate definition and justified itself by stating that the required mental state of purposeful conduct, "requiring neither a bad motive nor knowing unlawfulness," best fit with how the court defined "willful" in other Maryland statutes. *Id.*

112. *Id.* at 203, 776 A.2d at 667 (Harrell, J., dissenting). Chief Judge Bell joined in Judge Harrell's dissent concerning the definition of willfulness, and Judge Battaglia only

provided in *Benford v. American Broadcasting Co.*[113] He argued that the better course was to follow the interpretations of the Court of Special Appeals of Maryland and the United States District Court for the District of Maryland in interpreting willfulness.[114] Judge Harrell adhered to the definition of "willful" in the *Fearnow* opinion that he authored while on the Court of Special Appeals.[115] Judge Harrell agreed that Deibler's conduct was "morally reprehensible," but would have held that Deibler did not possess the requisite degree of willfulness to support a conviction under the Maryland wiretap statute.[116]

4. Analysis.—In *Deibler*, the Court of Appeals reached an appropriate outcome with flawed reasoning when it defined the term "willful" in section 10-402 of the Maryland wiretap statute as meaning "intentionally-purposely," and not requiring knowledge of the breach of a legal duty.[117] In so doing, the court ignored persuasive case law interpreting "willful" in the Maryland wiretap statute and failed to consider the meaning of "willful" within the context of the Maryland wiretap statute. Furthermore, the court improperly analyzed the legislative history pertaining to the federal wiretap statute, and thus incorrectly applied the post-1986 legislative history of the Act. Because the Maryland Court of Special Appeals and the United States District Court for the District of Maryland already defined "willful" in the Maryland wiretap statute, the court improperly based its definition solely on the language of the current federal wiretap statute.

a. The Court of Appeals Should Have Looked to Other Courts' Definition of "Willful."—The *Deibler* court's attempt at defining "willful" is flawed because it fails to consider the term in the context of the Maryland wiretap statute. The court essentially ignored the decisions that already defined "willful" in the context of the Maryland wiretap statute.[118]

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joined Judge Harrell's dissent concerning the telephone harassment conviction. *Id.* at 205, 776 A.2d at 668-69.

113. *Id.*; *see also* Benford v. Am. Broad. Co., 649 F. Supp. 9, 10 (D. Md. 1986) (holding that the definition of willfulness is "either an intentional violation or a reckless disregard of a known legal duty").

114. *Deibler*, 365 Md. at 203, 776 A.2d at 667 (Harrell, J., dissenting).

115. *Id.* at 203, 776 A.2d at 667-68. In *Fearnow*, Judge Harrell wrote that to establish liability under the wiretap statute, the plaintiff must prove that the defendant "know what he or she is doing is illegal." Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1, 24, 655 A.2d 1, 12 (1995).

116. *Deibler*, 365 Md. at 203, 776 A.2d at 668 (Harrell, J., dissenting).

117. *Id.* at 199, 776 A.2d at 665.

118. *See Deibler*, 365 Md. at 192, 197, 776 A.2d at 661, 664; *see also* Earley v. Smoot, 846 F. Supp. 451, 453 (D. Md. 1994) (defining "willful" in the context of the Maryland wiretap

The *Deibler* court should have looked to *Hawes v. Carberry*, *Fearnow v. Chesapeake & Potomac Telephone Co.*, *Earley v. Smoot*, and *Benford v. American Broadcasting Co.*, decisions which interpreted "willful" in the context of the Maryland wiretap statute.[119] The relevance of these cases is unmistakable. All of these opinions specifically analyze Maryland and federal legislative history surrounding the Maryland and federal wiretap statutes[120] and, more importantly, interpret the meaning of "willful" in the context of the Maryland wiretap statute. The Court of Appeals is well within its prerogative to disagree with the decisions of the Court of Special Appeals and the United States District Court, but considering the consistency in the courts' reasoning and interpretations, it should provide a logical reason for doing so. In *Deibler*, the Court of Appeals did not state a reason for why these decisions were not applicable and failed to sufficiently distinguish this case from the others.[121]

Furthermore, the Court of Appeals disregarded its own past discussion of the meaning of "willful" in the Maryland wiretap statute. The Court of Appeals discussed the issue of willfulness in the *Fearnow* case; however, the *Deibler* court failed to mention or acknowledge this discussion. In *Fearnow*, the Court of Appeals reviewed the validity of several jury instructions to which the defendant objected.[122] Deciding whether an instruction should have been read to the jury regarding section 10-402(c)(2) of the Courts and Judicial Proceedings Article,[123] the court found the instruction necessary because it was critical to the defendant's "defense that he was not recklessly disregarding a known

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statute as requiring either an intentional violation of a known legal duty or a reckless disregard of a known legal duty); *Benford*, 649 F. Supp. at 10 (reviewing the meaning of "willful" in the context of the Maryland wiretap statute and concluding that it requires an intentional or reckless disregard of a known legal duty); Fearnow v. Chesapeake & Potomac Tel. Co., 342 Md. 363, 388, 676 A.2d 65, 77 (1996) (reviewing a jury instruction involving the term "willful" in the context of the Maryland Wiretap Act); *Fearnow*, 104 Md. App. at 23-24, 655 A.2d at 12 (same); Hawes v. Carberry, 103 Md. App. 214, 222, 653 A.2d 479, 483 (1995) (defining "willful" in the context of the Maryland Wiretap Act as requiring the violation of a known legal duty).

119. *See supra* note 118 (providing the holdings of these cases).

120. *See Earley*, 846 F. Supp. at 453 (examining the federal statute's legislative history); *Benford*, 649 F. Supp. at 10 (discussing the legislative history of both the federal and Maryland wiretap statutes).

121. *Deibler*, 365 Md. at 192, 776 A.2d at 661 (citing to *Hawes* and *Fearnow*, but only to state that the Court of Appeals has not had the opportunity to define "willful").

122. *Fearnow*, 342 Md. at 373-88, 676 A.2d at 70-77.

123. Section 10-402(c)(2) of the Maryland statute provides the circumstances when an investigator or law enforcement officer may lawfully intercept one's communications; thus, this instruction was crucial to the question of whether the defendant acted "willfully" by knowingly violating a legal duty. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(2) (1998 & Supp. 2001).

legal duty."[124] The Court of Appeals affirmed the Court of Special Appeals's definition of willfulness when it stated that the "question of [the defendant's] willfulness hinged on what he believed was happening that evening and whether he was consciously disregarding a known legal duty."[125] This clearly suggests that the Court of Appeals agreed with the willfulness standard set forth by the lower court, which defined "willful" as intent plus knowingly violating a legal duty.[126]

Instead of looking to the above cases, which all define "willful" as a known violation of legal duty in the context of the Maryland wiretap statute, the *Deibler* court engaged in a lengthy, unfocused discussion of the many meanings of the term "willful" in various Maryland criminal statutes.[127] The court emphasized that "willful" appears 547 times in the Maryland Constitution, Code, and Rules in many different contexts.[128] The court then looked to cases interpreting "willful" in various criminal statutes. From a mere five criminal cases—none of which consider the definition of "willful" in the Maryland wiretap statute—the court concluded that the majority of Maryland criminal cases define "willful" to mean "purposeful conduct, requiring neither a bad motive nor knowing unlawfulness."[129] This inquiry has little relevance because the court failed to consider "willful" in the context of the Maryland wiretap statute. Despite other criminal statutes defining "willful" as only requiring intent, the wiretap statute's unique legislative history requires the court to distinguish the meaning of "willful" in the wiretap statute from the generic meaning used in other criminal statutes.[130]

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124. *Fearnow*, 342 Md. at 388, 676 A.2d at 77 (discussing the importance of whether the defendant knew he was violating the wiretap statute).

125. *Id.*

126. Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1, 63, 655 A.2d 1, 31 (1995).

127. *Deibler*, 365 Md. at 192-95, 776 A.2d at 661-63.

128. *Id.* at 192, 776 A.2d at 661.

129. *Deibler*, 365 Md. at 199, 776 A.2d at 665. The court also concluded that the majority of the interpretations of "willful" are in accord with the definition set forth in a 1976 law review article, which analyzed the term "willful" in federal criminal statutes as "requiring only that the act be committed intentionally." *Id.* at 195, 776 A.2d at 663; *see also* S. Brogan, *An Analysis of the Term "Willful" in Federal Criminal Statutes*, 51 NOTRE DAME LAW. 786, 786-88 (1976) (discussing the different meanings of "willful" in federal statutes).

130. *See Fearnow*, 104 Md. App. at 24 n.20, 655 A.2d at 12 n.20 ("We acknowledge, however, that the definition of willfulness to which we subscribe in the instant case is limited to its meaning within the Maryland Wiretap Act. The pertinent background in this case—federal case law interpreting the pre-1986 federal statute's willfulness requirement . . . leads us to our conclusion in this regard.").

Without any such reference to *Fearnow*, *Hawes*, *Earley*, or *Benford*, the court did not define "willful" in the context of the wiretap statute, but merely engaged in a broad analysis of the different meanings of the term in unrelated and irrelevant Maryland criminal statutes.

b. The Court Improperly Applied the Legislative History of the Federal Wiretap Statute to Determine the Definition of "Willful" in the Maryland Wiretap Statute.—Although the Court of Appeals should have first examined other courts' interpretations of "willful" in the Maryland wiretap statute, it was proper for the *Deibler* court to consider the federal wiretap statute's legislative history because the Maryland legislature based the Maryland statute on the federal statute. However, the court should have examined the legislative history of the 1968 federal wiretap statute, not the 1986 amended federal statute, because Maryland's statute was based upon the 1968 version.[131]

(1) The Court Should Have Focused on the Legislative History of the 1968 Federal Wiretap Statute.—When interpreting "willful" in Maryland's wiretap statute, the court should have limited its reliance to the legislative history of the federal wiretap statute prior to 1977. When Maryland enacted its statute in 1977, Maryland based the statute on the 1968 federal wiretap statute.[132] The federal statute was interpreted as defining "willful" as requiring a violation of a known legal duty.[133] Accordingly, when determining the meaning of "willful" intended by the Maryland General Assembly, it is only appropriate for the Court of Appeals to look to the definition of "willful" in the 1968 federal wiretap statute. However, in its analysis, the court improperly focused on the legislative history pertaining to the 1986 amendment, which eliminated "willful" and replaced it with "intentional."[134]

The court's reliance on the 1986 legislative history for the federal wiretap statute is illogical. When Maryland enacted its statute, it only had available, and thus presumably relied upon, the legislative history of the 1968 federal wiretap statute. There is no indication that Mary-

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131. *See* Ricks v. State, 312 Md. 11, 15, 537 A.2d 612, 614, *cert. denied*, 488 U.S. 832 (1988) (explaining that Maryland modeled its wiretap statute on the federal wiretap statute).

132. *Id.*

133. *See* Benford v. Am. Broad. Co., 649 F. Supp. 9, 10 (D. Md. 1986) (defining "willful" prior to the 1986 amendment).

134. *Deibler*, 365 Md. at 197-99, 776 A.2d at 664-65. The *Deibler* court reported an abundance of legislative history surrounding the 1968 federal wiretap statute; however, it stated that it seemed that Congress paid little attention to the use of "willfully." *Id.* at 196, 776 A.2d at 663. The court then devoted a majority of its discussion to the legislative history surrounding the 1986 amendment to the federal statute, which replaced the term "willful" with "intentional." *Id.* at 197-99, 776 A.2d at 664-65.

land anticipated the 1986 federal amendment replacing "willful" with "intentional" and, furthermore, the Maryland legislature has not since changed its statute to include the term "intentional."[135] Moreover, it has now been sixteen years since Congress amended the federal wiretap statute, and the Maryland General Assembly still has not changed the language of its statute from "willful" to "intentional." The court's reading of willful as "intentionally-purposely" is flawed because it interpreted "willful" in accordance with the 1986 amendment to the federal statute rather than interpreting "willful" in accordance with the legislative history of the version of the federal statute upon which the Maryland wiretap statute was based—the 1968 version. Thus, because "willful" in the 1968 federal wiretap statute has been interpreted as requiring a violation of a known legal duty,[136] the Maryland statute also should be interpreted as defining "willful" as a violation of a known legal duty.

(2) Manipulating and Interpreting the Federal Wiretap Statute's Legislative History to Coincide with the Court's Interpretation of "Willful."—By attempting to effectuate the "true intent" of Congress when it enacted the original 1968 wiretap statute, the Court of Appeals erroneously based its opinion that "willful" meant "intentionally-purposely" on the legislative history surrounding the 1986 amendment to the federal wiretap statute.[137] The court took the position that Congress amended the statute in 1986 to replace "willful" with "intentional" in order to return the standard to "what Congress initially had in mind."[138] This position provided a justification for the court's conclusion. However, it was not Congress's intent at the inception of the wiretap statute to define the term "willful" as "intentional." There is sufficient legislative history and cases interpreting the language of the 1968 statute to show that Congress intended "willful" to mean a violation of a known legal duty and not "intentional."[139]

The most instructive explanation of Congress's original intent with regard to the 1968 meaning of "willful" appears in a Senate Judiciary Committee Report.[140] The Report listed "willful" as an element of the federal wiretap statute and subsequently cited to *United States v.*

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135. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (1998 & Supp. 2001).

136. *See, e.g.*, Malouche v. JH Management Co., Inc., 839 F.2d 1024, 1026 (4th Cir. 1988); Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983).

137. *See Deibler*, 365 Md. at 197-99, 776 A.2d at 664-65.

138. *Id.* at 198-99, 776 A.2d at 665.

139. *See, e.g.*, Earley v. Smoot, 846 F. Supp. 451, 453 (D. Md. 1994) (viewing the 1986 amendment as "dilut[ing] the standard of proof from willfulness to mere intent").

140. *See* S. REP. NO. 90-1097, at 1093 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2181.

Murdock.[141] The federal courts interpreted the reference to *Murdock* to mean that Congress intended *Murdock*'s definition of "willfully" to apply to the federal wiretap statute.[142] Thus, the legislative history suggests that Congress meant to define "willful" as "characteriz[ing] a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has the right so to act."[143]

Although the Court of Appeals acknowledged the Senate Report, the court suggested that Congress did not intend the *Murdock* standard of willfulness to be an element of the wiretap statute.[144] Rather, the court interpreted the 1986 elimination of "willful" as indicating that federal courts misconstrued Congress's reference to *Murdock* in the Senate Report, and that Congress did not intend for "willful" to denote a knowing violation of a legal duty.[145]

The court's interpretation of *Murdock*'s relevance is unreasonable. Several federal courts have interpreted the reference to *Murdock* by Congress as defining "willful" in the federal wiretap statute.[146] However, in disagreement, the court ignored these cases and did not provide adequate explanation as to why those cases were not instructive.[147]

In support of its dismissal of those cases, the court used only one law review article from 1968, which the court proclaimed to demonstrate that Congress did not intend for "willful" to have the restrictive meaning given it by the federal courts attempting to discern the reference to *Murdock* in the federal wiretap law.[148] The article was authored by one of the draftsmen of the federal law and stated that wiretap violations must be willful, and thus "good faith mistakes under the statute will not be subject to criminal sanctions."[149] However, this

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141. *Id.*

142. *See, e.g.*, Malouche v. JH Management Co., 839 F.2d 1024, 1025-26 (4th Cir. 1988) (defining "willful" as requiring a violation of a known legal duty and citing to *Murdock* to support its definition).

143. United States v. Murdock, 290 U.S. 389, 394-95 (1933) (citations omitted).

144. *Deibler*, 365 Md. at 196-97, 776 A.2d at 663-64. The court downplayed the importance of the Senate Report's reference to *United States v. Murdock* and stated that the Committee "simply noted the requirement that a violation of § 2511(1) be 'willful to be criminal' and cited, in parenthesis and without explanation, *United States v. Murdock*." *Id.* at 196, 776 A.2d at 663.

145. *Id.* at 198-99, 776 A.2d at 665.

146. *See supra* notes 35-43 and accompanying text.

147. *See Deibler*, 365 Md. at 197, 776 A.2d at 664.

148. *Id.* (citing G. Robert Blakey & James A. Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968)).

149. *Id.* (quoting Blakey & Hancock, *supra* note 148, at 666 n.19).

statement can actually be read to support the argument that willful requires some *known violation of the law*; in essence, good faith mistakes are not "willful" because the offender does not knowingly violate the law. Thus, the court's reliance on the article's "good faith" explanation of "willful" does not properly support the position that Congress only intended "willful" to require intent. In fact, it bolsters the federal courts' interpretation that "willful" is a violation of a known legal duty.

Further support offered by the court that "willful" is merely intent is also unpersuasive. As part of its attempt to reject the *Murdock* reference, the court reasoned that it was always Congress's intent to have "willful" mean "intentional."[150] However, the consistent interpretation of "willful" prior to the 1986 amendment and the United States District Court for the District of Maryland's opinion in *Earley v. Smoot* suggest otherwise.[151] According to the *Earley* court, the amendment "dilute[d] the standard of proof from willfulness to mere intent, after holdings that the willfulness standard required proof of knowledge of the unlawfulness of the interception."[152] To counter the *Earley* court's position, the *Deibler* court relied on various House and Senate reports from which it inferred that the federal courts had misconstrued Congress's legislative intent.[153] However, the legislative history regarding the 1986 amendment is lean and does not give a direct explanation for the omission of "willful." For example, when Congress amended the federal wiretap statute in 1986, it never clearly stated whether it omitted "willful" because the word had been given an improper meaning since its enactment, or because Congress's intentions had since changed and it was updating the statute to reflect its intent that the statute was more restrictive than the federal courts had interpreted it to be. The Senate Report's only stated purpose for the amendment was "to underscore that inadvertent interceptions are not crimes under the Electronic Communications Privacy Act."[154]

The court's reliance on the Senate Report statement that "willful" was always intended to mean intentional is problematic in two re-

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150. *Id.* at 198-99, 776 A.2d at 665 (relying on comments made in Senate and House reports that the federal courts had misconstrued Congress's original intent).

151. *See* Malouche v. JH Management Co., 839 F.2d 1024, 1026 (4th Cir. 1988) (explaining that "willful" in the federal wiretap statute means an intentional or reckless disregard of a known legal duty); Citron v. Citron, 722 F.2d 14, 16-17 (2d Cir. 1983) (defining the pre-1986 amendment definition of "willful" as requiring at least an "intentional violation," or "reckless disregard of . . . a known legal duty"); Earley v. Smoot, 846 F. Supp. 451, 453 (D. Md. 1994) (same).

152. *Earley*, 846 F. Supp. at 453.

153. *Deibler*, 365 Md. at 198-99, 776 A.2d at 664-65.

154. S. REP. NO. 99-541, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577.

spects. First, the statement inadequately supports the notion that "willful" does not require knowledge of a violation of a duty. Second, the statement does not suggest that Congress felt the federal courts had misconstrued their intended meaning. The Senate Report only suggests that the amendment was added to prevent the convictions of those who mistakenly intercept another's conversation. This does not suggest that the various federal courts' interpretation of "willful" as requiring knowledge of the violation of a duty of was incorrect. In fact, it is arguable that the 1968 definition afforded more protection to the "good faith" interceptor and assured that these interceptors would not be prosecuted. Under the 1968 standard, the interceptor was protected more because it had to be proven both that he intentionally intercepted the conversation and that he did so knowingly violating a legal duty.[155] Certainly, the 1968 standard fits Congress's purpose of ensuring that inadvertent interceptions are not prosecuted. Thus, the Court of Appeals's disagreement with *Earley* and its finding that Congress always intended willful to only mean intentional is unpersuasive.

Thus, by focusing on the 1986 federal wiretap statute and its legislative history, instead of the 1968 statute, the court incorrectly applied the federal statute's current *mens rea*, even though it was not available when Maryland adopted its own wiretap statute in 1977.

c. Further Indication that the Court of Appeals's Definition of "Willful" in the Deibler *Case Was Not Reflective of the Maryland Legislature's Intent.*—The Maryland General Assembly has amended the Maryland wiretap statute since Congress passed the 1986 federal amendment, and the General Assembly retained the term "willful."[156] In fact, the General Assembly amended the statute in 1998, after the *Fearnow* and *Hawes* decisions that defined "willful" as requiring a knowing violation of a legal duty.[157] In its 1998 amendment, the Maryland legislature specifically chose to leave "willfully" untouched.[158] If the General Assembly disagreed with the definition of "willfully" ap-

155. *See Citron*, 722 F.2d at 16.

156. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (1998 & Supp. 2001).

157. *See* Fearnow v. Chesapeake & Potomac Tel. Co., 104 Md. App. 1, 23-24, 655 A.2d 1, 12 (1995); Hawes v. Carberry, 103 Md. App. 214, 222, 653 A.2d 479, 483 (1995). When the General Assembly amended the wiretap statute in 1998, both the *Fearnow* and *Hawes* decisions had been published for close to four years.

158. *Compare* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (1998 & Supp. 2001), *with* Act of July 1, 1977, ch. 692, 1977 Md. Laws. The General Assembly reenacted the statute in 1998 and kept § 10-402 subparts (a) and (b), where the term "willful" appears without change.

plied by the Court of Special Appeals, the legislature would have replaced the term "willfully" with the term "intentionally." That the General Assembly kept "willfully" strongly suggests that the legislature approved of the courts' interpretation that "willful" required knowledge of a violation of a legal duty, thus indicating the inherent inaccuracies of the *Deibler* decision.

5. Conclusion.—In *Deibler v. State*, by holding that "willfully" in the Maryland wiretap statute means an act is "done intentionally-purposely,"[159] the Court of Appeals over-stepped its role and assumed the role of the legislature.[160] In so doing, the court allowed its sense of morality to consume its sense of fairness under the law. While the court's opinion arguably resulted in a morally just outcome, the court should have refrained from redefining "willfull," and instead should have fulfilled its judicial duty by writing an opinion alerting the General Assembly to the ambiguity of "willfull" and the need for legislative clarification. While the outcome of this case serves society by punishing an immoral person for his undoubtedly wrongful acts, it also undermines the faith one may have in the judicial system. This decision was unpredictable and suggests that it is within the court's power to, without reason, ignore an abundance of past case law and take on the role of the legislature to override these other courts.

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159. *Deibler*, 365 Md. at 199, 776 A.2d at 665.

160. The Court of Appeals arguably changed the General Assembly's intent with regard to the meaning of "willful." When the General Assembly reenacted the wiretap statute in 1998, it was most likely aware of the way *Fearnow* and *Hawes* had interpreted "willful" and of Congress's change to the federal wiretap statute; however, the fact that the General Assembly reenacted "willful" without change suggests that it agreed with the courts' interpretations. Thus, when the Court of Appeals deviated and defined the term as only requiring mere intent, it arguably overrode the intent of the Maryland legislature.

B. *Defining Slot Machines: The Court of Appeals Refuses to Expand Section 264B to Include Pull-Tab Dispensers*

In *Chesapeake Amusements, Inc. v. Riddle*,[1] the Court of Appeals of Maryland held that a pull-tab dispenser that contains a video screen and plays musical notes when a winning ticket is dispensed is not a slot machine as defined by Article 27, section 264B of the Annotated Code of Maryland.[2] While the court's holding is consistent with Maryland law, the court declined to examine precedent and the legislative history of the statutory provision. In so doing, the court forfeited an opportunity to clarify the intent of section 264B and insist that any regulation of pull-tab dispensers be promulgated by the General Assembly.

1. The Case.—Chesapeake Amusements, Inc. is a for-profit corporation that operates a validly licensed commercial bingo establishment in Calvert County, Maryland.[3] In addition to live bingo games, Chesapeake Amusements offers instant bingo games, also called "pull-tabs" or "pull-tab tickets."[4] Customers may either purchase pull-tabs from an employee or play a pull-tab ticket from an instant bingo machine.[5] Prior to the filing of this action, Chesapeake Amusements of-

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1. 363 Md. 16, 766 A.2d 1036 (2001).

2. *Id.* at 18-19, 766 A.2d at 1037. Article 27, section 264B of the Maryland Code provides that:

> Any machine, apparatus or device is a slot machine within the provisions of this section if it is one that is adapted for use in such a way that, as a result of the insertion or deposit therein, or placing with another person of any piece of money, coin, token or other object, such machine, apparatus or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, coin, token or other object representative of and convertible into money, irrespective of whether the said machine, apparatus or device may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise or money or other tangible thing of value.

MD. ANN. CODE art. 27, § 246 (1996).

3. *Riddle*, 363 Md. at 19, 766 A.2d at 1037.

4. *Id.* Pull-tabs are paper tickets that are identical on the outside, but when the top is peeled back reveal a combination of symbols. Brief for Appellant at app. 3, *Riddle* (No. 1131). If the symbols inside a ticket match a predetermined combination, the ticket is considered a winner. *Id.* Pull-tabs are sold in "deals," which contain a finite number of tickets and a predetermined number of winning tickets. *Id.*

5. *Riddle*, 363 Md. at 19, 766 A.2d at 1037.

fered three types of instant bingo machines, the Play & Win, the Lucky Tab II, and the Oasis.[6]

The Play & Win machine is simply a pull-tab dispenser that, upon the insertion of money, removes a paper pull-tab from the top of a stack and places it in a tray on the front of the machine.[7] The Lucky Tab II also dispenses a paper pull-tab upon the insertion of money; in addition, the machine uses a bar code located on the back of the paper ticket to display a video image of the symbols located on the inside of the pull-tab.[8] If the pull-tab is a winning ticket, the Lucky Tab II emits a musical signal.[9] The Oasis does not dispense paper pull-tab tickets, but instead operates entirely electronically.[10] Upon the insertion of money, the Oasis displays video images and keeps track using a credit system of the number of winning electronic tickets a customer has purchased.[11]

In an unpublished letter dated February 27, 1996, in response to a request from Senator Gloria Lawlah, the Attorney General's Office opined that the "player enhancement features" of the Lucky Tab II made it an illegal slot machine.[12] Based on this letter, the State's Attorney for Calvert County informed Chesapeake Amusements that its instant bingo machines may be illegal.[13] In response, Chesapeake Amusements filed a declaratory judgment action in the Circuit Court for Calvert County to determine the legality of its instant bingo machines.[14]

The circuit court ruled that the Play & Win machine was not a slot machine, but that both the Lucky Tab II and the Oasis were illegal slot machines.[15] With respect to the Lucky Tab II, the circuit judge held that because the machine "reads the printed card and tells the player whether he or she has won" the ticket is "unnecessary except as voucher to get payment of winnings."[16] This feature, the court con-

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6. *Id.*

7. Brief for Appellant at app. 7, *Riddle* (No. 1131).

8. *Id.* at app. 8-10.

9. *Id.* at app. 10.

10. *Id.* at app. 11.

11. *Id.* at app. 11-12.

12. *Riddle*, 363 Md. at 18 n.2, 766 A.2d at 1037 n.2.

13. *Id.* In 1995, prior to the Attorney General's letter, the Calvert County State's Attorney's Office had indicated to Chesapeake Amusements that instant bingo machines with video enhancement were legal. Brief for Appellant at app. 14, *Riddle* (No. 1131).

14. *Riddle*, 363 Md. at 18, 766 A.2d at 1037.

15. Chesapeake Amusements Inc. v. Riddle, No. CA 97-535, at 9 (Calvert County, Md., Cir. Ct. Apr. 1, 1998).

16. *Id.*

cluded, made the Lucky Tab II an illegal slot machine.[17] The court relied on *Clerk v. Chesapeake Beach Park*,[18] in holding that because the Lucky Tab II is "a machine that furnishes gratification or reward to a winning player other than further free plays," it is among those machines the General Assembly intended to ban through article 27, section 264B.[19] Chesapeake Amusements appealed to the Court of Special Appeals, but the Maryland Court of Appeals intervened, issuing a writ of certiorari *sua sponte* in order to consider whether the Lucky Tab II machine qualified as an illegal slot machine.[20]

2. *Legal Background.*—When considering whether the Lucky Tab II can properly be classified as a slot machine under section 264B, it is appropriate to consider several areas of law. Because the inquiry requires interpreting a statute, it is important to review the general rules of statutory construction. In order to fully understand the legislative intent of section 264B, the legislative history of the statute should be examined. A thorough review of case law interpreting section 264B is crucial to understanding how the Maryland courts have previously dealt with similar issues. Finally, an examination of other jurisdictions' treatment of the same or similar machines provides instruction when classifying the Lucky Tab II.

a. Statutory Construction.—Maryland courts employ several general rules of construction when interpreting a statutory provision. The most important rule of statutory construction is to "ascertain and effectuate legislative intent."[21] The inquiry into legislative intent ordinarily begins and ends with the wording of the statute, provided that the wording is plain and unambiguous.[22] The legislative history of an unambiguous statute may be consulted in order to better understand

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17. *Id.*

18. 251 Md. 657, 248 A.2d 479 (1968).

19. *Riddle*, No. CA 97-535, at 9 (internal quotation marks omitted).

20. *Riddle*, 363 Md. at 23, 766 A.2d at 1039. The other two pull-tab machines, the Play & Win and the Oasis, were not at issue on appeal. *Id.*

21. Mayor of Baltimore v. Chase, 360 Md. 121, 128, 756 A.2d 987, 991 (2000) (quoting Chesapeake & Potomac Tel. Co. v. Dir. of Fin., 343 Md. 567, 578, 683 A.2d 512, 517 (1996)); *see also* Condon v. State, 332 Md. 481, 491, 632 A.2d 753, 757 (1993) (stating that carrying out the true intention of the legislature is the cardinal rule of statutory interpretation); State v. Crescent Jaycees Found., Inc., 330 Md. 460, 468, 624 A.2d 955, 959 (1993) (stating that effectuating legislative intent is the cardinal rule of statutory interpretation).

22. *See* Oaks v. Connors, 339 Md. 24, 35, 660 A.2d 423, 429 (1995) (explaining that when statutory language expresses a plain meaning the court will interpret the statute as written); Mayor of Baltimore v. Cassidy, 338 Md. 88, 93-94, 656 A.2d 757, 760 (1995) (stating that "where the ordinary and common meaning of the words . . . is clear and unambiguous is it ordinarily unnecessary to go further").

legislative intent;[23] however, it should not be used to undermine or contradict the plain meaning of the statute.[24]

Courts must consider the plain language of a statute even when the legislature has instructed the courts to construe that statute liberally.[25] In *Mayor of Baltimore v. Cassidy*, the Court of Appeals interpreted the Workers' Compensation Act,[26] which mandates a liberal interpretation.[27] The court declared that it is "well settled . . . that the court may not disregard the plain meaning of the Act in the name of liberal construction."[28]

Likewise, the court may not extend the meaning of the statutory language beyond the bounds of common sense. In *Condon v. State*, the court noted that a statute should not be construed using "forced or subtle interpretations that limit or extend its application."[29] In *Victor Sparkler Co. v. Gilbert*, the court reasoned that even when construing a statute liberally, the court must still look to general rules of statutory interpretation and should not extend the coverage of a statute beyond "the intent of the law."[30]

b. History of Section 264B.—In 1962, Governor Tawes announced his intention to abolish slot machines in Maryland.[31] Recognizing the economic impact this would have, the governor appointed a committee to recommend procedures for banning slot machines in four southern Maryland counties.[32] Known as the Emory Commission,[33] the committee examined the economic impact of slot machines in Anne Arundel, Calvert, Charles, and St. Mary's counties.[34] The committee determined that the abolition of slot machines re-

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23. *See* Harris v. State, 331 Md. 137, 146, 626 A.2d 946, 950 (1993) (reasoning that "[i]n the interest of completeness" a court may look to the legislative history of an unambiguous statute).

24. *See, e.g., Chase*, 360 Md. at 131, 756 A.2d at 993.

25. *See, e.g., Cassidy*, 338 Md. at 97, 656 A.2d at 762; Victory Sparkler Co. v. Gilbert, 160 Md. 181, 185, 153 A. 275, 276 (1931).

26. *Cassidy*, 338 Md. at 90, 656 A.2d at 758.

27. *See* MD. CODE ANN., LAB. & EMPL. § 9-102(b) (1999) (stating that the rule of strict construction is inapplicable to the Workers' Compensation title).

28. *Cassidy*, 338 Md. at 97, 656 A.2d at 762.

29. Condon v. State, 332 Md. 481, 491, 632 A.2d 753, 758 (1993) (internal quotation marks omitted).

30. *Gilbert*, 160 Md. at 185, 153 A. at 276.

31. RICHARD W. EMORY ET AL., SLOT MACHINE STUDY COMMITTEE REPORT 1 (1963).

32. *See generally* Clerk v. Chesapeake Beach Park, Inc., 251 Md. 657, 660-62, 248 A.2d 479, 481-82 (1968) (explaining the legislative history of section 264B).

33. The commission was named after its chairperson, Richard W. Emory. State v. 158 Gaming Devices, 304 Md. 404, 414, 499 A.2d 940, 945 (1985).

34. EMORY ET AL., *supra* note 31, at 7.

quired the enactment of legislation prohibiting any machine that could be used for gambling purposes, including "free play slot machines."[35] Prohibiting only traditional slot machines, the committee found, would allow gambling in Maryland while depriving the state of the revenues it enjoyed through legalized gambling.[36]

c. Maryland Case Law Interpreting Section 264B.—The Court of Appeals interpreted section 264B for the first time in *Clerk v. Chesapeake Beach Park, Inc.*, a declaratory judgment action brought to determine whether machines that award winners free plays redeemable for merchandise are slot machines as defined by the statute.[37] After reviewing the legislative history of section 264B,[38] the court noted that article 27, section 246 of Maryland Code requires that courts construe gaming statutes liberally "so as to prevent the mischiefs which the Legislature sought to repress."[39] The court also noted that a general rule of statutory interpretation is to consider the intent of the legislature and whenever possible "harmonize all parts of the statute" so the intent and interpretation remain consistent.[40] With that in mind, the court held that the phrase "representative of and convertible into money" in section 264B should be interpreted to mean "representative of *or* convertible into money" in order to effectuate legislative intent.[41] Because the machines in question allowed players to trade their accumulated free plays for merchandise, thereby making the free plays representative of money, the court concluded that the machines were illegal under section 264B.[42]

Five years later, the Court of Special Appeals interpreted section 264B in *Allen v. State*.[43] The court held that both the shell of a console slot machine with most of its inner workings removed and the reel apparatus from another machine were not slot machines under sec-

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35. *Id.* at 14.

36. *Id.*

37. *Chesapeake Beach Park*, 251 Md. at 659, 248 A.2d at 480.

38. *Id.* at 660-62, 248 A.2d at 481-82. The Emory Commission looked closely at the problem of "free play" machines, noting that if they were not prohibited, the slot machine business would continue without providing the counties the revenue that they once enjoyed. *Id.* at 660, 248 A.2d at 481.

39. *Id.* at 664-65, 248 A.2d at 483 (quoting Gaither v. Cate, 156 Md. 254, 258, 144 A. 239, 240 (1929)). Article 27, section 246 of Maryland Code provides: "The courts shall construe the preceding sections relating to gambling and betting liberally, so as to prevent the mischiefs intended to be provided against." MD. ANN. CODE art. 27, § 246 (1996).

40. *Chesapeake Beach Park*, 251 Md. at 663-64, 248 A.2d at 483 (quoting State Dep't v. Elliott-Brandt, 237 Md. 328, 335-36, 206 A.2d 131, 135 (1965)).

41. *Id.* at 667, 248 A.2d at 485.

42. *Id.* at 668-69, 248 A.2d at 485.

43. 18 Md. App. 459, 307 A.2d 493 (1973).

tion 264B.[44] The court noted that section 264B proscribes any machine "that is adapted for use as a slot machine."[45] Although acknowledging that gambling laws must be liberally construed, the court declared that "common sense" must mark the limit of liberal construction.[46] The court concluded that if the legislature intended to proscribe machines that are "'adaptable' or 'easily adapted' for use as slot machines" it could have used those terms; instead, the legislature chose more restrictive language.[47] Finally, the court stated that if the legislature was displeased with the court's holding, the remedy would be to amend the statute.[48] The court refused to engage in what it termed "judicial embellishment" of the current language.[49]

The Court of Appeals revisited section 264B in 1985, holding in *State v. 158 Gaming Devices*[50] that machines equipped with knock-off meters, odds mechanisms, or other indicia of gambling are illegal slot machines under section 264B.[51] The court determined that when a machine has been adapted for gambling, a free play can be considered an object "representative of or convertible into money" as prohibited by section 264B.[52] The court refused to go further, however, stating that section 264B does not prohibit a device that awards free plays but is not adapted for gambling.[53] In *158 Gaming Devices*, as in *Allen*, the court recognized that the legislature examined the language of other jurisdictions' gambling statutes before enacting Maryland's gambling statute. Again, the court concluded that the language of section 264B was intentionally restrictive.[54]

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44. *Id.* at 471, 307 A.2d at 500.

45. *Id.* at 465, 307 A.2d at 497 (internal quotation marks omitted).

46. *Id.* at 469-70, 307 A.2d at 499.

47. *Id.* at 465, 307 A.2d at 497. The court looked to the legislature's consideration of a New York statute when writing section 264B and noted that section 982 of the New York Penal Laws defines a slot machine as "any machine . . . that is adapted, or may readily be converted into one that is adapted" for use as a slot machine. *Id.* at 466, 307 A.2d at 497. The court used the legislature's knowledge of alternative statutes to infer that the restrictive language was chosen deliberately. *Id.* at 465, 307 A.2d at 497.

48. *Id.* at 471, 307 A.2d at 500.

49. *Id.*

50. 304 Md. 404, 499 A.2d 940 (1985).

51. *Id.* at 436, 499 A.2d at 956. Knock-off meters operate to remove the accumulated free plays from the machine while maintaining a record of the total free plays actually won. *Id.* at 409, 499 A.2d at 943. Odds mechanisms allow the player to change the odds of winning by inserting more money. *Id.* at 416, 499 A.2d at 946.

52. *Id.* at 429, 499 A.2d at 953.

53. *Id.* at 432, 499 A.2d at 954.

54. *Id.*, 499 A.2d at 955.

Two years later, in *State v. 149 Slot Machines*,[55] the Court of Appeals held that the phrase "any other gaming device," found in the statute that permits charitable organizations to participate in certain forms of gaming, does not include slot machines.[56] The court stated that it must "ascertain the intent" of the legislature in enacting the statutes in order to interpret them correctly.[57] After noting that section 246 calls for liberal construction of gaming statutes, the court looked to the legislative history of section 264B to determine that the General Assembly intended to completely ban slot machines from the State of Maryland, including their use by non-profit organizations.[58]

When interpreting section 264B, Maryland courts have attempted to strike a balance between legislative intent and the mandate to construe all gaming statutes liberally. The courts have on several occasions refused to expand section 264B beyond the plain meaning of its language, noting that the legislature had the opportunity to write a more restrictive statute and chose not to do so. However, the courts have also considered the original intent of section 264B—the complete abolition of slot machines—when determining what constitutes a slot machine under the statute.

d. Treatment of Pull-Tab Dispensers in Other Jurisdictions.—

(1) Federal Treatment of Pull-Tab Dispensers.—The federal government has considered the legality of pull-tab dispensers in the context of the Indian Gaming Regulatory Act (IGRA).[59] Under the provisions of the IGRA, Indian tribes can engage in certain forms of gambling without state approval and may also use electronic or computer aids, labeled Class II devices, in conjunction with those forms of gambling.[60] However, tribes may not use electronic "facsimiles of any game of chance,"[61] labeled Class III devices,[62] without a tribal-state compact.[63]

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55. 310 Md. 356, 529 A.2d 817 (1987).

56. *Id.* at 365, 529 A.2d at 821. Article 27, section 255 of the Maryland Code allows religious and other non-profit organizations to participate in fund raisers that include "paddle wheels, wheels of fortune, chance books, bingo, or any other gaming device." MD. ANN. CODE art. 27, § 255(b)(2) (1996).

57. *149 Slot Machines*, 310 Md. at 361, 529 A.2d at 819.

58. *Id.* at 362-64, 529 A.2d at 820-21 (noting the Emory Commission's failure to recommend any exemptions from the ban on slot machines in its report to the legislature and the General Assembly's rejection of numerous amendments that would have exempted certain non-profit organizations from section 264B).

59. 25 U.S.C. §§ 2701-2721 (2000).

60. *Id.* §§ 2703(7), 2710(b).

61. *Id.* § 2703(7)(B)(ii).

62. *Id.* § 2703(8).

63. *Id.* § 2710(d).

In *Cabazon Band Mission Indians v. National Indian Gaming Commission*,[64] the United States Court of Appeals for the District of Columbia held that a video machine that selects a pull-tab, opens the tab, and displays the symbols found inside the card on the video screen constituted a Class III facsimile.[65] The court stated that the machine in question was a "computerized" version of the game of pull-tabs and was thus a facsimile.[66] Similarly, in *Sycuan Band of Mission Indians v. Roache*,[67] the United States Court of Appeals for the Ninth Circuit concluded that a self-contained machine with a video monitor and a printer was a Class III facsimile.[68] The court reasoned that because a player puts money into the machine and either loses the money or receives a winning ticket, he or she plays "with the machine even though not against it."[69]

In *Diamond Game Enterprises, Inc. v. Reno*,[70] the Court of Appeals for the District of Columbia had occasion to classify the same machine at issue in *Riddle*, the Lucky Tab II.[71] The court held that the game was an electronic aid, and therefore a Class II gaming device.[72] The court rejected the reasoning of the District Court for the District of Columbia,[73] which held that because the Lucky Tab II performs all the functions of a player in a traditional pull-tab game, it is a facsimile of a pull-tab game.[74] The court instead distinguished the Lucky Tab II from the game at issue in *Cabazon*, noting that unlike the machine in *Cabazon*, the Lucky Tab II cannot function without the insertion of the roll of paper pull-tabs.[75] A player of the Lucky Tab II must present an actual paper pull-tab to a clerk before obtaining any winnings, and should a discrepancy exist between the paper pull-tab and the video screen, the paper tab would control.[76] This, the court held, makes the Lucky Tab II "little more than a high-tech dealer . . . an aid to the

64. 14 F.3d 633 (D.C. Cir.), *cert. denied*, 512 U.S. 1221 (1994).
65. *Id.* at 636.
66. *Id.*
67. 54 F.3d 535 (9th Cir. 1994).
68. *Id.* at 542.
69. *Id.* at 543 (internal quotation marks omitted).
70. 230 F.3d 365 (D.C. Cir. 2000).
71. *Id.* at 366.
72. *Id.* at 370.
73. *Id.* at 371.
74. Diamond Game Enters., Inc. v. Reno, 9 F. Supp. 2d 13, 20-21 (D.D.C. 1998).
75. *Diamond Game*, 230 F.3d at 370.
76. *Id.*

game of pull-tabs," and thus a Class II electronic aid not requiring a tribal-state compact.[77]

(2) Other States' Treatment of Pull-Tab Dispensers.—Several states address the issue of pull-tab dispensers through statutory regulation. For example, Texas prohibits the operation of more than five pull-tab dispensers on one premises[78] and requires that a "bingo game representation" be displayed on a ticket dispensed from a pull-tab dispenser.[79] The Texas statute also prohibits the dispensing of awards or prizes by a pull-tab dispenser.[80]

Louisiana specifically regulates "electronic pull-tab devices," which it defines as "any . . . device . . . that, upon insertion of cash, produces electronic facsimiles of pull-tab tickets or cards and is available to play or simulate the play of the game of pull-tabs."[81] Among other regulations, the statute requires the inspection of each machine,[82] that machines be equipped to print a ticket voucher that includes the prize won in numbers and words,[83] and prohibits the machine from accepting bills with a denomination over ten dollars.[84]

Like many other states, Pennsylvania permits non-profit organizations to raise funds using certain games of chance.[85] Pennsylvania's legislature defines games of chance as "punchboards, daily drawings, raffles and pull-tabs," adding that "the assistance of any mechanical or electrical devices or media other than a dispensing machine" is not permitted.[86] The Commonwealth Court of Pennsylvania applied that statute to the Lucky Tab II in *Major Manufacturing Corp. v. Department of Revenue*.[87] The court held that the Lucky Tab II's enhancements "assist the play of the game" and its "active nature" supports the find-

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77. *Id.* The court stated that it saw no discernible difference between the Lucky Tab II and an electronic scanner entitled the "Tab Force Validation System," which simply reads a paper pull-tab that has been dispensed by a clerk and displays the results on a video screen. The National Indian Gaming Commission, the agency charged with implementing the IGRA, has classified the Tab Force Validation System as a Class II aid. *Id.*

78. TEX. OCC. CODE ANN. § 2001.410(c) (Vernon Supp. 2002).

79. *Id.* § 2001.410(d).

80. *Id.* § 2001.410(a)(3).

81. LA. REV. STAT. ANN. § 733(A)(2) (West 2000).

82. *Id.* § 733(B)(1).

83. *Id.* § 733(B)(5)(a)(iii-iv).

84. *Id.* § 733(B)(5)(b).

85. *See* PA. STAT. ANN. tit. 10, § 314 (West 2002) (regulating the use of games of chance by nonprofit organizations).

86. *Id.* § 313.

87. 651 A.2d 204 (Pa. Commw. Ct. 1994), *appeal denied*, 665 A.2d 471 (Pa. 1995).

ing that it is more than a passive dispensing machine, and therefore illegal.[88]

3. The Court's Reasoning.—In *Chesapeake Amusements, Inc. v. Riddle*, the Court of Appeals of Maryland held that the Lucky Tab II was not an illegal slot machine as defined by Article 27, section 264B.[89] Chief Judge Bell, writing for the court, declared that the crucial question was whether the relevant statute permitted drawing a distinction between pull-tab dispensers with enhancements and those without enhancements.[90] The court concluded that the answer lies in how the statutory phrase "by reason of any element of chance or of other outcome of such operation unpredictable by [the player]"[91] is interpreted.[92] The court interpreted the phrase to mean that an illegal slot machine must contain an element of chance that provides the possibility of winning due to the "unpredictable operation of the machine."[93] Because the Lucky Tab II dispenses pull-tabs off a roll in a nonrandom fashion, and the game itself is played with the paper pull-tabs, the court held that the element of chance required by section 264B is not present.[94]

The government argued that the legislative mandate to construe gaming statutes liberally supported an interpretation of 264B that considers the element of chance from the viewpoint of the player.[95] The government contended that whether a machine's visual and aural enhancements lead a player to believe that the machine itself contains the element of chance should be considered when determining if a machine is prohibited by section 264B.[96] The court rejected this argument, concluding that the language of section 264B is clear and unambiguous with regard to the chance element.[97] The court concluded that section 264B clearly states that for a machine to be considered a slot machine, a player must provide consideration in return for the possibility of receiving a prize based upon "the unpredict-

88. *Id.* at 207-08.

89. *Riddle*, 363 Md. at 18-19, 766 A.2d at 1037.

90. *Id.* at 28, 766 A.2d at 1042.

91. MD. ANN. CODE art. 27, § 264B (1996).

92. *Riddle*, 363 Md. at 28, 766 A.2d at 1042. The court defined the phrase above as the "chance element" of the statute. *Id.*

93. *Id.* at 30, 766 A.2d at 1043.

94. *Id.* at 30-31, 766 A.2d at 1043.

95. *Id.* at 27, 766 A.2d at 1041.

96. *See* Brief for Appellee at 6, 9-13, Chesapeake Amusements, Inc. v. Riddle, 352 Md. 309, 721 A.2d 988 (1998) (No. 124).

97. *Riddle*, 363 Md. at 41, 766 A.2d at 1049.

able operation of the machine."[98] The court concluded that because the statute is unambiguous, general rules of statutory construction prohibit its rewriting, even under the guise of liberal interpretation.[99]

In rejecting the government's argument, the court distinguished previous cases that broadly interpreted section 264B.[100] While acknowledging that section 264B does require a liberal interpretation,[101] the court concluded that the previous cases all dealt with either ambiguous language[102] or ambiguity created by the juxtaposition of two separate statutes.[103] Although the court agreed that *Clerk v. Chesapeake Beach Park* contains the broadest interpretation of 264B, it concluded that because of the laxity surrounding the terms "and" and "or", *Chesapeake Beach Park* is an example of the court interpreting ambiguous language.[104]

The court dismissed the government's argument that the court should hold consistently with cases from other jurisdictions finding pull-tab dispensers to be illegal slot machines.[105] The court opined that those cases were "not particularly persuasive" because they interpreted statutes containing different language.[106] The court did find the D.C. Circuit's reasoning in *Diamond Game Enterprises, Inc. v. Reno* appealing, however, noting that it is "reminiscent of the appropriate analysis in this case."[107] The court quoted extensively from *Diamond Game*, particularly noting the D.C. Circuit's reasoning with regard to the similarities between a validation machine that simply reads a pull-tab and the Lucky Tab II.[108] The court concurred that there is no legitimate difference between a machine that merely reads manually purchased pull-tabs and the machine at issue in *Riddle*.[109]

The Court of Appeals concluded that the element of chance required by section 264B is in the paper pull-tabs and not in the opera-

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98. *Id.* at 30, 766 A.2d at 1043.

99. *See id.* at 34, 766 A.2d at 1045 (stating that liberal interpretation, like all rules of construction, exists to "construe an ambiguous statute, not to rewrite a clear one").

100. *Id.* at 32-36, 766 A.2d at 1044-46.

101. *Id.* at 32, 766 A.2d at 1044.

102. *Id.* at 33-36, 766 A.2d at 1045-46.

103. *Id.* at 33, 766 A.2d at 1044-45.

104. *Id.* at 35-36, 766 A.2d at 1046.

105. *Id.* at 36-39, 766 A.2d at 1046-48.

106. *Id.* at 38, 766 A.2d at 1048. The court found *Major Manufacturing Corp. v. Department of Revenue*, 651 A.2d 204 (Pa. Commw. Ct. 1994), particularly unpersuasive because Pennsylvania's statute requires the court to ask whether a machine assists in the play of the game, not whether the element of chance is required to be inherent in the operation of the machine. *Riddle*, 363 Md. at 36-37, 766 A.2d at 1046-47.

107. *Riddle*, 363 Md. at 39, 766 A.2d at 1048.

108. *Id.* at 40-41, 766 A.2d at 1048-49.

