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Tributes to Judge Howard Chasanow

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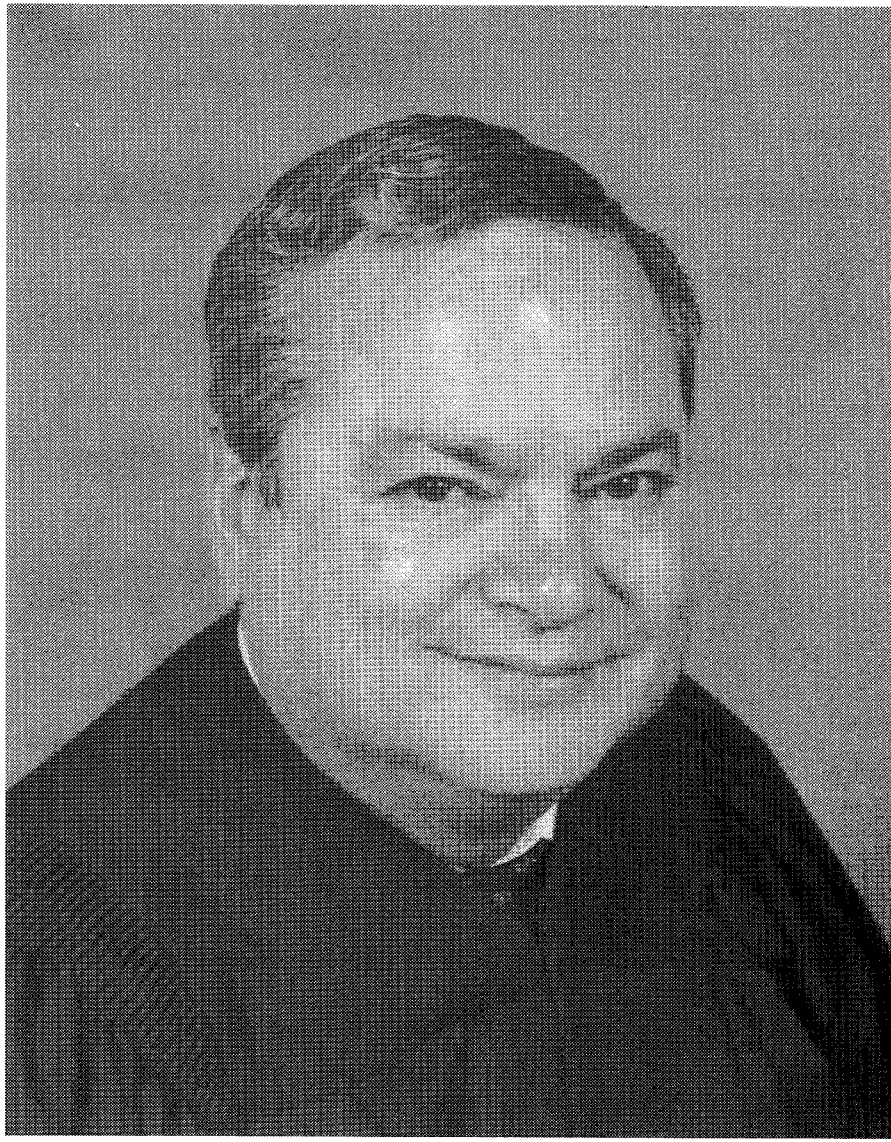

JUDGE HOWARD CHASANOW

The editors of the *Maryland Law Review*
dedicate this issue to Judge Howard Chasanow

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Tributes

TRIBUTES TO JUDGE HOWARD CHASANOW

INTRODUCTION

WILLIAM L. REYNOLDS*

Howard Chasanow retired as an Associate Judge of the Court of Appeals of Maryland on August 15, 1999. He had served for nine years on that court, and a total of thirty years as a judge of this state. Howard's judicial career, marked by wisdom, dignity, and common sense, has earned him great respect throughout Maryland; but it is possible that he has won more praise for his friendship, sincerity, and humor.

Accordingly, it was thought appropriate to devote the annual meeting of the Section on Judicial Administration of the Maryland State Bar Association to a review of Howard's work.[1] Although advertised as a "roast," the panel of speakers could do little more than "toast" Howard lightly; and even that was mixed in with much praise. The three speakers, of course, are old friends of Howard. Indeed, we know him primarily in other roles: law reformer, fellow law professor, and friend. We can only hope that our scholarly dedication to truth has kept us reasonably honest.

The first paper, however, is not by a professor, but by another judge, Deborah Chasanow, of the United States District Court for the District of Maryland. Judge Chasanow provides us with an interesting perspective on her husband. Professor Alan Hornstein then examines

* Jacob A. France Professor of Judicial Process, University of Maryland School of Law.

1. The session was held on June 8, 1999, at the MSBA Annual Meeting in Ocean City, Maryland. The Section on Judicial Administration has presented an annual review of the work of the Court of Appeals since 1980.

Howard's opinions concerning the law of evidence. Next, I subject Howard's opinions to a legal process analysis. Finally, Professor Edward Tomlinson examines Howard's administrative law opinions.

DEBORAH K. CHASANOW*

As I write this introduction to the very nice, incisive articles by Professors Hornstein, Reynolds, and Tomlinson, it has been more than six months since Howard "retired" from the Court of Appeals of Maryland. One thing is very clear: retirement has not meant leaving the judiciary. What it has meant for Howard is that he can return to his first love, the trial courtroom, and venture enthusiastically into the growing realm of alternative dispute resolution. Those of us who know Howard are not surprised. His training, experience, and concern for professional excellence have naturally prepared him for his current work.

I make no pretense of being unbiased when it comes to assessing Howard's role as a judge. Indeed, Professor Reynolds invited me to write this paper because he thought I might have a unique perspective and insight due to my personal relationship with Howard as well as my own judicial career. In Maryland, though, it is not at all unique to be part of a judicial couple. In recent times, there have been at least six. Howard remarked at the investiture of Judge Peter Krauser to the Court of Special Appeals that, despite this growing list of Maryland judicial couples, there still was no established way to address mail to a two judge household. We've received letters addressed to the Judges Chasanow, the Honorable Chasanows, the Honorable and the more Honorable Chasanow, the Honorable Howard S. Chasanow, et hon ux, and, his favorite, the Hons. As he said, it sometimes makes reading envelopes more fun than reading the mail.

It is still difficult to know what is safe to comment on and what is not—the confidences of the marriage relationship are at least as stringent as the confidences of a judge's chambers, perhaps more so. But I'll try to provide an insight into Howard's working life from my perspective.

Perhaps a little history is in order. Judge Howard S. Chasanow, a lifelong resident of Prince George's County, graduated from the University of Maryland School of Law in 1961, first in his day school class. With law school teaching a future goal, he went on to receive an LL.M. from Harvard in 1962. Military service prevented him from accepting a judicial clerkship offered by Judge Edward S. Northrop, on

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* Judge, United States District Court for the District of Maryland.

the United States District Court for the District of Maryland. When he was able to begin the practice of law, he joined the State's Attorney's Office for Prince George's County and practiced law part time, with his father. A year later, he became the first full time Deputy State's Attorney under Arthur A. Marshall, Jr. He resumed the private practice of law in 1969.

In 1970, he became a substitute People's Court Judge. The creation of the District Court in 1971 provided him an opportunity to become a full time judge. He remained on the District Court until December 1976, when he succeeded Judge Ralph Powers on the Circuit Court. In 1990, he was appointed to the Court of Appeals of Maryland by Governor William Donald Schaefer. He left the Court of Appeals on August 15, 1999, and now sits by designation on courts throughout the State. In addition to presiding over trials in Prince George's, Anne Arundel, and Dorchester Counties, he is active in alternative dispute resolution efforts in several counties.

Howard always enjoyed an excellent reputation among the lawyers who appeared in his courtroom as a fair, able, and personable judge. He often met with counsel after a case was over to point out their strengths and weaknesses, so that their skills would be enhanced. As an appellate judge, his opinions were appreciated by the trial bench and bar for their logic and practicality, as much as for their scholarship.

He has taught at the University of Maryland School of Law, first criminal procedure in the 1970s, and more recently, evidence. He generously gives of his time to teach at the New Trial Judge programs for Maryland judges, lectures to State's Attorney and Public Defender offices, and participates in MICPEL programs. For over twenty years, he has taught evidence to judges throughout the country for both the American Academy of Judicial Education and the National Judicial College.

The "homework" of an appellate judge won't fit in any normal briefcase. Instead, the judges use banker's boxes, or rumor has it, those fabric log carriers designed to carry firewood. Reading briefs and petitions for certiorari consumes massive amounts of time and Howard always said he could do his reading more efficiently at home, where there were fewer distractions (that was before Sukoshi, our black pug, became a member of the family). As the years progressed, technology made working at home easier. The law on disk services provided access to Maryland cases, at least back to the early 1900s, although Howard has lamented how the advent of computer assisted legal research has reduced the universe of precedent cited by attor-

neys to cases since 1939. The judges circulate draft opinions by e-mail, and they could be e-mailed to Howard at home. The only real drawback to having Howard work at home was the long distance telephone bill.

The isolation, and the big change from being a trial judge, were not easy to adapt to. I sometimes felt sorry for those attorneys and trial judges who happened into Howard's chambers in Upper Marlboro. It was often a long stay. Like a spider's web, his natural desire to interact with others on legal matters drew them in and trapped them until he had satiated his need for conversation. He joked that visitors became prisoners to his loneliness. I like to think that my availability at home also contributed to his success as an appellate judge. Sometimes the nature of the things the judge wants to say demands another audience—one who will not take umbrage. I hope Howard appreciated my availability to be that kind of audience. Because he and I almost always agree, I'm not sure how well I handled the role of Devil's Advocate.

Conflicts were unlikely, we knew, but there were times during the past nine years when being married to a Court of Appeals judge caused more than the normal type of conflict problems. There was the day my husband called to let me know that, unbeknownst to either of us, one of the cases on the docket that day was a certified question from the Fourth Circuit in one of my cases. Although the district judge receives a copy of a notice of appeal, we do not receive information on the proceedings thereafter until the opinion arrives, by FAX if it's bad news, or in the mail. Thus, I did not know that the appellate court had certified a question of state law to the Court of Appeals of Maryland. And, for some reason, none of the briefs filed in the appellate court thought to mention the name of the trial judge. It was only during oral argument that one of the attorneys mentioned my name. Embarrassed, Howard quickly gathered his papers and left the bench. Sometimes Howard would call to ask if I had handled anything in a particular case, perhaps hoping that a conflict would appear.