109. *Id.*

tion of the Lucky Tab II.[110] Because the court found the language of 264B clear and unambiguous, the court refused to recognize an interpretation of that provision that considers the element of chance from the player's perspective.[111]

4. Analysis.—The court's holding in *Chesapeake Amusements, Inc. v. Riddle,* that the Lucky Tab II does not fit within the statutory definition of a slot machine as provided by section 264B, is consistent with Maryland law. Section 264B is clearly written, and the plain language of the statute leads to the conclusion that the Lucky Tab II is not a slot machine. It was appropriate, therefore, for the court to refuse to adopt an interpretation that would be tantamount to a rewriting of the statute. The court's decision would have been better supported, however, by an examination of legislative intent with regard to pull-tab dispensers. Legislative intent in this case supports the court's conclusion that section 264B should not be interpreted from the player's perspective. Furthermore, Maryland precedent instructs against adopting the government's position in situations where the courts have declined to liberally interpret section 264B if the interpretation proves contrary to legislative intent. However, the Court of Appeals should have noted that previous courts have refused to interpret section 264B as liberally as possible when not supported by legislative intent. The court also should have declared that the General Assembly possesses the only authority to amend the gaming statutes and regulate pull-tab dispensers. In failing to do so, the court has left the door open to similar challenges charging that different types of pull-tab machines are illegal slot machines.

a. Maryland Precedent Supports the Court's Interpretation of Section 264B.—In its brief to the court, the government argued that because gambling statutes are to be construed liberally, it is reasonable to interpret the chance element of section 264B from the player's perspective.[112] Courts, however, have repeatedly refused to give section 264B the most liberal interpretation possible in the absence of legislative intent instructing them to do so.[113] These cases support the *Rid-*

110. *Id.* at 41, 766 A.2d at 1049.

111. *Id.*

112. Brief for Appellee at 8-14, Chesapeake Amusements, Inc. v. Riddle, 352 Md. 309, 721 A.2d 988 (1998) (No. 124).

113. *See, e.g.*, State v. 158 Gaming Devices, 304 Md. 404, 432, 499 A.2d 940, 954 (1985) (holding that only those free play machines that have been adapted for gambling are illegal slot machines); Allen v. State, 18 Md. App. 459, 464-65, 307 A.2d 493, 496-97 (1973) (holding that slot machines must actually be adapted for use rather than readily or easily adapted for use).

dle court's refusal to accept the government's interpretation of section 264B.

For example, in *State v. 158 Gaming Devices*, the Court of Appeals could have interpreted section 264B as outlawing all machines that award free plays, even those not adapted for gambling.[114] Instead, the court examined legislative history and determined that section 264B was not intended to prohibit "a true amusement device which awards only free plays."[115] Rather than blindly adopt the most liberal interpretation possible, the court looked to the language and history of section 264B to determine and effectuate legislative intent.[116]

In *Allen v. State*, the Court of Special Appeals had the opportunity to interpret section 264B to include machines that are "adaptable" or "easily adapted" for use as slot machines.[117] Again, the court looked to legislative history and determined that the language chosen by the General Assembly was deliberately restrictive.[118] The court held that because the General Assembly chose the language "is adapted for use" as a slot machine, section 264B does not proscribe pieces of machines that are not currently adapted for use as a slot machine.[119] The court looked to the legislative intent to bolster its interpretation of the plain language of the statute and concluded that even when construing a statute liberally, common sense must mark the boundaries of statutory construction.[120]

In *Riddle*, the Court of Appeals again rejected a liberal interpretation of section 264B that strayed outside the boundaries of common sense.[121] The court rejected the government's argument that the chance element of section 264B can be interpreted from the player's perspective.

b. Legislative Intent Supports the Court's Interpretation of Section 264B.—Although not required to do so, the court should have examined the Emory Commission's Report.[122] The court could have compared the language in the report to the language in section 264B in order to fully comprehend the legislature's goal in enacting section

114. *See 158 Gaming Devices*, 304 Md. at 413, 499 A.2d at 945.
115. *Id.* at 432, 499 A.2d at 954.
116. *Id.*, 499 A.2d at 954-55.
117. *Allen*, 18 Md. App. at 464-65, 307 A.2d at 496-97.
118. *Id.* at 465, 307 A.2d at 497.
119. *Id.*
120. *Id.* at 469-70, 307 A.2d at 499.
121. *Riddle*, 363 Md. at 40, 766 A.2d at 1049.
122. *See supra* notes 31-36 and accompanying text (explaining the role of the Emory Commission in enacting section 264B).

264B. Additionally, the court could have confirmed the plain meaning of the statute.[123] The Court of Appeals stated in *Riddle* that an inquiry into legislative intent with regard to a clearly worded statute usually begins and ends with the language of that statute.[124] However, the history of an unambiguous statue may be consulted in order to achieve a full awareness of the legislature's purpose in enacting that statute.[125] Examining the legislative history of an unambiguous statute should serve only to confirm the intent made clear by the language, not contradict or expand it.[126] An examination of legislative history in this case would have confirmed the plain meaning of the statutory language. This confirmatory process would have strengthened the court's interpretation of section 264B.

The most informative piece of legislative history with respect to section 264B is the Emory Commission's report. The report states that its study includes "gambling legalized by local laws" and "Anne Arundel County commercial bingo establishments . . . because it would seem inconsistent to abolish legalized gambling by machines and retain legalized gambling by commercial bingo establishments."[127] The report examined the economic impact that a ban on slot machines would have and considered extensively whether to include free play machines in the overall ban.[128] Finally, the report examined several state statutes and the federal anti-gaming statute and recommended the repeal of all local laws pertaining to "cash pay-off machines" as well as the abolition of free play machines.[129]

While it is clear from the Emory Commission's Report that it recommended the abolition of all forms of cash pay-off machines, including free play machines,[130] the General Assembly chose not to do so. Instead, the legislature used the language found in section 264B, which bans only machines in which the user becomes entitled to re-

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123. *See* Harris v. State, 331 Md. 137, 146, 626 A.2d 946, 950 (1993) (stating that a court may look to supplementary material when interpreting an unambiguous statute "[i]n the interest of completeness"); *see also* State v. Thompson, 332 Md. 1, 7, 629 A.2d 731, 734 (1993) (noting that the court may look to material that bears on legislative purpose even when a statute is clear).

124. *Riddle*, 363 Md. at 28, 766 A.2d at 1042.

125. *See supra* note 123 and accompanying text (discussing the court's ability to look to supplementary material when interpreting a clearly worded statute).

126. *See* Mayor of Baltimore v. Chase, 360 Md. 121, 131, 756 A.2d 987, 993 (2000) (noting that examining legislative history when interpreting an ambiguous statute is not done in order to contradict the statute's plain meaning).

127. EMORY ET AL., *supra* note 31, at 2.

128. *Id.* at 3-14.

129. *Id.* at 14.

130. *Id.*

ceive money or any object that may be converted into money.[131] As the Court of Special Appeals noted in *Allen v. State*, because the Emory Commission detailed other, more sweeping legislation banning slot machines,[132] there is a permissible inference that the General Assembly's choice of more restrictive language was not accidental.[133] In the case of pull-tabs, the General Assembly could have chosen to use language that would have prohibited all commercial bingo, including pull-tab dispensers; it did not.[134] The legislature made a conscious choice not to prohibit pull-tab dispensers. By examining the legislative history of section 264B and acknowledging that choice, the court could have provided additional support for its decision.

c. Regulating Pull-Tabs Is a Function of the General Assembly.— The *Riddle* court's holding would also have been strengthened by a declaration that the legislature is the only branch of government with the authority to regulate pull-tab dispensers. Additionally, the court could have noted that if the General Assembly disagreed with the court's ruling, the General Assembly could amend the statute accordingly.[135] Since the passage of section 264B, the General Assembly has enacted legislation permitting commercial bingo in several Maryland counties.[136] By enacting this legislation, the General Assembly has expressed its willingness to regulate instant bingo machines. Other states, such as Texas and Louisiana have been successful in regulating the use of pull-tab dispensers through statutory enactments.[137] These states clearly define pull-tab dispensers and restrict their use through statute.[138] In so doing, these states have provided an instructive example of successful regulation in its proper forum—legislative enact-

131. MD. ANN. CODE art. 27, § 264B (1996).

132. The Florida and New York statutes quoted by the Commission banned any machine whereby the operator, through some element of chance, may receive a thing of value or "may secure additional chances or rights to use the machine." EMORY ET AL., *supra* note 31, at 14.

133. Allen v. State, 18 Md. App. 459, 467, 307 A.2d 493, 498 (1973).

134. *See* MD. ANN. CODE art. 27, § 264B.

135. *See Allen*, 18 Md. App. at 471, 307 A.2d at 500 (declaring that if the legislature felt the purpose of section 264B was construed too narrowly by the court, the remedy was to amend the statute).

136. *See* MD. ANN. CODE art. 27, §§ 247-261. The statutes regulating commercial bingo include a clause which states that the term "bingo" may in certain instances include the game of "instant bingo" commonly referred to as pull-tabs. *See, e.g.*, MD. ANN. CODE art. 27 § 259A(a). Article 27, section 259A(a) regulates instant bingo in Calvert County, the location of Chesapeake Amusements. *Id.*

137. *See supra* notes 78-84 and accompanying text (examining the statutes in Texas and Louisiana that define and regulate pull-tab dispensers).

138. *Id.*

ments. It is not the role of the judiciary to broaden the reach of a statute in order to proscribe a machine not explicitly banned by the legislature.[139]

By failing to declare that any regulation of pull-tab dispensers must be done by the General Assembly, the Court of Appeals has left open the door for similar challenges of pull-tab dispensers under the slot machine statute. The government could argue that machines that differ only slightly from the machine at issue in *Riddle* are properly characterized as slot machines, and the courts may find themselves declaring pull-tab dispensers legal or illegal on a case-by-case basis.[140] The Court of Appeals could have prevented such a scenario by clearly stating that the legislature is the only body of government with the authority to regulate any type of pull-tab dispenser.[141]

5. Conclusion.—The decision by the Court of Appeals in *Riddle* would have been strengthened by an examination of precedent and the legislative history of section 264B. In so doing, the court would have shown that its interpretation is supported not only by the plain language of the statute, but also by legislative intent and precedent. The court failed to state that the regulation of pull-tabs is the job of the General Assembly and amending existing statutes to cover pull-tabs is not within the court's powers. Because this was not clearly stated, the court can expect the slot machine statute to continue to be used to challenge the legality of pull-tab machines.

CARRIE J. WILLIAMS

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139. *See Allen*, 18 Md. App. at 471, 307 A.2d at 500 (noting that the court's role is limited to interpretation and its powers do not include amending existing statutes).

140. *Cf.* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 740-46 (1994) (arguing that courts have applied labor laws to Indian tribes on a case-by-case basis, thereby creating inconsistency and the need for Congress to create a clear statutory scheme).

141. *Cf.* Thomas H. Boyd, Note, *A Call to Reform the Duties of Directors Under State Not-for-Profit Corporation Statutes*, 72 IOWA L. REV. 725, 738 (1987) (discussing the problems arising from a lack of statutes to guide decision-making, including case law based entirely on fact-specific precedent).

X. TORTS

A. *A New Special Relationship in Maryland—But When Does it Apply?*

In *Grimes v. Kennedy Krieger Institute, Inc.*,[1] the Court of Appeals of Maryland considered whether a research institute has a duty to warn its human subjects about the potential risks that may arise out of participation in a research study.[2] In considering this question, the court concluded that the nature of the relationship between researchers and their human subjects "normally will" create a special relationship out of which the duty to warn will arise.[3] However, the court noted that in the future, the decision of whether a special relationship exists must be determined on a case-by-case basis by the trier of fact.[4] In light of this fact specific application, the court should have provided a more thorough analysis explaining why the particular factors on which it relied are important in determining the existence of a special relationship. This guidance by the court would have ensured consistent application of these factors in the future. Therefore, even though the holding is appropriate to resolve the question presented by the specific facts of this case, the court's lack of sufficient legal support and guidance fails to provide a workable standard for future application.

1. The Case.—In 1993, the Kennedy Krieger Institute (KKI) began a two-year research study that tested lead paint levels both in residential homes and in the children that lived in the homes.[5] KKI designed the research project to find the cost of the minimum level of effective abatement that would ensure both safe and efficient means

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1. 366 Md. 29, 782 A.2d 807 (2001).

2. *Id.* at 46, 782 A.2d at 818.

3. *Id.* at 113, 782 A.2d at 858.

4. *Id.*

5. *Id.* at 48-49, 782 A.2d at 819. The Environmental Protection Agency and the Maryland Department of Housing and Community Development provided joint sponsorship of the study. *Id.* at 50, 782 A.2d at 820. The Environmental Protection Agency awarded KKI $200,000 to fulfill its obligations under the research contract. *Id.* at 48, 782 A.2d at 819. The Maryland Department of Housing and Community Development, through the Lead Paint Abatement Program established by the Maryland General Assembly, provided loans to the homeowners participating in the study to pay for the necessary maintenance and repair. *Id.* at 52 n.15, 782 A.2d at 821 n.15. In addition, the Baltimore City Health Department and the Maryland Department of the Environment aided in the study. *Id.* at 50, 782 A.2d at 820.

of ridding homes of dangerous levels of lead paint.[6] In implementing its study, KKI approached the landlords of low-income housing in Baltimore City, or the renters themselves, and solicited participation.[7] To be eligible, KKI required that a child in the developmental stage reside in the home so that his or her blood could periodically be taken and analyzed for lead content.[8] Three main prerequisites had to be satisfied prior to participation in the study: fulfillment of both the property and occupant requirements,[9] a signed "informed consent form" acknowledging the family's willingness to participate in the study,[10] and an intent to remain in the residence for at least the two-

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6. *Id.* at 42 n.6, 782 A.2d at 815 n.6. Presumably, the cost of total lead paint abatement was too expensive for low-income housing landlords to afford. *Id.* Therefore, one goal of the project was to determine whether partial abatement caused the level of lead in children's blood to exceed a level hazardous to their well-being. *Id.*

7. *Id.* at 36-37, 782 A.2d at 811-12. In the event that the landlord could not afford the necessary repairs, KKI arranged for public funding in the form of grants or loans. *Id.* at 36, 782 A.2d at 812.

8. *Id.* at 36-37, 782 A.2d at 812.

9. *Id.* at 54, 782 A.2d at 822. To fulfill the property requirement, the researchers focused on structurally sound, two-story, row houses constructed prior to 1941 and located in Baltimore City. *Id.* at 54-55, 782 A.2d at 822-23. To fulfill the occupant requirement, the researchers focused on households with at least one small child under the age of forty-eight months and older than five months at the beginning of the study. *Id.* at 55, 782 A.2d at 823. Children that were mentally retarded, severely handicapped in any way that would limit their physical movement, and those with sickle cell anemia were excluded from participation. *Id.*

10. *Id.* at 55, 782 A.2d at 823. The parents of each child agreed to sign a consent form allowing their children to participate in the study. *See id.* at 56, 63, 782 A.2d at 824, 828. The consent form stated in part:

> PURPOSE OF STUDY:
>
> As you may know, lead poisoning in children is a problem in Baltimore City and other communities across the country. Lead in paint, house dust and outside soil are major sources of lead exposure for children. Children can also be exposed to lead in drinking water and other sources. We understand that your house is going to have special repairs done in order to reduce exposure to lead in paint and dust. On a random basis, homes will receive one of two levels of repair . . . . The repairs are not intended, or expected, to completely remove exposure to lead.
>
> We are now doing a study to learn about how well different practices work for reducing exposure to lead in paint and dust. We are asking you and over one hundred other families to allow us to test for lead in and around your homes up to 8 to 9 times over the next two years provided that your house qualifies for the full two years of study. Final eligibility will be determined after the initial testing of your home. We are also doing free blood testing of children aged 6 months to 7 years, up to 8 to 9 times over the next two years. We would also like you to respond to a short questionnaire every 6 months. This study is intended to monitor the effects of the repairs and is not intended to replace the regular medical care your family obtains.
>
> . . .

year research period.[11] Nowhere on the consent form did it indicate the health dangers lead paint poses to children or the possibility of contracting lead poisoning as a result of the study.[12]

a. The Research Study Protocol.—The research study consisted of two main components (*A* and *B*) that were broken down into five test groups, and each group consisted of about twenty-five homes.[13] Component *A* was the experimental portion of the study and consisted of three test groups (Groups One, Two, and Three), each of which received varying degrees of repair and maintenance.[14] Over the course of its two-year study, KKI measured lead levels from the homes in Component *A* by collecting children's blood samples, vacuum dust samples from the home, exterior soil samples, and drinking water samples.[15] The children's blood samples and vacuum dust samples were to be taken at the following times: pre-intervention, immedi-

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BENEFITS

To compensate you for your time answering questions and allowing us to sketch your home we will mail you a check in the amount of $5.00. In the future we would mail you a check in the amount of $15 each time the full questionnaire is completed. The dust, soil, water, and blood samples would be tested for lead at the Kennedy Krieger Institute at no charge to you. *We would provide you with specific blood-lead results. We would contact you to discuss a summary of house test results and steps that you could take to reduce any risks of exposure.*

Id. at 57-58, 782 A.2d at 824-25 (footnote omitted).

11. *Id.* at 56, 782 A.2d at 823-24. It was necessary for the children to remain living in their homes for the entire two-year period, even upon first detection of elevated lead levels in their blood, because the accuracy and success of the test depended on data collection over time. *Id.* at 55, 782 A.2d at 823.

12. *See id.* at 57-58, 782 A.2d at 824-25.

13. *Id.* at 50, 52, 782 A.2d at 820, 821. It should be noted, however, that according to the record "only 108 houses actually participated in the study." *Id.* at 55 n.20, 782 A.2d at 823 n.20.

14. *Id.* at 52, 782 A.2d at 821. The repairs to Group One were capped at $1650. *Id.* at 53, 782 A.2d at 822. These repairs included:

wet-scraping of peeling and flaking lead-based paint and paint of unknown composition on all interior surfaces, including walls, trim, and doors; repainting of treated surfaces; installation of window well caps; repainting of all exterior window trim, repainting of all interior window sills; vacuuming of all horizontal surfaces and window components with a high efficiency particulate (HEPA) vacuum; and wet cleaning all horizontal surfaces.

Id. The repairs to Group Two were capped at $3500 and included all the repairs from Group One and the "use of sealants and paints to make floors smoother and more easily cleanable, and in-place window and door treatments to reduce abrasion of lead-painted surfaces." *Id.* The repairs to Group Three were capped at $6000-$7000 and included "added window replacement and encapsulation of exterior door trim with aluminum, and the use of coverings on some floors and stairs to make them smooth and more easily climbable." *Id.*

15. *Id.* at 54, 782 A.2d at 822.

ately post-intervention, and at the one-, three-, six-, twelve-, eighteen-, and twenty-four-month stages of post-intervention.[16]

Component *B* served as the control portion and consisted of the remaining two test groups (Groups Four and Five).[17] KKI collected similar lead measurements from Component *B* homes at similar time intervals throughout the two-year study.[18] Parents of the children subjects from both Component Groups were required to fill out a questionnaire at enrollment and again at six-month intervals.[19]

b. Facts Leading to the Causes of Action.—

(1) Ericka Grimes's Cause of Action.—In March 1993, KKI representatives solicited ten-month-old Ericka Grimes to participate in the study by visiting the home where she lived with her mother, Viola Hughes.[20] Following a conversation with KKI representatives discussing the nature, purpose, scope, and benefits of the study, Hughes agreed to let her daughter participate and signed the required consent form on March 10, 1993.[21] The consent form did not disclose that Ericka might accumulate dangerous levels of lead in her blood as a result of the experiment.[22]

KKI implemented the study protocol and collected dust samples from Ericka's home several times in the following months.[23] The first dust sample from March 9, 1993 revealed "hot spots" in the home.[24] However, information about the sample was not supplied to Hughes until almost ten months after the sample had been collected.[25] KKI also took blood samples from Ericka three times during the nine-

16. *Id.* at 53, 782 A.2d at 822. Although never specifically defined by the court, intervention appears to be the point in time that KKI began testing a house. *See id.* Soil samples were to be taken pre-intervention, immediately post-intervention, and at twelve and twenty-four months post-intervention. *Id.* at 53-54, 782 A.2d at 822. Drinking water samples were to be taken pre-intervention, and at twelve and twenty-four months post-intervention. *Id.* at 54, 782 A.2d at 822.

17. *Id.* at 54, 782 A.2d at 822. Group Four consisted of homes built that were completely abated of lead paint and were not to receive any additional repairs. *Id.* Group Five homes also were not to receive any additional repairs because they were constructed after 1980, and were thus presumed free of lead-based paint. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 56, 782 A.2d at 824. Ericka's home was assigned to the control group—Group Four. *Id.* at 57 n.21, 782 A.2d at 824 n.21.

21. *Id.* at 56, 782 A.2d at 824.

22. *Id.* at 57, 782 A.2d at 824.

23. *Id.* at 58, 782 A.2d at 825.

24. *Id.* "Hot spots" are areas with a lead level higher than that found in a lead-abated house. *Id.*

25. *Id.*

month interval.[26] The results of the first test placed Ericka's blood lead level in the "normal" range according to standards established by the Centers for Disease Control.[27] However, the two subsequent tests indicated Ericka's blood lead level to be "highly elevated."[28] These increased readings came after KKI had identified "hot spots" on the property, but before it had informed Hughes of the potentially dangerous levels of lead in her home.[29] Hughes and Ericka subsequently vacated the property in the summer of 1994 and no further testing was performed.[30]

(2) Myron Higgins's Cause of Action.—In 1993, KKI asked Laurence Polakoff, President of Chase Management, Inc., to enroll one of his company's properties in the research study.[31] In December of that year, KKI hired an outside contractor to examine the property, which subsequently tested positive for lead paint and dust.[32] Polakoff's row house was admitted into the study and assigned to Group Two, undergoing the repairs required therein.[33] The repairs to the house were completed sometime in April 1994.[34]

In the spring of 1994, the Higgins family moved into the home.[35] KKI approached Catina Higgins about participating in the study after her family had moved into the partially abated home.[36] On May 24, 1994, Higgins agreed to participate in the research study and signed a consent form providing permission for her five-year-old son, Myron Higgins, to participate.[37] Similar to the consent form signed on behalf of Erika Grimes, nowhere did it indicate that Myron may be exposed to lead and might accumulate some lead in his blood as a result of the experiment.[38]

Pursuant to the study, KKI collected dust samples from the Higgins' home on May 17, 1994.[39] The post-intervention dust samples were collected using both an experimental Cyclone collector and a

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26. *Id.* at 59, 782 A.2d at 825.
27. *Id.*
28. *See id.* at 59 n.23, 782 A.2d at 825 n.23.
29. *Id.* at 59, 782 A.2d at 825.
30. *Id.*
31. *Id.* at 60-61, 62 n.25, 782 A.2d at 826, 827 n.25.
32. *Id.* at 61, 782 A.2d at 826.
33. *Id.*
34. *Id.*
35. *Id.* at 61-62, 782 A.2d at 827.
36. *Id.* at 63, 782 A.2d at 828.
37. *Id.*
38. *Id.*
39. *Id.* at 62, 782 A.2d at 828.

dust wipe technique, each registering different measurements of lead.[40] The Cyclone collector samples from the May 17, 1994 collection indicated lead concentrations above the Maryland clearance level, while the dust wipe samples indicated lead concentrations significantly lower, below the clearance level.[41] However, KKI only informed Higgins of the dust wipe results, thus indicating that the lead concentration found in the home was at an acceptable level.[42]

On July 25, 1994 and November 3, 1994, KKI again took dust samples from the Higgins home.[43] The dust wipe samples indicated lead concentrations above the clearance levels on both occasions.[44] KKI informed Higgins of the elevated results by letter after each elevated result.[45] KKI also obtained blood samples from Myron Higgins three times during his participation in the study.[46] The results from the first and third tests in June 1994 and November 1994 registered Myron's blood lead level as "moderately elevated," and the second test, in July 1994, indicated his blood lead level to be "highly elevated."[47] KKI notified Ms. Higgins of the results by mail.[48] KKI also informed Ms. Higgins that the results of the second test had been provided to the Baltimore City Health Department (BCHD) and that she "should provide the test result to her child's primary health care provider right away."[49]

c. Procedural History.—Viola Hughes filed a complaint in the Circuit Court for Baltimore City alleging KKI to be negligent for failing to warn of the lead paint hazards that it had apparently discovered.[50] KKI filed a motion for summary judgment on the grounds that it did not owe a duty to Grimes.[51] On July 26, 2000, the circuit court granted KKI's motion and entered judgment in its favor.[52] The court stated that it did not find a special relationship, as defined by

40. *Id.* at 62 n.26, 782 A.2d at 827 n.26.
41. *Id.*
42. *Id.* at 63-64, 782 A.2d at 828.
43. *Id.* at 63, 782 A.2d at 828.
44. *Id.* at 64, 782 A.2d at 828.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*, 782 A.2d at 828-29.
50. *Id.* at 59, 782 A.2d at 825-26. KKI filed a third party complaint to add the owners of the property, JJB, Inc., as an additional defendant. *Id.* at 60, 782 A.2d at 826. Grimes then filed an amended complaint adding JJB, Inc. as an additional defendant. *Id.*
51. *Id.*
52. *Id.*

the courts of appeal, to exist between KKI and Hughes or Grimes that imposed a duty on KKI.[53] Grimes filed an appeal.[54]

Catina Higgins, individually and on behalf of her son Myron Higgins, filed a complaint in the Circuit Court for Baltimore City alleging KKI and Environmental Restoration, Inc.[55] to be negligent on several grounds.[56] The complaint alleged that the defendants were negligent in deciding to undertake the abatement and repair of Catina Higgins's home prior to and during the child's occupancy, the abatement was performed negligently, which increased rather than decreased the lead dust on the premises, and the defendants breached their duty to warn Catina and Myron of the elevated lead levels in the home and in Myron's blood.[57] KKI filed a motion for summary judgment asserting that it did not owe a duty to Catina and Myron Higgins.[58] The circuit court granted KKI's motion and entered judgment in its favor.[59] The trial court stated that there was no duty on the part of KKI "to inspect or test this premises or to test the individual."[60] In fact, the court classified KKI as an "institutional volunteer" to the community that owed no raised duty under the law.[61] The Higginses filed a motion to reconsider, which the court subsequently denied.[62] Myron Higgins and his mother filed an appeal.[63]

On February 8, 2001, prior to consideration by the Court of Special Appeals, the Court of Appeals issued a writ of certiorari for both cases.[64] The court consolidated the cases to consider the circuit court's decision in each case to grant KKI's summary judgment motions.[65] The appellants contended in their appeal that despite the

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53. *Id.* at 70, 782 A.2d at 832.

54. *Id.* at 60, 782 A.2d at 826. Ericka Grimes dismissed her claims against JJB, Inc. at the time she filed her appeal. *Id.*

55. Environmental Restoration, Inc. performed the repair work on Catina Higgins's home. *Id.* at 61, 782 A.2d at 826.

56. *Id.* at 65, 782 A.2d at 829. The Higginses' complaint initially included only Lawrence Polakoff as a defendant. *Id.* The claim was later amended to add Chase Management, Inc. and CFOD-2 Limited Partnership (owners of the property after Polakoff transferred his interests) as defendants. *Id.* at 65 & n.29, 782 A.2d at 829 & n.29. Higgins dismissed the claims against Polakoff, Chase Management, Inc., and CFOD-2 Limited Partnership. *Id.* at 69, 782 A.2d at 831.

57. *Id.* at 65, 782 A.2d at 829.

58. *Id.* at 66, 782 A.2d at 829.

59. *Id.* at 69, 782 A.2d at 831.

60. *Id.* at 70, 782 A.2d at 832.

61. *Id.*

62. *Id.* at 69, 782 A.2d at 832.

63. *Id.*

64. *Id.*

65. *Id.* at 70-71, 782 A.2d at 832-33. On April 4, 2002, both houses of the Maryland General Assembly passed legislation partly in response to this case. H.B. 917, 2002 Gen.

trial court's holding, KKI did owe a duty to warn them of the presence of lead paint and dust in their homes.[66] They based their claim, in part, on the arguments that there was a special relationship between the parties, and that the danger posed by lead paint was foreseeable.[67] Specifically, the appellants contended that "KKI had an affirmative duty to give [them] complete and accurate information concerning the risks and hazards of participating in the study . . . ."[68]

2. Legal Background.—In Maryland, a cause of action in negligence requires the plaintiff to establish the following four elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual harm or loss, and (4) that the defendant's breach of duty proximately caused the plaintiff's harm or loss.[69] In *West Virginia Central Railroad Co. v. Fuller*,[70] the Court of Appeals established that absent a duty owed from one person to another, there can be no cause of action in negligence.[71] Furthermore, the court stated that the duty owed varies according to the circumstances of each case and the relationship of the parties involved.[72]

a. The Duty Element in a Negligence Action.—Duty has been defined as, "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."[73] The Court of Appeals, in *Jacques v. First National Bank of Maryland*,[74] stated that there are two necessary considerations in determining whether a tort duty should be recognized: "the nature of

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Assem., Reg. Sess. (Md. 2002). Delegate James W. Hubbard introduced the bill in light of the Kennedy Krieger lead paint study and the death of a volunteer in a Johns Hopkins asthma experiment. *See* David Nitkin, *Senate OKs Bill to Tighten Rules on Human Research; Governor Expected to Sign Legislation*, BALT. SUN, Apr. 6, 2002, at 1B. The legislation applies the federal research standards outlined in 45 C.F.R. § 46 to all human experiments in Maryland. H.B. 917, 2002 Reg. Sess. Additionally, the new law requires consent of the human subject, review of the study by an Institutional Review Board (IRB) that includes a nonvoting expert in the field of study, public exhibition of the minutes of the IRB, and the ability for the Attorney General to intervene in studies that do not comply with the law. *Id.*

66. *Grimes*, 366 Md. at 71, 782 A.2d at 832-33.

67. *Id.* The appellants also claimed that KKI owed them a duty because a contractual duty was created by the consent agreement and the relevant federal regulation. *Id.*

68. *Id.*, 782 A.2d at 833.

69. *See, e.g.*, Rosenblatt v. Exxon Co., 335 Md. 58, 76, 642 A.2d 180, 188 (1994).

70. 96 Md. 652, 54 A. 669 (1903).

71. *Id.* at 666, 54 A. at 671.

72. *Id.*, 54 A. at 672.

73. Brown v. Dermer, 357 Md. 344, 357, 744 A.2d 47, 54 (2000) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984)).

74. 307 Md. 527, 515 A.2d 756 (1986).

the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties."[75] The *Jacques* court found that when economic loss is the only harm complained of, there must be "an intimate nexus" between the parties to impose tort liability.[76] Conversely, when the harm is personal injury, the foreseeability of harm becomes the determining factor.[77]

In addition to the foreseeability of the harm, the court, in *Ashburn v. Anne Arundel County*,[78] adopted several factors originally proposed in *Tarasoff v. Regents of the University of California*[79] that help to determine whether a duty exists.[80] These factors include: the foreseeability of harm, whether the plaintiff suffered an injury, the moral blame of the defendant's conduct, the policy of preventing future harm, the connection between the defendant's actions and the harm suffered, the effect that imposing the duty will have on the community, and the cost and necessity of insurance for the risk.[81] Nevertheless, the *Ashburn* court agreed with the *Jacques* court that, among these factors, the foreseeability of harm in personal injury cases is the most important consideration in determining the existence of a duty.[82]

In applying the factor of foreseeability of harm, the court has noted that the test is simply a reflection of the "current societal standards" about whether an individual should be held liable for actions that result in harm or whether it is "highly extraordinary" that the negligent conduct was the cause of the harm.[83] Generally, the defendant will only be held liable when he should have reasonably known that the plaintiff might suffer harm.[84]

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75. *Id.* at 534, 515 A.2d at 759.

76. *Id.* at 534-35, 515 A.2d at 534-35.

77. *Id.* at 535, 515 A.2d at 760. This principle first outlined in *Jacques* has since been relied on in *Weisman v. Connors*, 312 Md. 428, 445-48, 540 A.2d 783, 791-93 (1988), and more recently in *Griesi v. Atlantic General Hospital Corp.*, 360 Md. 1, 12-14, 756 A.2d 548, 554-55 (2000) and *Walpert, Smullian & Blumenthal v. Katz*, 361 Md. 645, 658, 762 A.2d 582, 589 (2000). An increasing number of courts outside the State of Maryland, however, have abandoned the distinction between the risk of economic loss and personal injury. *Jacques*, 307 Md. at 534 n.4, 515 A.2d at 760 n.4; *see, e.g.*, Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983).

78. 306 Md. 617, 510 A.2d 1078 (1986).

79. 551 P.2d 334 (Cal. 1976).

80. *Ashburn*, 306 Md. at 627, 510 A.2d at 1083.

81. *Id.* (quoting *Tarasoff*, 551 P.2d at 342).

82. *Id.* at 628, 510 A.2d at 1083.

83. Henley v. Prince George's County, 305 Md. 320, 334, 503 A.2d 1333, 1340 (1986) (citing RESTATEMENT (SECOND) OF TORTS § 435(2) (1965)).

84. *See id.* ("The application of the foreseeability requirement to determine the existence of a duty has in some cases spawned the belief that a duty will be found only in favor of 'identifiable plaintiffs,' i.e., those within a foreseeable zone of danger whose identities are known in advance.").

The Court of Appeals took the application of duty one step further in *Rosenblatt v. Exxon Co.*,[85] noting that "the determination of whether a duty should be imposed is made by weighing the various policy considerations and reaching a conclusion that the plaintiff's interests are, or are not, entitled to legal protection against the conduct of the defendant."[86]

Determining the existence of a duty has also been made by distinguishing between action and inaction, typically referred to as misfeasance and nonfeasance.[87] Misfeasance occurs when the defendant actively creates the risk of harm, whereas nonfeasance occurs when the defendant has not done anything to create or complicate the harm.[88] Individuals can typically be held liable for negligence when their *actions* injure or cause harm to another.[89] However, the law has been slow to accept the idea that an individual could be held liable in tort law when he or she failed to act and that failure caused the harm.[90] Generally, courts have been reluctant to recognize a duty in instances of omission or nonfeasance; accordingly, there is no duty to come to the aid of another, to warn another of danger, or to control the actions of another for the benefit of a third party.[91] But courts have acknowledged liability for nonfeasance when there is a special relationship between the parties.[92] "Until the door to duty, foresee-

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85. 335 Md. 58, 642 A.2d 180 (1994).

86. *Id.* at 77, 642 A.2d at 189 (citations omitted). In *Rosenblatt*, the court considered whether a subsequent purchaser of land is owed a duty by the landowners. *Id.* The court held that such a duty is not imposed. In so concluding, the court found no relationship between the parties that would have made it foreseeable that an act or omission on the part of a prior owner would result in injury to the current owner. Therefore, the court recognized for the first time the policy implications of imposing duties on parties. *Id.* The court also pointed out that in this instance the subsequent landowner was in a position to learn of the harm prior to purchasing the land. *Id.* at 78. The court deemed it unreasonable to assign a duty to the prior owner when the current owner was in a position to avoid the harm altogether. *Id.*

87. *See* Mesmer v. Md. Auto. Ins. Fund, 353 Md. 241, 254, 725 A.2d 1053, 1059 (1999). While the "misfeasance" and "nonfeasance" terminology has fallen out of favor in Maryland courts, the distinctions between the two concepts are generally recognized. *Id.* at 256, 725 A.2d at 1060.

88. *Id.* at 254, 725 A.2d at 1059 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 614-15 (4th ed. 1971)).

89. *See id.*

90. *See id.* at 255, 725 A.2d at 1059.

91. *See, e.g.*, Southland Corp. v. Griffith, 332 Md. 704, 716, 633 A.2d 84, 90 (1993).

92. Holson v. State, 99 Md. App. 411, 420, 637 A.2d 871, 875 (1994) (quoting RESTATEMENT (SECOND) OF TORTS § 314 (1965)). The *Holson* court recognized that a special relationship is created in one of two ways: (1) by law or (2) when a person voluntarily takes custody of another and deprives him of the usual opportunities for protection. *Id.* In *Holson*, the court did not find the presence of a special relationship. *Id.* at 421, 637 A.2d at 875-76. A police trooper pulled over a vehicle in which Holson was a passenger for an

ability, ordinary care, etc., is opened by a custodial or other special relationship, suits in negligence based upon negligent omission . . . cannot be successfully maintained."[93] Therefore, the court has stated that foreseeability of harm follows from the creation of a special relationship.[94]

b. Special Relationships and Situations that Give Rise to a Duty in Maryland.—The Court of Appeals has stated that "the law is clear that a person has no legal duty to come to the aid of another in distress."[95] However, the often recognized exception to this rule is when a special relationship exists among the parties.[96] Maryland courts have recognized, therefore, that as a matter of law, certain relationships impose duties upon the parties because of the close nexus between them.[97] These relationships include, but are not limited to: landlord and tenant, jailer and inmate, and police officer and citizen.[98] Although these relationships are recognized by law, they do not automatically impose a duty upon the parties. The factual context of each situation determines the imposition of a duty. Two main factors that the courts look to in determining the presence of a duty for special relationships are control and reliance.

(1) Control or Custody.—In *Scott v. Watson*,[99] the Court of Appeals considered whether the special relationship between a landlord and tenant should impose a duty on the landlord to protect his tenants from the criminal activity of third parties occurring in the "common areas" of the building.[100] In *Scott*, the plaintiff argued that when the landlord has knowledge of criminal activity in the area surrounding his property, a duty to protect the tenants from criminal assaults should be imposed.[101] The court declined to impose such a

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alcohol related offense. *Id.* at 413, 637 A.2d at 872. Holson alleged he was intoxicated at the time of the offense. *Id.* The officer arrested the driver and left Holson at the scene, where he later walked into the path of another vehicle and was struck. *Id.* The court held that no special relationship existed between the parties, and therefore the state trooper owed no duty to Holson. *Id.* at 414, 637 A.2d at 872.

93. *Id.* at 424, 637 A.2d at 878.

94. *Id.*

95. *Griffith*, 332 Md. at 716, 633 A.2d at 90.

96. *See, e.g.*, Valentine v. On Target, Inc., 353 Md. 544, 552, 727 A.2d 947, 950-51 (1999) (stating that one does not owe a duty to protect another from criminal conduct by a third party unless there is a special relationship between the two parties).

97. *Id.* at 552-53, 727 A.2d at 951.

98. *See, e.g., Griffith*, 332 Md. at 716-17, 633 A.2d at 90.

99. 278 Md. 160, 359 A.2d 548 (1976).

100. *Id.* at 161, 359 A.2d at 550.

101. *Id.* at 164-65, 359 A.2d at 551.

duty because the duty of a landlord toward his tenant is to simply "exercise reasonable care."[102] The court found that "to impose a special duty on a landlord . . . would place him perilously close to the position of insurer of his tenants' safety."[103] However, the court took a different approach in answering a separate question posed by the plaintiff.[104] In considering whether a landlord has a duty to protect his tenants from criminal activity in common areas under the landlord's control, where the landlord has taken deliberate measures to protect his tenants, the court found that a duty is not created per se.[105] However, if the landlord voluntarily implemented security devices in common areas that the landlord controlled, improper performance of this voluntary act would constitute a breach of a duty.[106]

The court further explained when control between parties creates a duty in *Lamb v. Hopkins*.[107] In this case, Russell Newcomer, Jr., was convicted of armed robbery, whereafter the court suspended a portion of his sentence and placed him on parole.[108] Lamb was convicted of driving while intoxicated twice while on parole, but his parole was never revoked.[109] Furthermore, Newcomer's parole violations were never reported to the court.[110] While still on parole, Newcomer again drove while intoxicated and collided with another car.[111] As a result, five-month-old Laura Lamb was rendered a quadriplegic.[112] Laura's parents sued Newcomer and his probation officers on her behalf.[113]

The Lambs contended that when a person has control over another whom they know to be dangerous, that person owes a duty of care to those plaintiffs foreseeably harmed by the failure to exercise that care.[114] In analyzing this question, the court first adopted section 319 of the *Restatement (Second) of Torts* into Maryland law.[115] That sec-

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102. *Id.* at 167, 359 A.2d at 553.
103. *Id.*
104. *Id.* at 170, 359 A.2d at 554-55.
105. *Id.* at 171, 359 A.2d at 555.
106. *Id.*
107. 303 Md. 236, 492 A.2d 1297 (1985).
108. *Id.* at 239, 492 A.2d at 1299.
109. *Id.* Newcomer was also convicted of discharging a firearm and driving while his license was suspended. *Id.* at 240, 492 A.2d at 1299. These violations were not reported to the court. *Id.*
110. *Id.* at 239, 492 A.2d at 1299.
111. *Id.* at 240, 492 A.2d at 1299.
112. *Id.*
113. *Id.*
114. *Id.* at 241, 492 A.2d at 1300.
115. *Id.* at 245, 492 A.2d at 1302.

tion, entitled *Duty of Those in Charge of Person Having Dangerous Propensities*, states:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.[116]

The court explained that this section applies to two situations.[117] First, it applies when the actor has control over persons who generally have the tendency to act injuriously. Second, section 319 applies when the actor has control of a third person who has a "peculiar tendency so to act of which the actor from personal experience or otherwise knows or should know."[118] In evaluating the application of this section to the case at hand, the court found that the probation officers did not have control over Newcomer.[119] Likewise, the court found that no special relationship existed between the parties, and the probation officers owed no duty to the Lambs.[120]

In *Eisel v. Board of Education of Montgomery County*,[121] the Court of Appeals considered whether a special relationship existed between a school counselor and the parents of a child attending the school, such that the counselor had a duty to intervene to attempt to prevent the child's suicide.[122] In analyzing this question, the court focused on whether the school's control over the child imposed tort duties on the school counselor.[123] The court found that a special relationship may have existed between the parties that would have imposed a duty on the school counselor to intervene and attempt to prevent the student's suicide.[124] The court found the following factors to be indicative of the presence of a special relationship between the parties in *Eisel*: the victim was an adolescent, there was an *in loco parentis* relation-

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116. RESTATEMENT (SECOND) OF TORTS § 319 (1965).

117. *Lamb*, 303 Md. at 243, 492 A.2d at 1301.

118. *Id.*

119. *Id.* at 246, 492 A.2d at 1302.

120. *Id.* at 253, 492 A.2d at 1306.

121. 324 Md. 376, 597 A.2d 447 (1991).

122. *Id.* at 378, 381, 597 A.2d at 448, 450. The victim's father brought this wrongful death suit against the school board after learning that the school counselor was aware of his daughter's suicidal tendencies, but failed to discuss with him those concerns. *Id.* at 378, 597 A.2d at 448. The counselor did speak with the child about what he had heard from other students, but the child denied that she had suicidal thoughts. *Id.*

123. *See id.*

124. *See id.* at 381-87, 597 A.2d at 450-52.

ship,[125] and there was a therapeutic relationship with the victim.[126] But instead of making a final determination, the court remanded the case back to the Circuit Court for Montgomery County to make the ultimate decision of whether a tort duty existed between the parties.[127]

In *Hartford Insurance Co. v. Manor Inn*,[128] the court again focused on control and the relationship between the parties to determine whether a duty existed. In this case, Robert Griffin was involuntarily committed to the Springfield Hospital Center in Carroll County, Maryland.[129] Somehow, Griffin managed to escape from the hospital.[130] Three days later, he was found by the Montgomery County Police, taken to the Manor Inn, and given a place to sleep. Springfield Hospital Center was not notified of Griffin's whereabouts. The next morning, a laundry truck with the keys left in the ignition was parked outside the Inn.[131] Griffin stole the truck and subsequently ran into a car stopped at a stop sign.[132] The insurance company insuring that car sued the state and Manor Inn for negligence to recover what it had paid out.[133]

The state conceded that Griffin was in its control when he was a patient at the hospital, and therefore a special relationship existed between the parties at that time.[134] However, in analyzing whether a duty should be imposed on the state *at the time of the accident*, the court found that no duty existed.[135] The court relied on the principle that a party in control of another owes a duty only to "those within a foreseeable zone of danger whose identities are known in advance."[136] Be-

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125. "'Loco parentis' exists when a person undertakes care and control of another . . . ." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

126. *Eisel*, 324 Md. at 383-85, 597 A.2d at 451-52 (discussing the factual differences between *Eisel* and those cases in which there was no duty to prevent suicide because there was no special relationship).

127. *Id.* at 393, 597 A.2d at 456.

128. 335 Md. 135, 642 A.2d 219 (1994).

129. *Id.* at 139, 642 A.2d at 221. The hospital was owned and operated by the Department of Health and Mental Hygiene for the state. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 139-40, 642 A.2d at 221.

133. *Id.*

134. *Id.* at 151, 642 A.2d at 227. The state thereby conceded that at that time it was under a duty to prevent Griffin from causing physical injury to others. *Id.*

135. *Id.*

136. *Id.* at 154, 642 A.2d at 228.

cause the persons in the car hit by Griffin were not foreseeable plaintiffs, no duty was imposed on the hospital to protect them.[137]

In *Shields v. Wagman*,[138] the court stated that when a landowner maintains control of an area, the landowner can be liable for injuries.[139] In this case, landlord Wagman rented a commercial bay to tenant Thomas.[140] Thomas kept a pit bull dog on the premises, and on two different occasions the dog attacked patrons in the parking lot of Thomas's automobile repair shop.[141] Both patrons sued Thomas and Wagman.[142] The court considered whether the landlord owed a duty to these patrons.[143] In finding that he did, the court recognized that when a landlord knows or should know of a dangerous condition in common areas, the landlord should be held liable for injuries occurring there.[144]

(2) Reliance on Protection.—In *Ashburn v. Anne Arundel County*,[145] the court considered whether a police officer and victim have a special relationship because of the public's unique reliance on the police department and police officers individually for protection.[146] The *Ashburn* court held that although there is no general duty to act for the benefit of another,[147] if it can "be shown that the local government or the police officer affirmatively acted to protect the specific victim or a specific group of individuals like the victim, thereby inducing the victim's specific reliance upon the police protection," then a special relationship may exist, and a negligence claim can be supported.[148] The police officer in *Ashburn* saw John Millham behind the wheel of a parked pickup truck and suspected that he had been drinking and driving.[149] Millham was legally drunk, but the officer did not arrest him; instead, he instructed Millham not to drive that

137. *Id.* Just two years later, the Court of Special Appeals, in *State v. Johnson*, 108 Md. App. 54, 670 A.2d 1012 (1996), recognized that a special relationship exists between a jailer and inmate because of the control a jailer has over inmates. *Id.* at 65, 670 A.2d at 1017. The court specifically noted that a jailer has "exclusive control over the care and confinement of prison inmates," which justifies the imposition of a special relationship. *Id.*

138. 350 Md. 666, 714 A.2d 881 (1998).

139. *Id.* at 673, 714 A.2d at 884.

140. *Id.* at 669-70, 714 A.2d at 882.

141. *Id.* at 671-72, 714 A.2d at 883.

142. *Id.*

143. *Id.* at 672, 714 A.2d at 884.

144. *Id.* at 682, 714 A.2d at 888.

145. 306 Md. 617, 510 A.2d 1078 (1986).

146. *Id.* at 631, 510 A.2d at 1085.

147. *Id.*

148. *Id.*

149. *Id.* at 619-20, 510 A.2d at 1079.

evening.[150] As soon as the officer left, Millham drove away and hit John Ashburn, the plaintiff, a short distance later.[151] Ashburn lost his leg as a result of the collision and sued the police department, alleging that the officer had a duty to detain all suspected drunk drivers.[152] The court found that although the police officer "affirmatively acted" when he advised the drunk driver to stop driving, those actions did not create a special relationship between the police officer and the victim of the accident because the officer did not act for Ashburn's benefit nor did Ashburn rely on the officer.[153] The court emphasized that because Ashburn did not rely on any police protection, no special relationship was formed between the parties.[154]

In *Williams v. Mayor of Baltimore*,[155] the court again considered whether reliance on police protection created a special relationship between a citizen and a police officer.[156] Petitioner Mary Williams alleged that when Baltimore City Police Officer Edward Colbert arrived at her home and promised to protect her and her family, and the family relied on that promise, a special relationship was formed that imposed a duty of protection on the officer.[157] Officer Colbert was called to the Williams' home in response to a domestic violence incident involving Mary's daughter, Valerie Williams, and her boyfriend.[158] At some point when Officer Colbert left the Williamses' home to get a camera to record the injuries to Williams's daughter, the perpetrator entered the home shooting Williams and killing her daughter.[159] The court found that there was enough genuine dispute of facts concerning whether a special relationship existed between the parties in this case to overrule the trial court's grant of summary judgment; however, the court recognized that the existence of a special relationship was a decision for the trier of fact.[160]

The court then provided an analysis of when and how a special relationship is formed. The court began by explaining the general rule that a police officer does not typically have a special relationship with the common citizenry unless the officer affirmatively acts and in-

150. *Id.* at 620, 510 A.2d at 1079.
151. *Id.*
152. *Id.*
153. *Id.* at 631-32, 510 A.2d at 1085.
154. *Id.*
155. 359 Md. 101, 753 A.2d 41 (2000).
156. *Id.* at 108, 753 A.2d at 44.
157. *Id.* at 111-12, 753 A.2d at 46-47.
158. *Id.* at 109, 753 A.2d at 45.
159. *Id.* at 109-10, 753 A.2d at 45-46.
160. *Id.* at 141, 753 A.2d at 63.

duces reliance upon the police protection.[161] Next, the court provided a discussion of several cases that have followed this principle, including cases from other jurisdictions.[162] In its discussion, the court cited to *Melendez v. City of Philadelphia*[163] and the test that court created for determining whether a special relationship exists.[164]

In *Melendez*, a young man was shot in the face by his neighbor during a racial conflict.[165] Melendez and his parents sued the Philadelphia police department alleging that the boy's injuries occurred as a result of nonfeasance by the police department because the department failed to act and protect the community once it learned of racial violence in that area.[166] After citing the general principle that police officers have no duty to protect an individual person absent a special relationship, the *Melendez* court recognized that a special relationship exists between a police officer and citizen when the police officer takes the responsibility of protecting the citizen.[167] The court then outlined a three-part test used to determine the presence of a special relationship: (1) the police must have been aware of the citizen's particular situation; (2) the police must have had knowledge of the potential for harm; and (3) the police must have voluntarily assumed to protect the individual from the harm.[168] Because in this instance the Melendez family never contacted the city or police department and reported racial violence in their neighborhood, the first prong of the test was not satisfied.[169] The police had no knowledge or awareness of the racial violence in the Melendez's neighborhood.[170] Therefore, the police could not have entered into a special relationship with the

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161. *Id.* at 144, 753 A.2d at 64-65.

162. *Id.* at 145-50, 753 A.2d at 65-68. The court mentioned in its discussion *Holson v. State*, 99 Md. App. 411, 637 A.2d 871 (1994), where the Court of Special Appeals held that unless a police officer exerts control over an inebriated citizen, no special relationship exists between the parties that requires the officer to protect the person. *Id.* at 428, 637 A.2d at 879.

163. 466 A.2d 1060 (Pa. Super. Ct. 1983).

164. *Williams*, 359 Md. at 148-49, 753 A.2d at 67.

165. *Melendez*, 466 A.2d at 1061.

166. *Id.* at 1061-62.

167. *Id.* at 1063.

168. *Id.* at 1063-64.

169. *Id.* at 1064. The court also pointed out that in the Melendezes' depositions they admitted they had no knowledge of any other racial conflict in the community. There was no evidence that the police even knew the shooter had a gun or the propensity to use it. Furthermore, the Melendezes' son acknowledged that "the police patrolled the area 'a couple of times a day,'" and that the police arrived only seconds after the shooting. *Id.*

170. *Id.*

Melendez family to protect them from harm of which they had no knowledge.[171]

The *Williams* court concluded, based in part on this *Melendez* discussion, that there was sufficient evidence to find the presence of a special relationship because the officer had knowledge and awareness of the peril of the situation.[172] The question for the trier of fact would be whether the officer voluntarily assumed protection of the Williamses and whether they relied on that promise.[173]

c. Researcher-Human Subject Relationships in Other Jurisdictions.—In *Blaz v. Michael Reese Hospital Foundation*,[174] the United States District Court for the Northern District of Illinois decided whether a physician in charge of a hospital research study had a duty to warn human subjects of the risk associated with radiation treatments.[175] From 1930 to 1960, 5000 patients, including Joel Blaz, "were treated with X-ray therapy for some benign conditions of the head and neck" at Michael Reese Hospital and Medical Center.[176] In 1987, doctors determined that Blaz had developed a neural tumor. Blaz later sued the hospital's successor and one of the hospital's doctors. He contended that they failed to notify him that he may be at greater risk of developing neural tumors because of his earlier participation in the hospital's study.[177] The doctor in charge of the research study argued that because he was not Blaz's treating physician, he had no such duty.[178] The court, however, held that the doctor did owe a duty to inform Blaz of the risk associated with the study.[179]

In Illinois, a duty to warn exists when there is "unequal knowledge and the defendant, possessed of such knowledge, knows or should know that harm might occur if no warning is given."[180] The court determined that the physician's affiliation with the hospital sponsoring the research study, of which Blaz was a part, created a special relationship between the physician and Blaz. Thus, the physician had a duty to warn Blaz of the potential dangers of participating in the study.[181] Additionally, the court relied on the notion that a reasona-

171. *See id.*
172. Williams v. Mayor of Baltimore, 359 Md. 101, 150-51, 753 A.2d 41, 68 (2000).
173. *See id.*
174. 74 F. Supp. 2d 803 (N.D. Ill. 1999).
175. *Id.* at 804.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 805 (citations omitted) (internal quotation marks omitted).
181. *Id.* at 806.

ble physician would foresee the risks of tumor development associated with the study and would warn his patients of such risks.[182] The court also recognized that the doctor was in a position to acquire information concerning the risks to Blaz and could easily pass the information along to Blaz.[183]

In reaching its conclusion, the court essentially engaged in a balancing test of various policy considerations rather than applying formalistic rules.[184] The court recognized the potential problem associated with finding a duty absent the traditional physician-patient relationship, yet remained concerned about the chilling effect the holding may have on future research projects.[185] Any potential negative implications were outweighed by the concern that researchers may try to advance their own personal goals or desire for the prestige of making new discoveries in the field of medicine at the expense of the subjects of a potentially dangerous study.[186]

3. The Court's Reasoning.—In *Grimes v. Kennedy Krieger Institute, Inc.*, the Court of Appeals of Maryland considered whether a special relationship exists between a research institute and a human subject.[187] In answering this question the court held that a special relationship may exist between the parties on three bases. First, the court held that informed consent agreements may, under certain circumstances, be deemed a contract and, as a matter of law, such a contract may constitute a special relationship.[188] Second, the court held that the very nature of human subject research will "normally" create a special relationship between the subject and the researcher.[189] Third, the court recognized that government regulations may create duties researchers owe to human subjects out of which a special relationship may arise.[190] Whether such a special relationship has been created is a question the court determined to be properly answered on a case-by-case basis by the trier of fact.[191] Therefore, the court held that the

182. *See id.* at 805-06.

183. *Id.* at 806.

184. *See id.* at 807 ("In determining whether a duty exists, the Illinois Supreme Court sensibly conducts a policy analysis rather than applying a cookie cutter.").

185. *Id.*

186. *Id.*

187. 366 Md. at 47-48, 782 A.2d at 818-19.

188. *Id.* at 113, 782 A.2d at 858.

189. *Id.*

190. *Id.*

191. *Id.* at 113-14, 782 A.2d at 858. In addition, the court held that a parent may not consent to a child's participation in a human research study when the study could potentially pose a risk to the child's well being. *Id.* at 113, 782 A.2d at 858.

lower courts' decisions to grant KKI's motions for summary judgment was erroneous because ample evidence existed to support a finding of a special relationship on the basis of a contract, the nature of the research, or government regulations.[192] The Court of Appeals thus vacated the circuit courts' grants of summary judgment and remanded the cases back to the circuit court to further determine whether such a duty was created in these cases.[193]

Judge Cathell, writing for the majority, engaged in a general discussion of experimentation using humans as subjects.[194] The court then explained the history of nontherapeutic research and the significance of the relationship between a researcher and his human subjects through a discussion of the Nuremberg Code.[195] The court looked to the Code because it was judicially crafted in response to the scientific atrocities that occurred during the Holocaust and World War II era and used legal thought and principles, as opposed to medical or scientific principles.[196] The court recognized that the Code was the "most complete and authoritative statement of the law of informed consent to human experimentation."[197] Furthermore, the court noted that "[t]he Code requires that the informed, voluntary, competent, and understanding consent of the research subjects be obtained" before experimentation on humans would be allowed.[198]

The court then expanded on its historical discussion by providing examples of scientific research studies that have been conducted inappropriately in the United States, even since the implementation of the Code. First, the court described a recent incident that involved genetic experimentation on a Pennsylvania citizen.[199] Jesse Gelsinger consented to participation in a study at the University of Pennsylvania's Institute of Human Gene Therapy.[200] Gelsinger died as a result of the study because he had a different type of the disease than

192. *Id.* at 114, 782 A.2d at 858.

193. *Id.*

194. *Id.* at 74-78, 782 A.2d at 834-37. Judges Eldridge, Wilner, Harrell, Battaglia, and Karwacki joined in the majority opinion. *Id.* at 35, 782 A.2d at 811. In addition to this discussion, the majority noted that it was unaware of any law or court decision that prevented the finding of a special relationship between a researcher and a human subject. *Id.* at 73-74, 782 A.2d at 834.

195. *Id.* at 74-78, 782 A.2d at 834-37. The Nuremberg Code is the international common law standard for experimentation on humans and is composed of ten points explaining the duties researchers owe to their human subjects. *Id.* at 74-75, 782 A.2d at 835.

196. *Id.* at 74, 782 A.2d at 835.

197. *Id.* at 75, 782 A.2d at 835 (quoting George J. Annas, *Mengle's Birthmark: The Nuremberg Code in United States Courts*, 7 J. CONTEMP. HEALTH L. & POL'Y 17, 19-21 (1991)).

198. *Id.* (quoting Annas, *supra* note 197, at 19-21).

199. *Id.* at 80-81, 782 A.2d at 838-39.

200. *Id.* at 80, 782 A.2d at 838.

that addressed by the research.[201] His brand of disease was under control; therefore, it was impossible that the research conducted would benefit him.[202] The court recognized that Gelsinger was subject to nontherapeutic research, as were the children in the case at bar.[203] Likewise, the court noted that there were problems with the extent of informed consent given by Gelsinger.[204]

Second, the court discussed a research experiment that occurred prior to World War II at the State University of Iowa.[205] The leader of the experiment, Wendell Johnson, was a stutterer.[206] Johnson hypothesized that stuttering is a product of environmental causes and conditioned in children by criticism from their parents.[207] Johnson knew that no parent would willingly agree to allow their child to be subject to his testing methods. So, Johnson approached a nearby orphanage and under the guise of trying to improve the orphans' speech, he "conditioned" the children to stutter. Only minimal and unsuccessful attempts were made to cure the children. Those children, who had not been stutters prior to the experimentation, remained stutterers for life. The court recognized that in this study, just as with the case at bar, children were "deliberately placed in a potentially harmful experimental environment for the good of science in order to test a theory that, if proven, might have helped many more children."[208] The court was also quick to point out that the University of Iowa, the successor to the State University of Iowa, acknowledged the impropriety of the experiment, whereas "KKI continues to assert the propriety of a study that is inherently inappropriate . . . ."[209]

The court then discussed the legal basis for the appellants' claim that KKI was negligent.[210] Reviewing the elements necessary to establish a claim of negligence under Maryland law,[211] the court noted that the important inquiry was whether KKI had a duty to protect its sub-

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201. *Id.* at 81, 782 A.2d at 838. It was not until after Gelsinger's death that the United States Food and Drug Administration (FDA) halted the rest of the human gene therapy experiments at the University of Pennsylvania and elsewhere. *Id.* at 80, 782 A.2d at 838. The FDA took action after it learned of problems in the University's informed consent procedures and general unethical treatment of the experimental human subjects. *Id.*

202. *Id.* at 81, 782 A.2d at 838.

203. *Id.*

204. *Id.*

205. *Id.* at 82 n.32, 782 A.2d at 839 n.32.

206. *Id.*

207. *Id.*

208. *Id.* at 83 n.32, 782 A.2d at 840 n.32.

209. *Id.*

210. *See id.* at 84, 782 A.2d at 841.

211. Under Maryland law, to establish a claim for negligence the plaintiff must establish the following elements: (1) the defendant owed the plaintiff a duty; (2) the defendant

jects from injury.[212] On this point, the court reached the conclusion that the evidence in the record suggested that a special relationship involving a duty of care "would ordinarily exist, and certainly could exist, based on the facts and circumstances of these individual cases."[213] The court reached its conclusion despite the fact that the Annotated Code of Maryland and prior case law fails to identify the researcher and human subject relationship as one that creates a duty.[214] Furthermore, the majority recognized that the decision to define duties of care under tort law is one that the courts typically will defer to the legislature.[215] However, in the absence of legislative policymaking, and considering the vulnerability of using child human subjects in scientific research, the court held that "special relationships, out of which duties arise, the breach of which can constitute negligence, can result from the relationships between researcher and research subjects."[216]

In finding that a special relationship may have existed between the parties, the court specifically established that a nexus may not always exist between researchers and their human subjects.[217] However, the court pointed to certain factors as being indicative of the existence of a special relationship, including recruitment, age, and participation in a nontherapeutic study that is potentially dangerous to the health of the participant.[218] The court stressed that the creation of a scientific study that used otherwise healthy human subjects and interacted them with potentially dangerous conditions for the purpose of testing scientific hypotheses "would normally warrant or create such special relationships as a matter of law."[219] Finally, the court refuted the proposition that institutional volunteers should, for public policy reasons, be precluded from liability.[220]

In a separate opinion, Judge Raker concurred in the judgment of the court only, agreeing that the lower courts erred in granting sum-

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breached that duty; (3) the plaintiff suffered injury or harm; and (4) the loss proximately resulted from defendant's breach. *Id.* at 85, 782 A.2d at 841 (citations omitted).

212. *Id.*

213. *Id.* at 87-88, 782 A.2d at 842-43.

214. *Id.* at 87, 782 A.2d at 842.

215. *Id.* at 93, 782 A.2d at 846. However, the court later noted that "[t]he determination of whether a duty exists under Maryland law is the ultimate function of various policy considerations as adopted by either the Legislature, or, if it has not spoken . . . by Maryland courts." *Id.* at 100, 782 A.2d at 850.

216. *Id.* at 93-94, 782 A.2d at 846.

217. *See id.* at 92-93, 782 A.2d at 845-46.

218. *Id.*

219. *Id.* at 93, 782 A.2d at 846.

220. *Id.*

mary judgment to KKI.[221] Judge Raker also agreed with the majority's conclusion that enough facts existed to recognize a special relationship between the parties in these cases.[222] She further agreed that this special relationship gives rise to a duty of care that, if breached, could support a negligence claim.[223] Judge Raker articulated, "I agree with the majority that this duty includes the protection of research subjects from unreasonable harm and requires the researcher to inform research subjects completely and promptly of potential hazards resulting from participation in the study."[224] However, she did not agree with the majority's determination that the tort duty arising out of a special relationship is a question for the trier of fact.[225] Instead, Judge Raker felt that "Maryland case law established that existence of a duty of care is a legal question to be determined by the trial court, in the first instance, and [the Court of Appeals] on appeal."[226] Judge Raker did not think it was appropriate to "create an express exception" to this rule that allows the existence of a special relationship to be determined by the trier of fact.[227] Additionally, Judge Raker criticized the majority for expanding the narrow question presented to the court and inappropriately concluding that KKI had breached the duty owed to its subjects, and that the research undertaken by KKI was "per se" inappropriate, unethical, and illegal.[228] Judge Raker also critiqued the majority's holding that parents do not have the right to consent to their child's participation in nontherapeutic research studies.[229]

On October 11, 2001, the court denied a motion for reconsideration, specifying that the only conclusion they held as a matter of law was that "summary judgment was improperly granted" by the circuit courts in these cases.[230]

4. Analysis.—In *Grimes,* the Court of Appeals did not provide adequate support for its holding that a "special relationship, out of which duties arise, the breach of which can constitute negligence, may

221. *Id.* at 114-15, 782 A.2d 858-59 (Raker, J., concurring in the result).
222. *Id.* at 115, 782 A.2d at 859.
223. *Id.*
224. *Id.*
225. *Id.* at 115-16, 782 A.2d at 859.
226. *Id.* at 116, 782 A.2d at 860.
227. *Id.*
228. *Id.* at 118, 782 A.2d at 861.
229. *Id.*
230. *Id.* at 119, 782 A.2d at 861. Judge Raker dissented from the denial of the motion for reconsideration, reiterating that the court's "statements are a declaration of public policy that, in the posture of this case, are best left to the General Assembly." *Id.* at 120, 782 A.2d at 862.

result from the relationship between researcher and human subjects."[231] In explaining its holding, the court found three factors necessary to consider when determining the presence of a special relationship: recruitment by the researchers, the age of the human subject, and participation in a nontherapeutic study that is dangerous to the subject's health.[232] These factors provide a workable standard for the trier of fact on remand to find the existence of a special relationship in this particular case. However, the court should have provided more guidance by explaining these factors and analyzing how they should be applied in similar negligence claims.[233] Additionally, although *Grimes* was a case of first impression, the court failed to support its analysis of when special relationships are created by not citing to any legal authority.[234] To provide a more complete analysis and ensure consistent findings in the future, the court should have included as factors: foreseeabilty of harm, control, and reliance. Moreover, the court should have referenced the voluminous case law in Maryland that identifies these factors as indicators of the presence of a special relationship.[235]

a. The Grimes *Court's Factors.*—The court's opinion in *Grimes* failed to thoroughly analyze the individual factors that create a special relationship between a researcher and a human subject, thus making future application of its holding particularly difficult. The court stated that the legislature is generally the appropriate forum to resolve potential exceptions to the rules of tort law, but the legislature had not yet addressed the issue of whether a researcher owes a duty to his human subject.[236] In order to provide the lower courts with guidance in resolving these cases, the court felt compelled to speak on the issue. In so doing, the court found three factors that indicate when a special relationship between a researcher and a human subject

231. *Grimes*, 366 Md. at 94, 782 A.2d at 846.

232. *Id.* at 93, 782 A.2d at 845-46.

233. The need for a workable standard is evidenced by more recent instances of negligence by medical researchers in the State of Maryland. *See* Lawrence K. Altman, *F.D.A. Faults Johns Hopkins Over Process in Fatal Study*, N.Y. TIMES, July 3, 2001, at A12 (describing the death of Ellen Roche, a healthy asthma volunteer who died during participation in an experimental drug trial at Johns Hopkins).

234. The court did not cite to one case or legal authority in its discussion of special relationships. *See generally Grimes*, 366 Md. at 90-94, 782 A.2d at 844-46.

235. *See supra* notes 99-173 and accompanying text.

236. *Id.* at 93-94, 782 A.2d at 846. Ironically, the Maryland legislature adopted H.B. 917 in what appears to be a response to this case. *See supra* note 65. The new law requires consent of the human subject, review of the study by an IRB, public exhibition of the minutes of the IRB, and allows the Attorney General to intervene in studies that do not comply with the law. *See* Nitkin, *supra* note 65.

is created as a matter of law: active recruitment of participants by the researcher; specific recruitment of children "whose consent is furnished indirectly"; and participation in a "potentially hazardous, dangerous, or deleterious" nontherapeutic study.[237] The court found these factors indicative of a special relationship between researcher and subject solely through a public policy argument that participating in a potentially dangerous study "for the purpose of creating statistics from which scientific hypotheses can be supported, would normally warrant or create such special relationships as a matter of law."[238] Despite the court's identification of these three factors, its failure to provide justification unnecessarily makes the reader assume that public policy warrants the finding of a special relationship in this instance. The court should have explained why these three factors are necessary to the finding of a special relationship between a researcher and human subject.

The court first delineated recruitment by the researchers as an important factor to be considered.[239] In recognizing this factor, the court appeared to highlight the importance of holding researchers legally accountable for when they actively recruit people to participate in a research study. Although this factor appears to be appropriate, the court should have explained why it chose recruitment to be a fundamental element instead of simply relying on public policy concerns. This could have been accomplished in several ways.

Earlier in its opinion the court discussed a scientific study where orphans from Iowa were "conditioned" to stutter.[240] Specifically, the court admonished the study because the children were actively sought out to participate in a study that only had the potential to benefit science and not the children individually.[241] The court should have referenced this study as an example of why recruitment by researchers should be indicative of a special relationship. The recruitment and participation in this study left those children stutterers for life.[242] The power of researchers to recruit people to participate in their studies should be subject to tort duties to prevent the sort of lifetime injuries that occurred to the orphans in Iowa.

In *Scott v. Watson*, the court explained that a special relationship would have been recognized between a landlord and tenant if the

237. *Grimes*, 366 Md. at 92-93, 782 A.2d at 845-46.
238. *Id.* at 93, 782 A.2d at 846.
239. *Id.*, 782 A.2d at 845.
240. *Id.* at 82-83 n.32, 782 A.2d at 839-40 n.32.
241. *Id.*
242. *Id.*

landlord voluntarily implemented a security system in common areas of the apartment complex.[243] The court pointed out that it was the voluntariness of the landlord's actions that required the finding of a special relationship between the parties.[244] The *Scott* court recognized that it was the active involvement by the landlord that required imposition of tort duties.[245] Likewise, the court in *Grimes* should have referenced this case to show that it was the active recruitment of the human subjects that may lead a trier of fact to find the presence of a special relationship.

The second factor offered by the court was the age of the children in question.[246] A child is in a particularly vulnerable position in a researcher-subject relationship because he or she must rely on his or her parent or guardian to act in his or her best interest.[247] The court again grounded its reliance on this factor in public policy concerns—safeguarding children who cannot otherwise protect their best interests—rather than prior case law recognizing age as an appropriate consideration.[248]

The court has previously found age to be a factor in determining whether a special relationship exists. In *Eisel v. Board of Education of Montgomery County*, the court held that if the relying party was an adolescent, a special relationship requiring the other party to exercise a duty of care may exist.[249] Ericka Grimes and Myron Higgins's ages and potential vulnerability certainly suggest that finding a special relationship is warranted.

The final factor recognized by the court was participation in a potentially dangerous nontherapeutic study.[250] The court should have stated that this factor is the crucial element in the court's test because it recognizes that only researchers can be aware of the potential harm of the research study. The court could have accomplished this by identifying the inherent subparts of this factor: knowledge and foreseeability. The knowledge component, either actual or construc-

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243. Scott v. Watson, 278 Md. 160, 171, 359 A.2d 548, 555 (1976).

244. *Id.*

245. *Id.*

246. *Grimes*, 366 Md. at 93, 782 A.2d at 845.

247. *See id.* at 100, 782 A.2d at 850 ("We do not feel that it serves proper public policy concerns to permit children to be placed in situations of potential harm, during nontherapeutic procedures, even if parents, or other surrogates, consent.").

248. *See id.*

249. Eisel v. Bd. of Educ. of Montgomery County, 324 Md. 376, 393, 597 A.2d 447, 456 (1991).

250. *Grimes*, 366 Md. at 93, 782 A.2d at 846. Nontherapeutic research is designed to test and study a condition for the benefit of society and not for the specific benefit of the research subject. *Id.* at 36 n.2, 782 A.2d at 811 n.2.

tive on the part of the researcher, is inferred because it explains that the only way a research study can be potentially dangerous is if it is, or should be, identified as such by a reasonable researcher. Moreover, knowledge is a factor that the court previously has employed numerous times as an indicator of a special relationship.[251] Use of the term knowledge also implies that foreseeability of the harm should be assessed. If a researcher knows or should know of potential harm, then that harm is foreseeable. Because the foreseeability of harm has also previously been recognized as an element in determining the presence of a special relationship, the court should have referenced that case law. Therefore, for the sake of clarity, the court should have explained its final factor—participation in a potentially dangerous nontherapeutic study—in terms of knowledge and foreseeability, terms which the court has previously used in explaining the presence of a special relationship.

To support its third factor, the *Grimes* court could have cited *Blaz v. Michael Reese Hospital Foundation.* In that case, the court pointed out that a special relationship between a researcher and subject exists, giving rise to a duty to warn, when there is "unequal knowledge and the defendant, possessed of such knowledge, knows or should know that harm might occur if no warning is given."[252] In *Blaz,* the court found that a special relationship existed between the researching doctor and his human subject because the doctor had knowledge that the subject might develop tumors as a result of participating in the study.[253] The court also found that the physician breached his duty when he failed to warn Blaz of this potential danger.[254]

The court also could have relied on *Williams v. Mayor of Baltimore* to support its third factor. In *Williams,* the court stated that a special relationship does not exist between a police officer and citizen unless the officer acts and induces reliance on police protection.[255] In explaining this principle, the court referenced *Melendez v. City of Philadelphia.*[256] *Melendez* created a three-part test for determining the existence of a special relationship between parties: awareness, knowledge, and voluntary protection by the police.[257] The *Melendez* court recognized that duties cannot be imposed on a party unless they have

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251. *See supra* notes 83-84, 168-173 and accompanying text.

252. Blaz v. Michael Reese Hosp. Found., 74 F. Supp. 2d 803, 805 (N.D. Ill. 1999) (citations omitted) (internal quotation marks omitted).

253. *Id.*

254. *Id.*

255. Williams v. Mayor of Baltimore, 359 Md. 101, 151, 753 A.2d 41, 68 (2000).

256. *Id.* at 148-49, 753 A.2d at 67.

257. Melendez v. City of Philadelphia, 466 A.2d 1060, 1064 (Pa. Super. Ct. 1983).

knowledge of the potential for harm and fail to warn of that harm.[258] Because the police did not have knowledge of the racial violence in the Melendez's neighborhood, the court found no special relationship between the parties.[259] Conversely, in *Williams*, the police officer did have knowledge of the potential domestic harm to Mary and Valerie Williams, so the court ruled that a trier of fact may find the presence of a special relationship in that instance.[260] Likewise, there is ample evidence that the KKI researchers had knowledge of the potential of harm to warrant the finding of a special relationship.

The researchers in the KKI study had knowledge that partial lead paint abatement in homes would be potentially dangerous to the participants. A previous article written by the researchers stated, "Exposure to lead-bearing dust is particularly hazardous for children because hand to mouth activity is recognized as a major route of entry of lead into the body and because absorption of lead is inversely related to particulate size."[261] It is abundantly clear, therefore, that this sub-element would have been satisfied.

Implied in the knowledge of the potential for harm is the notion that the harm is foreseeable. The foreseeability of harm has long been a recognized factor for determining the presence of a duty. In *Jacques v. First National Bank*, the court recognized that the foreseeability of harm helps determine the imposition of a duty.[262] That principle was also recognized in *Ashburn v. Anne Arundel County* when the court found that the foreseeability of harm might be the most important factor in determining whether a duty is owed to another.[263] The court continued to explain that just because a harm is foreseeable does not mean that a duty is automatically imposed, for there must also be a special relationship between the parties.[264] Because the police officer did not have a special relationship with the victim in *Ashburn*, no duty existed.[265] It therefore directly flows that the foreseeability of harm may be a factor in determining the presence of a special relationship. Because the researchers in *Grimes* obviously had

258. *Id.*

259. *Id.*

260. *Williams*, 359 Md. at 150-51, 763 A.2d at 68.

261. *Grimes*, 366 Md. at 37-38, 782 A.2d at 812 (citation omitted) (internal quotation marks omitted).

262. Jacques v. First Nat'l Bank of Md., 307 Md. 527, 534, 515 A.2d 756, 759 (1986).

263. Ashburn v. Anne Arundel County, 306 Md. 617, 628, 510 A.2d 1078, 1083 (1986). The *Ashburn* court also cited *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), which listed the foreseeability of harm as a factor used to determine whether a duty exists. *Ashburn*, 306 Md. at 627, 510 A.2d at 1083.

264. *Ashburn*, 306 Md. at 628, 510 A.2d at 1082.

265. *Id.*

knowledge of the potential for harm,[266] it follows that they recognized the foreseeability of harm. Indeed, if a trier of fact finds that the researchers had the requisite knowledge for the potential harm and foresaw the possibility of that harm, a finding of a special relationship between the parties would be necessary. The *Grimes* court should have explained that these two elements are dispositive of a special relationship between a human subject and researcher.

b. Continued Application of the Test.—In developing this three-factor test, the court failed to clearly establish whether all of the factors, a majority of the factors, or just one factor are necessary to prove a special relationship between a researcher and his human subject. This oversight by the court may lead to varied applications of the test in the future. To avoid this problem the court should have indicated that the test it proposed was not exhaustive. In so doing, the court should have stated that the third factor—participation in a potentially dangerous nontherapeutic study—is the crucial factor and *must* be present to make a finding of a special relationship between a researcher and his human subject. It is this factor that strongly suggests that a special relationship exists between researchers and human subjects because a researcher would have knowledge of the harm, thereby making it foreseeable, and thus implicating a responsibility on behalf of the researcher to warn the subject of potential risks.[267]

The other two factors are simply *indicators* of a special relationship between a researcher and human subject. Recruitment by the researchers and age are not necessarily required for a finding of a special relationship, but may be analyzed as factors if they happen to be present. These two elements are important to this case because Grimes and Higgins were actively recruited to participate in the research experiment and were minors.[268] However, other reasonably possible scenarios would not include these two indicators, but still require the finding of a special relationship.[269]

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266. *See supra* note 261 and accompanying text.

267. If a researcher has actual or constructive knowledge of the potential for harm and recognizes that such harm is foreseeable, it is unconscionable to think that such information would not create a special relationship and impose on the researcher the duty to warn of potential harm. This is the unique qualifier of the human subject-researcher relationship that warrants the finding of a special relationship.

268. *Grimes*, 366 Md. at 93, 782 A.2d at 845.

269. An example of this may arise if an adult volunteers to participate in a research study, but is nevertheless injured. According to the *Grimes* analysis, such an individual would not have a special relationship with the researcher, and therefore would be unable to bring a tort claim against that researcher.

c. Control and Reliance—Additional Factors the Court Should Have Included.—The court should have also discussed indicators of a special relationship identified in prior case law, namely control and reliance. The court first recognized control in *Scott v. Watson*, stating that when a landlord voluntarily takes control over a common area, he enters into a special relationship with those tenants using that common area and owes them a duty of protection.[270] This principle was again employed in *Shields v. Swagman*, where a property owner was found to hold a special relationship and owe a duty to those citizens who are injured in common areas.[271]

Likewise, the researchers in *Grimes* took control over the lead paint content in the Grimes and Higgins homes.[272] The researchers were in complete control of the abatement of those homes, and therefore, according to *Scott* and *Shields*, entered a special relationship with those families. The *Grimes* court should have included this analysis in its opinion, thereby providing another indicator of a special relationship for courts to use in the future.

Furthermore, the court should have included a discussion explaining why reliance is an indicator of a special relationship generally and in this case. In *Ashburn* the court first articulated that when a citizen relies on police protection because of affirmative action by an officer, a special relationship may exist between those parties.[273] This notion was then reiterated and emphasized in *Williams*, where the court again recognized that when an officer induces reliance, he owes a duty of protection to those who rely on him.[274] The court was remiss in not including this discussion, thereby providing another indicator of a special relationship for future courts.

In the case at hand, both Erika Grimes's and Myron Higgins's mothers alleged that they relied on KKI to provide complete and accurate information regarding the study.[275] The fact that Erika and

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270. Scott v. Watson, 278 Md. 160, 171, 359 A.2d 548, 555 (1976). This ideology was expanded in *Lamb v. Hopkins* and *Hartford Insurance Co. v. Manor Inn* to include situations when a person actually has control or custody over another. In those instances, the person with the control owes a duty to third parties to protect them from the harm that may arise from the person being controlled. *See* Hartford Ins. Co. v. Manor Inn, 335 Md. 135, 150, 642 A.2d 219, 226-27 (1994); Lamb v. Hopkins, 303 Md. 236, 245, 492 A.2d 1297, 1302 (1985). However, in the case at hand, one person did not have control over another.

271. Shields v. Wagman, 350 Md. 666, 673, 714 A.2d 881, 884 (1998).

272. *See Grimes*, 366 Md. at 52-54, 782 A.2d at 821-22 (describing the physical lead paint abatement repairs to the participating homes).

273. Ashburn v. Anne Arundel County, 306 Md. 617, 631, 510 A.2d 1078, 1085 (1986).

274. Williams v. Mayor of Baltimore, 359 Md. 101, 144, 753 A.2d 41, 64-65 (2000).

275. *Grimes*, 366 Md. at 60, 64-65, 782 A.2d at 826, 829. Ms. Higgins contended that KKI withheld information of the potential dangers of the study and only informed her of the

Myron's mothers detrimentally relied on the misleading information given to them serves as another indicator that a special relationship existed in this case.

The court in *Grimes* provided three factors that may indicate the presence of a special relationship between a human subject and researcher. However, in light of the court's decision to leave the ultimate decision to the trier of fact, a more thorough analysis of the three factors was necessary. Moreover, the court should have looked to prior case law and incorporated factors already delineated by the court, namely control and reliance, into its discussion. Finally, the court should have recognized that participation in a potentially dangerous nontherapeutic study was the crucial factor in determining whether a special relationship exists between human subject and researcher. It is this factor that exemplifies whether a researcher has knowledge of the potential harm that may occur because of participation in the study.

5. Conclusion.—The Court of Appeals, in *Grimes v. Kennedy Krieger Institute, Inc.*, failed to set a clear methodology for evaluating whether a special relationship exists between a researcher and his or her human subject. The court's finding of certain factors to be dispositive of a special relationship and concurrent failure to adequately discuss their implementation renders the court's analysis incomplete and has the potential to lead to inconsistent application of the court's three factors in the future. Rather than basing its analysis on broad policy goals, the court needed to provide a more thorough analysis of how tort law precedent provides an appropriate conclusion in this case. Thus, while the court's conclusion is correct, its analysis only confuses an already inconsistent factual determination.

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"lower [of the two] results of the samples collected by dirt wipe methodology." *Id.* at 64-65, 782 A.2d at 829. Ms. Higgins maintained that this was "misleading to her as a participant in the study," and that "it gave her a false sense of security that there were no potential lead-based paint or dirt hazards in her house." *Id.* at 65, 782 A.2d at 829. Although reliance is often difficult to prove, it is reasonable to assume that both mothers relied on KKI to fulfill their obligations under the contract and provide them with the results of the dust wipe and blood tests taken in their homes.

B. *Eliminating Pre-Seizure Conduct of a Law Enforcement Officer from Review Under Constitutional and Tort Law*

In *Richardson v. McGriff*,[1] the Court of Appeals of Maryland addressed whether a jury that was assessing a police officer's actions under Article 26 of the Maryland Declaration of Rights and the common law principles of self-defense and gross negligence should have been able to consider the actions of the police officer that occurred antecedent to the seizure of an individual in its analysis.[2] The Court of Appeals concluded that the jury should not have been able to consider the pre-seizure actions of the police officer in its analysis of the police officer's actions under Article 26, self-defense, and gross negligence.[3] The court found that the pre-seizure actions of a police officer are not relevant to the examination of a police officer's conduct pursuant to Article 26 or common law self-defense and gross negligence, and therefore cannot be considered in the analysis of a police officer's action under those principles of law.[4] What the Court of Appeals failed to realize in justifying the restriction on the scope of the jury's examination, however, is that while all pre-seizure actions are irrelevant to, and should thus be excluded from, an analysis under Article 26, the principles of self-defense and gross negligence provide that some pre-seizure actions may be relevant to, and thus should be included in, an analysis of an officer's conduct. Fortunately for the Court of Appeals, *Richardson* is one of those cases where the pre-seizure actions of the police officer are not relevant to the self-defense and gross negligence analyses. Thus, while the court's conclusion was correct, its reasoning was flawed.

1. The Case.—

a. The Facts.—On January 12, 1996, Baltimore City Police Officer Horace McGriff received an emergency call indicating that there were several male individuals in an abandoned apartment and that shots had been fired.[5] After arriving at the apartment, Officer

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1. 361 Md. 437, 762 A.2d 48 (2000).
2. *Id.* at 451-52, 762 A.2d at 56.
3. *Id.* at 465, 762 A.2d at 63.
4. *See id.* at 452-53, 762 A.2d at 56 (asserting that the Fourth Amendment standard would govern the resolution of the issue under Article 26, self-defense, and gross negligence); *id.* at 458, 762 A.2d at 59 (adopting the view of courts that have excluded pre-seizure actions from review); *id.* at 465, 762 A.2d at 63 (affirming the trial court's exclusion of the pre-seizure actions).
5. *Id.* at 442, 762 A.2d 50.

McGriff requested the presence of another officer and was joined at the scene by Officer Donald Catterton.[6] Once the officers located the abandoned apartment, they determined that the apartment needed to be "checked" and proceeded to conduct a room-to-room search.[7]

During this search, the officers heard a noise and entered the kitchen.[8] The officers determined that a closet was the only possible hiding place in the kitchen.[9] Officer McGriff positioned himself in front of the closet door with his weapon drawn and the flashlight pointed at the closet. Both officers announced that they were going to open the closet door. No one responded.[10] When both officers were in position, Officer Catterton opened the closet door.[11] At this point, Officer McGriff saw Taurrance Richardson holding what appeared to be a weapon[12] and fired a shot at Richardson, severely wounding him.[13]

b. Procedural History.—

(1) The Trial.—Approximately one year after the shooting, Richardson filed a lawsuit against numerous city officials and Officers McGriff and Catterton, alleging that they committed tortious acts and violated Articles 24 and 26 of the Maryland Declaration of Rights.[14] All claims except those brought against Officers McGriff and Catterton were dismissed.[15] Additionally, Officers McGriff and Catterton filed a motion for summary judgment, which was granted as to

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6. *Id.*

7. *Id.* at 443, 762 A.2d at 51. The petitioner, Taurrance Richardson, disputed hearing the officers announce their presence in the apartment. *Id.* at 443 n.2, 762 A.2d at 51 n.2.

8. *Id.* at 444, 762 A.2d at 51.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*, 762 A.2d at 51-52. Richardson was actually holding a vacuum cleaner pipe. *Id.* at 442, 762 A.2d at 50.

13. *Id.* at 444, 762 A.2d at 52. It was not until after Officer McGriff fired the shot that he realized the object was a vacuum cleaner pipe. *Id.*

14. Richardson v. McGriff, No. 5396, slip op. at 2 (Md. Ct. Spec. App. Nov. 3, 1999). Richardson alleged that the various parties were liable in tort for: (1) assault and battery; (2) false arrest and imprisonment; (3) intentional infliction of emotional distress; (4) gross negligence; (5) civil conspiracy; (6) negligence (only against Officer McGriff, the Police Commissioner, Baltimore City, and the State of Maryland); and (7) malicious prosecution (only against officers McGriff and Catterton). *Id.* Article 26 states that "all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [grievous] and oppressive; and all general warrants . . . without naming or describing the place . . . are illegal, and ought not to be granted." MD. DECL. OF RTS. art. 26. Article 24 states that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, . . . or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. DECL. OF RTS. art. 24.

15. *Richardson*, No. 5396, slip op. at 2-3.

the claims for intentional infliction of emotional distress, civil conspiracy, and malicious prosecution.[16]

Prior to the trial on the remaining counts, the officers filed a motion *in limine* seeking to preclude Richardson from introducing evidence pertaining to allegations that the officers violated proper police procedures.[17] After initially denying the motion *in limine*, the circuit court eventually granted the motion.[18] Subsequently, the trial judge, in keeping with the motion *in limine* ruling, also concluded that Richardson was precluded from questioning Sergeant Laron Wilson regarding the alternatives available to Officer McGriff during the incident and the deadly force training given to city police officers.[19]

With the circuit court having definitively ruled on Richardson's ability to introduce the alleged violations of police procedures in the battery, gross negligence, and Article 26 claims, the case was sent to the jury with only the three claims against Officer McGriff remaining.[20] The trial court instructed the jury that, in determining whether Officer McGriff was justified in using deadly force against Richardson, it was to determine "whether a reasonable police officer under the same or similar circumstances" could have believed that Richardson "pos[ed] a significant threat of death or serious physical injury" to the officer or others.[21] The court further instructed the jury that they were to judge the reasonableness of the use of force in light of "all of the circumstances as they appeared to the officer at that time."[22] After questions by the jury, the circuit court also concluded that the jury was restricted to examining "the circumstances as they existed at the moment the force was used, which means . . . as you found them to be when that door was opened . . . ."[23] On the basis of this clarification, the jury concluded that Officer McGriff had acted reasonably in his

16. *Id.* at 3.

17. *Id.*; *see also Richardson*, 361 Md. at 446, 762 A.2d at 53. Essentially, Richardson wanted to use the police procedures and regulations in order to demonstrate that the officers' actions were unreasonable. *See id.*

18. *Richardson*, No. 5396, slip op. at 3.

19. *Richardson*, 361 Md. at 450-51, 762 A.2d at 54-55.

20. *Richardson*, No. 5396, slip op. at 4. The three causes of action against Officer McGriff were the only remaining counts because the circuit court granted summary judgment in favor of Officer Catterton as to all the allegations against him and in favor of Officer McGriff as to the negligence, false imprisonment, and false arrest allegations. *Id.*

21. *Id.* at 450-51, 762 A.2d at 55.

22. *Id.* at 450, 762 A.2d at 55.

23. *Richardson*, No. 5396, slip op. at 5.

use of deadly force.[24] The jury did not find Officer McGriff liable to Richardson for battery, gross negligence, or Article 26 violations.[25]

(2) The Court of Special Appeals.—The Court of Special Appeals, in an unreported opinion, affirmed the decision of the circuit court.[26] With regard to Richardson's argument that the officers excluded jurors solely based on race, the Court of Special Appeals concluded that the circuit court did not err in determining that the officers' counsel sufficiently demonstrated that all of the peremptory strikes were made on race-neutral grounds.[27] In addition, the Court of Special Appeals held that the circuit court did not abuse its discretion when it granted the motion *in limine*,[28] denied the petitioner the opportunity to examine witnesses regarding the training and reasonable alternatives available to Officer McGriff,[29] and instructed the jury to only consider Officer McGriff's actions at the time the deadly force was used when assessing the reasonableness of his actions.[30]

The court determined that an "objective reasonableness" test should govern the analysis of Richardson's Article 26, battery, and gross negligence claims.[31] Therefore, the court concluded that any actions or events that occurred prior to Officer McGriff's use of deadly force were not relevant to the ultimate determination of whether Officer McGriff was liable to Richardson under any of the three remaining legal claims.[32] Consequently, the Court of Special Appeals affirmed the circuit court's decision regarding the motion *in limine*,[33] the denial of testimony,[34] and the jury instruction.[35]

The Court of Appeals granted certiorari and determined that Richardson's appeal presented two primary questions for resolution: whether the conduct of a police officer that occurred prior to the actual seizure should be considered when attempting to analyze and determine whether the police officer's actions during the seizure were

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24. *Id.*
25. *Id.*
26. *Id.* at 7, 10, 12, 14-15.
27. *Id.* at 7.
28. *Id.* at 10.
29. *Id.* at 12.
30. *Id.* at 14-15.
31. *Id.* at 9-10. According to the Court of Special Appeals, the "objective reasonableness" test not only covers an alleged violation of Article 26 of the Maryland Declaration of Rights, but also applies to an analysis of a police officer's use of force under the common law causes of action of battery and gross negligence. *Id.* at 10.
32. *Id.* at 10.
33. *Id.*
34. *Id.* at 12.
35. *Id.* at 14-15.

reasonable;[36] and whether the circuit court committed reversible error when it permitted the officers' peremptory challenges to the jurors.[37]

2. *Legal Background.*—

a. Interpretation of Excessive Force During a "Seizure" in Claims Under 42 U.S.C. § 1983.—

(1) The "Objective Reasonableness" Test.—The United States Constitution contains various provisions that protect citizens and individuals from being subjected by the government to such things as "unreasonable searches and seizures."[38] The Constitution, while providing these protections, does not provide an avenue to seek redress for violations of these protections. Thus, 42 U.S.C. § 1983 was enacted.[39] Section 1983 established that every citizen or person can seek redress against a government actor who deprives that person of a right, privilege, or immunity.[40]

The use of excessive force by a law enforcement official during an arrest, investigatory stop, or other type of "seizure"[41] has been found by courts to infringe upon constitutional rights.[42] Furthermore, in *Graham v. Connor*, the Supreme Court found that a police officer's use of force should be subjected to an examination under the Fourth Amendment's "reasonableness" test.[43] The Court held that lower courts should determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[44]

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36. *Richardson*, 361 Md. at 441, 762 A.2d at 50.

37. *Id.* at 451-52, 762 A.2d at 56. This issue is not the focus of this Note. As a result, it will be addressed only in a cursory fashion throughout the remainder of the Note.

38. *See, e.g.*, U.S. CONST. amend IV.

39. 42 U.S.C. § 1983 (2000).

40. *Id.*

41. Seizures, which include arrests and investigatory stops, occur "only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)). Shooting a suspect is a seizure. Bella v. Chamberlain, 24 F.3d 1251, 1255 (10th Cir. 1994).

42. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that the use of deadly force to prevent an apparently unarmed felon from fleeing violated the Constitution).

43. *Graham*, 490 U.S. at 395.

44. *Id.* at 397. The Supreme Court noted that the "reasonableness" inquiry in the Fourth Amendment is an objective inquiry that requires an examination of the facts and circumstances "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. The Court indicated that the "reasonableness" inquiry should examine "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

(2) Pre-Seizure Actions of a Law Enforcement Officer and the "Objective Reasonableness" Test.—

(a) Graham's Treatment of the Pre-Seizure Actions of a Law Enforcement Officer.—Although the decision in *Graham v. Connor* clearly established that a § 1983 case alleging impropriety during the course of a "seizure" must be analyzed under the "objective reasonableness" test, the decision did not definitively establish the assessment parameters.[45] In particular, the *Graham* decision did not establish whether the actions and conduct of a law enforcement officer that occurred prior to the actual "seizure" should be included in the determination of whether the amount of force applied by the officer was reasonable or excessive.[46] The *Graham* court instead restricted the review to that of a reasonable officer on the scene and provided a non-exclusive list of factors to consider in this examination.[47]

(b) Excluding Pre-Seizure Actions.—

(i) The United States Court of Appeals for the Fourth Circuit.—Following the *Graham* decision, some courts have established a "time frame" to be used when assessing the reasonableness of a police officer's actions.[48] The United States Court of Appeals for the Fourth Circuit addressed this "time frame" issue in *Greenidge v. Ruffin.*[49] In *Greenidge,* an officer was accused of using excessive force when she shot the plaintiff during a seizure.[50] The Fourth Circuit concluded that the officer's actions prior to the "seizure" were irrelevant to the examination of her decision to use deadly force.[51] According to the court, under the Fourth Amendment's "objective reasonableness" test, the officer's actions prior to the seizure were "not probative of the reasonableness of Officer Ruffin's decision to fire the shot."[52] Thus, the Fourth Circuit limited the inquiry under the "objective reasona-

45. *See id.* at 395-97.

46. *See id.*

47. *Id.* at 396.

48. *See* Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) (holding that a police officer's actions prior to a seizure were irrelevant to the objective reasonableness assessment); Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 1995) (holding that the district court did not abuse its discretion when it excluded the actions of a police officer that occurred prior to a constitutional "seizure" from its reasonable analysis).

49. 927 F.2d 789 (4th Cir. 1991).

50. *Id.* at 790.

51. *Id.* at 792.

52. *Id.*

bleness" test to the officer's actions occurring immediately prior to or during the seizure.[53]

Greenidge is not the only case in which the Fourth Circuit has excluded the pre-seizure conduct of a police officer from assessment under the "objective reasonableness" test. Two years after *Greenidge*, in *Drewitt v. Pratt*,[54] the Fourth Circuit again excluded the pre-seizure conduct of a police officer from assessment, holding that an officer's failure to display his badge prior to a shooting was irrelevant as to whether the officer was reasonable in using deadly force.[55]

(ii) Other United States Courts of Appeals.—Other appellate courts have also established a similar time frame for the analysis of a law enforcement officer's actions under the "objective reasonableness" test.[56] For example, the Court of Appeals for the Eighth Circuit, in *Cole v. Bone*,[57] determined that the actions taken by a law enforcement officer prior to a constitutional seizure should not factor into the assessment of the objective reasonableness of the officer's actions at the moment of and during the seizure.[58]

Two years later, in *Schulz v. Long*, the Eighth Circuit affirmed the time-frame parameters that were established in *Cole*, holding that "evidence that [the] Officers . . . created the need to use force by their actions prior to the moment of seizure is irrelevant to the issues presented here, and therefore the district court did not abuse its discretion in excluding it."[59] In *Schulz*, the plaintiff argued that the law enforcement officers, who eventually shot him, essentially created the need to use deadly force by: (1) not waiting for backup, and (2) becoming tangled in a barricade that was erected by the plaintiff for the purpose of keeping the officers away.[60] The Eighth Circuit, however, agreed with the trial court and concluded that the Supreme Court's decision in *Graham*, along with the court's previous decision in *Cole*,

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53. *Id.* The majority in *Greenidge* placed particular importance upon the statement in *Graham* that "'reasonableness' meant the 'standard of reasonableness at the moment.'" *See id.*

54. 999 F.2d 774 (4th Cir. 1993).

55. *Id.* at 780.

56. *See, e.g.*, Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) (holding that the pre-seizure actions of an officer were irrelevant in determining whether the officer acted with objective reasonableness in shooting an individual).

57. 993 F.2d 1328 (8th Cir. 1993).

58. *Id.* at 1333.

59. 44 F.3d 643, 649 (8th Cir. 1995).

60. *Id.* at 646, 648.

warranted excluding the evidence pertaining to the actions of the officers prior to the seizure.[61]

(c) Setting a Time-Frame that Includes Pre-Seizure Actions.— Other courts have been unwilling to adopt a strict time-frame parameter. The Seventh Circuit, after initially adopting a standard that excluded pre-seizure actions from review,[62] reversed its position in *Deering v. Reich*.[63] In *Deering*, the Seventh Circuit held that pre-seizure actions were not exempt from judicial review during an investigation into the reasonableness of a seizure.[64] Unlike the Fourth and Eighth Circuits, the Seventh Circuit determined that the "totality of the circumstances" included the actions prior to the moment of the seizure.[65]

The First Circuit, in *Saint Hilaire v. City of Laconia*,[66] and the Third Circuit, in *Abraham v. Raso*,[67] more explicitly rejected the limitations imposed by the Fourth and Eighth Circuits. In *Saint Hilaire*, the First Circuit indicated that the exclusion of a police officer's conduct occurring prior to the moment of a shooting violated tenets established by the Supreme Court.[68] Consequently, the First Circuit concluded that actions taking place prior to a seizure should be included in any assessment or examination of the reasonableness of the use of force by the officer during the seizure.[69] Similarly, in *Abraham*, the Third Circuit concluded that pre-seizure events were relevant because the "totality of the circumstances" implies that "reasonableness should be sensitive to all of the factors bearing on the officer's use of force."[70] Furthermore, in the opinion of the *Abraham* court, excluding pre-seizure events not only contradicted Supreme Court precedent, but also created logistical and theoretical problems for assessing an officer's reasonableness.[71]

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61. *Id.* at 649.

62. *See* Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[T]he Fourth Amendment [does not] prohibit[ ] creating unreasonably dangerous circumstances . . . . The Fourth Amendment prohibits unreasonable *seizures* not unreasonable, unjustified or outrageous conduct in general.").

63. 183 F.3d 645 (7th Cir. 1999).

64. *Id.* at 649-51.

65. *Id.* at 650.

66. 71 F.3d 20 (1st Cir. 1995).

67. 183 F.3d 279 (3d Cir. 1999).

68. *St. Hilaire*, 71 F.3d at 26.

69. *Id.*

70. *Abraham*, 183 F.3d at 291.

71. *Id.* The *Abraham* court was unclear as to how the reasonableness of a particular use of force would be assessed if pre-seizure actions were not examined, and was concerned

As the above cases demonstrate, the *Graham* opinion has been interpreted differently with respect to whether the actions of a police officer prior to a seizure should factor into the assessment of the overall reasonableness of the police officer's actions.

b. Claims Brought Pursuant to Article 26 of the Maryland Declaration of Rights.—Article 26 of the Maryland Declaration of Rights, which protects against unreasonable searches and seizures,[72] has long been considered to be the state equivalent of the Fourth Amendment to the United States Constitution.[73] Thus, courts in Maryland give great deference to the decisions of the Supreme Court interpreting the Fourth Amendment when assessing a claim brought pursuant to Article 26.[74]

c. Utilizing the Pre-Seizure Actions of a Law Enforcement Officer Under Common Law Principles.—

(1) Pre-Seizure Actions Analysis Under Self-Defense.—Over time, Maryland has incorporated the doctrine of self-defense into its common law.[75] Under the doctrine of self-defense, as articulated by the Court of Appeals of Maryland, an individual will be absolved from liability for a homicide or assault if:

> (1) The accused . . . had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
> (2) The accused must have in fact believed himself in this danger;
> (3) The accused . . . [was] not . . . the aggressor . . . [and did not] provoke[ ] the conflict; and

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that excluding these actions would result in every shooting being unreasonable because the officer's rationale for shooting could not be considered. *Id.*

72. MD. DECL. OF RTS. art. 26. Article 26 provides:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

73. *See* Gadson v. State, 341 Md. 1, 8 n.3, 668 A.2d 22, 26 n.3 (1995) (stating that "Article 26 of the Maryland Declaration of Rights is *in pari materia* with the Fourth Amendment").