While I eagerly read any opinion that he asked me to read, I must confess that I did not read most of the court's opinions at the time they were issued. I glance at the *Daily Record* synopsis of Maryland opinions, but primarily rely on the parties, my law clerks, or my own research to unearth the relevant Maryland precedent. Thus, when an attorney in oral argument before me refers knowingly to a particular case like I should be intimately familiar with it, I get a little nervous. Just because an opinion was authored by Judge Howard Chasanow does not mean that Judge Deborah Chasanow knows it by heart!

The authors of the papers published in this issue focused on several themes of Howard's tenure on the appellate bench: his practicality, respect for discretion of trial judges, and judicious use of precedent. Those perspectives came naturally to him and animated his desire to explain the practical ramifications of any decision—whether writing for the majority or in dissent. I always marveled at his ability to write the facts of a case in an easy, informative way so that the legal analysis had a clear backdrop. In "retirement," I am sure he will keep watching to see how true his prophesies turn out to be.

On behalf of Howard and myself, I want to thank the *Law Review* and the authors for this high honor.

ALAN D. HORNSTEIN*

When I was asked to participate in this *Festschrift* to pay homage to Judge Howard Chasanow for his contributions to Maryland's jurisprudence, I was flattered and delighted—flattered because I had long admired Judge Chasanow's work in the law of evidence, the topic I was asked to address, and delighted because I thought it could be easily accomplished. I was half right. Judge Chasanow's contributions to the evidence law of Maryland is worthy of admiration. Indeed, anyone seeking to understand Maryland's evidence law must become acquainted with Judge Chasanow's work. But a complete appreciation of that contribution can not be accomplished in the brief space allotted in this issue of the *Maryland Law Review.* Instead, this essay is limited to Judge Chasanow and the recently enacted Maryland Rules of Evidence. In a future issue of the Review, we will explore in greater detail Judge Chasanow's contribution writ large.[2]

Among the more challenging concepts in the law of evidence—yet central to its understanding and correct application—is the notion of relevance. Relevance is a relational notion, describing the relation between a piece of evidence and the proposition for which it is offered, such that the evidence changes the probability of the truth of the proposition. Thus, a particular piece of evidence may be relevant to any of several different propositions. For example, in preparing for this essay, I called Judge Chasanow's chambers and asked for a copy of his c.v. I was told that the latest available was from 1996. One might draw several inferences from that piece of evidence. For instance, it

* Professor of Law, University of Maryland School of Law. A modified version of this paper was presented for the Judicial Administration Section of the Maryland State Bar Association at its annual meeting, June 10, 1999, Ocean City, Maryland.

2. Alan D. Hornstein & Nichole G. Mazade, *A Match Made in Maryland: Howard Chasanow and the Law of Evidence,* 60 MD. L. REV. (forthcoming 2001).

might be that Judge Chasanow has simply done nothing since 1996; alternatively, it might be that he decided in 1996 to stop looking for work. As he would be the first to tell you, the evidence is relevant to both propositions (though, of course, sufficient to establish neither).

Judge Chasanow and I have a long association, beginning with his first stint on the adjunct faculty at this law school. He taught in the criminal procedure area, and I taught Evidence, both of us late into the evening. But it was not that which brought us together. It was rather that he was the only faculty member at Maryland who was even shorter than I, and so I took an immediate liking to him. Even as a criminal procedure teacher, however, his interest in the law of evidence—perhaps further stimulated by his appointment to the Circuit Court for Prince George's County—led to any number of fascinating conversations about problems in evidence.

Those conversations continued over the years when Howard invited me to join a small group of judges and lawyers who would meet at his favorite Chinese restaurants to discuss evidence issues, a group I came to think of as the Hong Shu Gai and Hearsay Group. Howard thought he might be able to learn some evidence law that way, but he wound up teaching the rest of us instead. I hope that with his retirement from the Court of Appeals he will reconstitute that group. Most of us learned a lot of evidence over those tables—it was, you might say, food for thought.

Since then, Judge Chasanow has continued to instruct us in the law of evidence, chiefly but not solely from the bench, and like most teachers, sometimes he gets it right and sometimes he gets it not quite right. Now, I am not going to review here all of Judge Chasanow's opinions and other contributions to the law of evidence in Maryland. That larger project must await a later opportunity. Here the focus of our attention will be the enactment of Title 5 of the Maryland Rules of Practice and Procedure—the Evidence Rules.

Although Maryland was late to recognize the benefits of codification,[3] Judge Chasanow was one of the great champions of the effort to codify Maryland's chaotic law of evidence. An earlier attempt at codification, under the leadership of Judge Rodowsky, failed to win acceptance by the Court of Appeals.[4] Several years later, when the Court of

3. Maryland was the thirty-eighth state to adopt a body of evidence rules modeled on the Federal Rules of Evidence. For a brief history of Maryland's efforts at codification of its law of evidence, see Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1033-34 (1995); LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 1.3 (1994).

4. MCLAIN, *supra* note 3, at 7.

Appeals agreed to have the Rules Committee again investigate the benefits of codification, Judge Chasanow, then a Judge of the Circuit Court, was appointed to chair the Evidence Rules Subcommittee, charged with drafting a code of evidence for the state. As Chair, Judge Chasanow made no secret of his preference for a body of rules that would not merely take the federal rules as a model, but that would depart from them only to the extent necessary to accommodate their application to a state system of justice.

It is a base canard that the Judge took this position in deference to the other Judge Chasanow.[5] The more likely reason was simply his disinclination to have to learn something new. Had the new rules more closely adhered to the federal model, Debbie could have taught him everything he needed to know. In any event, some of his objections to departures from the language or structure of the federal rules were well taken, others less so, and a few simply misconceived.

After the subcommittee began its work, Judge Chasanow was appointed to the Court of Appeals, and the Chair of the Subcommittee devolved to Judge Wilner. Thus, Judge Chasanow was not privy to the detailed deliberations of the subcommittee over the ensuing several years that new rules were being drafted and discussed. Judge Chasanow's next official connection with the proposed new rules, comprised by Title 5, came when they were presented to the Court of Appeals for approval. Perhaps not surprisingly, while enthusiastically favoring the enactment of a codified body of evidence law, Judge Chasanow was less than delighted by the departures from the language and, less frequently, the substance of the federal rules. As he explained, "In disregard of the common sense maxim, 'if it ain't broke, don't fix it,' the Rules Committee recommended, and this Court adopted, rules patterned after the Federal Rules, but which alter the language in over four-fifths of the Federal Rules."[6] His partial dissent from the order adopting the new rules catalogs the departures from federal rule language. Some of these departures were designed merely to correct grammatical errors or infelicitous phrasing. For example, Rule 5-103(a) differs from Federal Rule of Evidence 103(a) to correct the use of the non-restrictive "which" to the restrictive "that."[7]

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5. Judge Chasanow's spouse, the Honorable Deborah Chasanow, is a United States District Judge for the District of Maryland.

6. Md. Order Adopting Rules of Practice and Procedure, Dec. 15, 1993 (Chasanow, J., partial dissent) [hereinafter Chasanow Rules dissent].

7. *See* MD. RULE 5-103(a), "Error may not be predicated upon a ruling [which] *that* admits or excludes evidence . . . ." (Brackets indicate deletions from Fed. R. Evid. 103(a); italics indicate additions). *Compare* FED. R. EVID. 102, *with* MD. RULE 5-102.

Similarly, some of the changes in language were intended to clarify the meaning of particular provisions without altering the consequences of applying the rule,[8] while others were drafted to change the results envisioned by the federal rules.[9] Judge Chasanow dissented from twelve of the adopted rules.[10]

Judge Chasanow was concerned that a change in the language would signal a change in the interpretation to be given a rule, even in instances in which the Rules Committee expressly disclaimed any such intention.[11] In short, he was concerned that the attempt at improving the language would result in unnecessary confusion.[12] In the main, that fear turned out to be groundless, though it must be admitted that the occasional case suggests the validity of Judge Chasanow's concern. Fortunately, he is around to straighten us all out.

Federal Rule of Evidence 801(d)(1)(b) provides for the substantive use of a prior consistent statement of a witness to rebut a charge of recent fabrication, typically based on impeachment by prior inconsistent statement. The cognate Maryland rule omits the word "recent."[13] Suppose Zoltan testifies at trial that the defendant did not shoot the victim, and the State impeaches Zoltan with evidence that on a prior occasion he said that the defendant did shoot the victim and that Zoltan has changed his story because the defendant had threatened him. The rule on the substantive use of prior consistent statements might then allow the defendant to offer another out-of-court statement by Zoltan that is consistent with his current testimony—that the defendant did not do the dastardly deed.

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8. Nine of the Maryland Rules contain a source note stating that the rule is "derived without substantive change" from the corresponding Federal Rule and that "[a]ny language differences are solely for purposes of style and clarification." MD. RULES 5-102, 5-105, 5-106, 5-406, 5-602, 5-705, 5-706, 5-802.1(e), 5-805; *see also infra* notes 13-18 and accompanying text (discussing MD. RULE 5-802.1(b)).

9. Maryland Rule 5-612 provides that when a writing or other item is used to refresh a witness's memory *while the witness is testifying*, other parties may inspect the writing or item or question the witness about it. MD. RULE 5-612. This rule eliminates the provision of Fed. R. Evid. 612 that also permits (where necessary in the interests of justice) the inspection of, or cross examination about, writings used by a witness *before testifying* to refresh the witness's memory for the purpose of testifying. FED. R. EVID. 612 (emphasis added).

10. Chasanow Rules dissent, *supra* note 6. Judge Chasanow dissented from the following rules: Rules 5-103; 5-404; 5-408; 5-409; 5-612; 5-613; 5-615; 5-616; 5-801; 5-802.1; 5-803; 5-902. *Id.*

11. *See supra* note 8 and the rules cited therein.

12. *See* Chasanow Rules dissent, *supra* note 6 ("Attempting to clarify but not change the substance of a specific Federal Rule, by rewriting the rule, may create, rather than alleviate, confusion.").

13. MD. RULE 5-802.1(b).

Under the common law and the federal rule, Zoltan's prior consistent statement could be used only if it were made before the motive to fabricate arose—that is before the threat. This makes perfect sense analytically: If the impeacher's claim is that Zoltan's current testimony was fabricated because of the threat after he made a statement identifying the defendant, the fact that Zoltan denied the defendant's involvement before he was threatened suggests that his current testimony is not fabricated. On the other hand, if his denial of the defendant's involvement follows the threat, the earlier denial does nothing to rebut the charge that the denial at trial is fabricated. The claimed fabrication must be more "recent" than the statement offered to rebut it. But "recency" is an awkward way of describing this notion. For one thing it does not, by its terms, relate the timing of the two statements—the inconsistent statement and the earlier statement offered to rebut it—to each other; it suggests instead that the alleged fabrication have been made close to the time of trial. Nevertheless, in *Tome v. United States*,[14] the Supreme Court construed the federal rule as requiring that the prior consistent statement be made before the motive to falsify arose.[15]

In *Holmes v. State*,[16] Judge Chasanow explored the significance of Maryland's deletion of the word "recent" as a modifier of the word "fabrication." Distinguishing *Tome* and despite the weight of the common law on the admissibility of prior consistent statements, the Court of Special Appeals had held that the deletion of "recent" implied the admissibility of prior consistent statements whether or not made before the motive to falsify arose.[17] Writing for the Court of Appeals, Judge Chasanow interpreted the Maryland evidence rule on prior consistent statements to accord with the common law's pre-motive requirement, and incidentally, consistently with the Supreme Court's interpretation of the federal rule in *Tome*.[18] Judge Chasanow was not confused by the elimination of the word "recent" in the Maryland rule, illustrating what the drafters of the rule anticipated: that a clear and careful analysis would assure that efforts to clean up the federal rules would not result in unintended differences in interpretation.

Another departure from the Federal Rules of Evidence can be found in Rule 5-616, which has no federal counterpart. Rule 5-616, an omnibus rule on the impeachment and rehabilitation of witnesses,

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14. 513 U.S. 150 (1995).
15. *Id.* at 167.
16. 350 Md. 412, 712 A.2d 554 (1998).
17. 116 Md. App. 546, 698 A.2d 1139 (1997).
18. *Holmes*, 350 Md. at 422, 712 A.2d at 558.

purports to list the various methods of impeaching and rehabilitating a witness and provides for the circumstances under which extrinsic evidence (as opposed to examination of the witness to be impeached or rehabilitated) might be admitted for this purpose. No comparable federal rule exists, and indeed, the Federal Rules have been criticized for a lack of rules governing, for example, impeachment by bias.

Judge Chasanow was analytically sophisticated enough to understand that a rule governing impeachment by bias was entirely unnecessary.[19] The Rules—Federal and Maryland—permit the introduction of all relevant evidence, unless excluded or limited by some other rule, statute, or constitution.[20] So, if evidence of the bias of a witness is relevant, and there is no particular restriction imposed or foundation required for the admissibility of such evidence, there is no necessity for a rule.

This is a crucial bit of understanding about the structure of the rules. With very few exceptions, these bodies of rules—state or federal—are rules of exclusion: They say what relevant evidence is *not* admissible. Thus, the absence of a rule suggests that the evidence at issue is (assuming relevance) admissible without restriction.[21] So, when the rules were adopted, it appeared that Judge Chasanow was correct in the view that this omnibus impeachment rule was unnecessary. Since then, however, I have come to believe that though analytically unnecessary, it has been helpful to the state's lawyers to have a rule that collects the various methods of impeachment and rehabilitation under a single provision.

The Maryland Rules—unlike their federal counterpart—treat party admissions as an exception to the hearsay rule.[22] Now this should come as no surprise to those who learned evidence before the advent of the federal rules, since the overwhelming judicial treatment was to characterize admissions as a hearsay exception. There were, however, the occasional law professors who viewed admissions not as an exception to the hearsay rule, but as nonhearsay.[23] These profes-

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19. Chasanow Rules dissent, *supra* note 6.

20. FED. R. EVID. 402; MD. RULE 5-402; *see* United States v. Abel, 469 U.S. 45 (1984).

21. *See* Hornstein, *supra* note 3, at 1054 n.97.

22. MD. RULE 5-803(a).

23. *See, e.g.*, Zachariah Chafee, Book Note, 37 HARV. L. REV. 513, 518-19 (1924) (reviewing JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1923)) ("[W]e need not worry about the Hearsay rule at all, because admissions are *sui generis* and rest on a deep-rooted human instinct antedating common law rules of Evidence . . . . We do not have to justify [their] general trustworthiness, as in the case of true hearsay exceptions . . . ."); EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1962) ("[T]he rule which makes admissions receivable is older than the hearsay rule and . . . the orthodox decisions refuse to apply to evidence of personal admis-

sors, following the sainted Wigmore's lead,[24] saw the admissibility of party admissions as a function of the adversary system rather than as based on the trustworthiness of the statement, as were the other hearsay exceptions. The theory, in brief, was that the restrictions on hearsay evidence are based on the lack of opportunity to cross-examine, and because a party could not complain about the lack of opportunity to cross-examine himself or herself, party admissions presented none of the dangers with which the hearsay rule is concerned.[25] There was some limited validity to such a view. So the drafters of the Federal Rules, perhaps in an attempt to show their erudition, followed the professors.

There are two problems with such a treatment, however. First, the Federal Rules define hearsay as an out-of-court statement offered for the truth of the matter asserted.[26] Party admissions are squarely within that definition; yet, the very next paragraph of the Federal Rules declares such statements (along with some others that also meet the definition) to be nonhearsay.[27] Now, whatever else one might say about the theory of party admissions, this is simply intellectually incoherent. It is not intellectually permissible to define a concept and then immediately exclude by fiat something squarely within the definition.

Second, even on its own terms, the professors' analysis works only for the personal admission.[28] Perhaps it can be extended to the authorized admission.[29] But it falls apart when one turns to vicarious admissions—unauthorized statements by agents[30] or co-conspirators.[31] Remember the professors' theory: There is no need to provide a party the opportunity to cross-examine himself or herself. So, if Zoltan is driving his car and hits someone and makes a statement, it should not violate the policy underlying the hearsay rule for Zoltan's

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sions restrictions usually applicable to testimonial evidence."); Edith L. Fisch, *Extra Judicial Admissions*, 4 SYRACUSE L. REV. 90, 90 (1953) (stating that many theories have been brought up to explain the testimonial use of admissions and that "[t]he one most generally accepted is that exclusionary rules are designed for the protection of the party against whom the evidence is offered. As the declarant is the one who made the statement he has no standing to complain that he was not under oath, that there was no confrontation or that he had no opportunity to cross-examine himself.").

24. 4 WIGMORE, EVIDENCE § 1048, at 4-5 (Chadbourne rev. 1972).

25. *Id.*

26. FED. R. EVID. 801(c).

27. FED. R. EVID. 801(d), "Statements Which Are Not Hearsay."

28. *See* FED. R. EVID. 801(d)(2)(A), (B); MD. RULE 5-803(a)(1), (2).

29. *See* FED. R. EVID. 801(d)(2)(C); MD. RULE 5-803(a)(3).

30. *See* FED. R. EVID. 801(d)(2)(D); MD. RULE 5-803(a)(4).

31. *See* FED. R. EVID. 801(d)(2)(E); MD. RULE 5-803(a)(5).

own statement to be admitted against him at trial. Zoltan should not be heard to object to the lack of opportunity to cross-examine his own statement. But now, assume that Zoltan is a trucking company rather than an individual and that one of his drivers is involved in an accident and makes a statement that is sought to be admitted not just against her, but against Zoltan. Can it reasonably be claimed that Zoltan has no need to cross-examine the driver?

Such statements are often quite trustworthy. The driver or other agent is likely to have better knowledge of the event in question than other potential witnesses. There may be very good reasons to admit such statements despite the hearsay rule. But if such statements are admitted, they are admitted because they share the qualities of trustworthiness and necessity of other *exceptions* to the hearsay rule, not because there is no need to cross examine the declarant. Thus, they should be treated as exceptions to the hearsay rule as the Maryland rules treat them, rather than as nonhearsay as the federal rules would have it. On this one, Judge Chasanow, like the drafters of the Federal Rules, got it wrong.[32]

Modern developments in the law of evidence in Maryland differ from most other areas of law. Until 1995, the law of evidence was largely a patchwork of cases, with the occasional statute added to the mix. Thus, one seeking a grasp of the corpus of evidence doctrine had to turn to a treatise or other secondary authority[33] or scour the Maryland Reports, Maryland Appellate Reports and the Maryland Code. In 1995, the Court of Appeals promulgated Title 5 of the Maryland Rules of Practice and Procedure, codifying, for the first time, Maryland evidence law. Since then, of course, the interpretation and the application of those rules have been the province of judicial decisionmaking. So, we are once again thrown back to the cases. Now, however, that judicial authority can be organized coherently. Thus, in the development of the law of evidence in Maryland, the Court of Appeals has acted in its judicial capacity, but also in a quasi-legislative capacity, through rulemaking. Judge Chasanow has played an important part in both endeavors. The focus of this essay has been his role

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32. *See* Chasanow Rules dissent, *supra* note 6. Chasanow stated:

> In an unnecessary attempt to imply that Wigmore, the other evidence scholars, and the Federal Rules were in error when they classified admissions as nonhearsay, the Rules Committee moved admissions to Rule 5-803(a) and classified them as hearsay, but an exception to the hearsay rule. This change, like so many others, is unnecessary and a potential source of confusion and misinterpretation.

33. *See, e.g.*, MCLAIN, *supra* note 3; JOSEPH MURPHY, MARYLAND EVIDENCE HANDBOOK (3d ed. 1999).

in the quasi-legislative process of adopting the Maryland Rules of Evidence.

Once the Rules were enacted and the cases began working their way up to the Court of Appeals, Judge Chasanow's role was different. He was now called upon to interpret and to apply the new rules to specific cases under a traditional judicial regime. In some of these cases, he interpreted the relevant rule consistently with the interpretations of its federal counterpart;[34] in others, he took a decidedly different approach;[35] and in still others, he looked back to pre-existing common law evidentiary principles despite the enactment of a codified body of rules.[36]

But always, as we shall explore more fully next time[37] and as Professor Reynolds notes in his contribution to this *Festschrift*,[38] Judge Chasanow writes clearly; his research is thorough, the law and his rationale straight forward and easy to follow, with careful attention to facts and policy. We are fortunate to have had him on Maryland's highest court, and our fortune holds in his continuing contribution to the State's jurisprudence.

WILLIAM L. REYNOLDS*

Howard Chasanow is primarily a lawyer's judge—not a law professor's judge (that statement is meant as praise, and almost all lawyers would so understand it). His opinions are clear and straight-forward. There are no (or almost none) extended flights of rhetorical fancy or idle speculation. The research is thorough, including the widespread use of secondary sources, but the reader does not drown in the references. Most important, the law and its *ratio* are easy to understand. Howard's opinions show a real mastery of the subject; they also show a thorough understanding of the way the legal process works, surely an understanding that is due to his many years as a trial judge. That comprehension results from Howard's careful attention to the actual facts (and procedure) of the case, and his eminently sensible discussion of the law in relation to the facts. And it is that comprehension which makes possible such very clear opinions.