74. *Id.*

75. *See* Jones v. State, 357 Md. 408, 430, 745 A.2d 396, 407 (2000) (holding that self-defense precludes a finding of reckless endangerment); Baltimore Transit Co. v. Faulkner, 179 Md. 598, 600, 20 A.2d 485, 487 (1941) (stating that a person who acts in self-defense based on a reasonable belief of immediate danger is immune from civil or criminal liability).

> (4) The force used . . . [was] not unreasonable and excessive, that is, the force [was] not . . . more force than the exigency demanded.[76]

While Maryland courts have not had the opportunity to apply the law of self-defense to the use of deadly force by a law enforcement officer, they have addressed the question of what evidence is admissible to prove self-defense in other types of actions. In particular, Maryland courts have been willing to allow acts that occurred prior to the use of force to be considered when a defendant claims self-defense.[77] For example, courts have allowed the prior acts of the victim to be introduced into evidence.[78] Furthermore, courts have indicated that acts of the person claiming self-defense that occurred prior to the use of force can be relevant to a self-defense claim. In *Cunningham v. State*,[79] for instance, the Court of Special Appeals relied on the pre-force acts of the person attempting to avoid liability on the basis of self-defense in concluding that the individual was an aggressor and had not established that he acted in self-defense.[80] Despite these cases, which are instructive on what may be considered in assessing whether a defendant acted in self-defense, courts have not definitively determined what evidence will be acceptable in self-defense cases involving the use of force by law enforcement officers.

(2) Utilizing Pre-Seizure Actions in an Analysis Under Gross Negligence.—Under Maryland law, causes of action for negligence require the plaintiff to prove that the defendant owed the plaintiff a duty or obligation; that the defendant breached this duty; and that the plaintiff suffered a harm as a proximate result of the defendant's breach of his or her duty.[81] In particularly egregious cases, a plaintiff

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76. State v. Faulkner, 301 Md. 482, 485-86, 483 A.2d 759, 761 (1984). Although the doctrine of self-defense requires all four elements to be present, the defendant need only demonstrate that there is "some evidence" which suggests that he or she acted in self-defense. Dykes v. State, 319 Md. 206, 216, 571 A.2d 1251, 1256-57 (1990).

77. *See* Gunther v. State, 228 Md. 404, 410, 179 A.2d 880, 883 (1962) (admitting evidence regarding the character of the victim); Jones v. State, 182 Md. 653, 659-61, 35 A.2d 916, 919-20 (1944) (finding that evidence pertaining to the "victim's" character was admissible); *see also* Colleen K. Heitkamp, Note, *Evidence of Prior Convictions*, 49 MD. L. REV. 671, 678 (1990) (stating that Maryland self-defense law recognizes that "the victim's prior acts are relevant to establish the defendant's state of mind").

78. *See Gunther*, 228 Md. at 410, 179 A.2d at 883; *Jones*, 182 Md. at 660-61, 35 A.2d at 919-20.

79. 58 Md. App. 249, 473 A.2d 40 (1984).

80. *Id.* at 257, 473 A.2d at 43.

81. *See, e.g.*, Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 335 Md. 135, 147-48, 642 A.2d 219, 225 (1994).

may have a cause of action for gross negligence.[82] In addition to the causation and harm requirements, gross negligence requires that the conduct of the defendant amount to a wanton or reckless disregard for others.[83]

Prior to *Richardson*, the Court of Appeals has had the opportunity to determine whether certain actions of a police officer amounted to gross negligence. In *State v. Albrecht*,[84] the Court of Appeals examined whether an officer was grossly negligent when he applied force that ultimately resulted in the death of an individual.[85] The court concluded that the officer's actions prior to the use of deadly force could be included in a determination of whether the law enforcement officer was guilty of grossly negligent conduct.[86] According to the court, Officer Christopher Albrecht's actions prior to his use of deadly force, which included "drawing and racking a shotgun fitted with a bandolier and bringing it to bear, *with his finger on the trigger*, on an unarmed individual who did not present a threat to the officer or to any third parties, in a situation where nearby bystanders were exposed to danger," supported a finding that a reasonable officer in a similar situation would not have taken those actions.[87] Consequently, there was a sufficient basis for a finding that Officer Albrecht was grossly negligent, and therefore guilty of involuntary manslaughter.[88]

In 1999, in *Lovelace v. Anderson*,[89] the Court of Special Appeals addressed whether an officer's pre-seizure conduct could be considered in assessing whether the officer acted with gross negligence.[90] In *Lovelace*, the plaintiff asserted that the officer, who at the time of the shooting, was working as a private security guard, engaged in grossly negligent conduct prior to and contemporaneous with the use of deadly force.[91] Some of the actions from which the plaintiff asserted the officer's gross negligence could be inferred were actions that occurred prior to the seizure of suspects.[92] The Court of Special Ap-

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82. *See* Boyer v. State, 323 Md. 558, 579, 594 A.2d 121, 132 (1991) (asserting that in order to "charge Trooper Titus with gross negligence, the plaintiffs must have pled *facts* showing that Trooper Titus acted with a wanton and reckless disregard for others").

83. *Id.*

84. 336 Md. 475, 649 A.2d 336 (1994).

85. *Id.* at 477-78, 649 A.2d at 337.

86. *Id.* at 505, 649 A.2d at 350-51.

87. *Id.*

88. *Id.*, 649 A.2d at 351.

89. 126 Md. App. 667, 730 A.2d 774 (1999).

90. *Id.* at 696, 730 A.2d at 788.

91. *See id.* at 696, 730 A.2d at 790-91 (providing the facts of the encounter upon which Lovelace claimed the inference of gross negligence could be drawn).

92. *Id.* at 701, 730 A.2d at 792.

peals rejected the plaintiff's contention that the officer's actions, which occurred prior to the seizure, were relevant to whether the officer was grossly negligent.[93] The Court of Special Appeals concluded that the officer's failures were not relevant to the liability determination because those actions were not immediately prior to or contemporaneous with the shooting.[94]

3. The Court's Reasoning.—In *Richardson,* the Court of Appeals addressed whether the actions of a law enforcement officer that occurred prior to a "seizure" were relevant to, and could be included in, an assessment of whether the officer violated Article 26 by effecting an unreasonable seizure, whether the officer acted with gross negligence, or whether he acted in self-defense.[95] The Court of Appeals first determined that, in this case, the "objective reasonableness" test employed in Fourth Amendment unreasonable seizure jurisprudence was the test that would govern the issues of self-defense and gross negligence.[96] Based on this determination, the court concluded that the linchpin of the analysis would be whether the police officer's antecedent actions are admissible under the Fourth Amendment's "objective reasonableness" test.[97]

Having concluded that the "objective reasonableness" test was the guidepost for the court's resolution, the Court of Appeals examined Fourth Amendment cases in which the "objective reasonableness" test was applied.[98] Writing for the majority, Judge Wilner concluded that Fourth Amendment precedent established that the actions of a law enforcement officer occurring prior to the moment of seizure were not relevant to the assessment of the reasonableness of the officer's actions or use of force during a seizure.[99] Based on this conclusion, the Court of Appeals then held that the circuit court did not commit reversible error when it: (1) granted a motion *in limine* filed by the police officer, (2) excluded certain testimony that related to the officer's actions prior to the officer's discharge of deadly force, and (3) instructed the jury to only consider those circumstances and facts that

93. *See id.*, 730 A.2d at 792-93.
94. *Id.*
95. *See Richardson*, 361 Md. at 451-53, 762 A.2d at 56.
96. *Id.* at 452-53, 762 A.2d at 56.
97. *See id.* at 453, 762 A.2d at 56.
98. *See id.* at 453-58, 762 A.2d at 57-59.
99. *See id.* at 458, 762 A.2d at 59.

existed at the moment when the officer decided to use deadly force.[100]

Judge Harrell, joined by Chief Judge Bell[101] and Judge Eldridge, dissented.[102] The dissent first rejected the notion that the "objective reasonableness" test of the Fourth Amendment prohibited an examination of a police officer's conduct that occurred prior to a seizure.[103] Rather, the dissent argued that preventing the reasonableness analysis from factoring in the pre-seizure conduct artificially limited the circumstances that could be examined.[104]

After concluding that the "objective reasonableness" test should include an analysis of the police officer's actions prior to the moment of seizure, the dissent determined that the circuit court erred by issuing a jury instruction that prevented the jury from considering the officer's pre-seizure actions in their assessment of the reasonableness of the officer's use of deadly force.[105] Furthermore, Judge Harrell opined that the trial court had erred when it granted the motion *in limine* and prevented the introduction of certain testimony related to the Article 26 and self-defense claims.[106]

Despite his opinion that the trial court erred by not admitting certain evidence related to the Article 26 and self-defense claims, Judge Harrell concluded that a police officer is not liable for gross negligence because he enjoys public official immunity; thus, the guidelines that proved gross negligence, even if improperly excluded, would not have aided Richardson in his claim.[107] Therefore, Judge Harrell determined that the exclusion of the guidelines was harmless

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100. *Id.* at 465, 762 A.2d at 63. The court also rejected the plaintiff's *Batson* challenge, finding that the failure to make a timely claim caused the challenge to be waived. *Id.* at 466-67, 762 A.2d at 63-64.

101. Chief Judge Bell joined the dissent except for Part III.D, in which the dissenters opined that a finding of gross negligence would not "[pierc]e public official immunity," and the *Batson* issue, on which he wrote a separate opinion. *Id.* at 523-26, 762 A.2d at 95-96 (Bell, C.J., dissenting).

102. *Id.* at 467, 762 A.2d at 64 (Harrell, J., concurring and dissenting).

103. *See id.* at 502-03, 762 A.2d at 83-84 (stating that "a standardized time frame or line of demarcation for considering deadly force reasonableness would be contrary to the spirit of *Graham*"). The portion of Judge Harrell's concurrence and dissent prior to the above conclusion consisted of a review of the procedural and factual history of the case and a review of previous cases that dealt with the setting of a "time-frame" under the "objective reasonableness" test set forth in *Graham v. Connor.*

104. *Id.* at 501, 762 A.2d at 83.

105. *Id.* at 503, 762 A.2d at 84.

106. *Id.* at 509, 517, 762 A.2d at 87, 91.

107. *Id.* at 523, 762 A.2d at 95. Chief Judge Bell did not join in the dissent with regard to this issue. *Id.*

error, which did not prejudice Richardson.[108] Based on his conclusion regarding the assessment of pre-seizure conduct in the reasonableness analysis, Judge Harrell would have reversed the rulings of the trial court.[109]

4. Analysis.—In *Richardson*, the Court of Appeals concluded that the acts of a police officer that preceded the actual seizure of an individual could not be used to determine whether that police officer violated the unreasonable seizure portion of Article 26 of the Maryland Declaration of Rights.[110] The court also held that the acts of a police officer that preceded the actual seizure could not be used to determine whether that police officer was entitled to use a certain amount of force in self-defense, or whether that police officer's actions were grossly negligent.[111] This holding was not completely appropriate. The court was correct in excluding the pre-seizure actions from the Article 26 analysis because the pre-seizure actions are not relevant to the Fourth Amendment and its "objective reasonableness" examination. The Court of Appeals was incorrect, however, in excluding the pre-seizure actions of the police officer from the analysis of the officer's actions under the common law principles of self-defense and gross negligence. The pre-seizure actions of a police officer can be relevant to an examination of an officer's actions under the self-defense and gross negligence tests. Conversely, however, the Court of Appeals was correct in excluding the particular pre-seizure actions at issue in *Richardson* because those actions were not relevant to the examinations under the self-defense and gross negligence principles.

a. Pre-Seizure Actions: Irrelevant to and Excluded by the Fourth Amendment and its "Objective Reasonableness" Test.—In excluding the pre-seizure actions of Officer McGriff from the seizure analysis under Article 26,[112] the Court of Appeals reached an appropriate decision because the pre-seizure actions of police officers are irrelevant to the analysis of a seizure under the Fourth Amendment.

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108. *Id.* Judge Harrell also stated that because he would dispose of the case on the issues previously addressed, he declined to address the *Batson* issue. *Id.* Chief Judge Bell authored a separate dissent that addressed the *Batson* issue. *Id.* at 523-24, 762 A.2d at 95 (Bell, C.J., dissenting).

109. *Id.* at 509, 517, 762 A.2d at 87, 91 (Harrell, J., concurring and dissenting).

110. *Richardson*, 361 Md. at 465, 762 A.2d at 63.

111. *See id.* at 451-53, 465, 762 A.2d at 56, 63 (concluding that the trial court did not err by excluding pre-seizure actions).

112. *Id.*

The United States Supreme Court, which in *Graham v. Connor* established that the Fourth Amendment and its "objective reasonableness" test would govern the assessment of seizures by police officers, did not explicitly set forth whether pre-seizure actions would be included in this examination.[113] The "objective reasonableness" test articulated by the Supreme Court, however, as many United States Courts of Appeals have asserted, excludes these actions from the assessment because these actions are irrelevant.[114]

First, the Supreme Court, in its discussion of the reasonableness analysis, indicated that the reasonableness test focuses on "reasonableness at the moment."[115] Reasonableness at the moment implies that reasonableness is judged at the moment of the seizure, and therefore should only focus on the actions of the police officer at the moment of the seizure and should not take into account pre-seizure actions.[116]

Second, in establishing that the Fourth Amendment's reasonableness test would employ an objective perspective, the Supreme Court articulated that the determination would be made "in light of the facts and circumstances confronting" the officers.[117] This language also seems to contemplate that the "objective reasonableness" examination would only factor in those "facts and circumstances" that exist at the moment of a seizure and not any "facts and circumstances" that existed prior to the moment of the seizure.[118] By focusing on the facts confronted at the moment of the seizure, the Court appears to be ignoring the pre-seizure actions of the police officer.

In fact, the *Graham* Court's non-exclusive list of items that should be factored into the examination did not include any actions of police officers that would precede a seizure.[119] Instead, the Court addressed only those actions of the seized individuals that should factor into the

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113. 490 U.S. 386, 395-97 (1989).

114. *See* Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that pre-seizure events are not examined under the Fourth Amendment); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) (holding that events prior to the seizure are not relevant and are inadmissible).

115. *Graham*, 490 U.S. at 396.

116. *See Greenidge*, 927 F.2d at 792 (focusing on the Supreme Court's emphasis in *Graham* on "reasonableness *at the moment*" in concluding that the pre-seizure actions of the officer were not relevant to the examination of the seizure under the "objective reasonableness" test).

117. *Graham*, 490 U.S. at 397.

118. *See Cole*, 993 F.2d at 1333 ("In analyzing the reasonableness of [the] decision to use deadly force, we examine the information that [was] possessed at the time of [the] decision.").

119. *Graham*, 490 U.S. at 396.

reasonableness assessment.[120] While the failure to mention the pre-seizure actions of police officers as factors in the reasonableness examination does not definitively mean that the Court intended those acts to be excluded, it certainly indicates that actions of the seized individual, as opposed to the pre-seizure actions of the officers, was at the forefront of the Justices' minds. This fact, when combined with the above-mentioned language in the *Graham* opinion, would seem to bolster the position of those courts that have focused on the Supreme Court's use of "at the moment" and "split-second judgment" as reasons for excluding the pre-seizure actions from the reasonableness examination.[121]

Still, despite the opinion in *Graham*, there are some courts that feel that the "objective reasonableness" examination, which takes into account the totality of the circumstances,[122] must include the pre-seizure actions of police officers.[123] The Fourth Amendment itself, however, counsels against this interpretation. The Fourth Amendment, as courts that have excluded pre-seizure actions realize, "prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general."[124] Consequently, actions of a police officer that take place prior to the actual "seizure" are not relevant to, and should not be included in, an examination of a claim of excessive force during a seizure, whether it be under the auspice of the Fourth Amendment or Article 26 of the Maryland Declaration of Rights.

b. Pre-Seizure Actions: Can Be Relevant to the Examination of a Police Officer's Conduct Under Self-Defense.—In *Richardson*, the Court of Appeals determined that the pre-seizure actions of a police officer should not be included in an examination of a police officer's use of force under self-defense.[125] The court reasoned that the pre-seizure actions should not be included in the self-defense examination because the pre-seizure actions are not relevant to the review of a police officer's conduct under the common law principle of self-defense.[126] In reaching this determination, however, the court failed to recognize

120. *Id.*

121. *See, e.g.*, Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995) (using the *Graham* language to support the exclusion of the pre-seizure actions).

122. *See Graham*, 490 U.S. at 396.

123. *See, e.g.*, Deering v. Reich, 183 F.3d 645, 649-50 (7th Cir. 1999).

124. Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993); *see also Schulz*, 44 F.3d at 648.

125. *See Richardson*, 361 Md. at 465, 762 A.2d at 63.

126. *See id.* at 453, 762 A.2d at 56 (concluding that the Fourth Amendment's reasonableness test also controls the self-defense and gross negligence issues).

that pre-seizure actions of a police officer may be relevant to the self-defense analysis.

The potential relevance of the pre-seizure actions of a police officer to the self-defense analysis is derived from the third element of the self-defense test—"the defendant must not have been the aggressor or provoked the conflict."[127] This element may, in certain situations, permit the introduction of a police officer's conduct antecedent to the seizure because implicit in this element is the fact that the actions of the accused prior to the critical moment—the moment when deadly force is used—will have to be investigated.[128] In order to determine whether an individual (*viz*, a police officer) provoked a conflict that ultimately led to that individual using deadly force, it is necessary for the fact-finder to examine actions prior to the moment when the force at issue was used.[129] Consequently, if there is a suggestion that a police officer provoked a conflict that led to a use of force contemporaneous to a seizure, it is necessary to investigate the officer's actions prior to the seizure.[130]

The Court of Appeals justified the exclusion of pre-seizure actions in the self-defense context by concluding that the self-defense principle in Maryland requires an "objective reasonableness" examination.[131] According to the majority's rationale, the self-defense test excluded the pre-seizure actions because the Fourth Amendment, which also applied an "objective reasonableness" test, excluded the pre-seizure actions.[132] Using this reasoning was incorrect, however, because in so doing the court was implicitly concluding that the normal four-part test for self-defense had been replaced solely by an "objective

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127. Jones v. State, 357 Md. 408, 422, 745 A.2d 396, 403 (2000).

128. *See* Street v. State, 26 Md. App. 336, 339-40, 338 A.2d 72, 74 (1975) (looking at the actions prior to a shooting in determining that the accused was the aggressor in the conflict and could not claim self-defense).

129. *See id.*

130. *See id.* The existence of this aggressor element in the self-defense test, while certainly implicating some pre-seizure actions of police officers, does not mean that every pre-seizure action of a police officer will be relevant to the self-defense analysis. There will be some pre-seizure actions of a police officer that will have no relation to whether the officer provoked the conflict, and those actions would not be relevant to the aggressor element or the self-defense analysis. *See infra* notes 164-168 and accompanying text (discussing why the pre-seizure actions in *Richardson* were not relevant to and were properly excluded from the self-defense analysis).

131. *Richardson*, 361 Md. at 453, 762 A.2d at 56.

132. *See id.* at 453-58, 762 A.2d at 56-59 (concluding that the common law of Maryland would apply an "objective reasonableness" examination and that those courts that had excluded pre-seizure actions from the "objective reasonableness" inquiry were correct).

reasonableness" examination when the conduct of a police officer is at issue.[133] Contrary to the court's suggestion, this has not occurred.

In reaching the conclusion that a test similar to the Fourth Amendment's "objective reasonableness" test, instead of the traditional self-defense test, governs the assessment of a police officer's conduct under self-defense, the Court of Appeals relied upon a statement made by the court in *Boyer v. State*.[134] The *Richardson* majority focused on the statement in *Boyer* that a "police officer's conduct should be judged not by hindsight but should be viewed in light of how a reasonably prudent officer would respond faced with the same difficult emergency situation."[135] According to the *Richardson* court, it was this statement which indicated that the objective reasonableness examination would serve as the standard by which to assess a police officer's actions under self-defense.[136] This statement in *Boyer* did not establish such a principle.

First, the statement in *Boyer* was made in the context of assessing a police officer's actions under the common law principle of negligence.[137] It was not made in the context of a general discussion of how to assess a police officer's actions or in a discussion of a police officer's actions under self-defense.[138] Instead, it was articulated solely within the confines of a negligence discussion,[139] and thus should be limited to that area of law. Second, the statement by the *Boyer* court was only intended to guide the trial court in its resolution of the question pertaining to whether the police officer in *Boyer* breached a duty of care,[140] and was not intended to replace the methods by which a police officer's actions would be analyzed under other principles. The Court of Appeals merely wanted to indicate two things: (1) the negligence examination should not be based on the end result of the officer's actions (hindsight),[141] and (2) the reasonable examination in the negligence context should be from that of a police officer and not a normal person because the behavior of police officers and normal

133. *See id.* at 453, 762 A.2d at 56 (asserting that the "objective reasonableness" standard was the standard that would govern the analysis of Officer McGriff's actions under self-defense).

134. *Id.*

135. Boyer v. State, 323 Md. 558, 589, 594 A.2d 121, 136 (1991).

136. *Richardson*, 361 Md. at 453, 762 A.2d at 56.

137. *Boyer*, 323 Md. at 588-91, 594 A.2d at 136-37.

138. *See id.* (assisting the trial court in determining whether there was a breach of a duty of care).

139. *Id.*

140. *See id.*

141. *Id.* at 589, 594 A.2d at 136.

people are judged according to different standards.[142] It does not seem that the *Boyer* court would have wanted to assert that the traditional self-defense test was replaced by an objective reasonableness examination.

Instead, it seems logical to conclude that the examination of a police officer's actions under the common law principle of self-defense would retain the traditional four-part analytical framework, including both an objective reasonableness and anti-aggressor element. Such a test implicates and makes relevant certain pre-seizure actions of a police officer.

c. Pre-Seizure Actions: Can Be Relevant to the Examination of a Police Officer's Conduct Under Gross Negligence.—In *Richardson*, the Court of Appeals also determined that the pre-seizure actions of a police officer should not be included in an examination of a police officer's conduct under gross negligence.[143] Again, the court asserted that the examination of a police officer's conduct under gross negligence should not include the pre-seizure actions of the police officer because the actions of a police officer antecedent to a seizure are not relevant to the Fourth Amendment's "objective reasonableness" test.[144] Similar to the principle of self-defense, and unlike with Article 26, what the court failed to realize in justifying its exclusion of the pre-seizure actions from the examination in *Richardson* is that some pre-seizure actions of a police officer may be relevant to the gross negligence analysis.

While it is true that an analysis of a police officer's actions under the principle of gross negligence in Maryland employs an "objective reasonableness" examination,[145] the factors and reasons that warrant the exclusion of the pre-seizure actions of police officers from the Fourth Amendment examination are not present in the gross negligence context. Thus, there is no reason to conclude that the pre-seizure actions of police officers are not relevant to the gross negligence analysis of a police officer's actions on the basis that those same pre-seizure actions are not relevant to, and excluded from, an analysis of a police officer's use of force under the Fourth Amendment.

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142. *See id.* ("The officer is not to be held to the same coolness and accuracy of judgment of one not involved in an emergency vehicle pursuit.").

143. *See Richardson*, 361 Md. at 453, 762 A.2d at 56 (concluding that the standard for assessing a police officer's conduct under the Fourth Amendment—the "objective reasonableness" test—was the same standard that would guide the assessment under the principle of gross negligence).

144. *See id.* at 465, 762 A.2d at 63.

145. State v. Albrecht, 336 Md. 475, 500, 649 A.2d 336, 348 (1994).

In the context of the Fourth Amendment's "objective reasonableness" test, there are two main factors that warrant the conclusion that pre-seizure actions are not relevant to the assessment of a use of force during a seizure. First, the Fourth Amendment only regulates and pertains to seizures.[146] According to the Eighth Circuit, for example, "The Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. . . . Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment."[147] The second factor is the formulation of the "objective reasonableness" test in *Graham v. Connor*. As the Fourth Circuit indicated in *Greenidge v. Ruffin*, the use of language such as "at the moment" and "split-second judgments" in *Graham* implies that the pre-seizure events "are not relevant [to] and . . . inadmissible" from the "objective reasonableness" test.[148] Neither of these two factors, however, are relevant to the examination of a police officer's use of force under the common law principle of gross negligence even though that principle also applies an "objective reasonableness" examination.

First, the common law gross negligence principle does not solely focus on or pertain to the regulation of seizures.[149] The common law principle of gross negligence instead focuses on all conduct.[150] Thus, because the gross negligence principle, even with its "objective reasonableness" examination, does not focus on or solely regulate seizures, there is no reason to conclude that pre-seizure actions of police officers should be excluded from that examination based on the exclusion of those actions from a Fourth Amendment inquiry.

Second, the focus of the Fourth Amendment's "objective reasonableness" test on those actions contemporaneous with the seizure is not relevant in the gross negligence context because the gross negligence test, even in regards to police officers, was not formulated in such a way as to make irrelevant and excludable the pre-seizure actions of police officers.[151] Instead, the Court of Appeals of Maryland, in defining the gross negligence test, has merely indicated that: (1) allega-

146. *See* Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993).

147. *Id.*

148. Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991).

149. *See Albrecht*, 336 Md. at 500, 649 A.2d at 348 (stating the gross negligence test).

150. *See* Boyer v. State, 323 Md. 558, 578-80, 594 A.2d 121, 131-32 (1991) (examining whether there were sufficient facts alleged to establish gross negligence).

151. *Compare* Graham v. Connor, 490 U.S. 386, 395-97 (1989) (establishing the test for assessing claims that a police officer used excessive force), *with Albrecht*, 336 Md. at 500, 649 A.2d at 348 (explaining the gross negligence test in the context of examining the actions of a police officer).

tions of gross negligence should examine whether the conduct of an individual deviated so far from that of a reasonably prudent person that the conduct could be considered wanton and reckless;[152] and (2) in the context of police, the reasonably prudent person should be a police officer in similar circumstances.[153] The Court of Appeals, in formulating this test, unlike the Supreme Court, has never utilized restrictive terms like "reasonableness at the moment," which could and have been interpreted to limit the functional period of review and thereby exclude pre-seizure actions.[154] Instead, the only limitations placed upon the gross negligence test by the Court of Appeals are those based on whether an action is wanton and reckless or the legal cause of a harm. Thus, because the gross negligence test has not been set-up to exclude pre-seizure actions, there seems to be no reason to remove those actions from the gross negligence examination based on the exclusion of those actions from the Fourth Amendment's test.

d. The Pre-Seizure Actions in Richardson *Were Not Relevant to the Self-Defense and Gross Negligence Tests.*—While always excluding the pre-seizure actions of the police officer in *Richardson* from the self-defense and gross negligence analysis was incorrect,[155] the exclusion of the particular pre-seizure actions in *Richardson*[156] was appropriate. The exclusion of the particular pre-seizure actions in *Richardson* was appropriate because those actions were irrelevant to the examination of Officer McGriff's actions under either the self-defense or gross negligence tests.[157]

In the context of a claim of gross negligence, in order for the pre-seizure actions of the police officer in *Richardson* to be relevant, those actions would have to have made it more probable that Officer McGriff acted in a wanton and reckless manner.[158] The pre-seizure ac-

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152. *Albrecht*, 336 Md. at 500, 649 A.2d at 348.

153. *Id.* at 501, 649 A.2d at 349.

154. *See, e.g.*, Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991).

155. *See Richardson*, 361 Md. at 453, 762 A.2d at 56 (determining that the standard for assessing a police officer's use of force under self-defense and gross negligence parallels that of the Fourth Amendment's "objective reasonableness" test); *id.* at 453-58, 762 A.2d at 57-59 (adopting the reasoning of those courts that have precluded the pre-seizure actions of police officers from the Fourth Amendment examination).

156. *Id.* at 465, 762 A.2d at 63.

157. In order to be "relevant," a particular piece of evidence must "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MD. R. EVID. 5-401.

158. *See* MD. R. EVID. 5-401 (defining relevance); State v. Albrecht, 336 Md. 475, 500, 649 A.2d 336, 348 (1994) (defining gross negligence).

tions in *Richardson*,[159] however, did not make this more probable. The pre-seizure actions—failing to wait for adequate back-up and failing to turn on the kitchen lights[160]—would not have made the determination of whether Officer McGriff acted in a wanton and reckless manner more or less probable. The pre-seizure conduct, both by itself and when combined with the actions contemporaneous to the seizure—firing a gun after opening a closet and seeing a person holding what appeared to be a long, gun-like object[161]—would not have been sufficient as a matter of law to find that Officer McGriff acted in a grossly negligent manner. The pre-seizure conduct would not have been sufficient to establish gross negligence because those actions, when compared with the actions of police officers in previous cases, like in *State v. Albrecht*, where the Court of Appeals found that that an officer who pointed a "shotgun fitted with a bandolier" at an "unarmed individual," "*with his finger on the trigger*" was grossly negligent,[162] and *Boyer v. State*, where the Court of Appeals determined that an officer engaging in a high speed chase with a suspected drunk driver was not grossly negligent,[163] were clearly not wanton and reckless. Consequently, because the *Richardson* pre-seizure actions would not have made it more probable that Officer McGriff would have been found to have acted in a wanton or reckless manner, the pre-seizure actions in *Richardson* were not relevant in the gross negligence context.

Similarly, in order for actions to be relevant in the self-defense context, those actions would have to have made it more or less probable that one of the four elements in the self-defense test either would have or would have not been met.[164] The pre-seizure actions would have to have made it more or less probable that: (1) the person who used deadly force had a reasonable belief in imminent danger of death at the time he used deadly force; (2) the person who used deadly force had a subjective belief that he was in immediate danger; (3) the person who used deadly force was not the aggressor of the conflict that gave rise to the need to use deadly force; or (4) the force used was not unreasonable.[165] Given the specific scenario in *Richardson*, the only pertinent question in determining whether the pre-seizure actions were relevant is whether the inclusion of the pre-

159. *See Richardson*, 361 Md. at 451-52, 762 A.2d at 56 (articulating the issue in the case).
160. *Id.* at 444-45, 762 A.2d at 52.
161. *Id.* at 444, 762 A.2d at 51-52.
162. *Albrecht*, 336 Md. at 505, 649 A.2d at 351.
163. Boyer v. State, 323 Md. 558, 579-80, 594 A.2d 121, 132 (1991).
164. *See* MD. R. EVID. 5-401 (defining relevance).
165. *See* State v. Faulkner, 301 Md. 482, 485-86, 483 A.2d 759, 761 (1984).

seizure actions would have made it more probable that Officer McGriff provoked the situation that led to the use of deadly force.

Officer McGriff's pre-seizure actions would not be sufficient to establish that Officer McGriff was the aggressor because, when compared with the actions of individuals in other cases that were sufficient to establish that that individual was the aggressor, the actions appear completely benign. In *Cunningham v. State*,[166] for example, the actions that warranted finding that the defendant was the aggressor in the conflict consisted of the defendant pulling a loaded gun.[167] In *Richardson*, on the other hand, actions allegedly making the officer the aggressor were failing to wait for back-up and failing to turn on the kitchen lights.[168] When compared with pulling a gun on a potential victim, these actions clearly are not sufficient to warrant a finding that the person who undertook those actions provoked the conflict. Instead, it seems logical to conclude that these actions were completely benign, and therefore irrelevant to not only the aggressor section of the self-defense examination, but also the self-defense examination as a whole. This determination, when combined with the lack of relevance of these actions in the gross negligence context, permits the conclusion that while the Court of Appeals' reasoning was incorrect, the decision to exclude the pre-seizure actions from the self-defense and gross negligence examinations was correct.

5. Conclusion.—In *Richardson v. McGriff*, the Court of Appeals of Maryland affirmed the decision of the circuit court that excluded pre-seizure actions of police officers from the review of a police officer's actions under Article 26 of the Maryland Declaration of Rights, self-defense, and gross negligence.[169] The court determined that this exclusion of pre-seizure actions was appropriate because pre-seizure actions of police officers are irrelevant to the analysis of a police officer's use of force under these legal doctrines.[170] In reaching this conclusion, however, the court did not recognize that pre-seizure actions of officers, while always irrelevant to and excluded from an Article 26 examination, may be relevant to an examination of self-defense and gross negligence. Consequently, while the Court of Appeals appropriately affirmed the trial court's exclusion of pre-seizure actions from an Article 26 analysis, the court inappropriately affirmed the trial court's

166. 58 Md. App. 249, 473 A.2d 40 (1984).

167. *Id.* at 254, 256, 473 A.2d at 42, 44.

168. *Richardson*, 361 Md. at 451-52, 762 A.2d at 56.

169. *Id.* at 465, 762 A.2d at 63.

170. *See id.* at 451-53, 762 A.2d at 56 (analogizing the Fourth Amendment test to the Article 26, self-defense, and gross negligence tests).

exclusion of pre-seizure actions from the self-defense and gross negligence analyses. The Court of Appeals should have realized that pre-seizure actions may be relevant to the self-defense and gross negligence examinations and affirmed the trial court's exclusion of the actions in *Richardson* on the basis that the particular pre-seizure actions of the police officer in *Richardson* were irrelevant to the self-defense and gross negligence examinations. Had the Court of Appeals followed this course, the court would have not only reached the proper decision, but also used the proper reasoning.

JASON M. WHITEMAN

Recent Decisions

The United States Court of Appeals for the Fourth Circuit

I. Civil Procedure

A. *Reaffirming the Effectiveness of Traditional Personal Jurisdiction Doctrine in Light of Virtual Contacts*

In *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan*,[1] the United States Court of Appeals for the Fourth Circuit considered the exercise of personal jurisdiction over an Arizona defendant based on his contributions to a website created and maintained by a North Carolina co-defendant.[2] The Fourth Circuit held that the assertion of jurisdiction over the defendant was proper because he had deliberate, specific contacts with the forum state such that he should have anticipated defending a lawsuit in North Carolina.[3] In so holding, the court properly analyzed Nolan's contacts with North Carolina under traditional personal jurisdiction doctrine, rather than applying the "sliding scale" analysis introduced in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, under which the permissible scope of personal jurisdiction "is determined by the level of interactivity and commercial nature" of the defendant's Internet use.[4] Moreover, by deciding the case under traditional personal jurisdiction doctrine, the court demonstrated that the proposed alternatives to asserting personal jurisdiction over a nonresident defendant based on Internet contacts are unnecessary and unduly burdensome.

1. The Case.—In February 1999, David Nolan, an Arizona resident, founded the University of Christian Science (UCS), an online university allowing Christian Scientists to study the teachings of the Church's founder, Mary Baker Eddy, and to exchange ideas about the organization.[5] Nolan struggled with the technicalities of setting up

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1. 259 F.3d 209 (4th Cir. 2001).
2. *Id.* at 212.
3. *See id.* at 216-17.
4. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
5. *Nolan*, 259 F.3d at 212-13. In 1872, Mary Baker Eddy founded The First Church of Christ, Scientist (TFCCS). *Id.* at 212. TFCCS is a Boston-based, international religious organization governed by a Board of Directors who supervise and control the Church's publishing enterprise, The Christian Science Publishing Society. *Id.* TFCCS distributes publications and products "which bear federally registered and common law trademarks owned by the Board." *Id.*

the website so, in the spring of 1999, he enlisted the help of David Robinson, a North Carolina resident.[6] Robinson obtained a domain name for the online university and posted the information supplied to him by Nolan.[7] As the "webmaster" of the site, Robinson was responsible for "physically creat[ing] and maintain[ing] the [web]site," as well as the billing and the administrative aspects of the enterprise.[8] Nolan was responsible for drafting and making decisions regarding the content of the UCS website, but he could not remove the contents of the website without the assistance of Robinson.[9]

Throughout the spring of 1999, Nolan and Robinson remained in constant contact, and Nolan periodically sent revisions of the site's content to Robinson, which Robinson posted.[10] In addition to other features, the website contained information about the UCS library, live chat rooms, a weekly lecture series, video tape productions of seminars, published articles and literary productions on the religion, and a campus book store that sold items related to Christian Science and Mary Baker Eddy.[11]

In July 1999, the Board of Directors of TFCCS (the Board) filed a trademark infringement suit in the Western District of North Carolina against Robinson, Nolan, and the two entities with which they were affiliated, The Roan Mountain Institute of Christian Science and UCS, respectively.[12] Despite the fact that Nolan and Robinson are active Christian Scientists, their beliefs diverge significantly from those advocated by TFCCS.[13] The Board claimed that the defendants were using marks belonging to the Board without their permission or marks "confusingly similar thereto" in violation of the Lanham Act.[14]

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6. *Id.* at 213.

7. *Id.*

8. *Id.*; *see also* Christian Sci. Bd. of Dirs. v. Robinson, 123 F. Supp. 2d 965, 969 (W.D.N.C. 2000).

9. *Nolan*, 259 F.3d at 213.

10. *Id.*

11. *Robinson*, 123 F. Supp. 2d at 974.

12. *Nolan*, 259 F.3d at 213.

13. *Id.* at 212.

14. *Id.* at 213-14 (internal quotation marks omitted). The Lanham Act states that to establish a trademark infringement claim, the plaintiff must show the defendant's "use in commerce" of a registered mark "in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion . . . ." 15 U.S.C. § 1114(1)(a) (2000). The Board alleged that the defendants used the terms "Church of Christ, Scientist" and "Board of Education of the Church of Christ, Scientist" on the website and in printed materials knowing that the use of these terms would cause confusion. *Nolan*, 259 F.3d at 213.

Complaint and summons were served on Robinson, but the attempts to serve Nolan were unsuccessful.[15] Because Nolan failed to respond to the Board's complaint, the Board moved the district court for an entry of default judgment against Nolan.[16] On July 6, 2001, the district court entered an order declaring that Nolan was in violation of the Lanham Act for infringing on certain registered trademarks and permanently enjoined him from using the marks.[17] Subsequently, the Board moved to have Nolan held in contempt for his failure to comply with the injunction order and to cease using the registered trademarks.[18] On September 6, 2000, the district court entered another order, finding that although Nolan received notice of the default judgment, he continued to violate its terms and provisions by not removing the infringing marks from the website.[19] Nolan was ordered to appear on September 25, 2000 to show cause why he should not be adjudged in civil contempt.[20]

When Nolan finally appeared before the North Carolina district court, he argued that the default judgment was void for lack of personal jurisdiction or for invalid service of process, thereby barring the order of contempt.[21] The district court rejected both of Nolan's assertions, stating "that no exceptional circumstances were present to justify setting aside the Default Judgment."[22] Nolan immediately appealed to the United States Court of Appeals for the Fourth Circuit and concurrently moved in the district court to stay enforcement of

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15. *Nolan*, 259 F.3d at 213. The Board tried unsuccessfully to notify Nolan by certified mail. *Id.* When that failed, the Board enlisted the services of a private investigator to help locate him. *Id.* The investigator determined that Nolan was living in Modesto, California, but the process server was unable to serve Nolan at that location. *Id.* Finally, the Board sought to serve Nolan by publication in *The Modesto Bee* newspaper, which is generally circulated in the area of Modesto. *Id.* at 213-14. Nolan failed to respond to the publication. *Id.* at 214.

16. *Id.* at 214; *see also* FED. R. CIV. P. 55(a) (stating that a judgment by default may be entered "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend").

17. *Nolan*, 259 F.3d at 214.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part:

> [T]he court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b).

22. *Nolan*, 259 F.3d at 214 (internal quotation marks omitted).

the injunction pending appeal.[23] At the contempt hearing, the district court considered Nolan's motion for a stay and the Board's motion to find Nolan in contempt of the default judgment.[24] On October 4, 2000, the district court ruled in favor of the Board on both motions.[25]

Nolan appealed the district court's contempt order.[26] On appeal, the United States Court of Appeals for the Fourth Circuit considered whether the district court had a sufficient basis to assert personal jurisdiction over Nolan based on his contacts with North Carolina.[27]

2. Legal Background.—Personal jurisdiction, originally a territorial-based doctrine, has evolved to permit the assertion of jurisdiction based on a defendant's minimum contacts with the forum state.[28] Recently, however, the introduction of the Internet has challenged courts to evenhandedly assert personal jurisdiction.[29] One court's response to the difficulty of assessing contacts over the Internet was to develop a three-part "sliding scale" to categorize the quality of com-

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23. *Id.*

24. *Id.*

25. Christian Sci. Bd. of Dirs. v. Robinson, 123 F. Supp. 2d 965, 976-78 (W.D.N.C. 2000).

26. *Nolan*, 259 F.3d at 215.

27. *Id.* The appeal encompassed both the September 22, 2000 order for Rule 60 relief and the October 4, 2000 rulings on the motion for a stay and motion to find Nolan in contempt of the default judgment. *See id.* In addition to the issue of personal jurisdiction, the Fourth Circuit decided four issues on appeal that will not be discussed at length in this Note. First, the court determined that Nolan's argument that he was never properly served was without merit. *Id.* at 219. According to the court, the steps taken by the Board to locate and serve Nolan were appropriate under Rule 4(j1) of the North Carolina Rules of Civil Procedure, which sets forth the requirements for effective notice by publication. *Id.*; *see also* N.C. R. CIV. P. 4(j1) (stating that a party that cannot be served by personal delivery or registered or certified mail may be served by publication). Second, the court was not persuaded by Nolan's contention that he was entitled to Rule 60(b) relief from the default judgment. *Nolan*, 259 F.3d at 219. Third, the court concluded that the district court did not abuse its discretion in denying Nolan's motion to stay the injunction pending appeal. *Id.* Finally, the court, in agreement with the district court, held that even after Nolan modified the website and included a disclaimer about his affiliation with the Board, the site still did not comply with the terms of the default judgment, and therefore rendered his conduct contemptuous. *Id.*

28. *Compare* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) (discussing how the ability of a court to assert jurisdiction over a party is "restricted by the territorial limits of the State"), *with* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (explaining that a defendant need not be present in the forum state so long as he has minimum contacts).

29. *See* Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1191 (1998) (stating that cyber-jurisdictional case law suggests some "workable standards by which to measure jurisdiction," but to date "there is [no] . . . consistency in the decisions").

mercial contacts occurring over the Internet.[30] While many courts have adopted and applied this scale, the results have been inconsistent, illustrating the difficultly of classifying contacts made over the Internet.[31]

a. The Development of Contemporary Personal Jurisdiction Doctrine.—Before a court can adjudicate a claim over a nonresident defendant, it must first establish personal jurisdiction over that defendant to the extent permissible under state law.[32] The test for a court's exercise of personal jurisdiction over a nonresident defendant requires the court to consider the application of both the state's long arm statute and the Due Process Clause of the United States Constitution.[33]

Prior to 1945, a court's ability to assert personal jurisdiction over a defendant depended on that defendant's presence within the territorial jurisdiction of the court.[34] However, due to increased interstate communication and mobility, as well as the rise of the corporation, the notion of "presence" became difficult to define.[35] The Supreme Court's decision in *International Shoe Co. v. Washington* redefined the notion of "presence" by developing a more flexible test to determine whether personal jurisdiction exists.[36] According to the *International Shoe* Court, the "*capias ad respondendum*," or physical arrest of the person, no longer constituted the accepted means of giving notice.[37] In-

30. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

31. *Compare* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997) (holding that a defendant's passive website merely accessible to Arizona residents is not sufficient to assert personal jurisdiction over him), *with* TELCO Communications v. An Apple a Day, 977 F. Supp. 404, 407 (E.D. Va. 1997) (holding that posting allegedly defamatory press releases on the Internet allows a court to exercise jurisdiction).

32. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985).

33. *See, e.g.*, Stover v. O'Connell Assocs. Inc., 84 F.3d 132, 134 (4th Cir. 1996); *see also* U.S. CONST. amend. XIV, § 1 (stating, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law"). Nearly every state has a long-arm statute that authorizes its courts to exercise jurisdiction over non-resident defendants based on a defendant's contacts with the forum state. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (1998).

34. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.").

35. *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-19 (1945) (discussing the criteria by which a court determines that a corporation has subjected itself to a lawsuit in a particular state).

36. *Int'l Shoe*, 326 U.S. at 316-17.

37. *Id.* at 316.

stead, the Court made it constitutionally permissible for a court to assert personal jurisdiction over a defendant so long as he maintained certain "minimum contacts" with the state, such that the maintenance of the suit did not offend "traditional notions of fair play and substantial justice."[38]

The Court determined that the minimum contacts test is satisfied when there are "continuous and systematic" contacts with the state that give rise to the lawsuit.[39] On the other hand, the minimum contacts test is not met via "casual presence" or isolated activities for suits unrelated to the contacts.[40] Finally, the Court stated that there are some contacts that "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the [defendant] liable to suit."[41] Thus, the *International Shoe* Court created a test that was not solely dependant on the defendant's physical presence within the forum state, but rather considered the defendant's contacts with the forum state.

Several courts in the post-*International Shoe* era have further developed the minimum contacts doctrine and provided additional methods of gauging whether these minimum contacts exist. For example, in *McGee v. International Life Insurance Co.*,[42] the Supreme Court held that California's jurisdiction over a Texas based insurance company was proper even though the only contact the insurance company had with California was mailed correspondence.[43] The Court determined that there was a "substantial connection" between the defendant insurance company and the forum state, and that California had a strong interest in protecting its citizens who could be severely disadvantaged if they had to "follow the insurance company to a distant State in order to hold it legally accountable."[44]

In *Hanson v. Denckla*,[45] the Supreme Court further elaborated on the requirements needed to establish minimum contacts for purposes of asserting personal jurisdiction.[46] In *Hanson*, the Court held that a Delaware trustee's contacts with Florida were insufficient to warrant the exercise of personal jurisdiction because the trustee had no office in Florida and did not transact any business there; therefore, the

38. *Id.* (quoting, in part, Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
39. *Id.* at 317.
40. *Id.*
41. *Id.* at 318.
42. 355 U.S. 220 (1957).
43. *Id.* at 223.
44. *Id.*
45. 357 U.S. 235 (1958).
46. *See id.* at 251-53.

cause of action could not be said to have arisen out of the business done in Florida.[47] Despite the fact that the potential heirs to the trust resided in Florida, the Court noted that the more "flexible" requirements for jurisdiction set forth by the *International Shoe* Court did not signify the "demise of all restrictions on the personal jurisdiction of state courts," and emphasized that despite the ease of defending in the forum state, the defendant cannot be called upon to do so unless he has the requisite minimum contacts with that state.[48] The Court also noted that when assessing the nonresident defendant's contacts with the forum state, "it is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[49]

In *Calder v. Jones*,[50] the Supreme Court established another method for evaluating the existence of minimum contacts. The *Calder* Court analyzed personal jurisdiction based on the effects of the defendant's tortious conduct in the forum state rather than on his physical presence within that state.[51] In *Calder*, the plaintiff brought suit in

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47. *Id.* at 251.

48. *Id.* at 251, 254.

49. *Id.* at 253. Case law is conflicting surrounding the "purposeful availment" inquiry. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). The *Asahi* Court split on the issue of whether placing a product into the stream of commerce with knowledge that it would reach the forum state constituted minimum contacts. *Id.* at 105. Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Powell and Scalia in Part II-A, suggested that some additional activity was necessary to constitute minimum contacts, and the "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112 (plurality opinion). Justice Brennan disagreed, stating that "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (stating that the "purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts" (internal quotation marks omitted)).

50. 465 U.S. 783 (1984).

51. *See id.* at 789. It is this analysis that subsequent courts have termed the *Calder* "effects test." *See* IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 261 (3d Cir. 1998) (holding that the plaintiff could not rely on the *Calder* effects test to assert specific jurisdiction over the defendant). This test has been clarified to require the plaintiff to establish that

> (1) the defendant committed an intentional tort;
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> (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort;
>
> (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

Id. at 265-66 (footnote omitted). When *Calder* was decided in 1984, the Internet was not yet a foreseeable phenomenon, but this has not stopped courts from analyzing the "effects

California, claiming that she had been libeled in an article written and edited by the defendants in Florida.[52] The defendants argued that "they [were] not responsible for the circulation of the article in California," but the Court determined that the defendants' actions were intentional and that they had knowledge of the "potentially devastating impact upon [the plaintiff]" in California.[53]

Other forms of classification have developed to help reconcile the doctrine of personal jurisdiction in addition to tests that determine whether a defendant has the requisite minimum contacts within the forum state. Today, courts classify personal jurisdiction as either "general" or "specific," and the constitutional limitations on the exercise of jurisdiction differ depending on which type of jurisdiction the court seeks to assert.[54] The basic distinction between general and specific jurisdiction centers around whether the contested claim arises out of or is related to the defendant's contacts with the forum.[55] If the claim and the defendant's contacts are unrelated, then the court exercises *general* personal jurisdiction.[56] If they are related, then the exercise of personal jurisdiction is *specific*.[57]

Courts have adopted a three-part analysis to determine whether to exert specific personal jurisdiction over a nonresident defendant.[58] First, the defendant must have sufficient "minimum contacts" with the forum state in which the defendant purposefully availed himself of the privilege of doing business in the forum state.[59] Second, the claim asserted against the defendant must arise out of those contacts.[60] Finally, the exercise of jurisdiction must be fair.[61] The "fairness" inquiry

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test" in the context of the Internet. *See, e.g.*, Amway Corp. v. Procter & Gamble Co., No. 1:98-CV-726, 2000 U.S. Dist. LEXIS 372, at *13-16 (W.D. Mich. Jan. 6, 2000) (using the effects test and finding that an intentional tort was committed when the respondent posted defamatory information about petitioner on a website).

52. *Calder*, 465 U.S. at 784. "The article was published in a national magazine with a large circulation in California." *Id.*

53. *Id.* at 789.

54. *See* Helicópteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984) (explaining the distinction between specific and general jurisdiction). *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1966). Professors von Mehren and Trautman were the first to articulate the distinction between specific and general jurisdiction. *See id.*

55. *See Helicópteros*, 466 U.S. at 414 nn.8-9.

56. *Id.* at 414 n.9.

57. *Id.* at 414 n.8.

58. *See, e.g.*, Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221-22 (3d Cir. 1992).

59. *Id.* at 1221.

60. *Id.*

61. *Id.* at 1222.

ensures that the defendant is not subject to unjust or inconvenient litigation.[62] In *World-Wide Volkswagen Corp. v. Woodson*,[63] the Supreme Court delineated five factors implicit in the fairness inquiry:

> [T]he burden on the defendant . . . ; the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies . . . .[64]

The Supreme Court indicated the potential value of the fairness analysis in *Burger King v. Rudzewicz*[65] when it stated that "[the fairness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[66] The Court elaborated by stating that a defendant who objects to jurisdiction, but "who purposefully directed his activities at forum residents," will bear the burden of presenting a compelling case that the assertion of jurisdiction would be unreasonable.[67]

Due to technological advancements and the increase in interstate travel, the ability to assert personal jurisdiction over nonresidents has evolved from a territorial-based inquiry to one that considers both the defendant's efforts and intentions as well as the reasonableness of requiring a party to defend in a foreign jurisdiction. Despite this adaptability, courts have not been entirely consistent with their response to the uncertain territory of the Internet.

b. The Effect of the Internet on the Assertion of Personal Jurisdiction.—The bulk of personal jurisdiction disputes relating to the Internet did not arise until the mid to late 1990s.[68] Since that time, courts have inconsistently asserted personal jurisdiction over defendants whose only contacts with the forum state are via Internet use.

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62. *See id.*

63. 444 U.S. 286 (1980).

64. *Id.* at 292 (citations omitted).

65. 471 U.S. 462 (1985).

66. *Id.* at 477.

67. *Id.*

68. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997) ("[T]he development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant.").

(1) Early Internet Cases.—In early Internet cases, courts inconsistently asserted personal jurisdiction over nonresident defendants based on the defendant's virtual contacts with the forum state. In *Maritz, Inc. v. CyberGold, Inc.*,[69] the United States District Court for the Eastern District of Missouri considered the exercise of personal jurisdiction over a California defendant who operated a website on the Internet that was accessible to citizens in Missouri as well as all over the world.[70] The defendant's website merely provided information about CyberGold's upcoming service, yet the court upheld jurisdiction because the "contacts [were] of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant."[71]

Similarly, in *Inset Systems, Inc. v. Instruction Set, Inc.*,[72] the United States District Court for the District of Connecticut upheld jurisdiction over a Massachusetts corporation based on the corporation's Internet advertising.[73] The court found that advertising the corporation's activities as well as a toll-free number over the Internet was the equivalent of purposefully availing itself of the privilege of doing business within Connecticut; therefore, the Massachusetts corporation could reasonably anticipate the possibility of being haled into court in Connecticut.[74] The court, concerned about the breadth of the Internet, distinguished Internet advertising from other forms of advertising, stating that "[u]nlike television and radio . . . or newspapers . . . advertisements over the Internet are available to Internet users continually."[75]

However, in 1996, on facts nearly identical to those of *Inset Systems, Inc., Bensusan Restaurant Corp. v. King*[76] held that a Missouri jazz club owner did not purposefully avail himself of the benefits of New York law by posting a passive website on the Internet providing general information about the club and a telephone number.[77] The court stated that there was no evidence that the defendant desired to

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69. 947 F. Supp. 1328 (E.D. Mo. 1996).

70. *Id.* at 1330.

71. *Id.* at 1333. CyberGold's upcoming service included maintaining a mailing list of Internet users, some of whom were possibly Missouri residents. *Id.* at 1330.

72. 937 F. Supp. 161 (D. Conn. 1996).

73. *Id.* at 165.

74. *Id.*

75. *Id.* at 163.

76. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

77. *Id.* at 301.

attract New York residents to his website, nor did he conduct any business in New York.[78]

TELCO Communications v. An Apple a Day[79] further illustrates courts' disagreement about the relationship between the Internet and personal jurisdiction. In *TELCO*, the United States District Court for the Eastern District of Virginia adopted the analysis of the United States District Court for the District of Connecticut in *Inset Systems, Inc.*, holding that a Virginia court could assert personal jurisdiction over a defendant who simply posted two press releases over the Internet allegedly defaming the plaintiff.[80] The court in *TELCO* specifically rejected the Second Circuit's decision in *Bensusan*, indicating the divergence among courts over what virtual contacts allow the assertion of personal jurisdiction.[81]

(2) The Introduction of the Zippo *"Sliding Scale" and Courts' Disagreement Over How to Apply It.*—In 1997, the United States District Court for the Western District of Pennsylvania decided *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[82] The Pennsylvania corporation, Zippo Manufacturing Company (Manufacturing), brought an action against California-based Zippo Dot Com (Dot Com), alleging trademark dilution, infringement, and false designation.[83] Manufacturing objected to Dot Com's use of the word "Zippo" in their domain name and in numerous other places on the website.[84]

Recognizing the world-wide breadth of the Internet, the district court concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[85] The court then formulated a "sliding scale," consistent with established personal jurisdiction principles, to categorize Internet contacts.[86] At one end of the scale are "situations where the defen-

78. *Id.* The district court expressly adopted Justice O'Connor's "stream of commerce" argument from *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion), by stating that "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state." *Bensusan*, 937 F. Supp. at 301.

79. 977 F. Supp. 404 (E.D. Va. 1997).

80. *Id.* at 406-08.

81. *See id.* at 406.

82. 952 F. Supp. 1119 (W.D. Pa. 1997).

83. *Id.* at 1121.

84. *Id.*

85. *Id.* at 1124.

86. *Id.*

dant clearly does business over the Internet."[87] According to the court, entering into contracts with residents in foreign jurisdictions and repeatedly transmitting computer files would constitute "doing business," and therefore would be an appropriate occasion to assert personal jurisdiction.[88] The other end of the *Zippo* sliding scale are situations when the defendant simply posts information on a website.[89] According to the *Zippo* court, these "passive" websites are not grounds for the exercise of personal jurisdiction because they do "little more than make information available to those who are interested in it."[90] Finally, the court identified the scale's middle ground, which consists of interactive websites that allow users to exchange information with each other.[91] According to the court, the exercise of jurisdiction in the middle group of Internet personal jurisdiction cases is determined by "examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site [between the user and the host computer]."[92]

After *Zippo*, many courts implemented the "sliding scale" in an effort to make sense of the emerging group of Internet cases involving personal jurisdiction issues.[93] Despite the helpfulness of viewing Internet personal jurisdiction cases along a spectrum, courts' applications of the "sliding scale" have produced widely different conclusions. This inconsistency results from the *Zippo* court's failure to define what constitutes "interactive" and "passive" web sites.[94] For example, courts have disagreed over the definition of a "passive" website and whether a passive website constitutes purposeful availment toward a particular forum so as to justify the exercise of personal jurisdiction.[95] Some courts, like the district court in *TELCO*, held that

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *See, e.g.*, ALS Scan, Inc. v. Wilkins, 142 F. Supp. 2d 703, 708 (D. Md. 2001); Alitalia-Linee Aeree Italiane v. Casinoalitalia.com, 128 F. Supp. 2d 340, 349-50 (E.D. Va. 2001).
94. *See Zippo*, 952 F. Supp. at 1124; *see also* Veronica M. Sanchez, Comment, *Taking a Byte out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes*, 46 UCLA L. REV. 1671, 1687 (1999) (stating that the *Zippo* court's categorization is not always helpful because the second and third scenarios, the passive and the interactive websites, "are not as clear as the court makes them out to be").
95. *Compare* TELCO Communications v. An Apple a Day, 977 F. Supp. 404, 407 (E.D. Va. 1997) (holding that the defendant's passive website posting allegedly defamatory press releases rises to the level of doing business in the State of Virginia), *with ALS Scan*, 142 F. Supp. 2d at 708-09 (holding that the defendant's website was passive and therefore not sufficient to exercise personal jurisdiction over a nonresident defendant).

a passive website does meet the requirements for personal jurisdiction because continuously advertising over the Internet constitutes a "persistent course of conduct" that "rise[s] to the level of regularly doing or soliciting business."[96] However, other courts, adopting the *Zippo* line of reasoning, decline to assert jurisdiction over a site that is essentially passive in nature.[97]

In addition to the disagreement about what constitutes a passive website under the *Zippo* analysis, there is also concern that the *Zippo* analysis is underinclusive. In *ESAB Group, Inc. v. Centricut, L.L.C.*,[98] the court explained that in addition to categorizing a website as interactive or passive, the "critical issue for the court to analyze is the nature and quality of commercial activity actually conducted by an entity over the Internet in the forum state."[99] Applying this consideration, the court declined to assert personal jurisdiction over a defendant because of the lack of commercial activity conducted over the defendant's website.[100] Notwithstanding the concerns that at least one court has expressed about the vagueness of the *Zippo* sliding scale, many circuits have expressly followed the *Zippo* line of reasoning.

(3) The Circuits' Reaction to Zippo.—After *Zippo*, the United States Courts of Appeals have considered seven personal jurisdiction cases where contact with the forum state occurred over the Internet. Three of these decisions expressly follow the reasoning in *Zippo*.

In 1997, the Ninth Circuit decided *Cybersell, Inc. v. Cybersell, Inc.*,[101] in which it expressly adopted the *Zippo* court's reasoning that the constitutionality of exercising personal jurisdiction based on Internet contacts is "proportionate to the nature and quality of the commercial activity that an entity conducts."[102] In *Cybersell*, the plaintiff alleged that certain marks on the defendant's website providing mar-

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96. *TELCO*, 977 F. Supp. at 407; *see also* Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (implying in dicta that a toll-free phone number included in a website may represent the type of electronic contacts that are sufficient to exercise personal jurisdiction).

97. *See, e.g.*, Virtuality L.L.C. v. BATA Ltd., 138 F. Supp. 2d 677, 684 (D. Md. 2001); Amberson Holdings, L.L.C. v. Westside Story Newspaper, 110 F. Supp. 2d 332, 336-37 (D.N.J. 2000).

98. 34 F. Supp. 2d 323 (D.S.C. 1999).

99. *Id.* at 330-31.

100. *Id.* at 331.

101. 130 F.3d 414 (9th Cir. 1997).

102. *Id.* at 419 (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

keting and advertising services constituted trademark infringement.[103] The Ninth Circuit concluded that the website was "essentially passive" because the defendant did not engage in any commercial activity with the residents of the forum state; thus, the defendant had not purposefully availed itself of the privilege of doing business in the forum state.[104] As a result, the court held that personal jurisdiction could not be asserted over the defendant.[105]

One year after its decision in *Cybersell*, the Ninth Circuit decided *Panavision International, L.P. v. Toeppen*,[106] holding that the defendant was subject to the court's jurisdiction because his acts occurring in cyberspace were "aimed at [the plaintiff] in [the forum state] and caused it to suffer injury there."[107] The defendant claimed that any contact he had with California, the forum state, was insignificant because it was based on the registration of a domain name, which he did in Illinois.[108] The Ninth Circuit rejected this argument, but rather than use the *Zippo* "sliding scale" analysis, the court applied the "effects test" to determine that the assertion of personal jurisdiction was proper and that the defendant should have anticipated being haled into court in California.[109] The court also noted that the effects doctrine "was not applicable in [its] *Cybersell* case."[110]

In 1999, the Fifth Circuit decided *Mink v. AAAA Development, L.L.C.*,[111] in which it determined that the defendant's website advertisements, which included information about the defendant's services, mail-in order forms, a telephone number, a mailing address, and an e-mail address, did not provide sufficient justification for asserting personal jurisdiction.[112] The lack of business conducted by the defendant over the Internet persuaded the court to categorize the site on the "passive" end of the *Zippo* spectrum, which the court concluded "is not grounds for the exercise of personal jurisdiction."[113]

The Tenth Circuit indicated its approval of the *Zippo* "sliding scale" when it decided *Soma Medical International v. Standard Chartered*

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103. *Id.* at 415-16.
104. *Id.* at 419-20.
105. *Id.* at 420; *see also* 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1380 (Fed. Cir. 1998) (citing *Cybersell* for the proposition that passive websites are insufficient to establish personal jurisdiction and thereby adopting the logic of *Zippo*).
106. 141 F.3d 1316 (9th Cir. 1998).
107. *Id.* at 1318.
108. *Id.* at 1322.
109. *Id.* at 1322-24.
110. *Id.* at 1321.
111. 190 F.3d 333 (5th Cir. 1999).
112. *Id.* at 337.
113. *Id.* at 336-37.

Bank.[114] In *Soma,* the Tenth Circuit found that the defendant's passive website, which "merely provided information to interested viewers," was insufficient to assert personal jurisdiction because it did not constitute purposeful availment.[115]

In 2000, the Tenth Circuit faced another case involving the exercise of personal jurisdiction based on virtual contacts, *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*[116] Here, the Tenth Circuit concluded that the exercise of personal jurisdiction over a Delaware defendant was proper because the defendant continuously routed e-mails through an Oklahoma mail server, even after he was put on notice that his actions were unauthorized.[117] The court likened the scenario to the portion of the *Zippo* "sliding scale" where the defendant enters into contracts with the forum state via transmission of computer files.[118]

The District of Columbia Circuit, on the other hand, decided a case involving personal jurisdiction and the Internet without mentioning the *Zippo* sliding scale. In *GTE New Media Services Inc. v. BellSouth Corp.*,[119] the court found that it could not assert personal jurisdiction over a nonresident defendant based solely on the ability of D.C. "residents to access the defendants' websites."[120] The plaintiff alleged that the defendant "transact[e]d business" in the District of Columbia when the defendants' Yellow Pages website was accessed by D.C. residents.[121] The D.C. Circuit likened the ability to access a Yellow Pages website to searching a telephone book, which, according to the court, did not constitute a business transaction.[122] The D.C. Circuit found that the advent of technology should not "vitiate long-held and inviolate principles of federal court jurisdiction."[123]

3. The Court's Reasoning.—In *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan,* the Fourth Circuit held that

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114. 196 F.3d 1292 (10th Cir. 1999).

115. *Id.* at 1299.

116. 205 F.3d 1244 (10th Cir. 2000).

117. *Id.* at 1247-48.

118. *Id.* at 1248.

119. 199 F.3d 1343 (D.C. Cir. 2000).

120. *Id.* at 1349. The court rejected the plaintiff's theory that "mere accessibility" of a website establishes the requisite minimum contacts for asserting personal jurisdiction. *Id.* at 1349-50. Furthermore, the court noted that if it applied this theory, "personal jurisdiction in Internet-related cases would almost always be found in any forum in the country." *Id.* at 1350.

121. *Id.* at 1350.

122. *Id.*

123. *Id.*

a North Carolina court could exercise personal jurisdiction over an Arizona defendant based on the defendant's contributions to a website created and maintained in North Carolina.[124]

Judge King, writing for the court,[125] set forth the two conditions that must be satisfied before a court can validly assert personal jurisdiction over a nonresident defendant. "First, the exercise of jurisdiction must be authorized by the long-arm statute of the forum state, and, second, [it] must also comport with Fourteenth Amendment due process requirements."[126] The court recognized that like many other states, North Carolina's long-arm statute is interpreted to extend jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause.[127] Therefore, the court concluded that the "dual jurisdictional requirements collapse into a single inquiry as to whether the defendant has such 'minimal contacts' with the forum state that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[128]

The court next considered whether Nolan could be subjected to general or specific jurisdiction.[129] Agreeing with the district court, Judge King observed that Nolan was "not engaged in such 'substantial' or 'continuous and systematic' activities in North Carolina to subject [himself] to the district court's general jurisdiction."[130] Rather, the court concluded that the analysis should be based "on whether the Board's trademark infringement suit sufficiently ar[ose] from, or relate[d] to, Nolan['s] . . . contacts with North Carolina to support the exercise of specific jurisdiction."[131]

The court analyzed the appropriateness of exercising specific jurisdiction considering the factors discussed by the Supreme Court in *Burger King Corp. v. Rudzewicz*.[132] With respect to the first factor, the extent to which a defendant purposefully avails himself of the privi-

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124. *Nolan*, 259 F.3d at 212.

125. *Id.* Judges Williams and Traxler joined in Judge King's opinion. *Id.*

126. *Id.* at 215.

127. *Id.* (citing Century Data Sys., Inc. v. McDonald, 428 S.E.2d 190, 191 (N.C. Ct. App. 1993)).

128. *Nolan*, 259 F.3d at 215 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

129. *See id.* at 215-16.

130. *Id.* at 215 (citation omitted).

131. *Id.* at 215-16.

132. *Id.* at 216. The Court in *Burger King* stated that the important factors for consideration are to what extent the defendant "purposefully availed" himself of the privileges of conducting activities in the forum state, whether the plaintiff's claims arose out of the defendant's activities, and whether the exercise of jurisdiction was reasonable. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-77 (1985).

leges of conducting activity in the forum state, the court concluded that Nolan's contact with North Carolina was deliberate; therefore, he "purposefully availed [himself] of the privileges of conducting activity in [the state] . . . ."[133] Nolan insisted that he "passively" accepted Robinson's offer to develop and maintain the website, but the court found that Nolan knew his actions would affect residents in North Carolina and rejected his contention that a defendant must initiate the relevant contacts with the forum state.[134]

The second factor the court examined to determine whether the exercise of specific jurisdiction was appropriate focused on whether the Board's claims arose out of Nolan's activities in North Carolina.[135] The Fourth Circuit, in agreement with the district court, concluded that the material transmitted by Nolan "formed the basis for the alleged infringement" in North Carolina, thereby satisfying the second factor.[136]

The third factor the court examined was whether the exercise of jurisdiction was constitutionally reasonable.[137] Characterizing the issue of constitutional reasonableness as a "somewhat nebulous concept," the court confidently concluded that the district court's assertion of personal jurisdiction over Nolan did not offend "traditional notions of fair play and substantial justice."[138] The court then evaluated "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."[139] In addition to recognizing North Carolina's interest in adjudicating the suit and deterring trademark infringement within its borders, the court stated that the inconvenience for Nolan to defend the suit in North Carolina was not violative of due process.[140] Rather, the court felt that North Carolina was a "relatively sensible" location in terms of promoting judicial efficiency, and thought that the Board's decision to bring the suit in North Carolina instead of in its home state of Massachusetts was reasonable because it imposed no

133. *Nolan*, 259 F.3d at 217 (internal quotation marks omitted).
134. *Id.* at 216-17.
135. *Id.* at 216.
136. *Id.*
137. *Id.* at 217.
138. *Id.* (citations omitted).
139. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)).
140. *Id.* at 217-18.

additional burden on Nolan and at the same time reduced the burden on his co-defendant Robinson.[141]

Finally, the court disagreed with Nolan's reliance on the "sliding scale" test discussed in *Zippo*.[142] The Fourth Circuit recognized that exercising jurisdiction over a defendant whose only contact with the forum state consists of a website accessible by residents of the forum state is a debated issue among courts.[143] However, the court avoided the controversy because, unlike other cases where the defendant's only contacts with the forum state came from a website accessible to the forum's residents, Nolan had specific contacts with North Carolina, which provided an independent basis for personal jurisdiction.[144] The court stressed that it was Nolan's periodic revisions to the website's contents, rather than the accessibility of the website in North Carolina, that served as the basis for its holding, and explained that it would be much more hesitant to allow the exercise of personal jurisdiction over Nolan if the Board had brought the suit in a forum other than North Carolina.[145]

4. Analysis.—In *Nolan*, the Fourth Circuit properly upheld the assertion of personal jurisdiction over the defendant based on traditional personal jurisdiction doctrine, rather than on the application of the *Zippo* sliding scale.[146] Although some commentators argue that the advent of the Internet requires the traditional, territorial-based due process doctrine to be reevaluated,[147] the *Nolan* court's decision reaffirms not only the relevance of traditional personal jurisdiction doctrine in the modern age, but also the notion that not every personal jurisdiction case involving virtual contacts necessitates the application of the *Zippo* "sliding scale."[148]

a. It Was Appropriate for the Fourth Circuit to Analyze Nolan *in Terms of Classic Personal Jurisdiction Doctrine and not the* Zippo *"Sliding*

141. *Id.*
142. *Id.* at 218.
143. *See id.*
144. *Id.*
145. *See id.* at 218 n.11.
146. *Id.* at 216-18.
147. *See, e.g.*, Susan Nauss Exon, *A New* Shoe *is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 48-55 (2000) (describing alternatives to analyze personal jurisdiction cases involving the Internet that would yield more consistent results).
148. *See Nolan*, 259 F.3d at 215 (explaining that the issue can be adequately addressed by simply examining whether Nolan had specific contacts with North Carolina such that maintaining the suit would not offend "traditional notions of fair play and substantial justice").

Scale."—The Fourth Circuit prudently focused the personal jurisdiction debate on the substance and direction of the defendant's contacts with North Carolina, rather than on the medium by which they occurred. Although it was unclear whether the website was directed at North Carolina residents, the court in *Nolan* determined that North Carolina had an interest in adjudicating the dispute.[149] Nolan was in contact with North Carolina when he sent periodic revisions to Robinson via e-mail to be uploaded onto the website.[150] Therefore, as the Fourth Circuit recognized, in addition to the website, Nolan had specific contacts with North Carolina satisfying the first prong of the personal jurisdiction analysis.[151] Furthermore, the assertion of jurisdiction was fair. According to the court, "North Carolina's interest in deterring trademark infringement is implicated by the postings of allegedly infringing materials by a North Carolina resident to a website accessible through a North Carolina-based domain."[152] In addition to considering North Carolina's interest in the suit, the court also contemplated the ability of Nolan to defend in North Carolina.[153] The court held that although defending in North Carolina was not the best alternative for Nolan, "the inconvenience was not so grave as to offend constitutional due process principles."[154] Thus, the court did not have to go through an inquiry especially designed for Internet cases because Nolan's virtual contacts lended themselves to a traditional personal jurisdiction analysis.

Because courts have traditionally tested contacts with the forum state in terms of physical boundaries, some commentators argue that the Internet's absence of physical boundaries requires the advent of a new doctrine to assist in classifying the appropriateness of asserting jurisdiction.[155] *Nolan* indicates, however, that there are instances where virtual contacts can be analyzed as specific contacts as well, thus permitting the application of traditional personal jurisdiction doctrine. Similar to *Nolan,* the Ninth Circuit's decision in *Panavision* illustrates the point that the existence of virtual contacts does not preclude the application of personal jurisdiction doctrine. In *Panavision,* the defendant claimed that he had no physical or specific contact

149. *Id.* at 218 & n.10. The Fourth Circuit explained that the district court suggested that the Nolan defendants "targeted" North Carolina by using a website accessible through a North Carolina domain. *Id.* at 218 n.10.

150. *Id.* at 213.

151. *Id.* at 218.

152. *Id.*

153. *Id.* at 217-18.

154. *Id.* at 217.

155. *See* Exon, *supra* note 147, at 48-55.

with the forum state of California when he registered the plaintiff's trademarks on the Internet and posted them on a website.[156] However, the Ninth Circuit concluded his acts were aimed at California, and thus he was subject to personal jurisdiction by way of the "effects test."[157] By focusing on the effects of the contacts rather than on their virtual nature, the Ninth Circuit prudently analyzed the defendant's contacts with California under a traditional model of personal jurisdiction. Like *Nolan*, *Panavision* illustrates that the existence of virtual contacts between parties does not necessitate a unique personal jurisdiction analysis. Rather, the traditional inquiry that encompasses the "effects test" is sufficient.

b. Although Inapplicable in Nolan, *the* Zippo *"Sliding Scale" Provides a Useful Analysis.*—In *Nolan*, the Fourth Circuit recognized the significance of the sliding scale of interactivity set forth in *Zippo*, but appropriately declined to apply the *Zippo* analysis because Nolan was subject to personal jurisdiction based on his specific contacts with North Carolina.[158] Although the court in *Nolan* declined to apply the *Zippo* spectrum analysis, the three-part inquiry, in certain Internet-use personal jurisdiction cases, is still valuable.

When the nonresident defendant's sole contacts with the forum state arise from a website accessible by residents of the forum, the *Zippo* sliding scale is a useful jumping off point for the courts.[159] Without specific, non-virtual contacts or apparent intentional behavior, the *Zippo* analysis facilitates the classification of a passive website not worthy of personal jurisdiction versus an interactive website where the defendant should be subject to jurisdiction.

The Christian Science Board of Directors essentially sidestepped the *Zippo* analysis by bringing the dispute in North Carolina, rather than in its home state of Massachusetts.[160] If the claim was brought in Massachusetts, the *Zippo* analysis would have been useful because the

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156. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

157. *Id.* at 1321-22.

158. *Nolan*, 259 F.3d at 218. According to the court, the *Zippo* analysis was irrelevant to the inquiry because in addition to the website, Nolan had specific contacts with North Carolina sufficient to subject him to personal jurisdiction. *Id.* The Fourth Circuit admitted it has not addressed the *Zippo* jurisdictional dilemma, but it did note the importance of the inquiry. *See id.*

159. *See, e.g.*, Jeffers v. Wal-Mart Stores, Inc., 152 F. Supp. 2d 913, 923 (S.D. W. Va. 2001) (holding that the defendant's website was passive in nature and thus fell at the bottom of the *Zippo* scale of interactivity).

160. *See Nolan*, 259 F.3d at 218 n.11 ("Had the Board brought suit in another, unrelated forum—South Carolina, for instance—we would be more hesitant to allow the exercise of personal jurisdiction . . . .").

sole basis for jurisdiction would have been the defendant's website. The only contact that Nolan would have had with the forum state of Massachusetts would have been his website, accessible by Massachusetts residents. In the future, if the Fourth Circuit faces a situation where the sole basis for jurisdiction arises from an informational website, like the one designed by Nolan and Robinson, *Zippo* would be a useful guidepost upon which to judge the virtual contacts.

c. Why Classic Personal Jurisdiction Is Still Applicable in Internet Cases.—The requirement of personal jurisdiction is an attempt to mediate the conflict between the interests of the forum state and the interests of the defendant.[161] The defendant's interest in the adjudication has historically centered around the burden of defending in the forum state.[162] On the other hand, the state's interest has centered around whether the harm complained of occurred within state borders.[163] Therefore, while convenience has traditionally been a proxy for the defendant's interest in a nonresident dispute, territorial boundaries have been the proxy for the state's interest. Because it has no physical boundaries, the Internet has essentially displaced the territorial proxy for the state.[164] However, an even more fundamental state interest remains. At the heart of every dispute lies the state's interest in protecting its citizens and presiding over the litigation that is brought before its courts.[165] The rise of the Internet, therefore, does not preclude the inquiry as to whether the complained of activity has implicated a state's interest, and thus does not preclude the application of traditional personal jurisdiction doctrine.

5. Conclusion.—In *Nolan*, the Fourth Circuit appropriately applied traditional personal jurisdiction doctrine to a case involving vir-

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161. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (stating that the requirement of minimum contacts protects defendants from litigating in an inconvenient forum and ensures that the states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

162. *See id.* at 292 (stating that the burden on the defendant is "always a primary concern").

163. *See* Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (stating that a defendant's "presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding him"); Pennoyer v. Neff, 95 U.S. 714, 720 (1877) (stating that the "authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established").

164. *See generally* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

165. *See World-Wide*, 444 U.S. at 292 (listing the forum state's interest in adjudicating the dispute as one of the factors to consider in determining the reasonableness of the exercise of personal jurisdiction over a defendant).

tual contacts. The court determined that the *Zippo* analysis was unnecessary because Nolan had specific contacts with North Carolina such that traditional personal jurisdiction could be asserted without offending due process.[166] The *Zippo* sliding scale is helpful when the defendant's sole contact with the forum state is by way of the Internet, but that was not the situation in *Nolan.* Therefore, by focusing on Nolan's specific contacts with North Carolina rather than on his website's virtual contacts, the Fourth Circuit illustrated the resilience of classic personal jurisdiction doctrine in the age of the Internet.

MEGAN K. GREENE

166. *See Nolan*, 259 F.3d at 218.

II. CONSTITUTIONAL LAW

A. *One Step Backward: The Loss of a "Totality of the Circumstances" Approach in the Fourth Circuit's State Action Analysis*

In *Mentavlos v. Anderson*,[1] the United States Court of Appeals for the Fourth Circuit considered whether two upperclass students at The Citadel, a state-supported military college in South Carolina, acted under color of state law for purposes of a sexual harassment and discrimination claim under 42 U.S.C. § 1983.[2] The plaintiff, Jeannie Mentavlos, a female freshman, alleged that the actions of two upperclass male students forced her to withdraw from the college.[3] Analyzing the upperclass students' actions under the tests for state action promulgated by the United States Supreme Court, the Fourth Circuit affirmed the decision of the United States District Court for the District of South Carolina and concluded that the students' private actions were not "fairly attributable" to the State of South Carolina.[4] While the court in *Mentavlos* arrived at the correct decision, its analysis reflects a subtle retreat in the Fourth Circuit's interpretation of the state action doctrine. Prior to *Mentavlos*, the Fourth Circuit adhered to a totality of the circumstances analysis for determining state action.[5] However, the *Mentavlos* court returned to a more rigid and formalistic approach, applying the facts of Mentavlos's case to a series of isolated tests. Although not explicitly rejecting the totality of the circumstances approach, the *Mentavlos* court's emphasis on individual, formal tests marks an effective regression from the totality of the circumstances approach and runs contrary to the holistic understanding of the state action doctrine expressed by the Supreme Court most recently in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[6]

1. The Case.—The Citadel, The Military College of South Carolina, is a state-supported institution that receives both financial and

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1. 249 F.3d 301 (4th Cir. 2001).

2. *Id.* at 305.

3. *Id.* at 306. Specifically, Mentavlos claimed that several upperclass cadets subjected her to sexual harassment, intimidation, and abuse. *Id.*

4. *Id.* at 323. Accordingly, the court was not required to consider whether the cadets' actions "deprived Mentavlos of a right secured by federal law." *Id.* at 323 n.8.

5. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 348 (4th Cir. 2000).

6. *See* 531 U.S. 288, 295 (2001) (recognizing that "[w]hat is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity").

other assistance from the state.[7] In the fall of 1996, The Citadel abandoned its 154-year-old policy of admitting only male students to its student body, known as the "South Carolina Corps of Cadets."[8]

The Citadel operates on a highly restrictive military model, subjecting students to military style rules and living conditions; however, its objective is to produce community leaders, not enlisted soldiers.[9] Under what is known as the "Fourth Class System," freshmen must adhere to a strict set of disciplinary and behavioral rules.[10] Further, the Fourth Class System creates an environment where upperclassmen possess a large degree of authority over freshmen.[11] The Citadel's operation is dependent upon this cadet chain of command, where senior students mentor and supervise the students below them.[12] While mild harassment of freshmen at The Citadel is not uncommon,[13] the school expressly prohibits hazing or other abuse of freshmen.[14] Discrimination on the basis of gender is also expressly prohibited by The Citadel, and freshmen have formal rights to appeal discriminatory treatment.[15]

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7. *Mentavlos*, 249 F.3d at 305. The Fourth Circuit recognized that The Citadel is listed among state-supported colleges and universities in section 59-101-10 of the Code of Laws of South Carolina, and that aspects of The Citadel's operation are governed by sections 59-121-10 to 450 of the Code of Laws of South Carolina. *Mentavlos*, 249 F.3d at 319. The court also noted that The Citadel's treatment in the South Carolina Code is "no different in any material respect" from the treatment of other state-supported South Carolina colleges and universities, like the University of South Carolina and Clemson University. *Id.* The Citadel is also designated a "senior military college" by the federal government and consequently receives certain federal benefits. *Id.* at 317.

8. *Mentavlos*, 249 F.3d at 305-06. Although voluntary, The Citadel's decision followed a legal challenge by a female applicant whose admission was revoked, *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), and came in the wake of a Supreme Court decision finding a similar male-only admissions policy at the Virginia Military Institute to be unconstitutional, *United States v. Virginia*, 518 U.S. 515 (1996).

9. *Mentavlos*, 249 F.3d at 307, 314-15. In fact, only about one-third of The Citadel's cadets ultimately enter military service. Mentavlos v. Anderson, 85 F. Supp. 2d 609, 622 n.18 (D.S.C. 2000).

10. *Mentavlos*, 85 F. Supp. 2d at 616. The school's official policy is contained within several written manuals, including the "Blue Book," a copy of which is given to each student. *Id.*

11. *Id.* For example, freshmen must come to attention when an upperclassman enters their barracks or speaks to them and are allowed only limited, formal responses to upperclassemen. *Id.* at 617.

12. *Id.* at 616.

13. *Id.* at 617. The district court noted that the types of acceptable harassment freshmen commonly face at The Citadel might include mild verbal aspersions or the requirement to perform menial tasks, such as polishing an item for extended periods of time. *Id.*

14. *Id.*

15. *Id.* at 618.

Jeannie Mentavlos was one of the first four women to be admitted to The Citadel in the fall of 1996.[16] Four months after her arrival, however, Mentavlos withdrew, alleging that the commanding senior administrative officer and several upperclass cadets had "successfully conspired to perpetuate the former all-male Corps of Cadets by driving her from the school."[17] Specifically, she alleged the men subjected her to "sexual harassment, intimidation, and abuse" in the form of "insults, indignities, physical assaults and humiliating treatment."[18]

Mentavlos brought suit against The Citadel, her commanding administrative officer, Captain Richard Ellis, and five upperclass cadets, alleging that Ellis and the cadets acted in concert to deprive her of her constitutional right to equal protection in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 1985.[19] All of the defendants settled the claims except for Cadets John Anderson and James Saleeby and one cadet who was in default.[20] With Captain Ellis no longer a party to the suit, Mentavlos was allowed to amend her complaint to allege that each cadet was a state actor individually and to proceed solely on her § 1983 claim.[21]

Mentavlos cited specific incidents that she alleged indicated a kind and degree of harassment that was more severe than that experienced by similarly situated male cadets.[22] Mentavlos alleged that defendant Saleeby lit her clothing on fire twice, once putting it out with his feet; once kicked her in the legs after commenting that she "likes to be kicked"; and once entered her room shirtless.[23] Mentavlos alleged that defendant Anderson once began "ranting and raving" at her and then pushed cardboard into her face and chin; once disciplined her more severely than male classmates; and once threatened

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16. *Mentavlos*, 249 F.3d at 306.

17. *Id.*

18. *Id.*

19. *Id.* Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (2000). Section 1985 provides a civil action for those whose rights have been deprived by a conspiracy to obstruct justice. *Id.* § 1985(2).

20. *Mentavlos*, 249 F.3d at 306.

21. *Id.*; *see also* Mentavlos v. Anderson, 85 F. Supp. 2d 609, 611 (D.S.C. 2000) ("Prior to [this] amendment, [Mentavlos's] state actor allegations depended on proof that the cadet defendants acted in concert with one or more members of the college's faculty or staff . . . .").

22. *See Mentavlos*, 249 F.3d at 306.

23. *Mentavlos*, 85 F. Supp. 2d at 612-13.

to physically harm or kill Mentavlos or her brother, another upperclass cadet.[24] All of the incidents violated official written school policy and were fully disciplined by The Citadel's administration when they were brought to its attention.[25]

Viewing the facts in the light most favorable to the plaintiff,[26] the district court granted summary judgment to Anderson and Saleeby, holding that they were not liable under § 1983 because they did not act under color of state law.[27] The district court certified the case as one appropriate for immediate appeal under 28 U.S.C. § 1292(b), and the Fourth Circuit consented to hear the appeal.[28]

2. Legal Background.—Originally constructed by the Supreme Court as a legal device to overcome the limited application of the Fourteenth Amendment's protections to state entities,[29] the much-maligned state action doctrine has become one of the most confused areas of constitutional law.[30]

a. Section 1983 Generally.—42 U.S.C. § 1983 provides that a person who, under *color of state law,* deprives the "rights, privileges, or immunities secured by the Constitution and laws," is liable to the injured party.[31] Congress enacted § 1983 "to aid enforcement of the rights guaranteed by the Fourteenth Amendment,"[32] and, like the Fourteenth Amendment itself, it is well-established that the "color of

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24. *Id.* at 613.

25. *Id.* at 614.

26. *Id.* at 612 (noting that "because this matter is before the court on [the] defendants' motion for summary judgment, the court must view the record in the light most favorable to the plaintiff").

27. *Id.* at 628.

28. *Mentavlos,* 249 F.3d at 307.

29. The language of the Fourteenth Amendment limits its prohibitions to the states. *See* U.S. CONST. amend. XIV, § 1.

30. *See* Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine,* 24 GA. L. REV. 327, 327 (1990).

31. 42 U.S.C. § 1983 (2000). Section 1983 was originally passed as section 1 of the Civil Rights Act of 1871, in response to the terrorism against African-Americans by the Ku Klux Klan throughout the South. Robert L. Phillips, Comment, *Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?,* 1995 BYU L. REV. 237, 238.

32. Ashley Smith, Comment, *Students Hurting Students: Who Will Pay?,* 34 HOUS. L. REV. 579, 586 (1997); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) ("[Section] 1983 . . . was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibit[ing] interference with federal rights under color of state law.").

law" requirement excludes private conduct, no matter how wrongful, from its reach.[33]

Over time, however, it gradually became clear that state-supported discrimination often presented itself in the guise of private action, and the Supreme Court began recognizing situations when a private party may be deemed a "state actor," and thus subject to liability under Fourteenth Amendment claims.

b. Key United States Supreme Court Cases that Shaped the Tests for State Action Doctrine.—

(1) Early Development.—The Supreme Court began shaping its modern state action doctrine in the 1920s. One of the first Supreme Court cases to rely on the state action doctrine was *Nixon v. Herndon*,[34] in which the Court held that a private voting committee was prohibited from discriminating against blacks because, although not operated by the state, it was performing a state function.[35] In *Marsh v. Alabama*,[36] the Court held that a privately owned company town, by virtue of its similarities to a public municipality, was prohibited from discriminating.[37] In *Shelley v. Kraemer*,[38] the Court held that a state court's enforcement of a private race-restrictive covenant was sufficient to constitute state action because the covenant at issue could only take effect with the affirmative action of the state court.[39] In *Burton v. Wilmington Parking Authority*,[40] the Court looked at the symbiotic relationship between a private lessee operating on state-leased property and held it subject to the Fourteenth Amendment's proscriptions.[41] The Court held that the lessee in question, a privately owned coffee shop, was operated as an "integral part of a public building,"

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33. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (quoting Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)). Section 1983's "color of law" requirement has "consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *Rendell-Baker*, 457 U.S. at 838 (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)).

For the origins of this limited interpretation, see the *Civil Rights Cases*, 109 U.S. 3, 6 (1883) (holding that the Fourteenth Amendment only places prohibitions on states, not private parties). "[C]ivil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual . . . is simply a private wrong . . . ." *Id.* at 17.

34. 273 U.S. 536 (1927).

35. *Id.* at 541.

36. 326 U.S. 501 (1946).

37. *Id.* at 507-08.

38. 334 U.S. 1 (1948).

39. *Id.* at 20.

40. 365 U.S. 715 (1961).

41. *Id.* at 726.

and that the state, by its inaction, had placed its "power, property and prestige" behind its lessee's discrimination.[42] In *Evans v. Newton*,[43] the Court held that a private park, "municipal in nature,"[44] could not remain segregated, even after the appointment of private trustees, because the city remained "entwined in the management or control of the park."[45]

(2) June 25, 1982—The Court's Principles Defined.—On a single day in 1982, the Court decided three major state action cases: *Blum v. Yaretsky*,[46] *Lugar v. Edmonson Oil Co.*,[47] and *Rendell-Baker v. Kohn*.[48] While these cases finally provided the doctrine with articulable principles, the sense of formality suggested by these principles had the effect of deceptively simplifying a very complicated doctrine.[49]

In *Blum*, the Supreme Court held that a private nursing home was not a state actor, even though it could make decisions that led the state to reduce patient medical payments.[50] Alternately, in *Lugar*, the Supreme Court found that a lessee was a state actor when he misused a state statute.[51] Indicating that the ultimate issue in a state action determination is whether the infringement of federal rights is "fairly attributable to the State,"[52] the *Lugar* Court found that the lessee's procurement of an *ex parte* writ of attachment pursuant to a state statute and executed by a sheriff satisfied the state action requirement.[53] Finally, in *Rendell-Baker*, the Supreme Court found that a private school's acceptance of state-funded students and public funds did not make it a state actor when it fired a teacher.[54] The Court held that even though the school was virtually dependent on government fund-

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42. *Id.* at 724-25.

43. 382 U.S. 296 (1966).

44. *Id.* at 301.

45. *Id.*

46. 457 U.S. 991 (1982).

47. 457 U.S. 922 (1982).

48. 457 U.S. 830 (1982).

49. *See* Mindy A. Kaiden, Note, Albert v. Carovano: *The Second Circuit Redefines Under Color of State Law for Private Universities*, 39 AM. U. L. REV. 239, 241 (1989) (noting that "[t]he Court's decisions in these cases . . . failed to clarify the confusion surrounding state action").

50. 457 U.S. at 1012. Ultimately, the Court failed to find that the state was responsible for patient discharge and transfer decisions made by the nursing home. *Id.* at 1008-09.

51. 457 U.S. at 941.

52. *Id.* at 937.

53. *Id.* at 942.

54. 457 U.S. 830, 841-43 (1982).

ing, its decision to discharge Rendell-Baker was sufficiently distant from any influence by the state.[55]

The Supreme Court's analysis in *Blum* provided a comprehensive summary of its interpretation of the state action doctrine, as the Court reviewed its precedent and attempted to formulate the three situations in which a private party has been classified as a "state actor" under a § 1983 claim.[56] The Court began by noting that the overarching state action question has remained "whether [the private party's] conduct has sufficiently received the imprimatur of the State so as to make it 'state' action."[57] Then the Court laid out three principles to help future courts make that determination. First, the *Blum* Court suggested that the state action requirement would be met where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[58] Next, the Court recognized as state action those situations in which the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[59] Finally, the Court explained that the "required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"[60]

While the evolution of the state action doctrine has been thoroughly documented, even the Justices themselves have at times conceded that the "cases deciding when private action might be deemed that of the state have not been a model of consistency."[61] Still, this difficult *Blum* analysis has persisted as the fundamental inquiry in a state action determination.[62]

c. The State Action Doctrine Today.—While the Supreme Court recently reaffirmed the use of its *Blum* analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[63] the *Brentwood*

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55. *Id.* at 840-41.

56. Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982).

57. *Id.* at 1003.

58. *Id.* at 1004 (quoting Jackson v. Metro Edison Co., 419 U.S. 345, 351 (1974)). The Fourth Circuit, in *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993), characterized the first of the three principles as the "symbiotic relationship." *Id.* at 215.

59. *Blum*, 457 U.S. at 1004.

60. *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 353).

61. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

62. *See Mentavlos*, 249 F.3d at 314 (noting that the Supreme Court still relies on the *Blum* principles).

63. 531 U.S. 288, 295 (2001).

Court also indicated that there is no exclusive test that can be used to identify state actions, that the criteria "lack rigid simplicity," and that the ultimate determination remains one of normative judgment.[64] In *Brentwood*, a statewide association designed to regulate inter-scholastic athletic competition among both public and private secondary schools was held to be a state actor due to the "pervasive entwinement of state school officials in the structure of the association."[65] The Sixth Circuit applied the three *Blum* criteria and found no state action,[66] but the Supreme Court reversed that decision.[67] The Court indicated that the principles it has promulgated in the past serve only as *examples* of state action, representing its past identification of facts relevant to a "close nexus" analysis and not a formal, bright-line testing apparatus.[68] In effect, the Court reached beyond the *Blum* tests and announced a new criteria of "entwinement," which it justified through an analysis of prior state action findings.[69]

d. The Fourth Circuit's State Action Analyses.—The Fourth Circuit has used a variety of tests in making its state action determinations. In *Andrews v. Federal Home Loan Bank*,[70] the court held that a regional bank, although set up and regulated by the federal government, was not a state actor when it fired an employee because its conduct did not fall into one of the four categories that characterize a private party's actions as "fairly attributable" to the state.[71]

Two other Fourth Circuit state action cases, *Haavistola v. Community Fire Co.*[72] and *Goldstein v. Chestnut Ridge Volunteer Fire Co.*,[73] further illustrate the Fourth Circuit's understanding of the Supreme Court's

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64. *Id.* at 295. The Court's emphasis on a nonformalistic approach is not limited to post-*Blum* cases. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (stressing the importance of "sifting facts and weighing circumstances" when a court makes a state action determination).

65. *Brentwood*, 531 U.S. at 291.

66. *Id.* at 294.

67. *Id.*

68. *Id.* at 295-98.

69. *Id.* at 298.

70. 998 F.2d 214 (4th Cir. 1993).

71. *Id.* at 220. The four categories the court noted were:

> (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Id. at 217.

72. 6 F.3d 211 (4th Cir. 1993).

73. 218 F.3d 337 (4th Cir. 2000).

close nexus analysis. Both cases concerned summary judgments granted to local fire companies for § 1983 discrimination actions, and both dealt with the question of whether privately incorporated fire companies could be state actors.[74] However, their respective analyses show significantly different applications of the state action doctrine.

(1) Haavistola.—In *Haavistola*, a female volunteer alleged that the Community Fire Company's refusal to reinstate her after the criminal complaint she filed against a colleague was resolved constituted sexual discrimination.[75] The lower court considered each of Haavistola's state action arguments independently, applied the facts of her case to the individual state action tests promulgated by the Supreme Court in *Blum*,[76] and granted summary judgment to the fire company, finding that it was not a state actor.[77] On appeal, the Fourth Circuit held that the district court did not have the factual record necessary for its grant of summary judgment to the defendant fire company and remanded without making a state action determination.[78] Although noting that a "[r]eview of the preceding precedents and decisions *does little to simplify the issue* of when a private entity assumes the role of state actor," and stressing the need for a "factually intense analysis,"[79] the court held tightly to the Supreme Court's *Blum* analysis, suggesting that the three *Blum* principles are the sole indicators of when private conduct constitutes state action.[80]

(2) Goldstein.—In *Goldstein*, the Fourth Circuit was more clear as to how a state action inquiry should incorporate *Blum*, stressing a totality of the circumstances approach to state action analy-

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74. *Id.* at 339-40; *Haavistola*, 6 F.3d at 213-14.

75. *Haavistola*, 6 F.3d at 214.

76. Haavistola v. Cmty. Fire Co., 812 F. Supp. 1379, 1392-99 (D. Md. 1993).

77. *Id.* at 1400.

78. *Haavistola*, 6 F.3d at 222. The court's decision to remand has been heavily criticized. *See* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 328-32 (1995). Professor Krotoszynski argues:

> [T]he Fourth Circuit goofed . . . : although the subsidiary facts necessary to determine whether the Rising Sun fire company was a state actor were within the province of the jury, the legal significance of those facts was a question of law, appropriately reserved to the court. Because the parties in *Haavistola* did not dispute any of the subsidiary questions of fact, there was no role for the jury in determining whether the fire company was a state actor.

Id. at 330 n.141.

79. *Haavistola*, 6 F.3d at 218 (emphasis added).

80. *Id.* at 215.

sis at the outset.[81] The plaintiff in *Goldstein*, who was suspended from the Chestnut Ridge Volunteer Fire Company, alleged a violation of his First Amendment rights.[82] Consequently, the court was faced with determining whether the fire company's decision to terminate the plaintiff was under color of state law for purposes of § 1983.[83] Rather than directly applying the *Blum* analysis, however, the *Goldstein* court conducted its own review of Supreme Court precedent in an attempt to identify past situations where the Court found that government authority so dominated a private party's action that it could be viewed as an action of the state.[84]

Through its examination of previous cases, the *Goldstein* court identified four contexts in which a private party's conduct may be state action: (1) if the government is more than passive toward the private conduct; (2) if the conduct stems from state-delegated obligations to a private party; (3) if the government has conferred sovereign power on the private party; and (4) if state officials help in the private use of state procedures.[85] Noting the heavily fact-based nature of the state action analysis, the *Goldstein* court indicated that "[a]t bottom, the state action determination requires an examination of all the relevant circumstances, in an attempt to *evaluate the degree of the Government's participation in the private party's activities.*"[86] As it had in *Haavistola*, the *Goldstein* court acknowledged that the central principle that inspires any state action analysis is a *factual inquiry* into the government's relationship with the private party,[87] which is central to all of the promulgated tests and principles.

Noting that the tests it identified are incomplete by themselves,[88] the *Goldstein* court listed four additional factors that the Fourth Circuit had considered in the past in making determinations of state action: (1) if the injury is "aggravated in a unique way by the incidents of government authority"; (2) the "extent and nature of public assistance" given to the private party; (3) the "extent and nature of govern-

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81. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 342 (4th Cir. 2000). A "totality of the circumstances" approach is supported by Professor Krotoszynski, who advocates forcing courts to "go beyond the mechanical application of the traditional tests to determine if, in the totality of the circumstances, a particular private entity is a state actor." Krotoszynski, *supra* note 78, at 304.

82. *Goldstein*, 218 F.3d at 339.

83. *Id.*

84. *Id.* at 341-43.

85. *Id.* at 342.

86. *Id.* (quoting, in part, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989)) (emphasis added) (internal quotation marks omitted).

87. *Id.* at 342-43.

88. *See id.*

mental regulation" over the private party; and (4) "how the state itself views the entity."[89] The court immediately qualified the use of these factors, stressing that no one test alone can identify state action; rather, the factors merely help to inform a court's resolution of state action questions.[90]

The court then turned to the facts of the case, addressing Goldstein's argument that the Chestnut Ridge Volunteer Fire Company was a state actor because it performed a function traditionally and exclusively reserved to the government.[91] While suggesting that the fire company might not qualify as a state actor based solely on its performance of traditional government functions, the *Goldstein* court noted its duty to examine the "totality of the circumstances."[92] The court stated that its doubts were mitigated by the fact that, along with its government function, Chestnut Ridge received substantial state assistance, was subject to extensive state regulation, and was considered to be a state actor by the state itself.[93]

3. The Court's Reasoning.—In *Mentavlos v. Anderson*, the Fourth Circuit held that the upperclass cadets were not state actors, unanimously affirming the district court's grant of summary judgment to the defendant cadets on *de novo* review.[94]

The Fourth Circuit reviewed and ultimately rejected three of Mentavlos's arguments: (1) that the district court applied the wrong test for state action by applying the *Haavistola* analysis instead of *Goldstein*;[95] (2) that The Citadel's cadets are analogous to cadets at the United States military service academies because these institutions perform the traditional government function of training civilians for the military and are entitled by the government to certain benefits, and therefore their cadets should all be considered "in the military" for purposes of the color of state law requirement of § 1983;[96] and (3) that the cadets' actions are "fairly attributable to the state" because the state provides financial assistance to The Citadel and extensively regulates its military programs.[97]

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89. *Id.* at 343 (internal quotation marks and citations omitted). The court pulled these factors exclusively from Supreme Court precedent—and *Haavistola*. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 345-48.