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34. *See, e.g.*, Holmes v. State, 350 Md. 412, 712 A.2d 554 (1998), discussed *supra* notes 16-18 and accompanying text.

35. *See, e.g.*, Streater v. State, 352 Md. 800, 724 A.2d 111 (1999); Sahin v. State, 337 Md. 304, 653 A.2d 452 (1995), discussed in Hornstein & Mazade, *supra* note 2.

36. *See, e.g.*, Streater v. State, 352 Md. 800, 724 A.2d 111 (1999); Conyers v. State, 345 Md. 525, 693 A.2d 781 (1997), discussed in Hornstein & Mazade, *supra* note 2.

37. Hornstein & Mazade, *supra* note 2.

38. *See infra* pages 14-20.

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But law professors do like Howard's opinions. Contrary to popular belief, some of us, at least, admire clear and comprehensible judicial writing. More important to academics, however, is the fact that Howard's opinions make the law better; his opinions, in other words represent sound policy and help to further the common endeavor that is our society.[39] Clarity and common sense are the watch words here.

An example of clarity, chosen more or less at random, is *Caldor, Inc. v. Bowden*,[40] a case arising out of an arrest of an employee for an alleged theft. The legal issues involved in *Caldor* were of some concern and confusion at the time. Howard set out to get the law on those issues straight—and they were a tough group: wrongful discharge, false imprisonment, defamation/conditional privilege, the preclusive effect (if any) of a juvenile master's decision, and malicious prosecution. In a comprehensive as well as comprehensible opinion, Howard managed to clarify the issues. In doing so, he made the law more predictable; that predictability, in turn, reduced the costs of litigation and made the life of trial judges (and trial lawyers) a bit easier.

Julian v. Christopher[41] provides a good example of Howard's use of common sense. There, the Court of Appeals, speaking through Judge Chasanow, held that commercial lessors generally had a duty to act reasonably when their consent was required to approve an assignment, even in the teeth of a general anti-assignment clause. In reaching that holding, the court had to overrule a fairly recent precedent of its own,[42] as well as to overcome centuries of hoary common law doctrine. *Julian* was a wise decision.[43] The opinion relied on developments elsewhere, developments in both case law and in secondary sources. The reliance on secondary sources is particularly important because it signals to practitioners that those sources—which they con-

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39. I will not hold Howard responsible for more than his pro rata share for the serious continued anomalies in Maryland law. I will mention none of them here because I may have to defend one of those policies in court one day.

40. 330 Md. 632, 625 A.2d 959 (1993). The case came back to the Court of Appeals recently on the issue of punitive damages. Caldor, Inc. v. Bowden, 350 Md. 4, 710 A.2d 267 (1997), *noted in* 58 MD. L. REV. 604 (1998).

41. 320 Md. 1, 575 A.2d 735 (1990).

42. *See* Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961).

43. I cannot be as kind to that part of the Court's decision to apply the holding in *Julian* prospectively. It is difficult for me to believe that prospective over-ruling is *ever* proper. *See* WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 162-72 (2d ed. 1991). It is certainly not proper in a case like *Julian* where developments elsewhere—amply demonstrated by Howard in his opinion—foreshadowed for the careful attorney the likely future of Maryland law and the resulting need to deal explicitly with the anti-assignment issue in the lease.

sult regularly—are reliable sources. Judge Chasanow also tied his holding nicely to the time-honored "[t]raditional property rules."[44] That tie-in reminds the reader of the opinion of the economic benefits served by a rule favoring the free alienability of property.[45]

The next two cases I wish to discuss are dissents written by Howard. In some respects writing a dissent is like shooting ducks in a barrel. All judges know that it is easier to write a dissent than a majority opinion (when other judges horn in on the dissenting process). Dissents, of course, serve several useful functions, including keeping the majority honest and signaling the legislature that corrective action might be needed.[46] Howard's dissents really stand out, however; they are fun to read and very focused, in true common law fashion, and they certainly pinpoint the weak spots in the majority opinion.

In the first dissent, *Post v. Bregman*,[47] the dispute was between two attorneys who had agreed between themselves to split a contingency fee. When the fee came in, however, the second lawyer refused to pay the first. A lawsuit naturally ensued. The defense: The first attorney had violated Rule 1.5 of the Code of Professional Responsibility by not having done a proportionate share of the work, and that the first attorney also had not assumed joint responsibility for the case.

The majority opinion in *Post* spent most of its energy on a very nice discussion of whether a violation of an ethical Rule can be asserted in a private action between attorneys. (It can.) In an inexplicable ipse dixit, however (that is law professor talk for a statement made without convincing authority or explanation), the court held that "equitable" principles should control the resolution of the situation.[48]

Howard, that ultimate common law judge, dissented. What are "equitable" principles (a/k/a fuzziness) doing in what, after all, is a simple suit for breach of contract? As Howard saw it, the real problem is whether the contract was improper or unethical at the time when it was entered into.[49] If it was not, then the Court should enforce the contract and apply traditional breach of contract remedies. The contract should not be judged in the light of hindsight. Now, that cer-

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44. 320 Md. at 7, 575 A.2d at 738.

45. Alienability can give way to real bargain, however. In strong dicta, the *Julian* opinion noted that if the anti-assignment clause specifically forbids the assignment the clause will be enforced—that dicta leads to an economically sound result in that it permits the parties to bargain expressly over the terms of the lease. *Id.*

46. *See generally* REYNOLDS, *supra* note 43, at 19-22.

47. 349 Md. 142, 707 A.2d 806 (1998), *noted in* 58 MD. L. REV. 1067 (1999).

48. *See Post*, 349 Md. at 169-70, 707 A.2d at 820.

49. *See id.* at 181, 707 A.2d at 825 (Chasanow, J., dissenting).

tainly is a good common law response. I agree with Howard's result, but the issue is not perhaps as clear as the dissent seems to suggest.

The doctrine of illegality in contract law is a harsh one. In theory, it is like contributory negligence in that it is either there or not. A contract is either illegal or it is not. If it is illegal, it cannot be enforced. Most of us would believe, however, that there are a lot of situations in between. There will be a lot of cases where applying "equity" might lead to an ultimately fairer result. It is not a sufficient response to the majority's analysis simply to say that equity has no place in contract law—after all that law is replete with semi-equitable escape devices (the law of conditions, for example, purports to be absolute, but the doctrines of substantial performance and waiver largely ameliorate its harshness).

But having said all of that, I like Howard's application to the doctrine of illegality in *Post* because I see no reason—and the majority advanced none—why contracts involving lawyers should be treated differently from other contracts. If the *Post* contract were treated the same as every run-of-the-mill ordinary contract, we would not hear anything about "equitable principles." And by linking attorney contracts with the general doctrine of illegality, Howard plugged the problem of fee-splitting contracts into a well-developed, if somewhat incoherent, more general body of contract law. In other words, resolution of fee-splitting disputes could be resolved by referring to the well-developed law of illegality (and its exceptions) rather than to the vagueness of "equitable considerations." Not surprisingly, Howard's prediction of the trouble that would be caused by the "equitable considerations" test bore fruit almost immediately.[50]

Perhaps the finest example of Howard's use of common sense is his dissent in *Telnikoff v. Matusevitch*.[51] The case was an unusual one, and its proceedings were very complicated. In 1984, Telnikoff wrote an article in *The Daily Telegraph* (London) questioning the BBC's Russian language broadcasting. A few days later, Matusevitch published a letter in *The Daily Telegraph* replying to the Telnikoff article. The literary dispute led to litigation, and a jury eventually found the Matusevitch letter to be defamatory and awarded Telnikoff £240,000 in damages. After more complications, not relevant here, the United States Court of Appeals for the District of Columbia Circuit certified to the Court of Appeals of Maryland the following question: "Would

50. *See* Son v. Margolius, Mallios, Davis, Rider & Tomar, et al., 349 Md. 441, 466, 709 A.2d 112, 124 (Chasanow, J., concurring).

51. 347 Md. 603, 702 A.2d 230, 251 (1997) (Chasanow, J., dissenting).

recognition of Telnikoff's foreign [British] judgment be repugnant to the public policy of Maryland?"[52]

The answer to that question is deceptively simple. A well-respected tribunal, the British court, certainly according due process to the defendant, had entered a judgment. Obviously, it should be enforced. And yet the majority of the Court of Appeals held that the English libel judgment was so "repugnant" to the public policy of Maryland that it was unenforceable.[53]

On the surface, the majority's reasoning is impeccable. After a long discussion of free speech in England (going all the way back to 1476), the Court turned to a discussion of free speech in Maryland at the time of the American Revolution; that analysis showed "the very strong public policy in Maryland regarding freedom of the press."[54] The Court then examined the differences between the protection afforded defamation defendants in England and in America, concluding that the difference between the two was striking.[55] These "sharp differences"[56] led the Court to conclude that the "importance of the free flow of ideas and opinions on matters of public concern precludes Maryland [sic] recognition of Telnikoff's English libel judgment."[57]

That opinion makes eminent sense. American law protects speech more—often, far more—than does the law of almost all other civilized countries. Why should an American court enforce a judgment striking at such a fundamental policy? That intuition is reinforced by the fact that foreign despots had been using their own libel laws to stifle foreign criticism of their government. It would be hard to find an issue that smacked more of "Mom and Apple Pie." I confess that I was in that camp; I was aware of the *Telnikoff* litigation as it developed, and when I read the majority opinion, I was a true believer; it was clearly right. Score one for the American flag.

Then I read Howard's dissent. As the reader might expect by this time, Howard laid out several perfectly valid procedural reasons to explain the wrongness of the majority. What really grabbed my attention, however, was his explanation of why Maryland's public policy did not forbid enforcement of the English judgment. The reason was obvious: The underlying case involved a dispute in an English newspa-

52. 347 Md. 561, 573, 702 A.2d 230, 236 (1997).
53. 347 Md. at 600, 702 A.2d at 251.
54. *Id.* at 590, 702 A.2d at 244.
55. *Id.* at 595, 702 A.2d at 247.
56. *Id.* at 602, 702 A.2d at 250.
57. *Id.* at 603, 702 A.2d at 251.

per between two persons who were not American residents. The public policy of Maryland, whatever it might be, had simply nothing to do with a libel action that had no contacts with this state.

He was right of course. What business does an American court have telling a civilized court in another civilized country that it cannot resolve an issue that is wholly domestic to it? Modern choice of law analysis makes this quite obvious; a state with no "interest" in the transaction has no business applying its law to the case. The only concern of such a state is with whether the trial in Britain afforded the defendant due process. It was typical of Howard that he was able to cut through the fog of rhetoric surrounding the case and reach the right, non-"PC" result.

I will close with what is surely Howard's most famous opinion, at least on a national level, his majority opinion in a choice-of-law case known as *ARTRA*.[58] Because this opinion resurrects the doctrine of renvoi—perhaps the most esoteric of all the arrows in the common law judge's quiver—it does not at first blush reinforce the notion of Howard as a sensible jurist. Nevertheless, when the history of choice of law in Maryland is considered, *ARTRA* can be seen as a creative method to bring our law of choice of law into modern times. Thus, *ARTRA* resembles Howard's other opinions.

ARTRA was a complex dispute about whether an insurer had a duty to defend or indemnify an insured in a suit seeking to recoup the costs of cleaning up pollution at an industrial site. The merits of that dispute need not concern us here. Our concern is whether Illinois law, where the insurance company was located, or Maryland law, where the pollution cleanup took place, should be applied.

Maryland choice-of-law rules are deceptively simple, purportedly following the *lex loci* rules of the First Conflicts Restatement. That test requires a court to use the law of the place where a particular right vested. In *ARTRA*, it required application of the law of the place where the insurance contract was signed.[59] Those rules stand in stark contrast to those of most other jurisdictions which follow the "modern" approach of the Second Conflicts Restatement (or one of its closely related competitors). That analysis asks the court to apply the

58. American Motorists Ins. Co. v. ARTRA Group, Inc., 338 Md. 560, 659 A.2d 1295 (1995).

59. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311-19 (1932).

law of the most "interested jurisdiction"—in policy terms—of the relevant jurisdictions.[60]

Judge Chasanow used renvoi in *ARTRA* to slice through the Gordian knot that had become choice of law in Maryland. He did so artfully; he inquired into whether an Illinois court would have applied its own law or that of Maryland. This use of renvoi[61] made perfect sense in *ARTRA*. If Illinois had no "interest" in applying its own law to a dispute involving two of its domiciliaries, then Maryland as the only remaining "interested" jurisdiction was justified in applying its own law.

The decision reflects a sea of change in Maryland's attitude towards choice of law questions. For the first time, the Court of Appeals expressly recognized the modern principle that choice-of-law rules should seek to achieve substantive ends.[62] To be sure, that expression was expressly limited to contracts cases, but it is a significant step forward.[63]

Howard's dissent in *Telnikoff* and his opinion for the Court in *ARTRA* typify his approach to judicial decision making. Find out the facts, get the procedural posture right, and understand the substantive concerns raised by the case. The game may not really be that easy, although Howard's deft pen often made it look deceptively so. The State—and I—shall surely miss his judging.

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60. This is obviously a serious over-simplification. The reader dying to know more should *see generally* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 193-248 (2d ed. 1993).

61. Renvoi asks whether another involved jurisdiction (here, Illinois) would apply its own law to the case or "refer" the case to the law of another jurisdiction (here, Maryland). *See generally id.* at 155-59.

62. There had been hints earlier that Maryland courts would apply a functional, policy-based analysis. *See, e.g.*, Hauch v. Connor, 295 Md. 120, 453 A.2d 1207 (Md. 1987). But backsliding into the *lex loci* rules or the swan song of "public policy" proved all too common. For a fine overview of the tortured history of choice of law in Maryland in recent years, see generally Richard W. Bourne, *Modern Maryland Conflicts: Backing Into The Twentieth Century One Hauch at a Time*, 23 U. BALT. L. REV. 71 (1993).

63. *ARTRA* has drawn a lot of attention from choice-of-law scholars. One academic criticized Howard's opinion for using an indirect method (renvoi) to achieve policy ends rather than directly adopting a modern, explicitly policy-based analysis. *See* SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 80-81 (1998). The short answer, of course, is that the perfect is often the enemy of the good; Howard in other words, got what he could. Professors, on the other hand, often seem willing to do the opposite: If the professors can't get perfection, they will settle for the bad.

EDWARD A. TOMLINSON*

I am delighted to participate in this session, humorously dubbed "the State versus Howard Chasanow," honoring Judge Chasanow on his retirement from the Court of Appeals of Maryland. My colleague Bill Reynolds, however, did not make a very good choice if you wanted a prosecutor for today's festivities. Two reasons support my point. First, I am not particularly qualified to serve as a prosecutor. I have had limited practical experience as a lawyer, and that which I have had has been on the side of the defense. In my Death Penalty seminar at the Law School I place students with defense counsel representing capital defendants, serving myself as a consulting co-counsel in those case. So my orientation is more on the defense side than on the prosecution's. Second, and more importantly, in Judge Chasanow's case the prosecution simply has no case. An experienced prosecutor would bring no charges or nol pros any charges filed by a predecessor foolish enough to initiate a prosecution. Indeed, Judge Chasanow deserves a court-ordered judgment of acquittal. Once having said that the prosecution has no case, I should add that my assigned role as prosecutor has encouraged me to make some critical evaluations during the course of praising the jurisprudence of Judge Chasanow. To present Judge Chasanow's approach to judging, I have focused on an area with which I am familiar and, more importantly, to which Judge Chasanow has made a major contribution: Criminal Law and Procedure.

How would one describe the jurisprudence of Howard Chasanow? That question is at first blush a difficult one. Unlike Supreme Court Justices, most judges on the highest court of a state do not have the occasion to write decisions that the educated public associates with the judge's name. While Justice Blackmun's name will always be joined with *Roe v. Wade*, Chief Justice Warren's with *Brown v. Board* and *Miranda v. Arizona*, Chief Justice Taney's (much less favorably, of course) with *Dred Scott*, and even Justice Scalia's with his prophetic dissent in the Special Prosecutor case (*Morrison v. Olson*), the name Chasanow does not invoke a similar response. That silence is the consequence of being a state appellate judge who is not Benjamin Cardozo. There is little opportunity to render landmark decisions, and one quickly becomes reconciled to the fact that the important

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decisions one does render usually receive little attention in the media. That benign neglect is not always bad. Indeed, the decision written by Judge Chasanow that I believe obtained the most attention was the reversal of Scotland Williams' murder convictions and death sentences.[64] In that case, the coverage was not entirely positive,[65] as I believe Judge Chasanow is likely to remember.

Well, how does one describe the jurisprudence of Howard Chasanow? I would suggest three characteristics. First, Judge Chasanow's opinions are scholarly. They rely not only on precedent but also on secondary authorities, such as treatises and scholarly articles by us academics. In deciding cases he wants to know how the law has developed over time not only in Maryland but also in other jurisdictions. Academic writing, as Judge Chasanow well realizes, can provide that perspective, although I must acknowledge that a good deal of what contemporary academics publish is useless to the courts and to anyone else for that matter. The second characteristic is a commonsensical approach that dominates both Judge Chasanow's common law and statutory decisions. Unlike some judges, he does not allow rigid rules or esoteric doctrinal constructs, even when they appear in precedent, to produce results that defy common sense. Third, Judge Chasanow is a fair and impartial judge in that he calls cases as he sees them. Unlike many federal judges (especially Supreme Court Justices), he does not have an ideological perspective or slant, but decides cases on their merits—in accordance with the law as it has developed and is continuing to develop. That is what he did in the Scotland Williams case. Williams had been convicted of two first-degree murders and sentenced to death for the brutal and well-publicized killings in Annapolis of two prominent Washington attorneys. The evidence of Williams's guilt was considerable, but the State had benefitted from several erroneous evidentiary rulings at trial. Surely, if I were on the Court of Appeals at the time the case was argued, my reaction would have been "why should I be in the catbird seat? Why cannot someone else write this opinion?" But Judge Chasanow did write the opinion for a unanimous Court and did what needed to be done: Reverse the

64. Williams v. State, 342 Md. 724, 679 A.2d 1106 (1996).

65. That decision was the subject of two Op-Ed pieces in the *Washington Post*. *See* Joseph J. Gilbert, *Strange Justice in Maryland*, WASH. POST, Oct. 2, 1996, at A17 (sharply critical); Ira Mickenberg, *Strange Justice? Not in This Case*, WASH. POST, Oct. 24, 1996, at A21 (supportive).

convictions and death sentences because the errors were not harmless.[66]

Let me turn now to Judge Chasanow's opinions in the criminal law and procedure areas to demonstrate the latter two characteristics. (I shall treat his scholarly approach as self-evident.) I shall first present three opinions which I believe demonstrate his common sense approach to decision making. Two of the three opinions—one for the majority and another a dissent—address issues of statutory construction, while the third (also a dissent) involves the common law rule permitting a citizen to resist a peace officer making an illegal arrest. Now the term "commonsensical," when applied to statutory interpretation, is not Judge Chasanow's but was coined by Justice Frankfurter in 1952 when writing for the Supreme Court in *United States v. Universal Corp.*[67] In that opinion Justice Frankfurter described what he believed to be the art of interpreting a statute. According to Justice Frankfurter, generalities about statutory construction were largely useless; they were not "rules" of law but merely "axioms of experience."[68] Thus, every problem of statutory construction was unique, requiring the Court to consider many sources of information to discover the design of the legislature. For Justice Frankfurter, "the basic consideration" was to ensure that "legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning."[69] This approach to statutory interpretation subordinates the use of maxims or rules to the more difficult tasks of ascertaining the legislature's purpose in enacting the particular statutory text before the Court.[70]

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66. At retrial, Williams was again convicted of two first-degree murders, but at sentencing the judge imposed life without parole because she found a reasonable doubt on whether Williams was a principal in the first degree to the murders.

67. 344 U.S. 218 (1952).

68. *Id.* at 221.

69. *Id.*

70. As demonstrated many years ago, there are two opposing maxims or canons on almost every point. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to Be Constructed*, 3 VAND. L. REV. 395, 401-06 (1950) (listing twenty-eight canons and their opposites). The courts' use of canons thus tends to camouflage decisions reached on other grounds. *Id.* at 401.