94. *Mentavlos*, 249 F.3d at 305.

95. *Id.* at 312-14.

96. *Id.* at 314-18.

97. *Id.* at 318-23.

a. First Argument: The "Wrong Test."—Mentavlos argued that the district court applied the wrong test for state action because *Haavistola*, on which the district court relied for its three-part test, had been implicitly overruled by the Fourth Circuit's subsequent decision in *Goldstein*.[98] Mentavlos asserted that the upperclass cadets' actions met *Goldstein*'s "totality of the circumstances" test, and therefore were taken under color of state law.[99]

The court noted that although cases determining state action may not be entirely consistent,[100] the "critical inquiry"—whether the conduct is "fairly attributable to the state"—has remained constant.[101] Acknowledging that prior panels of the court have used different tests and factors when determining whether a challenged action is fairly attributable to the state,[102] the *Mentavlos* court explained that the *Goldstein* decision merely summarized precedent and did not overrule *Haavistola*.[103] Consequently, the court held that the district court did not apply the wrong test by relying on *Haavistola*'s *Blum* analysis.[104]

b. Second Argument: "Traditional Government Function."—The court rejected Mentavlos's next argument that The Citadel, like the United States service academies, performs traditional government functions, such that its cadets' actions were under color of state law.[105] First, Mentavlos attempted to analogize cadets at The Citadel to cadets at the United States military service academies, who have previously been deemed state actors under "the *Feres* doctrine."[106] While the court accepted that training civilians for military service, as done by the United States military service academies, is a traditional govern-

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98. *Id.* at 312. The Fourth Circuit rejected Mentavlos's argument that *Haavistola* had actually been overruled by the *Goldstein* decision, noting that only a panel of the court sitting *en banc*, or the Supreme Court, can overrule a prior appellate decision. *Id.* at 312 n.4.

99. *See id.* at 312.

100. *Id.* at 313.

101. *Id.* (quoting Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984)).

102. *Id.*

103. *Id.* at 313-14. The *Mentavlos* court also noted that *Haavistola* summarized the standard set by the Supreme Court in *Blum*, which the Supreme Court recently relied on in *Brentwood*. *Id.* at 314.

104. *Id.* at 314.

105. *Id.* at 316.

106. *Id.* at 314. The *Feres* doctrine, announced in *Feres v. United States*, 340 U.S. 135, 146 (1950), bars members of the military services from bringing claims against the government under the Federal Tort Claims Act for service related injuries. Noting that the Seventh Circuit applied the *Feres* doctrine to cadets at the United States military academies in *Collins v. United States*, 642 F.2d 217, 220-21 (7th Cir. 1981), Mentavlos reasoned that cadets at those military institutions and, by analogy, The Citadel should be viewed as state actors. *Mentavlos*, 249 F.3d at 314.

ment function,[107] it distinguished The Citadel's "business" as one of only using a military-style environment to produce community leaders rather than training soldiers.[108]

The court recognized that educating civilians for leadership is not the exclusive prerogative of the state[109] and found pivotal that nowhere in The Citadel's mission statement is the objective to "train soldiers for the military."[110] Even though the Seventh Circuit, in *Collins*, applied the *Feres* doctrine to a United States Air Force Academy cadet,[111] the Fourth Circuit sufficiently distinguished Air Force Academy cadets, who are considered members of the Air Force, from students at The Citadel who are not "in the military."[112]

Mentavlos next argued that The Citadel's designation by the federal government as a "senior military college," and its entitlement to special state and federal benefits, mandates that actions by its cadets be considered state action.[113] Noting that the public function test is "carefully confined,"[114] the *Mentavlos* court held that the relevant question is "whether the 'function performed has been traditionally the *exclusive* prerogative of the State.'"[115] Ultimately, the court refused to equate Congress's delegation of legislative benefits to The Citadel with the delegation of a traditional, exclusive government function to its non-enlisted, non-military cadets.[116]

c. Third Argument: Government Assistance and Regulation.— Lastly, the Fourth Circuit rejected Mentavlos's contention that the actions of the defendant cadets were attributable to the state because South Carolina provides financial assistance to The Citadel and extensively regulates its programs.[117]

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107. *Mentavlos*, 249 F.3d at 314.

108. *Id.* at 314-15.

109. *Id.*

110. *Id.* at 315.

111. *See Collins*, 642 F.2d at 220-21.

112. *Mentavlos*, 249 F.3d. at 315-16.

113. *Id.* at 316-17. This federal designation is noted in the Senior Reserve Officers' Training Corps Act, 10 U.S.C. § 2111a(f) (2000). State special recognition is provided in S.C. CODE ANN. § 25-1-520 (Law. Co-op. 1990).

114. *Mentavlos*, 249 F.3d at 317 (quoting Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 348 (4th Cir. 2000)).

115. *Id.* (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).

116. *Id.*

117. *Id.* at 318-19. The Fourth Circuit went on to cite *Rendell-Baker*, 457 U.S. at 840-41, for the proposition that "a private party's dependence upon the state for assistance, even if substantial, does not transform its actions into actions of the state." *Mentavlos*, 249 F.2d at 319.

First, the court found South Carolina's financial assistance to The Citadel to be no different than its financial support of the University of South Carolina and Clemson University.[118] The court noted that while The Citadel's receipt of state assistance might factor into a determination of whether The Citadel *itself* is a state actor, the financial relationship was not relevant to the significantly narrower question of whether *students* at The Citadel are state actors.[119] Noting that Mentavlos had not argued that The Citadel's students independently received any type of direct financial assistance from the state, the *Mentavlos* court refused to "view the unauthorized actions of private students to be state action merely because they attend a state-supported college and receive the benefit of public funds."[120]

The court also rejected Mentavlos's claim that the state's regulation of The Citadel should lead to the conclusion that the students acted under color of state law.[121] Reviewing the authority of upperclass cadets to discipline freshmen, the court found instructive that The Citadel expressly prohibits abusive treatment or discrimination, and that the abuses that Mentavlos reported were punished when she brought them to the attention of The Citadel's administration.[122]

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118. *Mentavlos*, 249 F.3d at 319.

119. *Id.*

120. *Id.*

121. *Id.* Recognizing that a court may consider the extent and nature of government regulation over an institution as a factor in its state action analysis, the *Mentavlos* court clarified its position by explaining that "state regulation unrelated to the alleged constitutional violation, even if extensive," will not transform private action into state action. *Id.* at 320 (quoting Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 347 (4th Cir. 2000)).

122. *Id.* at 320. Additionally, the court noted that "Mentavlos presented no contrary evidence that any member of The Citadel administration, faculty, or staff ever encouraged, endorsed, participated in, refused to prevent, or acquiesced in the challenged actions." *Id.*

The court also rejected Mentavlos's argument that The Citadel's prohibition of the cadets' actions was irrelevant under *United States v. Classic*, 313 U.S. 299, 326 (1941), where the Supreme Court held that state officials can act under color of state law even if they abuse their official capacities. *Mentavlos*, 249 F.3d at 321. Mentavlos specifically cited the Fourth Circuit's holding in *Scott v. Vandiver*, 476 F.2d 238, 241 (4th Cir. 1973), where two county employees who had been deputized by a local sheriff were still considered state actors when they misused the law enforcement power granted to them by the state. *Id.* The *Mentavlos* court reasoned that, unlike the defendants in *Classic* and *Scott*, the cadets were not state officials or employees, and that a "public school or college student is not fairly transformed into a state official or state actor merely because the school has delegated to that student or otherwise allowed the student some limited authority to act." *Mentavlos*, 249 F.3d at 322. The *Mentavlos* court declined to find the authority granted to the upperclass cadets by The Citadel analogous to the broad authority given to police officers found to constitute state action in *Scott*. *Id.*

As further support, the court cited its holding in *Milburn v. Anne Arundel County Department of Social Services*,[123] where it refused to find abusive foster parents to be state actors under § 1983, even though the individuals were licensed and authorized by the state to care for the abused child.[124] The court stressed that where the state does not in any way encourage or coerce the specific conduct at issue, it has declined to find the private conduct state action.[125]

Finally, the *Mentavlos* court distinguished its decision from the Supreme Court's holding in *Santa Fe Independent School District v. Doe*,[126] where a student-led, student-initiated invocation was deemed government speech.[127] In contrast to the actions in *Doe*, which were explicitly authorized and endorsed by the school, the *Mentavlos* court reiterated that the cadets' harassment of Mentavlos "was not coerced, compelled, or encouraged by any law, regulation or custom of the State of South Carolina or The Citadel."[128]

4. Analysis.—While the Fourth Circuit's decision in *Mentavlos* was correct, its retreat from the "totality of the circumstances" analysis it applied in *Goldstein* represents a significant regression in the Fourth Circuit's application of the state action doctrine. The *Mentavlos* court did not explicitly reject a totality of the circumstances approach.[129] Indeed, it acknowledged the fact-based nature of the state action question and suggested that the guidance provided by *Goldstein* is consistent with, if not analogous to, the approach it borrowed from *Haavistola*.[130] The court is correct,[131] but its analysis in *Mentavlos* exposes an application of the state action tests that is far more mechanical than the spirit of its understanding in *Goldstein*, as well as the view

123. 871 F.2d 474, 479 (4th Cir. 1989).

124. *Mentavlos*, 249 F.3d at 320.

125. *Id.*

126. 530 U.S. 290 (2000).

127. *Id.* at 310.

128. *Mentavlos*, 249 F.3d at 323. The court's opinion ended with a footnote recognizing that its conclusion that the cadets did not act under color of state law precluded a need to decide whether their alleged actions actually deprived Mentavlos of a right secured by federal law. *Id.* at 323 n.8.

129. *See id.* at 313-14.

130. *Id.* The court noted that the factors it identified as relevant in *Goldstein* represented a summary of the Fourth Circuit's precedent, and as such is compatible with *Haavistola*'s summary of the Supreme Court's *Blum* tests. *Id.*

131. The court's pronouncement that *Goldstein* did not overrule *Haavistola* is true. Foremost, only a panel of the court sitting *en banc*, or the Supreme Court, can overrule a prior appellate decision. *Id.* at 312 n.4. By ultimately turning to the "close nexus" inquiry, the Fourth Circuit correctly asserted that it is guided—not controlled—in this complex area "by the factors which have been described by the Supreme Court in prior precedents and which are pertinent to the circumstances of this case." *Id.* at 314.

expressed by the Supreme Court in *Brentwood.* While the court may have reached the same outcome using an analysis more in line with *Goldstein,* its formalistic approach to state action is a significant step backwards.

a. Overlooking Goldstein*'s Contribution to State Action Analysis.*—The *Mentavlos* court's suggestion that *Goldstein* was merely a summary of precedent that was not meant to espouse anything new[132] is an inaccurate characterization of the significant step the *Goldstein* court took to recognize the proper context of a state action analysis. Moreover, it blatantly glosses over the fact that *Goldstein*'s importance lies not so much in the *type* of tests it applied, but in its *application* of the tests it chose.[133]

In *Goldstein,* after applying the "traditional government function" test, the Fourth Circuit acknowledged that doubt might still exist that the Chestnut Ridge fire company unequivocally performed traditional and exclusive state functions.[134] However, noting that the Supreme Court "has admonished the lower courts to examine the totality of the circumstances,"[135] the *Goldstein* court stated that any such doubts must be assuaged by a series of other factors that suggest that the state delegated authority to the fire company.[136] By reaching outside of a single state action test and exploring the "totality of the circumstances," the *Goldstein* court confidently held that Chestnut Ridge was a state actor.[137]

The *Goldstein* approach differs markedly from the analysis performed by the Fourth Circuit seven years earlier in *Haavistola.* In *Haavistola,* the Fourth Circuit suggested that a finding of state action depends entirely on satisfying one of the three *Blum* tests.[138] Nowhere in the opinion did the court mention a totality of the circumstances approach.

The flexible analysis advanced by the *Goldstein* court is precisely what the Supreme Court itself has come to promote. In *Brentwood,* the Court explicitly stated that the state action determination "is a matter

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132. *Id.* at 313-14.

133. *See supra* notes 81-93 (discussing *Goldstein*'s application of the state action tests).

134. 218 F.3d 337, 345 (4th Cir. 2000).

135. *Id.*

136. *Id.* at 345-48.

137. *Id.* at 348.

138. *See* Haavistola v. Cmty. Fire Co., 6 F.3d 211, 215 (4th Cir. 1993) (stating definitively that "[t]he Supreme Court has identified three situations in which particular conduct by a private entity constitutes 'state action'").

of normative judgment, and the criteria lack rigid simplicity."[139] Moreover, the notion that the state action tests can be applied in rigid isolation has been squarely rejected by academics.[140]

The *Mentavlos* court's state action analysis was deficient in many respects: there was no discussion of "totality of the circumstances," no implied consideration of how various factors might influence each other, and no suggestion that the court was doing anything but viewing each test as a solid, stand-alone operation. In fact, there is a noticeable absence of any reference to any of the principles the court laid out in *Goldstein*—all the more striking because Mentavlos herself raised the issue.[141]

Instead, the *Mentavlos* court fragmented its opinion into wholly separate analyses under each of the *Blum* tests relevant to Mentavlos's case.[142] Beginning with the "traditional governmental function" test, the court applied the case's facts and found no state action.[143] Then, the court switched gears and searched for state action under the "government funding and regulation" test, again failing to find state action.[144]

What the court never did, overlooking the significance of *Goldstein*, was to recognize the possibility that, even without passing the individual state action tests it applied, the facts of the *Mentavlos* case could, in the totality of the circumstances, still suggest state action. Finding neither test satisfactorily met, the *Mentavlos* court concluded that the cadets' actions could not be attributed to the state.[145] However, its failure to step back from the separate tests to view the facts holistically, examining all of Mentavlos's arguments in a broad inquiry for a "close nexus," runs counter to the progressive understanding of

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139. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001).

140. *See, e.g.*, Krotoszynski, *supra* note 78, at 305. Professor Krotoszynski suggests:

> The federal courts' use of the various state action tests as formulaic shorthands that yield quick and easy answers represents an inappropriate application of the Supreme Court's state action precedents. Such jurisprudence has the unfortunate effect of insulating from constitutional scrutiny behavior fairly attributable to the state and is significantly underprotective of constitutional rights.

Id.; *see also* Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 88 (1967) (declaring that "there were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catch-phrase").

141. *Mentavlos*, 249 F.3d at 311-14.

142. *See id.* at 314-21.

143. *Id.* at 314-18.

144. *Id.* at 318-21.

145. *Id.* at 323.

the doctrine that the Fourth Circuit expressed in *Goldstein* and is even more unsettling in light of the Supreme Court's decision in *Brentwood.*

b. Seeking "Entwinement"—The Implications of Brentwood.—If there had been any doubts that the tests promulgated by the Supreme Court in *Blum* were meant to serve only as guidelines within a broader analysis and not as finite tools for independent analysis, the Supreme Court's recent decision in *Brentwood* should have mitigated them. Scouring its precedent to uncover a connection between private actor and state that it labeled "entwinement,"[146] the Supreme Court in *Brentwood* went to great lengths to stress that state action cannot be determined by the application of separate tests:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, *no one fact can function as a necessary condition across the board for finding state action*; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.[147]

While the *Brentwood* Court did not specifically use the phrase "totality of the circumstances," it did instruct that "no one criterion must necessarily be applied."[148] However, given that the facts in *Brentwood,* while not passing any one of the individual *Blum* tests, could still lead to a finding of state action by virtue of "entwinement," the Supreme Court has indicated an unwillingness to be bound by the kind of rigid analysis applied in *Mentavlos.*[149]

Mentavlos herself did not argue that the cadets' actions were so "entwined" with the state as to compel a finding of state action, most likely because the *Brentwood* decision was announced after the argument of her case before the Fourth Circuit.[150] Even so, the Fourth Circuit acknowledged its awareness of *Brentwood,* citing it in its discussion of *Goldstein*'s relationship to the Fourth Circuit's state action pre-

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146. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 297 (2001).

147. *Id.* at 295-96 (emphasis added). The *Mentavlos* court actually quotes this exact language, but does not use it in its analysis. *Mentavlos,* 249 F.3d at 311. In fact, the court stressed the last portion of the quote, noting that the presence of a set of circumstances "might not be conclusive of the state action issue." *Id.* at 312.

148. *Brentwood,* 531 U.S. at 303.

149. *See id.* at 295-98.

150. *Mentavlos* was argued on January 25, 2001, while *Brentwood* was decided on February 20, 2001. *Compare Mentavlos,* 249 F.3d at 301, *with Brentwood,* 531 U.S. at 288.

cedent.[151] Yet what is most strange about the *Mentavlos* court's decision to cite *Brentwood* was its reason for doing so—not to apply the broad understanding so clearly promulgated by *Brentwood*,[152] but to support the proposition that the *Blum* analysis used by the *Haavistola* court was still being relied upon by the Supreme Court and therefore remained a valid analytical tool.[153]

The *Mentavlos* court relied on *Brentwood* to support its contention that *Haavistola*'s "*Blum*" approach, and not *Goldstein*'s totality of the circumstances approach, reflects the Supreme Court's modern state action doctrine.[154] A correct reading of *Brentwood*, however, can only support the exact converse of the *Mentavlos* court's understanding. While *Brentwood* does indeed cite *Blum*, the citation merely serves as a small part of the Court's review of its past findings of state action, and the Court puts no more emphasis on *Blum* than on any of its other precedent.[155]

In *Mentavlos*, the Fourth Circuit ignored *Brentwood*'s preference for the "practical certainty" provided by an outside-of-the-tests approach over the "formal clarity" provided by a strict adherence to the tests themselves.[156] Consequently, the Supreme Court's move towards evaluating the circumstances of a case for state action without being restricted by the artificial limitations set by individual tests is lost in the *Mentavlos* decision.

c. What Might Have Been—How the Mentavlos *Court Could Have Applied a "Totality of the Circumstances" Analysis.*—Whether the outcome of the case would have changed had the *Mentavlos* court held more closely to a totality of the circumstances approach is not likely, although certainly arguable, given that Mentavlos based her appeal on exactly that argument.[157] Although the *Mentavlos* and *Goldstein* ap-

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151. *See Mentavlos*, 249 F.3d at 310 (citing *Brentwood* repeatedly).

152. *Brentwood*, 531 U.S. at 295-96.

153. *See Mentavlos*, 249 F.3d at 314 (citing to *Brentwood* as evidence of the validity of the *Blum* tests).

154. *Id.*

155. *See Brentwood*, 531 U.S. at 296.

156. *Id.* at 301 n.4. The Supreme Court noted that

> if formalism were the *sine qua non* of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling. For example, a criterion of state action like symbiosis . . . looks not to form but to an underlying reality.

Id.

157. *Mentavlos*, 249 F.3d at 312-14.

proaches may have ultimately produced similar outcomes in this case, the differences between the approaches are nonetheless significant.[158]

Mentavlos argued that the cadets were state actors, both because they performed a traditional government function and because the government regulated and funded The Citadel's programs.[159] The court, applying the tests in isolation, found neither argument compelling.[160] A totality of the circumstances analysis need not become a complicated jumble of tests that loses the functional advantages of the *Blum* analysis; rather, as the Fourth Circuit did in *Goldstein*, the court could have analyzed the facts of Mentavlos's situation under each test and then, after finding neither test sufficiently met, provided an additional prong of analysis acknowledging that all of the evidence, when viewed in the totality of the circumstances, either did or did not suggest that the cadets' actions were fairly attributable to the state.

If the court believed that, even in the totality of the circumstances, state action still did not exist, the additional analysis need not be lengthy nor complex—it must only recognize that the court has at least considered the circumstances of the case holistically.[161] The fact that neither test was fully met should not automatically preclude the possibility that the portions of each test that were met, when viewed together, could compel a finding of state action.[162]

Given the Supreme Court's analysis in *Brentwood*, it would be improper to hold that a set of facts, although suggesting elements of state action under each of the Court's constructed tests, cannot ultimately compel a finding of state action simply because none of the tests are fully met independently. Only when the Fourth Circuit begins to routinely and explicitly examine the facts of its cases under a totality of the circumstances approach can it ensure that it is providing a state action analysis fully in line with Supreme Court precedent.

5. Conclusion.—The *Mentavlos* court's retreat from the totality of the circumstances analysis that the Fourth Circuit advocated in *Goldstein* and further supported by the Supreme Court in *Brentwood* is a subtle but significant regression in the Fourth Circuit's understanding

158. *See supra* notes 132-145 and accompanying text.

159. *Mentavlos*, 249 F.3d at 314, 318.

160. *Id.*

161. *See* Krotoszynski, *supra* note 78, at 335-46.

162. *Id.* at 337. Professor Krotoszynski notes that had the lower court in *Haavistola* considered all of the connections between the state and the fire company "conjunctively, rather than singly and in isolation," it might have held differently. *Id.* at 330. Krotoszynski later suggests more generally that "[i]n many instances, if courts applied the tests in tandem, the state action requirement would be satisfied." *Id.* at 336.

of the state action doctrine. By choosing to apply isolated tests to the *Mentavlos* facts and ignoring the genuine connections between the various factors that might illustrate state action, the *Mentavlos* decision illustrates a return to an interpretation of the doctrine that is more formal, more rigid, and less reasonable.

ALAN J. SACHS

B. *The Court Begins to Journey on the Path of Establishment Clause Nullification*

In *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*,[1] the United States Court of Appeals for the Fourth Circuit considered the constitutionality of Montgomery County, Maryland Zoning Ordinance section 59-G-2.19(c)[2] under the Establishment Clause of the First Amendment.[3] The court held that the ordinance was valid under the Establishment Clause, reversing the decision of the district court.[4] The court reasoned that by providing parochial schools an exemption from local zoning ordinances, Montgomery County "permissibly accommodated religion."[5] Further, the court determined that allowing parochial schools to build without acquiring a special exemption was consistent with prior Supreme Court and Fourth Circuit rulings.[6] The *Ehlers-Renzi* court, in upholding the constitutionality of a provision that provides special benefits to religious institutions, acted in a manner that constituted government endorsement of religion.[7] The Fourth Circuit's misapplication of the *Lemon* test,[8] and its failure to apply the "neutrality principle" set out by the Supreme Court in *Mitchell v. Helms*,[9] resulted in a finding that paves the way toward the dilution of the Establishment Clause. The court failed to recognize that

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1. 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001).

2. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-G-2.19(c) (2001). The zoning ordinance states:

> The requirements of this section shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

Id.

3. *Ehlers-Renzi*, 224 F.3d at 284. The Establishment Clause and the Free Exercise Clause state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

4. *Ehlers-Renzi*, 224 F.3d at 292.

5. *Id.*

6. *Id.*

7. *See id.* at 293 (Murnaghan, J., dissenting) (stating that "County Zoning Ordinance § 59-G-2.19(c) was not enacted with the legitimate secular purpose of avoiding governmental interference with the free exercise of religion").

8. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* (internal quotation marks and citations omitted).

9. 530 U.S. 793, 809 (2000). The neutrality principle upholds "aid that is offered to a broad range of groups or persons without regard to their religion." *Id.*

by allowing the exemption to the zoning permit to be premised on religious ownership of the land, it created an exemption that constitutes the support and aid of religion, an action that the Establishment Clause is specifically intended to prohibit. By deviating from past rulings which held that there is an obligation for the government to provide equal benefits to both the secular and the religious, the court validated aid that goes only to religious institutions, thereby resulting in unconstitutional discrimination.

1. The Case.—Vincent Renzi and his wife Birgit Ehlers-Renzi were homeowners in Montgomery County, Maryland.[10] They lived across the street from a Roman Catholic school, the Connelly School of the Holy Child (Connelly School), that wished to make structural improvements and additions to its school building.[11] The school advocates Christian values, and both the institution and the property on which it is located are owned by a religious corporation, the Society of the Holy Child Jesus, Inc.[12] Before beginning construction, the school notified the surrounding community that it would not seek a special exception to make its construction renovations.[13] Under the Montgomery County Zoning Ordinance, a special exception is ordinarily required for a private educational institution's construction on land that is in a residential zone.[14] However, the zoning ordinance contains an exemption from the need to obtain a special exception for private and parochial schools that are located on property owned or leased by a religious organization.[15] Zoning Ordinance § 59-G-2.19(c) exempts any lot or tract of land used "for any private educational institution, or parochial school, . . . located in a building or on premises owned or leased by any church or religious organization," or any federal, state, or local government in Montgomery County, Maryland.[16]

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10. *Ehlers-Renzi*, 224 F.3d at 284.

11. *Id.* at 284-85.

12. *Id.* at 285. The Society of the Holy Child Jesus, Inc. functions under the sponsorship of the Roman Catholic Church. *Id.*

13. *Id.* Obtaining a special exception would have required a private school to file a detailed application with the county. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-G-2.19(b)(1) (2001). The application approval process demands public notice and the opportunity for a public hearing. *Id.* § 59-A-4.41(a). In addition, the Board of Appeals may grant a special exception based on its findings on matters including, but not limited to, potential nuisances or effects on nearby community development caused by the use of the land, as well as the ability of the building itself to blend in with surrounding structures. *Id.* § 59-G-2.19(a).

14. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-1.31(d).

15. *Id.* § 59-G-2.19(c).

16. *Id.*

The Renzis opposed the school's failure to obtain a special exception for its renovations and asked that Montgomery County determine whether the Connelly School was required to obtain the special exception.[17] The County ruled that the Connelly School was indeed exempt from the special exception requirement, and the Renzis subsequently filed an administrative appeal with the Montgomery County Board of Appeals.[18] The Renzis then withdrew that appeal and filed suit in the United States District Court for the District of Maryland.[19] The Renzis asked for a declaratory judgment that the religious exemption from the generally required exception was unconstitutional under the First Amendment's Establishment Clause.[20]

The district court found for the plaintiffs on the grounds that section 59-G-2.19(c) of the ordinance, which provided for the religious exemption, violated the Establishment Clause.[21] In finding that section 59-G-2.19(c) violated the Establishment Clause, Chief Judge Motz relied on the *Lemon* test, which is used to decide if a challenged government action unlawfully advances religion.[22]

Judge Motz stated that the ordinance was unconstitutional because it "fails to be neutral in a context where neutrality is possible. By favoring sectarian schools over most other non-profit private educational institutions, it belies any secular purpose and has a principle effect of advancing religion."[23] Judge Motz further explained that in order for section 59-G-2.19(c) to become lawful, the county must extend the same exception to all private nonpublic schools no matter who owns the land.[24]

The Connelly School appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit to determine whether the statutory zoning exemption violated the Establishment Clause of the First Amendment to the United States Constitution.[25]

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17. *Ehlers-Renzi*, 224 F.3d at 285.

18. *Id.*

19. *See id.*; *see also* Renzi v. Connelly Sch. of the Holy Child, 61 F. Supp. 2d 440 (D. Md. 1999).

20. *See Renzi*, 61 F. Supp. 2d at 441. Additionally, the Renzis sought injunctive relief to stop the school from continuing its renovations. *Id.* Montgomery County intervened as a defendant. *Id.* Each of the parties filed cross-motions seeking summary judgment. *Id.*

21. *Id.* at 448.

22. *Id.* at 443.

23. *Id.* at 444. The court allowed the school to finish work on the construction that was already in progress, but enjoined the Connelly School from engaging in any further construction. *Id.* at 448.

24. *Id.*

25. *See Ehlers-Renzi*, 224 F.3d at 285.

2. *Legal Background.*—Courts have struggled with the proper application of the Establishment Clause.[26] Through the years, the United States Supreme Court has derived basic principles to use in the interpretation of the Establishment Clause; however, these guidelines continue to evolve.[27] The Court's cases can be classified into two categories: "early" Establishment Clause cases in which the Court struggled to define the meaning of separation of church and state, and the "modern" Establishment Clause cases in which the Court has sought to define a conclusive test to determine what constitutes the endorsement of religion.

a. Early Establishment Clause Cases: The Court's Struggle to Define the Meaning of Separation of Church and State.—The Court's struggle to define the meaning of the Establishment Clause began in *Everson v. Board of Education.*[28] In *Everson,* the Court delivered its first decision that dealt specifically with the standards that control when government aid may be given to religious schools.[29] The *Everson* Court upheld a statute that provided state-funded transportation to both public and parochial schools.[30] The Court explained that providing bus transportation to all children did not violate the "high and impregnable" wall of separation between Church and State because it did no more than create a program that helped students get to school "regardless of their religion."[31] In holding that the state-funded transportation was constitutional, the Court reasoned that the First Amendment requires the neutral treatment of religion and secular institutions, thus indicating that "[s]tate power is no more to be used so as to handicap religions than it is to favor them."[32]

The Court's decision to uphold programs that offered aid to both public and parochial students, despite the fact that it may increase the likelihood of parochial school attendance, was revisited and reaf-

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26. *See* Mueller v. Allen, 463 U.S. 388, 392 (1983) (expressing the difficulty presented in interpreting the Establishment Clause); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (stating that the "language of the Religion Clause of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment"); Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970) (explaining that there is no bright-line test that can be used to determine the existence of an Establishment Clause violation).

27. *See Lemon,* 403 U.S. at 612-13 (providing the factors courts need to consider to determine whether the Establishment Clause has been violated); *see also* Mitchell v. Helms, 530 U.S. 793, 807-09 (2000) (reviewing the evolution of Establishment Clause interpretation).

28. 330 U.S. 1 (1947).

29. *See id.* at 14-16.

30. *Id.* at 18.

31. *Id.*

32. *Id.*

firmed in *Board of Education v. Allen*.[33] In *Allen*, the Court held that a New York law that required public school officials to freely lend textbooks to both public and parochial school systems did not violate the First Amendment.[34] The Court reasoned that although the state law might make it more probable that more students would attend parochial schools, it did not constitute unlawful aid of a religious establishment because the statute provided benefits to all students—both those who attended private schools and those who did not.[35] In reaching its conclusion, the Court stated that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation."[36]

The Court extended this line of reasoning one year later in *Walz v. Tax Commission of New York*.[37] In *Walz*, the Court upheld a property tax exemption to religious organizations, even though the exemption provided an indirect economic benefit to religious organizations.[38] The *Walz* decision differed from previous cases because it determined that a law that extended benefits to only the religious, as opposed to both the religious and the secular, did not violate the Establishment Clause.[39] In upholding the property tax exemption statute, the Court used a two-pronged analysis: first, what is the intention behind the statute; and second, does the statute result in "excessive governmental entanglement with religion."[40] The Court found that the exemption did not violate the Establishment Clause because it did not create "sponsorship, financial support, and active involvement of the sovereign in religious activity."[41] The *Walz* Court further explained that,

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33. 392 U.S. 236 (1968).

34. *Id.* at 238.

35. *Id.* at 243-44.

36. *Id.* at 242.

37. 397 U.S. 664 (1970).

38. *Id.* at 680.

39. *See id.* The New York City tax exemption was granted to religious organizations for properties used exclusively for religious purposes. *Id.* at 666-67.

40. *Id.* at 674.

41. *Id.* at 668, 679-80. The Court noted that the Framers of the Constitution, when writing the Religion Clauses of the First Amendment, believed that "'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 668. The Court reasoned that granting the tax exemption did not support any church because the government refrains from gathering its financial support from organized religions. *Id.* at 675. The Court noted that the exemption reduces the pecuniary relationship between churches and the state and serves to disentangle the two. *Id.* at 676. The Court stressed the impossibility of complete separation between church and state and explained that tax exemptions for religious organizations have been commonplace in American history. *Id.* at 676-78. The majority then noted that the long history of government tax exemptions for churches has not led to the establishment of a religion. *See id.* at 678.

while there are factors to consider, there is no bright-line test to determine an Establishment Clause violation.[42] Therefore, courts must look at each statute on a case-by-case basis to determine if a provision is "intended to establish or interfere with religious beliefs and practices."[43] The *Walz* Court explained that following "the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice."[44]

b. Modern Establishment Clause Cases: The Court Seeks to Define a Conclusive Test to Determine What Constitutes the Endorsement of Religion.— The landmark case of *Lemon v. Kurtzman*[45] created a three-pronged test to determine the constitutionality of government benefits granted to religious groups.[46] The Court's decision in *Lemon* led to Establishment Clause interpretative reform in subsequent cases. However, *Lemon* is still the foundation for present day Establishment Clause analysis.[47]

In *Lemon v. Kurtzman*, the Court formulated a test that marked a consolidation of the Court's prior analysis of Establishment Clause cases.[48] In *Lemon*, the Court found that Pennsylvania and Rhode Island statues that either reimbursed or supplemented a portion of the costs involved in teaching secular subjects at "nonpublic" schools violated the twin religion clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause.[49] In its analysis, the *Lemon* Court created the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[50]

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42. *See id.* at 669.

43. *Id.*

44. *Id.* at 669-70.

45. 403 U.S. 602 (1971).

46. *See id.* at 612-13.

47. *See* Mitchell v. Helms, 530 U.S. 793, 807 (2000).

48. *Lemon*, 403 U.S. at 612-13. The *Lemon* Court did not specify the origin of every prong of its three-prong test came. *See id.* at 612. It did state that the test was based on prior Supreme Court rulings. *Id.*

49. *Id.* at 607. The Rhode Island statute permitted the state to add up to 15% of teachers' salaries in private religious and nonreligious elementary schools if the instructors did not teach a religion course. *Id.* at 607-08. The Pennsylvania statute reimbursed private elementary and secondary schools for some of the expenses of secular education. *Id.* at 609. These expenses included textbooks, teaching materials, and secular teachers' salaries. *Id.* Under both statutes, aid was given to "church-related" schools. *Id.* at 607.

50. *Id.* at 612-13 (internal quotation marks and citations omitted).

The Court reasoned that the Constitution requires religion to be an individual, private matter; therefore, the Rhode Island and Pennsylvania laws that provided secular financial assistance to religious schools were prohibited.[51]

Lemon left undecided the question of whether direct state aid to students, rather than to parochial schools, also violated the Establishment Clause. *Meek v. Pittenger*[52] addressed this question when the Court considered a portion of a Pennsylvania law that provided for the direct lending of secular textbooks to students.[53] A plurality of the Court explained that there was no reason to believe that the textbooks purchased with government funds, for the purpose of lending them to nonpublic schools, would be used for anything but secular education.[54] Consequently, in *Meek*, the Court upheld a provision that provided funds for the lending of textbooks to nonpublic schools.[55]

In contrast, the Court invalidated other provisions of the same law that provided funds for the lending of general instructional materials and secular support staff to nonpublic schools.[56] The loans for instructional materials were deemed unconstitutional "direct aid" to a religious institution.[57] The Court maintained that providing state-funded secular support staff to religious or nonpublic schools posed "the danger that religious doctrine will become intertwined with secular instruction" because when instructional materials and support staff are provided there remains a risk that the secular instruments will be used to further religious indoctrination.[58]

The Court continued on its path of Establishment Clause interpretation in *Wolman v. Walter*.[59] In *Wolman*, the Ohio legislature, in an effort to comply with the Court's decision in *Meek*, amended its school aid program to provide for aid to nonpublic schools for field trip transportation.[60] The majority, relying on the reasoning in *Meek*, found the portion of the statute providing state funds for field trip transportation unconstitutional because it would encourage field

51. *See id.* at 625. Justice White disagreed with the Court's conclusion, asserting that the First Amendment does not forbid legislation that provides state funds to exclusively finance the teaching of secular subjects. *Id.* at 670 (White, J., dissenting).

52. 421 U.S. 349 (1975).

53. *Id.* at 351.

54. *See id.* at 361-62.

55. *Id.* at 362.

56. *Id.* at 366, 372.

57. *Id.* at 366.

58. *Id.* at 370-71.

59. 433 U.S. 229 (1977).

60. *Id.* at 233.

trips, thus constituting "impermissible direct aid to sectarian education."[61] The Court reasoned that because field trips are such a vital component of the curriculum, they pose the unavoidable consequence of being used by a teacher in a parochial school to further the encouragement of religion, thus creating "excessive entanglement."[62]

The Court next considered the Establishment Clause in a pair of companion cases, *School District of Grand Rapids v. Ball*,[63] and *Aguilar v. Felton*.[64] In *Ball*, the Court considered whether a program that provided remedial and enrichment courses to children taught by publicly employed teachers in nonpublic schools was valid under the Constitution.[65] In *Aguilar*, the program at issue was very similar to the one in *Ball*, except that it provided for monitoring of the funded classes to ensure they were not used for religious indoctrination.[66] The Court held that both programs were invalid under the Establishment Clause.[67] In *Ball*, the Court based its decision on three factors: the program would allow teachers to advocate particular religions at the state's expense; state-funded education in religious buildings conveyed a symbolic message of state support for religion; and the program amounted to a subsidy to religious schools.[68] In *Aguilar* the Court found that the monitoring system put into place to prevent religious indoctrination would actually result "in the excessive entanglement of church and state."[69]

The Supreme Court considered what the government *can* permissibly do in order to accommodate religion in the case of *Corporation of*

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61. *Id.* at 254-55. The Court also considered and upheld other portions of the statute providing nonpublic school students with books, standardized tests, test scoring services, and diagnostic and therapeutic services. *Id.* at 255. The *Wolman* Court upheld aid in the form of textbooks because such aid provided the same safeguards as the textbook programs approved by the Court in *Meek*. *Id.* at 238. Further, the *Wolman* Court found the supplying of testing and scoring services to nonpublic schools constitutional because the nonpublic schools had no control over the context of the text or its scoring, thus preventing the school from using it as a tool of religious teaching. *Id.* at 240-41. Additionally, the *Wolman* Court upheld the statutory provision providing for diagnostic and therapeutic services because it did not have the effect of aiding or enhancing religion. *Id.* at 244, 248. However, the Court found the statutory provisions providing for the lending of instructional materials and equipment to parents and students of nonpublic schools unconstitutional because it was deemed similar to a cash grant. *Id.* at 251.

62. *Id.* at 254.

63. 473 U.S. 373 (1985).

64. 473 U.S. 402 (1985).

65. *Ball*, 473 U.S. at 375-77.

66. *Aguilar*, 473 U.S. at 408-09.

67. *See Ball*, 473 U.S. at 397-98; *Aguilar*, 473 U.S. at 414.

68. *Ball*, 473 U.S. at 397.

69. *Aguilar*, 473 U.S. at 409.

Presiding Bishop v. Amos.[70] In *Amos*, the Court stated that there are times when the government is allowed to accommodate religion—and there are even certain circumstances when the government may actually be required to do so—without violating the Establishment Clause.[71] The *Amos* Court held that an exemption for religious organizations from the requirements of Title VII of the Civil Rights Act of 1964 prohibiting religious discrimination does not violate the Establishment Clause.[72] The Court used the *Lemon* test to differentiate between constitutional accommodation of religion and unconstitutional establishment of religion.[73] The Court validated the exemption for religious institutions on the basis that it qualified under each of the three prongs of the *Lemon* test.[74] The Court found that the exemption's purpose of reducing government interference with religious decision-making was a valid "secular purpose" as required by *Lemon*.[75] Further, the Court held that the second prong of the *Lemon* test—that a law's main effect may not be to advance or inhibit religion—was met because the exemption did not improve the religious organization's ability to foster religious indoctrination.[76] The Court dismissed any challenge to the exemption under the third prong of the *Lemon* test by stating that it "cannot be seriously contended" that the exemption "impermissibly entangles Church and State."[77] In fact, the Court determined that the statute's exemption of all of an institution's activities actually "effectuates a more complete separation [of Church and State]."[78]

In *Agostini v. Felton*,[79] the Court reconsidered its interpretation of the Establishment Clause.[80] In *Agostini*, the Court considered New York's plan for dispersing federal education funds that were to be used to provide all students, both public and private, with the same level of education regardless of wealth.[81] The *Agostini* Court held that

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70. 483 U.S. 327 (1987).
71. *Id.* at 334.
72. *See id.* at 329-30.
73. *See id.* at 334-35.
74. *See id.* at 335-39.
75. *Id.* at 335-36.
76. *Id.* at 336-37.
77. *Id.* at 339.
78. *Id.*
79. 521 U.S. 203 (1997).
80. *See id.* at 218-22.
81. *Id.* at 209-10. The City of New York had difficulty deciding how to use the funds to have public teachers provide help to private school children while not running afoul of the Establishment Clause. *Id.* at 210. Previously, the City experimented with transporting private school children to public schools for after-school instruction, but experienced poor results. *Id.* Next, the City tried to provide the instructional service within the parochial

New York City's plan that provided public employees to parochial schools on a neutral basis to teach remedial classes was constitutional under the Establishment Clause "when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards."[82] The *Agostini* Court reached its decision by using the *Lemon* test and by placing emphasis on the first two prongs—whether a statute has a secular intent and whether the statute has the primary effect of advancing or inhibiting religion.[83] In clarifying the *Lemon* test, the Court reasoned that the third prong—the creation of excessive entanglement between government and religion—was really one of the considerations applicable to understanding the effect of a statute, and not itself indicative of an Establishment Clause violation.[84] Using this modified test, the Court upheld the New York statute as constitutional because it did not result in "governmental indoctrination[,] define its recipients by reference to religion[,] or create an excessive entanglement."[85] Although *Agostini* was reflective of the more recent view of the Supreme Court on the Establishment Clause, it did not overrule cases like *Meek* and *Wolman*, leaving the Court to address the dilemma in *Mitchell v. Helms*.[86]

The *Mitchell* Court restated the modification to the *Lemon* test articulated in *Agostini* when it determined whether government aid to religious schools violated the Establishment Clause.[87] Justice Thomas, announcing the judgment of the Court, explained that the government aid was constitutional because it passed the "purpose and effect"

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schools, with certain safeguards to remove the risk that the state-funded teachers were advancing a religion. *Id.* at 210-11. However, the Supreme Court eventually ruled that this plan violated the Establishment Clause in *Aguilar*. *Id.* at 212. After *Aguilar* was decided, the Supreme Court's rulings in other Establishment Clause cases suggested its *Aguilar* decision had been overruled. *Id.* at 208-09. As a result, the City of New York initiated the case to allow federally funded teachers to instruct inside parochial schools under Federal Rule of Civil Procedure 60(b)(5). *Id.* at 209.

82. *Id.* at 234-35.

83. *See id.* at 232-34.

84. *Id.* at 233.

85. *Id.* at 234.

86. 530 U.S. 793 (2000).

87. *Id.* at 801, 808. In *Mitchell*, a plurality of the Court held that Chapter 2 of the Education Consolidation and Improvement Act of 1981, as applied in Jefferson Parish, Louisiana, did not advance or endorse the establishment of religion. *Id.* at 835. Chapter 2 aid is a program in which "the Federal Government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid that it receives." *Id.* at 801.

test articulated in *Agostini*.[88] Looking to *Agostini* for guidance, Justice Thomas outlined the factors used when deciding a statute's effect: "[G]overnment aid has the effect of advancing religion [if it] . . . result[s] in governmental indoctrination; define[s] its recipients by reference to [their] religion; or create[s] an excessive entanglement."[89] Furthermore, Justice Thomas explained that deciding whether a statute causes indoctrination necessitates an examination of whether indoctrination can be attributed to the state.[90] In order to make this determination, the neutrality principle must be applied.[91] The "neutrality principle" focuses on the principle that the government program must be equally available to both the secular and the religious, thus not advancing religion.[92]

Justice Thomas, for the plurality, concluded that even "direct aid," if it is neutral and it reaches religious schools as the result of private choice, is still valid under the Religion Clause of the First Amendment.[93] The plurality acknowledged that abandoning the "direct-aid" doctrine contradicted *Ball*, but explained that *Agostini* had already rejected the rule relied on in *Ball*.[94] Using the principle of neutrality, the plurality upheld the statute, reasoning that it offered aid to a wide variety of people without regard to their religion, and therefore it did not constitute support of a religion.[95] Finally, Justice Thomas also explicitly overruled any part of *Meek* and *Wolman* that conflicted with his decision.[96]

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88. *Id.* at 801, 808. Justice Thomas noted that the secular purpose of Chapter 2 aid was not challenged in the suit, and therefore the only issue before the Court was the effect of the statute. *Id.* at 808.

89. *Id.* (quoting *Agostini*, 521 U.S. at 234).

90. *Id.* at 809.

91. *Id.*

92. *Id.* at 809-10.

93. *Id.* at 816.

94. *Id.*

95. *Id.* at 829.

96. *Id.* at 835. *Meek* and *Wolman* had created a distinction between government-supplied textbooks and "other in-kind aid." *Id.* at 805. In these decisions, the Court ajudged the textbook program constitutional under the Establishment Clause while the in-kind aid was found to be unconstitutional. *See* Meek v. Pittenger, 421 U.S. 349, 362 (1975) (holding that direct state aid to students in the form of governmentally loaned textbooks is valid under the Constitution); Wolman v. Walter, 433 U.S. 229, 254-55 (1977) (holding that government funding for field trips violated the Constitution). In *Mitchell*, Justice O'Connor concurred, along with Justice Breyer, and argued that the majority opinion placed too much emphasis on the neutrality principle. 530 U.S. at 836-38 (O'Connor, J., concurring in the judgment). In addition, Justice O'Connor stated that she did not think the Chapter 2 program constituted a "true private choice program." *Id.* at 842. In Justice O'Connor's view, the neutrality of the aid was only one factor of many that would need to

c. The Fourth Circuit's Clarification of the Lemon *Test.*—In *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church,*[97] the Fourth Circuit applied the Court's reasoning in *Amos* to the question of whether a state can impose licensing requirements on churches that provide daycare and education programs.[98] The educational programs that were in question in *Forest Hills* were not overtly religious.[99] The Fourth Circuit reasoned that the Supreme Court's clarification of the *Lemon* test in *Amos* required it to analyze the situation differently than it had under the "old" *Lemon* test.[100] The *Forest Hills* court explained that the type of litigation burdens that the Court sought to alleviate in *Amos,* namely to protect religious organizations from having to explain their faith and practice before religiously uneducated judges, were the exact burdens that Forest Hills faced in this suit.[101] Therefore, the court explained that to force the church to submit to state licensing requirements placed a "difficult and intrusive burden" on the church because it forced the church "to persuade a secular court of the sincerity and centrality of the beliefs they consider threatened by governmental licensing."[102] Furthermore, *Forest Hills* interpreted *Amos* to mean that the avoidance of "interference with the execution of religious missions in a nonprofit area in which a church operates" is a legitimate legislative purpose.[103]

3. The Court's Reasoning.—In *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.,* the Fourth Circuit held that Montgomery County, Maryland Zoning Ordinance section 59-G-2.19(c) did not violate the Establishment Clause of the First Amendment.[104] Judge Niemeyer wrote the opinion for the court, which Judge Widener joined.[105]

In his opinion, Judge Niemeyer stated that the Establishment Clause mandates that the government act neutrally toward religion.[106] However, he reasoned that under the Establishment Clause the government is allowed to take measures to accommodate religion and

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be examined in order to determine a statute's constitutionality. *See id.* at 839. However, she did concur that the statute was valid. *Id.* at 867.

97. 846 F.2d 260 (4th Cir. 1988).

98. *Id.* at 261.

99. *Id.* at 262.

100. *Id.*

101. *Id.* at 263.

102. *Id.*

103. *Id.*

104. *Ehlers-Renzi,* 224 F.3d at 292.

105. *Id.* at 284.

106. *Id.* at 287.

that sometimes this accommodation is mandatory.[107] He stated that the Supreme Court has recognized that "this Nation's history has not been one of entirely sanitized separation between Church and State," and that the Court has never desired or thought it would be able to demand a political system that fostered total separation.[108] Judge Niemeyer also noted that the Supreme Court has determined that there is a recognized principle that a government program that provides a benefit to a religious institution is not, solely for that reason, unconstitutional under the Establishment Clause.[109]

Judge Niemeyer explained that without some government accommodation of religion, the government would unconstitutionally be advocating an absence of religion rather than the practice of it.[110] He reasoned that there is a "line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, [that] must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment."[111]

Judge Niemeyer explained that in the recent Supreme Court decision of *Mitchell v. Helms*, the Court established guidelines for Establishment Clause jurisprudence by employing a modified version of the *Lemon* test.[112] While acknowledging that the *Lemon* test had been modified, Judge Niemeyer applied the "old" *Lemon* test because it was not overruled by *Mitchell*.[113] Using the *Amos* version of the *Lemon* test, Judge Niemeyer analyzed the constitutionality of the zoning ordinance.[114]

Under the first prong of the *Amos-Lemon* test—the legislative purpose prong—the court questioned whether the ordinance had the secular purpose of minimizing the interference of Montgomery County with the religious mission of the Connelly School.[115] Judge

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107. *Id.*

108. *Id.* (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)) (internal quotation marks omitted).

109. *Id.*

110. *Id.* (citing Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

111. *Id.* at 287-88.

112. *See id.* at 288.

113. *Id.* The *Lemon* test has three prongs. The first two require a statute to have a secular purpose that does not inhibit or advance religion. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The third prong, which received very little analysis from the *Amos* Court, requires that a statute not result in the excessive entanglement of government with religion. *Id.* at 613; *see also* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987).

114. *Ehlers-Renzi*, 224 F.3d at 288.

115. *Id.* at 288-89.