Judge Chasanow remains faithful, of course, to Court of Appeals precedent which requires judges, in determining legislative intent, to consider both the plain meaning of the text and the overriding purpose or goal of the statute. *See* Martin v. Beverage Capital, 353 Md. 388, 399-400, 726 A.2d 728, 734-35 (1999) (Chasanow, J.) (following Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 525 A.2d 628 (1987)). For Judge Chasanow, a plain meaning that defies common sense is unlikely to be the legislature's meaning. See his opinions in *Lancaster* and *Spitzinger* discussed *infra.*

Judge Chasanow applied this approach in two cases involving the merger of offenses. In both cases, his bête noir was the required evidence test—the traditional rule for ascertaining whether multiple punishments are permissible for offenses arising from the same act or acts.[71] Under the required evidence test, the offenses are not the same, and multiple punishments are permissible, only if each offense requires proof of fact that the other does not. Thus, at common law, larceny and robbery were the same offense because larceny did not require proof of a fact not required for robbery, which was defined as larceny by violence. The offenses therefore merged; the court could punish the defendant only once, in this case for the greater and more severely punished offense of robbery. In *State v. Lancaster*,[72] a majority of five, speaking through Judge Eldridge, applied this rule to hold that the offense of unnatural or perverted sexual practices[73] merged with the fourth-degree sexual offense of engaging in fellatio with a person fourteen or fifteen years of age when the person performing the sexual act was four or more years older than the other person.[74] Judge Chasanow dissented, as did Judge McAuliffe in a separate opinion. In *Spitzinger v. State*,[75] on the other hand, Judge Chasanow wrote for a majority of four in holding that the new consolidated theft offense, enacted by the legislature in 1978,[76] did not merge with simple robbery. Judge Raker, who had not been on the Court when the Court decided *Lancaster*, wrote for the three dissenters, who included Judges Eldridge and Bell, both of whom were part of the *Lancaster* majority.[77]

For Judge Chasanow, the result in *Lancaster* was "illogical" and "an affront" to the legislature,[78] while the result in *Spitzinger* conformed with what a "commonsensical" legislature would have intended."[79] Strong arguments support both these propositions, and Judge Chasanow's majority opinion in *Spitzinger* and his dissent in *Lan-*

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71. For the classic formulation of the required evidence test, see *Blockburger v. United States*, 284 U.S. 299 (1932).

72. 332 Md. 385. 631 A.2d 453 (1993).

73. MD. ANN. CODE art. 27, § 554 (1996).

74. MD. ANN. CODE art. 27, § 464(C)(a)(2) (1996 & Supp. 1998).

75. 340 Md. 114, 665 A.2d 685 (1995).

76. MD. ANN. CODE art. 27, § 342 (1996).

77. In her *Spitzinger* dissent, Judge Raker invoked the required evidence test only indirectly. She argued that common law larceny and robbery merged under the required evidence test and that the legislature had intended to retain that result when it enacted the consolidated theft offense. 340 Md. at 130, 665 A.2d at 693 (Raker, J., dissenting).

78. State v. Lancaster, 332 Md. 385, 426, 631 A.2d 453, 474-75 (Chasanow, J., dissenting).

79. 340 Md. at 130, 665 A.2d at 692.

caster strike me as more convincing than the opinions favoring a strict application of the required evidence test. Proponents of Judge Chasanow's approach, however, like those of Justice Frankfurter, must recognize the dangers which accompany the more subjective, free wheeling "commonsensical" approach.[80] "Common sense," like beauty, is often in the eyes of the beholder. Judges less sensitive than Judge Chasanow may too readily equate the common sense result with the result they prefer.

Why was the result in *Lancaster* an affront to the legislature? It was affront, according to Judge Chasanow, because the merger of the two offenses limited the defendant's punishment to the one year maximum provided for a fourth-degree sexual offense and required the Court to vacate the maximum ten year sentence imposed on the defendant for the offense of unnatural or perverted sexual practices.[81] That result was the necessary consequence of merger because the lesser offense of unnatural or perverted practices (punishable by ten years) merged into the greater offense of fourth-degree sexual offense (punishable by one year). It did not matter that the offense of unnatural or perverted practices was more severely punished; the less severely punished fourth-degree sexual offense was the greater offense because it required proof of a fact (the victim's age) not required for the unnatural or perverted sexual practices offense. For Judge Chasanow, it defied common sense to interpret the legislative intent to permit a ten year sentence if the defendant's partner was older than fifteen years, or if the partner (we should say victim in this case) was fifteen years of age and the State did not charge the defendant with unnatural and perverted practices, but only one year when the State convicted (or put in jeopardy) the defendant of both offenses committed on a fifteen year old victim.[82]

The *Lancaster* majority, in my opinion, has no convincing response to Judge Chasanow's analysis. It relies on the required evidence test, which it treats "as a long-standing rule of law to determine whether one offense is included within another when both are based

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80. As Justice Frankfurter himself recognized, statutes are not "empty vessels into which he [the judge] can pour anything he wants—his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

81. The jury convicted Lancaster of both offenses on the State's proof that Lancaster committed oral sex numerous times on a fifteen-year-old male. For the sentences imposed, see *Lancaster*, 332 Md. at 395, 631 A.2d at 458.

82. Merger of offenses occurs only if jeopardy attaches for both offenses. *See* Thomas v. State, 333 Md. 84, 91, 634 A.2d 1, 4 (1993).

on the same act or acts."[83] The *Lancaster* majority's approach is no doubt the predominant approach in Maryland; Judge Eldridge cites more than a dozen case applying the required evidence test to find merge and bar multiple punishments.[84] Although several Court of Appeals' precedents had upheld multiple punishments for offenses that merge under the required evidence test, in those cases the legislature had "express[ly] intend[ed]"[85] or "specifically authorized"[86] cumulative punishments.[87] There was no such smoking gun in the legislative history in *Lancaster.* When the legislature in 1976 enacted the new sexual offenses law, it did not expressly address the issue of cumulative punishments. Given the precedents, that silence does provide support for the majority's holdings on merger. However, the majority advances no plausible reason why a rational legislature might wish to punish oral sex with persons fourteen and fifteen years old remarkably less severely than oral sex with persons over fifteen years of age. Judge Chasanow strikes me as correct when he says it is an affront to so construe the legislature's intent. The legislature promptly agreed; at the next legislative session it raised to ten years the maximum penalty for engaging in oral sex with a person who is fourteen or fifteen years of age, at least when the defendant is over twenty-one years of age.[88]

We can handle more quickly the second merger case (*Spitzinger*) before evaluating Judge Chasanow's commonsensical approach. In that case, the State charged the defendant with felony theft of property having a value of $300 or greater (punishable by fifteen years imprisonment)[89] and with simple robbery (punishable by ten years of imprisonment).[90] Both offenses arose from the same acts. The jury acquitted the defendant of robbery and convicted him of felony theft, for which the trial judge imposed a twelve years sentence, two years greater then the maximum authorized for simple robbery. Writing for the majority, Judge Chasanow found it "patently obvious" that the legislature did not intend felony theft to merge into robbery, which

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83. *Lancaster*, 332 Md. at 409, 631 A.2d at 466.

84. *Id.* at 409-11, 631 A.2d at 466-67.

85. Newton v. State, 280 Md. 260, 274 n.4, 373 A.2d 262, 269 n.4 (1977).

86. Randall Book Corp. v. State, 316 Md. 315, 323, 558 A.2d 715, 719 (1989).

87. The federal Double Jeopardy Clause does not bar multiple punishments for offenses that are the same under the required evidence test; however, it does bar multiple prosecutions. United States v. Dixon, 509 U.S. 688 (1993).

88. 1994 Session Laws, ch. 523 (amending § 464B(a)(4) on third-degree sexual offense).

89. MD. ANN. CODE art. 27, § 342(f)(2).

90. MD. ANN. CODE art. 27, § 486.

would have limited the maximum punishment for the merged offense to ten years.[91] Judge Raker in dissent sharply disagreed. She invoked the "principle" that statutes are presumed not "to make any alterations in the common law other that what has been specified and plainly pronounced."[92] Thus, felony theft merged into robbery as it did at common law.

In response to the dissent's point, Judge Chasanow first argued rather lamely that the consolidated theft statute modified the common law.[93] That argument is unconvincing, as Judge Chasanow should well know. The 1978 consolidated theft statute derived from the Proposed Criminal Code drafted by the Brune Commission in the late 1960s and early 1970s. The Commission's intent in consolidating the theft offenses was not to modify the common law but to prevent a defendant obtaining a reversal of a conviction, say for larceny, on the ground that he had committed embezzlement or some other offense. I know that because I was the reporter who drafted the language adopted by the Commission, and Judge Chasanow should know that because he served as a consultant to the Commission's theft subcommittee. So, in *Spitzinger* as in *Lancaster*, Judge Chasanow's approach conflicts with a good deal of precedent. Nevertheless, Judge Chasanow strikes me as convincing in *Spitzinger* when he argues that a "commonsensical" legislature "could not have intended that felony theft of property valued at $300 or more carries a maximum penalty of up to 15 years if committed by stealth, but if committed by violence or threat of violence, then the maximum penalty for felony theft is reduced to only 10 years."[94]

The commonsensical approach to statutory interpretation has the advantage of flexibility. It allows the Court to avoid the illogical if not absurd results often reached by a rigid or wooden application of maxims or rules of statutory construction. Legislators do not legislate with those rules in mind, and their application often produces results that would surprise even the most attentive legislator. On the other hand, the traditional rules offer the advantage of greater certainty. Judges

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91. Spitzinger v. State, 340 Md. 114, 121, 665 A.2d 685, 688 (1994). Later in his opinion Judge Chasanow concluded that the merger of penalties (something different than the merger of offenses) precluded the trial court from imposing for both offenses sentences more severe than the fifteen year maximum for felony theft. *Id.* at 125-29, 665 A.2d at 690-92.

92. *Spitzinger*, 340 Md. at 132, 665 A.2d at 694 (Raker, J., dissenting) (citing cases).

93. *Spitzinger*, 340 Md. at 122-24, 665 A.2d at 689.

94. *Id.* at 130, 665 A.2d at 692. Once again the legislature responded by amending the statute to achieve the commonsensical result advocated by Judge Chasanow. *See* 1996 Session Laws, ch. 632 (raising the maximum penalty for simple robbery to fifteen years).

are human beings and may too readily impose their own subjective views when seeking the common sense result. The classic case is *Holy Trinity Church*.[95] In that case, the Supreme Court refused to apply the Plain Meaning Rule because it produced the absurd result of convicting an Episcopal Church for paying the transatlantic fare of an alien to serve as its rector. Justice Brewer for the majority, reasoning that the United States was a "Christian nation," concluded that Congress could not have intended to treat *Holy Trinity Church* as a criminal. Justice Brewer's opinion has been much praised in the 100 plus years since its adoption, but it seems to me that the Justice invoked his own views on the importance of religion to avoid a result that the Congress enacting the statute would not have found absurd.[96]

Judge Chasanow has not done what Justice Brewer did in *Holy Trinity Church*, but I am not fully confident that other judges can avoid that pitfall. The danger is all the greater because legislatures, contrary to Judge Chasanow's assumption, sometimes act illogically or in ways that defy many people's common sense. That may have happened in 1976 when the legislature enacted a comprehensive reform of the sex offenses. The original bill, as introduced in the Senate and approved by the Senate Judicial Proceedings Committee, repealed the sodomy and unnatural or perverted sexual practices sections of the Code. Those sections punished, with a maximum term of ten years' imprisonment, sexual activity between consenting adults. They are highly controversial and raise difficult constitutional issues.[97] The full Senate backtracked by amending the bill to retain them intact.[98] This backtracking, which restored provisions that did not belong in the comprehensive revision, appears to reflect illogical prejudice against homosexuals. A court must nevertheless respect legislative choices as long as those choices are not unconstitutional.