Niemeyer then explained that this prong "presents a fairly low hurdle," and that it was possible to satisfy this prong if the legislation had a facially plausible secular purpose.[116] The court found such a secular purpose in the arguments made by the Connelly School that the zoning exemption allows Montgomery County to avoid interfering with the school's "religious missions" that could result from the "scrutiny and procedures" that would otherwise be required by the zoning law.[117] The court, drawing analogies to *Amos* and *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church,* found that the special exemption kept the school from having to rationalize to a civil authority its unique religious needs that prompted a building structure change, and relieved the school of having to persuade zoning authorities that its architectural modifications conformed with the neighborhood characteristics.[118]

In applying the second prong of the *Lemon* test—the purpose of the statute may not advance or inhibit religion—the *Renzi* court, quoting *Amos,* stated that the exemption's effect of "simply allowing a religious school to 'better . . . advance [its] purposes'" does not violate the prong.[119] Further, in analyzing the third prong of the *Lemon* test—excessive entanglement—the court acknowledged that the Supreme Court has reasoned that this prong is violated only when direct funds are supplied to parochial schools or teachers in parochial schools.[120]

Judge Murnaghan wrote a dissenting opinion, stating that while he agreed with the court's reasoning, he disagreed with where it chose to draw the line between permissible and impermissible aid to religion.[121] Furthermore, he felt that the exemption at issue violated the Establishment Clause.[122] Judge Murnaghan believed that applying the special exception procedures to the Connelly School "would not significantly interfere with the school's ability to define and carry out its mission."[123] He explained that there is a critical distinction between a regulation that affects an institution's programs and employees, and a regulation that merely affects the progress of the institution's physical amenities.[124] Further, he indicated that what occurs inside a church building is substantially more important than

116. *Id.* at 288 (internal quotation marks and citations omitted).
117. *Id.*
118. *Id.* at 289.
119. *Id.* at 291 (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987)).
120. *Id.* at 291-92.
121. *Id.* at 292 (Murnaghan, J., dissenting).
122. *Id.*
123. *Id.*
124. *Id.* at 293.

what the physical building of the institution looks like.[125] He indicated that enforcing the zoning ordinance does not allow Montgomery County to become involved in the regulation of the school's religious missions.[126] Judge Murnaghan further reasoned that by neglecting to create a significant barrier between what is a "significant" and what is an "incidental" intrusion of religious institutions' activities, the majority expanded the principle established in *Amos* so significantly that it is "traveling down a path that will ultimately render the Establishment Clause meaningless."[127]

In support of his finding, Judge Murnaghan explained that the ordinance language does not foster the suggested secular purpose of escaping government interference with the church's mission.[128] This is because Montgomery County Zoning Ordinance § 59-G-2.19(c) is applicable to both private secular schools operated on land owned or leased by religious organizations, as well as similarly situated religious schools.[129] He noted that if Montgomery County intended the ordinance to legitimately avoid government interference with religious schools' religious activities, it would have been written in a manner that would have limited its benefits only to schools engaged in religious teaching.[130] He explained that "[t]he overinclusive language of the ordinance belies the legislative purpose accepted by the majority."[131] He therefore concluded that the ordinance was not enacted for the permissible purpose of removing government interference from the workings of religious institutions.[132] He also distinguished *Ehlers-Renzi* from *Amos* and *Forest Hills*, stating that in those cases the Supreme Court and the Fourth Circuit acted to allow religious institutions to run their programs absent substantial government interference. In *Ehlers-Renzi*, he did see "any such genuine effort"; rather, he perceived religious favoritism.[133]

4. Analysis.—In *Ehlers-Renzi*, the Fourth Circuit misapplied the *Lemon* test and failed to adhere to the "neutrality principle" set out by the Supreme Court. The court's analysis of the pertinent case law resulted in a finding that stands to eventually eviscerate the implications

125. *Id.*
126. *Id.* at 292.
127. *Id.* at 293.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

of the Establishment Clause.[134] The *Ehlers-Renzi* court failed to recognize that the Montgomery County zoning ordinance constituted advancement of religion violative of the Establishment Clause.[135] By deviating from precedents that obligate the government to provide equal benefits to both the secular and the religious, the court validated aid that goes only to private schools owned by religious organizations. Consequently, the court's holding rendered constitutional an ordinance that provides an incentive for religion, an act the Establishment Clause prohibits.

a. Deviation from Past Case Law—A Failure to Apply the Neutrality Principle as Articulated by the Supreme Court.—The court in *Ehlers-Renzi* failed to apply the established neutrality principle to the zoning ordinance in question. In *Mitchell*, a plurality of the Supreme Court articulated a neutrality principle that must be followed when analyzing whether a government program violates the Establishment Clause.[136] Under this principle, the court must analyze the government program in question to see whether it provides the same benefit to both the religious and the secular.[137] Accordingly, any government program that provides an exclusive benefit to a religious organization violates the Establishment Clause.[138] The *Mitchell* Court used the neutrality principle to uphold a statute because the challenged statute offered aid to a wide variety of people without regard to their religion.[139] However, the *Ehlers-Renzi* court upheld a statute that provides benefits to schools owned by a religious institution.[140] The Fourth Circuit's decision to uphold the exemption is at odds with the Court's holding in *Mitchell* because, by allowing the exemption to the special zoning exception to be premised on the qualification of religious ownership of the land rather than a neutral or secular basis, the exemption constituted the support for and aid of religion that the Establishment Clause is specifically intended to prohibit.

In the same manner that the *Ehlers-Renzi* court ignored the dictates of *Mitchell*, it also ignored the Supreme Court's teachings in *Walz*

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134. *See id.* (stating that such an expansion of *Amos* will result in "traveling down a path that will ultimately render the Establishment Clause meaningless").

135. *See id.* (stating that the portion of the Montgomery County zoning ordinance in question constitutes religious favoritism).

136. Mitchell v. Helms, 530 U.S. 793, 809 (2000).

137. *See id.* at 809-10.

138. *Cf. id.* (asserting that dispersal of government aid for a secular purpose without regard to religion is required to show that the government does not seek to indoctrinate citizens with religion).

139. *Id.* at 829.

140. *Ehlers-Renzi*, 224 F.3d at 286.

v. Tax Commission of New York. The Court in *Walz* explained that "establishment of a religion connote[s] sponsorship, financial support, and active involvement of the sovereign in religious activity."[141] The zoning exemption in *Ehlers-Renzi* is an example of the sponsorship of religious activity that the Court has specifically prohibited.[142] The majority in *Ehlers-Renzi,* though recognizing this clear standard set by the Court in *Walz,* dismissed its applicability to the *Ehlers-Renzi* case by rationalizing that in the history of the United States there has not been an "entirely sanitized separation between Church and State."[143] Furthermore, the Fourth Circuit explained that if a state law functions in a manner that benefits religious institutions, the law "does not, for that reason alone, violate the Establishment Clause."[144] However, the court failed to recognize that although it is historically true that church and state have not been strictly separated,[145] there is a great difference between a law that allows the state to provide a benefit to religious groups and a law which *mandates* that a state provide a benefit extending exclusively to religious organizations.

The exemption in *Ehlers-Renzi* provided an exclusive benefit to religious institutions, a benefit that is not simultaneously extended to secular institutions.[146] Consequently, it is difficult to justify the court's finding that a law that benefits only religious organizations is consistent with precedent allowing for only limited, neutral government involvement with religious groups.

The *Ehlers-Renzi* court correctly stated that the Establishment Clause requires "neutrality toward religion and among religions."[147] In addition, the court explained that this neutrality may be a "benevolent neutrality" that allows the government to aid religious institutions.[148] Therefore, the court reasoned that under the Establishment Clause, the government might take steps to accommodate religious institutions.[149] However, the steps taken to accommodate the religious institution cannot support or establish a religion and must be available to all groups, both religious and secular, as stated by the

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141. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970) (internal quotation marks omitted).

142. *See, e.g.,* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (prohibiting laws that aid one religion or all religions).

143. *Ehlers-Renzi,* 224 F.3d at 287 (internal quotation marks and citations omitted).

144. *Id.*

145. *See id.*

146. *See id.* at 293 (Murnaghan, J., dissenting) (arguing that the Montgomery County zoning ordinance smacks of partiality toward religious landowners).

147. *Ehlers-Renzi,* 224 F.3d at 287.

148. *Id.* (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).

149. *Id.*

Court in the seminal Establishment Clause case *Everson v. Board of Education*.[150]

In *Ehlers-Renzi*, the court acted completely contrary to the doctrine set out in *Everson*. In *Everson*, the Court established the principle that government aid provided to all groups irrespective of religion must not violate the "high and impregnable" wall of separation between church and state.[151] In contrast, the *Ehlers-Renzi* court validated a law that granted a privilege to a party specifically and exclusively because of its religious affiliation, not in spite of the organization's or school's affiliation.[152]

The court's holding, which provides a benefit exclusively to religious organizations, not only violates the requirement of neutrality as explained most recently by *Mitchell*, but also dilutes the purpose of the Establishment Clause of the First Amendment.

b. The Ehlers-Renzi *Court's Evaluation of the Zoning Ordinance Under* Amos *Fails to Consider Practical Effects.*—The *Ehlers-Renzi* court misapplied the *Lemon* test in its analysis by choosing to follow the application of the *Lemon* test as formulated in *Amos*,[153] without regard to the fact that the Supreme Court later modified the *Lemon* test in *Agostini* and *Mitchell*.[154] The Fourth Circuit erred in using the older *Amos* version of the test, rather than applying the more revised articulation of *Lemon* provided by the Supreme Court in *Mitchell*.

In looking at the first prong of the *Lemon* test, the Fourth Circuit asked, following precisely the modification in *Amos*, whether the government had "abandon[ed] neutrality and act[ed] with the intent of promoting a particular point of view in religious matters."[155] Finding that the government did not "abandon neutrality," the *Ehlers-Renzi* court then explained that it viewed the first prong as a "fairly low hurdle," and that it was possible to satisfy this prong if the ordinance had a facially plausible secular purpose, which the court found it did.[156]

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150. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (stating in its explanation of the neutrality principle that "State power is no more to be used so as to handicap religions than it is to favor them").

151. *Id.*

152. *See Ehlers-Renzi*, 224 F.3d at 293 (Murnaghan, J., dissenting).

153. *See Ehlers-Renzi*, 224 F.3d at 288 (concluding that *Amos*'s formulation of the *Lemon* test provides a better structure for analyzing "religious exemption[s]").

154. *See* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (stating that *Agostini* clarified Establishment Clause jurisprudence by revising the *Lemon* test and specifically by revising criteria that determine a statute's effect).

155. *Ehlers-Renzi*, 224 F.3d at 288 (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987)) (alterations in original).

156. *Id.*

By providing an exception to religious organizations, the court found that the local government is kept from scrutinizing religious schools in a manner that could lead to interference with the schools' religious mission, and thus is kept from violating the Free Exercise Clause of the First Amendment.[157] Indeed, the Fourth Circuit opined that this reasoning was in accord with the Supreme Court's decision in *Amos*.[158]

What the *Ehlers-Renzi* court did not acknowledge, however, is that the ordinance exemption at issue goes further than a "hands-off policy" of allowing a religious institution to function without undue interference from the government. The ordinance on its face actually "indicates a purpose to favor religious landowners."[159] Thus, endorsement of religion results because the ordinance goes further than allowing a religious institution to build without interference from the government; the ordinance actually provides a special exemption to *any* institutions located on property owned by a religious organization.[160]

For example, if a beauty school was located on a lot owned by a church, it would be exempt from the zoning ordinances, whereas a beauty school located on property not owned by a church would be subject to the regular zoning laws.[161] This is bias in favor of religious institutions, and a law that has a bias in favor of religion does not satisfy the *Lemon* test's requirement of a secular legislative purpose.

The court erroneously rejected this argument, stating that the Ehlers-Renzi's arguments were based on hypotheticals, such as the above one, and that because the court did not have those situations in front of it currently, it would not consider them.[162] The court based its reasoning on the "traditional rule . . . that one to whom a statute

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157. *See id.* Giving the school this special exemption keeps the school from having the burden of rationalizing, to a civil authority, the school's unique religious requirements that prompted the need to change the building structure. *Id.* at 289.

158. *See id.* at 288-89. The *Ehlers-Renzi* court stated that upholding the exemption to the zoning ordinance, based on the fact that it has a valid secular purpose, is also consistent with the Fourth Circuit's reasoning in *Forest Hills Early Learning Center v. Grace Baptist Church*. *Id.* at 289. In *Forest Hills*, the Fourth Circuit stated that an exemption has a legitimate secular purpose if it results in the avoidance of state interference in the "execution of religious missions in a nonprofit area in which a church operates." Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 263 (4th Cir. 1988). The *Forest Hills* court reasoned that "the Court distinguished laws such as those invalidated in *Lemon* which positively aid, endorse, and advance religion, from laws which, by adopting a hands-off policy, leave the way open for churches to advance their own teachings." *Id.*

159. *Ehlers-Renzi*, 224 F.3d at 290.

160. *Id.* at 289-90.

161. *See id.* at 290 (stating that the Renzis argued that a cosmetology school located on church owned land would be entitled to the special exemption).

162. *Id.*

may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court."[163] This rejection of the hypothetical analysis by the court is inconsistent with the Supreme Court's Establishment Clause evaluation in *Mitchell* because in *Mitchell* the Court determined that understanding a statute's practical implications shows something vital about the nature of the statute itself.[164]

In *Mitchell*, the Supreme Court discussed the relevance of a hypothetical situation in which a teacher could use Shakespeare's King Lear to teach the importance of the Fourth Commandment—honor thy father and mother—and the relevance this hypothetical had on the validity of a statute permitting aid in the form of secular books to religious schools.[165] Therefore, hypotheticals *are* appropriate and have been used in Establishment Clause jurisprudence when deciding on the validity of laws that provide benefits to religious institutions. Thus, the Fourth Circuit should have analyzed the implications of the hypotheticals presented because the hypothetical situation would have helped the court in deciding whether the ordinance truly had a secular purpose. Had the court analyzed the hypothetical, it would have been in a better position to determine the statute's practical implications. By looking at the hypotheticals, the court would have realized that it was doing more than "stepp[ing] out of the way of religion";[166] it was actually acting to endorse religion.

5. Conclusion.—In *Ehlers-Renzi v. Connelly*, the Fourth Circuit's misapplication of the *Lemon* test and total failure to apply the "neutrality principle" set out by the Supreme Court in the recent decision of *Mitchell v. Helms* incorrectly resulted in the validation of the zoning ordinance's exception on the grounds that it was consistent with the purpose of the Establishment Clause.[167] The *Ehlers-Renzi* court's reasoning diverges from past Supreme Court rulings that require the government to provide equal benefits to both the secular and the religious in order to ensure that religion is neither advanced nor inhibited by acts of the state. In *Ehlers-Renzi*, the court should have examined the statute's practical effects as the Court in *Mitchell* did when

163. *Id.* (internal quotation marks and citations omitted).

164. *See* Mitchell v. Helms, 530 U.S. 793, 824-25 (2000).

165. *Id.* The Court introduced this hypothetical to counter the dissent's contention that the textbooks under consideration in *Board of Education v. Allen* were not "readily divertible" for religious uses. *Id.* The *Mitchell* plurality presented the Shakespeare hypothetical to show that a secular writing could be put to religious uses. *Id.*

166. *Ehlers-Renzi*, 224 F.3d at 289.

167. *See id.* at 292 (upholding the zoning ordinance).

it analyzed the statute in question in that case.[168] It is only through an examination of the practical implications of a statute, which can be achieved by looking at such things as hypotheticals, that the *Ehlers-Renzi* court could have properly determined the constitutionality of the exemption at issue.

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168. *Mitchell*, 530 U.S. at 824.

III. COPYRIGHT

A. The Fuzzy Test Is Appropriate for Barney: The Fourth Circuit Casts Aside Adult Reasoning in Determining the Substantial Similarity Between the Famous Purple Dinosaur and an Imposter

In *Lyons Partnership, L.P. v. Morris Costumes, Inc.*,[1] the United States Court of Appeals for the Fourth Circuit held that in distinguishing the similarities between Barney, the copyrighted children's character, and Duffy, a purple dinosaur rental costume accused of infringing on Barney, the proper audience to consider was not the adults purchasing the costume, but rather the children who would see the costume in action.[2] The Fourth Circuit reached this result by applying the novel test it had created in a previous case—seeking the judgment of the "intended audience"—rather than applying the "objective observer" test used by most courts to determine the similarities of copyrighted works.[3] In applying the intended audience test, the court overlooked constraints imposed on the test in *Dawson v. Hinshaw Music Inc.*[4] In doing so, the court created a precedent that is likely to burden courts considering copyright infringement by opening the door to litigation over the identification of a work's intended audience. The court should have identified the adult purchasers of the Duffy costume as the intended audience of the adult-sized purple dinosaur costume, rather than two- to five-year-old children who did not purchase or wear the Duffy costume, but who watch Barney on television and play with Barney products. The court could have reached the same result without breaching policy concerns and creating administrative difficulties.

1. The Case.—Plaintiff Lyons Partnership, L.P., a Texas limited partnership, owned all of the intellectual property rights to the children's entertainment character Barney,[5] "a purple, highly stylized 'Tyrannosaurus Rex' type dinosaur character with a friendly mien, a swath of green down his chest and stomach, and green spots on his back."[6] Since his debut on the Public Broadcasting System on April 5,

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1. 243 F.3d 789 (4th Cir. 2001).
2. *Id.* at 803.
3. *Id.* at 801. For examples of the "objective observer" test, see *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).
4. 905 F.2d 731, 737 (4th Cir.), *cert. denied*, 498 U.S. 981 (1990).
5. *Morris*, 243 F.3d at 795.
6. Lyons P'ship v. Giannoulas, 14 F. Supp. 2d 947, 949 (N.D. Tex. 1998).

1992, Barney was a national television star among the targeted audience of two- to five-year-old children.[7] At the time of the suit, "Barney and Friends" was viewed weekly by 14 million children, and more than 50 million copies of Barney-related videos had been sold.[8]

To protect the "wholesome" Barney image it created, Lyons closely controlled live appearances by Barney.[9] Five people were trained by a single choreographer to wear the Barney costume, and only one person provided Barney's characteristically nasal baritone voice.[10] However, Lyons licensed the Barney image on toys, clothes, books, and other paraphernalia, holding hundreds of copyrights to the Barney name and the character's depiction.[11]

Morris Costumes, Inc., a North Carolina corporation principally owned by Philip Morris and Amy Morris Smith, operated a costume rental retailer in Charlotte, North Carolina.[12] Among its collection were three alleged Barney look-a-like costumes: a purple dinosaur manufactured by National Discount Costume (NDC) Company; "Hillary the Purple Hippopotamus," also manufactured by NDC and altered by Morris Costumes; and "Duffy the Dragon," a purple creature manufactured by Alinco Costumes, Inc.[13]

On May 2, 1997, as part of a nationwide campaign to protect the Barney image,[14] Lyons sued Morris Costumes, Inc., Philip Morris, and Amy Morris Smith in the United States District Court for the Western

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7. *Morris*, 243 F.3d at 795. "Barney is readily recognizable to young children, who repeatedly parrot his song, 'I Love You,' often testing the patience of nearby adults." *Id.* (footnote omitted). The song's lyrics, sung to the tune of "This Old Man," a well-known children's song among Barney's fans' parents, are: "I love you. You love me. We're a happy family. With a great big hug and a kiss from me to you, won't you say you love me too." *Id.* at 795 n.1. Lyons acquired the song rights from Lee Bernstein of Schererville, Indiana in 1993 and slightly modified it to the current, well-known version. Favia v. Lyons P'ship, No. 94 CIV. 3277 (SS), 1996 WL 194306, at *1 (S.D.N.Y. Apr. 23, 1996).

8. *Morris*, 243 F.3d at 795.

9. *Id.* "[Lyons] claims that it would be unable to prevent would-be Barneys from behaving in a decidedly un-Barney-like manner and tarnishing his wholesome reputation." *Id.*

10. *Id.*

11. *Id.*; *see also* Lyons P'ship v. AAA Entm't, Inc., No. 98 CIV. 0475DABMHD, 1999 WL 1095608, at *2 (S.D.N.Y. Dec. 3, 1999) (reporting that Lyons owned 176 copyrights on a variety of films, home videos, audio recordings, radio programs and plush toys that feature the Barney character).

12. *Morris*, 243 F.3d at 795.

13. *Id.* at 795-96.

14. *See* Lyons P'ship v. Center Stage Novelties, Inc., No. 98 C0406, 1999 WL 33893 (N.D. Ill. Jan. 15, 1999); *AAA Entm't*, 1999 WL 1095608; Lyons P'ship v. Giannoulas, 14 F. Supp. 2d 947 (N.D. Tex. 1998); Brooke A. Masters, *Protecting Barney's Image From Bogus Beasts*, WASH. POST, Mar. 25, 1998, at B1 (discussing lawsuits filed by Lyons nationwide).

District of North Carolina, alleging copyright and trademark infringement and violations of state law.[15]

After a four-day bench trial, the district court found in favor of Morris on all claims.[16] Regarding the Duffy-related claims, Lyons offered as evidence first-hand accounts by adults describing children's actual reactions mistaking the Duffy costume for Barney and newspaper articles in which reporters mistook Duffy for Barney. The court disregarded the evidence as hearsay.[17] The court determined that the Duffy costume did not infringe on Lyon's copyright because the plaintiff failed to prove that Duffy was "substantially similar" to the protected Barney character.[18] The court based the holding on its finding that the average adult renting the Duffy costume would not mistake it for Barney.[19] Lyons appealed on several grounds, challenging the lower court's disposition of claims against all three costumes.[20]

The Fourth Circuit considered whether the infringement actions regarding the first two costumes—the NDC dinosaur and Hillary—occurred outside the statute of limitations or whether they were barred by laches.[21] Regarding the Duffy costume, the court deliberated over whether the lower court misapplied the "substantial similarity" test by considering the views of the wrong "intended audience."[22]

2. Legal Background.—The authority for federal copyright protection is found in the United States Constitution, which grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] In exercising this power, Congress enacted the Copyright Act of 1976,[24] protecting "original works of authorship fixed in any tangible medium of expres-

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15. *Morris*, 243 F.3d at 795.

16. *Id.* at 796.

17. *Id.*

18. *Id.*

19. *Id.* at 802.

20. *Id.* at 796.

21. *Id.* at 794. Regarding the NDC dinosaur and Hillary costumes, the district court found that Morris had infringed against Lyons's copyrights and trademarks, but denied Lyons a remedy because the claims were barred by the applicable statute of limitations and laches. *Id.* at 796. The court also found that Morris's infringement was not willful and denied injunctive relief because Morris was no longer renting the costumes. *Id.*

22. *Id.* at 801.

23. U.S. CONST. art. I, § 8, cl. 8.

24. 17 U.S.C. § 102(a) (2000).

sion . . . ."[25] With the ultimate goal of advancing ideas for the public good, the Act has a dual aim of encouraging authors and inventors to create by giving them the benefit of a monopoly over their work for a period of time, while simultaneously promoting the sharing of the authors' and inventors' ideas to further advance art and science.[26] To that end, the Act protects an author's creative expression, but not the ideas that are imbedded in that expression.[27] The Act leaves the courts to determine exactly how to decipher expression from idea and protect one while promoting the sharing of the other. This puzzle has plagued courts for decades.[28] While the notion of protecting expression, but not idea, is axiomatic in copyright law, the test for doing so is not.[29] The Supreme Court has not clarified the rule.[30] What the courts are left with are a variety of analyses developed by the United States courts of appeals and district courts that attempt to solve the problem.[31]

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25. *Id.* Works of authorship include: literary, musical, dramatic, and choreographic works; pictorial, graphic, and sculptural works; sound recordings; and architectural works. *Id.* § 102(a)(1)-(8).

26. Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 696 (2d Cir. 1992) (describing the delicate balance between providing an incentive for authors and preventing "monopolistic stagnation"); Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) ("This principle attempts to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter."); Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976) (discussing copyright law's attempts to reconcile an interest in "rewarding an individual's ingenuity" with society's interest in allowing others to make improvements).

27. 17 U.S.C. § 102(b). "In no case does copyright protection for an original work . . . extend to any idea . . . [or] concept . . . regardless of the form in which it is . . . embodied . . . ." *Id.*

28. In attempting to distill the expression from the idea of two plays in 1930, Judge Learned Hand introduced the "abstractions test." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930); *see infra* note 45 and accompanying text (quoting the abstractions test). Courts have continued to cite the test, both for its analytical value and its comment on the conundrum facing courts trying to decipher idea from expression. *See, e.g., Krofft*, 562 F.2d at 1163; *Reyher*, 533 F.2d at 91 (discussing the test).

29. Judge Learned Hand noted famously that the test for infringement was "of necessity vague." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). "Obviously no principle can be stated as to when an imitator has gone beyond the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc.*" *Id.*

30. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(E)(1) (2002) [hereinafter NIMMER]. "[T]he authority for the audience test emanates exclusively from the inferior courts . . . ." *Id.*

31. *See, e.g.*, Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733 (4th Cir. 1990) (applying the "intended audience" test to compare two works of music); *Krofft*, 562 F.2d at 1164 (establishing a two-prong test to separate the objective similarities of a work's idea from its

Each analysis lays its foundation in "substantial similarity": The copyright-owning plaintiff can either offer direct evidence to prove copying, which is rare, or the plaintiff can show that the defendant had access to the protected work and that the two works are "substantially similar." Proof of the latter creates a rebuttable presumption that the defendant copied.[32] The variance between circuits lies primarily in how they establish "substantial similarity."[33] Most courts rely on some form of an audience, or "objective observer" test.[34] The Second and Ninth Circuits have developed the "objective observer" test, influencing other courts' analyses, including the Fourth Circuit.[35]

a. Limited Guidance from the Supreme Court.—The Supreme Court did not begin examining copyright cases with regularity until recent decades. The Court has not specifically addressed the issue of substantial similarity;[36] however, the landmark case of *Feist Publications, Inc. v. Rural Telephone Service Co.*,[37] may provide some instruction on the Court's view.[38] In *Feist*, the Court considered the claim of a telephone company that appropriated an alphabetical list of names and numbers and published them in another phone book.[39] The Court held that facts are not original work and may not be protected by copyright, but the arrangement of facts can be protected.[40] Even though the plaintiff had a copyright on the phone book, and the defendant copied exact listings from the plaintiff's book, the Court found that the defendant's copying was not infringement because the "constituent elements" that the defendant appropriated did not rise to the minimum standard of originality required for copyright protection.[41] The Court did not use the objective observer test for copying

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expression); *Nichols*, 45 F.2d at 121 (creating an abstraction test to help find the point at which the expressions of a work are no longer protected by copyright).

32. *See, e.g.*, Towler v. Sayles, 76 F.3d 579, 581-82 (4th Cir. 1996) (applying the "substantial similarity" test when only circumstantial evidence was available); *Krofft*, 562 F.2d at 1162 (same); *Reyher*, 533 F.2d at 90 (same).

33. *See supra* note 31 (comparing the tests offered by several courts).

34. 4 NIMMER, *supra* note 30, § 13.03(E)(1).

35. *See, e.g.*, *Krofft*, 562 F.2d at 1164 (discussing the role of the ordinary reasonable person in determining whether an expression is substantially similar); *Dawson*, 905 F.2d at 733 (stating that "*Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), provides the source of modern theory regarding the ordinary observer test").

36. 4 NIMMER, *supra* note 30, § 13.03(E)(1)(b).

37. 499 U.S. 340 (1991).

38. 4 NIMMER, *supra* note 30, § 13.03(E)(1)(b).

39. *Feist*, 499 U.S. at 343.

40. *Id.* at 350-51.

41. *Id.* at 362. The plaintiff had entered phony telephone listings into its book to detect copying. The defendant copied those false entries. *Id.* at 344; *see also* 4 NIMMER, *supra* note 30, § 13.03(E)(1)(b) (discussing *Feist*).

that the circuits had been applying for decades, but it did not reject the test in express terms.[42] *Feist* remains in tension with the circuits' practice of comparing not only the constituent elements of a work that are original, as the Court did in *Feist*, but also the unprotected ideas and expressions inherent in works.[43]

b. The Second and Ninth Circuit Lead the Development of the "Substantial Similarity" Test.—The substantial similarity test of the Court of Appeals for the Second Circuit can be traced to three opinions, written over three decades, two by the renowned Judge Learned Hand. *Nichols v. Universal Pictures Corp.*, a 1930 case, involved an author of a play who brought an infringement action against the producer of a motion picture.[44] In determining whether the similar elements between the works were substantial enough to be considered infringement of expression, and not merely fair use of ideas, Judge Hand described what has been named the "abstractions test":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[45]

Sixteen years later, the Second Circuit, considering the similarities between musical compositions in *Arnstein v. Porter*,[46] announced a bifurcated test for infringement: proof of copying followed by proof that "the copying . . . went so far as to constitute improper appropriation."[47] Copying was shown either by direct evidence of the defen-

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42. 4 NIMMER, *supra* note 30, § 13.03(E)(1)(b).

43. *Id.* The *Feist* decision influenced a change in what was required to establish a prima facie case in many of the circuits. According to *Feist*, to prove copyright infringement, a plaintiff must show: "(1) ownership of a valid copyright, and (2) copying of *constituent elements* of the work *that are original.*" 499 U.S. at 361 (emphasis added); *see also* Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996) (applying the *Feist* prima facie case analysis).

44. Nichols v. Universal Pictures Corp., 45 F.2d 119, 120 (2d Cir. 1930).

45. *Id.* at 121. Judge Hand noted, "Nobody has ever been able to fix that boundary, and nobody ever can." *Id.*

46. 154 F.2d 464 (2d Cir. 1946).

47. *Id.* at 468. The Ninth Circuit used this bifurcated test to create its two-prong test for substantial similarity in *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). 4 NIMMER, *supra* note 30, § 13.03(E)(3). The Fourth Circuit later analyzed both cases to derive its "intended audience" test in *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733-35 (4th Cir. 1990).

dant's access to the protected work or by circumstantial evidence of access and similarities between the works.[48] The determination that copying rose to the degree of unlawful appropriation was based on the response of the ordinary lay hearer.[49]

Finally, in 1960, Judge Hand considered the similarities between two printed designs on cloth in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*[50] He suggested that the test in the case of a visual work such as the design on cloth at issue—as opposed to the verbal or audile works of *Nichols* and *Arnstein*—should be more intangible, requiring consideration of the scrutiny observers would give the cloth design when they used it as a garment.[51] The court found that even though the patterns were not identical, the designs were of the same general color, with arches, scrolls, and rows of symbols.[52] The court found that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them . . . ."[53] Any differences in the patterns, the court said, were irrelevant to the purpose for which the design was intended.[54]

The Second Circuit has continued to follow the principles of the "vague test" using expert opinion and the view of the ordinary observer set out by Judge Hand to help it distill the unprotectible idea from the protected expression in copyright infringement cases. *Reyher v. Children's Television Workshop*,[55] decided in 1976, built on these principles. Faced with the challenge of deciphering the similarities between a children's book and a children's magazine story, the *Reyher* court noted that it needed an additional test to handle the less complex inquiry.[56] It borrowed the "total concept and feel" test created by

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48. *Arnstein*, 154 F.2d at 468.

49. *Id.* The Second Circuit found that the similarities between the compositions were sufficient to allow the issue to go to the jury if the plaintiff produced sufficient evidence of the defendant's access to the composition. *Id.* at 469. The observer, or audience test, is said to have originated from *Daly v. Palmer*, 6 F. Cas. 1132 (S.D.N.Y. 1868) (No. 3,552), a case in which the court considered two movie scenes, both involving a railroad track where someone tied to the track was released in the nick of time. The *Daly* court set out the standard for determining whether works are similar, which began by determining if the differences would be recognized by the spectator. 4 NIMMER, *supra* note 30, § 13.03(E)(2).

50. 274 F.2d 487 (2d Cir. 1960).

51. *Id.* at 489. The cloth was intended to be used in women's dresses. *Id.* at 488.

52. *Id.* at 489.

53. *Id.*

54. *Id.*

55. 533 F.2d 87 (2d Cir. 1976).

56. *Id.* at 91.

the Ninth Circuit[57] and determined that the book about the relationship between a Ukraine girl and her mother was different in "mood, details [and] characterization" from the magazine story about a boy and his mother in an African village.[58]

The Court of Appeals for the Ninth Circuit has also been instrumental in developing copyright law and the tests for substantial similarity. In 1977, the Ninth Circuit, in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,[59] determined that the widely accepted rules guiding copyright infringement decisions were "boilerplate" and liable to produce "untenable results."[60] Therefore, the court amended the requirements necessary to establish a prima facie case of copyright infringement.[61] Seeking a clearer way to distill unprotected ideas from protected expression, the court broke down the substantial similarity inquiry into two steps.[62] The first step was an "extrinsic test" to compare the works' ideas. The second step was an "intrinsic test" to compare the expression used.[63] The extrinsic test would look at specific criteria, expert opinion, analysis, and dissection, while the intrinsic test would depend on the response of the ordinary reasonable person and not on external criteria and analysis.[64] The intrinsic inquiry would focus on whether the allegedly copied work captured the "total concept and feel" of the protected work.[65]

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57. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (announcing the "total concept and feel" test for graphic works). *But see* 4 NIMMER, *supra* note 30, § 13.03(A)(1)(c) (critiquing the total concept and feel test). Nimmer writes:

> The phrase is geared towards simplistic works that require only a highly "intrinsic" (*i.e.* unanalytic) evaluation; . . . . [T]he touchstone of "total concept and feel" threatens to subvert the very essence of copyright, namely the protection of original *expression* . . . . [T]he addition of "feel," . . . being a wholly amorphous referent, merely invites an abdication of analysis.

Id. (footnotes omitted).

58. *Reyher*, 533 F.2d at 92.

59. 562 F.2d 1157 (9th Cir. 1977).

60. *Id.* at 1162. Using the hypothetical of a cheaply manufactured plaster statue of a nude, the court said that should a manufacturer own a copyright to such a thing, future manufacturers of statues of nudes would "face the grave risk" of being infringers because the two statues would "in all probability be substantially similar." *Id.* at 1162-63; *see also* Hennon v. Kirkland's Inc., 64 F.3d 657, No. 94-2595, 1995 WL 490266, at *3 (4th Cir. 1995) (discussing the case of two dolls—one cheaply made, the other of better quality—that were found dissimilar).

61. *Krofft*, 562 F.2d at 1163-64.

62. *Id.* at 1164.

63. *Id.*

64. *Id.*

65. *Id.* at 1167.

In *Aliotti v. R. Dakin & Co.*,[66] the Ninth Circuit recognized that the new bifurcated test did not always sufficiently sift the unprotected elements from the protected ones.[67] To solve the problem, *Aliotti* announced that analytical dissection, previously reserved for the objective, extrinsic prong of analysis, may be performed during the intrinsic analysis to ensure that the substantial similarities found when the ordinary, reasonable person views both protected and unprotected elements are not based solely on the use of common ideas, which are not protected.[68] The court recognized, as have other circuits, that some elements of a work necessarily follow from the use of an idea.[69] In applying the modified inquiry, the court, comparing two stuffed dinosaur toys, said the test could not be effectively executed by simply comparing the dolls' physiognomy and gentle, cuddly nature, as these elements are dictated by the idea of stuffed animals.[70]

c. The Fourth Circuit Develops the "Intended Audience" Test.—In 1990, the Court of Appeals for the Fourth Circuit, in *Dawson v. Hinshaw Music, Inc.*,[71] adopted a two-part substantial similarity analysis similar to that announced by the Ninth Circuit in *Krofft*.[72] As the *Dawson* court described it, the test involved two prongs. The first, objective prong, incorporates expert testimony and analytical dissection to determine if the similarities between two works are sufficient to prove copying.[73] The second, subjective prong, had previously relied on the ordinary lay person's consideration of the "total concept and feel" of the works.[74] However, the Fourth Circuit analyzed the "objective observer" formulation—particularly scrutinizing its application in *Arnstein* and *Krofft*—and ultimately rejected the test as too broad.[75] The court determined that *Arnstein* demanded a comparison of the works

66. 831 F.2d 898 (9th Cir. 1987).

67. *Id.* at 901.

68. *Id.*

69. *Id.* "No copyright protection may be afforded to the idea of producing stuffed dinosaur toys or to elements of expression that necessarily follow from the idea of such dolls." *Id.*; *see also* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (finding the idea and expression of jeweled bee pins to be inseparable).

70. *Aliotti*, 831 F.2d at 901.

71. 905 F.2d 731 (4th Cir. 1990).

72. *Id.* at 733.

73. *Id.*

74. *See id.* at 733-36.

75. *Id.* at 733-35. "Although *Arnstein* established a sound foundation for the appeal to audience reaction, its reference to 'lay listeners' may have fostered the development of a rule that has come to be stated too broadly." *Id.* at 734.

by the intended audience.[76] The court noted that the *Krofft* court also suggested an intended audience test by making special note of the fact that it was considering characters aimed at children.[77] Finally, the court announced the new rule that when conducting the subjective inquiry, the court must consider the nature of the intended audience of the plaintiff's work.[78] Furthermore, to avoid creating an overly burdensome standard, the court warned trial courts to be "hesitant" before finding that any audience other than the lay public is appropriate.[79]

Six years later, in *Towler v. Sayles*,[80] the court applied the "intended audience" test when it reviewed the finding of the District Court for the Eastern District of Virginia that two screenplays were not similar.[81] In the first step, the court looked at the similarities in the "plot, theme, dialogue, mood, setting, pace, [and] sequence" of the play and movie at issue.[82] Finding only that both involved "a black female character and white female character who [were] friends," the court determined that the plaintiff could not copyright such a general idea.[83] Next, the court looked at the "total concept and feel" of the play and movie through the eyes of the "movie-going public," the intended audience of the screenplays, and found the works to be "completely different."[84] Thus, the plaintiff failed to prove substantial similarity.[85] Identifying the "movie-going public" as the audience cast a wide enough net that it represented the lay public, so the court was, in fact, "hesitant" to view the works through the eyes of a more specific audience.

3. The Court's Reasoning.—In *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, the Fourth Circuit held that the district court misapplied

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76. *Id.* at 734. "Although *Arnstein* does not address the question directly, we read the case's logic to require that where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended audience would be the relevant inquiry." *Id.*

77. *Id.* at 734-35.

78. *Id.* at 736. The court included children among those audiences who may have specialized expertise. *Id.* at 735.

79. *Id.* at 737.

80. 76 F.3d 579 (4th Cir. 1996).

81. *Id.* at 581.

82. *Id.* at 584. The first prong of the court's analysis is to determine whether the plaintiff has proved, with aid of expert testimony, that the works "contain substantially similar ideas that are subject to copyright protection." *Id.* at 583.

83. *Id.* at 584.

84. *Id.*

85. *Id.* "[N]o member of the public reading or viewing the screenplays could reasonably decide the works are substantially similar." *Id.*

the intended audience test by identifying adults rather than children as the proper audience for considering the similarities between the protected Barney character and the defendant's Duffy the Dinosaur rental costume.[86]

The court recognized that the lower court had no evidence on the record that children directly influenced adults' decisions to purchase the Duffy costume and noted that there was substantial evidence of actual confusion by children who witnessed the Duffy costume.[87] The court then turned to the proposition that copyright infringement actions are designed to protect the profits of copyright holders by preventing an unauthorized person from selling copies of the protected work and pirating what would otherwise be the creator's profits.[88] The court found that the evidence tended to show that the target audience for both Barney and Duffy was children aged two to five.[89] The court further found that the "economically important" viewpoint was not that of the parents or adults renting, buying, and wearing the Duffy costume, but that of the children who witnessed Duffy once it was purchased and who influenced the adults to rent and wear the costume to entertain them.[90] The court reasoned that economic damage would result if the children mistook Duffy for Barney and the adult wearing the Duffy costume behaved in a manner contrary to the wholesome image Lyons Partnership had built, promoted, and protected. The court reasoned that "[s]uch a 'Barney' at the mall, at school, or at local promotions might quickly erode the good will of the true Barney on PBS and adversely affect Lyons' sales of copyrighted toys, clothes, and videotapes."[91] The court rejected the lower court's reasoning that the child's perspective was irrelevant because only adults were known to rent the adult-sized costume and children were not present when the costumes were rented.[92] Instead, the

86. *Morris*, 243 F.3d at 802-03. In addition, regarding the claims surrounding two other costumes—the NDC dinosaur and Hillary—the court held that the statute of limitations did not bar Lyons's recovery for the infringement that occurred within the time allotted; that Morris had no defense of laches; and that Morris's acts of infringement were, as the lower court found, not willful. *Id.* at 797-99. The court said Lyons could receive an injunction even though Morris was no longer renting the offending costumes and remanded the case to award Lyons statutory damages based on the unwillful infringement. *Id.* at 801, 805.

87. *Id.* at 802.

88. *Id.* "Put more directly, copyright law is concerned with those 'knock-offs' that could actually diminish a copyright owner's profits, and that threat only arises when the owner's customers or potential customers believe that the new work is in fact a 'copy.'" *Id.*

89. *Id.* at 802-03.

90. *Id.* at 803.

91. *Id.*

92. *Id.*

court concluded that it was ultimately the child's determination that influenced the adults' purchases.[93]

The court recognized the risk of considering the perspectives of young children because of their "reduced ability . . . to distinguish" between different objects.[94] However, the court opined that the children's reduced reasoning in the second, subjective prong of the substantial similarity test would be ameliorated by the court's objective investigation under the first prong.[95] The court noted that if considering children's perspectives extended liability, it would only be to the degree that actual confusion and economic loss resulted.[96]

4. Analysis.—The Fourth Circuit's application of the "intended audience" test was flawed for several reasons. First, the court did not follow the instruction it set out in *Dawson v. Hinson Music Inc.* that courts should hesitate before identifying an intended audience more specific than the lay public.[97] Second, in naming young children as the intended audience,[98] the court failed to recognize the serious doctrinal implications the reduced judgment of a young child could have on copyright protection. Additionally, the court overlooked the obvious, intended audience—the adult purchaser of goods for young children. It is this audience that, in reality, economically impacts the market. Finally, by failing to recognize the obvious market and overstepping the limiting principle of the intended audience test, the court may have invited the increase of litigation it attempted to avoid in *Dawson*, and may have complicated what had been an easily administrable inquiry.

a. The Fourth Circuit Misapplied Its Intended Audience Inquiry.—

(1) Children Are Not an Audience with Specialized Expertise that Lies Beyond the Lay Public's General Knowledge.—By focusing on children as the intended audience, the Fourth Circuit ignored its own warning in *Dawson* that courts should be hesitant when considering an intended audience more specific than the lay public.[99] The *Dawson* court created the intended audience test in a case that required the

93. *Id.* The district court had noted, "many of these adults rented these costumes with the intent of confusing their young children." *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 737 (4th Cir. 1990).

98. *Morris*, 243 F.3d at 803.

99. *Dawson*, 905 F.2d at 737.

trial judge, who did not read music, to decipher two pieces of sheet music using the "ordinary observer" test.[100] After experts determined, in the first prong, that the ideas of the two spiritual arrangements were substantially similar, the judge determined in the second prong that no reasonable person would confuse one piece of sheet music for the other; thus, no copyright was infringed.[101] *Dawson* presented a situation in which the lay public failed the task of discerning between the works. Only an expert knowledgeable in music could read the notes and tell the difference between the sheets of music. The lay public similarly fails in cases involving computer software and other high-tech works that require the ability to read computer languages and complex code.[102] *Dawson*'s specialized "intended audience" test appears to resolve the failures in those cases by providing the opportunity for an expert knowledgeable in the field to decipher the works.[103]

Morris, however, does not present the same situation as *Dawson*. Barney, with its purple fur, exaggerated features, and contrasting bright colors, is not highly technical.[104] Nor does his audience possess "specialized expertise"[105] by which they properly recognize him.[106] In fact, the opposite is true. Children between the ages of two and five do not have greater knowledge or understanding about their toys than the general public. In fact, courts have recognized a child's reduced understanding in many contexts.[107] Like the movie-going public in *Towler v. Sayles*,[108] or the figurine purchaser in *Hennon v.*

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100. *Id.* at 733.

101. *See id.* at 737.

102. *See, e.g.*, Whelan Assoc. Inc. v. Jaslow Dental Lab. Inc., 797 F.2d 1222, 1232 (3d Cir. 1986) (involving computer programs so complicated that no lay jury or judge could be expected to make comparisons for substantial certainty without expert help); *see also* 4 NIMMER, *supra* note 30, § 13.03(A)(1)(d) ("In the field of software infringement, some courts have viewed the [existing] tests as inadequate, and have formulated new approaches to determining substantial similarity.").

103. *See* 4 NIMMER, *supra* note 30, § 13.03(E)(4). "One court, acutely conscious of the difficulties inherent in seeking the 'ordinary observer's' reaction to computer software, has resolved the dilemma not by discarding the audience test, but by refocusing it." *Id.* (citing *Dawson*).

104. *Morris*, 243 F.3d at 795.

105. *Dawson*, 905 F.2d at 736.

106. *See Morris*, 243 F.3d at 802.

107. *See, e.g.*, Schleifer v. Charlottesville, 159 F.3d 843 (4th Cir. 1988) (citing examples of how the law affords children more limited rights than adults, such as children are subject to compulsory school attendance laws and are excluded from gainful employment by labor law); *see also* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140 (E.D. Pa. 1987) (finding that a minor is not competent to enter into a valid contract); Mumford v. United States, 150 F. Supp. 63 (D. Md. 1957) (concluding that an 8-year-old child is not held to the same measure of care as an adult).

108. 76 F.3d 579, 584 (4th Cir. 1996).

Kirkland's Inc.,[109] the adult purchaser of toys for young children is a general, broadly defined group that is no more specific than the "lay public" audience that *Dawson* instructs should serve as the intended audience to test similarity. By defining the intended audience more narrowly than the adult purchaser, the court ignored *Dawson*'s warning to avoid specifically defining the audience.

Other courts have been able to come to reasonable conclusions about the subjective similarity of children's toys without resorting to the judgments of the children themselves. In *Williams v. Crichton*,[110] the Second Circuit weighed the "total concept and feel" of two books about dinosaur parks to come to the conclusion that they were not subjectively similar.[111] The court then turned to the more concrete elements such as "theme, setting, characters, time sequence, [and] plot" to determine that the works also were not objectively similar.[112] The court ultimately found that any substantial similarity between the two books was based only on the "unprotectible idea of a dinosaur zoo."[113] In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, the Ninth Circuit compared the H. R. Pufnstuf television characters with the McDonaldland television commercial characters.[114] Recognizing that both characters were directed at child audiences, the court modified its version of the subjective inquiry.[115] By evaluating the factual similarities between the characters without being overly

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109. 64 F.3d 657, No. 94-2595, 1995 WL 490266, at *3 (4th Cir. 1995).

110. 84 F.3d 581 (2d Cir. 1996).

111. *Id.* at 588. In comparing a set of children's books about a modern dinosaur park with the novel and movie version of *Jurassic Park*, the court sought to determine whether the "total concept and feel" of each was different. While the *Jurassic Park* works were "high-tech horror stories with villainous characters and gruesome bloodshed" in which danger arises "because of the evils of humans," the Dinosaur World series were "adventure stories . . . suspenseful in places [with] happy endings," in which the "wild nature of dinosaurs" causes threats that are "intended to educate children" about dinosaurs. *Id.* at 589. "The total concept and feel of the *Jurassic Park* works is of a world out of control, while . . . Dinosaur World is well under control." *Id.* Interestingly, while the Dinosaur World books were aimed at children and the 400-page *Jurassic Park* novel was more likely aimed at adults, the court did not discuss the different audiences.

112. *Id.* at 589.

113. *Id.*

114. 562 F.2d 1157, 1165-69 (9th Cir. 1977). H. R. Pufnstuf was a popular Saturday morning television show involving a boy named Jimmy who lived in a fantasyland with moving trees and talking books. *Id.* at 1161. McDonaldland was an advertising campaign launched in 1971, which also involved an imaginary world inhabited by fanciful creatures and talking trees. *Id.*

115. *Id.* at 1166. "The present case demands an even more intrinsic determination because both plaintiffs' and defendants' works are directed to an audience of children. This raises the particular factual issue of the impact of the respective works upon the minds and imaginations of young people." *Id.*

particular and placing greater weight on the intrinsic similarities, the court took the child audience into consideration without eliminating the adult perspective completely.[116] The McDonaldland characters failed the subjective inquiry—they were found to be intrinsically similar, to have "captured the 'total concept and feel' of the Pufnstuf show."[117] In *Conan Properties, Inc. v. Mattel, Inc.*,[118] the court did not even consider childrens' perspectives when it appraised a battle between a Barbarian comic book superhero and He-Man, an overly muscular action figure.[119] The court asked whether the "lay observer would recognize the alleged copy as having been appropriated from the copyrighted work"[120] and determined that no reasonable trier of fact could conclude that the protected elements of Conan and He-Man were substantially similar.[121] As shown through these courts' reasoned opinions, there is nothing magical about children's toys and characters that takes them outside the realm of adult understanding. No "specialized expertise" is required to measure their similarities. Likewise, the *Morris* court had no reason to take the inquiry out of the hands of reasonable adults and give it to children.

Furthermore, the court failed to satisfactorily account for the obvious weakness of allowing a pre-school aged child's view to determine similarities. The court recognized that allowing young children—who have a "reduced ability . . . to distinguish between objectively different items and concepts"[122]—to determine the subjective similarity prong might broaden liability for infringement because children are more likely than the average lay person to find similarity. The court reasoned that the objective prong of the substantial similarity test, in which the trier of fact looks to experts and uses comparative analysis to determine the objective similarity of the works, would mitigate the

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116. The court noted that "the ordinary reasonable person, let alone a child, viewing these works will [not] even notice that Pufnstuf is wearing a cumberbund while Mayor McCheese is wearing a diplomat's sash." *Id.* at 1167.

117. *Id.*

118. 712 F. Supp. 353 (S.D.N.Y. 1989).

119. *Id.* at 355.

120. *Id.* at 360 (quoting Steinberg v. Columbia Pictures Indus. Inc., 633 F. Supp. 706, 711 (S.D.N.Y. 1987)). "In the words of Judge Learned Hand, two works are substantially similar when 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" *Id.* at 360 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

121. *Id.* at 361; *see also* Mattel, Inc. v. Azrak-Hamway Int'l, Inc., 724 F.2d 357, 360 (2d Cir. 1983) (denying infringement liability when the only similarity between the parties' dolls was the idea of "a superhuman muscleman crouching in what since Neanderthal times has been a traditional fighting pose").

122. *Morris*, 243 F.3d at 803.

problem and reduce the risk of extended liability.[123] The court further found that if viewing the subjective test from a child's perspective did broaden the risk, it would only be to the extent of the "reality of the confusion and actual economic loss to the copyright owner."[124] The court misidentified the risk. What actually is at risk is the protection of expression rather than idea. If children cannot discern between objectively different items, how is their judgment about the more subtle subjective qualities of an object to be trusted?

Copyright law allows the copying of general ideas, such as that of a purple dinosaur, but does not allow copying of protected expression,[125] such as that of a chubby purple dinosaur with green spots and a friendly mien. The two-prong test was designed to separate those two elements.[126] The objective prong determines, based on expert testimony, whether the works contain substantially similar ideas that are protected.[127] The second, subjective prong—which the Fourth Circuit in *Morris* has given to children—determines whether the expression of those ideas is similar.[128] Deciphering between idea and expression is notoriously difficult.[129] Handing the task to a two to five-year-old child, Barney's target television market, seems ill-advised. Prone to folly, preschool children are known to stretch their imaginations and blur reality. A little girl dressed in a tiara becomes a princess. A blanket over two chairs is an impenetrable fort. Monsters live under the bed. Santa Clause exists. Every purple dinosaur can look just like the real Barney. This is no legal standard. It, in fact, violates the protections the Constitution allows. If the court is going to put the question of similarity to children—those same princesses in tiaras and frontier defenders under blankets—it might as well not ask the question at all. Discounting the similarity test, the court is left with only the answer to the first inquiry, which is merely proof that the two works have similar ideas in common. Under the court's new test, the expression, the heart of what is protected, has not been examined.