My prime example of Judge Chasanow's commonsensical approach to judging is a common law and not a statutory case. The case is *State v. Wiegmann*.[99] Judge Chasanow's dissent does not include the phrase "common sense," but he does advance a commonsensical argument against the result reached by the six-judge majority. The *Wiegmann* case arose from a brawl before a domestic relations master.

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95. 143 U.S. 457 (1892).

96. For a similar analysis, see Adrian Vermeule, *Legislative History and the Limits of Judicial Review; the Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998) (arguing that the Court in Holy Trinity Church badly misread legislative history).

97. *See* Schochet v. State, 320 Md. 714, 580 A.2d 176 (1990).

98. See bill file on Senate Bill 358, enacted as chapter 573 of 1976 Session Laws.

99. 350 Md. 585, 714 A.2d 841 (1998).

The master, after holding Wiegmann in contempt for nonpayment of child support, ordered the deputy sheriffs in the hearing room to detain Wiegmann. When it appeared that Wiegmann planned to resist and even to strike one of the deputies, another deputy grabbed Wiegmann's arm. Wiegmann responded by punching that deputy in the face. A general melee then followed, which ended when other deputies subdued Wiegmann with pepper spray. Subsequently, Wiegmann was convicted of battery but acquitted of resisting arrest. The State's problem was that a domestic relations master is not a judicial officer and has no authority to hold persons in contempt or to order their detention. The master's directive to the deputy sheriffs was therefore illegal, even though it was fairly plain that the master only had in mind detaining Wiegmann temporarily—pending the circuit court's approval of the master's recommendations. In fact, the master specifically used the word "recommendation" in referring both to the contempt and to the detention.

For the *Wiegmann* majority, the illegality of the master's order was fatal to the State's case. The traditional common law rule allowed a citizen to use reasonable force to resist an illegal arrest. In its *Rodgers* decision,[100] the Court of Appeals had abrogated the common law rule for illegal arrests with a warrant. Citizens can no longer resist a police officer executing a warrant, even if the warrant was illegally issued and, as in the *Rodgers* case, defective on its face. The *Wiegmann* majority acknowledged that *Rodgers* was part of a nation-wide trend limiting if not abolishing a citizen's right to resist an illegal arrest; it nevertheless found that *Rodgers* was inapplicable in Wiegmann's case because the master was not a judicial officer with authority to issue warrants. According to the majority, any further limitations on the common law rule should come from the legislature.

For Judge Chasanow, this result—the reversal of Wiegmann's battery conviction, defied common sense. The defendant Wiegmann was most assuredly unaware that the deputy sheriffs were acting illegally. More importantly, the deputy sheriffs were also surely unaware that the black-robed master was acting illegally. What did one expect them to do when ordered by the master to detain Wiegmann? As recognized by Judge Chasanow, deputy sheriffs do not receive training on the legal authority of masters and how masters differ from judicial officers. The sheriffs are in the courtroom for security purposes. What do you think would happen to their careers if they snubbed their noses at the master's order? Such a response seems inconceiv-

100. 280 Md. 406, 373 A.2d 944 (1977).

able. More importantly, the majority's toleration of a violent response in the hearing room encourages just what happened in Wiegmann's case, i.e., an unseemly brawl that normally ends with the court officers subduing the resister.

Judge Chasanow makes, quite effectively in my opinion, three practical, common sense arguments in drawing an analogy between Wiegmann's case and *Rodgers*. In *Wiegmann*, the master had at least colorable authority. How is that different from the colorable authority of a purported warrant, which, as in *Rodgers*, is defective on its face because it charges the arrestee with a nonexistent offense? More importantly, in both *Rodgers* and *Wiegmann*, the officer attacked, unlike the officer attacked in the case of an illegal warrantless arrest, was not the source of the illegality but was executing in good faith an order, which turned out to be invalid. Do we want to expose those officers to the possibility of a violent response by a disgruntled litigant? I would say no, especially in domestic cases where, as Judge Chasanow explicitly recognized in his dissent, children are often present.[101] Finally, security is a genuine concern in domestic cases, both in the circuit court and in proceedings before masters. The *Wiegmann* case arose in Howard County. This year a fatal shooting by a disgruntled husband occurred at the Howard County Courthouse immediately after a hearing in a domestic relations matter.

So Judge Chasanow's dissent in *Wiegmann* makes a strong, common sense argument for upholding the battery conviction. I found it convincing, but as prosecutor for the day I must close with two criticisms. First, Howard, why were your persuasive skills so weak that you could not convince even one of your brethren to join your dissent? Second, where did you get the idea that domestic masters wore black robes? You mention that fact in your dissent to strengthen your argument that the master had colorable authority but cite no authority.[102] Judicial notice does not work to establish that fact, as in most jurisdictions masters do not wear robes. Fortunately for the *Chasanow* defense, the *Wiegmann* record tells us that the master who ordered the deputy sheriffs to detain Wiegmann was actually wearing a black robe.[103]

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101. *Wiegmann*, 350 Md. at 607, 714 A.2d at 852 (Chasanow, J., dissenting).

102. *See id.* at 609, 214 A.2d at 852 ("master garbed in black robe").

103. See page 11 of the State's brief quoting Corporal Horan's testimony that the master was wearing a black robe on the bench. Corporal Horan further testified that the "ladies and gentleman that wear the black robes. . .are the ones that rule this courtroom." *Id.*

Let me proceed by presenting several of Judge Chasanow's opinions on the rights of the criminal defendant. These opinions demonstrate the third characteristic of Judge Chasanow's jurisprudence—an effort to decide criminal cases in ways that are fair both to the defendant and to the prosecution. Once again the opinions reflect a distrust of rigid rules and a preference for case-by-case decision making; they also reflect a sound respect for considered exercises of discretion by prosecutors and trial judges. Perhaps, as I shall argue, Judge Chasanow should give similar deference to the discretion of police officers.

Three of Judge Chasanow's earlier opinions embodying this approach are relatively straightforward. In *White v. State*,[104] Judge Chasanow, speaking for a unanimous Court, upheld the trial judge's application of the rape shield statute[105] to bar testimony that the rape victim had previously exchanged sex for drugs. The *White* Court, taking solace in the fact that the statute did not absolutely bar defense access to evidence of the victim's prior sexual conduct, held that the trial court had properly found that the excluded evidence's prejudicial effect outweighed its probative value. This balancing in the State's favor was easy because the defendant's defense was not consent but a denial that any sexual activity had occurred. The second case, *Gibson v. State*,[106] is also relatively straightforward. Judge Chasanow, speaking for the Court, held that the defendant's interest in the disclosure of an informant's identity outweighed the State's interest in confidentiality. The informant was an eyewitness to a drug sale, and the defendant sharply contested, through alibi and other evidence, the seller's identification of the defendant as the buyer. The *Gibson* Court did reverse the trial judge's ruling on disclosure; the trial judge, however, had not been able to exercise properly his discretion because he had ruled before the Court of Appeals rendered its lead precedent on the informer's privilege.[107] Finally, in *Davis v. State*,[108] Judge Chasanow for the majority upheld the trial judge's discretion in refusing to ask prospective jurors on voir dire whether they are or were associated with law enforcement personnel. That decision at-

104. 324 Md. 626, 598 A.2d 187 (1991).

105. MD. ANN. CODE art. 27, § 461A.

106. 331 Md. 16, 626 A.2d 44 (1993).

107. Warrick v. State, 326 Md. 696, 607 A.2d 24 (1992). Judges McAuliffe, Murphy, and Karwacki partially dissented in *Gibson* because they believed that the Court should have remanded the case to the trial judge to do the proper balancing rather than reverse the conviction. *Gibson*, 331 Md. at 28, 626 A.2d at 50 (McAuliffe, J., concurring and dissenting).

108. 333 Md. 27, 633 A.2d 867 (1993).

tracted a vigorous dissent[109] by then Judge Bell (joined by Judge Eldridge), but the majority seems to have the better argument, given the wide discretion Maryland law affords the trial judge on voir dire.

Two other decisions authored for the Court by Judge Chasanow strike me as more difficult. In *Goldsmith v. State*,[110] the Court upheld the privileged status of the victim's psychotherapy records[111] sought by a defendant charged with child abuse and other sexual offenses. The defendant sought the evidence primarily to impeach the victim's testimony (the victim had waited ten years before making her accusations) but did not proffer anything specific on the records' contents. The defendant emphasized the victim's long delay in bringing the charges as a suspicious circumstance, but the *Goldsmith* Court held that the delay was not enough to require disclosure. To overcome the victim's claim of privilege, according to Judge Chasanow, the defendant "must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense."[112] Once again there was a spirited dissent. Judge Bell, joined by Judge Eldridge, argued that it was unrealistic to expect the defendant to make such a specific proffer without knowing what was in the records; for the dissent, it was enough that the victim's credibility was seriously at issue.[113] The question dividing the majority and the dissent is a close one, but I can understand Judge Chasanow's setting a high threshold to protect such a valued privilege.

The second of the more difficult decisions is *Gunning v. State*.[114] For Judge Chasanow, the problem in that case was that the trial judge had failed to exercise discretion. The defendant, charged with armed robbery and related offenses, had requested the trial judge to give an eyewitness identification instruction to assist the jury in evaluating the eyewitness testimony. The trial judge tartly responded that he never gave such an instruction because it addressed the facts and not the law and that he found it "exceedingly unfortunate that it found its way into a pattern jury instruction."[115] The *Gunning* Court responded that the pattern jury instruction was appropriate and that the trial judge

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109. *See id.* at 55-69, 633 A.2d at 881-88 (Bell, J., dissenting).

110. 337 Md. 112, 651 A.2d 866 (1995).

111. MD. CODE ANN., CTS. & JUD. PROC. art. 9-109 recognizes a psychotherapist-patient privilege.

112. 337 Md. at 133-34, 651 A.2d at 877.

113. 337 Md. at 159, 651 A.2d at 889 (Bell, J., dissenting).

114. 347 Md. 332, 701 A.2d 374 (1997).