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123. *Id.*

124. *Id.*

125. 17 U.S.C. § 102(b) (2000); *see also supra* notes 26-27 and accompanying text (discussing the protection of expression but not ideas).

126. *See, e.g.*, Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977).

127. *Morris*, 243 F.3d at 801.

128. *Id.*

129. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("Nobody has ever been able to fix that boundary, and nobody ever can.").

(2) The Court Should Have Looked to the Adults Buying for Children as the "Intended Audience."—Adults buying the Duffy costume to entertain children should have been designated as the "intended audience" for the same reasons that the court posited they should not: evidence that no child decided to rent the costume and the consequent economic impact that the adults, as buyers, affected. First, the court noted that children "went wild" when they saw the Duffy costume presented to them as Barney, and in fact, parents rented the adult-sized costume precisely to fool young children.[130] Furthermore, there was no evidence that any child actually took an active part in the decision to rent the costume.[131] The evidence the court used to determine the children's role also shows why adults chose to rent the costume. The adults buying with children in mind provides a sufficient intended audience for the court to inquire into similarity. If the lower court erred in applying the similarity test, perhaps it was in not considering more specifically the adult buying with the child in mind—which is still a lay public audience[132]—and only considering the average adult renter.[133]

The other reason the court gave for not finding the adult purchaser to be the intended audience is that the adult does not have the "economically important" view in terms of protecting Lyons's copyright.[134] However, the adult purchaser holds the purse strings and makes the ultimate decision on whether to buy a product. It is ultimately the adult purchaser who inflicts any economic damage, especially in the case in which the adults are purchasing items in the absence of children, as was the case in *Morris*.[135]

Lyons apparently was concerned about people who were renting Barney-like costumes and behaving in manners not consistent with the Barney image, such as removing the head of the costume to smoke,[136]

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130. *Morris*, 243 F.3d at 802-03.

131. *Id.* at 802.

132. *See supra* notes 108-109 and accompanying text (discussing the lay public audience in other Fourth Circuit cases).

133. *See Morris*, 243 F.3d at 802. There is also an argument to be made that the court should not look to evidence in determining the intended audience to avoid unnecessary complications of the judicial inquiry.

134. *Id.* at 803.

135. Generally, a preschool-aged child wields no economic power of her own; she is only as strong as her parent's will. However, as marketing executives will attest, the will of the child is a strong one.

136. Masters, *supra* note 14; Julie Deardorff & Flynn McRoberts, *When it Comes to Mannequins, We Can Be Dummies*, CHI. TRIB., Aug. 16, 1999, at 2.

or disco dancing and brawling.[137] The Fourth Circuit opined that such a performance by an imposter Barney could negatively impact the child, who might no longer want to play with the Barney it considers tainted after the bad experience, stop asking her parents to buy Barney, and thus adversely impact the profits of Lyons.[138] However, the adult protector of the child is just as likely, if not more so, to remove a toy from a child if the adult thinks it will have a bad influence on the child. Furthermore, the *Morris* court reasoned that knock-offs only cause economic harm when the potential customers believe the new work is in fact a copy, thus diminishing the copyright owner's profits.[139] The parents and adult purchasers *did* believe Duffy to be a copy—at least one close enough to fool their children—and rented it for the purpose of presenting it as Barney.[140] Still, instead of recognizing this obvious audience of purchasers, the court went an extra step in its analysis and identified an audience with "specialized expertise," contrary to its own instruction to practice "hesitancy" when doing so.[141]

b. The Court's Decision Will Likely Have Problematic Consequences.—In naming children as the intended audience with specialized expertise, the Fourth Circuit has set an ill-advised precedent that invites litigation that *Dawson* aimed to avoid. Where *Dawson* sought to limit the use of specialized intended audiences,[142] *Morris* uses a specialized audience without hesitation.[143] Such a precedent invites new litigation on the issue of audience expertise where it previously had not been warranted. Also, *Morris* indicated that the court is willing to hear evidence to determine whether the intended audience is special-

137. Lyons P'ship v. Giannoulas, 14 F. Supp. 2d 947, 950 (N.D. Tex. 1998). Lyons sued Giannoulas, who is also known as "The Famous San Diego Chicken," which performs at baseball games, for a skit in which the chicken danced and fought with a Barney look alike. *Id.* The court determined that Giannoulas's use of the Barney image was a fair use for parody. *Id.* at 955.

138. *Morris*, 243 F.3d. at 803.

139. *Id.* at 802. The court noted that copyright only protects "the creator's economic market and resulting financial returns." *Id.* The effect in this case would have been more attenuated than the usual "knock-off" situation because Lyons did not manufacture Barney costumes for use by the general public. Parents were not choosing between an authentic Barney costume and a knock-off, but rather between a purple dinosaur or another character.

140. *Id.* at 803.

141. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 737 (4th Cir. 1990).

142. *Id.*

143. *Morris*, 243 F.3d at 802.

ized.[144] This precedent threatens to make the simple audience inquiry a complicated evidentiary investigation.

(1) Overlooking the Obvious Intended Audience Invites More Complicated Litigation.—If the court had accepted adult purchasers of the Duffy costume as the intended audience, it would have avoided broadening the narrow exception it drew in *Dawson*.[145] *Dawson* created a test in which a specialized expert may be consulted in cases where the court compares works that are beyond the comprehension of a lay audience.[146] The court was careful to make the query exceptional; "specialized expertise" was to "rise to the level of the possession of knowledge that the lay public lacks."[147] Trial courts were to hesitate before seeking the specialized audience to avoid creating a burdensome, litigious test.[148] However, *Morris* crossed the line of hesitancy with impunity. Even though an adequate lay audience was available—that of adult purchasers—the court sought the "specialized" audience of children.[149] In *Dawson*, the improper intended audience was the "lay public" judge who did not know how to read sheet music; the correct audience was the "specialized" musician who could.[150] The situation in *Dawson* was not analogous to that in *Morris*. The "lay public" audience in *Morris* was adult purchasers; the "specialized" audience was children.[151] However, each audience possessed the same knowledge: someone wearing the Duffy the Dinosaur costume will fool children into thinking he or she was Barney.[152] The specialized audience did not have any expertise that surpassed the lay public's knowledge.

The *Morris* court expanded the application of the "specialized expertise" exception that *Dawson* allowed. It expanded the intended audience with specialized expertise from one with knowledge "that lay people would lack"[153] to one that should be consulted "when it is clear that the work is intended for a more particular audience."[154] The

144. *See id.* (noting the "substantial" evidence of children's misidentification of the Duffy costume as Barney and concluding that the lower court incorrectly identified adults as the intended audience).

145. *Dawson*, 905 F.2d at 736-37.

146. *Id.* at 737.

147. *Id.*

148. *Id.* at 736-37.

149. *Morris*, 243 F.3d at 803.

150. *Dawson*, 905 F.2d at 733.

151. *Morris*, 243 F.3d at 802.

152. *Id.* at 803.

153. *Dawson*, 905 F.2d at 736.

154. *Morris*, 243 F.3d at 801.

court did not "hesitate" as *Dawson* instructed it to.[155] In leaping too quickly from the "lay public" to the "specialized" intended audience, the *Morris* court may have opened the door to the increased litigation *Dawson* foresaw.[156] In demanding a more specific test, *Dawson* recognized that it was making a further demand on the court.[157] Instead of analyzing the substantial similarity from the bench or jury box as regular "lay" people, the court would now have to inquire into and draw conclusions about the nature of the works and their intended audiences.[158] The Fourth Circuit wisely noted:

> That burden would be a substantial one if our holding were read as an invitation to every litigant in every copyright case to put before the court the seemingly unanswerable question of whether a product's audience is sufficiently specialized to justify departure from the lay characterization . . . . [C]oncerns about copyright actions becoming unwieldy are legitimate.[159]

The *Morris* court ignored the warning. Instead, it chose a specialized audience, based on evidence and economic concerns, when a proper lay audience was available. This sets the stage for future copyright holders who might similarly benefit by the expertise of an intended audience to put before the court arguments and evidence about their product's audience and economic target.

(2) The Audience Inquiry Might Become a Complicated, Evidentiary Inquiry.—By making an evidentiary issue out of the intended audience inquiry, the court has made what was an easily administrable test into one that could bury courts in audience inquiries. The subjective, second prong of the substantial similarity test has long been a system of reasoning by the trier of fact.[160] By its nature, the second prong of the test did not require expert testimony; in fact, it shunned the use of experts.[161] The trier of fact determined exactly how similar two works were.[162] After the *Morris* decision, the second prong of the

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155. *Dawson*, 905 F.2d at 737.

156. *Id.* at 736.

157. *Id.*

158. *Id.*

159. *Id.* at 736-37.

160. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (describing the second prong of the substantial similarity test as "an issue of fact which a jury is peculiarly fitted to determine").

161. *See id.*

162. *See, e.g.*, Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977) (noting that the subjective test for similarity is "uniquely suited for determination by the trier of fact").

substantial similarity test has the potential of being anything but straightforward. *Morris* has opened the door for parties to argue not only over the defendant's access to a work and the substantial similarity of the works, but also over who the intended audience is and whether they have specialized expertise.

Worse, *Morris* suggests that the Fourth Circuit is willing to weigh evidence to independently determine whether the audience is sufficiently specialized.[163] The Court of Appeals reviewed evidence that had been disregarded by the lower court. That evidence was used to determine that because children reacted to the Duffy costume as if it were Barney, they must have some specialized knowledge of the similarity of the costumes that adults did not have.[164] The court provided no boundary for determining when such a review was appropriate. In doing so, the court may have summoned future copyright litigators to present similar evidence on specialized audiences, thus adding a new inquiry to the already illusive substantial similarity inquiry.

5. Conclusion.—The Fourth Circuit failed to consider the repercussions of naming preschool-aged children as the specialized, intended audience. A young child's impressions are as fanciful as Barney; therefore, a child's judgment cannot be legally trusted. The parent or guardian, as he or she does in the child's life, should act as the child's spokesperson in the "intended audience" test if it must be aimed at youngsters. In failing to recognize the adult purchasers as the obvious lay audience for satisfying the intended audience inquiry, the court has overstepped the limiting principle it built into the test and threatened trial courts with an overly burdensome, litigious copyright infringement doctrine.

KRISTEN KLICK

163. *See Morris*, 243 F.3d at 802.
164. *Id.*

IV. ENVIRONMENTAL LAW

A. *The Fourth Circuit Holds Firm Against a Stream of Decisions in Other Circuits Requiring Active Disposal for Superfund Liability*

In *Crofton Ventures Ltd. Partnership v. G & H Partnership*,[1] the United States Court of Appeals for the Fourth Circuit considered whether the term "disposed of" in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes the passive leaking of hazardous material into soil as well as the physical placement of hazardous material onto property.[2] The Fourth Circuit held that liability under CERCLA can result from passive "disposal" in addition to active "disposal," and that the trial court erred when it required Crofton Ventures Limited Partnership (Crofton) to show that the defendants "placed or dumped" trichloroethylene (TCE) on the site.[3] The court reasoned that CERCLA defined "disposal" broadly to include not only the placement of hazardous waste on a site, but also waste that leaks or spills.[4] By continuing to recognize CERCLA liability for passive "disposal," the Fourth Circuit acted contrary to a group of decisions in other circuits requiring active "disposal" by a prior owner to trigger liability.[5] The Fourth Circuit reached the correct decision by finding that liability may result from passive "disposal."[6] A broader definition of "disposal" allows the statute's terms "leaking" and "spilling" to have their plain meaning.[7] Decisions in other circuits that narrowly limit liability to active "disposal" are flawed.

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1. 258 F.3d 292 (4th Cir. 2001).

2. *Id.* at 296.

3. *Id.* at 300. The Court of Appeals also found that the district court erred when it "apparently believed that the defendants could not be liable for Crofton's response costs absent evidence linking the TCE used by the defendants and the TCE that was buried in the drums at the site." *Id.*

4. *Id.*

5. *See* United States v. 150 Acres of Land, 204 F.3d 698, 705 (6th Cir. 2000) (requiring that a spill must occur by "human intervention" in order to be considered a disposal); ABB Indus. Sys., Inc. v. Prime Tech. Inc., 120 F.3d 351, 359 (2d Cir. 1997) (finding the site operators not liable under CERCLA for "mere passive migration"); United States v. CDMG Realty Co., 96 F.3d 706, 714 (3d Cir. 1996) (holding that leaking and spilling "require affirmative human action").

6. *But see* Craig May, Note, *Taking Action—Rejecting the Passive Disposal Theory of Prior Owner Liability under CERCLA*, 17 VA. ENVTL. L.J. 385, 385 (1998) (arguing that active "disposal" has properly become the position of the majority of circuits).

7. *See* 42 U.S.C. § 6903(3) (2000).

1. The Case.—

a. Hazardous Waste Discovered.—In 1995, Crofton discovered that a portion of a thirty-two acre parcel in Anne Arundel County, Maryland contained 285 fully or partially buried 55-gallon drums.[8] After testing five of the drums, Crofton discovered that four of them contained a mixture of asphalt and TCE,[9] which is a "hazardous substance" under CERCLA.[10] Crofton notified the Maryland Department of the Environment and cleaned the site under the department's supervision.[11] After cleaning the site, Crofton sued G & H Partnership and prior owners and operators of the parcel in order to recover all or part of its cleanup costs.[12]

b. The Crofton Site.—The land involved in the Crofton case (the Crofton Site) was originally held as part of a larger tract of land in Anne Arundel County (the Tract).[13] From 1930 to 1967, Alan E. Barton conducted hot-mix asphalt manufacturing on the Crofton Site.[14] On the portion of the Tract adjacent to the Crofton Site, other landowners and operators had hot-mix asphalt operations from 1977 onward.[15] E. Stewart Mitchell, Inc., which operated an asphalt plant on the adjacent site from 1977 to 1980, sold its asphalt business in 1981 to a corporation controlled by Harry Ratrie. In 1985, another Ratrie organization, G & H Partnership, purchased the entire Tract from Mitchell, Inc.[16] G & H Partnership then entered into an agreement to sell the Crofton Site portion of the Tract to C & H Properties, subject to an inspection to determine the absence of hazardous waste.[17] By 1991, C & H Properties obtained an engineering study certifying the absence of hazardous materials.[18] C & H Properties

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8. *Crofton*, 258 F.3d at 294.

9. *Id.*

10. 40 C.F.R. § 261.24 (2001). TCE is a hazardous waste based on its toxicity at concentrations equal or greater than 0.7 milligrams per liter. *Id.*

11. *Crofton*, 258 F.3d at 294.

12. *Id.* at 295. Crofton also filed claims based on fraudulent misrepresentation and breach of warranty. *Id.* The district court dismissed these claims with prejudice because Crofton failed to prove by a preponderance of the evidence "that G&H [Partnership] knew, or should have known, of the hazardous waste." Crofton Ventures Ltd. P'ship v. G & H P'ship, 116 F. Supp. 2d 633, 645 (D. Md. 2000).

13. *Crofton*, 116 F. Supp. 2d at 635.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 636.

then assigned its right to purchase the property to Crofton, and Crofton purchased the property in 1991.[19]

c. A Potential Source of Contamination.—Each of the asphalt paving businesses[20] typically generated an asphalt TCE mixture when testing batches of asphalt on site prior to the customer's acceptance.[21] Each test used approximately two to three pints of TCE to dissolve a "two-hockey puck" sized sample of finished asphalt.[22] After the test, the asphalt-TCE mixture was placed into a fifty-five gallon drum for disposal.[23] While some of the drums discovered during the clean up of the Crofton Site had fully corrugated sides, evident of drums in use during the 1930s and 1940s, most of the drums had just two corrugations on the side, indicative of those manufactured beginning in the late 1970s.[24] The discovered drums were "'rusted,' 'crushed,' 'split open,' 'leaking,' and 'broken.'"[25] Testing revealed high levels of TCE in the soil and groundwater at the Crofton Site.[26] While not legally obliged to do so, the last owner of the Site, Bituminous Construction Inc., did not retain any records of its TCE disposal and did not produce any witnesses "who could recall, with any specificity, the manner of disposal of TCE waste."[27]

d. District Court Trial.—During the four-day trial in the United States District Court for the District of Maryland, Crofton's attorney argued for liability under CERCLA based on allegations that G & H Partnership and other owners placed the hazardous substance on the site or that the hazardous substance leaked out of the drums while G & H Partnership owned the property.[28] Near the end of closing argument, "one of Crofton's lawyers said, 'I want to take a step back . . . and kind of drop a bomb shell on this Court.'"[29] Crofton's

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19. *Id.*; *Crofton*, 258 F.3d at 294 n.1.

20. Alan E. Barton operated on the Crofton Site from about 1930 to 1967. E. Stewart Mitchell, Inc. and Ratrie's Bitumous Construction, Inc. operated on the adjacent site from 1977 to 1980, and beginning about 1981, respectively. *Crofton*, 116 F. Supp. 2d at 635.

21. *Id.* at 636.

22. *Id.*

23. *Id.* at 637.

24. *Id.* at 641.

25. *Crofton*, 258 F.3d at 294.

26. *Id.* at 295.

27. *Crofton*, 116 F. Supp. 2d at 642.

28. *Crofton*, 258 F.3d at 298 n.3.

29. *Id.* at 301 (Michael, J., dissenting). Judge Niemeyer characterized the "bomb shell" differently when he stated that counsel for Crofton was not advancing a new theory of liability, but was instead advising the district court that the court was reading "disposal" too narrowly. *Id.* at 298 n.3.

attorney then explained that G & H Partnership should be liable for both active and passive disposal.[30] The defense attorney objected to the passive disposal argument, stating that they had no notice that Crofton would use a passive disposal theory.[31]

After listening to Crofton's counsel make a passive liability argument based on leaking hazardous waste, the district court found that passive "disposal" was not acceptable as an additional argument because passive "disposal" was a different theory and deprived Crofton and other defendants of adequate notice.[32] The district court judge stated, "The question before this Court is whether the Court can find, by a preponderance of the evidence, that Bituminous Producers *dumped* their TCE waste on the Site."[33] The district court found that Crofton did not present enough circumstantial evidence to permit a finding that any of the asphalt production companies placed drums containing TCE on the site.[34] The district court dismissed all of Crofton's claims with prejudice and concluded that Crofton failed to meet its burden of proof for all claims.[35] Crofton appealed, challenging the district court's legal and factual findings on the CERCLA claim.[36] The Fourth Circuit granted certiorari to consider whether G & H Partnership was liable for the passive "disposal" of a "hazardous substance" under CERCLA.[37]

2. *Legal Background.*—

a. CERCLA and RCRA.—The Resource Conservation and Recovery Act (RCRA)[38] and CERCLA[39] are complimentary statutes because both seek to address the problems associated with hazardous substances.[40] RCRA regulates the management of hazardous substances from creation through disposal.[41] CERCLA imposes strict

30. *Id.* at 301 (Michael, J., dissenting).

31. *Id.*

32. *Id.*

33. Crofton Ventures Ltd. P'ship v. G & H P'ship, 116 F. Supp. 2d 633, 643 (D. Md. 2000) (emphasis added).

34. *Id.* at 639.

35. *Id.* at 645.

36. *Crofton*, 258 F.3d at 296.

37. *Id.* The Fourth Circuit also heard Crofton Venture's common law claim for fraudulent misrepresentation and breach of contract. The Fourth Circuit affirmed the district court's rulings on those claims. *Id.* at 294.

38. 42 U.S.C. §§ 6901-6965 (2000).

39. *Id.* §§ 9601-9675.

40. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992).

41. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 201 (3d ed. 2000).

joint and several liability on responsible parties to clean up sites that are contaminated with hazardous substances.[42]

CERCLA attaches liability for response costs to four categories of parties: current owners and operators of the facility, prior owners and operators at the time of disposal, persons who arranged for disposal, and transporters of hazardous substances to the facility.[43] The prior owner or operator must have been the owner or operator at the time of disposal to be liable.[44] CERCLA gives "disposal" the same meaning as RCRA.[45] RCRA defines "disposal" as "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . ."[46]

A party who is liable under CERCLA may seek contribution from any other person who is liable under CERCLA.[47] In order to recover contribution, the liable party must establish that it incurred costs that were both necessary and consistent with the national contingency plan, in response to a "release" or "threatened release" of a "hazardous substance," and that the defendant was liable for response costs.[48]

In order for the defendant to be liable in an action for contribution, there must have been a "release."[49] CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . ."[50]

In order for CERCLA to apply, the released material must have been a "hazardous substance."[51] CERCLA defines "hazardous substance" broadly to include "hazardous waste" under RCRA and materi-

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42. *Id.*; *see also Nurad*, 966 F.2d at 841.

43. 42 U.S.C. § 9607(a)(1)-(4).

44. *Id.* § 9607(a)(2).

45. *Id.* § 9601(29).

46. *Id.* § 6903(3). The complete definition reads:

> (3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Id.

47. *Id.* § 9613(f)(1). Parties who may be liable under CERCLA are commonly referred to as "potentially responsible parties" (PRPs). 40 C.F.R. § 35.6015(32) (2001).

48. 42 U.S.C. § 9607(a)(4).

49. *Id.*

50. *Id.* § 9601(22).

51. *Id.* § 9607(a).

als designated as hazardous under other specified environmental laws.[52]

CERCLA provides limited defenses to liability, including an innocent owner defense.[53] CERCLA provides that there is no liability for PRPs if the party can establish by

> a preponderance of evidence that the release or threat of release of a hazardous substance . . . [was] caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . .[54]

The conditions for an innocent owner defense are set out in § 9601(35), defining a "contractual relationship."[55] In order to use the innocent owner defense, the defendant must acquire title or possession "after the disposal or placement of the hazardous substance."[56] For a private party to use the innocent owner defense, the defendant must establish by preponderance of evidence that he "did not know and had no reason to know" that any hazardous substance was disposed on the property, or that he "acquired the facility by inheritance or bequest."[57] For a defendant to establish that he "had no reason to know" about the hazardous substance, "the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practices in an effort to minimize liability."[58]

b. Federal Circuit Split Over the Meaning of "Disposal."—The federal circuits are split in their interpretation of the term "disposal." As noted above, "disposal" is defined in CERCLA by referring to the definition in RCRA.[59] The dispute between the circuits centers over whether the terms "spilling" and "leaking" in the RCRA definition

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52. *Id.* § 9601(14).

53. *Id.* § 9607(b); Catherine S. Stempien, *Sins of Omission, Commission, and Emission: Does CERCLA's Definition of "Disposal" Include Passive Activities?*, 9 J. ENVTL. L. & LITIG. 1, 3 (1994) (describing the limited defenses to a CERCLA action).

54. 42 U.S.C. § 9607(b).

55. *Id.* § 9601(35)(A). Contractual relationship "includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility . . . ." *Id.*

56. *Id.*

57. *Id.*

58. *Id.* § 9601(35)(B).

59. *Id.* § 9601(29).

carry their ordinary meaning[60] or whether these terms should be read more narrowly as requiring some action by a person that causes a "hazardous substance" to spill or to leak.[61]

(1) Fourth Circuit Decisions Imposing Liability for Passive Disposal.—The Fourth Circuit first found that "disposal" included passive "disposal" in *United States v. Waste Industries, Inc.*[62] In that case, the EPA sought injunctive relief against a leaking landfill to prevent further contamination of a community's acquifer.[63] The court found that "disposal" was not limited to active conduct because limiting the meaning of "disposal" "would so frustrate the remedial purpose of the Act as to make it meaningless."[64]

Eight years later in *Nurad, Inc. v. William E. Hooper & Sons Co.*,[65] the Fourth Circuit used *Waste Industries* as the basis to find that CERCLA "imposes liability not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that the hazardous waste was 'spilling' or 'leaking.'"[66] In *Nurad*, the owner of property in Baltimore sued prior owners for contribution to recover the costs it incurred to remove several leaking underground storage tanks and the "hazardous waste" in those tanks.[67] The court reasoned that some of the terms in the definition of "disposal," such as "leaking" and "spilling" have a passive meaning.[68] The court found that by requiring active "disposal" to impose liability, the district court arbitrarily deprived the words of their passive meaning.[69] Moreover, the Fourth Circuit found that the district court's interpretation of "disposal" was at odds with the strict liability emphasis of CERCLA.[70]

(2) Decisions in Other Circuits Requiring Active "Disposal" for CERCLA Liability.—In *United States v. CDMG Realty Co.*,[71] the Third Circuit found that "disposal" should be read to require "affirmative

60. *See infra* notes 65-70 and accompanying text (describing *Nurad*'s interpretation of "disposal").

61. *See infra* notes 77-80 and accompanying text (describing the *CDMG* court's use of *noscitur a sociis* to limit "leaking" and "spilling" to meanings requiring human action).

62. 734 F.2d 159, 165 (4th Cir. 1984).

63. *Id.* at 163.

64. *Id.* at 164.

65. 966 F.2d 837 (4th Cir. 1992).

66. *Id.* at 846.

67. *Id.* at 840.

68. *Id.* at 845.

69. *Id.*

70. *Id.* at 846.

71. 96 F.3d 706 (3d Cir. 1996).

human action."[72] In *CDMG*, the EPA and New Jersey Department of Environmental Protection and Energy brought suit under CERCLA against HMAT Associates, Inc., CDMG Realty, and other prior owners to clean up a ten-acre site, which was once part of a larger landfill.[73] CDMG was not the owner at the time of the government-ordered cleanup because it had sold the property to HMAT.[74] HMAT sued CDMG for contribution under CERCLA under an active and a passive "disposal" theory.[75] Using an active "disposal" theory, HMAT alleged that CDMG actively disposed of the contaminants when CDMG drilled soil testing bore holes that caused the contaminants to spread. Using a passive "disposal" theory, HMAT also alleged that CDMG's failure to stop the migration of hazardous waste constituted "disposal."[76] In examining the definition of "disposal," the court used the canon of construction *noscitur a sociis*,[77] which requires an inference of the meaning of a word based on the surrounding words.[78] The court reasoned that the words that surround "leaking" and "spilling"—"discharge," "deposit," "injection," "dumping," and "placing"—all require a human actor.[79] Because the majority of the terms in the definition of "disposal" require a human actor, the Third Circuit found that Congress intended "leaking" and "spilling" to have solely an active meaning.[80] The court thus concluded that the passive migration of waste at issue did not constitute "disposal."[81] The court reinforced its interpretation of "disposal" by examining the statutory language "release" and "at the time of disposal."[82] Finally, the court examined both the structure of CERCLA—specifically the innocent owner defense—and CERCLA's general purpose—"to facilitate the cleanup of potentially dangerous hazardous waste sites . . . and to force polluters to pay the costs associated with their pollution"—to support its interpretation of "disposal."[83]

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72. *Id.* at 714.

73. *Id.* at 711-12.

74. *Id.* at 712.

75. *Id.*

76. *Id.*

77. *Noscitur a sociis* translates as "it is known by its associates." BLACK'S LAW DICTIONARY 1684 (7th ed. 1999).

78. *CDMG*, 96 F.3d at 714.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 714-16.

83. *Id.* at 716-18.

In *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*,[84] the Second Circuit applied the reasoning used by the *CDMG* court.[85] In *ABB Industrial Systems*, the Second Circuit found that a landowner was not liable for the underground passive migration of hazardous chemicals.[86] In dicta, however, the court stated that it had no opinion on whether prior owners would be liable "if they acquired a site with leaking barrels even though the prior owner's actions are purely passive."[87]

The Sixth Circuit took the analysis in *CDMG* one step further in *United States v. 150 Acres of Land*[88] by applying the rule of *CDMG* and *ABB Industrial Systems* to leaking barrels found on the surface of the land, instead of to leaking underground storage tanks.[89] The Sixth Circuit held that the district court improperly granted a motion for summary judgment against the landowners under CERCLA when the landowners "raised a genuine issue of material fact as to each element of the CERCLA 'innocent landowner' defense."[90] The court found *CDMG* and *ABB Industrial System*'s reasoning persuasive and concluded that "disposal" should be interpreted in this case as "spills occurring by human intervention."[91]

While the Court of Appeals for the Seventh Circuit has not considered whether CERCLA liability should be limited to active "disposal," the Seventh Circuit district court case *United States v. Petersen Sand & Gravel, Inc.*[92] required active "disposal" for CERCLA liability.[93] In *Petersen Sand*, the United States government cleaned a contaminated site and sued the previous owner, Petersen Sand and Gravel, on theories of active and passive "disposal."[94] The district court denied the government's motion for summary judgment because there was a genuine issue of material fact as to whether the corporation was the

84. 120 F.3d 351 (2d Cir. 1997).

85. *See id.* at 358 ("We are persuaded by the Third Circuit's reasoning, and rather than reinventing the wheel, we simply summarize . . . what we believe to be the Third Circuit's most persuasive arguments.").

86. *Id.* at 359.

87. *Id.* at 358 n.3.

88. 204 F.3d 698 (6th Cir. 2000).

89. *Id.* at 706.

90. *Id.* at 711.

91. *Id.* at 705. In his concurring opinion, Judge Jones argued that the majority opinion went too far in restricting the meaning of "disposal." *Id.* at 711 (Jones, J., concurring). Judge Jones instead proposed defining "disposal" "to encompass spills produced by human agency, including those precipitated by willful neglect." *Id.*

92. 806 F. Supp. 1346 (N.D. Ill. 1992).

93. *Id.* at 1352.

94. *Id.* at 1348.

owner and operator at the time of "disposal."[95] The court found that passive "disposal" did not trigger liability for former owners and operators.[96] The court reasoned that by using the distinct terms "release" and "disposal," Congress intended there to be a difference in their meanings.[97] Because "release" includes more terms in its definition than "disposal," the court stated that Congress intended "release"—the definition of which includes the passive migration at issue in *Petersen Sand*—to be more inclusive than "disposal."[98]

Petersen Sand also drew on the language of CERCLA's innocent owner defense in its argument against liability for passive "disposal."[99] In the Superfund Amendments Reauthorization Act (SARA) in 1986, Congress added the innocent owner defense to CERCLA.[100] The innocent owner defense relieves liability if a purchaser acquired the contaminated land "after the *disposal or placement* of the hazardous substance" and at the time the defendant acquired the property "the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of, on, in, or at the facility."[101] The court in *Petersen Sand* reasoned that if "disposal" included passive "disposal," the innocent owner defense would have limited utility because if "disposal" through leaking was a continual process, almost no purchasers could use the innocent owner defense.[102] In order for the defense to be triggered, the defendant would have to purchase property where the "hazardous substance" was not leaking.[103]

(3) Ninth Circuit Attempts to Move Beyond the Active/Passive Distinction.—In an October 2001 *en banc* opinion, the Ninth Circuit reversed itself and found that the migration of contaminants across property does not fall within the definition of "disposal."[104] In doing so, the Ninth Circuit retreated from its initial support for CERCLA liability based on passive "disposal."[105] Property owner Carson Harbor

95. *Id.* at 1353.
96. *Id.* at 1351.
97. *Id.*
98. *Id.*
99. *Id.* at 1351-52.
100. 42 U.S.C. § 9601(35)(A) (2000).
101. *Id.*
102. *Petersen Sand*, 806 F. Supp. at 1352.
103. *Id.*
104. Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 867 (9th Cir. 2001) [hereinafter *Carson Harbor II*].
105. Carson Harbor Village, Ltd. v. Unocal Corp., 227 F.3d 1196, 1210 (9th Cir. 2000) [hereinafter *Carson Harbor I*].

sued Unocal, the prior owner of a leasehold interest and operator of a petroleum production facility, for contribution after removing a slag and tar-like material, which was a waste product or by-product from petroleum production.[106] The Ninth Circuit found that the migration of the sludge and tar contaminants did not fall within the statutory definition of "disposal."[107] Using the plain meaning of the terms defining "disposal," the court found that the migration of the tar-like substance "cannot be characterized as a 'discharge, deposit, injection, dumping, spilling, leaking, or placing.'"[108] The Ninth Circuit rejected "the absolute binary 'active/passive' distinction used by some courts."[109] Instead, the court examined the hazardous substance in the case, characterized it, and then examined whether the hazardous substance fit within any of CERCLA's defining terms.[110] The Ninth Circuit found that the movement of the viscous tar-like material and the slag at issue could be characterized as "'spreading,' 'migration,' 'seeping,' 'oozing,' and possibly 'leaching,'" but that none of those terms fit within the ordinary meaning of the words CERCLA used to define "disposal."[111] As a result, the contaminants were not covered by CERCLA.[112] While the Ninth Circuit concluded that passive soil migration was not included in "disposal," the court also stated that "disposal" "may include other passive migration that fits within the plain meaning of the terms used to define 'disposal.'"[113]

3. The Court's Reasoning.—In *Crofton Ventures Ltd. Partnership v. G & H Partnership*, the Fourth Circuit held that the term "disposal" as used in CERCLA should include passive as well as active "disposal."[114] First, the Court found that the district court read the term "disposal" too narrowly when it required Crofton to show "that the *defendants placed* or *dumped* TCE on the site."[115] Second, the Fourth Circuit found that by requiring Crofton to show evidence linking the TCE used by the defendants on that site to the TCE that was found buried in drums on the site, the district court departed from the strict liability standard established by CERCLA.[116] To reach this conclusion, the

106. *Carson Harbor II*, 270 F.3d at 869.
107. *Id.* at 867.
108. *Id.* at 877-78 (quoting 42 U.S.C. § 6903(3) (2000)).
109. *Id.* at 879.
110. *Id.*
111. *Id.*
112. *Id.* at 879-80.
113. *Id.* at 881.
114. *Crofton*, 258 F.3d at 299.
115. *Id.* at 300.
116. *Id.*

Fourth Circuit relied on the plain meaning of the terms in the statute and on its prior decisions supporting passive "disposal" and imposing strict liability.[117]

Writing for the majority, Judge Niemeyer examined CERCLA to determine the requirements for a plaintiff to recover contribution from a potentially responsible party.[118] The court found that Congress's use of the terms "discharge," "leaking," or "placing" created a broad definition of "disposal."[119] As a result, the court found that an owner or operator is liable for either active "disposal" by placement of hazardous waste or for passive "disposal" by leaking hazardous waste, regardless of whether the owner or operator was the cause of the "disposal" or had knowledge of it.[120] While the court cited *Nurad*, it did not provide arguments other than the plain meaning argument to support liability for passive "disposal," nor did the court respond to decisions in other circuits that either supported passive "disposal" or required active "disposal."

In his dissenting opinion, Judge Michael agreed "that a number of events or acts can constitute 'disposal' for the purposes of CERCLA liability."[121] Passive "disposal" was, however, a different theory of liability than liability based on active "disposal."[122] While cases could involve both passive and active "disposal," the dissent found that Crofton Ventures chose to try its case based on active "disposal" alone.[123] In doing so, Crofton Ventures waived the theory of passive "disposal."[124] In addition, Judge Michael found that Crofton Ventures did not produce sufficient evidence to prove that TCE leaked when the defendants were the owners of the property.[125]

4. Analysis.—Crofton Ventures is an important opinion in the debate over landowner liability for passive "disposal" because it affirmed the Fourth Circuit's position. By defining "disposal" to include both active and passive "disposal," the Fourth Circuit held firm against

117. *Id.* at 296.

118. *Id.* at 296-97. The court found that in order for a party who was liable under CERCLA to recover response costs, he must establish that he incurred costs which were consistent with the national contingency plan. In addition, he must show that the costs were incurred in response to a release or threatened release of a hazardous substance and that the defendant is also liable under CERCLA. *Id.* at 297.

119. *Id.* at 297.

120. *Id.*

121. *Id.* at 302 (Michael, J., dissenting).

122. *Id.* at 301.

123. *Id.* at 302-03.

124. *Id.* at 301.

125. *Id.* at 303.

a stream of decisions in other circuits requiring that a prior owner actively dispose the "hazardous substance" in order for that owner to be liable under CERCLA.[126] The court reached the correct decision by acknowledging that passive "disposal" of "hazardous substances" can trigger CERCLA liability, but the court's argument would have been more persuasive if it had addressed the ongoing debate over passive "disposal" in other circuits.

A broader definition of "disposal" of "hazardous substances" that includes both active and passive "disposal" is the correct interpretation. First, a broader definition of "disposal" is consistent with the plain meaning of CERCLA's definition of "disposal"[127] and the events that led to CERCLA's enactment.[128] Second, requiring active "disposal" would frustrate the purpose of CERCLA by opening a loophole in CERCLA's liability scheme.[129] Landowners with a leaking "hazardous substance" that they did not place on their property would have an incentive to sell the property without disclosure to escape liability.[130] Third, courts' attempts to limit the meaning of the terms in the definition of "disposal" by using the linguistic canon *noscitur a sociis* are not persuasive because there is nothing to indicate that courts should go beyond the plain meaning of the terms.[131] Lastly, arguments in other circuits that "disposal" should be read as active disposal because of passive disposal's conflict with their interpretation of the innocent owner defense are not persuasive because an alternative interpretation of the innocent owner defense avoids any conflict with a plain meaning of "disposal."[132]

a. A Broader Definition of "Disposal" Is Consistent with CERCLA's Text and Purpose.—A definition of "disposal" that includes both active and passive "disposal" is consistent with the plain meaning of the terms in CERCLA's definition. Ordinarily, a court begins its inter-

126. *See supra* notes 71-103 and accompanying text (discussing federal circuits that require active "disposal" for CERCLA liability).

127. *See* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) (objecting to a district court decision that deprived the defining terms of "disposal" of their passive meaning); *Carson Harbor II*, 270 F.3d 863, 878 (9th Cir. 2001) (analyzing the plain meaning of the terms that CERCLA uses to define "disposal").

128. *Carson Harbor II*, 270 F.3d at 885-86 (describing drums that leaked and spilled hazardous waste in Love Canal and the Valley of the Drums as the incidents that led to CERCLA's enactment).

129. Stempien, *supra* note 53, at 20.

130. *Id.*

131. *See Carson Harbor II*, 270 F.3d at 885 (concluding that a search of CERCLA's legislative history does not show congressional intent to depart from the plain meaning of the terms in CERCLA).

132. *See* United States v. CDMG Realty Co., 96 F.3d 706, 716 n.7 (3d Cir. 1996).

pretation of a statute by examining the language of the act and determining whether the language in the statute is plain.[133] If the statute's language is plain, then a court's sole task is to enforce the statute.[134] In addition, if a statute includes a definition, the court's task is to follow that definition.[135] In CERCLA, the term "disposal" is defined to include "leaking" and "spilling."[136] The American Heritage Dictionary defines "leak" as "to escape or pass through a breach or flaw" or "to permit the escape or passage of something through a breach or flaw."[137] "Leaking" then includes an event that occurs without active human conduct. The American Heritage Dictionary defines "spill" as "[t]o cause or allow (a substance) to run or fall out of a container."[138] So, "spill" includes both an event caused by active human conduct and an event that occurs without active human conduct. Requiring "active human conduct" would strain the reading of "disposal."[139]

A statute "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent."[140] A broader definition of "disposal" is consistent with the events leading to CERCLA's enactment and CERCLA's legislative history. Love Canal and the Valley of the Drums were the two most prominent incidents that led to CERCLA's enactment.[141] Hundreds of drums of chemical waste leaked into the soil at Love Canal and Valley of the Drums.[142] Both abandoned hazardous waste sites "were described as spilling or leaking with no affirmative human conduct."[143] These incidents caused Congress to become aware of the problem of leaking abandoned hazardous substances.[144] When Congress enacted CERCLA, it chose to establish liability for prior owners at the time a "hazardous substance" was placed and deposited, as well as when it spilled or leaked.[145] Congress was familiar with active terms

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133. *Carson Harbor II*, 270 F.3d at 878 (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).

134. *Id.*

135. *Id.* (citing Stenberg v. Carhart, 530 U.S. 914, 942 (2000)).

136. 42 U.S.C. § 6903(3) (2000).

137. THE AMERICAN HERITAGE DICTIONARY 996 (4th ed. 2000); *see also* 8 OXFORD ENGLISH DICTIONARY 758 (2d ed. 1989) (describing the origin of "leak" as a flaw or fissure in a vessel); RANDOM HOUSE DICTIONARY 762 (rev. ed. 1988).

138. THE AMERICAN HERITAGE DICTIONARY, *supra* note 137, at 1674.

139. *See* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) (citing United States v. Waste Indus., Inc., 734 F.2d 159, 164-65 (4th Cir. 1984)).

140. United States v. Champlin Ref. Co., 341 U.S. 290, 297 (1951).

141. *See supra* note 128 (describing Love Canal as a reason for enacting CERCLA).

142. *Carson Harbor II*, 270 F.2d 863, 886 n.15 (9th Cir. 2001).

143. *Id.* at 886.

144. *See id.* at 886 n.15.

145. 42 U.S.C. § 6903(3) (2000).

like "placing."[146] If Congress wished to establish liability only for active "disposal," it could have established liability for placement and not included other terms such as "leaking." CERCLA's legislative history also supports liability for passive "disposal" because "the primary legislative sponsors and relevant committees regularly used the words 'spill' or 'leak' to describe passive events at abandoned sites."[147]

b. Requiring Active "Disposal" Opens a Loophole in CERCLA's Liability Scheme.—Requiring active "disposal" for liability would frustrate the purpose of CERCLA by decreasing the incentive for owners with leaking waste to act and creating an incentive for owners who did not place the waste to sell.[148] Under CERCLA, a current owner is strictly liable, and the fact that he or she did not own the property at the time of "disposal" does not allow that owner to escape liability.[149] In contrast, a prior owner is only liable at the time of "disposal."[150] If a landowner has leaking hazardous waste on his property that the landowner did not place and if "disposal" is interpreted narrowly, then the landowner can escape current owner liability by selling the property.[151] Imposing liability for both active and passive "disposal" provides a greater incentive for landowners to clean up abandoned storage tanks.[152] Owners are more likely to act before contamination spreads further and increases their clean up costs.[153] If the owner was truly an innocent purchaser who was unaware of the leaking, then he could avoid liability under the alternative construction of the innocent owner defense.[154]

An interpretation of "disposal" that includes both active and passive disposal is more consistent with CERCLA's design as a comprehensive liability regime that encourages private party action to "remedy environmental hazards."[155] When interpreting a statute, the

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146. *Id.*

147. *Carson Harbor II*, 270 F.3d at 886. Representative Florio stated, "Hundreds, possibly thousands, of neglected, leaking disposal sites presently dot the country—threatening to release their lethal contents . . . ." *Id.*

148. Stempien, *supra* note 53, at 20.

149. 42 U.S.C. § 9607(a)(1).

150. *Id.* § 9607(a)(2).

151. Stempien, *supra* note 53, at 20.

152. *Carson Harbor II*, 270 F.3d at 881; *see also* PERCIVAL ET AL., *supra* note 41, at 265-66.

153. Stempien, *supra* note 53, at 4 n.13 (describing increasing clean up costs as hazardous substances spread through the environment).

154. *But see* United States v. CDMG Realty Co., 96 F.3d 706, 716 n.7 (3d Cir. 1996) (finding that this alternative construction has only "facial appeal"). *See infra* notes 169-178 and accompanying text.

155. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) (citing *In re* Dant & Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991)).

court should examine the statute's text and also the "design of the statute as a whole and to its object and policy."[156] In contrast to other environmental laws that operate based on a regulatory regime, CERCLA was designed to operate based on liability to "provide for liability, compensation, clean up, and emergency response for hazardous substances released into the environment and the clean up of inactive hazardous waste disposal cites."[157] The liability mechanism of CERCLA is also designed to provide a deterrent effect and reduce spilling and dumping of hazardous waste through the imposition of liability.[158] Interpreting "disposal" to require active "disposal" removes prior owners who acquired the property after the time the "hazardous substance" was placed from the liability regime.[159] Removing one class of prior owners reduces CERCLA's deterrent effect.[160] As a result, requiring active "disposal" weakens one aspect of CERCLA's liability scheme.

c. Active "Disposal" Arguments Using Noscitur a Sociis.—The argument used in *Petersen Sand & Gravel* and *CDMG* to limit the meaning of "disposal" to active "disposal" based on the linguistic canon *noscitur a sociis* is not persuasive without any indication that Congress intended the terms to be read narrowly.[161] Without a clear indication of a contrary legislative intent, statutory language should control a court's construction.[162] The court should only override the literal terms of a statute "under rare and exceptional circumstances."[163] Forcing "leak" and "spill" to require recent human action departs from the plain meaning of those terms in the statute.

A narrow reading of "disposal" also conflicts with the interpretive canon that remedial statutes should be construed broadly.[164] Under the remedial purpose canon, judges should construe the statute broadly to address the problem that the legislature sought to remedy.[165] A remedial statute is one that is not penal, that is procedural,

156. Crandon v. United States, 494 U.S. 152, 158 (1990).

157. *Carson Harbor II*, 270 F.3d at 880 (quoting Pub. L. No. 96-510, 94 Stat. 2767 (1980)).

158. *See* PERCIVAL ET AL., *supra* note 41, at 266.

159. Stempien, *supra* note 53, at 20.

160. *See id.* at 25.

161. *See supra* notes 71-83, 92-103 and accompanying text (discussing *Petersen Sand* and *CDMG*).

162. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3 (1981).

163. Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

164. *See Carson Harbor I*, 227 F.3d 1196, 1207 (9th Cir. 2000) (arguing that "disposal" should be read broadly to be consistent with CERCLA's remedial purpose).

165. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 230 (1996).

or that allows a cause of action to recover for injury.[166] One commentator asserts, "CERCLA is not only more remedial than most legislative enactments, it is arguably the most remedial of all federal environmental statutes, since its controlling focus is to remedy the harmful effects of previously disposed hazardous wastes in order to preserve the public health and the environment."[167] Given that the narrow reading of active "disposal" conflicts with the plain meaning of "leak," the court should not interpret "disposal" narrowly.

The legislative history for CERCLA does not show that Congress intended to depart from the ordinary meaning of the terms that define "disposal."[168] The court should not read in a requirement for owner or operator active "disposal" absent legislative history showing that Congress intended "leaking" to depart from the ordinary use of the word.

d. An Alternative Construction to the Innocent Owner Defense.— Arguments in other circuits that a narrow reading of "disposal" is necessary to avoid a conflict between their interpretation of the innocent owner defense and "disposal"[169] are weak because an alternative interpretation of the innocent owner defense would avoid a conflict between the two CERCLA provisions. In *CDMG*, the Court of Appeals for the Third Circuit reasoned that imposing liability for passive "disposal" of "hazardous substances" would make the innocent owner defense "basically useless."[170] The innocent owner defense states that a property owner is not liable if he can show that the contaminated property "was acquired by the defendant *after the disposal or placement of the hazardous substance* . . . ."[171] The *CDMG* court reasoned that with passive "disposal" an innocent owner who purchased property with leaking waste would not be protected because if the waste leaked over a long period of time, the purchaser would have difficulty proving that he acquired the property after the disposal.[172] In a footnote, however, the Third Circuit pointed out that an argument can be made for an alternative interpretation of the innocent owner defense which allows

166. *Id.* at 233.

167. *Id.* at 286.

168. *Carson Harbor II*, 270 F.3d 863, 885 (9th Cir. 2001) (noting that "[a]ny inquiry into CERCLA's legislative history is somewhat of a snark hunt").

169. *See, e.g.*, United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1352 (N.D. Ill. 1992).

170. United States v. CDMG Realty Co., 96 F.3d 706, 716 (3d Cir. 1996).

171. 42 U.S.C. § 9601(35) (2000) (emphasis added).

172. *CDMG*, 96 F.3d at 716; *see also* ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 358 (2d Cir. 1997).

that provision to retain "significant meaning" even with an interpretation of "disposal" that includes both active and passive "disposal."[173] The Third Circuit noted that a condition of the innocent owner defense is the purchase "after disposal *or placement*."[174] Even if leaking is a continual event, placement could be interpreted as the event of bringing the hazardous substance onto the property.[175] The Third Circuit admitted that this argument had "facial appeal," but reasoned that "placement" was redundant of the term "disposal."[176] However, in the innocent owner defense, Congress used the disjunctive "or," so that the defense applies either after the "disposal" *or* after the placement of hazardous material.[177] Using this construction, the innocent owner defense remains viable if the defendant can show that he purchased the property after placement of the hazardous substance.[178] For example, if a defendant made an appropriate inquiry and purchased property that had a buried, slowly leaking drum of hazardous waste, he would be able to assert the innocent owner defense if he could show that he purchased the property after the drum was placed on the property.

5. Conclusion.—In *Crofton Ventures Ltd. Partnership v. G & H Partnership*, the Court of Appeals for the Fourth Circuit held firm against a stream of decisions in other circuits requiring active "disposal" for a prior owner to be liable under CERCLA. In the Fourth Circuit, former owners and operators remain liable for both the active placement of hazardous material on the property and for the passive leaking of the hazardous material into the soil.[179] The Fourth Circuit's analysis would have been more persuasive if it had addressed the decisions of other circuits requiring active "disposal" for CERCLA liability. While the Fourth Circuit's opinion is less persuasive than it could be in this ongoing debate, the court did reach the correct result. A broader interpretation of "disposal" is consistent with the plain meaning of CERCLA's text and the events leading up to CERCLA's enactment. The arguments in other circuits to limit liability to active "disposal"

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173. *CDMG*, 96 F.3d at 716 n.7.

174. *Id.*

175. *Id.*

176. *Id.* The terms are not redundant because "disposal" includes "placing" and also "discharge, deposit, injection, dumping, spilling, [and] leaking . . . ." 42 U.S.C. § 6903(3). As a result, placement is actually a subset of "disposal" and not a redundant term. "[O]r placement" should not be blue-penciled out.

177. *Carson Harbor I*, 227 F.3d 1196, 1209-10 (9th Cir. 2000).

178. The defendant would also need to meet the other statutory requirements. *See supra* notes 54-58 (describing the innocent owner defense).

179. *Crofton*, 258 F.3d at 296.

based on *noscitur a sociis* and an alleged conflict with the innocent owners defense are not persuasive. In the absence of any evidence indicating that Congress intended to depart from the ordinary meaning of the language to which Congress and the President agreed, the courts should not narrow the scope of "disposal."

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