115. *Id.* at 339, 701 A.2d at 377. That remark occurred in the *Harris* case. The Court of Appeals decided *Gunning* and *Harris* in a single opinion; the same judge had presided at both trials.

had abused his discretion by refusing to give it or, as Judge Chasanow phrased it, by failing "to even exercise his judicial discretion."[116] The two dissenters (Judges Raker and Wilner)[117] primarily argued that the other instructions given by the trial judge adequately informed the jury on the problems posed by eyewitness testimony. Perhaps that is true, but on the facts of the case I am more comfortable with the majority's holding requiring a more focused instruction. In *Gunning* (and in the companion *Harris* case decided in the same opinion), the defense was mistaken identity and the State had obtained convictions based on the uncorroborated testimony of a single eyewitness. Those facts were essential to Judge Chasanow's holding. He formulated no broad rule requiring trial judges to instruct juries on identification evidence whenever there was eyewitness testimony.

In *Beverly v. State*[118] Judge Chasanow extended to prosecutors this respect for well considered exercises of discretion. Judge Chasanow in *Beverly* held for a four-judge majority that a prosecutor could agree to a guilty plea, which would allow a defendant to avoid a mandatory minimum sentence under a subsequent offender statute. In other words, a prosecutor, in exchange for a guilty plea, may decline to file a notice of a prior conviction, even though she has proof of the conviction, and may even withdraw a notice previously filed. That result is in conflict with a literal reading of Maryland Rule 4-245(c), which provides that the State's Attorney "shall" serve a notice of a prior conviction whenever that conviction produces a mandatory sentence. Judge Chasanow defused the effect of the verb "shall" by arguing, as I understand him, that prosecutorial discretion, especially prosecutorial discretion in plea bargaining, is such a fundamental component of our criminal justice system that one cannot interpret Rule 4-245 to eliminate it in the mandatory sentence context. Would not such a major departure from traditional practice have attracted more attention when the Court adopted the rule?[119] I think so, and I find Judge Chasanow's unwillingness to interpret the rule to abolish prosecutorial discretion more convincing than the dissent's concern

116. *Id.* at 354, 701 A.2d at 384-85.

117. *See* 347 Md. at 355-63, 701 A.2d at 385-89 (Raker, J., Wilner, J., concurring and dissenting).

118. 349 Md. 106, 707 A.2d 91 (1998).

119. The predecessors of present Maryland Rule 4-245(c), promulgated in 1977, are Maryland Rule 734(c) and Maryland District Rule 734 (c). *See* 4 Md. Reg. 235, 244-45 (1977). In 1984, as part of a general reorganization of the rules, the Court of Appeals combined those two rules in new Maryland Rule 4-245(c). The scant legislative history relevant to the issue of prosecutorial discretion supports the majority in *Beverly*. *See Beverly*, 349 Md. at 125-26, 707 A.2d at 100.

over prosecutors frustrating the enforcement of subsequent offender laws by "deliberately refusing to perform the ministerial act required by Rule 4-245 of sending a notice."[120]

Judge Chasanow adopts a more rule-based approach when reviewing police decision making which affects a defendant's rights. I shall briefly present three examples of opinions for the Court by Judge Chasanow where I think a greater respect for the judgment or discretion of law enforcement officers might have produced a different result—a result favoring the State. In two of the cases the Court's decision nevertheless appears to be correct because controlled by a rule-based, binding Supreme Court precedent. Thus, in *Hughes v. State*,[121] Judge Chasanow held for a unanimous Court that the question whether the defendant was a narcotics or drug user did not fall within the routine booking exception to *Miranda*. Now it seems to me that jail officials have good grounds for wanting to know that information, but the question is nevertheless "designed" (although not necessarily intended) to secure an incriminating response. An incriminating response is therefore inadmissible under the Supreme Court's decision in *Rhode Island v. Innis*.[122] Likewise, in *Gadson v. State*,[123] Judge Chasanow held that prospective prison visitors could avoid a canine sniff at the prison entrance by deciding to leave without entering the prison. That holding is probably correct because it is compelled by the Supreme Court's decision in *Michigan v. Sitz*[124] (the road block case), but there is force to the dissent's argument that prison authorities cannot keep prisons drug-free if prospective smugglers have unlimited free runs to test whether the dogs are on duty on a particular day.[125]

The third police practices decision, *State v. Smith*,[126] is more problematic. That case involved a stop and frisk during which a police officer discovered a plastic bag containing cocaine when he lifted the defendant's shirt. The officer's initial stop of the defendant and his fruitless patdown of the defendant's outer clothing were unquestionably valid, but Judge Chasanow held that the additional intrusion of lifting the defendant's shirt was unconstitutional because the protective purpose of the stop and frisk had already been accomplished.

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120. *Beverly*, 349 Md. at 139, 707 A.2d at 107 (Wilner, J., dissenting).

121. 346 Md. 80, 695 A.2d 132 (1997).

122. 446 U.S. 291 (1980) (applying *Miranda* to custodial questioning designed to elicit an incriminating response).

123. 341 Md. 1, 668 A.2d 22 (1995).

124. 496 U.S. 444 (1990).

125. *Gadson*, 341 Md. at 21-23, 668 A.2d at 33 (Murphy, C.J., dissenting).

126. 345 Md. 460, 693 A.2d 749 (1997).

That holding, in my opinion, gives insufficient weight to police officer discretion. Judge Raker's dissent, joined by Judges Rodowsky and Karwacki, convincingly quotes the police officers' testimony to demonstrate that the lifting of the shirt was part of a single and continuous protective search.[127] Given the officer's reasonable belief that the defendant had a gun in his waistband, it seemed a matter of common sense for the officer, after completing the patdown, to double check by lifting the shirt. Surely the question is a close one, but should not the majority for that reason have given more weight to the officer's judgment? Supreme Court precedent did not bar such a course. In *Adams v. Williams*,[128] the Court had refused to limit *Terry*-type frisks to a pat down of the defendant's outer clothing and had, in the circumstances of that case, allowed the officer to reach into the defendant's waistband to seize a gun. So it seems that the *Smith* decision does support the prosecution's case against Judge Chasanow.

Let me close on a more positive note by analyzing briefly two very recent opinions which I believe to be among Judge Chasanow's best opinions: his dissent in *Burral v. State*[129] and his opinion for the Court in *Owens v. State*.[130] His *Burral* dissent reflects many of the themes found in his earlier opinions, including a distaste for absolute rules, a preference for judicial discretion, and a desire to achieve a fair balance between the interests of the defendant and the State. In *Burral*, the majority applied the Maryland rule[131] excluding hypnotically enhanced testimony to bar the eyewitness testimony of a defense witness who had been hypnotized by the State. To reach that result, the Court had to distinguish the recent Supreme Court precedent of *Rock v. Arkansas*[132] where the Court had held that a similar absolute bar on the admissibility of the defendant's hypnotically enhanced testimony violated the federal constitution. Judge Chasanow convincingly argued that the majority's effort to distinguish *Rock* was shaky at best,[133] but that is not what is interesting in his dissent. What I find interesting, and very appealing, is once again his distaste for absolute rules, his preference for relying on trial judge discretion in admitting or

127. *Smith*, 345 Md. at 472-77, 693 A.2d at 755-57 (Raker, J., dissenting).

128. 407 U.S. 103 (1972).

129. 352 Md. 707, 741, 724 A.2d 65, 82 (1999) (Chasanow, J., dissenting). Judge Eldridge also dissented in a separate opinion.

130. 352 Md. 663, 724 A.2d 43 (1999).

131. *See* State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983).

132. 483 U.S. 44 (1987).

133. Judge Chasanow primarily argued that the constitutional pedigree of the defendant's right to call witnesses was stronger than the pedigree of the defendant's right to testify.

excluding evidence, and his desire to develop safeguards to protect both the defendant's and the State's interest. That approach seems particularly appropriate on the *Burral* facts. In *Burral*, the defendant contended that someone else had killed the victim; the hypnotically enhanced eyewitness testimony supported that contention. On those facts, it appears unconscionable to bar that exculpatory testimony without a more particularized inquiry into its reliability. Howard, you may have been wrong in the stop and frisk case but it strikes me that you were sure right in *Burral*.

Judge Chasanow's opinion for the Court in *Owens* does not reflect the same themes but stands out as a model of craftsmanship. The Court's holding is not a popular one, at least not in academia where us professors have become overly enamored with mens rea. In *Owens*, the majority held that the trial court had not violated the defendant's constitutional rights when it prevented the defendant from presenting, as a defense to a statutory rape charge, that he reasonably believed the victim was above the statutory age. The defendant was eighteen and the victim was in fact thirteen, thus bringing the case within the statutory rape section which required that the victim be under fourteen and the defendant be at least four years older.[134] The Court of Appeals had previously held, rather over broadly in my opinion, that statutory rape was a strict liability offense, but had not ruled on the constitutionality of eliminating mens rea.[135] That issue returned to the Court in *Owens*.

I admire Judge Chasanow's craftsmanship in resolving it because he decides no more than is necessary to dispose of the case before the Court. While he does recognize, as he really can not avoid, the Court's prior holding that statutory rape was a strict liability offense, he carefully limits the *Owens* Court's constitutional holding to the circumstance of the victim's age. According to Judge Chasanow, the legislature acted constitutionally when it deprived the defendant of any mistake of age defense because the defendant's knowingly engaging in vaginal intercourse with another person (the other elements of the offense) ensured that the defendant received adequate notice on the criminality of his conduct.[136] Under controlling Supreme Court precedents, that notice satisfied due process; there was no separate constitutional requirement, as suggested by the dissent,[137] that the

134. MD. ANN. CODE art. 27, § 463(a)(3).

135. Garnett v. State, 332 Md. 571, 632 A.2d 797 (1993).

136. Owens v. State, 352 Md. 663, 679-81, 724 A.2d 43, 50-52 (1999).

137. *Id.* at 691, 724 A.2d at 58 (Bell, C.J., dissenting). Judge Eldridge wrote a concurring opinion more critical of Judge Chasanow's craftsmanship. *Id.* at 693, 724 A.2d at 58

State establish a certain level of fault or culpability to obtain a conviction. Some might find it faint praise to admire a decision for the narrowness of its holding, but I believe that overbroad holdings, like rigid rules, often preclude doing justice in the next case. Judge Chasanow surely agrees; his recent opinions keep dicta to a minimum. But I can not help closing on a prosecutorial note. Howard, do you remember your opinion for the majority in *Ford v. State*,[138] a case involving that criminal law professor's delight of transferred intent? Ten pages of pure dicta urging the overruling of the Court's recent holding in *State v. Wilson*.[139] What Chutzpah. Then you were a rookie appellate judge, but now you are a seasoned one. You will be surely missed.

(finding the majority opinion "somewhat confusing"). What Judge Eldridge finds to be confusing I find to be a decent respect for the holding in *Garnett*. Judge Chasanow wisely chose to accept, and not to criticize, *Garnett* in rendering the Court's narrow holding in *Owens*.

138. 330 Md. 682, 625 A.2d 984 (1993).

139. 313 Md. 600, 546 A.2d 1041 (1988).